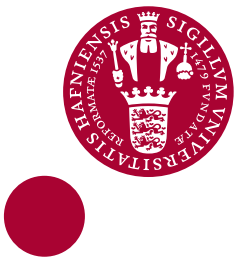

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MacLeod, Sorcha

Published in:
European Public Law

Publication date:
2007

European Public Law

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Published by:
Kluwer Law International
P.O. Box 316
2400 AH Alphen aan den Rijn
The Netherlands

Kluwer Law International
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Kingston upon Thames
Surrey KT2 6SR
United Kingdom

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Subscription enquiries and requests for sample copies should be directed to Turpin Distribution Services Ltd.

Subscription prices, including postage, for 2008 (Volume 14):
EUR 400.00 / USD 528.00 / GBP 294.00.
This journal is also available online. Online and individual subscription price are available upon request. Please contact our sales department for more information at –
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European Public Law is published quarterly.

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ISSN: 1354 3725

Reconciling Regulatory Approaches to Corporate Social Responsibility: The European Union, OECD and United Nations Compared

Sorcha MacLeod*

In recent years the European Union, along with other international organizations has attempted to address the globally relevant problem of Corporate Social Responsibility (CSR). In doing so, the EU has restricted itself to the voluntary mechanisms advocated by business as a means of tackling the issues. This is in direct contrast to other organizations relevant in the European context such as the OECD and the UN. This article compares these three different regulatory frameworks for CSR. It asks which of them is most effective at reconciling the inherent tension between voluntarism and the case for hard regulation as its polar opposite. To this effect, the article examines the EU, the OECD and the UN's most recent initiatives; that is, the Global Compact and the Norms on the Responsibility of Transnational Corporations and Other Business Enterprises with regard to human rights.

Introduction

> 'It's not a simple case of choosing between voluntary or regulatory systems to induce corporate responsibility … Regulation is crucial to minimize abuses and to enforce compliance with minimum norms but it alone will not establish the business case for making the necessary changes. To do so we must provide incentives, so that doing the right thing also makes good business sense.'[1]

* University of Sheffield. Thank you to Professor Tamara Hervey for her invaluable help and comments. Any flaws of course remain my own. Thank you also to Jessica Peake for her research assistance.

[1] M. Robinson, 'Beyond good intentions: corporate citizenship for a new century' RSA World Leaders Lecture, *RSA Journal* 3/6 (2002) pp. 34-36 at 34. For a general discussion of CSR *see* P. Muchlinski, *Multinational Enterprises and the Law* 2nd ed. (OUP, 2007).

There is much talk of the 'business case' in Corporate Social Responsibility (CSR) circles and it is the viewpoint which appears to be dominant. The business case embraces CSR as a voluntary concept whereby transnational corporations undertake to adhere to certain standards of behaviour on a purely voluntary basis. This may involve a firm creating a corporate code of conduct, or participating in initiatives such as the United Nation's Global Compact or the European Union's Multistakeholder Forum.[2] The prevailing view of the majority of corporations, as well as business organizations such as the International Chamber of Commerce, is that there is no need for any CSR mechanism which goes beyond voluntarism. Bodies opposed to undiluted voluntarism include Non-Governmental Organizations and labour organizations. They seek other regulatory regimes for CSR.

The other possibility is – as Mary Robinson says in the opening quotation – something other than a conception of voluntarism as the polar opposite to regulation.[3] Such an approach would reconcile the apparently opposing positions on how best to achieve CSR. This article is based on the proposition that a binary approach to CSR – that is, voluntarism *versus* hard regulation – is unhelpful, impractical and implies entrenched positions from which opposed parties will not move. By reconciling the apparently irreconcilable positions of voluntarism and hard regulation, a compromise approach or 'third way', which rejects the dichotomous relationship of voluntarism and hard regulation, offers the most practical regulatory solution to the question of how to achieve CSR among transnational corporations.

This article compares three different regulatory frameworks for CSR which apply within Europe. The article asks which of them is most effective at reconciling the inherent tension between voluntarism (presented by the business case) and the case for hard regulation as its polar opposite. To this effect, the article examines the EU, the OECD and the UN's most recent initiatives; that is, the Global Compact and the Norms on the Responsibility of Transnational Corporations and Other Business Enterprises with regard to human rights.

The article first sets out the case for voluntarism. This is followed by the case for the opposing view: the case for hard regulatory measures, that is, binding

[2] Communication from the Commission to the European Parliament, The Council and the European Economic and Social Committee, *Implementing the Partnership for Growth and Jobs: Making Europe A Pole of Excellence on Corporate Responsibility*. COM(2006) 136 Final, 22 March 2006 at p. 3. The decision to reinstate the European Multistakeholder Forum came late in the day and only after vociferous complaints from civil society actors that they were being excluded from the Commission's CSR agenda.

[3] This position is also supported in the academic literature, *see* e.g. H. Ward, *Legal Issues in Corporate Citizenship* (2003), available at <www.psicondec.rediris.es/RSC/legalissues_corporate.pdf>. It is also a story which is rehearsed in the Report of the UN Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, J. Ruggie, 'Business and human rights: mapping international standards of responsibility and accountability for corporate acts' A/HRC/4/35, 19 February 2007. (Ruggie Report). *See* section IV in particular.

and enforceable legislative provisions. These two approaches need not be mutually exclusive. They can be reconciled in a 'third way' between voluntarism and legislation. The article then explores what shapes such a 'third way' might take. There are in essence three overlapping potential options. Firstly, a 'mix and match' approach would combine elements of voluntarism with elements of hard regulation. Secondly, a CSR system could be based upon transparency requirements and reporting mechanisms. Finally, there is the possibility of a participatory governance model. The main body of the article then analyses the effectiveness of each of the various legal regimes applicable within Europe at achieving reconciliation between voluntarism and hard regulatory measures.

Voluntarism

The voluntarism approach to CSR is that there is no need for any CSR measures which go beyond non-binding, industry-defined codes of conduct. Under this approach, only firms themselves are involved in determining and adhering to CSR standards. There is no role for legislative authorities, such as Parliaments, or for a wider range of stakeholders, such as NGOs.

Voluntarism is based on the idea of the business case for CSR. The business case proceeds from the assumption that adherence to CSR standards makes good business sense. Put simply, the argument is that CSR is economically advantageous for business, and in particular that consumers will favour companies which act in an ethically responsible manner. Firms that act consistently with CSR standards will not lose competitiveness. Rather they may actually *enhance* their competitive position through improvements to their image and thus their marketing prospects.

Those who argue for a voluntarism-based approach to CSR need to respond to the following question: if CSR does in fact enhance competitiveness, then why does business choose voluntary measures only? What does business have to fear from non-voluntary measures? There are a variety of potential commercial reasons for such a response.

Aside from what appears to be a generalized distaste for regulation,[4] it seems that there is also a perception that imposed CSR will be more expensive in terms of production costs such as wages and employee benefits, and administration. The argument is that this extra expense will affect the competitiveness of European corporations in the global marketplace. Such perceptions are linked to a neo-liberal, laissez faire attitude to commercial activities, that is, the view that the market is

[4] *See*, for example, business responses to the EU Commission Green Paper on Promoting a European Framework for Corporate Social Responsibility, at 3, COM (2001) 366 final (18 July 2001), available at <www.europa.eu.int/comm/trade/issues/europa.eu.int/comm/employment_social/soc-ial/csr/greenpaper_en.pdf> (Green Paper) or to the UN Norms on the Responsibility of Transnational Corporations and Other Business Enterprises with regard to human rights obligations UN Doc. E/CN.4/Sub.2/2003/12/Rev.2 of 26 August 2003.

the most efficient mechanism to dictate how business operates. Only minimal regulation, as necessary to correct the standard 'market failures', is therefore necessary or appropriate.

From a geopolitical standpoint, a neo-liberal reading of economic globalization demands, in theory at least, global freedom for business entities, which can then operate without the encumbrances of (excessive?) regulatory frameworks. Linked to the general notion of global freedom for business is the drive towards Foreign Direct Investment, particularly in developing nations. As a concept propounded by the International Monetary Fund and the World Bank, Foreign Direct Investment encompasses such neo-liberal economic ideas as privatization and focuses on creating safe investment regulatory regimes to protect business investors. Imposed CSR, it is said, may have negative effects on Foreign Direct Investment. For example, it is argued that an imposed CSR regulatory regime could increase costs for potential investors and that it could therefore in fact hinder economic development by also deterring investment.

A further point put forward in favour of voluntarism is that by compelling minimum CSR standards to be adhered to, northern, developed human rights standards are being imposed. For the North to impose CSR standards as enforceable human rights is seen as unfair, as Western economies developed at a time when such CSR standards were not imposed on their industries. To impose CSR standards on businesses operating in the South is thus a form of double standard. Furthermore, an imposed CSR regime applicable in certain parts of the world may encourage 'bottom feeding', that is, the phenomenon that business will seek those jurisdictions without formal CSR standards because they are perceived to be (and may actually be) cheaper for production.

Thus it can be seen that there are numerous motivations put forward for the corporate adherence to voluntarism. Likewise, there are many reasons proposed in favour of other regulatory mechanisms.

Hard Regulation

At the opposite end of the spectrum from voluntarism is the legal positivist view that the only effective means of ensuring that firms adhere to CSR standards is to enshrine those standards in legally binding obligations. According to this view, these obligations should take the form of hard regulatory measures, especially legislative measures, at national, regional and international levels. Such a system of CSR would create rights that are enforceable through litigation. Under this approach, legislative authorities, in particular Parliaments, would have a central role in determining the content of legislative standards and securing CSR. Courts would play their usual role of interpreting legislative rules. Indeed, given the political reality of the law-making processes in this field, agreed legislative texts would be likely to be formulated at high levels of abstraction. This is likely to be true particularly at the regional and international level. This implies that courts

would play a prominent role under the hard regulation approach in determining the practical content of corporate obligations in specific situations. There would also be a role for civil society, in an advisory capacity to legislative processes, and as an enforcer of standards through sponsoring litigation.

In recent years, in every CSR context from the UN Norms to the EU Multistakeholder Forum, NGOs and labour organizations have campaigned vociferously for legislative frameworks on CSR. The consensus among these groups has been that corporations have regularly violated international human rights standards with impunity and that nothing less than an imposed CSR regulatory regime will be sufficient to stop ongoing violations and to prevent future violations.

