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The Social Responsibility of Large Multinational Corporations

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The Social Responsibility of Large Multinational Corporations

Douglas M. Branson*

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Most theorists today and the speakers at the McGeorge 2002 Annual International Law Symposium on "Corporate and Securities Law in the Twenty-First Century" have written and spoken about what is sometimes termed as the "vertical" aspects of corporate governance. Vertical governance deals with the election by owners (shareholders), who presumably are numerous, of directors to a board. A board of directors then, in turn, appoints, monitors, and if necessary, removes senior executives. Those executives hire employees, again, who are

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1. The name actually derives from the seating arrangement, in which the overseers of a corporation would meet around a makeshift table formed by laying a plank or a board across some barrels. The board "came to be the symbol representing the assembled owners of an enterprise." See, e.g., RALPH D. WARD, 21ST CENTURY CORPORATE BOARD 30 (1997).

2. See, e.g., DOUGLAS M. BRANSON, CORPORATE GOVERNANCE §§ 1.01-1.22 ("Directors' Selection"),
presumably great in number, to do the corporation's business on many fronts and
in the trenches, if you will. Legal and business educators often depict vertical
corporate governance as a pyramid, with shareholders at the base and the handful
of senior executives at the apex.³

My subject today is "horizontal" corporate governance. This subject deals
with how a corporation's shareholders, directors, executives, and finally, employees
interrelate with each other, spread horizontally, and affect the world around them.
Professor Lawrence Cunningham distinguishes among "vertical" governance
mechanisms of the type previously described and "external" or "external horizontal"
governance mechanisms.⁴ If we define corporate governance as the allocation of
power or authority to allocate, and the allocation of, the corporation's resources
among its various constituencies (shareholders, directors, managers, and employees),⁵
how does that allocation affect non-constituents or less recognized constituents
(communities, host nation-states, clean air and clean water, and the like) of the
large global enterprise?

In the 1970s, legal scholars wrote extensively on the subject, as it was then
known, "corporate social responsibility."⁶ Proposals surfaced for public interest
directors, mandatory social accounting and disclosure, increased use of Security
Exchange Commission (SEC) shareholder proxy proposals, federal minimum
legal standards, and federal chartering of large corporations. However, that
debate was eclipsed completely by the law and economics movement of the
1980s. Now, in the new century, the inquiry into social responsibility of large
corporations has begun anew. This article is an attempt to take that inquiry, or
debate, and place it in the international context.

I have four stories to tell. First is that much of the globalization ballyhooed
by Thomas Friedman⁷ and other passionate globalization advocates may be
"negative" rather than "beneficial" globalization. Second, I describe another
profound occurrence, that is, the growth in number and size of gargantuan
multinational corporations. Third, I describe some of the problems perceived to
be created by the growth of large multinationals, such as regulatory arbitrage,

³. See ARTHUR PINTO & DOUGLAS M. BRANSON, UNDERSTANDING CORPORATE LAW ch. 5, "The Legal
Model and Corporate Governance" (1999).
⁴. Lawrence A. Cunningham, Commonsalities and Prescriptions in the Vertical Dimension of Global
Corporate Governance, 84 CORNELL L. REV. 1133, 1134-45 (1999).
⁵. Curtis Milhaupt defines corporate governance as "[t]he structural environment for corporate decision
making." See Milhaupt, Institutional Change and M & A in Japan: Diversity Through Deals, COLUM. L. REV.
(forthcoming 2002).
⁶. For a summary historical account, see Douglas M. Branson, Corporate Governance “Reform” and the New
Corporate Social Responsibility, 62 U. PITT. L. REV. 605 (2001); Douglas Branson, Corporate Social Responsibility
⁷. Thomas Friedman was the Chief Foreign Affairs correspondent of the New York Times and the
author of the popular and largely pro-globalization book entitled THOMAS L. FRIEDMAN, THE LEXUS AND THE
degradation of the environment, and the plantation production problem. Fourth, I highlight, briefly, a few of the ongoing efforts of international organizations and so-called "soft law" to solve some of the collective action problems which exist among nation states as they attempt to prevent or forestall at least some of the more obvious detrimental effects of large multinationals' presence on the globe.¹

I. THE MYTH OF GLOBALIZATION

A. Introduction

The creation of the large multinational corporate organization in ways that will open up channels of communication and disperse the corporate nerve center and other important functions about the earth, leading to truly global enterprise, has been the exception and not the rule. The Daimler-Chrysler or Deutsche Bank-Bankers Trust combinations, which many cite as evidence of the emergence of truly multicultural, if not global, corporations, are not representative of what empirical evidence demonstrates is occurring.

In an important new book, The Myth of the Global Corporation (The Myth),⁹ the authors demonstrate that the globalization of large multinational corporations is not taking place, or at least not occurring along the lines that some have predicted.

