# Dis-Incorporating Corporate Social Responsibility

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Some years ago, a well-established legal scholar summarized the globalized world of economics as:

> "The distinctions between economic and political collectives become fuzzy in a world in which states become participants in the market and economic enterprises assume traditional governmental functions" (Backer 2008: 505; Friedman 2000: 14).[1]

After the establishment of multinational corporations as fundamental global and globalizing actors namely in the period between the end of World War Two and the 1990ies, one can observe in particular how the role of state and state-based actors and private actors mixed, especially in transnational law-making. The goal of this work is to clarify this landscape, make it less "fuzzy" by using a legal theoretical analysis and by establishing, within transnational corporate law, those legal duties per default assigned to a corporation. In particular, the task is to evaluate which direction legal actors should take on the issue of corporate social responsibility, in order to render the transnational corporate legal landscape more consonant with its surrounding environments (Zamboni 2010).

This consideration as to the regulation of corporate social responsibility as a fundamental part of the regulation of corporate governance in general is based on two interconnected premises. The first has to do with the fact that after two major corporate collapses in the last decade (namely in 2002 and in 2008), one can observe a revival of the debate around the nature of corporate governance and whether corporations have a social responsibility towards actors others than their shareholders (Hill 2005: 397–398;

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[1] "Today, faced with a shift in power from the once dominant nation-State to other entities, such as transnational corporations and international and supranational organizations, one should ask if the state-oriented perception of human rights is still adequate to deal with current issues of human rights violations" (Hillemans 2003: 1071).

Zumbansen 2002: 143).[2] The second element stressing the importance of having an up-to-date regulation of corporate social responsibility in order to have a better corporate governance, is derived from the question of whether corporate social responsibility is (and/or should be) considered from a legal perspective as being part of corporate governance in general (Zerk 2006: 31).

This work aims at answering a basic question for transnational corporate lawyers: based on the legal definition of what a corporation is in a transnational context, do actors other than shareholders have "per default" certain legal rights towards the corporation? The implicit idea of this endeavor is that, as expressed by Kent Greenfield: "*corporate law should be considered as any* other regulatory tool and evaluated on the basis of whether it can bring about preferred policy outcomes in a cost effective way" (Greenfield 2002: 589). Based on this premise, this work aims at demarcating the starting line by answering the question of whether, in today's transnational law, a corporation can already be considered as socially responsible or whether corporate law has to be changed in order to make the transnational corporation (at least from a legal perspective) per definition a socially responsible economic organization.

Before starting, a brief definition is required as to what corporate social responsibility is, at least as used in this work. The debate as to corporate social responsibility is still very intense, in particular on both the modalities that corporations should observe in order to fulfill their "social" duties, and the borders of such duties (*e.g.* should the defense of alternative styles of life be included or not in the provisions to prevent gender-discriminatory measures). It is however possible to start by noting how most scholars agree upon the fact that corporate social responsibility can be considered as an umbrella definition covering those duties incumbent upon a corporation and which have as their beneficiaries (or, in more legal terms, bearers of corresponding rights) all those actors but the shareholders, upon whom the corporation affects while performing its activities (GAP Inc. 2007: 12; Backer 2008: 512). In particular from a legal perspective, three are the areas of operation recognized by all scholars and the vast majority of legally relevant documents as embedded in the idea of corporate social responsibility (though then the extension of the borders of each of these areas is still under an intense debate): protection of human rights, envi-

[2] The term "revival" of the debate as to corporate governance is used in this work in order to underline the fact that the literature on this such issue in the last decade not only has increased quantitatively but also qualitatively, i.e. with the participation of scholars coming from areas not traditionally "corporate oriented" (*e.g.* law and development, social welfare law, discrimination law). Within corporate scholarship, however, it should be worth stressing that corporate governance has been always on the top list of the agenda, at least during the last fifty years (Backer 2006: 313–319; Meeran 1990: 161).

ronmental protection and respect and implementation of fair labor standards (United Nations 2003; International Labour Organization 1978: 422; OECD 2008; European Commission 2001: 366; Parliament of Australia 2000; United Nations 2001).

## 1. The Situation

As part of the current administrative law debate has pointed out, the current reality of the transnational context shows a model of a third-party government, i.e. a situation where "crucial elements of public authority are shared with a host of nongovernmental or other governmental actors, frequently in complex of collaborative systems that somehow defy comprehension" (Salamon 2002: ix; Slaughter 2001: 349; Aman 1999: 412–418). This sliding of the law-making and law-applying phases from an exclusive monopoly by the state and state-based organizations into a sort of condominium with other types of actors, is not novel in legal history. For instance, in the Middle Age, many aspects of the law, at least on the European continent, were decided and applied (often in conflicting terms) by secular powers and religious authorities. Moreover, even after the birth of the nation state, as stressed by both political scientists and legal scholars, it is possible to observe certain areas where the state and its agencies have delegated some of their law-making prerogatives to other subjects ("extension of the state") or where public actors simply decide to not intervene at all, leaving regulation to private actors ("a step away from the state").

What actually characterizes modern globalization, and its mirroring in transnational law, is the fact that there is a presence of private actors in the law-making and law-applying moments, a presence which is neither allowed nor authorized by the state or state-based organizations, but simply is considered as necessary as a part of "the uses of the market as an integral part of governance" (Aman 2001: 394). As pointed out by Zumbansen,

> "[w]ith the Western welfare state struggling to rediscover its institutional promise for the future, the answers to the regulatory challenges of globalized markets are increasingly sought elsewhere" (Zumbansen 2006a: 264).

This acceptance of the intervention of private actors into transnational law-making and law-applying is mainly due that which has been defined as the "growing regulatory fatigue" of the state apparatus as faced by the challenges posed by the globalization of the markets (and of other spheres of life, for instance such as human rights or environmental issues). The

public, faced with a more complex and interconnected world, requires a higher level by the state and its agencies of regulatory protection, in order to address (real or perceived) dangers coming from the rest of the world (*e.g.* effects of over-border nuclear accidents or industrial dumping policies in foreign countries).[3] The administrative and legislative public agencies are often confronted with these demands, but the results most of the time lead to the creation of a less efficient and effective administrative government. This is due, in part, to the impossibility of using the typical nationally limited "command-and-control methods of regulation" for solving cross-bordering problems.[4] Consequently, with the increase of cross-bordering activities, non-state actors have almost naturally taken over some of the regulatory functions held by the state as to these activities, a conquest which has been not legitimized, at least from a legal perspective, by any sort of "authorization" by or "formal retreat" of state agencies from the areas theoretically under their competence.

Applying this observation of the partial "privatization" of law-making and law-applying to the field of corporate governance, it is possible to notice how, in particular in recent decades, the phenomenon has created a fundamental dilemma. On one side, large segments of the transnational regulations of multinational corporations are left to private actors (and mostly corporations themselves) due to the very dominance of the US models and their contractual ideology as to what a corporation is. On the other side, corporations have come to play a central role, not only for the global economy, but also for the other surrounding fields, i.e. what corporations do and/or ought to do by law has become an issue affecting actors other than the shareholders. As pointed out by a scholar,

> "[C]orporate codes can broaden the discussion of labor rights to address the frequent inability of developing countries and transition economies to provide functional labor inspection and dispute resolution services, not to mention suitable schools" (Blackett 2001: 431).

In other words, a transnational corporation, i.e. a private actor structured according to the wishes of the parties, is today also used as one of the major instruments for promoting welfare policies, i.e. policies affecting mainly subjects who cannot afford to be among the shareholders. However, as stressed by many scholars, this situation is an aspect of a more general problem of the "externalities of globalization," i.e. with the side effects

[3] "A system of legal rules ought to recognize the world that it regulates. If the world is complex, the legal rules should be complex" (Wolfe 1993: 1696).

[4] In the transnational administrative legal scholarship, these difficulties for the traditional instruments at the disposal of public agencies as to regulating transbordering activities have been summarized in the idea of a "regulatory fatigue" of national administrative law (Stewart 2003: 446).

of the globalization of markets (Pigou 1932; Backhouse 1985: 165–166, 315–317; Coase 1988). The latter also tends to bring with it a "democratic deficit" since, on one side affecting the lives of so many people, its regulatory mechanisms are in contrast structured and decided by a very small minority among those "affected" by the markets (Aman 2001: 383–384; Scholte 2000: 207). From the perspective of the transnational law regulating corporate governance, the following descriptive question naturally arises: Is it possible, from a legal perspective, to trace in the transnational legal discourse a principle stating that an agreement among individuals in order to pursue their economic interests also has embedded in it a legal duty to pursue a further challenge, outside of (if not often in conflict with) the private parties' interests (Perez 2003: 26)? In more plain words, is social responsibility a part of the transnational legal DNA of a corporation (Mitchell 1992)?

Attention as to the legal status of corporate social responsibility within the transnational regulatory regime is motivated by several considerations. First, as stressed by Fischel, "since it is a legal fiction, a corporation is incapable of having social or moral obligations… Only people can have moral obligations or social responsibility" (Fischel 1982: 1223). The economic organization known as a corporation cannot *per se* be the carrier of social or moral responsibility since, as also stressed above, it is first of all a legal construction (or "fiction," using Fischel's terminology). It therefore is necessary to evaluate whether it is possible to impose upon such a construction a series of "essential" legal obligations which, once coordinated, can lead to having a corporation that ought to act with consideration of its central position not only in the economic game but also, at least at the international level, in other fields. The "essential" nature of these possible legal duties refers to the fact that, since the corporation is mainly and primarily a legal product, these obligations should be considered as vital for the very existence of the corporation as such in the legal world (*e.g.* in terms of the possibility for its shareholders as to taking advantage of a limited financial liability).