One of the key arguments in favour of a legislative CSR regime is that transnational corporations have failed to live up to their own self-imposed standards. Throughout the 1990s and early 21st century, codes of conduct flourished among every image conscious corporation in response to the numerous high-profile allegations of human rights abuses which abounded. Yet there is a perception among NGOs and others that the code of conduct project, and by extension voluntarism, has been a failure. Corporate abuse of the UN Global Compact for marketing purposes and the collapse of the EU's Multistakeholder Forum, for example, are pointed to as evidence of that failure, as well as continuing human rights violations.[5]

NGOs also point to the fact that human rights standards are non-negotiable and that international law imposes obligations upon legal persons.[6] The adoption of a CSR legislative framework merely supports existing international norms in relation to human rights as well the principles enshrined in, for example, Permanent Sovereignty over Natural Resources, the New International Economic Order, the Charter of Economic Rights and Duties of States.[7]

In relation to the globalization arguments put forward by the voluntarism camp, there is very little, if any, empirical evidence to support the proposition that an

[5] *See* for example Shell: Friends of the Earth, 'Behind the Shine: The other Shell Report 2003', June 2004, online at <www.foe.co.uk/resource/reports/behind_shine.pdf>, accessed on 1 July 2004; Friends of the Earth press release. <www.foe.co.uk/resource/press_releases/shell_ordered_to_appear_by_11042006.html>, 11 April 2006, Essential Action: <www.essentialaction.org/shell/issues.html> Burma: Burma Project <www.earthrights.org/burma/>,accessed on 11 March 2007. *See also* the ongoing debate about sweatshops: Nike: NikeWatch <www.oxfam.orgau/campaigns/labour/index.html>; Donna Karan: *Lawsuit Accuses New York's Donna Karan of Running Sweatshops*, New York Times 8 June 2000; *See* generally: <www.business-humanrights.org/Home>, <www.nosweat.org.uk/> and <www.cleanclothes.org>.

[6] For a discussion on this *see* S. MacLeod, 'The United Nations, Human Rights and Transnational Corporations: Challenging the International Legal Order' forthcoming ICLQ (2007).

[7] UNGA Resolution 1803 (XVII) 1962 on Permanent Sovereignty over Natural Resources; UNGA Res.3201 of 9 May 1974, UN GAOR Supp. (No.1) 6th Special Sess., UN Doc. A/9559 (1974) 'The Declaration on the Establishment of a New International Economic Order'; UNGA Res.3202 of 16 May 1974, UN GAOR Supp., 6th Special Sess., 'The Programme of Action on the Establishment of a New International Economic Order'; UNGA Res.3281 (XXIX) of 15 January 1975, UN GAOR Supp. (No.31), UN Doc. A/9631 (1975), 'The Charter of Economic Rights and Duties of States.

imposed regulatory regime hampers economic efficiency and ultimately competitiveness in the global market place. Furthermore, if CSR really *does* encourage bottom feeding, this only supports the case for a *global* CSR regulatory regime. The reality is that rather than seeking to avoid CSR standards in order to attract Foreign Direct Investment, many developing states are keen to embrace them but have been thwarted in their attempts.[8]

A 'Third Way' For CSR?

Notwithstanding the obvious inconsistencies between these two approaches, there is no imperative for them to be always regarded as polar opposites. There is scope for a kind of 'third way' of CSR regulation. Although NGOs and labour organizations have argued for the hard regulation approach, recently they have indicated a willingness to embrace such 'third way' positions. Business, on the other hand, appears to have remained static in its support for voluntarism.

What would this 'third way' look like? For the purposes of analysis, three interconnected possibilities can be identified. One possibility is the creation of 'mix and match' regulatory structures that bring together elements of voluntarism and hard regulation.[9] Legislative measures could be combined with non-binding measures. For instance, a binding legislative obligation could be imposed upon firms to comply with their own voluntary codes of conduct.[10] The content of the codes of conduct would thus be determined by business itself. Nevertheless, litigation would be available as a strategy to enforce compliance with those obligations that firms chose to take upon themselves. This kind of 'immanent critique' would respond to the criticism that voluntary codes of conduct are no more than empty promises. Another example would be to embed soft CSR standards within public procurement provisions.

A second possibility is to use transparency requirements to promote compliance with CSR. Firms could be obliged to report publicly on what they have done to comply with CSR standards.[11] These standards might be internally produced, by

[8] *See* the Ruggie Report *supra* note 3.

[9] For example, Kolben argues for the linkage of public and private regulatory approaches in order to incorporate social standards and labour rights into free trade agreements, *See* K. Kolben, 'Integrative Linkage: Combining Public and Private Regulatory Approaches in the Design of Trade and Labor Regimes' 48 *Harvard International Law Journal* (2007) 203.

[10] European Coalition for Corporate Justice (ECCJ), Advocacy Briefing, Corporate Social Responsibility at EU Level: Proposals and recommendations to the European Commission and the European Parliament, November 2006 at pp. 2, 3 and 4. Another example is Nowak's proposal that a putative World Court of Human Rights could have jurisdiction over transnational corporations which accept voluntary codes of conduct with references to human rights standards. *See* M. Nowak, 'The Need for a World Court of Human Rights' 7 *Human Rights Law Review* (2007) 251 at 256-7.

[11] <www.unglobalcompact.org/AboutTheGC/integrity.html>.

firms themselves, or created externally, either by non-enforceable legislative or other regulatory instruments, or by a participatory mechanism bringing together all of the relevant stakeholders (see below). A system of peer review, or external review by an international organization, or regional or national regulatory body, could provide an assessment of the reports. Examples of best practice would be made available for firms to draw upon in the future. Practices of 'naming and shaming' and league tables could induce firms to improve their CSR ratings, for reasons of image, and 'good business sense'.[12]

Alternatively, a CSR system could be built on a participatory model. A participatory model would involve business, legislative authorities, and civil society. No single actor therefore would have control over the creation of CSR standards. All stakeholders would be involved in securing adherence to CSR standards. The standards themselves would be developed through an on-going dialogue between the relevant stakeholders, resulting in (provisional) statements of CSR good practice. The stakeholders would also monitor adherence to these non-binding norms, for instance through the practice of peer review, 'naming and shaming' and league tables outlined above. Such a system might be supported by legislative instruments that obliged the relevant parties to 'come to the table' and negotiate. A 'penalty default' of an enforceable CSR obligation might underpin such an approach,[13] and ensure that it would be in the interests of all stakeholders to participate.

In some respects, existing regulatory systems incorporate elements of the third way approach. The remainder of this article considers three such regulatory regimes: those of the EU, the OECD and the UN. The question is, which of these three systems is best at reconciling voluntarism and hard regulation?

European Union

Overall the EU has been relatively slow to embrace the concept of CSR, despite its public pronouncements about the long European tradition of 'socially responsible initiatives by entrepreneurs'[14] and its claim that it wants to be a 'pole of excellence' in CSR, leading the global way. There have been, however, several voluntary

[12] *Ibid.*

[13] The term 'penalty default' was first used by Ian Ayres and Robert Gertner, in 'Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules' 99 *Yale Law Journal* (1989) 87, in the context of contract law. A *regulatory* penalty default rule provides an incentive to stakeholders to reach agreed regulatory solutions, where the default position, which will apply in the absence of a bargained agreement, is unappealing to the stronger party. *See* B.C. Karkkainen, 'Information-forcing Regulation and Environmental Governance' in G. de Búrca and J. Scott (eds) *Law and New Governance in the EU and the US* (Oxford: Hart, 2006).

[14] Communication from the Commission Concerning Corporate Social Responsibility: A Business Contribution to Sustainable Development, at 5, COM (2002) 347 final (2 July 2002) (Corporate Social Responsibility).

initiatives over the years which have attempted to regulate corporations in the social sphere, both within the EU and externally.

Early EU CSR attempts were meagre and piecemeal. So for example, the European Employment Strategy, EU-Ecolabels, and the Eco-Management and Audit Scheme (EMAS) all attempt to promote socially responsible business within the EU. The EU-Ecolabel is a voluntary initiative designed to encourage the production of more environmentally friendly goods and services. It also strives to ensure transparency for consumers.[15] EMAS 'promotes continuous improvements in the environmental performance of industrial activities by committing firms to evaluate and improve their own performance'.[16] All three of these examples encourage CSR among European enterprises on a purely voluntary basis.

In the EU's external relations policy, the Cotonou Agreement with African, Caribbean, and Pacific nations constitutes a more concrete attempt to promote human rights norms. The Agreement 'incorporated a clause defining human rights as a fundamental element of the agreement which serves as the basis for dialogue with a third country government on human rights'.[17] This clause arguably represents a move away from voluntarism, because it imposes obligations, albeit upon states rather than on corporate entities themselves.

Notwithstanding these piecemeal attempts, it was not until 2001, that the EU elucidated its views on CSR in two important Communications: firstly, the 'Communication on the EU role in promoting human rights and democratization in third countries';[18] and secondly, the 'Communication on Promoting Core Labour Standards and Improving Social Governance in the context of Globalisation'.[19] On a practical level, the Communications provide incentives in the form of trade liberalization 'under the EU's Generalised System of Preferences (GSP) where countries comply and apply minimum social and environmental standards'.[20] Further, the GSP ensures compliance by imposing sanctions, in the form of preference withdrawal, when countries 'commit serious and systematic violations' of International Labour Organisation (ILO) core labour standards.[21] The EU sought to advance human rights

[15] *Ibid*., at 15. For more information, *see* European Union, Eco-label Homepage, <www.europa.eu.int/comm/environment/ecolabel/index_en.htm>.

[16] Corporate Social Responsibility, at 20.

[17] *Ibid*., at 22.

[18] European Commission, The European Union's Role in Promoting Human Rights and Democratisation in Third Countries, COM (2001) 252 final (8 May 2001).

[19] European Commission, Promoting Core Labour Standards and Improving Social Governance in the Context of Globalisation, COM (2001) 416 final (18 July 2001).

[20] Corporate Social Responsibility, at 22.