B. "Beneficial" Globalization Versus "Detrimental" Globalization

Beneficial, healthy globalization would be characterized by technology diffusion as well as other types of decentralization. Large multinational corporations (MNCs) would be transferring research and development (R&D) efforts to satellite operations in a meaningful way. Some of those receiving satellites would be located in newly industrializing countries, and, perhaps, in less developed countries as well. MNCs would be engaged in significant direct foreign investment (DFI). By forming subsidiaries and joint ventures in countries around the globe, MNCs would be making significant investments in plant and other production facilities, in modernization efforts, and in human resources so as to be able to decentralize the financial, marketing, and other "nerve center" aspects of their businesses. Simultaneously, MNCs would be shaking free from their roots and national origins, converging on a global model of governance and operation.

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¹ Professor Paul Stephan describes soft law as treaty provisions, trade agreements, corporate and NGO codes of conduct, corporate vendor standards, codes of "best practices," and other outputs of the international and NGO communities "that may provide a conceptual framework for [corporate] decisionmaking but [do] not seriously constrain decisionmakers." Paul B. Stephan, Accountability and International Lawmaking: Rules, Rents and Legitimacy, 17 NW. J. INT'L L. & BUS. 681, 707 (1997). One of the contentions of this article is that increasingly, in the Twenty-First Century, soft law does inform and constrain corporate behavior.

But "[t]he global corporation is mainly an American myth":\textsuperscript{10}

The ... idea[] that mobile corporations freed from political interference are now somehow arbitraging diverse national structures and forcing an involuntary process of convergence or an inevitable trend toward openness . . . marks a road to discord. On the surface, there is indeed a certain process of homogenization at work in a world where Americans drive BMWs, Germans listen to Sony CD players, and Japanese eat McDonald's hamburgers. But below the surface, where the roots of leading MNCs remain lodged, our research indicates durable sources of resistance to fundamental economic convergence.\textsuperscript{11}

Contrary to what global convergence advocates state, and "[h]owever lustily they sing from the same hymnbook when they gather together in Davos or Aspen, the leaders of the world's great business enterprises continue to differ in their most fundamental strategic behavior and objectives."\textsuperscript{12}

C. Lack of Widespread Direct Foreign Investment or Technology Diffusion

Worldwide DFI has expanded dramatically, from U.S.$500 billion in the early 1980s to U.S.$2.0 trillion in the mid-1990s.\textsuperscript{13} Yet, as the authors of The Myth demonstrate, DFI remains concentrated in developed nations that are members of the Organisation of Economic Cooperation and Development (OECD), or in a truncated version of that twenty-nine nation list. Japan still closes its border to significant DFI.\textsuperscript{14} E.U. domestic content requirements discourage inward investment in the fifteen E.U. member countries, all of which are OECD members.\textsuperscript{15} The spreading of wealth and the globalization that high absolute DFI numbers might portend is not occurring. When prosperous non-E.U. but OECD members such as Australia, Canada, New Zealand, and the United States are excluded, it is clear that the lion's share of worldwide DFI is going to a handful of nations that might be termed "developing," such as Chile, Malaysia, Mexico, and Turkey.

Tracking the volume of international royalty and license fee transactions as well as other statistics, the economist authors of The Myth ask "Is a global technology base emerging?"\textsuperscript{16} They conclude that hard evidence suggests it is

\textsuperscript{10} Id. at 143.

\textsuperscript{11} Id. at 146. In fact, the authors of THE MYTH surprised themselves: "Neither liberal nor radical approaches to understanding multinational corporate behavior . . . led us to expect the degree of continuing diversity we found at the level of the firm." Id. at 141.

\textsuperscript{12} Id. at 144.

\textsuperscript{13} Id. at 74.

\textsuperscript{14} Id. at 77.

\textsuperscript{15} Id. at 78.

\textsuperscript{16} Id. at 84.
not: "MNCs move R&D abroad far more slowly than production, sourcing, marketing, and other business activities... MNCs conduct relatively little R&D outside the home country." Japanese foreign affiliates have particularly "low R&D intensity." Thus, "development of new technology remains centralized in the home market operations of MNCs." The roots for future globalization or for high quality globalization are not being put down.

D. The Resiliency of Incorporating Nation States’ Cultures

Even in transnational mergers, which global convergence advocates feature prominently in their writing, one culture (belief system) extinguishes the other, rather than a convergence taking place. National differences persist and "are 'hard wired' into corporate structures [that] embody distinctive and durable ideologies or belief systems." Thus, an array of evidence documents striking differences between the behavior of most continentally based firms and their counterparts in Great Britain. Governance and financial structures "differ markedly" among major nations. German firms differ markedly from firms in Scandinavia, France or the Benelux countries. In fact, differences between German and firms in other countries seem especially persistent.

