

1-1-2002

# The Globalization of Corporate and Securities Law: An Introduction to a Symposium, and an Essay on the Need for a Little Humility When Exporting One's Corporate Law

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## Recommended Citation

Franklin A. Gevurtz, *The Globalization of Corporate and Securities Law: An Introduction to a Symposium, and an Essay on the Need for a Little Humility When Exporting One's Corporate Law*, 16 *TRANSNAT'L LAW*. 1 (2002).

Available at: <https://scholarlycommons.pacific.edu/globe/vol16/iss1/3>

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## **The Globalization of Corporate and Securities Law: An Introduction to a Symposium, and an Essay on the Need for a Little Humility When Exporting One's Corporate Law**

*Franklin A. Gevurtz\**

This symposium is the brainchild of my colleague, Kojo Yelapaala. He suggested that the two of us organize and co-chair, as the 2002 Annual McGeorge International Law Symposium, a symposium on “The Globalization of Corporate and Securities Law in the Twenty-First Century.” Our choice of this topic was based upon the recognition that corporations play a critical role in the global economy—often a more important role than many nation states.<sup>1</sup>

The symposium took place in February of 2002. We organized the symposium around three panels. The first panel looked at the topic of comparative corporate governance; in other words, these panelists were concerned with the rules and structures governing the inner workings of large corporations. The subject of comparative corporate governance has become a preeminent topic in corporate law scholarship in recent years,<sup>2</sup> and we were pleased to have a panel containing some of the leading U.S. and foreign scholars on the subject. The second panel stepped back from this internal governance (or “subatomic”) view of the corporate universe, and examined the transactions which take place between corporations and investors on stock markets around the world. A look during any trading day at CNBC, CNN or BBC World News illustrates how interconnected the stock markets in New York, London, Frankfurt, Tokyo, Hong Kong, and elsewhere have become. As a result, it is critical to address whose laws regulate disclosure concerning stocks traded on various securities markets. We were pleased that the panel on international securities regulation contained some of the most influential scholars writing in the field. The final panel stepped back from this bipolar (corporation-and-investor) view of the corporate universe, to

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1. E.g., Douglas M. Branson, *The Social Responsibility of Large Multinational Corporations*, 16 *TRANSNAT'L LAW* 121 (2002) (noting that the annual sales of many large multinational corporations can exceed the gross domestic product of most nations).

2. E.g., Brian R. Cheffins, *Does Law Matter? The Separation of Ownership and Control in the United Kingdom*, 30 *J. LEGAL STUD.* 459 (2001); Douglas M. Branson, *The Very Uncertain Prospect of “Global” Convergence in Corporate Governance*, 34 *CORNELL INT'L L.J.* 321 (2001); Amir N. Licht, *The Mother of All Path Dependencies: Toward a Cross-Cultural Theory of Corporate Governance Systems*, 26 *DEL. J. CORP. L.* 147 (2001); Mark J. Roe, *Political Preconditions to Separating Ownership from Corporate Control*, 53 *STAN. L. REV.* 539 (2000); Michael Bradley et al., *The Purposes and Accountability of the Corporation in Contemporary Society: Corporate Governance at a Crossroads*, 62 *L. & CONTEMP. PROB.* 9 (1999); John C. Coffee, *The Future as History: Prospects for Global Convergence in Corporate Governance and Its Implications*, 93 *NW. U. L. REV.* 641 (1999); William Bratton & Joseph McCahery, *Comparative Corporate Governance and the Theory of the Firm: The Case Against Global Cross Reference*, 38 *COLUM. J. TRANSNAT'L L.* 213 (1999).

examine the impacts that corporations have on other groups around the world, including workers, consumers, and indigenous populations. The passions ignited by this topic have been acted out in recent years on the streets of Seattle, Genoa, and other cities hosting meetings dealing with globalization. The final panel consisted of persons who have been in the forefront of scholarship or of professional dealings addressing the role and regulation of multinational corporations.