[21] *Id*. For more information on the GSP *see* Press Release, European Commission, Generalised System of Preferences (1 March 2001), <www.europa.eu.int/comm/trade/issues/global/gsp/eba4.htm>. The GSP applies to the Least Developed Countries: Additional preferences are immediately granted to developing countries that have ratified and effectively implemented the 16 core conventions on

by encouraging businesses operating in developing states to promote human rights values in relation to, *inter alia*, workers' rights and ethical standards, 'particularly where their operations have an influential role in countries with a poor record in this area'.[22] Of course, this may be precisely why some corporations choose to locate in such countries: to engage in so-called bottom-feeding.

Corporate misbehaviour was not addressed directly by the proposals outlined in the Communications. Publication of the 'Manifesto of Enterprises against Social Exclusion,' which resulted in the creation of the European Business Network in 1995 was the initial starting point for specific EU development of the concept of CSR.[23] The manifesto advocated an open dialogue between the relevant actors and the exchange of best practice on CSR.[24] By 2000, the year of the Lisbon Summit of the European Council, CSR was 'put at the top of the political agenda' within the framework of sustainable development.[25] The Göteburg Summit in June 2001 specifically considered the role of companies within society and within the context of a 'sustainable development strategy' for Europe.[26]

As a consequence of discussions at the summit, the European Commission published its 'Green Paper on Corporate Social Responsibility'.[27] Its stated aim was to stimulate debate about CSR within the European context rather than 'mak-

human and labour rights and 7 (out of 11) of the conventions related to good governance and the protection of the environment. At the same time beneficiary countries must commit themselves to ratifying and effectively implementing the international conventions which they have not yet ratified. In any case, the 27 conventions have to be ratified by the beneficiary countries by 31 December 2008. European Commission, Generalised System of Preferences, <www.europa.eu.int/comm/trade/issues/global/gsp/memo201004_en.htm> (accessed on 11 October 2005). The core human rights conventions include *inter alia* Universal Declaration on Human Rights UN Doc.A/811 10 December 1948; International Covenant on Civil and Political Rights 1966, 999 UNTS 171; Genocide Convention 1948, 78 UNTS 277; Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984, 1465 UNTS 85; International Convention on the Elimination of All Forms of Racial Discrimination 1966, 660 UNTS 195; Convention on the Elimination of All Forms of Discrimination Against Women 1979, 1249 UNTS 13; Convention on Biological Diversity 1992, 1760 UNTS 142.

[22] Corporate Social Responsibility, at 23.

[23] Commission Green Paper on Promoting a European Framework for Corporate Social Responsibility, at 3, COM (2001) 366 final (18 July 2001), available at <ww.europa.eu.int/comm/trade/issues/europa.eu.int/comm/employment_social/soc-ial/csr/greenpaper_en.pdf> (Green Paper).

[24] *Ibid*.

[25] Press Release, European Union Communication on Employment and Social Affairs, Corporate Social Responsibility: New Commission Strategy to Promote Business Contributions to Sustainable Development (2 July 2002), <www.europa.eu.int/comm/trade/issues/europa.eu.int./comm/employment_ social/news/2002/jul/131_en.html>.

[26] European Multistakeholder Forum on CSR, Final Results & Recommendations 2 (2004).

[27] Green Paper. Responses were invited from interested parties and submitted by 31 December 2001.

ing concrete proposals for action'.[28] In other words, the European Commission was not prepared to adopt even a soft law approach. From the outset, the Green Paper constricted any debate by relying on a very limited, and business-oriented, definition of CSR, describing it as a 'concept whereby companies integrate social and environmental concerns in their business operations and in their interaction with their stakeholders on a voluntary basis'.[29] The Commission has continued to maintain this approach.

As its basis, the Green Paper drew on the concept of the triple bottom line.[30] It asked several key questions relating to the role of the EU in CSR development; the role of CSR for business; the role of civil society in CSR; which CSR mechanisms were most appropriate; and how CSR could be monitored and evaluated. Member States, the business community and civil society were invited to respond.[31]

It is unsurprising that the Commission's emphasis on the voluntary nature of CSR did not find favour with many of the NGOs responding to the Green Paper.[32] Likewise, the proposition that CSR should be integrated into business operations, as opposed to being the starting platform from which business is conducted, was

[28] *Ibid*. at 23.

[29] Green Paper, at 6.

[30] This term refers to the concept of triple bottom line accounting whereby the traditional company reporting framework takes account of environmental and social performance in addition to the more usual financial matters.

[31] There were 261 responses to the Green Paper, (*see* European Commission, Responses to the Consultation on the Green Paper on CSR, <www.europa.eu.int/comm/employment_social/soc-dial/csr/csr_ responses.htm> (Green Paper Responses) with only nine out of fifteen Member States responding. These were Belgium, Germany, Finland, France, Ireland, Netherlands, Austria, Sweden and the UK. Of the forty-nine individual company responses, more than half were from UK-based corporations. 27 individual UK corporations responded and another 32 responses were received from networks representing the corporate sector, e.g. International Chamber of Commerce, Law Centres Federation. A large number of UK-based TNCs responded to the Green Paper. It may be that CSR has a high profile in the UK in the wake of the RTZ asbestos litigation, and the BP Brent Spar fiasco. This could also explain the relatively large number of US firms responding, e.g. NIKE, Levi Strauss. However, it is surprising that Shell did not submit a response in light of its experiences in Nigeria. The trade union movement including the Trade Union Congress submitted sixteen responses, while NGOs submitted thirty-five responses. NGOs which responded included, at the international level, OXFAM, Amnesty International, Save the Children and WWF. UK NGOs submitting responses were Baby Milk Action IBFAN, Christian Aid, Friends of the Earth, New Economic Foundation (NEF) and the Solicitors Pro Bono Group.

[32] *See* e.g. Submission from Amnesty International on The European Commission 2001 Green Paper: Promoting a European Framework for Corporate Social Responsibility, at <www.europa.eu.int/comm/employment_social/soc-dial/csr/pdf2/091-NGOINT_Amnesty-international_int_011219_en.htm> (§ 1 Definition of CSR). Amnesty International argues that CSR should not be an 'add-on to core business activities' and states that the assumption that CSR should be viewed as voluntary is 'flawed in that it fails to take account of the reality that voluntary approaches are generally implemented in response to consumer and community pressures, industry peer pressure, competitive pressure or the threat of new regulations or taxes,' i.e. rarely voluntarily.

negatively received. At this stage, the trade unions and the NGOs advocated a 'regulatory framework' that established 'minimum standards' and ensured 'a level playing field'.[33]

Another criticism levelled against the Green Paper concerned the intense focus on the 'business case', with little consideration for the interests of the wider constituency of stakeholders. This is a recurring criticism of the Commission's attitude to CSR. Critics also argued that the Commission's definition of CSR is flawed.[34] In particular, it is not clear *what* the Commission is seeking to protect through the adoption of CSR. The reference to a wide variety of international legal instruments, such as the Universal Declaration on Human Rights, ILO Conventions, and the UN Convention on the Rights of the Child, has caused much confusion.[35] Again, there is clear conflict between those who want regulation and those who do not, and the debate is framed in those terms.

In the responses to the Green Paper, there is a remarkable homogeneity between individual corporate responses and the responses of industry representatives. The responses emphasize self-regulation, while demonstrating a lack of enthusiasm for enforcement mechanisms, temporization of implementation requirements, but marked enthusiasm for voluntary CSR, and good practice. The responses also displayed a general abhorrence of a 'one-size fits all' approach to CSR. Even the very title of the communication – the 'Communication from the Commission concerning Corporate Social Responsibility: *a business contribution* to Sustainable Development' (The Business Contribution Communication) – clearly adheres to the business case. The Communication refers to frameworks, promotion, assistance, awareness, support, and good practice, but there is no indication that formal regulation is a possibility,[36] much less a rejection of the dichotomy between voluntarism and hard regulation. Additionally, the Commission has retained its arguably flawed definition of CSR.[37] 'In principle, adopting Corporate Social Responsibility is clearly a matter for enterprises themselves'.[38] The Commission continues, 'Nevertheless … there is a role for public authorities in promoting socially and environmentally responsible practices by enterprises.'[39] The Business Contribution Communication is thus almost entirely couched in terms of voluntarism. There is little sense of any

[33] Corporate Social Responsibility, at 4.

[34] *Ibid.,* at 4. *See also* the individual responses of the NGOs and trade unions to the Green Paper.

[35] UN Doc.A/811 10 December 1948; Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy 17 ILM 422 (1978) adopted by the Governing Body of the International Labour Office at its 204th Session, Geneva, November 1977; G.A. res. 44/25, annex, 44 U.N. GAOR Supp. (No. 49) at 167, U.N. Doc. A/44/49 (1989), entered into force 2 September 1990.

[36] Corporate Social Responsibility, at 7 ('In principle, adopting CSR is clearly a matter for enterprises themselves').

[37] *Ibid.*, at 5.

[38] *Ibid.*, at 7.

[39] *Ibid.*

recognition that the case for other regulatory measures exists, let alone any attempt to reconcile the two positions.

There is firm support in the Business Contribution Communication for the OECD Guidelines on Multinational Corporations, which may affect the operation of the OECD National Contact Points (NCP) (discussed below) and result in deeper cooperation.[40] Further, utilizing the OECD Guidelines as well as the International Labour Organisation's Conventions encourages convergence between codes of conduct emanating from different regulatory regimes, by providing 'a common minimum standard of reference'.

The Business Contribution Communication contains several practical proposals. Firstly, it proposed the creation of an EU Multi-Stakeholder forum on CSR (EMS forum), which was formally established in October 2002, and reported its conclusions in June 2004.[41] The EMS forum had 'the aim of promoting transparency and convergence of CSR practices and instruments'.[42] To that end, the EMS forum was to be composed of representatives from states, non-governmental organizations, corporations, and wider civil society.[43] In this respect, the EMS forum represented some elements of a 'third way' approach to CSR, in that it recognized the interests of non-business actors and sought to promote their participation in formulation of (admittedly voluntary) CSR measures.

Second, it was proposed that the EMS forum should consider the integration of CSR into all EU policies including employment and social affairs policy, enterprise policy, environmental policy, consumer policy, and public procurement policy.[44] The Business Contribution Communication also specifically addressed external relations polices. It advocates, as already discussed within the context of the Green Paper, the promotion of CSR in line with the 'Communications on the EU role in promoting human rights standards and democratisation in third countries'.[45] This promotion of CSR includes 'the use of bilateral dialogue with Governments' and 'trade incentives' as well as 'engaging directly with multinational enterprises.' This approach appears to embrace at least some elements of the 'third way', in that it engages a wider range of stakeholders than simply business, in particular it engages the governments of third party countries.[46]

[40] *Ibid*., at 13-14.

