THE GOVERNANCE OF THE MULTINATIONAL

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This Article endeavors to describe the development of two lines of thought about the multinational corporation or enterprise, and to explore its impact on the world of rules. The first was a body of research, starting in the early 1970s, that investigated the nature of the multinational corporation or enterprise (hereinafter "multinational"), and the second was a more recent corpus of research on the comparative aspects of corporate governance. The first body of research, was immediately taken to have normative significance. The multinational became a political concept, complete with calls for action to contain it. The normative implications of the second, the new comparative governance law, are less clear. After an explication of each of these lines of scholarship, we will proceed to study the attempts to give them normative meaning. First, we examine the "soft law" that has emerged from these bodies of learning. We then turn to projects concerned with developing harder law from these bodies. The conclusion will deal with conjectures about the future.

I. MULTINATIONAL LEARNING

Research into multinational enterprises became a major focus of work in the United States academic world in the early 1970s, although such multinationals had existed much earlier.[1] Some credit for first highlighting the multinational belongs to Jean-Jacques Servan-Schreiber, whose book, *American Challenge,* appeared in 1967.[2] The most conspicuous forum for multinational research was the project captained by Professor Raymond Vernon of the Harvard Business School and staffed by members of Harvard's faculty and others, including myself as a legal adjunct.[3] The program gathered and correlated data about a population of some 170 firms that satisfied fixed (if somewhat

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[1] *See generally* MIRA WILKINS, THE MATURING OF MULTINATIONAL ENTERPRISE: AMERICAN BUSINESS ABROAD FROM 1914 TO 1970 (1974).

[2] JEAN-JACQUES SERVAN-SCHREIBER, LE DÉFI AMÉRICAIN (1967).

[3] *See generally* Detlev F. Vagts, *The Multinational Enterprise: A New Challenge for Transnational Law*, 83 HARV. L. REV. 739 (1970).

arbitrary) criteria about what constituted a multinational. It explored the financial strategies and managerial policies of the multinational,[4] including such issues of foreign economic policy as the contribution of multinationals to the balance of payments problem and solution. In his volume *Sovereignty at Bay*,[5] which summarized the project's findings, Vernon portrayed multinationals as powerful entities whose wealth, flexibility, and technological advantages overwhelmed the governments attempting to regulate the new creatures. Years later, he returned to the subject and published a less dramatic work portraying the balance of power as much more even.[6] Importantly, the seminal Vernon work came out in a period when less developed countries were aggressively confronting the developed world in the wake of the 1973 Arab oil crisis, and contemplating the nationalization of foreign investments, particularly in the minerals field.

Other scholars researched the multinational. The United Nations convened a Group of Eminent Persons, which held protracted hearings in Geneva and ultimately published a report on the subject.[7] Subsequently, the UN established the Centre on Transnational Corporations to continue studies and publications, particularly the CTC Reporter.[8] It lasted until 1993 when, for economic reasons, it was folded into the United Nations Center for Trade and Development (UNCTAD).[9] Meanwhile, the multinational's presence was absorbed into the thinking of both economics and political scientists, despite the fact that the number of studies devoted specifically to multinationals declined somewhat.

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[4] *See* SIDNEY M. ROBBINS & ROBERT B. STOBAUGH, MONEY IN THE MULTINATIONAL ENTERPRISE: A STUDY OF FINANCIAL POLICY (1973). *See also* JOHN M. STOPFORD & LOUIS T. WELLS, JR., MANAGING THE MULTINATIONAL ENTERPRISE: ORGANIZATION OF THE FIRM AND OWNERSHIP OF THE SUBSIDIARIES (1972).

[5] RAYMOND VERNON, SOVEREIGNTY AT BAY: THE MULTINATIONAL SPREAD OF U.S. ENTERPRISES (1971).

[6] RAYMOND VERNON, IN THE HURRICANE'S EYE: THE TROUBLED PROSPECTS OF MULTINATIONAL ENTERPRISES (1998).

[7] U.N. Dep't of Econ. & Soc. Affairs [ESA], *The Impact of Multinational Corporations on Development and on International Relations*, 19-26, U.N. Doc. E/5500/Rev. 1/ST/ESA/6 (1974).

[8] CYNTHIA DAY WALLACE, THE MULTINATIONAL ENTERPRISE AND LEGAL CONTROL: HOST STATE SOVEREIGNTY IN AN ERA OF ECONOMIC GLOBALIZATION 1082 (2002).