It is my great pleasure to write an introduction to the papers which came out of this symposium. Viewed individually, these papers represent a fine collection of articles addressing a number of aspects of the globalization of corporate and securities law. In this introductory essay, however, I want to discuss one overriding lesson which struck me when considering these papers as a group. Quite a cottage industry has developed among legal professionals engaged in the export of their nations' corporate and securities laws to other countries (particularly to countries with developing or transition economies).<sup>3</sup> It is tempting for such professionals to assume (1) that having the best corporate and securities laws is a key to national prosperity, and (2) that the laws one seeks to export are the best. The overarching lesson I found emerging from these papers is the need for restraint in making these two suppositions. This probably should not be surprising, since such humility is often the lesson to emerge from comparative and international studies.

## I. PAPERS DEALING WITH COMPARATIVE CORPORATE GOVERNANCE

The first four papers in this symposium deal with comparative corporate governance. We begin with a paper from Brian Cheffins, who is the S.J. Berwin Professor of Law at the Faculty of Law at the University of Cambridge and Professorial Fellow at Trinity Hall. Professor Cheffins is perhaps the foremost expert on comparative corporate governance in England. Professor Cheffin's paper, *Corporate Governance Convergence: Lessons from Australia*,<sup>4</sup> looks at the experience of Australia in order to address a topic that has dominated comparative corporate governance scholarship in recent years.

The field of comparative corporate governance raises numerous issues: two-tier versus single-tier boards,<sup>5</sup> co-determination versus election of directors solely by the shareholders,<sup>6</sup> and shareholder primacy norm versus stakeholder models.<sup>7</sup> In recent years, however, discussion of these sort of specific technical differences

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3. This phenomenon is nothing new. See, e.g., Masao Fukushima, *The Significance of the Enforcement of the Company Law Chapters of the Old Commercial Code in 1893*, 24 L. IN JAPAN 171 (1991) (describing the work of Hermann Rossler in drafting Japanese corporate law in the late 1800s).

4. See Brian Cheffins, *Corporate Governance Convergence: Lessons from Australia*, 16 TRANSNAT'L LAW. 13 (2002).

5. See, e.g., Thomas J. Andre, Jr., *Some Reflections on German Corporate Governance: A Glimpse at German Supervisory Boards*, 70 TUL. L. REV. 1819 (1996).

6. See, e.g., Klaus J. Hopt, *New Ways in Corporate Governance: European Experiments with Labor Representation on Corporate Boards*, 82 MICH. L. REV. 1338 (1984).

7. See, e.g., Bradley et al., *supra* note 2.

between different nations' corporate laws have become subsumed into a much more global (if I might be forgiven the pun) comparison. Commentators have noted that the international corporate world (at least focusing on the large companies) seems to be divided into two realms.<sup>8</sup> In one corner, we have the United States and England. Here, large corporations typically have widely dispersed stockholdings in which no individual shareholder or cohesive group of shareholders own more than a small fraction of the outstanding stock. Under these circumstances, the traditional notion that shareholders control the corporation by selecting who will serve on the board is entirely unrealistic.<sup>9</sup> By contrast, large corporations in many other nations, such as Germany and Japan, commonly have substantial portions of their outstanding stock held by a limited number of large block shareholders. In such circumstances, the large block shareholders can and do exercise considerable control over the corporation.<sup>10</sup> Of course, from the perspective of a law journal symposium, the question becomes what does this difference in the pattern of shareholdings between different nations have to do with the law. A couple years back, studies by a group of economists found an interesting statistical correlation between different legal systems (common law versus civil law), as well as different corporate law rules (with respect to minority shareholder protections), and the pattern of stockholdings.<sup>11</sup> Specifically, common law systems and greater minority shareholder protections appear to correlate with dispersed stockholdings, while civil law systems and less minority protections seem to correlate with large block ownership.<sup>12</sup> This possible impact of law on shareholding patterns, in turn, raises three questions. The first question is descriptive: Does a difference in law, in fact, produce a difference in the pattern of stock ownership in large corporations? The second question is normative: Is one pattern of stockholdings more efficient than another so that the law should seek to promote dispersed shareholdings or large block shareholdings? The third question is predictive: As the world increasingly moves toward an integrated economy in which corporations of different nations must compete with each other, will one pattern of stockholding or the other prevail, or perhaps will corporations move to some hybrid in the middle?