[41] European Multistakeholder Forum on CSR, Final Results & Recommendations (2004).

[42] Corporate Social Responsibility at 17.

[43] *Ibid*.

[44] Some of the suggestions put forward for consideration by the EMS included (1) the incorporation of a framework directive harmonizing the fairness of commercial practices; and (2) the production of a handbook on 'green' public procurement. Corporate Social Responsibility, at 21-22.

[45] European Commission, The European Union's Role in Promoting Human Rights and Democratisation in Third Countries, COM (2001) 252 final (8 May 2001).

[46] Corporate Social Responsibility, at 22-23.

One of the criticisms levelled at the Commission's Communication by the European Parliament in its Report in April 2003 was that the Parliament was 'frozen out of the process in a way that is unacceptable: the Commission Communication was effectively written before the Parliament's response to the Green Paper had been absorbed', thus yet again appearing to reject a participatory model of CSR.[47] Beyond this general criticism, there appeared to be broad Parliamentary support for the Commission's strategy, at least in the conclusions reached by the Committee on Employment and Social Affairs.

There was, however, clear support among the various reporting committees for at least some mandatory rules. For example, the Committee on Industry, External Trade, Research, and Energy (CIETRE) demanded a 'Global Convention on Corporate Accountability' on the basis that 'world society has a right to accountability in terms of environmental, social and human rights from transnational corporations and … SMEs'.[48] This framing of a 'right' to 'accountability' again conceptualizes CSR in terms of voluntarism *versus* hard regulation. The Committee on Development and Cooperation sought to establish the extraterritorial reach of CSR by calling upon the Commission to 'create an agency which would be responsible for introducing a system for assessing and monitoring observance of international and national standards on CSR and the environment by EU companies operating in developing countries'.[49] The Committee on the Environment, Public Health, and Consumer Policy went further. It emphasized that 'companies should be required to contribute to a cleaner environment by law rather than solely on a voluntary basis', but it also invited the Commission to 'explore ways of establishing a system of corporate accountability to citizens.'[50] This might be seen as a call for an exploration of alternative CSR mechanisms, and in this respect it is an unusual example in the EU context of interest in third way approaches to CSR. Nevertheless, despite the various committee reports, the Committee for Employment and Social Affairs still came to the conclusion that a voluntary, soft law system was the best model.[51]

The European Multi-Stakeholder Forum presented its final report in June 2004,[52] but despite twenty months of consultation and consideration, the business and civil society approaches to CSR were irreconcilable. Notably, the first paragraph of the Foreword states that '[t]here are some differences and debates that remain. Members of the Forum expressed their views about the merits and limitations of this Report

[47] European Parliament Committee on Employment and Social Affairs, Report on the Communication from the Commission concerning Corporate Social Responsibility: A Business Contribution to Sustainable Development (COM(2002) 347-2002/2261(INI)), 12 A5-0133/2003 final (28 April 2003).

[48] *Ibid*., at 16.

[49] *Ibid*., at 22.

[50] *Ibid*., at 18.

[51] *Ibid*., at 8.

[52] European Multistakeholder Forum on CSR Final Results and Recommendations 2004.

in their speeches and statements made on the occasion of the plenary meeting of the Forum'.[53] The traditional battle lines have been drawn, with business on one side and NGOs, trade unions, and other stakeholders on the other. Ultimately, the Report makes lengthy recommendations of a non-binding nature, expressed in terms of 'cooperation,' 'promotion,' 'explore,' and other general statements.[54] For example, there are recommendations for 'increasing awareness' of CSR, encouragement of 'cooperation with stakeholders,' support for more empirical research on CSR and stress on the diffusion of information about CSR, and emphasis on cooperation with and between companies. In other words, the business case prevailed and the EMS final recommendations reflect voluntarism.[55] The EMS therefore failed to move the EU away from the binary approach to CSR, the idea that voluntary and other regulatory approaches are opposed and cannot be reconciled.

Whilst in the past, NGOs and trade unions wanted the EU to create a concrete legal CSR framework, with all that such a framework would entail, their current position has changed. Now these stakeholders are seeking a combination or third way approach to CSR.[56] From their perspective, the key limitation of the EMS report is the failure to recommend any form of monitoring or compliance procedure. A letter from the NGOs to the Commission and Council commented on the necessary steps for future progress:

> 'Taken together, the recommendations, if they are fully implemented by the relevant actors, will help to generate a significant advance. For that to happen, it will be necessary to develop them into a proper framework that complements the voluntary commitment of a steadily growing number of companies with proactive and consistent public policies to create the right enabling environment and ultimately to ensure accountability by all companies.'[57]

This middle way seems an obvious solution to the tension between the proponents of regulation and those who oppose it. The EMS, however, is yet to adopt this position.

[53] *Ibid.*

[54] *Ibid.*, at 12-16.

[55] *Ibid.* Although the European Parliament describes the seventh recommendation of the Report as promoting the creation of a legal framework for CSR, in the context of the rest of the Report, this can only mean a soft legal framework.

[56] For an overview of the NGO position, *see* the European Coalition for Corporate Justice Advocacy Briefing, 'Corporate Social Responsibility at EU Level: Proposals and recommendations to the European Commission and the European Parliament' November 2006 p. 4 *et seq.* (ECCJ Advocacy Briefing).

[57] Letter from Anne-Sophie Parent, President, Social Platform, *et al.*, to Commissioner Liikanen, *et al.* (29 June 2004), available at <www.psicondec.rediris.es/RSC/legalissues_ corporate.pdf.europa.eu.int/comm/enterprise/csr/documents/29062004/ngocs.pdf>.

Finally, after numerous delays, the Commission published a second Communication in 2006 entitled 'Implementing the Partnership for Growth and Jobs: Making Europe a Pole of Excellence on Corporate Social Responsibility' (the Pole of Excellence Communication).[58] NGOs were particularly concerned by the delay in publication as it was felt that CSR was being sidelined as opposed to mainstreamed, perhaps in line with the EU's increased emphasis on competitiveness in line with the Lisbon Strategy.[59]

More significantly, NGOs were excluded from the consultation process. The Commission chose to consult with business groups alone and did not include any representatives from civil society.[60] This reflects the Commission's position in the Pole of Excellence Communication where it explicitly moves away from the wider participatory model of CSR by saying that it will 'work more closely with European business' through a new European Alliance on CSR membership of which is only open to business enterprises.[61] Other stakeholders are acknowledged, but they are given no formal role in the CSR process with the Commission saying that it 'continues to attach the utmost importance to dialogue between all stakeholders' but no more. NGOs, through the European Coalition for Corporate Justice, expressed horror at this development,[62] especially in light of corporate attitudes which seemed to be that the impact of CSR ought to be minimized as much as possible.[63] The Commission did reinstate the EMS at a late stage, and after intense lobbying, via the Poles of Excellence Communication.[64] So latterly it would appear the Commission has recognized the value of a participatory CSR process.

In terms of the regulatory model adopted, once again the Commission adheres to voluntarism, primarily in its definition of CSR as a 'concept whereby companies integrate social and environmental concerns in their business operations and in their interactions with their stakeholders on a voluntary basis'.[65] Its rationale for focus on voluntarism is that 'an approach involving additional obligations and administrative requirements for business risks [would be] counter-productive and

[58] COM(2006) 136 final 22 March 2006.

[59] ECCJ Advocacy Briefing, at p. 1.

[60] *Ibid*., at p. 3.

[61] *Ibid*., at pp 3-4.

[62] 'A multistakeholder approach … has been abandoned outright.' The European Alliance on CSR is 'perfectly suited to become a major greenwash operation' and 'poses a great danger to serious CSR initiatives'. ECCJ Advocacy Briefing p. 3.

[63] Letter from UNICE, *ibid*., at p. 5.

[64] *Ibid*., p. 4. *See also* Press Release, 'Europe sees progress on Corporate Social Responsibility,' IP/06, Brussels 8 December 2006: 'The European Commission believes that while enterprises are the primary actors in CSR, credible CSR practices need to be developed with other stakeholders, such as trade unions, non-governmental organisations, public authorities and academic institutions.'

[65] Poles of Excellence Communication, *ibid*., at p. 2.

would be contrary to the principles of better regulation'.[66] This is again despite the strong opposition of NGOs which was voiced in the Final Report of the EMS and ever since.[67] The NGOs appear to be seeking a compromise 'third way' in terms of regulation and explicitly call upon the Commission to 'depolarise the debate on voluntary versus mandatory approaches to CSR'.[68] Rather than seeking the imposition of strict legally binding instruments, NGOs are now calling for a compromise variety of different regulatory mechanisms. Regulatory recommendations include mandatory social and environmental reporting, redress mechanisms, extra-territorial application of human rights and labour standards and a duty of care upon companies and their directors regarding social and environmental impacts.[69] The rationale for this is that voluntary initiatives gain credibility when they are supported by 'effective legal safeguards.'[70] In addition, the NGOs have proposed some alternative regulatory CSR mechanisms such as independent monitoring and verification, multistakeholder initiatives, and mandatory social and environmental reporting as a means of achieving transparency.[71]

Furthermore, the European Parliament has recently adopted a Resolution on Corporate Social Responsibility: A New Partnership.[72] The Resolution is based on the Special Rapporteur's report to the Committee on Employment and Social Affairs. In essence, the Resolution seems to chastise the Commission for its failure to engage all the relevant stakeholders in CSR regulation. It welcomes the reinitiation of the EMS,[73] and restates the importance of including non-business stakeholders in the European Alliance for CSR.[74] Although the Resolution welcomes reporting by business on their CSR compliance, it notes that very few reports refer to human rights norms, or cover the entire supply chain.[75] Of course, the European Parliament has no formal role in EU CSR regulation, and the European Commission is not obliged to follow any of its recommendations.

Two criticisms have been levelled consistently against the EU's CSR strategy. Firstly, that there has been an undue and unwarranted emphasis on voluntarism and secondly, that the interests of stakeholders have been marginalized and in some cases ignored. There are instances of the EU paying lip-service to a third way

[66] *Ibid.*

[67] *Infra* at p. 15 and *ibid.* at p. 1.

