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Social Responsibility of Corporations

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I

"SOCIAL RESPONSIBILITY" AS AN INHERENT PART OF THE THEORY OF CORPORATIONS

This Article contains a review of the social responsibility of corporations from a European perspective. My preconceived idea of the conflict between U.S. shareholder primacy versus European stakeholder approaches was very much shaken by my further analysis. In fact, with respect to social responsibility, I see more similarities than differences between the two approaches. However, one important difference—the fact that American equity culture is much more developed than that of Europe—explains why the two corporate theories do not treat the issue of social responsibility in a starkly contrasting manner.

One cannot easily categorize a European theme of corporate social responsibility because, except in England, the subject is rarely discussed under that heading.[1] In various countries, however, there is a growing movement toward improved business ethics which may not always be easily differentiated from "social responsibility."[2] My treatment of social responsibility focuses on structural corporate law issues rather than on management undertaking "good social behavior" toward third parties. Occasionally, however, I view matters from the other side of the same coin for, "whatever the fine points of argument about the appropriateness of expecting moral responsibility from the legal entities we call corporations, it is certain that moral responsibility will be ascribed to them by those affected by their operations. . . ."[3]

In most European countries the issue of social responsibility of collective entities such as corporations must be distilled primarily from a broad examination of the theory of corporate legal persons

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1 *See generally* IS THE GOOD CORPORATION DEAD?: SOCIAL RESPONSIBILITY IN A GLOBAL ECONOMY (John W. Houck & Oliver F. Williams eds., 1996) (collecting a series of essays on corporate responsibility). Another very noteworthy study is that of J.E. PARKINSON, CORPORATE POWER AND RESPONSIBILITY (1993). Parkinson stresses the importance of finding improved methods of corporate governance. *See id.* at 1-2.

2 *See, e.g.*, BUSINESS ETHICS: A EUROPEAN APPROACH (Brian Harvey ed., 1994) [hereinafter BUSINESS ETHICS] (collecting works of authors from various European countries and discussing several themes of corporate governance).

3 Brian Harvey, *Introduction* to BUSINESS ETHICS, *supra* note 2, at 5-6.

rather than from a behavioral perspective. This stance does not mean that corporations are invited to be freely charitable with other people's money, but rather establishes obligations to maintain a comprehensive approach to questions of social responsibility and balance continuously competing interests. In this context, a "traditional" discussion would not encompass or support Milton Friedman's statement that "[t]he social responsibility of business is to increase its profits"[4] because in such a discussion issues of social responsibility are not considered to be a "fundamentally subversive doctrine."[5] In a traditional discussion, a social theme is a constructive part of the corporation.

By contrast, one must consider a modern European discussion of the topic of social responsibility within the framework of the larger discussion of corporate governance.[6] Many Europeans do not readily comprehend the term, but do view the firm as a whole. The main social theme in Europe is worker co-determination, as opposed to the American approach that relies on semipolitical shareholder activism to promote business ethics on a worldwide scale.[7]

The impact of multinational corporations on developing countries also has left its mark on the European academic scene,[8] but the subject reached its political peak some time ago when the Organization for Economic Co-Operation and Development ("OECD") cared deeply about this issue.[9] Today, the multinational corporation seems to be a well-accepted part of the global economy.

I will now explain the various themes of my short contribution.

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4 Milton Friedman, *The Social Responsibility of Business Is To Increase Its Profits*, N.Y. TIMES, Sept. 13, 1970 (Magazine), at 32.

5 Harvey, *supra* note 3, at 3 (quoting Milton Friedman) (internal quotation marks omitted).

6 *See* COMPARATIVE CORPORATE GOVERNANCE (Klaus J. Hopt & Eddy Wymeersch eds., 1997); COMPARATIVE CORPORATE GOVERNANCE: THE STATE OF THE ART AND EMERGING RESEARCH (Klaus J. Hopt et al. eds., 1998) [hereinafter THE STATE OF THE ART]; Symposium, *Cross-Border Views of Corporate Governance*, 1998 COLUM. BUS. L. REV. 1; Peter Nobel, *Corporate Governance—Möglichkeiten und Schranken gesellschaftsrechtlicher Gestaltung*, 12 DER SCHWEIZER TREUHÄNDER 1057 (1995).

