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The Effect of Economic Integration with China on the Future of American Corporate Law

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Abstract

China's development into a world economic power and its continuing integration with the United States economy raise the question whether China's own history and the socialist context of its domestic corporate law may affect the meaning of business terms in use both internationally and in American domestic corporate law. Of particular interest is the question whether China's entry and impact may blunt the late-twentieth century effort in the United States to change the legal sense of the purpose of an American business corporation.

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Seven years ago it was Enron. Today as we meet it is the American financial system as a whole that presents the question I want to add to our discussion of the integration of China into our own and the world economy through the WTO.

That question is what the term "business," as in "business law" or "business corporation," will come to mean, both in a transnational setting and in American law. In a word, the question is the future of "profit maximization," and by "profit maximization" I mean something quite as specific as is meant by it in finance theory now taught in business schools or the theory of the firm taught in economics departments. It does not mean, there, a primarily monetary interest, a primary concern for economic growth, more income, fewer costs. It means truly "maximization," a sole concern for profit. It is a familiar notion in much Western thought, indeed the hypothesis on which

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organic evolution works in the non-human world. For the lawyers among us, "profit maximization" is a candidate for the critical definition of "corporate purpose" and fiduciary duty in business law. For the internationalists among us, it bears on the generally recognized meaning of basic terms such as "commercial consideration" or "business entity," terms as basic as the companion terms "contract" and "property," none of which can be reduced to the law of any one country.

What is at stake in this difference -- between, on the one hand, making economic decisions with a view toward profit, with profit as the primary consideration, and, on the other hand, making economic decisions "maximizing" profit -- is whether decision makers in the world's business corporations may or must take into account public values that are not measurable in quantitative ways. May or must they take such values into account as such, internally, not at arm's length, firing their imaginations as concerns of the corporation itself for which they act, rather than simply leading them to calculate the monetary cost to the corporation of the actions and reactions of others to whom those values are a real concern?

As streams of thought on this question merge from China and the United States, and from Europe, Japan, India, Islam, and

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beyond as well, what I and I think great numbers of people in the world sense more generally at stake is as large as can be: legitimacy, stability, the environment, a more humane world.

Now as I trace in the paper you have, American law still stands in the way of a wholly calculating and manipulative mentality in business and commerce. It is not the case that American law commands or even allows you, if you are doing your duty to the corporation, to think that in your social role as a business decision-maker you are to play a game with everything and everybody, the law included, become as it were a cynic, whatever you may be in your individual life. I think there is no doubt about this. The American Law Institute, securities law, constituency statutes in the majority of American states, rules of professional responsibility for corporate attorneys, the common law of Delaware closely read, the applicability of the criminal law to the corporation itself with corporate culpability the measure of the sanction: all these components of American law deny an exclusive interest in profit as the legal standard of good business decision-making. Corporate criminal law is especially telling in this regard, with ordinary state criminal law, manslaughter or assault, now applying to corporations as such together with the specific criminal provisions in federal regulatory regimes. Criminality corporate

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or individual, as any of us who has served on a jury knows well, lies in the very failure to internalize a public value -- the value of human life, or the environment, or a competitive economic system. And yet profit maximization has been increasingly taught in business schools and is built into economic models, and this teaching and assumption has spread into American law schools.

Thus the concerns of workers for their safety or security, concerns of consumers, of communities, of and for the environment animate or inanimate, are actually said not to be business decision-makers concerns except as it is useful to make it appear that they are. Business decision-makers are really to respond only to signals in the form of contract or tort damages or regulatory sanctions, and they are meant to minimize those in any way they can as they would any other cost.

These are old issues, decades old, and whatever is taught today in business or law schools, or in international institutions, many of those who act for business institutions do not think or act in this way. What is new in the United States is the nature and source of the pressure to make "maximization" a norm, something to be openly chosen rather than something mandated by necessity. I think this pressure reflects an

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increasingly serious claim on Western thought in general. "Ideology" does not quite describe what can be observed. A widespread project of "naturalizing" captures it better. Exclusive interest in profit, biological or economic, is what evolutionary biologists and many political and social scientists assume in their work of prediction and explanation of the human world, and it has been a useful and productive assumption. But moving from assuming it for predictive purposes, to asserting and teaching it, and, beyond that, to enforcing it as a norm, is a difficult thing to resist, by those who work with it or by others, because it fits a much wider thrust in Western thought that positively wants to see and understand each of us, and each of our institutions, as only self-seeking systems responding to the actions of other self-seeking systems.

Only a few years ago, China and Chinese institutions entered the world economic system, China with its ancient history as well as its twentieth century history and its present system of government. Over these few years our interest has begun to shift from how we can affect China to how we and China together can affect the world, and finally and most recently to how China will affect us. China and the Chinese are owners and creditors and investors and sometimes controlling investors, as America and the Americans are owners and creditors and investors

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and controlling investors. China is becoming legal home to business corporations, as America is. There is Chinese business law and the teaching of it, as there is American business law and the teaching of it. The paper you have was written on the occasion of China's accession to the World Trade Organization. There has been an explosion of economic activity in China since, and the Chinese Company Law I discuss was recently replaced with a newly drafted Company Law. It no longer speaks of "strengthening socialist spiritual civilization" or contains the American Law Institute's formulation of business purpose. But China's present Company Law has many of the same connections with socialist hopes as its predecessor law had, with explicit mandates, for instance, to "respect" and "undertake" "social responsibility" in addition to "commercial ethics," or explicit mandates to make worker safety in production a concern of the corporation itself, not just a concern -- as has been argued here -- of individual workers, or their unions, or public prosecutors, to which those acting for a business corporation might choose to respond if it seemed profitable to do so.

It is easy to observe a huge gap between command and response, theory and practice, in these runaway last years. But the twentieth century struggle between militant "socialism" and "capitalism" did not end in utter elimination of the influence

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of the ideals that might be expressed in "socialism," including its Chinese form. "End-of-history" talk has faded. I do not think we can overestimate the force and life in any of the movements that have brought us from the beginning of the nineteenth century, with slavery over much of the globe, to where we are today. We cannot assume there is not some authenticity in each of them, however mixed with raw desire for power and privilege. And so my question is, will the development of China's economic institutions and China's integration into the world economy, and our own, be a special challenge in an unexpected way? Not competitively, but internally, in what we come to project? Will it have the perhaps surprising effect of blunting the late-twentieth century pressure in the United States to see profit as the sole concern of business decision-making, and ultimately make the way we think fifty years hence more humane than it might otherwise have been?

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