Secondly, the importance of the legal perspective as to the corporate social responsibility is also due to the fact that, as pointed out by Zumbansen, the debate on this issue is actually at the same time part of three inter-connected larger questions permeating the very bases of transnational law and the nature of law in general: the dilemma between regulation through soft law vs. hard law; the transformation of the role of the nation state from supervising into moderating the relations among private parties; and the importance for the legal system of norms internal to the organization (Zumbansen 2006b: 15).

When moved to the transnational corporate community, all these three issues (and possible solutions to them) are in the end heavily dominated

and imprinted by the legal logic or, in broader term, by the common legal culture shared by transnational actors. As to the issue of soft law *vs.* hard law, the legal perspective becomes central in order to determine what is and is not law in a transnational context. As to the second issue, the role of state-supervisor vs. state-moderator, this question is actually part of a broader legal discussion as to the functions of the law in a globalized environment. Finally, as to the legal relevance of the internal regulation of an organization, this becomes important in the classical legal endeavor of setting limits between freedom of contract and public policy considerations.

As a third consideration underscoring the need to pay attention to the legal status of corporate social responsibility in the transnational corporate legal discourse, one can observe how the legal evaluation of the place of such responsibility within the very idea of corporation is essential in order to resolve (at least for lawyers) the basic dilemma typical of all welfare or quasi-welfare regulations: actual equal treatment can often been achieved only by severely limiting certain individual rights, i.e. those very rights whose protection and actual implementation for all members of society the welfare state has as its primary target. For example, one of the major goals of the welfare state is to create a "real" just and fair societal environment, in particular by imposing upon corporations certain responsibilities towards society at large. However, this goal can often be achieved by reducing or weakening the legal force of the principle of freedom of contract for some parties, that is the shareholders' rights on determining the activities to be pursued by the corporation. This is a paradox, since another major task of the welfare state is not the elimination of the freedom of contract, but at the opposite its actual extension to all members of society, also to its "weaker" members (*e.g.* by reinforcing the role of trade unions in setting hiring conditions) (Habermas 1996a: 779).

In other words, while from a legal perspective it is quite clear that the globalization of markets has led to a globalization (and partial privatization) of the sources of corporate law, in the transnational legal regulation of corporate governance, the issue on how to balance the principle of freedom of contract (as fundamental normative criterion in structuring corporations in a transnational context) and the socio-political (or, in evolutionary terminology, "environmental") pressures in having a corporation more sensible to non-economic instances is still open (Shapiro and Stone Sweet 2002: 299). In the globalizing world, there is then an evident gap between the legal treatment of transnational corporations (as created by and exclusively for the shareholders) and their actual role in society (affecting several other subjects). This is due to the fact that "the affinity of these global legal structures to economic interests has adversely influenced their sensitivity to 'civic' concerns and has been subject to extensive

criticism in both grass-root and academic circles" (Perez 2003: 26).[5] This gap is particularly important since one of the features of the globalization of law is the transnationalization of many aspects of the legal system, as an established legal scholar has pointed out, in the modern world "it is the rules, not merely the actions or events, that cross national boundaries" (Goode 1997: 2). The discovery then that within the transnational legal community, there is also a shared-by-many sense of urgency to fill this normative vacuum concerning the transnational corporal law is no surprise, in particular in terms of corporate social responsibility, so that transnational rules can render corporations accountable for their transnational actions.

The first step in order to fill this gap between the normative situation (i.e. what the corporations ought to do in terms of social responsibility) and the environment pushing for corporations to assume obligations to others than the shareholders, is towards the assessment from a legal perspective of the first pole of such a gap. This is namely the clarification of whether in the eyes of the transnational legal community, there is a "natural" or somehow embedded legal duty of corporations towards stakeholders and/or communities at large. When identifying from a legal theoretical perspective, the nature of corporations as a form of legal organization, in particular at the transnational level, the result, looking at the evolution of transnational corporate law as rooted in the model of structuring corporate governance in US corporate law (both as a two-tier system and a pyramidal structure), makes it possible from a legal perspective to define the transnational corporation as an organization privately created for fulfilling an economic function (Zamboni 2010).

Considering the fact that transnational corporate law is more *lex Americana* than *lex mercatoria*, i.e. inspired by the way US corporate law regulates corporate governance, legal actors should take into consideration, in particular when facing "hard cases," US basic principles as regulatory inspiration. For instance, since the prevailing model of structuring parent-subsidiaries relations is the US pyramidal model, in cases of doubt as to whether a certain holding company is liable for losses or damages generated by a subsidiary, international arbitrators should begin their reasoning from a presumption of liability of the parent company for all of its subsidiaries.

[5] The existence of such a gap between legal regulation and actual role of transnational corporations is clearly recognized for instance by Zumbansen, who complains that "a purely property-rights-based assessment of the corporation cannot adequately account for the role that is played by the corporation in society… [i.e. a role] defined by the various social interests that come together in its affairs" (Zumbansen 2006a: 282–283). However, for a minority group of scholars, there is no "overwhelming pressure of international convergence towards a set of corporate governance" (Zumbansen 2002: 136, note 8).

This focus on US corporate law and its basic principles is further encouraged by the fact that it was in the American environment, more than in other domestic legal systems, that the debate as to the binding character of corporate social responsibility was, from the very beginning, based upon the resolution of the issue as to the legal nature of a corporation.[6] In particular, the modern source of the connection between the discussions on the legal nature of a corporation and the ones concerning corporate responsibilities, can be traced back to the famous 1930ies debate between Adolph A. Berle and Merrick E. Dodd. Berle argued that the corporation is responsible only to its stockholders since it is a form of legal organization characterized for being a symbolic representation of a group of stockholders and their economic interests. Therefore, he continued, every legitimate corporate action must flow from the legal powers granted by the shareholders to the corporate fiduciary (Berle 1931: 1049). Dodd countered that argument by stating that a corporation has a legal obligation that goes beyond the simple increasing of profits for its shareholders: the corporate body also has a duty to engage in social service (Dodd 1932: 1148). This enlarged area of legal duties is specifically based by Dodd on the consideration that a corporation is, from a legal perspective, more than a simple association of individual shareholders (and corresponding duties): it is an entirely new and separate legal entity, carrier of its own specific rights (*e.g.* limited liability) but also duties (*e.g.* towards stakeholders and the community at large) (Dodd 1932: 1160).

One can see, from this very brief and quite rough historical example, how not much has changed since the 1930ies in the US legal discussion, at least when considering the fundamental terms of debate and the connection of the discussion on corporate social responsibility with the issue of the legal nature of the corporation. Even more importantly, one could stretch so far as to state that both in today's US and at the transnational level, the arguments supporting one position over the other tend to be largely rooted on the same legal political considerations or polarizations, namely freedom of contract vs. public policy. Even the most recent exchanges between the opponents and proponents of a "natural" social responsibility as embedded within the legal idea of corporation debate are developed around an issue related to the ultimate nature of the corporation. The most recent discussions as to corporate social responsibility can be traced in the debates namely to the modalities and extension of legislation on corporate constituency, i.e. how and to what extent state actors can interfere (*e.g.* for public policy reasons) with the freedom of contract

[6] "While the general view prior to the 1930s was that corporations should have a noticeable societal orientation, further economic and social developments led to the generally accepted belief that private profit was the controlling end in all businesses not classified as public utilities" (Supreme Court of New Jersey 1953: 583).

of the private parties constituting a corporation (Orts 1992: 85. Mitchell 1992: 579; Hanks 1991: 102; Millon 1991: 277).

## 2. Rule of Legal Principles as Shaping Transnational Corporate Law

When approaching transnational corporate law from a normative perspective, i.e. searching in its sources for the answer to the question "what ought to be done," it is important to keep in mind that this legal field, like other transnational laws, is not regulated by the paradigms of the *Rechtsstaat* or the rule of law, but rather by the "rule of legal principles" (Braithwaite and Drahos 2000: 531; Muchlinski 2007: 109; Ellis 2008; Gaillard 2001: 59). Due to this absence of a central and unique law-making authority (such as the legislative assemblies for the German *Rechtsstaat*) or a decision-making agency (as the court system for the English rule of law), the transnational corporate legal regime differs considerably from the mostly rule-based national legal regimes about corporations (Bul 1977: 46). Corporations operating in the transnational context are regulated instead mainly by a series of legal principles, created by both public and private sources of law (Kronke 2008: 51; Shapiro and Stone Sweet 2002: 304–306).[7]

Besides the lack of a central authority, legal principles tend to dominate as the form of regulation within the transnational corporate legal discourse because they tend to fulfill one of the criteria that this legal field requires of its norms: flexibility to the ever-mutating environments, both in time and space, a flexibility that cannot be guaranteed by legal rules, the latter tending instead, with their either-or shape, to mainly aim at fulfilling the goals of clarity and certainty in their regulatory target (MacCormick 1981: 126–130; Weber 1978: 34). More specifically, as pointed out, for example, by Ronald Dworkin, legal rules (which are common, for instance, in the shape of domestic statutory provisions or within the international treaties among the nation states) apply according to a "either-or" logic. Either they are relevant for the issue, and therefore apply, or they are not relevant, and therefore do not apply (Dworkin 1967; Raz 1972; Weber 1977: 131–134; MacCormick 1997: chapters VIII–IX).

In contrast, a legal principle (*e.g.* "no one should benefit from his or her wrongdoings") is always present on the stage and does not exclude the

[7] From a historical point of view, it is interesting to note how a similar dominance of legal principles, as a main regulatory tool, can be traced in a legal regime like the Roman Empire, which presents several structural similarities with transnational law, for instance generally weak public authorities and strong private or semi-private law-making and decision-applying actors (Plessis 2008).

simultaneous existence of possible conflicting principles (*e.g.* legal certainty in terms of "no behavior is prohibited unless by statute"), also relevant and equally applicable in deciding a certain solution for a law-making or law-applying issue. Legal principles offer legal actors a reason to decide a case one way over another, but this application does not render the antithetical or in general conflicting legal principle legally irrelevant and/or inapplicable to the case (Dworkin 1978: chapter 2; Gardner 2001: 214, note 33). In simpler terms, while the validity of one rule excludes (at least for the issue under consideration) all other rules not compatible, the legal principle is simply a "good reason" (and therefore always under the risk of being overrun by "better" principles) for the law-maker or decision-maker to decide in a certain way.