7 *See* Harvey, *supra* note 3, at 8-9.

8 *See* HANS-GEORG KOPPENSTEINER, INTERNATIONALE UNTERNEHMEN IM DEUTSCHEN GESELLSCHAFTSRECHT (1971); MULTINATIONALS AND THE EUROPEAN COMMUNITY (John Dunning & Peter Robson eds., 1988) (collection of shorter works); MULTINATIONALS AND WORLD TRADE (Mark Casson et al. eds., 1986) (collection of shorter works); MULTINATIONALS IN THE NEW EUROPE AND GLOBAL TRADE (Micbael W. Klein & Paul J. J. Welfens eds., 1992) (collection of shorter works); THE RISE OF MULTINATIONALS IN CONTINENTAL EUROPE (Geoffrey Jones & Harm G. Schröter eds., 1993) (collection of shorter works); STEPHEN YOUNG ET AL., FOREIGN MULTINATIONALS AND THE BRITISH ECONOMY (1988).

9 *See* BUSINESS SECTOR ADVISORY GROUP ON CORPORATE GOVERNANCE, ORGANIZATION FOR ECON. CO-OPERATION AND DEV., CORPORATE GOVERNANCE: IMPROVING COMPETITIVENESS AND ACCESS TO CAPITAL IN GLOBAL MARKETS—A REPORT TO THE OECD (1998) [hereinafter IMPROVING COMPETITIVENESS].

II
LESSONS FROM HISTORY

The history of corporate law contains plentiful evidence that society always has linked permission to create a corporate, and therefore separate, legal personality to the achievement of its social goals. Corporations are in this sense social persons.[10]

I will not dwell on the private Roman corporations used for tax collection (*publicani*)[11] or the chartered colonial enterprises (like the East India Company),[12] but up until the 19th century, the establishment of a corporate body required a state concession as a sign of public interest.[13] The Supreme Court of New Jersey, struggling with a corporate gift to Princeton University, held (luckily) "that just as the conditions prevailing when corporations were originally created required that they serve public as well as private interests, modern conditions require that corporations acknowledge and discharge social as well as private responsibilities as members of the communities within which they operate."[14]

Today, although the selection of corporate objects is unrestricted, nations still regulate many corporate activities and thereby maintain the "legislative" linking of corporate activity to social goals. For example, Europeans are currently discussing the issues of corporate social responsibility with regard to banks. This concern abounds for two reasons. First, the systemic risks of banking are substantial. Second, there is a fear of a "credit crunch." In Europe, providing credit is considered to be a social obligation.[15] The American history of banking regulation provides another example of social mistrust of (too) powerful organizations.

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10 *See* GEORG BESELER, SYSTEM DES GEMEINDEUTSCHEN PRIVATRECHTS 1052 (1885); JOHANN CASPAR BLUNTSCHLI, DEUTSCHES PRIVATRECHT 69 (3d ed. 1864).

11 *See* ERNST BADIAN, ZÖLLNER UND SÜNDER 85 (1997); F. Fick, *Über Begriff und Geschichte der Aktiengesellschaften*, ZEITSCHRIFT FÜR DAS GESAMTE HANDELSRECHT UND KONKURSRECHT (ZHR) 27 (1862).

12 *See* FERNAND BRAUDEL, DER HANDEL SOZIALGESCHICHTE DES 15-18. JAHRHUNDERTS 491 (1986) (volume II of the multivolume work); KARL LEHMANN, DIE GESCHICHTLICHE ENTWICKLUNG DES AKTIENRECHTS BIS ZUM CODE DE COMMERCE 37 (1895).

13 *See* 1 KARL LEHMANN, DAS RECHT DER AKTIENGESELLSCHAFTEN 68 (1898); *see, e.g.*, C. COM. art. 37 (1807) (Fr.) ("La société anonyme ne peut exister qu'avec l'autorisation du gouvernement, et avec son approbation pour l'acte qui la continue; cette approbation doit être donnée dans la forme prescite pour les règlements d'administration." (This statement translates as: The anonymous society is only able to exist with the authorization of the government, and with the approval of the act which continues it; this approval must be given in the precise form for the rules of administration.)).