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17. Id. at 85 (citation omitted); see also id. at 134 (recognizing that “MNCs still retain the bulk of their innovative capabilities in their home markets, and technology that does flow overseas tends to stay within multinational networks ... ”).
18. Id. at 93.
19. Id. at 109.
20. Id. at 15.
21. Id.
22. Id. at 12.
23. Id. at 23.
24. See, e.g., id. at 13.
25. Based upon systematic evidence, the authors of THE MYTH see a picture of persistent difference and resistance to change rooted in national origin. The German economy is characterized by codetermination of the supervisory board of large firms, a large role played by universal banks which vote fifty percent or more of the shares in all large German firms, and a pattern of cross share holdings. The result is an absence of hostile takeovers, a comfortable safety net for managers in the event of serious managerial mistakes or unanticipated market shocks because of the availability of backup resources from the banks, stable research and development budgets and wider fluctuations in earnings than would be tolerated in other countries. See id. at 33-42.
Japanese firms operate in foreign wholesale rather than retail markets, use intrafirm investment to a great extent, and display “a comparatively low level of integration in local markets.”\(^6\) In turn, Korea, Taiwan, Hong Kong, and Singapore each reflect great and persistent differences from one another in governance, finance, and other aspects of business.\(^7\)

The strongest determinant of these persistent differences is national origin. These differences exhibit an obvious correlation with corporate nationality, not with regional characteristics or industrial or financial maturity. These differences seem to be “systemic.” Across firms, sectors, and in the aggregate, “only one set of behavioral characteristic shines through—national ones.”\(^8\)

Hence, a “chain” begins deep in the idiosyncratic national histories behind durable domestic institutions and ideologies. That “chain” extends upward to firm-level structures of internal governance and long-term financing. Those structures, in turn, are then linked to continuing diversity in patterns of corporate R&D operations. Distinctive national institutions and ideologies shape corporate structure, and are vitally important policies in home markets. “The external behavior of firms continues to be marked by their idiosyncratic foundations.”\(^9\)

The Myth of the Global Corporation tells us, namely, that “national roots remain a vital determinant” to many multinationals and that “corporate cores remain national in a meaningful sense.”\(^10\)

II. A PRESSING PROBLEM OF THE NEW CENTURY: THE GROWTH AND REGULATION OF LARGE MULTINATIONAL CORPORATIONS

A. Background

The inexorable growth of large multinationals has been one of the least noticed phenomena of the 1990s and, in the new century, is only now receiving the critical attention it deserves. The growth of large multinational and truly international corporations poses a number of overlapping problems, such as the irrelevancy-impotency of the nation state, the resulting field of play for economic imperialism, and the resulting opportunities to engage in regulatory arbitrage, leading to problems such as environmental degradation and “plantation production,”

\(^{26}\) Id. at 116.

\(^{27}\) Stewart R. Clegg & S. Gordon Redding, INTRODUCTION TO CAPITALISM IN CONTRASTING CULTURES 14 (Stewart R. Clegg & Gordon Redding eds., 1990).

[It would be mistaken to regard these countries [Japan and the ‘little dragons’ of Hong Kong, Taiwan, South Korea and Singapore] as essentially similar in their patterns of economic success. They have quite distinct foundations which are sufficiently different as to counter any too easy reliance on a view of a single ‘post-Confucian’ way.

\(^{28}\) Id.

\(^{29}\) THE MYTH, supra note 9, at 139.

\(^{30}\) Id.
especially in the new industrializing countries and developed countries of the world. Traditional corporate governance theory, structure, and practices deal with solving problems thought to be generated by the separation of ownership from control in large publicly held corporations. They are simply irrelevant to the problems posed by the growth of large, sprawling multinational entities.

B. The Accelerating Growth of Large Multinationals

The number and size of large MNCs have grown at geometric rather than arithmetical rates as of late. MNCs are driven by a quest to achieve economies of scale and to market products with the same ingredients, packaging, and logos to all of the world’s 6.2 billion inhabitants. Predictions are that by the year 2010 the number of large multinationals will be several times the number that existed just a few years ago. Domestic and transnational merger activity is at an all time high, particularly in commodities areas (oil, aluminum) but also in automobile manufacture, telecommunications, and food. It appears that senior corporate managers are engaged in a quest to be number one, two, or three in size on a global, rather than merely a domestic or continental (E.U. or NAFTA) scale.

The quest to be in a handful of the largest corporations in a given field, and on a global scale, is driving a headlong pursuit of size, manifesting itself in a worldwide merger movement. The acquisition by Alcoa Aluminum of Reynolds Metals Co. illustrates this trend. Alcoa faced a situation in which three smaller foreign rivals combined to form an aluminum multinational with $21 billion in worldwide sales. Alcoa’s CEO felt that Alcoa had no choice but to make a ‘bear hug’ offer for the world’s third largest producer of aluminum products, Reynolds Metals. After the acquisition, Alcoa will rival the world’s largest producer, with slightly less than $21 billion in annual sales.


32. See Robert Guy Matthews et al., Fitness Test: Alcoa-Reynolds Union Bears Stamps of Deal Rocking Commodities, WALL ST. J., Aug. 20, 1999, at A1 (noting “the latest in a string of recent deals that have seen one commodity giant gobble up another... [and]... mergers reflect the confluence of three important trends: industry consolidation, convergence of once-distinct lines of products or services, and globalization”); Matthews et al., Commodity Crunch: Alcoa-Reynolds Deal Shows the Logic of Merger Dynamics from Aluminum to Oil, Survival of the Fittest Is Now the Order of the Day, WALL ST. J. (Eur.), Aug. 20, 1999, at 1.