[9] *Id.* at 1083.

One product of the continued investigation was the discovery that more and more multinationals were based outside the United States, including those in Japan and other parts of Asia, as well as a number of firms that were centered in developing countries such as Brazil. The law of multinationals was explored from time to time by such writers as Cynthia Wallace[10] and Peter Muchlinski.[11]

Throughout multinational literature, one question emerges repeatedly: how does one define a multinational? One first notices variations in the label—"multinational enterprise," "multinational corporation," "transnational corporation," and even "international."[12] The Vernon project preferred the term "enterprise" to that of "corporation" since one is seldom confronted with a single legal corporation. "Enterprise" also roughly corresponds to such terms in other legal systems as *Unternehmen* or *groupe des sociétés*.[13] One encounters an aggregation of corporations, typically chartered in different countries that are linked together by a managerial strategy supported by control based upon stock ownership, technology transfers, and other financial relationships, such as loans. Whatever the legal separateness of the entities within the grouping, business analysts and accountants treat them as a single, consolidated whole.

There is also the issue of scale. The size and power of multinationals is intriguing. Clearly, enterprises of smaller scale with limited involvements outside their home country should be excluded from our database. Vernon's definition of the multinational brought in the 187 corporations listed in Fortune's five hundred largest American corporations that have subsidiaries in six or more foreign countries.[14] Despite its arbitrary quality, this

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[10] *E.g., id.*

[11] *E.g.,* Peter Muchlinski, Multinational Enterprises and the Law (1999).

[12] The term "international" misleadingly suggests that the corporation is formed by two or more governments. Philip C. Jessup, Transnational Law 1 (1956). Moreover, "transnational" suggests operations across borders. *See id.* at 2.

[13] For treatment of these related concepts, see José Antunes, Liability of Corporate Groups (1994).

[14] *See* James W. Vaupel & Joan P. Curhan, The Making of Multinational Enterprise: A Sourcebook of Tables Based on a Study of 187 Major U.S. Manufacturing Corporations 2-3 (1969).

definition served for an academic exercise. As we shall see, however, this arbitrariness poses problems for any project imposing legal obligations on multinationals not imposed on lesser firms.

The multinational enterprise presents challenges for the world economy and the world polity,[15] particularly for states hosting multinationals that have their base somewhere else. Multinationals are blamed for economic strategies that recommend outsourcing production to countries with lower pay scales and worse working conditions than the United States and other industrialized countries. Multinationals are also charged with exporting pollution by moving production and storage facilities away from places where strict regulations apply. Finally, multinationals are accused by critics of evading taxes and bribing government officials.[16] In some quarters, the multinational became an all-purpose scapegoat, blamed for all sorts of ills, some of which were actually the products of general international economic trends or the policies of governments. The discovery of the multinational coincided with a wave of self-confident challenges from less-developed communist countries, who asserted a dedication to socialism and the belief that their possession of needed oil and other mineral resources would compel capital-exporting states to meet their terms. In the 1990s, these less-developed and communist countries abandoned non-capitalist forms of industrial organization, at the same time recognizing that the multinational was an engine for economic development.

II. COMPARATIVE CORPORATION LAW

The comparative study of corporations has a long history, including the assessment of company law[17] and special studies. When the Max Planck Institute in Hamburg, Germany launched the project for an International Encyclopedia of Comparative

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[15] For a selection of views of MNEs, see DETLEV F. VAGTS, TRANSNATIONAL BUSINESS PROBLEMS 113-146 (2d ed. 1998). For a negative view, see RICHARD J. BARNET & RONALD E. MÜLLER, GLOBAL REACH: THE POWER OF THE MULTINATIONAL CORPORATIONS 363-88 (1974).

[16] For a collection of such criticisms see VAGTS, *supra* note 15, at 116-25.

[17] *See, e.g.*, RUDOLF B. SCHLESINGER ET AL., COMPARATIVE LAW (5th ed. 1988).

