Convergence Upward: The Positive Role Corporate Governance Policy, and the OECD, Can Play in Supporting the Fair Treatment of Stakeholders by Corporations in a Global Economy

By

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I'm honored to deliver this important conference's keynote address. The OECD's work promoting an international economy that works for the many and builds on common values is crucial during these challenging times. The CVM and B3 make Brazil's market system function with integrity, encourage in-bound investment, and create opportunities for Brazilian workers. Issues like climate change and economic security can be tackled only if privileged nations like my own treat nations like Brazil as equal partners and help them simultaneously raise living standards and reduce carbon usage. This conference signals hope for that kind of international cooperation at a time when we surely need it.

In that spirit of hope and the spirit of the good Adolph — Adolph Berle — I offer these remarks to suggest ways that corporate governance policymakers like the OECD might better ensure that corporate power is exercised within a structure protecting the stakeholders and the societies it affects.

Adolph Berle was the deepest 20th century thinker about the importance of constraining corporate power. Berle was among President Franklin Roosevelt's braintrusters, who created the New Deal form of capitalism to ensure that businesses operated in the public interest and workers were paid fair wages and treated with respect. As a diplomat, Berle led FDR's efforts to forge bonds between the United States and South America on the basis of democratic values

and a responsible market system — the so-called "good neighbor policy" — and finished his diplomatic service as Ambassador to Brazil.

After World War II, Berle advocated President Roosevelt's vision of a global New Deal in which fair treatment of all stakeholders would become a core requirement of the world economic system. Berle supported measures like the Marshall Plan (which eventually generated the OECD itself) to encourage leading economies to adopt New Deal capitalism. Berle optimistically believed that a "public consensus" had emerged supporting the pro-stakeholder capitalism system associated with the New Deal in the United States, and social democracy in the wider OECD community. That consensus channeled corporate power so that it was exercised consistently with the best interests of workers and society.

In the last half century, that valuable public consensus has eroded. The erosion began with a mudslide in the U.S. in 1980, when we elected President Ronald Reagan, who considered the New Deal mistaken and wanted the world to return to 19th century, laissez-faire economic policies. This Milton Friedman-type thinking led U.S. policymakers to give primacy to the interests of capital and weaken the ability of workers, consumers, and communities of operation to protect themselves against corporate overreach.

Since the Reagan Administration, Republican leaders in the United States have undercut the ability of workers to unionize, eroded the real value of

minimum-wage laws, trimmed sources of economic security, denuded environmental regulators of authority, and otherwise undermined the New Deal regulatory state. On the international level, U.S. policymakers, even during some Democratic administrations, used their influence over institutions like the IMF, World Bank, and WTO to push many other nations — including in the Americas — to adopt laissez-faire economic policies reducing stakeholder protections. Businesses and nations seeking market participation internationally were given guaranteed access, without corresponding obligations to treat workers, communities of operation, or the environment with respect. Because this trading regime did not protect stakeholders, corporations sought advantage at the expense of stakeholders by playing nations off against each other. This resulted in an unhealthy incentive for OECD nations to reduce domestic stakeholder protections. Instead of a rising floor under stakeholder protections that encouraged competition on innovation and quality, arbitrage in terms of finding inexpensive labor, places to operate where environmental compliance costs were low, and in avoiding taxes multiplied.

This international Reagan/Friedman economic movement accelerated, and acted in concert with, changes within the corporate governance system itself. The strength of stockholders compared to other corporate stakeholders changed. Reagan/Friedman economic policies turned workers from pensioners into forced

capitalists and made them give over retirement savings each paycheck to big mutual funds to control. This steroidal injection of capital and thus power into institutional investors was used to demand manage-to-the-market corporate governance policies, making corporate managers more accountable for delivering returns to equity holders, even if that hurt other stakeholders.

These trends moved with less rapidity outside the U.S., but they did move. Institutional investors are stronger everywhere and large U.S. institutional investors are using their outsized muscle to globalize manage-to-the-market corporate governance policies. Putting a point on this, in every OECD nation except the U.S., the bulk of stockholders are from other nations, and increasingly from a discrete number of powerful institutions.

By stark contrast, union and worker influence is down everywhere in the OECD. The natural result of giving stockholders way more power and cutting the power of workers ensued: the share of corporate profits that went to the workers most responsible for their creation went sharply down, while returns to stockholders and management went sharply up. Worker share is down internationally. Inequality is up, with the gap between the haves and the many growing everywhere.