34. Deogun & Matthews, supra note 33, at A3.
In another commodities field, oil, Exxon acquired Mobil Oil in a $81.2 billion combination. The British Petroleum-Amoco merger represented a $48 billion transaction, which was followed by a proposed BP Amoco PLC buyout of Atlantic Richfield Co. for $30 billion more. In the summer of 1999, France’s Fina Petroleum made an offer for Elf Aquitaine, France’s other large international oil company. Reminiscent of the Bendix Martin Marietta “Pac Man” affair of the 1980s, Elf countered with a bid for Fina. Later in the summer, the two corporations agreed on a friendly amalgamation that resulted in the world’s fourth largest oil company. Later, in October 2000, the Chevron acquisition of Texaco for $38 billion relegated the combined French entity to fifth place worldwide. The merger wave continued with Phillips Petroleum’s November 2001 announcement that it was to acquire Conoco.

Global oligopoly seems a near certain prospect for the world’s automobile manufacturing industry. Chrysler and Daimler-Benz have combined as have Ford and Volvo. In March 1999, Renault S.A. of France took effective control of Nissan Motor Co. In 2000, General Motors Corporation held talks with Fiat SPA. These latter business combinations involve not only sheer size, but also portend an age of increasing transnational takeover and merger activity.

Carlo De Benedetti’s 1988 attempt to take over Societe Generale de Belgique was characterized as the first major transnational takeover, hostile or friendly, in the E.U.
By that time, of course, the United States had witnessed a crazy decade of merger activity, hostile takeovers, insider trading scandals and financial excesses. Europe and the E.U. member states are awakening, if not catching up to the United States. In summer 1999, Bank Nationale of France made two simultaneous $38 billion hostile offers, for Paribus and for Belgium’s Societe Generale.46 Deutsche Bank in Germany and Bankers Trust in the United States have combined.47 Recently, in telecommunications, Mannesmann A.G., the largest German wireless company, has acquired Orange PLC, Britain’s third largest wireless corporation, in a $33 billion transaction.48 Vodafone Airtouch, PLC then made an offer for Mannesmann, one of the first takeover bids for a large German firm.49

The size of the acquisitions has become truly staggering. In the 1980s the RJR Nabisco transaction featured in Barbarians at the Gate was thought to have set a record for the size of the deal, a record that would endure, at $24 billion.50 The MCI World Wide Communications proposed acquisition of Sprint was a $115 billion transaction.51 The America Online/Time Warner combination was a $165 billion transaction.52 The Vodafone offer for Mannesmann, A.G. was valued at $180 billion.53

C. An Illustrative New Multinational

A recent business combination of two multinationals frames the issues nicely. Unilever, a Netherlands based food and consumer products company, is a mid-size multinational which has one hundred and thirty eight subsidiaries in seventy-one countries worldwide: eleven in North America, fifteen in the Latin America, twenty-three in Africa and the Middle East, twenty-three on the Pacific Rim, fifty-five in the E.U., and eleven in the remainder of Europe.54 Its


47. Christopher Rhoads, Deutsche Bank's Bet Looks to be Paying Off: In Buying Bankers Trust, German Lender Boosts Investment Bank Profit, WALL ST. J., Nov. 18, 1999, at A16.


52. See Saul Hansell, America Online Agrees to Buy Time Warner for $165 Billion—Media Deal is Richest Merger, N.Y. TIMES, Jan. 11, 2000, at A1.


worldwide sales are approximately $44 billion. It employs 2.55 million people of whom 550,000 million work on corporate owned plantations.

In May 2000, Unilever made overtures to a smaller U.S. based food multinational, Best Foods Co. With $10 billion or so in worldwide sales, Best has sixty-two subsidiaries operating in one hundred and ten different countries, many on the Pacific Rim. Combined, after the $20.3 billion acquisition, with elimination of some overlap, the two multinationals will have over two hundred subsidiaries in over one hundred and thirty countries, with Best Foods’ strong presence in Asia complementing nicely Unilever’s presence in the Americas and the E.U. The combined entity is now the world’s second largest food company, after Nestle of Switzerland, with Kraft Foods of the United States ranking third.

A corporate organization such as the combined Unilever-Best organization illustrates nicely four interrelated regulatory problems: (1) power, size, and the resulting irrelevancy-impotency of the nation state; (2) increased economic imperialism; (3) regulatory arbitrage; and (4) the related “plantation production” problem.