[68] *Ibid.*, at p. 4.

[69] *Ibid.*, at pp3-4.

[70] *Ibid.*, at p. 3.

[71] ECCJ Advocacy Briefing, p 6.

[72] A6-0471/2006, 13 March 2007.

[73] *Ibid.*, at para. 14.

[74] *Ibid.*, at para. 11.

[75] *Ibid.*, at para. 26.

in CSR. For instance, the website of the Directorate General for External Trade describes CSR as

> 'not a substitute, but a complement to hard law. As such it must not be detrimental to public authorities' task to establish binding rules, at domestic and/or at international level, for the respect of certain minimum social and environmental standards. The focus of the debate in this respect has now moved on from a simple dichotomy between voluntary and binding instruments, towards the overarching challenge of devising reporting tools and verification mechanisms to ensure proper compliance with CSR commitments.'[76]

Overall, however, it seems that the EU, while demonstrating an initial interest in a compromise approach to CSR, in the form of the EMS, now appears to have retreated to an almost exclusively voluntarism CSR model. Thus, although it remains to be seen what will be the outcome of the resurrected European Multistakeholder Forum, it may be said that the EU is failing almost entirely to reconcile the approaches of voluntarism and hard regulation. Indeed, the European Commission does not appear to have understood the possibility of a third way.[77] In this respect, other regional and international regulatory regimes, such as those of the UN and the OECD, perform more favourably when it comes to reconciling the different approaches.

The OECD

Drafted in 1976, the OECD Guidelines for Multinational Enterprises (the Guidelines) contain recommendations addressed to multinational enterprises (MNEs) (transnational corporations) from adhering States which set out principles of acceptable behaviour for corporations in the social and environmental sphere globally.[78] The Guidelines were revised in 2000 and a Report on their operation is published annually.[79]

The Guidelines form part of the OECD Declaration on International Investment and Multinational Enterprises, and adhering governments agree to promote their observance among MNEs.[80] In terms of content, the Guidelines are broadly designed to facilitate and improve foreign investment by providing 'principles and standards

[76] <www.ec.europa.eu/trade/issues/global/csr/index_en.htm> (accessed on 20 April 2007).

[77] 'If the Commission really wants to make Europe a Pole of Excellence on CSR it should at least be on top of the debate' ECCJ Advocacy Briefing p. 7.

[78] For a general overview of the structure and workings of the Guidelines *see* OECD Guidelines for Multinational Enterprises, Revision 2000 particularly the Commentary; *see also* e.g. J. Karl, The OECD Guidelines for Multinational Enterprises in M.K. Addo (ed.), *Human Rights Standards and the Responsibility of Transnational Corporations*, (Kluwer: London, 1999) pp. 89-106.

[79] The OECD Guidelines for Multinational Enterprises, Revision 2000.

[80] OECD Declaration on International Investment and Multinational Enterprises, 27 June 2000.

of good practice' in relation to human rights, labour standards and the environment.[81] MNEs are encouraged to cooperate closely with local communities, uphold and apply 'good corporate governance principles' and 'develop and apply effective self-regulatory practices'.[82] Furthermore, there are relatively detailed provisions on disclosure matters which emphasise the need for full and accurate information to be made available on structure, activities, financial situation, performance, accounting, audit, environmental and social reporting ('where they exist'), plus other basic information relating to matters such as ownership, objectives, affiliates, and voting rights.[83] Employment and environmental matters are dealt with in separate provisions.[84] In relation to labour issues, the Guidelines concentrate on trade union rights, child labour, forced labour, discrimination, collective bargaining and health and safety. The environmental provisions address environmental management systems, disclosure of information, health and safety, technology, and training. Finally the Guidelines deal with bribery, consumers, science and technology, competition and taxation.[85]

Structurally, the OECD system differs significantly from the EU in that it involves a wide number of stakeholders, both informally and formally. Although the Guidelines are voluntary and non-binding for MNEs,[86] subsequent to the OECD Council Decision of June 2000, governments are obliged to set up National Contact Points (NCPs) in order to implement and promote the Guidelines among all corporations operating in or from their territory. Under the Guidelines, individual States are given wide latitude in relation to NCP structural arrangements. Some NCPs are single departments within government ministries (e.g. the UK), others are 'multi-departmental' and operate across a range of ministries, (e.g. Hungary; Slovak Republic) and a third group of NCPs are 'tripartite' incorporating commercial and trade union representatives as well as a number of Ministries (e.g. Sweden).[87] Finland's NCP is one of two examples of a 'quadripartite' NCP, composed of business, trade unions, various ministries and, significantly, NGOs.[88] However, it is recognized that characterizing the NCPs in this way 'does not provide a full picture

[81] Guidelines I(1) and II(1) & (2).

[82] *Ibid*. II(3), (6) & (7).

[83] Guideline III(1), (2), (3) & (4).

[84] Guidelines IV and V respectively.

[85] Guidelines VI, VII, VIII, IX & X respectively.

[86] Guideline I(1) 'Observance of the Guidelines is voluntary and not legally enforceable.'

[87] 'Summary Report of the Chair of the Meeting on the Activities of National Contact Points,' Annual Report 2001, pp. 11-18 at p. 12. *See also* Annex 1 'Structure of the National Contact Points pp. 20-24. There are 21 single government department NCPs, 7 multiple department NCPs, 9 tripartite NCPs and 2 quadripartite NCPs. OECD Guidelines for Multinational Enterprises: 2006 Annual Meeting of the National Contact Points, Report by the Chair, 20-21 June 2006.

[88] *Ibid*.

of the scope and breadth of consultation'.[89] Social partners and NGOs participate in the process formally and informally, so for example, in the USA they are consulted 'via the Advisory Council on International Economic Policy or individually on an *ad hoc* basis'.[90] The UK NCP (the Department of Trade and Industry) held a stakeholder consultation regarding implementation of the Guidelines in response to criticism of its performance relating to alleged corporate misbehaviour in the Democratic Republic of Congo.[91] The Annual Report 2006 notes that many of the NCPs regularly involve and consult civil society on both a formal and informal basis.[92]

Procedurally, in addition to the NCPs, the Guidelines fall within the remit of the Committee on International Investment and Multinational Enterprises (CIME) which is required to coordinate 'exchanges of views' on relevant matters.[93] Those to be consulted include the Business Industry Advisory Council (BIAC),[94] the Trade Union Advisory Council (TUAC)[95] as well as 'other non-governmental organisations.'[96] BIAC and TUAC are officially regarded as operating on an equal footing, with an emphasis being placed on 'strict parallelism of treatment.'[97] The NGO position is different. NGOs are formally excluded from the Guidelines' international implementation process which causes them great frustration.[98] This formal exclusion conflicts with the third way wider participatory approach to CSR regulation. However, the Council's Decision of June 2000 does require that NGOs be permitted to make their views known. In this respect, civil society stakehold-

[89] *Ibid.*

[90] *See* Annex 1 'Structure of the National Contact Points pp. 20-24 at p. 24.

[91] 'NCPs noted that they also use other means for enhancing the inclusiveness of their activities. A number of countries reported using advisory committees or permanent consultative bodies whose members include non government partners. Others stated that they convene regular meetings with business, trade unions and civil society. Still others state that they consult with NGOs or other partners on an informal basis or in reference to specific issues about which partners contribute their expertise.' OECD Guidelines for MNEs: 2006 Annual Meeting of the National Contact Points, Report by the Chair, 20-21 June 2006, p. 4.

[92] *Ibid.*

[93] Council Decision, June 2000 II(1).

[94] The BIAC is composed of industrial and employers' associations from OECD member States.

[95] The TUAC is composed of national trade union organizations from OECD member States. Both the TUAC and BIAC have secretariats are based in Paris and engage in formal and informal contact with the OECD itself. TUAC was deemed to be the organization most representative of labour interests. *See* OECD document 'Relations with BIAC and TUAC' 7.6.2001.

[96] OECD Council Decision, June 2000, II(1) and (2).

[97] *Ibid.*

[98] 'NGO Statement on the OECD Guidelines for Multinational Enterprises' in *OECD Guidelines for Multinational Enterprises: Global Instruments for Corporate Responsibility*, Annual Report 2001 (OECD, 2001) at p. 46 'The unconvincing explanation given is that the NGOs are not organised in a similar fashion as BIAC and TUAC.'

ers are certainly a better position under the OECD mechanisms than within the EU structures. Moreover, the OECD has publicly stated its support for the full participation model:

> 'Each of the main actors involved in corporate responsibility programmes – business, trade unions, NGOs, governments and international organisations – offers a distinctive perspective and body of knowledge and expertise. The challenge is to bring these distinctive competencies together and to incorporate them into a shared way of seeing things and a common blueprint for action.'[99]

In terms of its approach to CSR regulation, the OECD therefore promotes a model based on participation. At the national level, in the best cases, such as Finland, all relevant stakeholders are formally involved in implementation via the NCP. Even at the international level, all stakeholders are at least in theory informally involved.

It is made clear that the legal effect of the Guidelines is that they are not intended to supplant domestic laws, but are regarded as an 'add-on' to national legal provisions.[100] This places the Guidelines squarely within the 'mix and match' third way model. Nevertheless, there is no institutional mechanism for ensuring compliance with the Guidelines. Nor indeed is there any other form of compliance process in place, such as naming and shaming or identifying best practice. So, for example, while individual corporations are permitted to make representations to CIME about Guideline matters relating to their own interests, 'the Committee shall not reach conclusions on the conduct of individual enterprises'.[101]

Moreover, in a remarkably similar manner to discussions within the EU, the formally recognized representatives of business and the trade unions in the OECD context remain locked in a conception of CSR based on the revisiting of the voluntarism versus hard regulation debate.[102] The BIAC stance on the Guidelines is unequivocal:

> 'The Guidelines must remain voluntary – not legally binding. They are not designed to replace national or international legislation or individual company or sectoral codes of conduct.'[103]

[99] *See* e.g. the OECD Response to the EU Green Paper at <www.europa.eu.int/comm/employment_social/soc-dial/csr/csr_responses.htm>.

[100] The OECD Guidelines for Multinational Enterprises, Revision 2000, Commentary at p. 41 para.2: 'The Guidelines are not a substitute for nor should they be considered to override local law and regulation. They represent supplementary principles and standards of behaviour of a non-legal character, particularly concerning the international operations of these enterprises.'