As expressed in legal sociological terms, legal principles do fit as the best form of regulation for the transnational (corporate) environment because, rather than fixed and dichotomist rules, they are the expression of the "competing and conflicting rationalities" or "colliding discourses" which dominate the transnational context more than in other regulatory environments (Fischer-Lescano and Teubner 2004: 1006; Lyotard 1988). For instance, the clashes between the paradigms of the economic discourse and those of the cultural discourse tend to be transferred to the transnational legal field in an almost intact shape. This is due in particular to the lack of a higher authority (mostly of a political nature) with the specific duty and legitimacy to "solve" such conflicts in the community, at least as is the intention, by enacting a rule-based law (*e.g.* a statute from a National Assembly) or a rule-based decision (*e.g.* a decision from a Supreme Court).

It should also be stressed that underlying the importance of legal principles for a legal system does not necessarily conflict with having a modern legal positivist approach. According to Hart and most of his followers, legal positivism can admit legal principles as a primary form of regulation if, in the system under consideration (*e.g.* the transnational one) there is a rule of recognition that is recognized as law, and recognized as appropriate data for judicial decision, legal principles such as the Dworkinian "No one shall be permitted to profit by his own fraud" (Schauer and Wise 1997: 1090).

Moving the focus now closer to the legal field under consideration in this work, one of the most essential legal principles of transnational corporate law is certainly the one identified above, i.e. the one considering a corporation as a privately created organization fulfilling an economic function. Being a legal principle, this idea of corporation does not exclude the simultaneous existence within the transnational regulation of cor-

porate governance of other and diametric principles.[8] Actually, transnational corporate law is characterized for admitting as equally valid also the German ideal of corporation as created by public authorities and simply accepted by private actors. However, though valid transnational corporate law admits this possibility, once looking at the law in force for the governance in transnational corporate law, the conclusion is the dominance of the two-tier system and pyramidal structure, as being the effect of an evolution to a broader context of the basic US corporate legal principles as to governance: corporation is made through an agreement among individuals (or group of individuals) in order to pursue some economic goals.[9]

Therefore, since for modern legal positivists at the end of the day in cases of conflict between different valid laws, the prevailing one is ultimately the law in force, these "privately created" and "economic functions" concepts are the ultimately prevailing legal principles regulating corporate governance at the transnational level; such two legal principles should therefore operate as a normative standard and inspire the entire transnational law-making and decision-making corporate processes (Hart 1961: 55; Raz 1979; MacCormick 1994b). The dominance within the transnational corporate legal community of these legal principles (which in their turn are rooted in the prevalence of the US models as to the legal regulation of corporate governance) is of course valid as long as the dia-

[8] According to a certain scholarship, however, within the transnational context one can still retrace the traditional legal rules as the dominating way of shaping the regulatory system (Gaillard 2001: 61–62).

[9] Some years ago, an attempt has been made by a part of the corporate scholarship of bypassing these polarizations as to the nature of a corporation from a legal perspective (private/contractarianism *vs.* public/communitarianism), a polarization immediately affecting the answer as to what kind of general and "embedded" responsibility the corporation is a carrier (respectively, contractual responsibility *vs.* social responsibility). In particular, such bypassing has taken the shape of describing the corporation as a *Team Production Model*: the corporation is simply a "third party" where all the subjects (shareholders, managers, employees, suppliers, customers, and local communities) have made an investment and where the board is an independent (among all these subjects) non-stakeholder that has the legal duty to act in the best interests of the corporate entity. The board of directors, in other words, should be considered from a legal perspective as a trustee for the benefit of all who have invested time, money or resources in the corporation; therefore the board has the duty of working for the "team" of investors, intended in a very broad sense (Blair and Stout 1999; Meese 2002). The Team Production Manager model of structuring corporate governance can therefore be considered as a type of contractarian one (i.e. based upon the free will of the shareholders), but still with a sort contractual insertion of the social into the corporation as a form of contractual responsibility: from the dualism of "owner and control organs" to a dualism of "all affected by the corporate decision and the trustee board of directors." The corporation, if this model is adopted, still remains a private entity but is created by a wider spectrum of private actors, and towards them all, the board of the corporation has a (contractual) a responsibility (Blair and Stout 1999: 247).

metric principles (*e.g.* corporation as public based or corporation as aiming primarily to social goals) do not become "stronger" reasons from a legal perspective, a stronger legal force that they can acquire for instance when embraced in one or several binding documents from the United Nations or when considered as binding and applied by the majority of transnational legal actors.

As the private base and the economic nature are the normative elements characterizing the legal concept of corporation in the transnational context, it then becomes extremely difficult to accept the idea that corporate social responsibility ought to be considered (at least from a legal discourse perspective) as a fundamental and "natural" component in the very definition of what a corporation is and what a corporation ought to deal with.[10] If, for instance, according to the *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with regard to Human Rights*, "within the limits of their resources and capabilities," companies are expected to encourage social progress and development, especially in poor and developing countries," then the corporate social responsibility exceeds the limits of the corporation's legal capabilities. Consequently, such a document should then be considered (as it actually is) simply a policy document, certainly not binding upon transnational legal actors (at least as the situation stands) (United Nations 2003: under 10a). Therefore, despite such types of documents circulating within the transnational corporate community, and differently from that stated by some scholars, the encouragement of social progress cannot be considered as a prevailing legal principle in corporate disputes, unless such goal has been expressly stated in the charter of incorporation as one of the corporation's primary duties (White 1985: 1416–1418; Branson 2001; Zumbansen 2002: 136). In particular, the prevalence, or heavier weight, of such a form of social corporate responsibility ought to be excluded in all cases where the encouragement of social progress could somehow endanger the shareholders' economic interests, whose fulfillment, at the opposite, is considered as "embedded" within the very legal definition of corporation valid at transnational level.

This difficulty of inserting corporate social responsibility as a part of the legal DNA of a corporation is due to the very underpinning idea that corporations should always take into consideration the interests of society in

[10] This effect of corporations of becoming "socially irresponsible" is underlined by several voices critical to the actual basic ideology behind US corporate law and its idea of corporation as the product of an agreement among individuals (i.e. the founding shareholders) (Mitchell 2001). For instance, the privately constructed US model of corporation produces as a consequence the exclusion from the US regulation of corporate governance of the employees as subjects with legal voice in corporate governance's matters (Blair 1995).

their decisions. From a legal perspective, this consideration would imply a general and *ex lege* corporation's liability for the outcomes to stakeholders, employees, environment, and communities at large (United Nations 2003: under 10a; Hillemanns 2003: 1079–1080). As strikingly pointed out more than 35 years ago by Milton Friedman,

> "the key point is that, in his capacity as a corporate executive, the manager is the agent of the individuals who own the corporation or establish the eleemosynary institution, and his primary responsibility is to them" (Friedman 1970).

As pointed out both by scholars and by practice, this dis-incorporating of corporate social responsibility from the very legal idea of corporation takes place only within the transnational (corporate) legal discourse (Wolff 2002: 973; Schäfer 2010). This means that it does not obviously exclude the possibility that corporations can be found liable for specific violations of domestic laws, *e.g.* against corruption of foreign officials abroad. However, these forms of legal liabilities exist as an exception (i.e. because as long as they are pointed out by specific statutory provisions) and not as an expression of a general principle applicable as soon as a corporation is under the spotlight. In other words, unless something else is explicitly stated by statutory provisions or by international treaties or by contract, in front of the law the transnational corporation is not assumed to operate for the good of the host community at large.

From a legal perspective, this absence in a transnational context of a generalized duty by corporations of being socially responsible, can be explained by the fact that, as seen previously, a corporation for transnational actors is an organization privately created through contract. Therefore, liabilities can be imposed on the parties only in front of violations of expressly agreed contractual responsibilities and/or duties. Unless a clear provision is stated either within the charter of incorporation or by a clear binding transnational principle (as, for instance, is the case for many areas of transnational environmental law), the idea of a general legal principle stating that social responsibility hangs "by default" upon the corporation and is there in order to sanction any eventual violations of stakeholders and communities' spheres of basic interests must be rejected.

Social responsibility could be present as embedded in the legal idea of corporation if the latter, as in certain domestic legal systems (*e.g.* in Germany), was considered at the transnational level as being a "public creation," i.e. a legal model shaped by state law (or by international public law) and simply accepted by the private parties. The creating state law or international public law could then offer to the parties a model with "social responsibility" already inserted in the very definition of what a corporation is. This is done for instance for some aspects of transnational criminal law (*e.g.* by including certain types violence in the definition of

"genocide" or by including certain social and economic rights among the "human rights").

However, as the legal situation stands nowadays, one cannot detect within the transnational legal discourse any such generally binding source of law, *e.g.* a hypothetical Charter of Economic Rights as produced by a UN agency with binding force similar to the Declaration of Human Rights (Kennedy 1994: 371–373). Moreover, as seen above, the corporation is still a privately created organization. It is not possible therefore to legally "impose" upon both shareholders and the board of directors a "corporate" duty to be legally observed for which they have not signed up for. The social responsibilities of a corporation, if they were not in the *pacta*, i.e. unless the founding or subsequent shareholders explicitly have included or accepted them in the transnational corporation's bylaws, ought not to be considered as legally binding. If the basic legal principle of *pacta sunt servanda* is still considered as fully in force and dominating the legal regulations within the transnational corporate community at large, then an *e contrario* interpretation of it should lead to the consideration that where social responsibility was not in the corporate *pacta*, then the legal actors should consider such duty as *non sunt servanda*, i.e. as not legally binding (Shapiro and Stone Sweet 2002: 55).