III. PERCEIVED PROBLEMS POSED BY THE GROWTH IN SIZE AND NUMBER OF LARGE MULTINATIONAL CORPORATIONS

A. The Power and Size of Multinationals and the Irrelevancy of the Nation State

In the 1990s, the case for regulation clearly departs from the fifty plus year search by law professors and reformers to fill the vacuum created by the separation of ownership from control Berle and Means hypothesized in 1932. Berle and Means’s analysis implicitly assumes a large but not all powerful corporation operating, by and large, subject to the dictates of a single nation state which, in theory, possesses sufficient power to regulate should it desire to do so. Later reforms of the corporate social responsibility movement, such as federal chartering of corporations or federal minimum standards, hypothesized a lack
of a will to regulate, brought on by charter mongering and the “race to the bottom” engaged in by the states. Those proposals still assumed, however, the power of the nation state, in the form of the federal government, to bend corporations to its will if it wished to do so.

Today, however, large corporate empires sprawl across the globe. The power of the corporation may not only exceed that of any host state, but also that of the incorporating state. With a combined $54 billion in sales, the Unilever-Best entity has an annual turnover that exceeds the gross domestic product (GDP) of all but about fifty nations, including Ecuador, the United Arab Emirates, Kuwait, and Kenya, ranking just behind the Republic of Ireland whose GDP is $59.9 billion. Often the nation states in which subsidiaries operate and in which externalities are most felt do not have the power (or the will) to regulate. This scenario brings renewed call for the domiciliary state of the parent corporation to assert itself.

In turn, incorporating host nation states may refuse to take adequate action because of the fear that large multinationals may reincorporate elsewhere. Indeed, a multinational could move to an offshore incorporating jurisdiction like the Netherlands Antilles, the Cook Islands, Grand Cayman, in which secrecy prevails and the threat of meaningful regulation is nil. Indeed, an American

61. The leading piece was by the late Professor William L. Cary, Federalism and Corporate Law: Reflections upon Delaware, 83 YALE L.J. 663, 666 (1974) (positing a “race to the bottom” in states’ competition for incorporations).

62. The opposing view was that competition for charters produced an efficient mix of legal rules, resulting in a “race to the top” rather than “a race to the bottom.” Barry D. Baysinger & Henry N. Butler, Race for the Bottom v. Climb to the Top: The ALI Project and Uniformity in Corporate Law, 10 J. CORP. L. 431, 433 (1985); Daniel R. Fischel, The “Race to the Bottom” Revisited: Reflections on Recent Developments in Delaware’s Corporation Law, 76 NW. U. L. REV. 913, 920-22 (1982).


64. Eric W. Orts, The Legitimacy of Multinational Corporations, in PROGRESSIVE CORPORATE LAW 258-60 (Lawrence E. Mitchell ed., 1995) (noting that “multinational corporations often seem like ghosts escaping the various national and international laws that reach out impotently to claim them” and “[s]pread out among various countries, the operations of multinational corporations are often above the law of any particular country.”); see also KENICHI OHMAE, THE END OF THE NATION STATE: THE RISE OF REGIONAL ECONOMIES 39 (1995).

65. In response to which are heard replies that even domiciliary states lack the power or the will to regulate. ROBERT B. REICH, THE WORK OF NATIONS: PREPARING OURSELVES FOR 21ST CENTURY CAPITALISM 136-53 (1991) (positing “[t]he coming irrelevancy of corporate nationality”); Orts, supra note 64, at 253 (citation omitted).

Even when the international context is explicitly considered [by American legal academics in their writings]... discussion often degenerates into a neomercantilist debate over comparative models of corporate law. This debate is neomercantilist because it advances the assumption that multinational corporations will necessarily act as faithful instruments of the nation-states in which their parents are incorporated, rather than recognizing the more complex reality that multinationals are in fact becoming more and more “stateless.”

Id.

66. A vexing conundrum has been precisely why so few, if any, multinationals have moved to an offshore incorporating state. Scholars have raised the possibility of a “bandit” multinational moving off shore
icon, Stanley Works, makers of hand tools and other products known to every
do-it-yourself homeowner, recently attempted to leave its Connecticut domicile
to incorporate in Bermuda, largely for tax reasons, but was driven back on shore
by a protracted outcry, which included litigation against Stanley by the Connecticut
Attorney General. 67

Observations as to sheer power and size have led many scholars to predict or
proclaim the irrelevancy of corporate law and of the identity of the incorporating
state. 68

B. Economic Imperialism

On quaint Fort Street, in Victoria, British Columbia, Canada, a U.S. Banana
Republic store and a Burger King have displaced a Scots Tartan store and a
teashop that had been on Fort Street for decades. The main street of a middle size
town in Malaysia will be lined with U.S. franchised fast food outlets: a Kentucky
Fried Chicken, an A&W Root Beer, and a Burger King. Can a GAP store be far
behind? The U.S.-based McDonalds is everywhere, its stores and its billboards
despoiling the urban and the rural landscapes of countries around the globe.