14 A.P. Smith Mfg. Co. v. Barlow, 98 A.2d 581, 586 (N.J. 1953).

15 *See* JÜRGEN MÜLLER & INGO VOGELSANG, STAATLICHE REGULIERUNG: REGULATED INDUSTRIES IN DEN USA UND GEMEINWOHLBINDUNG IN WETTBEWERBLICHEN AUSNAHMEBEREICHEN IN DER BUNDESREPUBLIK DEUTSCHLAND (1979); PETER NOBEL, SCHWEIZERISCHES FINANZMARKTRECHT §§ 4, 7 (1997); Friedrich Schneider, Regulating the Banking Sector (1990) (unpublished dissertation, Florenz) (on file with author).

In many countries, the state also uses the corporate form to organize state-run activities, public companies such as utilities, and mixed companies.[16] In various European countries, Italy and France in particular, the state imposes corporate structures on banks and important sectors of industry. France often views the corporation as an instrument of economic policy. Nonetheless, one should note that Europe has witnessed a major wave of privatisations and public sector restructurings in recent years.[17]

European corporate legal theorists tend to view the corporation as a social reality rather than a mere legal fiction. In Continental Europe, mainly Germany, diverging opinions about the nature of the corporate entity led to a "scientific" battle in the nineteenth century,[18] which the "realistic" approach appears to have won. This approach views corporations as part of the social organization and as a social institution, not simply an institution that stems from the embarrassment of the economic theory of law that one cannot make contracts perfectly.[19]

The general European approach, which could be termed the "social" approach, identifies directors as inherent parts of the corporate body—as its organs—and not simply as inherently untrustworthy agents whom one must closely control to prevent them from stealing or taking unreasonable risks with investors' money. The social approach does not raise, in theory or in practice, major agency issues. This failure might be due to the fact that the corporation itself is seen as having a value that directors are inclined to serve properly.

Similarly, European legislators and courts view the statutory objects of a corporation in a broad manner. Even the English abandoned the doctrine of "ultra vires" in the course of the European

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16 *See* Symposium, *supra* note 6. In particular, see James A. Fanto, *The Role of Corporate Law in the Adaptation of French Enterprises*, 1998 COLUM. BUS. L. REV. 97; Jonathan R. Macey, *Italian Corporate Governance: One American's Perspective*, 1998 COLUM. BUS. L. REV. 121; Olivier Pastré, *Corporate Governance: The End of "L'Exception Française"?*, 1998 COLUM. BUS. L. REV. 79.

17 EDOUARD COINTRAU & FERNANDO WASSNER, PRIVATISIERUNG: ALTERNATIVEN ZUR STAATSWIRTSCHAFT (1987); COUNCIL OF EUROPE, PRIVATISATION OF PUBLIC UNDERTAKINGS AND ACTIVITIES: RECOMMENDATION NO. R (93) 7 AND EXPLANATORY MEMORANDUM (recommendation adopted by the Committee of Ministers of the Council of Europe on October 18, 1993); INTERNATIONAL PRIVATISATION (Thomas Clarke ed., 1994) (collection of sborter works); LES PRIVATISATIONS EN FRANCE, EN ALLEMAGNE, EN GRANDE-BRETAGNE ET EN ITALIE (Fabrice Dion ed., 1995); ORGANISATION FOR ECON. CO-OPERATION AND DEV., CORPORATE GOVERNANCE, STATE-OWNED ENTERPRISES AND PRIVATISATION (1998); RECHTLICHE PROBLEME DER PRIVATISIERUNG, BERNER TAGE FÜR JURISTISCHE PRAXIS (1997) (collecting a variety of contributions about the situations in Switzerland and Germany).

18 *See* I-9 OTTO VON GIERKE, DAS DEUTSCHE GENOSSENSCHAFTSRECHT (1954); OTTO VON GIERKE, NATURRECHT UND DEUTSCHES RECHT (1883); OTTO VON GIERKE, *Handelsgesellschaft und bürgerliches Recht*, *in* 19 ARCHIV FÜR BÜRGERLICHES RECHT 144 (1901).

19 *See* OLIVER HART, FIRMS, CONTRACTS, AND FINANCIAL STRUCTURE (1995).

Company Law harmonization (First Directive of 1968, Article 9).[20] This change provides corporations with more independence.

