Corporate Social Responsibility at the Interface of Business, Law and Politics: Transnational CSR Soft Law in the Global Context

Corporate Social Responsibility (CSR) is generally understood as a cluster of normative rules designed to promote the integration of business corporations into the social and environmental contexts in which they operate. This can be done at different levels, from the national, to the international and regional. Given the nature of large corporations today, however, it is above all at the transnational level that CSR takes on the greatest relevance. Here, however, a question arises as to the sources, or basis, of CSR. The standard – quasi-official – understanding of CSR today is that compliance with CSR principles has always been, and remains, voluntary. As such, it is the result of a business decision, taken by a company, to assume obligations that go beyond what the law demands.

I. Introduction

Corporate Social Responsibility (CSR) is generally understood as a cluster of normative rules designed to promote the integration of business corporations into the social and environmental contexts in which they operate.[1] This can be done at different levels, from the national, to the international and regional. Given the nature of large corporations today, however, it is above all at the transnational level that CSR takes on the greatest relevance. Here, however, a question arises as to the sources, or basis, of CSR. The standard – quasi-official – understanding of CSR today is that compliance with CSR principles has always been, and remains, voluntary. As such, it is the result of a business decision, taken by a company, to assume obligations that go beyond what the law demands.

This gives rise to two issues of principle for jurists. First, there is the question of whether CSR has, or could have, any legal relevance. Specifically, what is the role of the law in the establishment and enforcement of CSR rules? This can be referred to as the legal paradox of CSR: *Why should the law play any role in CSR, where CSR is in fact defined as something*

[1] Anne Mirjam Schneuwly, Corporate Social Responsibility an der Schnittstelle von Wirtschaft, Recht und Politik: Transnationales CSR-soft law im globalen Kontext (Fribourg: Helbing Liechtenhahn Verlag, 2012).

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that lies beyond the reach of the law? Second, there is the fact that the "law" referred to in this (first) question must necessarily remain undefined, due to the transnational orientation of CSR. Is there such a thing as a "world law" of CSR?

Given the dearth of literature on the question, a first step in addressing these issues must consist in the development of possible approaches, the drafting of a kind of blueprint on which further research efforts can be built. Transnational CSR soft law in the global context addresses a subject rarely touched on in the legal academic literature. What follows is an overview based on five main conclusions, the essence of which is concisely foreshadowed by Kerr, Janda, and Pitts: *"The question concerning CSR and corporate accountability is no longer whether, but how? The answer is enforced self-regulation in the shadow of the law."*[2]

II. Five main conclusions about CSR

1. CSR without a clear legal framework

The fact that CSR cannot be made to fit into any existing legal mould is reflected in the growing legitimacy attached to private governance mechanisms,[3] such as internal Compliance Officers or external social control, which help to ensure the implementation and enforcement of CSR principles. Soft law is perceived as a virtually invisible collection of behavioural norms that are able to impose themselves, despite the "sphère juridiquement non contraignante (pas sanctionnable),"[4] with the aid of business cases and social control. Soft law is further characterized by its heterogeneity and flexibility, which allow it to adapt to and to stabilize market expectations by conforming with economic realities in a manner comparable with that of the *lex mercatoria.* In order to maintain confidence in the smooth functioning of commercial affairs, there is a need to incorporate protective mechanisms into the hierarchical structures of corporations, which, like the *lex mercatoria*, take recourse to reputational risk, involvement of reliable third parties, and the internalization of market relationships. These private regulatory mechanisms lie beyond the bounds of the classic normative hierarchies of national and international law or international treaties and conventions. The variously defined

[2] Michael Kerr/Richard Janda/Chip Pitts, *Corporate Social Responsibility: A Legal Analysis* (Markham:LexisNexis Canada, 2009), at p. 486.

[3] Marc Amstutz/Vaios Karavas, "Weltrecht: Ein Derridasches Monster", in Gralf-Peter Calliess/Andreas Fischer-Lescano/Dan Wielsch*, et al.* (ed.), *Soziologische Jurisprudenz, Festschrift für Gunther Teubner zum 65. Geburtstag* (Berlin: De Gruyter Recht, 2009), pp. 645-672, at p. 671.

[4] Céline Etre, "Code de conduite et responsabilité sociale de l'entreprise: soft law et droit", in Bruno Boidin/Nicolas Postel/Sandrine Rousseau (ed.), *La responsabilité sociale des entreprises: Une perspective*

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concepts of CSR take shape at the interface of economics, sociology, political science, and law, and result from the reciprocal influences of these disciplines on one another. Because of this, it may be concluded that the fostering of such interactions must be considered by all interested parties as an essential prerequisite for the implementation of CSR principles.