In their attempts to homogenize the world, U.S. multinationals often attempt
to march in under the banner of free trade. Monsanto has attempted to shoehorn
its genetically engineered seed products into the E.U. over the objections of
French farmers. 69 Prodded by U.S.-based multinational producers, the U.S. Trade
Representative argues for the introduction into European markets of beef fattened
using human growth hormones. 70

This is the new economic imperialism. That imperialism views the eradication
of all barriers as tantamount to globalization. That imperialism wants a world
without borders so that the same products and services dominate market after
market. That imperialism uses globalization as a bulldozer to crush resistance for the achievement of those goals by the multinational corporations, which are the progenitors of economic imperialism.

C. Regulatory Arbitrage by Multinationals

The need to regulate, based upon the global scenario, is buttressed by a refinement, the notion of regulatory arbitrage, "defined as "[m]ultinational flexibility [which] allows firm . . . to shift operations among countries to take advantage of differing legal requirements, for example, lower labor costs due to absence of minimum wage laws or unions, more flexible antitrust or tax law, or weaker environmental law." 71 A multinational may locate activities in nation states in which the regulation poses the least, or no, obstacle to the activity in which the multinational wishes to engage. For example, the multinational may locate a polluting facility in a former Soviet Republic in which environmental law or enforcement is not only lax, but non-existent. The same multinational might locate a "knockoff" manufacturing facility in a nation with a large market for the product and little or no protection for intellectual property, such as in the People's Republic of China. With labor-intensive manufacturing, the multinational may seek out a developing nation eager for employment at any cost and locate a facility there. Through time, the multinational may shift activities from country to country, depending upon the regulatory obstacles that spring up in the multinational's path, usually as the standard of living and expectations rise. 72

A combined Unilever-Best, with two hundred separate operations already existent in one hundred and thirty countries around the globe, and on every continent save Antarctica, illustrates the potential for regulatory arbitrage open to managers of a far flung multinational.

D. The Plantation Production Problem

Multinationals may move activities to host nations in which working conditions are substandard to atrocious and in which wages paid do not rise even to the level of a living wage. Over decades, a manufacturer might move a facility from Korea to Malaysia to Indonesia to Vietnam. Newly industrializing countries of Africa could be next in the parade of host states. In other instances, a manufacturer may move manufacture or assembly activities from facility to facility.

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71. See Orts, supra note 64, at 250 (citing Joel P. Trachtman, International Regulatory Competition, Externalization, and Jurisdiction, 34 HARV. INT'L L.J. 47 (1993)).

72. Nike is an example of a multinational that has engaged in regulatory arbitrage over time. As wages and expectations rise and requirements for better working conditions are adopted by host nations, Nike has moved its athletic shoe manufacturing facilities from Korea to Thailand, then to Indonesia, and currently, to Vietnam.
facility in the same country, as in the “maquiladora” phenomenon that occurred in Mexico and has accelerated under NAFTA.\(^73\)

Host states often welcome roving multinationals, despite the exploitation of their citizens involved. In competition for economic growth, other states that may be prone to regulate at least more extreme forms of worker exploitation do not do so, fearing a competitive disadvantage. Among nation states, a collective action problem exists that may be solved by international organizations, such as the Bank for Reconstruction and Development (World Bank) or the World Trade Organization (WTO). Within the WTO, however, the newly industrialized countries and the lesser developed countries resist, perceiving WTO efforts to regulate plantation production as a ploy by wealthier states to keep these countries in ‘their place.’\(^74\) Given the economic disparities among nations around the globe, the plantation production problem seems an intractable one,\(^75\) certainly not susceptible to traditional corporate governance analysis.

IV. THE ROLE OF INTERNATIONAL ORGANIZATIONS AND SOFT LAW

Again, traditional corporate governance deals with what fills the void created by the separation of ownership from control (the role independent directors, federal chartering, social accounting and conflict of interest disclosure). The modern Berle and Means corporation represents a new form of property in that those who own the property, the dispersed shareholders, no longer control it.

If the shareholders think that the corporation is headed in the wrong direction or its assets being mismanaged by those in control, collective action problems would hinder shareholders from coming together again to assert, or to re-assert, themselves. Collective action problems include the simple difficulty of shareholders knowing who else owns shares in a particular corporation; the costs of communicating with them either by mail or telephone; and today’s costs posed by regulatory compliance, such as the proactive shareholder’s compliance with

\(^73\) Maquiladoras assemble motor vehicle parts, electric capacitors, stuffed animal toys, apparel, televisions sets, electric motors, and a host of other products often for multinationals, using low cost labor in tilt up construction facilities that may change products on a sixty or ninety-day basis. See generally KHOSROW FATEMI, THE MAQUILADORA INDUSTRY: ECONOMIC SOLUTION OR PROBLEM? (1990); KATHRYN KOPINAK, DESERT CAPITALISM: MAQUILADORAS IN NORTH AMERICA’S WESTERN INDUSTRIAL CORRIDOR (1996); LESLIE SKLAIR, ASSEMBLING FOR DEVELOPMENT: THE MAQUILA INDUSTRY IN MEXICO AND THE UNITED STATES (1989).