Law in the early 1970s, it included a volume on company law.[18] Much of this work was descriptive, and some of it was aimed at the needs of practicing lawyers dealing with investments in other countries. A great deal of literature was produced regarding the movement within the European Economic Community (later Union) to harmonize company law and diminish the chances of evasion of national corporate legislation by incorporating in a more lax jurisdiction.[19] Those studies laid the foundation for a series of directives dating from 1968.[20]

In the 1990s, a new force burst onto the intellectual scene: economists, not lawyers, began to ask questions about the correlation of legal rules with patterns of investment practices.[21] The volume of recent publication in the comparative corporate governance field is probably equal to all of the remaining comparative law scholarship combined. Some countries foster widespread investment by the general public in the equity securities of large companies with widely distributed ownership. In other countries, the voting control of large corporations remains in the hands of the founders' families or in institutional investors. Investors are reluctant to buy small packets of shares of corporations based in legal systems that will not protect outsiders from expropriation by insiders.[22]

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[18] Volume 13, after many delays, is due to appear in 2005. The present volume editor is the undersigned but Prof. Alfred Conard plied the laboring oar for many years.

[19] *E.g.,* Eddy Wymeersch, *The Effects of the Regulation of Securities Markets on Company Law within the EEC*, *in* EUROPEAN COMPANY LAWS: A COMPARATIVE APPROACH 61 (Robert R. Drury & Peter G. Xuereb eds., 1991); JULIAN MAITLAND-WALKER, GUIDE TO EUROPEAN COMPANY LAWS 576 (2d ed. 1997).

[20] For texts and decisions, see EUROPEAN COMPANY AND FINANCIAL LAW (Klaus Hopt & Eddy Wymeersch eds., 3d ed. 2004).

[21] The classic work is from Rafael La Porta et al., *Law and Finance*, 106 J. POL. ECON. 1113 (1998). For a review of the field, see John W. Cioffi, *State of the Art: A Review Essay on Comparative Corporate Governance: The State of the Art and Emerging Research*, 48 AM. J. COMP. L. 501 (2000). For my reaction, see Detlev F. Vagts, *Comparative Company Law: The New Wave, in* FESTSCHRIFT FÜR JEAN NICOLAS DRUEY ZUM 65. GEBURTSTAG 595 (Rainer J. Schweizer et al. eds., 2002).

[22] Rafael La Porta et al., *What Works in Securities Laws?*, 61 J. FIN. (forthcoming Jan. 2006), *available at* http://post.economics.harvard.edu/faculty/shleifer/papers/securities_0907.pdf.

Investigators pursued the theory that elements in corporation law produced these differences. For example, in some countries shareholders could exercise their vote without going to the trouble of attending a meeting. Some countries give investors information that is much more complete and carefully screened than in others. In other legal systems existing shareholders have a right to participate in offerings of new stock that could otherwise dilute their interests.[23] Investigators set up indices of such shareholder rights and performed calculations evaluating them against indices of the concentration of shareholding. They have even generalized these comparisons to conclude there is a major difference between civil law countries—in particular France and countries that have adopted legal codes influenced by France—and common law countries.[24] Of course, the United States and United Kingdom performed best in these comparisons.

The general opinion that a common law system offers greater shareholder rights and protection than a civil law system has not prevailed unchallenged. Traditional comparative lawyers were taken aback at the idea of economists charging into their domain. Responses began with the highly detailed German practice of depositing shares with brokers or bankers who then vote on the shares as instructed, a process almost indistinguishable, both in its strength and weakness, from the American proxy system. Others attacked at a more general level, arguing that markets developed differently in individual countries and that legal systems developed to accommodate their respective needs—the chicken, rather than the egg, came first.[25] Others emphasized the politics of the countries involved, finding that where socialist policies were important, only concentrated groups of shareholders had the ability to act together to fend off such influences.[26] Still others argued that the wrong standards were being applied, that the point of corporations was to serve the community at large,

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[23] LaPorta et al., *supra* note 21, at 1126-134.

[24] *Id.* at 1134.

[25] *E.g.,* Randall S. Thomas, *The Increasing Role of Empirical Research in Corporate Law Scholarship,* 92 Geo. L.J. 981 (2004) (reviewing Mark Roe, Political Determinants of Corporate Governance: Political Context, Corporate Impact (2003)).