The last half century also undermined the idea that corporate stockholders are residual risk-bearers who can't win unless others' fair expectations are first

met. Climate change has been fueled by a small set of corporations from wealthy nations, whose stockholders have benefited tremendously. Poorer nations suffered most of the harm and are being asked to sacrifice their use of natural resources at the instance of wealthy nations that did not hesitate to turn theirs into carbon. The immense harm corporations have caused through plastics pollution, tobacco, and opioids further reveals the emptiness of the residual claimant model, where stockholders take all the time, and the residual costs are borne by others.

The challenge of ensuring corporate power respects workers, the environment, and the best interests of society cannot be met without acknowledging that the different corporate law power dynamics of the 21st Century contribute to some of humanity's deepest problems. Stakeholder respect will not be assured without multilateral efforts to restore a supportive public consensus across the global economy. Corporate power has outgrown any single nation's reach, even one as powerful as the U.S. Regulatory arbitrage has put downward pressure on New Deal capitalism, social democracy, and stakeholder protection internationally. Huge institutional investors have pushed corporations to obsess over stockholder returns and to subordinate other stakeholders. And corporate law has helped corporations erode the rules of the game protecting workers and the environment, shift wealth away from workers to investors, and

escape fair taxation, undermining the capacity of governments to address the serious externalities that corporate power has generated.

How might corporate governance policymakers help situate corporate power within a public consensus more aligned with humanity's best interests?

First, we must address the decline in gain sharing with the constituency most responsible for capitalism's success — workers. Here's a suggestion for the OECD. Its corporate governance principles acknowledge that certain nations require that workers have a voice within corporate governance and that corporations must respect those requirements. But the principles do not address the reality that workers within *all* corporations should be a focus of good corporate governance, and that workers are the stakeholder group most responsible for corporate profits. The principles should recognize that *all* workers in *all* large corporations deserve a voice, and that a responsible corporation provides quality wages and working conditions to *all* its employees, *wherever* located.

Let's require boards of all large companies — public or private — to have workforce committees charged with considering the company's policies for worker compensation and benefits, training, safety, and respect; its policies toward living wages, unions, and outsourcing; and its similar policies addressing the treatment of its contracted workforce. Encourage them to experiment with EU-style works' councils and other forms of worker voice. Demand public disclosure by large

companies about the compensation by quartile of their workforce and other important metrics relevant to worker welfare as part of the information the principles require. Include information about median wages and types of jobs in all regions of the world in which corporations operate. Shining a light on what workers are paid in all regions in which corporations operate will encourage convergence up toward living wages for all the world's workers and discourage companies from competing by exploiting vulnerable workers. By encouraging fair disclosure covering all aspects of corporate workforces, domestic and international, the OECD principles would encourage rising standards for worker fair treatment in all global markets.

Soft law like the OECD principles should be accompanied by joint action by the U.S. and its OECD friends to include hard law protections for workers in all trade agreements, so that regionally appropriate minimum wages and the protection of workers' safety and right to organize are the price of inclusion. Fair worker protection and other constraints on the ability of business to exploit other stakeholders, communities of operation, and the environment should be required in every sphere in which corporate power is exercised, and international convergence should be on the enlightened New Deal/social democratic model, not the antediluvian 19th-century one. The minimum wage in Africa or South America need not be identical to that in Canada, Japan, Norway, or the U.S.; but there

should be strong minimum wage requirements and upward convergence toward better wages and working conditions in every global region.

Second, the OECD should promote international convergence toward more respectful consideration of stakeholders in corporate governance. By way of feasible example, OECD governments could give preferences in procurement to B corps certified as meeting responsible stakeholder protection standards and thus deserving of societal encouragement. The OECD could forge a one-stop certification process so that OECD-blessed certification has OECD-wide effect. This boost from government contracting systems would create a profit incentive to move toward greater stakeholder respect and environmental responsibility.

An important corporate law obstacle to stakeholder protection must also be overcome. For nearly a century, the U.S. has relied on disclosure from companies with publicly traded stock to give Americans information about how corporations behave. But our national securities laws have facilitated the emergence of large private companies, many of which are larger than typical public companies, but have no duty of public disclosure about how they treat their stakeholders. This unhealthy public-private divide creates a perverse incentive for large corporations wishing to engage in profit-seeking through behavior injurious to workers and society to "go dark" by going private, leaving us with bigger blind spots about the role corporate power plays in our societies.

But this regulatory arbitrage creating a biased playing field and diminishing corporate accountability to stakeholders is not limited to the U.S. In most OECD markets, the number of public companies has shrunk, and new listings have been exceeded by going privates. It makes no sense to require only companies with publicly traded shares to be accountable to the public for fair disclosure about how they affect workers, communities of operation, consumers, and the climate.