The temptation for those in the legal business (law professors, law makers and lawyers) is to assume a positive answer to the first question (law matters), focus on the second question (which pattern of shareholding is best), and then adopt laws designed to bring about the desired pattern in order to avoid leaving the third question (what form will prevail) to the forces of natural evolution.

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8. *E.g.*, Roe, *supra* note 2.

9. *E.g.*, FRANKLIN A. GEVURTZ, CORPORATION LAW § 3.1.5a (2000); Brian R. Cheffins, *Current Trends in Corporate Governance: Going from London to Milan via Toronto*, 10 DUKE J. COMP. & INT'L LAW. 5 (1999).

10. *E.g.*, Roe, *supra* note 2, at 542-44.

11. Rafael La Porta et al., *Investor Protection and Corporate Governance*, 58 J. FIN. ECON. 3 (2000); Rafael La Porta et al., *Legal Determinants of External Finance*, 52 J. FIN. 1131 (1997).

12. *See id.*

Indeed, in a recent article,<sup>13</sup> I noted that this sort of reasoning represents the principal articulated rationale expressed by nations around the world when adopting laws prohibiting insider trading. In an earlier work,<sup>14</sup> Professor Cheffins observed that as logical and appealing as the “law matters” thesis might be, it does not seem to match the historical experience in the United States and England. In the paper appearing in this symposium, Professor Cheffins uses Australia as a test subject to examine both laws, and a number of other possible explanations for the differing pattern of stockholdings. While Professor Cheffins suggests that the Australian experience is at least somewhat consistent with the “law matters” thesis, the indeterminacy of this result, and the numerous other possible factors behind the differences in stockholdings evidenced by the Australian experience, provide a much needed lesson in humility for those too eager to assume undue significance to the corporate law rules they might seek to export.

The next paper dealing with comparative corporate governance comes from Stephen Bainbridge, who is a Professor of Law at the University of California, Los Angeles, School of Law. Professor Bainbridge’s extensive scholarship has addressed a variety of issues in corporate and securities law, and he is the co-author of one of the most widely used corporate law casebooks in the United States.<sup>15</sup> Professor Bainbridge’s paper, *Director v. Shareholder Primacy in the Convergence Debate*,<sup>16</sup> contains a different lesson on the need for humility in the export of corporate laws: specifically, legal experts must be clear and accurate about their own country’s law when they seek to export such a law to another country.

To illustrate the need for clarity and accuracy, Professor Bainbridge points to the work of those who seek to export the United States’ “shareholder primacy norm” to the corporate laws of other countries.<sup>17</sup> The problem lies in defining what is meant by “shareholder primacy.” Commonly, reference to the shareholder primacy norm in corporate law scholarship refers to purpose of a business corporation—*i.e.*, that the primary purpose of a business corporation is to make money for the shareholders.<sup>18</sup> Professor Bainbridge agrees, without much discussion, that this represents an accurate statement of prevailing corporation law in the United States.<sup>19</sup>

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13. Franklin A. Gevurtz, *The Globalization of Insider Trading Prohibitions*, 15 *TRANSNAT’L LAW* 63 (2002).

14. Cheffins, *supra* note 2.

15. WILLIAM A. KLEIN ET AL., *BUSINESS ASSOCIATIONS: CASES AND MATERIALS ON AGENCY, PARTNERSHIPS, AND CORPORATIONS* (4th ed. 2000). In the interest of fairness to Professor Bainbridge and full disclosure to the reader, I should mention that Professor Bainbridge is also the author of a treatise on corporate law, STEPHEN M. BAINBRIDGE, *CORPORATION LAW AND ECONOMICS* (2002), which competes with my treatise on the subject, FRANKLIN A. GEVURTZ, *CORPORATION LAW* (2000).

16. See Stephen M. Bainbridge, *Director v. Shareholder Primacy in the Convergence Debate*, 16 *TRANSNAT’L LAW* 45 (2002).