An examination of the tenets of Private International Law concerning the determination of the nationality of a corporation reveals an interesting divergence among European nations. While countries like England and Switzerland adopt the same theory of incorporation[21] that the United States uses, Germany, France, and others still subscribe to the theory that a corporation's nationality should be the law of the place where the main decisions of the corporation are made. The managers bear the social responsibilities prevailing at the place of their main decisions.[22] The European community has yet to settle this important divergence. One also may see this difference as evidence that, under German and French law, a corporation is not a mere "paper tiger," a product of convenience (or inconvenience), but is rather part of and acting within a social reality.

The corporation is the dominant structure for assembling capital and for organizing governance structures to run a business. At certain times in this century, however, people largely disregarded those purposes and concentrated on the business itself. In Germany, people developed corporations under the theory of the "Business by itself" ("*Unternehmen an sich*") and paid only lip service to the function of efficient capital allocation. Many viewed each business as part of the national economy, fully engaged for the "social product."[23]

In the 1970s and 1980s, theorists, again mainly in Germany, dedicated themselves to a wider discussion of the organization of a business enterprise in which stakeholders participate in various activities. The debate recognized the workers as the principal stakeholders, but did not forget the interests of the community at large. The parties to this debate directed the main thrust of the discussion toward integrating a wider spectrum of "interests" (the so called "*Unternehmensrecht*") into the legal organization of corporations. This discussion, however, resulted only in the consolidation of employees' co-determination rights. Whether co-determination is a social advantage or a hindrance to employees at this stage, especially in the context of corporate restructurings in Germany, remains unresolved. This debate has just begun.

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20 *See* MARCUS LUTTER, EUROPÄISCHES UNTERNEHMENSRECHT 101 (4th ed. 1996).

21 *See* PETER FORSTMOSER ET AL., SCHWEIZERISCHES AKTIENRECHT 70 (1996).

22 *See* Frank Vischer, *Gesellschaftsrecht, in* IPRG KOMMENTAR: KOMMENTAR ZUM BUNDESGESETZ ÜBER DAS INTERNATIONALE PRIVATRECHT (IPRG) VOM 1 JANUAR 1989 art. 154, at 1341 (Anton Heini et al. eds., 1993).

23 *See* ARNDT RIECHERS, DAS UNTERNEHMEN AN SICH: DIE ENTWICKLUNG EINES BEGRIFFES IN DER AKTIENRECHTSDISKUSSION DES 20. JH. (1996).

III
WHAT ARE DIRECTORS ALLOWED TO DO?

Directors must run the business of the corporation with due care. In Europe, we do not use "Revlon,"[24] but instead use comparable cosmetics. In the company laws of European countries, the role of the board (or, in the German dualistic system, of the "*Aufsichtsrat*") has become a major issue in legislative matters, case law, and legal and business discussion.[25] Fulfillment of the obligations envisioned by the law alone did not seem satisfactory to many critics,[26] and various corporate failures intensified the debate.[27] As a result, European countries widely have increased and standardized the accounting standards and disclosure requirements through such measures as IAS and US-GAAP.[28]

Theorists rarely discuss the extent that social goals play a role in corporate thought. However, a consensus seems to exist that a corporation must consider the interests of all stakeholders (and not simply shareholders).[29] The courts often concentrate on the "interest of the corporation" and apply an integrated and wide balance-of-interests test.[30] Therefore, under a long-term view, even profit maximizing might demand that a corporation consider an optimal combination of all contributing factors.

To what extent social actions are legal, however, is not easy to say. After extensive research, the English author Parkinson comes to the following conclusion, which remains valid today:

> [T]he legal model will in practice accommodate a measure of profit-sacrificing responsibility notwithstanding the duty of management to maximize profits, given that the strict enforcement of that duty is not feasible. It is likely as a result . . . that the law will rarely present an obstacle to the limited social-policy objectives that companies currently espouse, and that in fact there is room for companies to take their activities considerably further before the legal controls begin to pose a serious threat.[31]

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24 *See* Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173 (Del. 1986).

25 *See* IMPROVING COMPETITIVENESS, *supra* note 9; REPORT OF THE COMMITTEE ON THE FINANCIAL ASPECTS OF CORPORATE GOVERNANCE (THE CADBURY REPORT) 20-35 (1992) [hereinafter THE CADBURY REPORT] (report named after the president of the committee, Adrian Cadbury).