\(^75\) In addition to the potential for oppression of less developed countries, law making in the international context brings another set of problems. The bureaucrats, trade representatives, and others who make law in the international sphere lack accountability to any electorate. See generally Stephan, supra note 8, at 681. Critics “assert that the establishment of NAFTA and the World Trade Organization (WTO) will mean that state and federal legislatures no longer may decide what kind of environmental safeguards or standards of consumer and worker protection we will have.” Id.
the SEC’s rules prohibiting solicitation of any form of consent, such as a proxy for voting shares, unless the person communicating with other shareholders complies with the SEC’s proxy solicitation rules. Compliance with those rules may impose large direct costs (hiring a fancy, or at least sophisticated, lawyer, paper and printing, and mailing and postage), as well as indirect ones (formal filings give the corporation’s attorneys a stationary target, and they can, and will, sue an activist shareholder for a mere slip of the pen because the SEC’s rules permit suit for omissions or misleading statements that are the product merely of a lack of reasonable care). In 1992, the SEC attempted to, and did, liberalize its rules so as to permit shareholders to communicate to one another how they intended to vote on a matter, but a coordinated campaign by U.S. corporate interests caused the SEC to pull its punch on more ambitious reforms.

A collective action problem susceptible of no ready solution is the “free rider” problem. Often many fellow shareholders will share the view that the corporation’s managers are not managing the corporation’s assets or affairs properly. But rather than joining the shareholder activist who wishes to do something about mismanagement, the other shareholders, even the sympathetic ones, may lie back in wait, not expending their own time or other resources in the activist effort. In other words, the other shareholders are willing to “free ride” on the efforts of their pro-active brethren. Too many “free riders” will doom any collective effort, whether it be in a homeowners’ association, a parent teacher group, or a publicly held corporation.

Of course, the SEC does not regulate collective action by nation states or solicitation of “proxies” or other forms of consent from them. Some nation states,
however, do experience some of the same collective action problems that dispersed shareholders experience. Rogue states lack the will, or more charitably perhaps, the resources, to regulate large multinationals operating within their borders. Other states deplore the situation, but persist in “free riding” on the efforts of the states that do exhibit a will to attempt regulation.

The best hope for solving these collective action problems are international organizations. The current players are the United Nations (UN), the OECD, the World Bank, the International Monetary Fund (IMF), and the WTO.

The UN began as a contender, with its proposed “UN Convention on Transnational Corporations.” This document has become a dead letter. The UN ceased its efforts. The UN convention is not readily available in most libraries and has become exceedingly difficult to obtain.

The OECD has evolved a Code of Best Practices for multinational corporations. It is a purely voluntary code. There are no teeth to it. Viewed as it is, as an elitist Paris based organization of twenty-nine nation states, the OECD has limited influence with many nations and governments. OECD products, such as its code, produce a backlash in many transition economies and newly industrializing nation states, although the OECD anti-corruption convention has been a great success. But with the Guidelines for Multinational Corporations, the less developed countries and the newly industrialized countries are unlikely to hold up the OECD code, waving it in the figurative face of a large multinational corporation.

The World Bank and the IMF have been active in many of the less developed countries and newly industrializing countries. The World Bank and the IMF do have a “hammer” over nation states in that states that do not commit to the IMF and World Bank program will not receive urgently needed loan disbursements from those organizations. The World Bank/IMF program is to impose upon lower


81. In addition to the 15 member states of the European Union, the OECD has as members the following nation states: Australia, Canada, Finland, Korea, Poland, Czech Republic, Hungary, New Zealand, United States, Iceland, Japan, Mexico, Norway, and Turkey. See http://oecd.org/EN/countrylist (last visited Apr. 16, 2002) (copy on file with The Transnational Lawyer).

developed countries and newly industrialized countries what Thomas Friedman refers to as the "Golden Straitjacket."\^83

The Golden Straightjacket has many elements, several of which are: fiscal austerity by government; privatization of state owned enterprise; limitation of government to provision of core types of public goods; modernization of economic laws so as to make both the lesser developed countries and the newly industrialized countries receptive to DFI; and elimination of corruption. Lately, the World Bank has pledged to turn more of its attention toward the alleviation of chronic poverty, defined as per capita income of less than one U.S. dollar per day.\^84

Absent from the agenda of the World Bank and the IMF IS significant proposals designed to deal with the problems posed by the growth in number and size of large multinational corporations. Indeed, many view the World Bank/IMF agenda as user friendly to multinationals, that is, promoting globalization as a bulldozer. The Golden Straightjacket homogenizes nation states. One possible motivation for doing so is to ease the burdens on multinationals as they roam about the earth.