[26] *E.g.,* Mark Roe, *Political Preconditions to Separating Ownership from Corporate Control*, 53 Stan. L. Rev. 539 (2000).

not just shareholders. They noted that American corporations pay their executives rewards that far exceed those afforded top management in other countries, yet the quality of management did not rise above that of their rivals abroad.[27] They noted that this gap in rewards might not be traceable to lesser legal controls in the United States but rather to American reverence for CEOs as capable of furnishing charismatic leadership that raises shareholder values, therefore justifying such lavishness.[28]

Academic literature has taken another turn since the American corporate scandals of the late 1990s, including those of Enron, WorldCom, and Tyco, which abruptly ended the euphoria of the early 1990s. To prevent a repetition of those mishaps (or at least provide investors with confidence that they would not be repeated), the U.S. Congress passed the Sarbanes-Oxley Act (SOX) in 2004.[29] This statute loaded a new variety of safeguards onto the American corporation law system, including the imposition of new duties on corporate officers, boards and auditors. The statute also gave lawyers new functions and enhanced liabilities. Commentators sympathetic to business interests criticized SOX as draconic and counter-productive.[30] They worried that such great emphasis on preventing managerial dishonesty could interfere with the core task of corporate boards and management: moving the business ahead to greater profitability. Academics disagreed on the appropriateness of the legislation, which was enacted in great haste. The haste of this reaction by Congress is remarkable in comparison with the four and five year lag between the great stock market crash of 1929 and the securities

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[27] For a comparison, see DETLEV F. VAGTS, *Das Gefälle bei den Gehältern von Spitzenmanagern—Amerika Gegen den Rest der Welt*, *in* FESTSCHRIFT FÜR MARCUS LUTTER ZUM 70. GEBURTSTAG: DEUTSCHES UND EUROPÄISCHES GESELLSCHAFTS-, KONZERN- UND KAPITALMARKTRECHT 767 (Uwe H. Schneider et al. eds., 2000). For a recent view of American practice, see LUCIEN BEBCHUK & JESSE FRIED, PAY WITHOUT PERFORMANCE: THE UNFULFILLED PROMISE OF EXECUTIVE COMPENSATION (2004).

[28] *See* RAKESH KHURANA, SEARCHING FOR A CORPORATE SAVIOR: THE IRRATIONAL QUEST FOR CHARISMATIC CEOS i-v (2002).

[29] Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (2002).

[30] Jill E. Fisch, *The New Federal Regulation of Corporate Governance*, 28 HARV. J.L. & PUB POL'Y 39, 39 (2005). Roberta Romano, *The Sarbanes-Oxley Act and the Making of Quack Corporate* Governance, 114 YALE L.J. 1521 (2005).

laws of 1933 and 1934. SOX recast the balance between countries because many Europeans rejected its program and sought to withdraw from the U.S. securities markets.[31]

The comparative governance law movement has regularly assumed that corporations can be assigned a nationality according to their place of incorporation or their corporate headquarters.[32] This assumption is the basis on which the performance of companies incorporated in X is compared with the performance of corporations formed under the laws of Y.[33] Reality, however, is blurring the picture. Increasingly, shareholders residing in X buy shares of corporations organized under the laws of Y. In a growing number of episodes, corporations shift their "allegiance" in order to minimize taxes or regulations.[34] All of this ambiguity about national allegiance underlines the importance (and the difficulty) of imposing restraints on multinationals.

It is unclear what implications can be drawn from the above-mentioned studies. Arguably, widespread ownership produces a more efficient securities market and cheaper sources of capital for producers, which implies convergence on an Anglo-American model.[35] Underlying this research is an assumption that that the interests of shareholders and investors are controlling, and that other stakeholders should be excluded from the internal processes of the corporation.[36]

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[31] For some European reactions, see generally Detlev F. Vagts, *Extraterritoriality and the Corporate Governance Law*, 97 AM. J. INT'L L. 289 (2003).

[32] For a comparative review of the history of the place of incorporation and seat rules, see Elvin R. Latty, *Pseudo-Foreign Corporations*, 65 YALE L.J. 137 (1955).

[33] Comparative analysts are somewhat vague about how they assign corporations to nationalities, but they seem to use a place of incorporation test. *See, e.g.,* La Porta et al., *supra* note 21, at 1119.

[34] For a comparative review in the light of recent EU authority, see generally Werner F. Ebke, *The "Real Seat" Doctrine in the Conflict of Corporate Laws*, 36 INT'L LAW. 1015 (2002).

[35] *See, e.g.,* CONVERGENCE AND PERSISTENCE IN CORPORATE GOVERNANCE (Jeffrey N. Gordon & Mark J. Roe eds., 2004).

[36] For reviews of the stakeholder question in American law, see generally Lawrence E. Mitchell, *A Theoretical and Practical Framework for Enforcing Corporate Constituency Statutes,* 70 TEX. L. REV. 579 (1992); Roberta S. Karmel, *Implications of the Stakeholder Model*, 61 GEO. WASH. L. REV. 1156 (1993).