26 *See* THE STATE OF THE ART, *supra* note 6, at 227.

27 *See* THE CADBURY REPORT, *supra* note 25, ¶¶ 2.1-2.2, at 14.

28 *See* FORSTMOSER ET AL., *supra* note 21, at 710-12.

29 *See* IMPROVING COMPETITIVENESS, *supra* note 9, at 61-66.

30 *E.g.*, Swiss Federal Court Decision, BGE 117 II 312, BGE 102 II 267, BGE 95 II 162, BGE 93 II 406, BGE 91 II 300, BGE 69 II 248.

31 PARKINSON, *supra* note 1, at 279-80.

A recent study by Eddy Wymeersch gives some further clues on the limits of "corporate necessities"[32] and reveals a great deal of disagreement regarding what actions are within the legitimate power of directors:

> [O]ne could conclude that with respect to the question of to what extent boards of European companies are considered to serve the interests of the shareholders, the European legal systems offer a variety of answers. The most shareholder-minded systems are the British, the Swiss and the Belgian, which limit attention for non-shareholder interests to long-term strategies aimed at ultimately protecting the wealth of the shareholders. In the other systems, there are different tendencies: some opt for a balancing of interests, primarily of capital and labor; some extend it to other stakeholders; and others see the ultimate continuity of the firm as the primary assignment of the board, an opinion which comes close to defending the interests of the firm "as such". The practical effects of this analysis also differ: although judges everywhere are very loath to interfere—in fact they almost never do—with the business decisions, remedies are granted on the basis of violations of procedural rules, informational imbalances or the refusal to take into consideration one of the classes of stakeholders. Review on the merits seems to be extremely rare.[33]

Therefore, a clear consensus among European scholars does not exist. It may be that corporations will have to sacrifice "some" profits for social reasons.

> What is needed is mechanisms [sic] that will secure the efficient operation of the business, but which will not at the same time render management impervious to considerations other than maximum profits. Unless managers operate in a disciplinary framework that allows them to trade off profits in favour of third-party interests, other measures to increase responsibility are likely to have rather limited results.[34]

Europe also is witnessing not only a growing awareness of the need to increase the flexibility of corporate reactions to a changing environment, but also a rise of increasingly different expectations amongst investors. The analysis and discussion of corporate governance are a key theme emerging from the major, and increasingly activist, role of institutional investors. Many of these investors collect and manage social capital.

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32 *See* Eddy Wymeersch, *A Status Report on Corporate Governance in Some Continental European States*, *in* THE STATE OF THE ART, *supra* note 6, at 1086.

33 *Id.*

34 PARKINSON, *supra* note 1, at 433.

IV
CO-DETERMINATION AS SOCIAL RESPONSIBILITY?

If one examines the European Union Company Law harmonization program, it becomes clear that Europe has not yet widely accepted the German co-determination legislation, which contains clear "social" aspects and, if implemented, would affect European Union corporate law and takeover proposals. For this reason, both the main directive on corporate governance, the Fifth Company Law Directive[35] on the "structure" of corporations, and the dreamy project of a European Company (Societas Europea or S.E.)[36] have not advanced in almost twenty years.[37]

The same reasons may lie, in part, behind German resistance to mandatory takeover bid rules in the proposals for a Thirteenth directive.[38] These opponents may believe that an active market for corporate control is too disruptive an element and raise stakeholder "rights" as an additional defensive argument. The proposed directive provides, therefore, that the German law for groups of companies is a sufficient alternative for protecting minority shareholders.[39] The proposal also subjects groups of companies to the rules of co-determination.[40] Of course, the German co-determination system is not an absolute obstacle to international mergers such as the Daimler-Chrysler merger. German corporation law and law of co-determination will goveru the new holding corporation, DaimlerChrysler AG, despite its beimg the head of a worldwide enterprise. Therefore, workers will elect half of the supervising body (the "*Aufsichtsrat*"). Surprisingly, this fact did not generate a wider discussion in the literature.

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35 1972 O.J. (C 131) 49.

36 *See* 1970 O.J. (C 124) 1.

37 *See* LUTTER, *supra* note 20, at 171.