From a legal perspective, a possible way-out of this naturally could be the reasoning that though not explicit in the articles of incorporation or bylaws when adopted or when shareholders later bought shares, i.e. though not embedded in the legal idea of *what a corporation is*, social responsibility should be considered among the specific functions "naturally" connected to corporate activities, i.e. as embedded in the very legal idea of *what a corporation ought to do*. However, since within the transnational legal community, the general principle is that the corporation is a privately created organization for fulfilling an economic function, namely to conduct commerce and produce goods and services with the goal of increasing profits for the shareholders, all functions having a nature different from the economic ones cannot be considered from a legal perspective as "naturally embedded" among the duties of a corporation (Muchlinski 2007: 92).

Using a *varieties of capitalism* approach, one can further strengthen these considerations by rooting the prevalence of the US model in the transnational corporate legal field on a more general prevalence in the transnational corporate context of the *liberal market economy model* (Hall and Soskice 2001: 27–29).The prevalence of this economic model, as stressed by Hall and Soskice, encourages "firms to be attentive to current earnings and the price of their shares on equity markets," mainly in order to compensate the lack of a network providing investors with inside information, a network which instead is present in coordinated market economies (Hall

and Soskice 2001: 29). Therefore, since the evolution of a certain legal category always implies an aiming towards a high degree of compatibility between the legal category and surrounding environment, it appears quite natural that in order to better fit into a market which "encourages firms to focus" on the current profitability for its investors, the legal shape assumed by the corporation privileges the devolution to the very investors the decision on how to structure the corporation in the way that guarantees best the highest profits, i.e. by privileging the economic nature of the corporate *pacta sunt servanda* over other types of non-economic considerations (*e.g.* impact on the local population) (Hall and Soskice 2001: 29).

It should be stressed that corporate social responsibility can be (and usually is) a fully legitimized element of corporate governance from the economic discourse perspective (*e.g.* because it increases the status among potential customers), from the social discourse perspective (*e.g.* because it increases the wealth for the entire community), or even from the cultural discourse perspective (*e.g.* because it increases the respect of local diversities) (GAP Inc. 2007; Mares 2003; Hall and Soskice 2001: 50).[11] However, as formulated by the current transnational corporate legal community, the prevailing legal principle is that a corporation is created to pursue economic functions. Therefore, in their law-making and decision-making processes, transnational legal actors ought always to keep as basic criterion that there is no general legal principle imposing upon a corporation a legally relevant "social liability" (Perez 2003: 28–29). This dominance of the legal principle of "non-general-social-responsibility" is of course valid until corporate behavior violates specific rules imposing duties on the corporation (*e.g.* in many environmental issue) and therefore activates that considered by the transnational community as being a stronger legal principle, *e.g.* the one of legal certainty, in case of a specific, binding and therefore valid rule of international environmental law, or the one of *pacta sunt servanda*, in case the corporation has signed a deal to protect the environment with the host-country.

The situation of transnational corporate law is that there is therefore a classical "regulatory gap:" on one side there is a surrounding environment that points out and underlines the necessity for corporations to take a larger role in social issues in the areas where they operate; on the other side, the transnational legal regulations, that in today's shape, do not allow the imposition upon corporations (and indirectly to their shareholders, managers, and boards of directors) of a general legal (i.e. binding) principle

[11] For instance, as pointed out by some scholars, transnational corporations like The Body Shop and Starbucks became "socially conscious" primarily for considerations belonging to the economic discourse, namely they became socially responsible corporations in order to attract more consumers or, in any case, in order to not lose them (Klein 2000: chapter 1, 430–435).

of "acting in a socially responsible manner." With such a discrepancy existing between the law and its surrounding environment and, as pointed out by the evolutionary approach among others, since law, in order to retain its legitimacy and not risk becoming "law in books," should always aim at promoting or somehow absorbing the instances coming from the surrounding environments. Its growth then naturally increases the demand for legal change (Pound 1910). In particular, it is possible to point out that, in order to survive and grow, transnational corporate law must adjust itself to the changed surrounding environment and to its requests of a more social role of corporations, i.e. there is an incumbent necessity upon the legal actors of identifying the best legal path allowing a realignment to the actual regulation of corporate law in the transnational context to the transnational context itself.

## 3. Operational or Structural Change?

A possible critique to this conclusion of dis-incorporating the idea of corporate social responsibility can be that the latter can in any event become a part of the essential features of corporate governance through changes in its regulation. This change, for instance, can take place through a new hypothetical Code of Ethical Business subscribed to and observed by the vast majority of transnational corporations (Romano 1999: 724). However, as pointed out by Muchlinski, when dealing with reforms of corporate law within the transnational community, one should take into consideration that two major ideal-typical lines of operations exist (Muchlinski 2007: 78). The first can be defined as "structural change" and consists of giving rise to new forms of corporations; the second can be defined as the one of "operational change", meaning that the reform of corporate law takes place by assigning to the corporation new duties and/or obligations, while keeping the same structure of governance.

As the fulfillment of economic goals is part of the very legal nature of a corporation (i.e. what a corporation is made for) and not simply one of its duties (i.e. what a corporation has to do), the insertion of the duties of corporate social responsibility within the spectrum of its obligations appears quite outside the reach of an operational change. The basic idea of an operational change is to keep the same structure and, in the case of in-corporation of corporate social responsibility, the very fundamental nature of the corporation would instead be radically changed. The legal genome of pursuing economic goals (*e.g.* increasing profits for investors) should be paralleled by the obligation of observing social duties (*e.g.* increasing the general welfare for the population living in the areas of operation) and, in

that, necessarily limited by the latter, due to the fact that the two (genome of economic nature and social duties) are not often compatible. In other words, the insertion of corporate social responsibility as a legal fundamental operational criterion in regulating the work of a corporation, is not a viable path since the maneuver will consist in authoritatively forcing upon the corporation doing something outside the field of operation of its legal structure. More importantly, an operational change of the legal regulation of transnational corporate governance into a more "social" direction will end up in legally forcing the corporation into something that may endanger (or in any case collide with) the very (economic) nature of this form of organization. As pointed out by Stone Sweet,

> "because normative structures constitute individual and collective identities, and therefore give meaning to action, they are difficult to change by way of action [i.e. *operational change*] without a concomitant change in identities [i.e. *structural change*]" (Shapiro and Stone Sweet 2002: 58–59).

To force by law an operational change upon a corporation (i.e. inscription of social goals among its "natural" legal duties) may then implicitly force a revolutionary structural change of nature upon this organization (from economic to non-economic), a change that will most likely end up in shifting the legal structure from the currently well-functioning (at least from an economic perspective) corporation into something unknown and, to some extent, unpredictable. In simpler words, by imposing by law an operational change upon today's corporations, the legal structure of Coca Cola as we know it today will certainly disappear. However, it will not necessarily be substituted by also economically successful and socially responsible corporations like Body Shop.

Of course it is true that, indirectly, the fact that the economic discourse is the one governing corporations can somehow open a space in their operations to considerations of a social character. For example, the corporation can decide to sign a document binding it to having certain quotas of "local" managers or women. However, even in this case, the choice in favor of a more social oriented operational criterion is ultimately due to the economic reasons that are at the basis of the legal construction known as a corporation. For instance, the economic motivation behind the policy of having quotas can be the creation of a favorable image among certain sections of possible customers or among the ruling political actors in order to then be more economically successful and, in the end, to increase the profits for the shareholders.

From a legal perspective, this ultimate economic foundation is decisive in a "hard-case," i.e. in a case where the legal actor is confronted with two different (both binding) legal rules applicable to a case but with opposite outcomes, one favorable to the social aspect, the other to the economic

aspect. In this case, the economic function for which the transnational corporation has been legally built will be the legal principle to be applied and it will push the decision always in the direction of the legal solution (both in terms of decision-making or law-making) favorable to the inner-economic nature of the corporation.

It is true that in recent decades within the US corporate legal community, some operational changes were made in order to somehow diminish the dominance of the economic discourse (i.e. maximization of the shareholders' profits) in favor of more socially oriented logics (*e.g.* protection of customers). In particular, the policy adopted in order to reach this goal has been the setting of legal borders to the area of activities for corporations.[12] The paths chosen in order to implement such a policy have either been the improvement of the legal power delegated to a federal agency (*e.g.* through the Sarbanes-Oxley Act of 2002) or the expansion of the area of legal competence assigned to the legal fields neighboring the economic activities of the corporations. As to the latter, for instance, the areas of "free activity" of corporations have been sensibly reduced by the environmental statutory regulations creating the US Environmental Protection Agency or by labor law or administrative regulations denying public contracts to companies not fulfilling the required gender or ethnic minorities' quotas (Orts 1995).

However, these types of operational changes up to now have not taken place within the transnational corporate legal community (Zumbansen 2006a: 305–306). This deficit is actually not due to a simple oversight by both private and public actors, but instead has to do with the fundamental and interlocking structural reasons making such operational changes very difficult to achieve (or in any way to implement) within the transnational community. In contrast to the US, the transnational legal context is characterized by a lack of a central legal authority, making the creation and implementation of an internationally valid Sarbanes-Oxley Act then difficult; by the structural weakness of the legal fields neighboring the corporate economic activities, since for instance there is not a unique international agency for the protection of the environment with binding power similar to the US EPA; finally, by the weakness in terms of legitimacy of those neighboring legal fields, for example, the legitimacy among the legal actors of transnational labor law still being "under construction" or at least a couple of steps back in comparison to the well legitimized transnational corporate law (Zumbansen 2006a: 274, 289; Arthurs 1996). As a result of all these structural and legitimacy limits typical of the transnational legal field in general, it then is possible to infer that, as the situation now

[12] It should be moreover stressed that all the changes are operational and not structural since, as pointed out by Zumbansen, these procedural remedies are still taken "from within the shareholder-value paradigm" (Zumbansen 2006a: 285).

appears, it is an extremely difficult and complex task to push the legal operational duties of a transnational corporation towards a more "social" oriented arena, either through reforms internal to the transnational corporate law community (like an international Sarbanes-Oxley Act) or through the rearranging of the bordering transnational legal communities (like with the EPA) (Zumbansen 2006a: 290–299).