To hold all powerful corporations accountable for behaving in a socially responsible manner, comparable information about stakeholder treatment must be expected from all large corporations, and the OECD should address this rapidly growing problem of disparate treatment between public and private large companies. Applying lessons from those OECD nations where public disclosure of this kind is required of *all* large companies based on the size of their operations would encourage convergence toward common standards of core disclosure about corporate treatment of key stakeholders and the environment. A level playing field encourages competition to occur on the right lines — innovation and quality — rather than through the poor treatment of workers, communities, and the environment. Enhanced disclosure about how corporations make money and treat their stakeholders in all regions of their operations promotes the emergence of a global public consensus holding corporations more accountable for closing a widening equality gap. To this end, the OECD's principles of corporate

governance could address large private companies, harmonize coverage with the Guidelines for Multinational Enterprises on Responsible Business Conduct, and thus ensure that on the dimensions most important to societal and stakeholder protection, large private companies bear equal accountability with public companies.

Third, stakeholder protection cannot be effective unless governments have the capacity to address key social problems and redress corporate externalities like climate change, plastics pollution, and consumer harm. Corporate law has facilitated the systematic erosion of government tax bases, and left governments without the capacity to educate their citizens, provide a social safety net, and address the huge challenge of preventing further climate change and protecting vulnerable populations from the enormous harm already posed by human-caused warming. Why doesn't corporate law itself have a responsibility to consider appropriate limits on the use of wholly owned subsidiaries — set up solely to erode fair taxation — by the nations in which the parent corporation's substantive business operations have transpired — such as where its proprietary intellectual property was actually created and used? Likewise, the world's wealthiest people exploit the ability to split themselves into exponential numbers of corporate entities to place their wealth as far beyond the reach of taxing authorities as possible. As corporations and billionaires erode the tax bases of governments using corporate

structures, they shift the support of government to the less wealthy and reduce state capacity to regulate in the public interest. Corporate law makes this possible. The OECD corporate governance principles, and in particular its Guidelines for Multinational Enterprises, recognize that corporations cannot be good citizens if they don't pay their fair share of taxes and that societies struggling to make the investments necessary to tackle climate change and inequality cannot do so if their treasuries are not fairly supported by corporations making profits within their borders.

To put more force behind these normative principles, required disclosure could be part of the answer. The public in all our nations should know when corporations are absolved from paying taxes required of human citizens. Corporations have undermined the tax bases of governments throughout the OECD, exploiting tax havens and using their leverage to play governments off against each other, and to avoid paying a fair share, well, anywhere. The OECD could buttress the principles by requiring corporations to file public annual tax subsidy reports identifying the extent of subsidies received in the nations where they operate, whether the corporation has honored promises it made in connection with those subsidies, and whether the corporation has sought subsidies by threatening to relocate, downsize or close its operations. By spotlighting corporate rent-seeking like this, we can dampen the enthusiasm corporations have for playing

nations against each other in auctions shifting value to stockholders at the expense of human taxpayers and stakeholders. Such disclosure would also make explicit when corporate success has been facilitated — as it often has been — by tax subsidies, rather than being entirely the result of private investment.

The corrosive effect of using the corporate form and domicile arbitrage to escape fair taxation, undermine stakeholder protection and social safety nets, and fuel inequality must be a priority of all the OECD nations' foreign policies. Corporate taxation must track where they conduct their substantive operations and make money. Parking IP in nations having nothing to do with its creation should not be a legitimate use of the corporate form. Developing, not just wealthy, nations must benefit from fairer corporate taxation regimes, especially given the greater threats they face from climate change and the further they are from prosperity. Only by this means will inequality and corporate externalities be reduced.

Fourth, corporations have escaped full responsibility for vast consumer harm using the shield of limited liability and their wealth to fend off fair accountability. Enormously profitable corporations form insolvent subsidiaries for the sole purpose of shirking future liabilities to tort victims and seek to leave the healthy parent and its "residual claimant" stockholders free from any responsibility to future claimants. Corporate citizenship is a privilege exposing society to

dangers. The transformation of a parent corporation into a proliferating number of wholly owned "subcitizens" challenges the idea that stockholders are residual claimants, and, in a world of global competition, allows for rent-seeking and the avoidance of fair responsibility. Corporate law facilitates these dysfunctions; corporate law has a responsibility to address them. Whether Brazil's approach to this — giving little weight to a wholly owned subsidiary's separate existence in considering where tort liability should fairly rest — is ideal is beyond my expertise. What I do applaud about it is that it confronts the real-world effects corporate law-authorized asset partitioning has on stakeholders who don't have leverage within the corporate power structure, and that further efforts are needed to make sure corporations escape public disclosure and accountability for causing harm.