17. *E.g.*, Henry Hansmann & Reinier Kraakman, *The End of History for Corporate Law*, 89 *GEO. L.J.* 439 (2001).

18. *E.g.*, Roc, *supra* note 2, at 554.

19. Actually, the proposition that the primary goal of a business corporation must be to make money for the shareholders might not constitute an entirely accurate a statement of prevailing corporate law in the United States. For one thing, judicial pronouncements to this effect have been more a matter of rhetoric, than of setting forth an

Professor Bainbridge worries, however, that reference to shareholder primacy will be misinterpreted to suggest that control by shareholders is the norm when it comes to the distribution of power within the corporation under prevailing laws in the United States—whereas, when it comes to the distribution of power within the corporation, the law in the United States contemplates, according to Professor Bainbridge, a director primacy norm.<sup>20</sup>

In what turned out to be useful coincidence, the next paper in this symposium may illustrate Professor Bainbridge's concern. This paper comes from Winfried van den Muijsenbergh. Mr. van den Muijsenbergh is a principal in the Dutch law firm of Loyens & Loeff and has extensive experience in the practice of corporate law. Mr. van den Muijsenbergh's paper, *Corporate Governance: The Dutch Experience*,<sup>21</sup> discusses recent efforts of corporate governance reform in the Netherlands.

It is interesting to juxtapose Mr. van den Muijsenbergh's paper against Professor Bainbridge's. In fact, as Mr. van den Muijsenbergh's paper discusses, the present Dutch corporate governance regime provides an example of extreme director primacy, with shareholders often lacking even the ability vote on whom shall be the directors. The reforms discussed by Mr. van den Muijsenbergh are designed to give shareholders more power in order to bring Dutch corporate law closer to the Dutch perception of United States' norms.

Mr. van den Muijsenbergh's paper also contains yet another lesson on the need for humility in the export of corporate law. As his discussion of the Dutch East India Company (founded in the beginning of the Seventeenth Century) illustrates, efforts at making corporate boards of directors into effective institutions of governance have been going on for some time. Moreover, the experience of the Dutch East India Company—which may have been influenced by the earlier formed English East India Company, and which, in turn, influenced the formation of French and other European East India Companies<sup>22</sup>—shows how the convergence in the structures of different nations' corporations, under the pressure of competing in a global economy, is a centuries old phenomenon.

While the Netherlands has a long experience with corporate governance, the same cannot be said of Russia. Russia was late among European nations to move out of a largely feudal economic organization and spent most of the twentieth century under Communism. Hence, when Russia embarked upon privatizing its

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enforceable standard against which to review specific management decisions. *E.g.*, Franklin A. Gevurtz, *Getting Real About Corporate Social Responsibility: A Reply to Professor Greenfield*, 35 U.C. DAVIS L. REV. 645, 648-50 (2002). Moreover, the adoption by numerous states of so-called other constituency statutes has undermined the shareholder primacy norm by allowing, if not commanding, directors to take into account the interests of other stakeholders in making decisions for the corporation. *Id.* at 647-48.

20. The proposition that directors, in reality, control large corporations in the United States provoked a vigorous exchange during the symposium. In questions following Professor Bainbridge's presentation, John Scriven, former General Counsel for Dow Chemical Corporation, argued that officers, in fact, control the typical large corporation, with directors generally doing little more than acting as rubber stamps for management decisions.

21. See Winfried van den Muijsenbergh, *The Dutch Experience*, 16 TRANSNAT'L LAW. 63 (2002).

22. *E.g.*, M. Schmitthoff, *The Origin of the Joint-Stock Company*, 3 U. TORONTO L.J. 74, 92-93 (1939-1940).

industrial enterprises in the 1990s, it provided a natural market for those eager to export their corporate laws. The next paper in the symposium comes from someone with a front row view of the export of Western style corporate laws to Russia. Roswell Perkins (who had been President of the American Law Institute during its turbulent effort to formulate principles of corporate governance for the United States) is the former head of the Debevoise & Plimpton LLC Moscow office from 1997 through 2001. Mr. Perkins' paper, *The FCSM Corporate Governance Code for Russian Companies*,<sup>23</sup> discusses a new code of corporate conduct promulgated by Russia's Federal Commission on the Securities Market.