Since operational change (at least from a legal perspective) is not a feasible option for inserting corporate social responsibility within the transnational corporate legal discourse, the only other solution available is to take the path of a structural change of the very idea of what is a corporation in transnational corporate law (Perez 2003: 34–35, 43). To structurally change the idea of corporation means to give to the corporation a new legal shape and a new nature where the responsibility towards the social surrounding is explicitly considered as part of its fundamental functions. At the end of the line, changing the nature of the corporation by law is a fundamental step in a transnational context, since "law, including corporate law, is one of the major mechanisms by which [the line between private and public nature of a corporation] is drawn" (Wolfe 1993: 1683).

In order to effect this legal shift from an economic organization to a socio-economic organization, from a legal evolutionary perspective it would be necessary to perform "shock-treatment," i.e. a series of radical and coordinated law-making measures (Hill 2005: 399). Such shock-treatment measures should in particular be a two-step process. First, they should aim at somehow breaking the former point of equilibrium reached between the transnational environment during the period of 1945–2000 and the idea of corporation as mainly a legal organization with economic functions (Paul 2001: 285–286). This step could be taken in particular by operating through the source of transnational law previously defined as "activist dispute resolution," i.e. the one source of law more than the others that has contributed to the creation and establishment of transnational law as an autonomous legal system (Mitchell 1992). As also suggested by Teubner,

> "The challenge for the relevant national, international and 'private' conflict resolution tribunals is… to creatively combine [the different laws] to form genuine transnational norms" (Teubner 2010: 274).

The fact that the decision-making authorities play a central role for the implementation within transnational law of new legal paradigms also encourages the choice of the "judicial" path in order to break the point of equilibrium that has somehow forced the transnational concept of corporation to be stacked into being considered in purely private and economic terms (Teubner 2010: 273–274). As pointed out by Stone Sweet, the very legal idea of governance, of which corporate social responsibility

is a part, is essentially made by an interaction of contracting parties with a dispute-resolving actor (*e.g.* the arbitrational tribunal) (Shapiro and Stone Sweet 2002: 55). Since it appears that the contracting parties (i.e. shareholders) are not yet willing to consider corporate social responsibility as a "genetic" element of a corporation, the only path available is to operate on the other end of the interactions constituting the governance, namely the decision-making actor (*e.g.* the international tribunal of arbitrations).

This stressing of the need of having more formal litigation (i.e. in front of third-party decision makers) in order then to be able to protect the public goods (*e.g.* through the development of a set of precedents or through the publication of the decisions), is not foreign to the transnational legal community, being widely used in the transnational contract legal discourse (Charny 1996: 1852). For instance, a measure that can produce a transnational corporation with a different and specific legal shape and, at the same time, can reinforce the autonomy of the transnational legal system, can be the insertion by international arbitration tribunals of the more economically oriented NGO's (*e.g.* those sponsoring micro-credit programs) among those organization that can benefit from (and be burdened by) all the legal consequences (in terms of rights and duties) of being a corporation.[13] Besides allowing the introduction of the "social" component among possible constitutive elements of a corporation (by offering an alternative to the traditional equation corporation = pure business), this step will moreover not be a complete revolution for Western legal systems. This is in particular true taking into consideration the similar way of thinking for instance when it comes to the today's US regulations governing non-profit organizations (the latter often treated, for taxes purposes, as an "in-between" business and social type of organization).

To conclude this part, as can be detected without much difficulty, the solution opted for in this work is somehow inspired by one of the approaches that more than the others, has paid specific attention to the evolutionary theory in law, namely Teubner's *autopoiesis*. In particular, the solution adopted here as to the way to break the point of equilibrium is reminiscent of Teubner's idea of "reflexive law." According to the idea of reflexive law, the duty of the regulatory tools provided by the state and state-based agencies (both national and international) consists simply in creating the broad regulatory frameworks and "communication channels to promote self-regulating measures by non-governmental entities," i.e. transnational corporate hard-law simply as a regulatory framework for facilitating the formation and implementation of regulations created by

[13] It is worth observing that transnational commercial law seems to have taken another path in order to break the "point of equilibrium," namely through international public law-making, and in particular through the creation of a new legal "terminology" (Kronke 2008: 51).

transnational corporate soft-law and activist dispute resolution (Stewart 2003: 450; Orts 1995: 1232; Teubner 1983: 239).

## 4. An In-House Corporate Ombudsperson

As to the solution pointed out above, i.e. the use of active dispute resolution in order to insert the "social" into the very legal idea of a corporation, there still remains a problem. As strikingly expressed by Wai, all non-state regulatory systems (among which the transnational corporate law is numbered) suffer from one fundamental danger: though on one side they "may be less nationalistic and fairer between the participants directly involved," on the other side these transnational "systems suffer from exclusion because they are not normative communities which include the interests of all those affected by their activities" (Wai 2002: 260). Therefore, in order to fill this "democracy deficit" affecting the very transnational law-making in general, a second parallel step has to be taken (Wai 2002: 263). This second step in particular needs to go in the direction of re-aligning the legal concept of what a corporation is to the demands coming from the transnational community or, in evolutionary words, to adapt the corporation to the mutated conditions of the surrounding environment.

This move could take place through the sources of hard-law, i.e. those sources more than the others in the transnational context that tend to be ascribed with the legitimacy of being "democratic" sources of law (*e.g.* because of their originating in collective organs usually representative of the majority's will, like the United Nations and its agencies or domestic National Assemblies). This option in favor of the hard-law path in order to change the transnational legal system, can also be seen as going in the direction of that as expressed by Teubner and his idea of the necessity of "constitutionalizing" corporate governance. Belonging to a part of a more general program of the "constitutionalization" of transnational law, the constitutionalization of corporate governance indicates the necessity in today's world of setting a hard-law external framework for the transnational activities of corporations, a system of statutory or statutory-like boundaries that simultaneously allows, organizes, and encourages a free interplay of the major resources of this field, namely the private actors and their law-making (Teubner 1997).

As to the content of these hard-law provisions, the transnational corporate hard-law-making should in particular be in the direction of inserting "the social" among the legal requirements for having a legally recognized transnational corporation, an insertion for which the majority of the con-

temporary corporate legal community also seems to feel a need.[14] At the end of the day, as summarized recently by one scholar, the vast majority of the legal actors working in the transnational community have become aware of the fact that "[w]hat emerges from these protests is a profound aspiration for a 'voice' –for greater civic involvement in these global processes of norm production" (Perez 2003: 26). This involvement of a larger community that the business community in particular can be guaranteed simultaneously by a decisive role played by the democratic representatives in the law-making process (i.e. by a tougher attitude of the actors controlling the hard-law sources, such as the United Nations and National Assemblies) and by opening the very legal definition of corporation to realities other than those of the shareholders.

Following the hard-law making path, a possible solution to the discrepancy between the actual legal regulation (corporation as an organization exclusively for the maximization of shareholder value) of what is required by the community at large (more socially oriented corporations) is an institutional change of what a corporation is in order to resettle the "imbalance between high normative standards of justice and weak institutional structures" (Reichman 2008: 102). For example, a possible solution can be the creation by an international public law treaty of a corporate form with a legally institutionalized veto position (Möllers 2004: 337). This structural reform will mean that the organization, in order to take advantage of the various legal benefits typical of the corporation (*e.g.* limited liability), has to integrate in its governance structure the "public" and their interests.[15] This integration will in particular be in the form of seats in the board of directors (with only veto power) assigned for instance to representative of environmental organizations or gender-issue organizations.

The solution here proposed is of a non-linear character, i.e. it is a mechanism structured around the way the law-making tends to work in a globalized world (Zamboni 2007b). It allows the social interests to be seated in the very corporate board of directors' room, that is the very room where the decisions directly affecting such interests will be formed. This particular character will also allow for bypassing the often criticized inefficiency and time consuming traditional linear mechanism of control

[14] "The still governing corporate law theory that describes the firm as a nexus of contracts must be reread in light of the changes that affect both the state's and the business corporation's activity… The firm becomes, especially as it assumes ever more public tasks in infrastructure provision and public service delivery, a hybrid actor – neither private nor public –at a crossroads of intertwining demands from the 'state' and the 'market'" (Zumbansen 2006b: 18–19; Wolfe 1993: 1695–1696; Johns 1994: 17).

[15] In transnational administrative law, some scholars have come to a similar line of thought, by offering the new regulatory model of "flexible agency-stakeholder networks" where the basic idea is to include the stakeholders of an agency's decision already in the moment of formulation of the decision-making (Stewart 2003: 448–450).

and representation of public interests typical of the state and state-based regulations of "sensitive" areas (*e.g.* the environment), i.e. a linear mechanism structured around a control power of an external public agency to operate either *ex ante* or *ex post* as to decisions taken by another public agency or by a private actor.

As to the choice in favor of veto rights as the legal power allowed to such as figures as in-house corporate ombudsperson, one should start by considering how, according to the business literature, there are three ideal-typical ways through which actors external to the traditional transnational corporate governance (i.e. all but the board of directors and shareholders) can have their interests represented: *control*, *voice*, and *consideration* (Sheehy 2005: 198). Leaving aside the debate as to their actual content and demarcation, from a legal perspective these three different modalities of representing a certain category's interests are mirrored in three types of rights: *veto rights* (for the control modality), *speech rights* (for the voice modality), and *voting rights* (for the consideration modality).