[101] Council Decision, June 2000, II(4).

[102] This position is reflected in the comments of the OECD Secretary-General, Speech at the Global Corporate Social Responsibility Forum, Beijing, China 22 February 2006 <www.oecd.org/dataoecd/23/33/37439881.pdf>.

[103] 'Business Industry Advisory Council (BIAC) Statement' in *OECD Guidelines for Multinational Enterprises: Global Instruments for Corporate Responsibility*, Annual Report 2001 (OECD: Paris,

Clearly and unsurprisingly BIAC vehemently supports the voluntary nature of the Guidelines. Indeed BIAC has gone further by condemning the Dutch government's proposals to oblige MNEs to adhere to the Guidelines as a prerequisite for obtaining export credit coverage and government subsidies.[104] BIAC states: 'such an action would set a very negative precedent that should be avoided and in no way should be followed by other countries'.[105] It could appear to some that for BIAC the Guidelines represent a corporate marketing opportunity rather than an authentic opportunity to moderate corporate misbehaviour:

> 'For companies, the wide coverage of the Guidelines represents a blueprint for management systems and practice in today's world where companies are subject to wider scrutiny than ever before. Used positively, the Guidelines are a helpful tool for companies positioning themselves in the global economy.'[106]

Predictably, BIAC focuses on and prioritizes one aspect of the Guidelines; that being the improvement of 'the climate for foreign direct investment:'[107] the business case support for voluntarism. Equally, TUAC has consistently focused on the need for enforceable CSR rules that are binding upon business.[108]

There is also NGO dissatisfaction with the lack of a system for monitoring the 'effectiveness of the … Guidelines in achieving corporate sustainable behaviour'.[109] On the face of it, the NGOs are not lobbying for the Guidelines to be made binding on MNEs. However, they do stress the need for practical solutions by stating that they have 'no interest in an instrument that will not have an actual impact on the ground'.[110] This implies an interest in a third way model – so long as it is effective in practice.

The OECD Annual Reports highlight the continuing gulf between industry and NGOs. The familiar hard regulation versus voluntarism standoff is merely reproduced without offering solutions. In this respect, the OECD does not attempt to reconcile

2001) pp. 31-35 at p. 35 This position is also reflected in the most recent Annual Report, 2006, *see* Annex 6, p. 78 *et seq*.

[104] *Ibid*., at 34. The BIAC continues: 'The Guidelines and their related implementation procedures are unequivocal in underscoring their voluntary nature with regard to MNEs. To render an essential element of international financial competitiveness conditional upon 'acceptance' and to pursue such acceptance with tools of 'enforcement' – or in other words, negative 'sanctions' – are abridgements of the terms and spirit of the Guidelines and of the premise upon which BIAC leadership submitted the Guidelines to members for their consideration.

[105] BIAC Statement, *ibid*., at p. 34.

[106] BIAC Statement, *ibid*., at p. 35

[107] *Ibid*., at p. 31.

[108] *See*, most recently, the speech of TUAC General Secretary John Evans, 29 March 2007, <www.tuac.org/News/default.htm#oslo>. (accessed on 20 April 2007).

[109] *Ibid*., at p. 47 para.4.

[110] *Ibid*., at p. 47 para.4.

the two positions, and seek a third way to regulate CSR. It would appear that so long as the BIAC viewpoint carries more weight than that of the NGOs and the TUAC within the context of the OECD, the Guidelines will remain voluntary and non-binding. Overall then, the OECD's approach to CSR is effective at promoting participation but does not embrace other third way models for CSR.

The United Nations

One of the UN responses to allegations of corporate misbehaviour throughout the 1990s emerged when the Sub-Commission on the Promotion and Protection of Human Rights under Resolution 1998/8 decided to establish a working group to examine the working methods and activities of transnational corporations. This resulted in the publication in 2003 of the Norms on the Responsibility of Transnational Corporations and Other Business Enterprises with regard to human rights obligations, with a view to their adoption by Member States.[111] The key difference between the Norms and both the EU approach to CSR and that of the Global Compact (*see* below) is that the Norms seek to impose *legally binding* obligations upon transnational corporations and attempt to provide the basis for a binding multilateral treaty on the issue.

NGOs have largely supported the initiative and have welcomed this attempt to ensure that business entities respect human rights standards. They also support the move away from soft law standards.[112] On the other hand, some Member States, corporations and business organizations rejected the Norms for this very reason.[113] It is therefore not surprising that the Norms did not enjoy an easy birth and were subsequently rejected by member states at the Commission on Human Rights on the basis that the Norms had:

> 'not been requested by the Commission and as a draft proposal, has no legal standing, and that the Sub-Commission should not perform any monitoring function in this regard.'[114]

[111] UN Doc. E/CN.4/Sub.2/2003/12/Rev.2 of 26 August 2003.

[112] E/CN.4/2005/91 (15 February 2005) Report of the United Nations High Commissioner on Human Rights on the responsibilities of transnational corporations and related business enterprises with regard to human rights, Submission by Amnesty International under Decision 2004/116 on the 'Responsibilities of Transnational corporations and related business enterprises with regard to human rights' to the UNHCHR, 29 September 2004. AI Ref. UN 411/2004; *See also* the Submission by Christian Aid, Submission by Human Rights Watch and Submission by Oxfam to the UNHCHR.

[113] Responses to the Note Verbale from the High Commissioner for Human Rights, Decision 2004/116 of 20 April 2004 'Responsibilities of transnational corporations and related business enterprises with regard to human rights.' For example, *see* submissions of the USA and BP. *See also* E/CN.4/Sub.2/2003/NGO/44 29 July 2003 'Joint Written Statement by the International Chamber of Commerce and the International Organization of Employers'.

[114] Decision 2004/116 'Responsibilities of transnational corporations and related business enterprises

Professor David Weissbrodt, who led the Sub-Commission in drafting the Norms, has described them as the 'first non-voluntary initiative' in corporate social responsibility.[115] They are predicated on some basic instruments, namely the UN Charter and the Universal Declaration on Human Rights (UDHR) which are referred to in the Preamble.[116] It is through these instruments that the Sub-Commission proposes to impose the obligation to protect human rights upon corporate entities and others. Articles 1, 2, 55 and 56 of the UN Charter root the Norms in the fundamental requirement to respect and observe human rights and fundamental freedoms. The UDHR makes reference to its principles being applicable to 'other organs of society and individuals' as well member states and governments and all should strive to promote respect for human rights, to ensure their universal recognition and to observe them.

The Norms Working Group concluded that dozens of international and regional human rights instruments can potentially engage the responsibility of transnational corporations and the Norms reflect this. They are varied in scope and nature and include *inter alia* the Genocide Convention, the Convention Against Torture, the Slavery Convention, the Conventions on the Elimination of All Forms of Racial Discrimination and Discrimination Against Women, the ICCPR and ICESCR, the Geneva Conventions, the Convention on Biological Diversity, the OECD Bribery Convention, the African Charter on Human Rights, the American Charter on Human Rights and the European Convention on Human Rights. [117] Reference is also made to ILO instruments, the OECD Guidelines on Multinational Enterprises and the UN's own Global Compact (see below).[118]

So there is a great breadth of human rights coverage, but consequently this means that the obligations are formulated in general, vague and non-specific

with regard to human rights' at (c) (E/CN.4/2004/L.11/Add.7 22 April 2004 Report to the Economic and Social Council on the Sixtieth Session of the Commission, Agenda item 21(b)).

[115] D. Weissbrodt &M. Kruger, 'Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights,' 97 AJIL (2003) 901 at 903.

[116] USTS 993 (1945) and UN Doc.A/811 10 December 1948 respectively.

[117] Genocide Convention 1948, 78 UNTS 277; Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984, 1465 UNTS 85; Slavery Convention 1926 as amended 1953, 212 UNTS 17; International Convention on the Elimination of All Forms of Racial Discrimination 1966, 660 UNTS 195; Convention on the Elimination of All Forms of Discrimination Against Women 1979, 1249 UNTS 13; Geneva Conventions, for the text of the conventions and protocols *see* <www.icrc.org/Web/Eng/siteeng0.nsf/html/genevaconventions>; Convention on Biological Diversity 1992, 1760 UNTS 142; Convention on Combating Bribery of Foreign Public Officials in International Business Transactions 1997, DAFFE/IME/BR(97)20, 10 April 1998; International Covenant on Civil and Political Rights 1966, 999 UNTS 171;International Covenant on Economic, Social and Cultural Rights 1966, 993 UNTS 3; African Charter on Human and Peoples' Rights 21, 1981, ILM 58 (1982); European Convention on Human Rights, 1950, 87 UNTS 103.

[118] *See* discussion *infra* at pp. 19 and 29 respectively.

terms.[119] For example, Norm 3 refers to security of the person and prohibits transnational corporations from either engaging in, or benefiting from, war crimes, genocide, crimes against humanity and torture, that is, breaches of international humanitarian law. Another example is Norm 12 which states that:

> 'Transnational corporations and other business enterprises shall respect economic, social and cultural rights as well as civil and political rights and contribute to their realization'.[120]

It goes on to identify a broad array of rights in this context such as *inter alia* the right to development, adequate food and drinking water, privacy, education, housing, freedom of religion and so on.

The Norms are innovative in the sense that they are an attempt to extend the reach of international law to a new corpus of actors, that is transnational corporations. Ostensibly, the Norms are an archetypal measure of positivist international law, because they impose legally enforceable obligations. There are no traditional sanctions and the Norms are not enforceable through litigation, because the regulatory regime involved is international law. In this respect, the Norms are the closest thing to an example of a hard regulatory approach to CSR that could be envisaged in traditional international law. They do not attempt to reconcile hard regulation and voluntarism.

In terms of transparency, Part H introduces an implementation and monitoring system and requires businesses to do the following:

1. Adopt internal codes of conduct implementing the Norms[121]
2. Submit to 'periodic monitoring and verification by the United Nations'[122]
3. Provide 'prompt, effective and adequate reparation' to anyone adversely affected by a failure to comply with the Norms.