Unfortunately, the consensus of most observers has been that Russia's efforts at privatization have been a disaster, as a "kleptocracy" looted many of the newly private corporations.<sup>24</sup> Accordingly, critics might ask whether the sort of corporate code discussed by Mr. Perkins will improve things, particularly given the voluntary nature of this new code. Yet, perhaps the voluntary nature of the new code simply renders transparent the situation that already had existed. Specifically, one explanation for the failure of Russian privatization finds that the problem did not lie primarily in the corporate or securities laws Russia adopted, but rather in the lack of a legal infrastructure (including such things as honest and competent judges and prosecutors) to enforce the laws.<sup>25</sup> Still, this is not to say that the new Russian code described by Mr. Perkins is pointless. Rather, even voluntary codes may help to create (albeit slowly) another building block toward honest corporate governance; this being the establishment of norms of honesty among corporate managers.<sup>26</sup> All told, the Russian experience provides a powerful lesson in the need to understand the limits of what corporate law can do on its own when transplanted to developing and transition economies.

## II. PAPER DEALING WITH INTERNATIONAL SECURITIES REGULATION

When we began to organize this symposium in the Spring of 2001, U.S. corporate and securities law seemed triumphant. Indeed, some scholars had proclaimed the "end of history" for corporate law, with the rest of the world inevitably copying the United States.<sup>27</sup> By the time this symposium took place in February of 2002, things had started to change with the Enron scandal then unfolding. Over the summer, while the symposium papers were being completed

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23. See Roswell B. Perkins, *The FCSM Code of Corporate Governance for Russian Companies*, 16 *TRANSNAT'L LAW* 75 (2002).

24. E.g., Bernard Black et al., *Russian Privatization and Corporate Governance: What Went Wrong?*, 52 *STAN. L. REV.* 1731 (2000).

25. *Id.*; see also Bernard S. Black, *The Legal and Institutional Preconditions for Strong Securities Markets*, 48 *UCLA L. REV.* 781 (2001).

26. See, e.g., Edward B. Rock & Michael L. Wachter, *Laws, Norms, and the Self-Governing Corporation*, 149 *U. PA. L. REV.* 1619 (2001) (discussing the role of non-legally enforceable rules and standards in corporate governance).

27. See, e.g., Hansmann & Kraakman, *supra* note 2.

and submitted for publication, the crisis in U.S. corporate and securities laws intensified, as scandals involving WorldCom, Tyco, and others followed Enron.<sup>28</sup> The reaction at the symposium to this crisis came from the panel dealing with international securities regulation.

The paper in this symposium dealing with international securities regulation comes from Stephen Choi, who is a Professor of Law at the University of California, Berkeley, School of Law (Boalt Hall) and an increasingly influential scholar in corporate and securities law. Defying the political stereotypes an outsider might have about scholars from Berkeley, Professor Choi has been a leading proponent (along with Professor Roberta Romano of Yale<sup>29</sup>) of free market solutions when it comes to the regulation of securities offerings in increasingly international markets.<sup>30</sup> This free market approach draws from the principle of U.S. (and, increasingly, other nations')<sup>31</sup> corporate law, under which the law of the state of incorporation governs the so-called internal affairs of a corporation—even if the corporation's business and shareholders are entirely outside of this state.<sup>32</sup> Professor Choi and others have argued that securities regulation, similarly, ought to allow those in charge of corporations to choose which nation's law will govern the company's disclosure obligation to prospective shareholders, even if those shareholders are in a country other than the one whose law is selected. Of course, advocates of such an approach face the challenge that the result of such regulatory competition will be a race toward laxity, as those in charge of corporations pick the nation with the weakest investor protections.<sup>33</sup> The reply, typically, is a replay of the market force arguments which have triumphed in dealing with corporate governance laws—specifically, that investors will discount the price of stock to take into account less legal protections, thereby deterring the selection of inefficient regulatory regimes.<sup>34</sup> Needless to say, recent events involving Enron, WorldCom, and the like cause one to question the faith which some have placed in securities markets to avoid problems of deregulation.<sup>35</sup>

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28. *E.g.*, *Special Report: The Best and Worst Boards: How Corporate Scandals Are Sparking a Revolution in Governance*, BUS. WEEK, Oct. 7, 2002, at 104, 105-06.