The choice in favor of veto rights as the best legal tool in the hands of an in-house ombudsperson representing different types of actors actually or possibly affected by the corporate activities, is based on a similar choice made by corporate scholars. In particular, many legal scholars have stressed veto rights as the best option within a corporate governance model also aiming at being sensitive to the interests of the stakeholders *strictu senso* (*e.g.* managers or workers) (Hansmann and Kraakman 2001: 448; Sheehy 2005: 221).

The general preference within the corporate discourse for this way of protecting one's interests can be rooted in the fact that with veto rights, it is possible to maintain the fundamental function of the corporation, the economic one of increasing the profits for the investors. Moreover, the presence of veto rights does not change the structural nature of the corporation as it does not affect the basic principle that the shareholders are the only legitimate body to decide how to use their own investments. At the same time, while keeping the original functional and structural features of today's corporate governance, the introduction of the figure of in-house corporate ombudsperson will allow the corporate structure to adapt itself to the evolution of the surrounding environment. In particular, it will be more sensitive to the that fact that nowadays, in contrast with the nineteenth century, there is a general demand for stronger participation also of stakeholders in a broad meaning (i.e. non-shareholders in general) in the governance of multinational corporations. In other words, an in-house ombudsperson will permit the realization in the transnational legal community also of the general social and political legitimatizion that these non-shareholders (starting with representative of the local population's interests) have acquired in recent decades in somehow restraining cor-

porate activities, even if they do not directly participate in the economic "risks" of such forms of enterprise.

As to the several procedural aspects and issues of this choice in favor of an in-house corporate ombudsperson as the better way to implement the request for more socially oriented transnational corporations also in the legal world, these cannot all be discussed in this work due to space constraints. However, just to mention a few, the choice of person as to directing such a new institutional figure should be left to a mixed private-public agency (where both public and corporate interests are represented) of the state where the corporation is registered. This solution is preferable as it then tends to be compatible with some of the essential legal features of contemporary corporations operating in the transnational context: its mixed regulatory regime (with both private and public actors as law-makers) and the connection of each corporation with one domestic legal regime (as stated above, each corporation, though operating transnational, has to be recognized as such by at least the national legal system of origin).

Moreover, there should always be a possibility for the board of directors to bypass any veto of its decisions, a possibility for instance to appeal to a pre-determined (possibly in the very articles of incorporation establishing each corporation), external, and international tribunal, with the informal and speedy procedural rules typical of contemporary tribunals of arbitration. As to this procedural solution, one should point out that the international character of the tribunal is necessary since otherwise, the choice of a national or international court could compromise the transnational (i.e. private plus public) nature of the new form of corporate governance. Moreover, this possibility of a "way out" for the board of directors can easily be justified by the fact that, even with the bearing of social responsibility, one should not forget that the primary task of a corporation is to operate within an economic context, i.e. a context where the logic of profits (for the shareholders) has to be considered as essential. It is of course true that other types of logics can then come into conflict (*e.g.* the one of sustainable development). In such a case, the most suitable solution is then conflict-resolving intervention by a third-party independent actor. Otherwise, the persistence of any stalemate situation (i.e. a vetoed decision of the corporation) will in practice often only benefit one logic (*e.g.* the environmental one) while damaging the other (the economic one).

Some critical voices can immediately claim that this type of solution has already been tried in the shape of the three tier system, in Germany and in other experiments at a broader European level (*e.g.* the EU Fifth Directive on Company Law) (Hansmann and Kraakman 2001: 445). However, the structural proposal made here in order to integrate social responsibility into the idea of corporation is more in line with the Nordic institution of

ombudsman. There the authority representing the social interests is not part of the mechanism of decision in terms of "codetermination," but the representative of the social aspects has only a legal right to veto in order to "control" the activities of public (or in this case, private) actors. In other words, through the veto right, the ombudsman operates as protector for the interests of others than the shareholders in the very room where the corporate activities are decided, i.e. the board of directors. However, he or she does not have a legal power to directly participate to the formation of the decisions as to the corporate activities.

The solution of an in-house corporate ombudsperson is in line with the recent trends within the corporate discourse, where certain scholars have suggested an evolution of corporate governance into the direction of institutionalizing the figure of "outside directors" (Hansmann and Kraakman 2001: 455–456). Just like the case for the in-house corporate ombudsperson, by inserting this figure into corporate governance, on one side it is possible to keep the accountability of the corporate managers only to the majority of the shareholders, while on the other side it is a clear signal in the direction of recognizing institutional figures within the corporate structure with the specific role of protecting interests other than those of majority of shareholders (Hansmann and Kraakman 2001: 441–443).

Another possible critique can be raised as to the issue of which kind of "public interest" the in-house corporate ombudsperson is going to represent. Corporate social responsibility is actually a conglomerate of often conflicting interests, *e.g.* environmental protection vs. employee rights *vs.* ethnic minorities' rights (1993: 1693–1694). Therefore, the problem of which part of the public interests would be represented in a corporation is natural (Perez 2003: 43). As pointed out clearly by one scholar, one of the major difficulties is to determine "which new groups ought to be represented at the corporate governance table" (Wolfe 1993: 1689–1690). There is then the necessity to identify the normative criteria (and motives) according to which "group" the in-house corporate ombudsperson ought to represent and defend with his or her veto rights (Perez 2003: 44).

Also in this case, the best solution can be modeled around the very idea of the Scandinavian ombudsman and its basic ideological underpinning: it is an institutional figure with the goal of protecting the "rights" of the community in which the corporations operate. Since the criterion to take into consideration is the one of rights to be protected, it becomes natural to make reference to only those interests that are vested with legal dresses (i.e. the shape of rights) formed by international public law. While, for instance, the right to live in a clean environment or to have equal pay for equal work should be considered as one of the targets of the in-house corporate ombudsperson, the violation of economic rights should not be considered as having an equally strong and uncontested protection, at least

as standing within the prevalent doctrine and practice in international public law.

There are several possible advantages in institutionalizing, from a legal perspective, the in-house corporate ombudsperson as a condition for an economic organization to gain the status of corporation within the transnational context. First of all, this solution directly targets where the corporate social responsibility issue is located, namely within multinational corporations operating in the transnational environment. In this way, it avoids finding solutions instead internal to the international community or to the nation state (*e.g.* by creating a state or an international controlling agency), but external to the very corporation. Operating through the latter system, the mechanism of integration of corporate social responsibility into the transnational corporate legal discourse will most likely run the risk of somehow being sabotaged by the very corporations, *e.g.* through the quite diffuse practice of "deceptive behaviors."

As a second advantage, by imposing this type of structure and its non-linear feature (i.e. its requirement of a constant and intersecting dialogue between public and private actors), it is possible not only to make the working procedure of the corporation more in line with the typical "overlapping" feature characterizing the law-making and decision-making processes in a globalized world (Zamboni 2007b). Moreover, the idea of ombudsperson also pushes corporate governance towards a position closer to the ideal of "directly deliberative democracy," an ideal whose lack is usually criticized regarding multinational corporations.

Needless to say, this moving closer to the ideal of deliberative democracy does not mean that the in-house corporate ombudsperson will create a more "democratic" structure within the corporation in itself. A corporation is per definition an economic organization (*e.g.* based on organizational hierarchical processes of productions of goods and services) and therefore somehow foreign to political paradigms (*e.g.* equality between the components of the organization). However, a corporation whose structure embeds a representative of actors others than shareholders will present a structure that fits in better in a democratic context of operation (*e.g.* a democratic state) since the corporation's decisions will be considered as being more "legitimized," i.e. as representing more the interests of those affected by such decisions (Perez 2003: 46; Habermas 2006; Dryzek 2000: 100, 154). In other words, with in-house ombudspersons, multinational corporations will not become more democratic but will at least fit in better in an environment like the transnational one, where the legitimacy of transnational regimes (and therefore also of private actors such as corporations) is increasingly judged by the nature of the process that led to the creation of those regimes, and by the fact that they are in some way accountable to the public (Perez 2003: 29).

Another advantage with inserting a representative of the stakeholders and other groups affected by the decisions of multinational corporations is that, in this way, this new type of corporate governance will offer a "flexible representational framework" (Perez 2003: 56). This quality refers to the ability of an organization to perceive a new event simultaneously through different perspectives (*e.g.* shareholders *and* the local community) and consequently the capacity to expand legal creativity in facing this new challenge, i.e. the capacity of the law "to reinvent itself in a non repetitive way" (Perez 2003: 56). In particular, this socio-economic form of corporation will enable this organization to operate and adapt better to the multi-nature (and not only multinational) environments in which the transnational corporations usually operate. For instance, by having a representative of religious congregations, corporations will most likely become more adaptable to moulding their activities towards communities dominated by a non-secular culture, a reality which comprehends right now one-fourt of world population.

A further consideration supports the option in favor of this new legal model for transnational corporate governance. This has to do with the very policy inspiring the entire legal regulation of governance of multinational corporations. According to Muchlinski, the fundamental policy of transnational corporate law consists in keeping the normative regulation at a minimum in order to guarantee the maximum operational flexibility to corporations. It is true that, as pointed out by Teubner and Luhmann, by inserting a type of logic (*e.g.* social) into a body dominated by another type of discourse (*e.g.* economic), one organization runs the risk of "dialogical paralysis." By this expression is meant that the insertion of a "foreign" logic into the economic culture of a corporation can create an initial incapacity of the board of directors and the in-house ombudsperson to understand each other's underpinning ideologies and, subsequently, it can give rise to time-consuming efforts in simply explaining the basic paradigms of the economic discourse (to the ombudsperson) and of the social discourse (to the board of directors) (Perez 2003: 53).

However, even if this risk of paralysis (or at least delay) due to a lack of comprehension as to the other's standpoints may result (in particular at the early stage), this delay is well overcome by the advantage that, by imposing an institutionalized veto position directly within the board of directors, the regulative power (and in particular in terms of prohibition *ex post*) of external agencies like a hypothetical international EPA, with their long and time-consuming procedures, will be reduced to a minimum. At the same time, operational flexibility will be guaranteed by allowing the boards of directors of transnational corporations to discuss (and eventually overcome) various social (*e.g.* gender related or environmental) issues

within the very structure of the organization, well before strategic decisions are taken and "sent out" for execution (Muchlinski 2007: 52).