The brighter spots, and better hope for the future, lie in the WTO, the Kyoto Accords in the environmental area, and nongovernmental organizations that are international in scope such as the Workers’ Rights Consortium, the Fair Labor Association, and the Forest Stewardship Council (FSC). The latter organization has a worldwide program for monitoring harvesting practices of the forest products industry. In the U.S. alone, the FSC has obtained the support of Home Depot, Wickes, Lowes, and Anderson Windows, among others. Those corporations have agreed to sell only products bearing the FSC symbol and seal of approval. The FSC mark of approval has become influential in the investment community as well.\^85

Many multinationals have adopted vendor standards of conduct, which insure that multinationals and their subcontractors provide adequate worker health and safety protections, prohibit child labor, and pay a living wage (by host country standards). Levis Strauss, the denim garment manufacturer, was among the first to adopt such a code but GAP and Nike have followed. The Walt Disney Company, which manufactures stuffed toy animals and other products in Mexico and elsewhere, has a code that is regarded by many as the paradigm.\^86

\^83. For a discussion on World Bank and IMF policies, see FRIEDMAN, supra note 7.

\^84. See, e.g., Paul Blustein, Turning Point Seen in War on Poverty, WASH. POST, Mar. 22, 2002 (noting comments of World Bank President James Wolfensohn); Blustein, O’Neill Targets World Bank’s Poverty-Fighting Strategy, WASH. POST, May 16, 2001; Robert Samuelson, Persistent Poverty, WASH. POST, Sept. 20, 2000 (noting that the desperately poor as defined by World Bank are those living on less than one U.S. dollar per day). In 2000, the World Bank published a 335 page report, GLOBAL POVERTY.


Paradigm code or not, the key is in the monitoring of compliance by vendors and in the enforcement. At least two nongovernmental organizations, the Workers' Rights Consortium (WRC) and the Fair Labor Association, attempt to monitor compliance and report violations of vendor-worker codes. The WRC includes in its membership forty-six household name universities, which field teams in high profile intercollegiate sports and on whose behalf sportswear with university logos is manufactured in Nicaragua, Indonesia, and elsewhere.87 Many multinationals, such as Reebok and Gap, favor the Fair Labor Association and even had a hand in founding the organization.88

The WTO has a powerful enforcement tool. By withholding most favored nation status or participation in multinational trade agreements, the WTO may be able to force even rogue states to comply with minimal environmental protection standards and core worker health and safety standards. The lesser developed countries and new industrialized countries see the WTO insertion of "green" and other social responsibility provisions in trade agreements and treaties not as an effort to curb the power of large multinational corporations. Rather, they see such provisions as Trojan horses, hiding within it an agenda to make the wealthier nation states wealthier yet or at least an agenda to preserve their hegemony. The lesser developed countries and new industrialized countries and their citizens will thus not receive their due in trade negotiations with the WTO. How that struggle among rich, poor, and not so rich nation states will play out will make for interesting watching in the next ten years or so.

V. CONCLUSION

Globalization in the Twenty-First Century brings with it a whole host of problems that corporate law has not faced previously. In fact, perhaps corporate law is not up to the task and will never face the problems posed by the size and geographical reach of large multinationals. Corporate law, as we know it, deals with problems of "vertical governance." The new problems are problems of "horizontal" governance.

Rather than the organic corporate law of nation states, under which corporations are formed and regulated, and the power allocated among the various governance organs of the corporation, our attention will be shifted away from what we have heretofore dealt with as "corporate law." Instead, in the large multinational corporate sphere, we will focus much more upon soft law, that is,

87. See Weekend Journal, WALL ST. J., May 12, 2000, at W17 (reporting that Nike and its founder withdrew support from the University of Oregon because Nike joined the WRC); Nike, Inc: Second University to Lose License, Funding Contract, WALL ST. J., Apr. 28, 2000, at B6 (noting that Nike withdrew funding for University of Michigan athletics because Michigan joined WRC).

88. See Mattel Creates System to Monitor Conditions in Overseas Factories, WALL ST. J., Nov. 21, 1997, at B9 (reporting that Mattel joins with Nike, Levi Strauss, Reebok, Walt Disney, and GAP to enact "a code of conduct for its overseas factories and an independent audit and monitoring system to ensure compliance").
aspirational codes of best practices such as the Cadbury Code or the ALI Corporate Governance Project; voluntary codes of conduct and vendor standards; non-governmental organizations, their standards, and their monitoring activities; trade agreements and treaties that also attempt to influence internal corporate affairs; international organizations such as the OECD that undertake similar efforts but not through trade law; and stock exchanges that will compete amongst each other in devising optimal governance standards.

In the Twenty-First Century, and within the multinational area, we shall see an entirely new panoply of norms and organizations that will attempt to influence corporate behavior. It is to that hinterland beyond traditional studies of corporate law to which corporate lawyers and legal scholars should shift much of their attention.

89. See generally Symposium, Norms and Corporate Law, 149 U. PA. L. REV. 1607-2191 (2001). Speakers and authors in the symposium talked and wrote about everything but law, including "shaming," game theory, voluntary disclosure, and "norms," skipping entirely over the area loosely labeled "soft law" in favor of the nebulous, the ridiculous, and the bizarre. But see Marcel Kahan, The Limited Significance of Norms in Corporate Governance, 149 U. PA. L. REV. 1869 (2001).