III. Soft Law Prescriptions

Turning to the prescriptive side, one begins with the guideline, or "soft law," approach. Soon after the Report of the Group of Eminent Persons, the United Nations commissioned the drafting of guidelines, some of which focused on a particular problem area.[37] The United National Conference on Trade and Development (UNCTAD) succeeded in producing a set of "Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices," but the Code of Conduct on the Transfer of Technology never materialized.[38] A general guideline on multinational or transnational corporations was also expected, but the project ended without success in 1983.[39] The Organisation for Economic Cooperation and Development (OECD) followed up with "Guidelines for Multinational Enterprises" when the 1976 edition was updated in 2000.[40] These rules dealt with disclosure, employment and industrial relations, environmental protection, combating bribery, dealing with consumer interests, fostering science and technology, maintaining competition, and contributing through taxation. The UN effort geared up again through its human rights machinery, which was selected to carry out this work and moved comparatively speedily to perform its mission and gain approval in 2003.[41] The guidelines were called "Norms on the Responsibilities of Transnational corporations and Other Business Enterprises with Regard to Human Rights." These norms followed the tactic of picking up rules that had been formulated to govern the behavior of governments and applying them to corporations. These rules pertained to fields

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[37] Wallace, *supra* note 8, at 1084-85.

[38] *Id.* at 1084-86.

[39] *Id.* at 1083.

[40] Org. for Econ. Co-Operation and Dev., The OECD Guidelines for Multinational Enterprises: Revision 2000 (2000), *available at* http://www.oecd.org/dataoecd/56/36/1922428.pdf [hereinafter OECD Guidelines].

[41] For an explication by the chair of the drafting group, see David Weissbrodt & Muria Kruger, *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*, 97 Am. J. Int'l L. 901 (2003).

such as environmental protection, labor standards and the like.[42] It is too early to tell what sorts of consequences they will have.

More generally, one wonders what the impact of guidelines as a category will be. They represent an instance of what internationalists call "soft law."[43] By definition, no concrete penalties follow upon their transgression, and no reward accompanies obedience. Consequences can follow a failure to obey soft law, but certain conditions must be present. If there is a strong sense within the relevant community that one should listen to the collective ethos, people will hesitate to violate the norm. The creator of the guidelines can enhance this effect by establishing a monitoring system that will highlight lapses and bring them to the attention of the community. Both personal and business relations may be interrupted by disgusted members. This approach best fits a village or small town where spaces are small and face-to-face contact almost inevitable. Does the environment of multinational enterprise bear any resemblance to such a setting? Is there such a thing as a "global village?"

In a sense, each area in which the multinational conducts its operations may be such an environment; it may be highly visible in those places and "the locals" may make life uncomfortable for the intruder. States may be emboldened to do so by the knowledge that the guideline they invoke is of international stature. The consumers or users of the product may constitute a community capable of organizing to take action, an occurrence more likely with a relatively small group of buyers of expensive and highly advertised fashionable items. Multinationals would face less pressure from mass buyers of consumer goods such as sneakers, and even less from managers of other corporations that buy production goods. At times, managers are quite satisfied with guidelines that instruct them authoritatively on what they can and cannot do. Indeed, a number of major enterprises have established their own guidelines for both internal management and

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[42] U.N. Econ. & Soc. Council [ECOSOC], Sub-Comm. on Promotion and Prot. of Human Rights, *Draft Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*, §§D and G, U.N. Doc. E/CN.4/Sub.2/2003/12 (May 30, 2003).

[43] *See generally* Prosper Weil, *Towards Relative Normativity in International Law?*, 77 AM. J. INT'L L. 413 (1983); Ignaz Seidl-Hohenveldern, *International Economic "Soft Law"*, 163 RECUEIL DES COURS 169 (1979).

external public relations.[44] They may take comfort from the idea that their competitors will also feel pressure to refrain from actions that make economic sense but trample upon the interests of those outside the system. Thus, many American executives supported moves to curtail bribery in foreign countries, feeling—sometimes with a whiff of paranoia—that managers from other countries were stealing business from them by resorting to corrupt practices.