## 5. Modes of Governance of Corporate Social Responsibility

Once both the necessity of giving birth to a new legal form of corporation more socially aware is demonstrated with only the limited capacity of the state or state-based provisions to offer through hard-law any contribution in this direction (*e.g.* in terms of setting the external borders of such new regulatory regime), it is now time to move attention to the indication of the modes of governance that should be adopted in order to incorporate corporate social responsibility within the legal concept of corporation as used and perceived within the transnational corporate legal community. As "modes of governance" are usually intended those mechanisms through which the rules in place in a certain community are changed and adapted to the experiences and exigencies of those living under them (Shapiro and Stone Sweet 2002: 55–59). Modes of governance here can then be considered as the modes of changing the (corporate) governance within the transnational legal community in order to "absorb" into the very structuring of the corporation the needs of those operating in this community.

Regardless the type of structural change one chooses as legal "shock-treatment" in order to make the nature of transnational corporations more social-oriented also from a legal perspective, there is a fundamental difference in the modes of governance between the general legal structure in which US corporate law originated and the structure at the transnational context (2006: 117). In the US, as soon as a shock decision is taken at political, social, legal, or economic levels, there are the structural legal possibilities of implementing such shifting of the corporation from an economic nature to a more socio-economic one, *e.g.* through a federal statute or by a decision of the Supreme Court (Backer 2006: 360; Möllers 2004: 329–330). In contrast, transnational corporate law is characterized by the very fact that it lacks central law-making and decision-making authorities with the same degree of legal legitimization and diffusion, such as a National assembly or a Supreme Court can have, in imposing a new legal model of corporate governance as the "only one valid" around the globe (Zumbansen 2002: 36).

As mentioned above, a possible solution surely would be the use of sources of hard-law, *e.g.* through an international treaty sponsored by the UN, imposing "from above" a global regulatory model forcing each national legal system to grant the legal benefits of being a corporation only

to those also fulfilling their social duties (McInerney 2007). A similar kind of hard-law solution (and in particular in statutory forms) for inserting "the social" in the law (i.e. more participation of the interests affected by corporate activities) is offered for instance in legislation at the national level on environmental issues. In particular, it is possible there to observe how it is the very hard-law approach that is the one that has shifted the role of NGOs from being a part of the law-making by litigation to being a part of the law-making by directly sitting in the legislatures (*e.g.* in drafting committees) (Dagget 2003: 112–113).

However, as pointed out by Teubner as to the codes of conduct ofmultinational corporations, "[t]he comprehensive transformation of purely voluntary codes into state-regulated and state-implemented registers is neither probable nor desirable" (Teubner 2010: 274). The imposition from above of a global regulatory model introducing a new legal form of corporation is not probable because it would be pretty difficult to reach an agreement in this direction by the entire international community or even the majority of it.[16] In contast with the historical goal of the "nationalization of the law," which aimed at supporting the construction of the nation state by unifying all regulations under one unique and comprehensive legal system, the globalization of the law has the feature of producing a *polycentric* globalization, i.e. a world where "the primary motor is an accelerated differentiation of society into autonomous social systems [*e.g.* the world of multinational corporations], each of which expands beyond territorial boundaries and constitutes itself globally" (Teubner 2008: 1). Consequently, the reshaping of the entire global legal environment back into one unique homogenized "global law" similar in nature to the one offered by the nation state, seems quite an unlikely task (Fischer-Lescano and Teubner 2004: 1004, 1006).

Moreover, this imposition on corporate practices in the shape of hard-law is not desirable because this solution also brings with it an embedded bias. The creation, in the shape of a UN treaty or with the form of broad multilateral agreements among various nation states, of a socially responsible model of transnational corporation will most likely change the delicate (and up to now quite well-functioning) balance between state-based regulations and non-state based law within the transnational context. The imposition by hard-law of a socially oriented corporate model will instead diminish the importance of the regulation of transnational corporate governance by soft law, by then shifting the transnational form of regulation for corporate governance to a regime heavily dominated (if not mono-

[16] "Substantive harmonization without centralized mechanisms for interpretation is unlikely to produce more than a growing number of very generally worded and essentially hortatory conventions" (Backer 2008: 509).

polized) by a state-based source of law, namely international public law (Schmitthoff 1968: 112; Seidenfeld 1997: 483).[17]

Regardless of any plausible or legitimate objections that can be raised as to the fairness or justice of the whole transnational legal field, and in particular of the sources of soft law, the practice has shown that, as far as concerns corporate law, the substitution of a state-based legal system for a non-state-based legal system is the solution that is more functional. This is both in terms of goals and effects, more function as to the inner-economic nature of the legal figure known as corporation. The preference of (or at least giving space to) soft-law as a fully legitimate modality for regulating corporations in a transnational context is, for instance, confirmed by looking at European company law. In recent decades, at least within the common economic and legal framework of the European Union, it is possible to detect a clear swing from a policy of hard-law regulations towards an approach more favoring soft-law-making. In particular, a shift is noticeable in Europe from state-based regulation to a regulation whose creation and participation actively includes contributions also by private actors. In this respect, the history of the making and applying of rules for European Public Companies (*societas europaea*), that is a model for legally structuring corporate governance throughout the entire European Union, is just the lastest example of the European favor for a soft-law approach (European Council 2001; Zumbansen 2002: 142; Wouters 2000: 226; Pirsl 2008: 281).

Moreover, the use of hard-law in order to give birth to the *harmonization* of certain legal fields, i.e. the maximum expression of the top-down imposition of legal principles coming from international law-making agencies, is usually easier in areas where the economic activity is relatively recent and, for this very reason, has not attracted attention from individual national legislatures or judiciaries. Corporate law, differently for instance from the fight against money laundering or Internet fraud, has been on both the legislative and judicial agenda of the national states for a long time and, at the side of that, has created a bulge of corporate well-established practices. Therefore it appears quite difficult the imposition by harmonizing measures from above (i.e. without the participation of the addressed corporations) of detailed solutions into an already scattered legal regulatory landscape, where in particular major transnational corporations tend to have a solid grip on the regulatory regime of their governance (Béraudo 1997: 11).

[17] For instance, Teubner assigns to the corporate codes the primary task of taking up instances of corporate social responsibility (specifically those connected to workers' right), in particular due to the "inefficacy" of the traditional tools of international law (Teubner 2010: 261–262).

For all the above-mentioned reasons, one should then rule out the option of introducing corporate social responsibility into transnational corporate law by producing a hard-law based structural change of transnational corporate law, i.e. a "shock" treatment of transnational corporate law by operating through a state-based law aiming at re-aligning, through a new figure of socio-economic corporation, the legal concept of corporation to the changed environment.[18] This mode of governance in the end would move transnational corporate law outside its original field, i.e. its being privately made law at the side of traditional state-based law, into a new field, i.e. its becoming a state-based international law (Hansen and Aranda 1991: 890).[19] In this way, it is most likely that the specific features characterizing the success (at least economically) of this legal field, *e.g.* flexibility, sensibility to economic situations and changes, and rapidity both in law-making and decision-making processes, will disappear or at least seriously be endangered (Schreurer 1993: 449). In general, as stated by Schreurer, this attempt of creating international legal institutions that are look-alikes to the national ones is designed for failure "because they do not reflect the decentralized nature of the international community, a feature which is likely to persist in the foreseeable future" (Schreurer 1993: 449).

Having ruled out the use exclusively of the hard-law path, the other viable mode of governance aiming at the problem of having a transnational corporation without embedded social responsibility, can be structured around a soft-law-making and, at the same time, an international (i.e. state-based) system of institutions and binding norms directed to limit and somehow redirect corporations into a more social-compatible way of operating (Kronke 2008: 42, 50). By this mixed solution of soft and hard law-making is meant that, from a legal perspective, the hard-law can then be used only to set the corporations with negative boundaries, while let-

[18] Moreover, it is also a feature of transnational law in general that the latter somehow rejects an exclusive hard-law regulation since "a treaty-based solution would not offer the same variability and flexibility as permitting arbitral institutions to calibrate the rules to their unique procedural settings. A treaty-based solution would also leave the development of the international structure to the 'lawyer-bureaucrat' who is 'attached to the policy-making machinery,' producing results that are 'no longer mediated through the development of a conceptual framework [that] is in tune with the changes of international reality.' The risk is that the solution will be a compromise designed to accommodate various national interests, but in a way that cumulatively undermines the rationality of the whole and leaves its suitability to the international arbitration system in doubt" (Rogers 2003: 28, footnotes omitted).

[19] An alternative path, though still state-based, is the solution offered by Wai, namely the exclusive use of national legal regimes and national courts in order to protect third party interests (regimes and courts to which many transnational legal issues need in the end to "touch down," *e.g.* in terms of enforcement of the arbitrators' decisions) (Wai 2002: 266–268, 271–273).

ting the corporations themselves develop the "positive actions" necessary to create and implement a corporate social responsibility. In this direction, for example, a UN sponsored treaty can prescribe the in-house ombudsperson as a necessary condition for enjoying the legal privileges of being defined as a corporation, while leaving to soft-law measures the actual construction of such a new institutional figure, *e.g.* the issue of selecting which NGOs can participate in the choice of their representative within the governing board of the corporation.

The modes of governance, i.e. the mechanisms to change the governing regulatory regimes, are however not only constituted by the law-making phase; there is also the need to transform the "law in books" into "law in action," i.e. to develop new forms of legal implementation (Zumbansen 2006a: 310). When it comes to transnational law in general, it has been repeatedly seen above that the latter is characterized for lacking a central state-based law-making and decision-making authority. Therefore, while the creation of this new legal category of socio-economic corporation is a task for lawyers (as operating in the sources of both hard and soft law), the real solution of how to implement this structurally changed new form of corporate governance into transnational law lies outside the reach of the legal transnational discourse, and therefore outside the reach of legal actors (Slaughter 2000: 1111).