38 *See id.* at 281.

39 *See* 1996 O.J. (C 162) 05 (proposing a thirteenth directive of the European Parliament and of the European Council in the field of company law and takeover offers). For German law, see § 5 Mitbestimmungsgesetz, v. 4.5.1976.

40 *See* Henry Peter & Francesca Birchler, *Les groupes de societes sont es societes simples*, 3 SWISS R. BUS. L. 113, 115-24 (1998).

Note that the law of the European Union provides for a groupwide scheme of worker representation at the sbop level, but not within the framework of corporate law. *See* Council Directive 97/74, 1998 O.J. (L 010) 22-23 (extending, to the United Kingdom of Great Britain and Northern Ireland, Council Directive 94/45, 1994 O.J. (L 254) 64, to establish a European Works Council or a procedure in Community-scale undertakings and groups of undertakings for the purposes of informing and consulting employees). Other rules to protect workers also exist at the European Commnunity level. *See, e.g.*, Council Directive 77/187, 1977 O.J. (L 61) 26 (addressing the approximation of the laws of the member states relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of businesses); Council Directive 80/987, 1980 O.J. (L 283) 23 (addressing the approximation of the laws of the member states relating to the protection of employees in the event of the insolvency of their employer).

V

THE SHAREHOLDER VALUE CONCEPT AND THE OECD REPORT ON CORPORATE GOVERNANCE

The shareholder value concept has gained acceptance in Europe, but with some suspicion. This skepticism prevails for two reasons. First, many perceive the shareholder value concept as an example of looking at the horse from the wrong end—from the shareholder perspective rather than the business enterprise perspective. This perception remains even though today no one would share the views of Fürstenberg, a Berlin banker in the 1920s, who described shareholders as "stupid because they give money and arrogant because they want dividends." Second, an almost universal opinion exists that the shareholder value concept is too narrow.[41] Therefore, for many Europeans, if they are to take account of the concept at all, it must be enlarged to a broader discussion regarding stakeholders and all other interests surrounding the corporation. Furthermore, the Berle/Means corporation[42] did not really exist in Continental Europe when the concept was introduced; rather, one could describe the former European situation by reversing Mark Roe: strong owners, obedient managers.[43]

Corporate governance also has become a fascinating and "hot" topic in Europe. The English Cadbury Report, which focused on management accountability and "best practice" for listed companies, began the debate in earnest in 1992.[44] This report was followed closely by the *Greenbury*,[45] *Hampel*,[46] and French *Viénot* Reports,[47] among others. The corporate governance debate reached its current climax in April 1998 with the OECD advisory group report (under the American chairmanship of Ira Millstein).[48] The OECD Report clearly favors the shareholder value concept, but not exclusively; instead, the

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41 *See* DIETER FEDDERSEN ET AL., CORPORATE GOVERNANCE: OPTIMIERUNG DER UNTERNEHMENSFÜHRUNG UND DER UNTERNEHMENS-KONTROLLE IM DEUTSCHEN UND AMERIKANISCHEN AKTIENRECHT 4-8 (1996); Heinz-Dieter Assmann, *Corporate Governance: Eine Vorbemerkung zu den Beitragen von Edward B. Rock und Eddy Wymeersch*, DIE AKTIENGESELLSCHAFT (AG), Heft 7/1995, 289-90.

42 *See* ADOLPH A. BERLE, JR. & GARDINER C. MEANS, THE MODERN CORPORATION AND PRIVATE PROPERTY (1932).

43 *See* MARK J. ROE, STRONG MANAGERS, WEAK OWNERS: THE POLITICAL ROOTS OF AMERICAN CORPORATE FINANCE (1994).

44 *See* THE CADBURY REPORT, *supra* note 25.

45 *See* DIRECTOR'S REMUNERATION: REPORT OF A STUDY GROUP (THE GREENBURY REPORT) (1995).

46 *See* FINAL REPORT OF THE COMMITTEE ON CORPORATE GOVERNANCE (THE HAMPEL REPORT) (1998).

47 *See* RAPPORT: LE CONSEIL, D'ADMINISTRATION DES SOCIETES COTEES, RAPPORT DU GROUPE DE TRAVAIL INSTITUE PAR L'ASSOCIATION FRANCAISE DES ENTREPRISES ET LE CONSEL NATIONAL DU PATRONAT FRANCAIS (THE VIENOT REPORTS) (1998).