29. Roberta Romano, *Empowering Investors: A Market Approach to Securities Regulation*, 77 YALE L.J. 2359 (1998). Professor Romano also appeared on our international securities regulation panel and addressed the implications of the Enron scandal. Professor Romano's presentation will be published as part of a book she is authoring on the subject of international securities regulation.

30. Stephan J. Choi & Andrew T. Guzman, *Portable Reciprocity: Rethinking the International Reach of Securities Regulation*, 71 S. CAL. L. REV. 903 (1998).

31. *See, e.g.*, *Case Centros Ltd. v. Erhvervs-og Selskabsstyrelsen*, 1999 E.C.R.I-1459, [1999] 2 C.M.L.R. 551 (1999) (requiring Denmark to register an English corporation formed by Danish nationals to circumvent Danish corporate law minimum capital requirements).

32. *E.g.*, *McDermott, Inc. v. Lewis*, 531 A.2d 206 (Del. 1987).

33. The classic exposition of this "race to the bottom" thesis in the corporate law context is William L. Cary, *Federalism and Corporate Law: Reflections upon Delaware*, 83 YALE L.J. 663 (1974).

34. *E.g.*, Romano, *supra* note 29, at 2421.

35. *E.g.*, Jeffrey N. Gordon, *What Enron Means for the Management and Control of the Modern Business Corporation: Some Initial Reflections*, 69 U. CHI. L. REV. 1233, 1241-43 (2002). In her presentation at the symposium, Professor Romano argued that market forces were acting to correct many of the abuses which led to Enron's downfall.

In his paper, *Channeling Competition in the Global Securities Market*,<sup>36</sup> Professor Choi responds to the challenge of recent corporate events by reminding us of the need for humility when exporting securities laws. Specifically, if recent events show that securities markets are flawed because of the inevitable foibles of those who participate in them, it still remains true that securities regulations also are often flawed because of the inevitable foibles of those who promulgate and enforce them. After all, the Enron, WorldCom and other recent scandals show the fallibility of the U.S. securities laws—which, until recently, have been held up as probably the most demanding in the world.<sup>37</sup> Still, if Enron suggests a need for humility in exporting U.S. securities laws, it also shows the need for a little humility in exporting academic theories, placing too much faith in market efficiency as a substitute for regulation.

### III. PAPERS DEALING WITH THE REGULATION OF MULTINATIONAL CORPORATIONS

The final three papers in the symposium deal with the regulation of multinational corporations. The first of these papers is from Douglas Branson, holder of the W. Edward Sell Chair in Business Law at the University of Pittsburgh School of Law. Professor Branson is a prolific corporate and securities law scholar whose views stand in contrast with the more *laissez-faire* oriented philosophies of some of the earlier participants in the symposium. Professor Branson's paper, *The Social Responsibility of Large Multinational Corporations*,<sup>38</sup> takes a highly critical look at the impact of the growth of multinational corporations.

Professor Branson's paper provides a useful counterpoint to some of the positions taken in the earlier papers. For instance, while Professor Bainbridge accepts without discussion the norm that the purpose of corporate management should be to make money for the shareholders (even if decisions directed toward achieving this goal lie with the directors, rather than with the shareholders),

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For example, the rapid decline in Arthur Anderson's business as a result of its participation in Enron's questionable accounting practices reinforces the notion that market forces constrain the misdeeds of firms, such as accounting firms, that depend on their reputation for monitoring the honesty of others. (Indeed, after the symposium, Arthur Anderson declared bankruptcy). Along the same lines, Professor Romano argued that the stock market was correcting by showing greater skepticism toward earnings reported by firms employing aggressive accounting practices. The problem, however, is that the market typically overcorrects, and, indeed, in the summer following the symposium, worries about the spreading corporate scandals triggered a broad decline in the stock market, both in the United States and abroad, which, in turn, seems to have slowed the recovery in the general economy. In fact, concern about the stock market's tendency to overreact—punishing good issuers with the bad—constituted one motivation behind the enactment of the securities laws following the 1929 stock market crash. *E.g.*, Gevurtz, *supra* note 9, at § 6.2.2.