As done at the early stages of implementation of human rights issues, the concrete implementation of this new legal form of socio-economic corporation (*e.g.* with an integrated in-house corporate ombudsperson) should consist more in operating through non-legal channels: the social discourse (*e.g.* by informing the population both "at home" and "away" as to the justice of this solution), the political discourse (*e.g.* by encouraging the national political elites to the advantages in terms of international political legitimacy coming from allowing only socio-economic corporations to operate on their territories), and the economic discourse (*e.g.* by showing to the corporations and their shareholders the benefits in terms of less long procedure coming from the non-linear insertion, directly into the board of the directors, of interests others than the pure economic ones) (Berman 2005: 545–546; Hansmann and Kraakman 2001: 452; Wai 2002: 260–264).[20] At the end of day, as emphasized by Teubner, the implementation of regulations often "depends on political relationships; that is the pressure exerted by leading actors and the mobilisation of the public" (Teubner 2010: 262).

[20] For example, Zumbansen suggests an extra-legal solution in order to put into practice workers' basic rights within the transnational context: the use of political activists, consumer groups, and NGOs as supervising and controlling the implementation of the code of conducts, i.e. as to making workers' rights binding "as if" they were law (Zumbansen 2006a: 303).

This devolution of the implementation phase to non-legal actors is actually in line with the shareholder-model, widely dominant in the US and here considered as the basic model also for the transnational context, where the "legal mechanism to protect the stake-holders lies outside of corporate law" (Hansmann and Kraakman 2001: 442). For instance, in the US, the previaling strategy used for the concrete implantation of corporate social responsibility into corporate practice has often been making use of the economic road. This can occur, for instance, through the widely spread policy that the non-fulfillment of gender and ethnic minorities' quotas can be considered a disadvantage in procurement contracts with state or federal agencies.

If one moreover considers the issue from the legal positivistic perspective as adopted in this work, this choice in favor of an extra-legal solution as to the problem of implementing a new legal form of corporate governance is further stressed by one consideration. Transnational corporations operate across different legal environments. The latter have different degrees of strength and capability as to transforming legal outputs into legal outcomes, i.e. to transform valid law into law in force (Zamboni 2007a: 139–142). In a less theoretical terminology, one can observe how the globalization of law tends to move at different speeds according to the specific conditions of the national environment, for instance slower in coordinated market economies while faster in liberal market economies (Hall and Soskice 2001: 57–60). As pointed out by Hill as to the final results of her studies on 2002 corporate scandals,

> "Even when identical reforms are adopted across jurisdictions, the regulatory outcomes are unlikely to be the same, given underlying differences in corporate governance systems, legal cultures and enforcement mechanisms" (Hill 2005: 415).[21]

In Nordic Europe, for instance, a national statute can easily reach the implementation of this new form of corporate governance incorporating the "social". The same can also said as to the US, though there the easy implementation of new forms of corporate governance can be considered as a result of a tradition, in particular within the Supreme Court back to the 80ies, of being generally favorable (or at least not negative towards) to somehow retreating from American business' interests in favor of a policy favoring the interests of the transnational community (Shapiro and Stone Sweet 2002: 339–341). At the opposite, in other systems where the legal pluralism is more dominant, operating only on state-based law (*e.g.* national statute implementing an international agreement) is not neces-

[21] More in general, as pointed out by Brenan, "[l]egal scholars and policymakers have an unfortunate tendency to assume that legal norms, once established, simply take effect and constitute a legal regime" (Berman 2005: 498).

sarily a guarantee of success (Baev 1996; Ziabkina 1998). Therefore, in the presence of such legal pluralist context), this risk of an "inefficacy" of the new legal paradigm, though not eliminated, could certainly be reduced by delegating the actual implementation to the non-legal discourses as more appropriate to introduce a certain normative model in a specific community (*e.g.* by using a religious discourse to penetrate non-secular communities.

The maneuver suggested here, i.e. a combined effort of soft-law, hard law, and non-legal channels for the making of a transnational socially oriented model of corporation, should be the best since, for the first, it can preserve the hybrid (private plus public) character of the transnational (corporate) law. Second, it requires a mutual agreement and strong coordination among the different actors populating the transnational corporate community, both legal and non-legal, state-based and non-state based, making then the final and actual implementation of such a new form of corporation easier to reach (Teubner 2010: 274). As stated by Teubner,

> "Their success [of the corporate codes] depends lately on a combination of political and legal constellations, which, on the one hand allows pressures from external actors – that is, NGOs, trade unions, media, international organisations, and domestic organs – to be effective and, on the other, give impetus to a juridification of the civic norms and their interaction with state law so that the codes constitute, not a corporate fad, but permanent valid law, which generates durable legal institutions, and which guarantees the preservation of high labour law standards" (Teubner 2010: 276; Backer 2008: 520–523).

Moreover, in contrast to a purely legal approach, the non-legal channels solution when it comes to the implementation of the new form of transnational corporation can easily be structured in such a way to take into consideration the multilevel feature of the environment of operation (and in particular its "local" level), in which the solution (socio-economic corporation) should be implanted (Hepple 1995: 21; MacKenzie 1994: 71). For instance, by making use of the cultural or religious discourses, one can increase the possibility of succeeding with the implementation of such a legal model in non-secularized local communities; similarly it can be said as to the facilitating role of the economic discourse (*e.g.* by stressing the financial benefits for all) in order to promote this new type of corporation in environments where legal legitimacy tends to have a low impact (*e.g.* nowadays Russia).

Naturally, there is a possible alternative pattern, and in this case a legal one, that can be used in order to implement a new form of corporate governance at the transnational level. However, in this case, it should be necessary to work on the other component (not discussed in this work) of corporate law, namely corporate finance. This option could in particular be taken in order to achieve certain results that the very nature of the corporation (an agreement among individuals for economic purposes) does

not allow to be reached through operational changes of the corporate governance. For instance, a possible solution to the issue of implementation at the transnational level could then be based on an international treaty imposing upon the nation states the construction of a taxation system in the home state constructed in order to either "encourage" financial investment in new socio-economic forms of corporate governance or "discourage" the traditional purely economic model. This working on corporate finance in order to change the equilibrium within corporate governance is moreover not totally foreign to a recent trend. As pointed out by many scholars, in recent years, in particular after the two financial crisis in the nineteenth century, it is possible to observe a broader "global trend… for stock exchanges [i.e. the primary financial institution of transnational corporations] to be more involved in corporate regulation," in particular in terms of forcing corporations to a choice of "comply or explain" as to the disclosure of financial corporate information (Hill 2005: 377).

Regardless the solution one opts for, i.e. legal implementation *vs.* non-legal implementation or changes in the corporate governance *vs.* changes in the corporate finance, it is clear that, when looking at what a corporation is from a transnational legal perspective, the claim by some contemporary corporate law scholarship of placing the implementation of social duties upon the shoulders of today's corporations is quite risky. In particular, these social responsibilities cannot be properly carried by transnational organizations such as Coca Cola or Nike as they are presently structured: from a legal perspective, they are shaped for being functional to their legal essence, namely their being a conglomerate of private actors with a common economic goal.[22] The main risk with inserting the social element through changes in the legal regime of the operative aspects of corporate governance (instead of giving birth, as suggested here, of a structural reform) is that this maneuver will most likely make corporations, which have a legal body essentially built according to an agreement of private actors and in order to play on the economic field, perform badly on the social field (Backer 2006: 359).

[22] An indirect confirmation of this distrust towards transnational corporations when it comes to implementing social and human rights, can be also found in many proposals for a reform of international public law on the issue, in particular among those sponsored by the United Nations. For instance, in the now aborted *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with regard to Human Rights*, the drafters stated clearly that when it comes to both the implementation of human rights and their observance by the corporations, the fundamental responsibility should rely exclusively upon of the state, state-based organizations and state agencies (United Nations 2003, under "General Principles").

## 6. Conclusion

This work has been devoted to offering a normative proposal in order to change the legal idea of corporation dominate today in the transnational context. In particular, the suggestion has been in the direction of inserting corporate social responsibility into the inner-nature of what a corporation is from a transnational legal perspective. Having ruled out the possibility of operational changes (i.e. what the corporation ought to do), the basic idea is that in order to be effective (i.e. to become law in force), this introduction of the social into the legal hard-core of transnational corporations should be done mainly through a combination of structural changes by hard-law and soft law (i.e. what the corporation ought to be) and implementation through non-legal discourses.

To conclude, some years ago a claim was made by a spokesman for Coca Cola that a major mission of his corporation is to implement human rights (PBS 2008); the results of this investigation indicate that this "humanitarian" task can turn out to be quite a dangerous one, at least if the issue is considered in light of the nowadays legal meaning of corporation within the transnational community. To legally force Coca Cola executives to operate in the field of human rights will most likely produce only executives that cannot take care of their business and, at the same time, will perform poorly as NGO's directors. As recently pointed out by a corporate law scholar,

> "One need not to be an advocate of the nexus of contracts approach to recognize that corporations are primarily in the business of making goods and providing services, and that the most we would want the public sector to do is to ensure that they carry out their proper task efficiently and fairly. To give corporations a whole set of new tasks seems to take the problem of corporate governance to a potentially unmanageable new level" (Wolfe 1993: 1692).

It is then a question of giving birth to a structural change, i.e. to create with a legal shock treatment a new legal body for corporations. This new body will have to be more open to the stimuli coming from the surrounding environment and will necessarily have "the social" directly implanted and represented in the very heart of the corporate governance, i.e. the board of directors (*e.g.* in form of compulsory and institutionalized representation with veto power in the executive boards).

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