The effects of guidelines might be enhanced by changes both outside and inside the corporate structure. Reporting practices could press enterprises to reveal what they had or had not done to fulfill the goals set by the guidelines. These practices could be supplemented by a system of investigating bodies, which would examine claims of lapses from the norms and issue subsequent reports. The OECD has established a Committee on International Investments and Multinational Enterprise (CIME).[45] CIME has undertaken a number of investigating and mediating missions to resolve controversies arising from such episodes as an American firm closing its European operations and refusing to accept responsibility for the financial needs of the personnel it thus abandoned.[46] One imagines pressing for a practice in which multinationals had boards of directors with representatives of each of the major states in which they operated. Such a practice would be resisted by those who believe it is important that boards be cohesive, collegial groups rather than noisy mini-legislatures. Alternatively, one can imagine a practice of having an advisory board staffed with representatives of the host states.

Another possibility is a regulation like the American proxy rules, which permitted people affected by the actions of multinationals to communicate with the shareholders of the firm. Although some shareholders are activists for causes, most are more interested in returns on their investment. There are an increasing number of stockholdings across national frontiers, though that is mostly due to the fact that investors in one developed

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[44] Steven Ratner, *Corporations and Human Rights*, 111 YALE L.J. 443, 531-33 (2001).

[45] WALLACE, *supra* note 8, at 679.

[46] *Id.* at 1093-94.

country own stock in corporations with their charters and headquarters in another developed country.[47] If the managers are intent on maximizing shareholder wealth, either by temperament, by pressure from investors, or by a mandate from the relevant corporation law, they will be less eager to comply with guidelines.

One rather erratic form of discipline for multinationals arises from the existence of the Alien Tort Claims Act (ATCA) in the United States.[48] Activists have commenced litigation raising issues ranging from environmental claims to charges of cooperation with governments that violate the human rights of their citizens. Companies such as Unocal, Texaco, and Freeport Sulphur have all been targets of such litigation.[49] The status of these claims is in doubt, particularly since the U.S. Supreme Court attempted to set up new standards for what constituted violations of the law of nations in its decision in *Sosa v. Alvarez Machain*.[50] ATCA is an erratic and blunt instrument for disciplining multinationals, and will be hard to extend it to corporations that are not really American or otherwise exposed to American legal action.[51]

In soft law, there is no need to draw a tight definitional line around the concept of "multinational." The OECD Guidelines say "[a] precise definition of multinational enterprises is not required for the purposes of the Guidelines. These usually comprise companies or other entities established in more than one country and so linked that they may co-ordinate their operations in various ways."[52] Indeed, the new United Nations Norms would cover some business enterprises that make no claim whatsoever to being multinational.

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[47] It is suggested that increasing American shareholdings in German corporations have narrowed the management's flexibility in responding to non-profit maximizing programs. Patrick Jenkins & Richard Milne, *The Coming Powers: How German Companies Are Being Bound to the Interests of Foreign Investors*, FIN. TIMES, April 1, 2005, at 11.

[48] 28 U.S.C. § 1350 (2000).

[49] *E.g., Tentative Settlement of ATCA Human Rights Suits Against Unocal* (John R. Crook ed.), 99 AM. J. INT'L L. 497 (2005). Additional cases cited in DETLEV F. VAGTS ET AL., TRANSNATIONAL BUSINESS PROBLEMS 218 (3d ed. 2003).

[50] 542 U.S. 692 (2004).

[51] SARAH JOSEPH, CORPORATIONS AND HUMAN RIGHTS LITIGATION 153 (2004).

[52] OECD GUIDELINES, *supra* note 40, 17-18.

IV. Hard Law

A worldwide government organization to control multinationals is more or less unthinkable. A truly effective international regime would require major concessions by national governments, particularly those that are the homes of multinationals. Too many people in too many countries feel disempowered by the migration of political power from state to national government and further to supranational organizations. This migration of power seems undemocratic and nontransparent. In Europe, the slogan "subsidiarity" has gained ground, and in the United States, states' rights have regained resonance unseen for a long time.[53] It might be possible to get nations to assent to a framework treaty imposing minimum standards of corporation law, like the obligations imposed by the successive European Union directives on the harmonization of company law[54] or the global intellectual property standards required by the Trade Related Intellectual Property Agreement (TRIPS).[55] On the other hand, individual governments are not well-positioned to cope with multinationals because they are too large and diverse to easily yield to regulation, and they are mobile enough to slip away when one country's prosecutors or tax collectors become too inquisitive. The national power to enforce rules stops at the border's edge. In the *Lotus* case, the International Court of Justice famously said the most established jurisdictional rule in international law is that one state may not exercise its police powers in the territory of another.[56] Today, multinationals have a similar status to U.S. corporations toward the end of the nineteenth century, which were able to defy state regulators' attempts to make them sensitive to local interests.