This is an attempt to implement a monitoring and compliance system. Amnesty International has been supportive of the Norms in general but critical of the lack of transparent mechanisms to assess compliance.[123] This line is adopted by the major

[119] It should be noted at this point that the Norms must be read in conjunction with the accompanying Commentary which clarifies and elaborates on many of the issues raised. Commentary on the Norms on the responsibility of transnational corporations and other business enterprises with regard to human rights, E/CN.4/Sub.2/2003/38/Rev.2, 26 August 2003.

[120] This wording mirrors that used in the International Covenant on Economic Social and Cultural Rights Article 2(1) state parties are obliged to achieve 'progressively the full realization of the rights recognized in the present Covenant'.

[121] Norm 15.

[122] Norm 16.

[123] Submission by Amnesty International under Decision 2004/116 on the 'Responsibilities of Transnational corporations and related business enterprises with regard to human rights' to the

NGO players, for example, Christian Aid, Human Rights Watch and Oxfam.[124] The weakness of the monitoring and compliance system is another example of the Norms' focus on hard regulation. There appears to be little attempt to harness the potential benefits of a third way of CSR regulation that could arise from enhanced transparency mechanisms.

Stakeholder participation in the Norms is through the normal channels of the UN. So, for example, accredited NGOs participate in the day-to-day operations of the organization in the usual manner. In addition, the Commission on Human Rights at its 60th session, at the behest of the UK and other states, requested that the High Commissioner for Human Rights (HCHR):

> 'compile a report setting out the scope and legal status of existing initiatives and standards relating to the responsibility of transnational corporations and related business enterprises with regard to human rights, inter alia the draft norms contained in document E/CN.4/Sub.2/2003/12/Rev.2 and identifying outstanding issues.'[125]

Further the High Commissioner was asked to identify 'options for strengthening standards on the responsibilities of transnational corporations…with regard to human rights' after consideration of existing standards (including the Norms) and *extensive stakeholder consultation*.[126] The High Commissioner was asked:

> 'to consult with all relevant stakeholders in compiling the report, including States, transnational corporations, employers' and employees' associations, relevant intergovernmental organizations, non-governmental organizations and treaty bodies.'[127]

The Report of the UNHCHR on the Norms was presented to the 61st session of the Commission on Human Rights in March 2005.[128] Responses came from States, NGOs, business groups, Trade Unions, universities, individuals and individual corporations. This is the point at which elements of a participatory model emerge in the Norms. That said, 'participation' in this context involves civil society only

UNHCHR, 29 September 2004. AI Ref. UN 411/2004.

[124] Submission by Christian Aid, Submission by Human Rights Watch and Submission by Oxfam to the UNHCHR.

[125] *Ibid*., at (b).

[126] Decision 2004/116 'Responsibilities of transnational corporations and related business enterprises with regard to human rights' at (c) (E/CN.4/2004/L.11/Add.7, 22 April 2004 Report to the Economic and Social Council on the Sixtieth Session of the Commission, Agenda item 21(b)).

[127] *Ibid*.

[128] Report of the United Nations High Commissioner on Human Rights on the responsibilities of transnational corporations and related business enterprises with regard to human rights, E/CN.4/2005/91, 15 February 2005.

in an advisory capacity. This is consistent with a hard regulation model, as outlined above, and again fails to attempt to reconcile hard regulatory and voluntary CSR mechanisms.

It is perhaps unsurprising that there is the usual divide between those supporting the 'business case' and those supporting the 'case for obligations.' So, on the one hand there are the businesses and trade organizations and some member states objecting to the introduction of the Norms and on the other, there are the NGOs and Trade Union Organizations supporting their introduction. This is a fairly crude division. There are of course some member states that support the initiative. In fact, Norway goes so far as to express concern about the lack of an effective monitoring system.[129] That said, the general division remains between those supporting voluntarism and those favouring other regulatory measures. These two positions continue to be presented as polar opposites in the debate surrounding the Norms.

A parallel but different UN attempt to regulate transnational corporations is the UN's Global Compact.[130] The Global Compact (GC) is unusual, in that it stems from a personal initiative of the then UN Secretary-General, Kofi Annan. The Global Compact was established in 1999 in response to the ongoing allegations of corporate misbehaviour in the human rights sphere. It is essentially a network of corporate and civil society participants which work with the freestanding Global Compact Office and a variety of UN agencies.[131] From its inception, the authors of the Global Compact underlined its voluntary nature by stressing that it is not a 'regulatory instrument' nor does it 'police, enforce or measure the behaviour or actions of companies'.[132] The GC assumes that it is in the interest of corporate actors to adhere to it on a voluntary basis. Much weight is placed upon the value of engaging in 'socially responsible business' such as establishing and preserving a 'good social reputation', 'reduction of damaging criticism' as well as 'being more in touch with markets, customers and consumers'.[133] The GC further points out that it is in the 'enlightened self-interest of companies, labour and civil society to initiate and share substantive action in pursuing the principles upon which the Global Compact is based' to ensure 'public accountability' and 'transparency'.[134]

[129] Submission of Norway to the UNHCHR.

[130] <www.unglobalcompact.org> and UN Doc. E/CN.4/Sub.2/2003/12/Rev.2 of 26 August 2003 respectively.

[131] Office of the High Commissioner for Human Rights ; United Nations Environment Programme; International Labour Organization; United Nations Development Programme; United Nations Industrial Development Organization; United Nations Office on Drugs and Crime <www.unglobalcompact.org/AboutTheGC>.

[132] <www.unglobalcompact.org/AboutTheGC/index.html> (accessed on 11 March 2007).

[133] 'The Global Compact and Human Rights' at <www.globalcompact.org>.

[134] *Ibid*.

In this respect, therefore, the Global Compact is firmly within the voluntarism approach.[135]

Notwithstanding its apparent adherence to pure voluntarism, however, the GC has adopted *and maintained* a participatory stakeholder approach. The GC seeks to involve a wide variety of business enterprises from TNCs to Small and Medium Enterprises. But it also involves representatives from civil society. This participatory attitude would seem to differentiate the GC from the purer version of voluntarism as demonstrated, for instance, by the EU's muddled approach to wider stakeholder participation. There are currently 3800 participants in the Global Compact, of which there are 2900 corporate participants from 100 states. Of the remainder, the majority is composed of NGOs with additional participants coming from UN agencies, business associations, labour organizations and educational establishments.[136] The harnessing of UN 'inter-agency cooperation,' bringing together the ILO, UNEP, UNHCR and UNDP is important for engaging especially wide, indirect stakeholder participation.[137] This is in direct contrast to the European Union which has struggled to sustain a stakeholder participation model at all with the dismantling and subsequent apparent rebirth of the European Multistakeholder Forum.

Corporate members are asked to adhere to the Ten Principles laid down by the GC relating to human rights, labour standards, the environment and corruption on a voluntary basis.[138] They are requested to 'embrace, support and enact' internationally recognized standards in four key areas and they agree to support and respect human rights as well as guaranteeing that they are not and will not be complicit in human rights violations.[139] These core values are derived from the Universal Declaration of Human Rights,[140] the International Labour Organization's Declaration on Fundamental Principles and Rights at Work,[141] the Rio Declaration on the Environment[142] and the UN Convention against Corruption.[143] The Ten Principles are vague in their terms and reflect the fact that the GC is not a formal regulatory instrument. As such, the GC cannot be enforced before a court. Nevertheless, the

[135] *See*, for example Ward, H, *Corporate Responsibility and the Business of Law* (International Institute for Environment and Development Globalt Ansvar, Swedish Partnership for Global Responsibility) Report No 6, September 2005, pp. 20-21.

[136] *See* <www.unglobalcompact.org/ParticipantsAndStakeholders/index.html> (accessed on 11 March 2007).

[137] Global Compact Report 2002 at p. 3 (GC Report 2002).

[138] <www.unglobalcompact.org/AboutTheGC/TheTenPrinciples/index.html> (accessed on 11 March 2007).

[139] United Nations Global Compact, 'The Ten Principles' at <www.globalcompact.org>.

[140] UN Doc.A/811 10 December 1948.

[141] 37 I.L.M. 1233 (1998); <www.ilo.org/dyn/declaris/DECLARATIONWEB.static_jump?var_language=EN&var_pagename=DECLARATIONTEXT> (accessed on 3 March 2007).

[142] Rio Declaration on Environment and Development, 31 I.L.M. 874 (1992).

[143] 43 ILM 37 (2007).

principles are expressly based upon recognized international human rights norms. Moreover, participant companies committed to the GC are required to give further assurances that they will promote the Compact via corporate documentation, e.g. annual reports, mission statements, training programmes and press releases.

Public statements about CSR commitments have been utilized by civil society to attempt, via litigation, to hold transnational corporations to account. For instance, the *Kasky* case[144] was brought under California's Unfair Competition Law and False Advertising Law,[145] alleging that Nike had made 'false statements and/or material omissions of fact'[146] regarding labour conditions in Nike factories in developing countries. Although Kasky failed ultimately, mainly on jurisdictional grounds, the claim illustrates the potential of such 'mix and match' approaches to CSR regulation, by showing that such claims are feasible at least in theory, depending upon local legislative provisions.

Within the GC, much emphasis is placed on stakeholder dialogue, which is all very well, but there is a fear that the GC could be used by transnational corporations as a mere marketing tool and early on in its history there were in fact examples of this.[147] The lack any enforcement mechanism renders the GC open to abuse. Nonetheless, the GC has responded to such abuse by enhancing its integrity measures. The Council issued guidelines 'regarding the official use of the Global Compact logo' after NGOs expressed concern about corporate abuse and exploitation.[148] Notwithstanding these guidelines, in March 2005, the Global Compact Office (GCO) felt compelled to release a new, detailed policy on the use of the GC names and logos.[149] The use of the GC name or logo is not permitted for promotional purposes, branding nor as a 'permanent graphical element of stationery'[150] nor may there be any suggestion or implication that the GCO 'has endorsed or approved' any particular activity.[151] Anyone wishing to use the name or logos must first seek authorization from the GCO and if permission is granted authorized users must then submit 'samples of all materials that bear the Global Compact name and logos' to the GCO.[152] Overall it can be said that the GC's wide stakeholder involvement renders it a good example of a participatory approach

[144] *Nike inc et al* v. *Marc Kasky* 539 US 654, 123 S Ct 2554.

[145] Cal Bus&Prof Code Ann, section 17200 *et seq* and section 17500 *et seq*, respectively.