Fifth, what about corporate behavior that may not violate the law of a particular nation in which a multinational corporation is operating — and may be encouraged by that nation — but that violates widely accepted ethical norms and human and civil rights? Think of American companies that have been pressured by oppressive regimes to turn over data about their customers that might be used to imprison them and to stifle their executives' free speech. This is where norms and other forms of softer law come to the fore, and where the OECD plays a vital role by making clear that multinational businesses have an obligation to honor the

human rights of those they affect — even if the governments in nations where they operate pressure them to be complicit in human rights violations against stakeholders. One promising avenue to reduce these unhealthy pressures on corporations is to expand trade within the OECD bloc and to require nations that wish to benefit from participation in an international market system to respect the basic norms — the public consensus, if you will — expected in terms of the rights of workers and human beings in general. Enlisting private businesses as an arm of a police state is inconsistent with the premises on which organizations like the OECD and WTO are based. Sharing in the benefits of reciprocal commerce must come with the obligation to respect internationally recognized rights of the human stakeholders affected by that commerce. Soft law in the form of not just the OECD Guidelines for Multinational Enterprises on Responsible Business Conduct but also governance codes like the U.N. Principles for Responsible Investing and the G20/OECD Principles of Corporate Governance, and support by institutional investors for corporate resistance to complicity in human and civil rights violations are critical to making progress.

Self-aware Americans must acknowledge why disclosure by large corporations about their treatment of stakeholders *in every market* where they participate and about why encouraging respect for stakeholders *in every market* is so vital. Large corporations that protect their home nation stakeholders face

incentives to take shortcuts harming stakeholders when they seek profit from their foreign operations. EU companies with domestic workers with the right to board representation often locate their foreign operations, even within the U.S., in markets where labor protections are weak. Certain U.S. multinationals have used child labor, underpaid labor, unsafe working conditions, and irresponsible environmental practices to produce profits in developing nations. The corrosive effect of powerful American corporations, like the United Fruit Company and the fossil fuel giants, on the democratic institutions, workers, and environment of many nations is still being felt. Making sure that corporate power operating *internationally* is responsible for fair stakeholder treatment *internationally* is vital in the global economy we have. The OECD is at the forefront of that important endeavor.

Finally, a particular warning from the U.S. The notion that corporations passively exist within a public consensus and rules of positive law, and thus those external protections should be relied upon solely to protect the stakeholders, ignores that corporate money, and thus power, dominates the U.S. political system. Corporations by design generate and amass wealth — wealth ultimately belonging to others, not corporate managers. Stockholders do not invest in them for political purposes, and corporate leaders have no legitimacy to use corporate funds to advance their own values. It turns the proper power dynamic upside down to have

the human society that gives corporations artificial rights like perpetual existence and limited liability subject to outsized influence from corporate money. Corporations should not be able to use the capital of their politically diverse investors to impede protections for workers, consumers, and the environment. Political leaders should not operate within systems where corporations can say "yes" to demands for political donations, because when corporations can say yes, then self-serving politicians pressure them to spend other people's money for reasons contrary to their interests and without their approval. Corporations should operate within a *public* consensus that makes sure that they operate in the *public* interest. Corporations should not set the rules of the game; human beings should.

Corporate law polices conflicts of interest using tools like required participation by independent directors in decision-making, stockholder approval, and disclosure. The plain facts demonstrate the need to use these tools to constrain corporate political influence, because the overwhelming weight of corporate political spending in the U.S. opposes protections for workers, consumers, and the environment, and fair corporate taxation, and this seems to hold true in other nations allowing corporate political spending. To avoid the spread of these poor practices — which Americans of all political persuasions oppose — model governance principles promulgated by organizations like the OECD should make corporate lobbying and political donations part of required public disclosure,

prohibit expenditures unless made under a stockholder-approved plan, and pressure independent directors and institutional investors to police any such expenditures for consistency with stakeholder interests and established human rights principles. Without disclosure and public accountability, politicians and corporate leaders operating in the dark bring out the worst behavior in each other to the detriment of society and public trust in both government and business.

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I do not use this keynote essay to set forth every answer nor do I expect even those who share my view of the problems to agree with my solutions. What I most hope is that you think for yourself about corporate governance the way Adolf Berle did: by tackling what matters. If corporate governance policy is to be a force for good, and not fuel irreversible harm, then it must address the big issues and stop pretending that those issues are for others to grapple with. Corporate conduct from generations ago is affecting our planet in dangerous ways, and so is the unfairness and divisiveness that comes with growing inequality. The impact of billions more of us now, acting on each other and the planet through corporate power, will be even more substantial. If we don't take commensurate action to channel that power in a fair, sustainable direction, our descendants will be the residual claimants of our excesses and inequities.

And if you think I believe that what it takes to do that is an OECD-wide commitment to forging a global New Deal, you understand me.