36. See Stephen Choi, *Channeling Competition in the Global Securities Market*, 16 *TRANSNAT'L LAW* 111 (2002).

37. *E.g.*, Coffee, *supra* note 2, at 673 n.107; Amir N. Licht, *Regulatory Arbitrage for Real: International Securities Regulation in a World Interacting Securities Markets*, 38 *VA. J. INT'L L.* 563, 566 (1998).

38. See Douglas M. Branson, *The Social Responsibility of Large Multinational Corporations*, 16 *TRANSNAT'L LAW* 121 (2002).

Professor Branson's paper reminds us that a single-minded drive for shareholder gain can create negative impacts on other groups affected by the operations of multinational corporations. Also, while Professor Choi expresses confidence in regulatory competition in the fields of corporate and securities laws, Professor Branson reminds us that such regulatory competition can produce poor consequences if applied to environmental, labor and other laws (where there might be more danger that those choosing lax regulatory regimes can externalize the costs of their choice on other parties who lack realistic market protection).<sup>39</sup>

In the end, however, Professor Branson's paper returns us to the lesson of humility in the export of corporate law, when he questions whether corporate law can provide the solution for the social problems created by multinational corporations. In this regard, Professor Branson's paper stakes out a different position from some other recent so-called "progressive" corporate law scholarship, which views tinkering with corporate laws to be means for achieving labor and other social welfare goals.<sup>40</sup> Interestingly, the history of corporations provides an insight into the limits of corporate law as a tool to curb arguably dangerous growth in the power of large corporations. Much of the Nineteenth Century evolution in U.S. corporate law involved the gradual undermining of limits imposed by early corporate legislation that sought to curb the economic power of corporations. This race toward laxity was the result of competition between states seeking to attract corporate charters.<sup>41</sup> Yet, where corporate law failed, other laws such as antitrust and other regulatory statutes were enacted to fill the breach. History also provides some solace for those inclined to despair at the power of the current multinational corporation. Earlier, Mr. van den Muijsenbergh reminded us of the Dutch East India Company, which, like its English cousin and other English and European trading companies possessed powers over vast territories and numerous inhabitants that would make the modern multinational corporation envious.<sup>42</sup> At least the current multinationals cannot raise large armies and navies and act as a law unto themselves, as did these earlier global corporations. We have made progress.

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39. I should, however, note a question regarding this point that my colleague, Claude Rohwer, posed to Professor Branson in the question-and-answer session following Professor Branson's presentation. Professor Rohwer, who has been a consultant for the Vietnamese government in drafting its commercial laws, asked Professor Branson whether the individual Vietnamese, who left their farms to work in Nike factories, felt that, despite the poor working conditions and wages, they were better off than they were before. The problem illustrated by this question, of course, is that actions by multinational corporations, which some might view as exploitation, might appear to others to offer persons in developing countries a better existence than they otherwise faced.

40. E.g., Kent Greenfield, *Using Behavioral Economics to Show the Power and Efficiency of Corporate Law as Regulatory Tool*, 35 U.C. DAVIS L. REV. 581 (2002).

41. E.g., *Louis K. Liggett Co. v. Lee*, 288 U.S. 517, 548-65 (1933) (Brandise, J., dissenting); Joel Seligman, *A Brief History of Delaware's General Corporation Law of 1899*, 1 DEL. J. CORP. L. 249 (1976).