The most rigorous attempt to put teeth into a shared prohibition is that respecting bribery. The majority of countries have adhered to the OECD convention. Not only do parties to the

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[53] George A. Bermann, *Taking Subsidiarity Seriously: Federalism in the European Community and the United States*, 94 Colum. L. Rev. 331 (1994).

[54] *See* European Company and Financial Law, *supra* note 20.

[55] *See generally,* Duncan Matthews, Globalising Intellectual Property Rights: The TRIPS Agreement (2002).

[56] S.S. "Lotus" (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 10 (Sept. 7).

Convention agree that bribery is illegal, but they promise to cooperate in its repression.[57] States agree to provide legal assistance to one another by providing information to help a given state's investigations and extraditing wanted criminals. The Convention assumes the focus of the enforcement operation to be in the state deprived of the disinterested services of one of its officers. The Convention falls far short of a centralized prosecutorial agency. Indeed, it rather resembles a specialized version of the procedures made available through Interpol in ordinary criminal cases.

However, a concept of governance through "networks" has gained some popularity in avoiding the Scylla of chaos and Charybdis of a remote international bureaucracy of Kafka-esque dimensions.[58] Networks are sets of relationships between national authorities and other bodies, such as non-governmental organizations, international agencies, and business enterprises[59] that produce an agreed-upon regulatory scheme. One such network is focused on corporate governance, or at least one aspect of it. It features IOSCO, the International Organization of Securities Commissions, and the organization of international accounting regulatory boards.[60] These organizations meet regularly and come to agreements about the standards to impose. These agreements are not treaties, nor do they constitute the law of the land. They have no operative effect within the countries linked together in the system. However, each agency can take action within its borders, upon its own authority and following its own procedures. That action will be uniform and produce a legal picture similar to that of a single sovereign.

Does this system avoid the twin dangers we have mentioned? Critics argue that it does not. According to Kenneth Anderson, to the extent such networks are effective in bringing

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[57] Convention on Combating Bribery of Foreign Government Officials in International Business Transactions, Dec. 18, 1997, 37 I.L.M. 1 (1998); for commentary, see Giorgio Sacerdoti, *The 1997 OECD Convention against Transnational Bribery: Effective Monitoring and Implementation*, *in* ARBITRATION: MONEY LAUNDERING AND FRAUD 47, 50 (Kristine Karsten & Andrew Berkeley eds., 2003).

[58] ANNE-MARIE SLAUGHTER, A NEW WORLD ORDER (2004).

[59] They are termed webs of influence in JOHN BRAITHWAITE & PETER DROHAS, GLOBAL BUSINESS REGULATION (2000).

[60] SLAUGHTER, *supra* note 58, at 38.

uniformity and order into international matters, they do so in a way that avoids democratic responsibility.[61] If the commissioners who belong to IOSCO agree upon concerted measures, they have in effect legislated, but have done so without any elected representatives having had much of a voice in the matter. The networks risk being "captured" by those they were meant to control, as have been the independent administrative agencies in the United States.

V. Conclusion

It is still unclear what will transpire between nation-states and the multinational. Much will depend upon the trajectory of the process of globalization in general. The relationship between multinationals and states may have reached its peak, due to a new wave of protectionism. In that case, multinationals will find themselves squeezed between national policies. If globalization continues, however, corporations will be further enabled to pursue the most profitable options for their shareholders' interests wherever they find them.

Will the multinational be singled out for special regulations or simply be another object of international agreements and regulations along with lesser entities? Controlling things from the top down—that is, from the headquarters of multinationals—presents problems. This scheme tends to interfere with the capacity each state has to regulate matters within its borders. This is also true of soft law, which tends to exert its pressures on top management by persuading them to deviate from shareholder wealth maximization in order to meet the expectations of the public in the state in which the corporate headquarters is located. It has been said that in soft law systems, diffuse interest groups such as consumers get rewarded with symbolic advantages while the real gains go to focused organizations such as businesses.

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[61] Kenneth Anderson, *Squaring the Circle? Reconciling Sovereignty and Global Governance through Global Government Networks*, 118 Harv. L. Rev. 1255, 1258 (2005) (book review).