[146] *Nike inc et al* v. *Marc Kasky* 539 US 654, at 656.

[147] E.g. Daimler Chrysler. *See infra*.

[148] *Ibid.,* at p. 7 and p. 9. *See also* note 63. Daimler Chrysler is charged with appropriating the GC logo in its corporate literature.

[149] The Global Compact, 'Policy on the use of the Global Compact name and logos,' 9 March 2005 (online) <www.unglobalcompact.org/content/NewsDocs/gc_logo_pol.pdf> (accessed on 22 March 2005).

[150] GC Policy at p. 2.

[151] *Ibid.*, at p. 1.

[152] *Ibid.*, at p. 2 and p. 4.

to regulation.[153] While the GC does not impose binding standards upon TNCs, it *does* recognize that the values it champions among participants have their roots in existing international legal principles and that it has an obligation to reconcile the polarized views held by business and other stakeholders.[154]

Although the GC is, without question, a voluntary initiative, it differs from the EU, the OECD and the UN Norms in several key ways. Firstly, corporations subscribing to the Compact are required, as a condition of their participation, to submit on an annual basis concrete examples of measures taken to comply with the Ten Principles.[155] In order to ensure that there is an element of transparency in the process, these are required to be posted on the GC website. During the initial 2001 pilot phase, of the 30 corporate submissions none were deemed 'worthy of publication'.[156] Several problems were identified ranging from 'substantial degrees of organizational change' to 'difficulties assessing the priority of corporate citizenship relative to profit-generating business activities'.[157] In an attempt to address some of these issues, companies are now required to formulate their public submissions in accordance with a 'concise template' in order to focus on the 'strictly factual elements of company experience'.[158] This response is an example of the third way participatory model, whereby CSR standards progress through stakeholder dialogue. The naming and shaming of non-compliant companies also sits squarely within a third way model.

In addition to reporting requirements, the GC convened the GC Advisory Council in January 2002 which comprised 'senior business executives, international labour leaders, public policy experts and the heads of civil society organizations'.[159] Notably, it was the 'first UN advisory body composed of both private and public

[153] 'The Global Compact is an ambitious and unprecedented experiment to fill a void between regulatory regimes, at one end of the spectrum, and voluntary codes of industry conduct, at the other. It is a cooperative framework based on internationally established rights and principles.' *See* G. Kell 'Introduction and Overview', The Global Compact: Report on Progress and Activities, Global Compact Office, July 2002 pp. 3-4 at p. 4 (Global Compact Report 2002).

[154] <www.unglobalcompact.org/AboutTheGC/integrity.html> (accessed on 18 March 2007). *See also* 'Policy on the use of the Global Compact name and logos' 9 March 2005.

[155] *Ibid.*, at p. 8.

[156] NGO Letter to Kofi Annan Recommending Redesign of Global Compact, 29 January 2002 at <www.globalcompact.org>. *See also* Global Compact Report 2002 at pp. 18-19 'According to a review conducted by an independent team of academics, none of the company submissions conformed to the guidelines suggested by the Global Compact Office, and 15 of the submissions did not directly address the implementation of the nine principles.'

[157] GC Report 2002, *ibid.*

[158] *Ibid.*, at p. 19. For the latest Communications on Progress *see*: <www.unglobalcompact.org/CommunicatingProgress/index.html>.

[159] *Ibid.*, at p. 7. *See* Appendix A at p. 31 for a list of current members. The Council has created two working groups: the Working Group on Company Participation and Civil Society Engagement and the Working Group on Compact Leadership.

sector leaders' and demonstrates again the GC's clear commitment to a participatory approach.[160] Whilst the GC is 'neither an instrument for monitoring companies nor a regulatory regime', the Advisory Council had a significant role to play.[161] It had four key priorities: (1) safeguarding the 'integrity of the GC'; (2) serving as 'advocates' of the GC; (3) providing 'expertise' and (4) offering 'advice on policy and strategy'.[162] The Advisory Council was replaced by the Global Compact Board in 2005 but it has largely the same objectives and responsibilities.[163] Again, because the Advisory Council involves all stakeholders, it demonstrates the GC's commitment to a participatory model of CSR.[164]

After early teething problems, in 2007 the GC registered its most successful quarterly reporting period with 428 companies submitting a Communication on Progress, representing a 41 per cent increase on 2005.[165] Notwithstanding this development, the increasing number of non-compliant participant companies continues to give cause for concern. As of 1 January 2007, an additional 203 companies were added to the inactive list.[166] In total, there are currently 755 non-communicating companies and 487 inactive companies.[167] This can be attributed directly to the combination of the voluntary nature of the GC and the lack of any concrete enforcement mechanisms. The GC has no weapons at its disposal to demand compliance with its voluntary reporting requirements so companies may act with impunity. Nevertheless, the GC has responded positively to genuine stakeholder concerns about the high non-compliance rate, although, it remains to be seen whether or not it will have a positive impact on transnational corporations' behaviour. There is a risk that it will merely encourage transnational corporations to focus on the style, rather than the substance of their submissions. Ultimately, the GC is a good example of the participatory and transparency elements of a

[160] *Ibid.*

[161] *Ibid.*, at p. 17

[162] *Ibid.*, at p. 7

[163] 'The Global Compact's Next Phase,' 6 September 2005, paras 4.5-4.9, at <www.unglobalcompact.org/docs/about_the_gc/2.3/gc_gov_framew.pdf>.

[164] Other developments include the expansion of the GC Learning Forum to encompass a 'global academic network' which engages in relevant research and analysis. GC Report 2002 *ibid.* at p. 6. The report also notes that the GC is being taught increasingly on MBA courses 'thus rooting the Global Compact in education.' *See also* <www.unglobalcompact.com/HowToParticipate/academic_network/index.html#newgov>.

[165] <www.unglobalcompact.org/NewsAndEvents/news_archives/2007_01_30.html>, Press Release, 'Record Quarter for Companies Communicating on Progress,' 30 January 2007.

[166] <www.unglobalcompact.org/NewsAndEvents/news_archives/2006_12_28.html> (accessed on 15 January 2007).

[167] <www.unglobalcompact.org/CommunicatingProgress/non_communicating.html> and <www.unglobalcompact.org/CommunicatingProgress/inactive_participants.html> respectively (accessed on 15 January 2007).

third way in CSR regulation. It does not, however, combine voluntarism with hard enforcement mechanisms, in particular litigation.

There seems to be a genuine desire to foster stakeholder participation in the process and recognition of the importance of 'high-level advocacy'.[168] The production of stricter guidelines on corporate use of the GC name and logos has gone some way to achieving this.[169] Furthermore, it publicly names 'inactive', companies which do not adhere to the GC requirements, in particular the obligation to submit an annual 'Communication on Progress'.[170] The impact of this classification remains to be seen as does the impact of the GC generally. What the GC experience demonstrates is that it is possible to operate a genuine stakeholder participatory approach to CSR and, notwithstanding the problems it faces, this alone arguably reconciles at least some of the differences between voluntarism and other regulatory mechanisms. In other words, by involving civil society, and by naming and shaming poor performers, and promoting best practice, through transparency mechanisms, the GC exhibits a move towards the 'third way' for CSR regulation.

Conclusion

This article proceeded from the position that it is fact possible to reconcile the apparently irreconcilable regulatory stances of voluntarism and hard regulation, into a compromise 'third way' of CSR regulation. The article has examined three different regulatory approaches applicable within the European context: the EU, the OECD and the UN, with a view to determining which best promotes this third way. The apparently fixed position of the European Commission, and indeed business itself, suggests that voluntarism and hard regulation are irreconcilable, and that voluntarism, founded on the business case for CSR, is the only appropriate basis for regulation of transnational corporations. The UN's Norms on the Responsibility of Transnational Corporations broadly speaking take the polar opposite approach in that they embrace what may be described as a more conventional legally binding regulatory approach. Neither of these two regimes, therefore, promotes a third way approach.

Nevertheless, as has been shown, there are several examples, notably within the Global Compact and the OECD, where 'third way' regulatory mechanisms are already in operation. In the Global Compact context, stakeholder participation and transparency are key to its operation, irrespective of its voluntary status. Failure

[168] *Ibid*., at p. 13 and p. 6. *See* for example the Global Policy Dialogue on the Role of Business in Zones of Conflict, *ibid*., at p. 13.

[169] Policy on the use of the Global Compact name and logos, 9 March 2005 GC news archive 12 Mrch 2005 <www.unglobalcompact.org/docs/news_events/9.1_news_archives/2005_03_12/gc_logo_pol.pdf> (accessed on 15 January 2007).

[170] *Ibid*., at note 155.

by corporate participants to adhere to the reporting mechanisms results in public 'naming and shaming' via the non-compliance register on the GC website. Such measures fall directly within the ambit of the 'third way' mode of regulation. While ostensibly adhering stoutly to voluntarism, the OECD also embraces a stakeholder participation model with roles for business, trade unions and NGOs, the latter albeit in an informal capacity.

Even the UN's Sub-Commission on the Protection of Human Rights' Norms on the Responsibility of Transnational Corporations include some elements of third way regulation. Wide stakeholder participation has taken place through the UN's usual NGO channels, in addition to the specific consultation which took place as part of the UNHCHR Report into the Norms. The UN therefore is encouraging stakeholder participation. This is in direct contrast to the European Commission which in practice seems intent on stifling civil society involvement in the CSR regulatory debate. The dismantling of the EMS Forum and the subsequent creation of an Alliance which involved business alone has done immense harm to the Commission's reputation with NGOs.[171] The belated resurrection of the EMS Forum may be insufficient to bridge the gaps between the parties. The Commission has shown itself to be unwilling to reconcile voluntarism and hard regulation. It clings to a polarized voluntarism model with little regard for any possible alternative third way regulatory measures. Unlike the NGOs, which have moved from their initial adherence to hard regulation to a compromise third way position, the Commission has adopted an entrenched voluntarism position. This also conflicts with the more enlightened positions adopted by the UN and the OECD. If it truly seeks to be a 'Pole of Excellence' in CSR regulation, the Commission must acknowledge that there are regulatory options beyond the confines of voluntarism with which it must engage.

[171] This can be seen by an examination of the ECCJ, Advocacy Briefing, Corporate Social Responsibility at EU Level: Proposals and recommendations to the European Commission and the European Parliament, November 2006.

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