48 *See* IMPROVING COMPETITIVENESS, *supra* note 9.

advisory group seems to intend the creation of a new concept, "enterprise value."[49]

The OECD Report's chapter headings illustrate this unusually wide approach:

> Chapter 2. Defining the Mission of the Corporation in the Modern Economy . . .
>
> Chapter 3. Ensuring Adaptability of Corporate Governance Arrangements . . .
>
> Chapter 4. Protecting Shareholder Rights . . .
>
> Chapter 5. Enabling Active Investing . . .
>
> Chapter 6. Aligning the Interests of Shareholders and Other Stakeholders . . .
>
> Chapter 7. Recognising Societal Interests. . . .[50]

Note that the Report separates "Aligning the Interests of Shareholders and Other Stakeholders" from "Recognizing Societal Interests," indicating that the authors view the two subjects as separate issues.[51]

The OECD advisory group explains its views on the importance of recognizing societal interests as follows:

> Companies do not act independently from the societies in which they operate. Accordingly, corporate actions must be compatible with societal objectives concerning social cohesion, individual welfare and equal opportunities for all. Attending to legitimate social concerns should, in the long run, benefit all parties, including investors. At times, however, there may be a trade-off between short-term social costs and the long-term benefits to society of having a healthy, competitive private sector. Societal needs that transcend the responsive ability of the private sector should be met by specific public policy measures, rather than by impeding improvements in corporate governance and capital allocation.[52]

The OECD Report is obviously the result of compromise among the many states that participated in its production.[53] Thus, while the enhancement of shareholder value increasingly becomes recognized as the primary goal of the corporation, a noteworthy kind of "local" perspective that integrates other contributing factors (such as the interests of stakeholders) visibly colors the result. There is no universal theory of the corporation yet.

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49 *See id.*

50 *Id.* at 3-4, 17-18.

51 *See id.*

52 *Id.* at 18.

53 Participants included representatives from Australia, Belgium, Canada, the Czech Republic, Denmark, Finland, France, Germany, Greece, Hungary, Italy, Japan, Korea, Mexico, the Netherlands, Norway, Poland, Portugal, Sweden, Switzerland, Turkey, the United Kingdom, and the United States. *See id.* at 93-103.

The Report not only recognizes that attempting to improve corporate performance while at the same time seeking to satisfy societal interests is a complex project, but also identifies six groups of issues that may affect any corporation's efforts to accommodate societal interests:

> 7.1 Corporate Trust Bases . . .
> 7.2 Potential Income and Opportunity Path Divergence . . .
> 7.3 Effective Disclosure of Contractual and Governance Structures . . .
> 7.4 Investments with High Social and Low Economic Returns . . .
> 7.5 Privatisation [and] . . .
> 7.6 Corporate Citizenship[54]

This list reflects not only all of the structural changes of modern corporate societies, but also the ongoing political discussion and its related stumbling blocks. The trend is, however, a global one, although at this level systems still compete more than they act jointly. We might allow ourselves to be confident of this trend; shareholder control has even discovered a Vietnamese sweatshop.[55]

CONCLUSION

In light of both the recent events affecting the world's financial markets and the new "community" of social democratic governments in the European Union, the question of corporate social responsibility is not a fading issue, but rather a very topical one. However, the answer to when corporations are "good citizens" will remain complex and disputed. In short, Europe seems to be following an increasing trend toward social responsibility, at least to the extent that more or at least wider aspects of the issue are being taken into consideration. The issue of social responsibility is no longer "subversive." It has become socially acceptable. As a judge of the Court of the European Union said recently, "My plea to you is: You must raise your eyes from pure competition issues; you must also take values into account."[56]

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54 *Id.* at 4.

55 *See Nike Shoe Plant in Vietnam Is Called Unsafe for Workers*, N.Y. TIMES, Nov. 8, 1997, at A1. For information about the Nike boycott, visit <http://www.saigon.com/~nike/update.htm>.

56 The statement was made in the Weimar Symposium on the Competition Law of Deregulation: The Scope for Private and Public Law & Regulation in European and International Economic Law (Oct. 16-18, 1998).