42. E.g., John P. Davis, *CORPORATIONS: A STUDY OF THE ORIGIN AND DEVELOPMENT OF GREAT BUSINESS COMBINATIONS AND OF THEIR RELATION TO THE AUTHORITY OF THE STATE* 158-59 (1904); GEORGE CAWSTON & A.H. KEANE, *THE EARLY CHARTERED COMPANIES* 210 (1896).

If corporate law is not the answer to corporate social responsibility, what is? Professor Branson suggests one possibility might lie in the actions of international organizations (such as the WTO) and in so-called “soft law” (such as environmental, labor, and similar guidelines adopted by non-governmental organizations, to which multinational corporations can subscribe in order to obtain a “seal of approval” for socially conscious consumers). Conveniently enough, the role of international organizations, such as the WTO, in regulating the activities of multinational corporations is the subject of the next paper in the symposium. The next paper comes from Cynthia Day Wallace, who has had a long and distinguished career in international trade and development, including serving as the Senior Advisor to the Executive Secretary of the United Nations Economic Commission for Europe. Dr. Wallace is also the author of a pair of books addressing the regulation of multinational corporations.<sup>43</sup>

Dr. Wallace’s paper, *The Legal Framework for Regulating the Global Enterprise Going into the New WTO Trade Round—A Backward and a Forward Glance*,<sup>44</sup> lays the groundwork for understanding the prospective WTO negotiations on foreign direct investment, which are likely to occur as a result of the Doha Declaration calling for a new round of trade negotiations dealing with development issues. Dr. Wallace’s paper contains its own lesson on the need for humility in seeking solutions through the law—including treaties and international guidelines—to the problems posed by multinational corporations. As Dr. Wallace’s discussion suggests, these treaties and guidelines reflect an inherent tension between the desire to promote the foreign investment and economic development which flows from the activities of multinational corporation on the one hand, and the need to regulate the potentially detrimental consequences posed by the activities of such entities, on the other hand. Resolving this tension, in turn, reflects fundamentally not a legal, but rather an economic and political question upon which judgments radically differ.

The next paper comes from John Scriven, who was the General Counsel of Dow Chemical Corporation for many years and has a long experience in viewing problems of corporate social responsibility from inside a multinational corporation. Needless to say, Mr. Scriven’s paper provides an important counterpoint to Professor Branson’s highly critical outsider’s view of the multinational corporation. Interestingly enough, however, once one looks beyond the predictable areas of disagreement, there is much convergence between Professor Branson’s and Mr. Scriven’s papers. Both papers see the forces for corporate social responsibility lying largely beyond the realm of traditional corporate law. Instead, both outsider and insider find the forces for corporate social responsibility to lie in other

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43. CYNTHIA DAY WALLACE, *THE MULTINATIONAL ENTERPRISE AND LEGAL CONTROL: HOST STATE SOVEREIGNTY IN AN ERA OF ECONOMIC GLOBALIZATION* (2002); CYNTHIA DAY WALLACE, *LEGAL CONTROL OF THE MULTINATIONAL ENTERPRISE* (1983).

44. See Cynthia Day Wallace, *The Legal Framework for Regulating the Global Enterprise Going into the New WTO Trade Round -- A Backward and a Forward Glance*, 16 *TRANSNAT’L LAW*. 141 (2002).

national and international regulatory laws and structures, and especially in soft law—the culture which governs the actors in the multinational enterprise. The difference is that Professor Branson sees the glass as half-empty (if I might be forgiven the cliché), with multinational corporations needing a strong push toward responsibility from regulations and the pressure of soft law, whereas Mr. Scriven views the glass as half-full, with significant regulation impacting the actions of managers of multinational corporations, who even without such regulation, commonly reflect the socially responsible ethos of the nations from which the executives come.

In reading symposia, I have noticed that introductions which attempt to go beyond the barest descriptive level serve as something as a Rorschach test for the symposium's organizer; in other words, the lessons the introduction derives from the papers may reflect the preconceived notions of the person writing the introduction. I suspect this may be true of my introduction to these papers, in which event the reader may well expect to draw very different precepts from these papers than did I. Whatever the lessons one draws, reading these papers should be a worthwhile experience.

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