2. CSR on the bandwagon of corporate governance

The interdisciplinary approach, which, by combining business, legal, and political considerations, has given rise to the dynamic development of corporate governance concepts, has drawn CSR in its wake. The rise of corporate governance has made it possible to formalize shareholder interests, the protection of which has been institutionalized. By contrast, there is no normative foundation for the enforcement of CSR principles for the protection of the more complex interests of a broader range of stakeholders. At the same time, however, there is a certain amount of convergence within the web of shareholder and stakeholder interdependencies on matters of common interest, which ultimately can contribute to an improvement in the quality of life for all concerned. The symbiosis between corporate governance and CSR can contribute to profit maximization for both shareholders and stakeholders alike.[5] By jumping on the corporate governance bandwagon, as it were, CSR could take advantage of the theoretical link that has already been established for the legal implementation of corporate governance norms. Although both corporate governance and CSR have their roots in soft law, corporate governance has already made its entry into the realm of enforceable legal norms.

The path taken towards corporate governance implementation followed the money trail, insinuating itself into regulatory law for stock exchanges and banks, which function as globally networked focal points (*plaques tournantes*). Calls for regulation through social control are similarly a consequence of shareholder and stakeholder impotence in the face of both corporate governance and CSR scandals. If global corporations can be compelled to implement CSR norms, as they have been constrained to accept certain corporate governance rules, this will likely be a result of CSR having successfully attached itself to the bandwagon of corporate governance.

institutionnaliste (Villeneuve d'Ascq: Presses Universitaires du Septentrion, 2009), pp. 69-86, at pp. 73 *et sqq*.

3. Social control as an external CSR enforcement mechanism

A business-oriented possibility for imposing CSR standards could involve the use of media and shareholder pressure to influence corporate behaviour.[6] The prevailing view in the literature is critical of such methods as being undemocratic, tantamount to mob rule, in that they deny corporations the fundamental right of a fair hearing. Public pressure as a means of fostering self-regulation requires that the stakeholders in question not only have access to transparent information through the media and corporate reporting, but also that they dispose of an adequate mouthpiece to make their demands heard. While it is true that highly mediatized representation of misconduct on the part of larger corporations exposes them to harsh public criticism, a modern form of pillorying, it must also be recalled that the civil litigation possibilities available to stakeholders are extremely limited, as private suits for the respect of fundamental rights along the supply chain do not normally have a very satisfactory outcome. This leaves stakeholders often with no other choice than to seek public attention through the media in order to exert social control as a means of pressure. This is the reason that aggrieved stakeholders often appeal to public opinion and the media as a means towards obtaining legal redress. By this process of "naming and shaming", globalized media reporting generates an international mechanism for imposing self-regulation, which leads to an increased implementation of CSR norms throughout the supply chain. This also creates greater transparency on questions of liability where parent companies outsource production to subsidiaries. The advantages and disadvantages of self-regulation at the instigation of actors without democratic credentials can be gauged by considering the efforts by NGOs to agitate public opinion in response to environmental scandals.

4. Business cases and risk management as internal CSR enforcement mechanisms

Based on a cost-benefit analysis, a calculation is made of the risks and potential profits involved in circumventing or respecting environmental and safety regulations, in order to determine whether the potential costs resulting from damage claims, financial penalties, and

[5] Cf. Joachim Schwalbach/Anja Schwerk, "Corporate Governance und Corporate Citizenship", in André Habisch/René Schmidpeter/Martin Neureiter (ed.), *Handbuch Corporate Citizenship: Corporate Social Responsibility für Manager* (Berlin/Heidelberg: Springer Verlag, 2008), pp. 71-86, at pp. 71, 84.

[6] Anne-Marie Slaughter, *A New World Order* (Princeton/Oxford:Princeton University Press, 2004), at p. 10; Simon Zadek, "The Path to Corporate Responsibility", 82, *Harvard Business Review* (2004), pp. 125-132, at p. 130: "Civil regulation, attacks by NGOs to damage corporate reputations, and the like rarely cause measurable, long-term damage to a fundamentally strong business." Cf. also pp. 6 *et sqq*.

reputational harm constitute an acceptable or unacceptable business risk.[7] Management is confronted with both rational and irrational expectations in connection with CSR and must attempt to meet actual or foreseeable demands from many sides at many levels. On the one hand, there are the expressly formulated objectives of shareholders, which must be met without neglecting the equally pressing, but implicit, interests of the company in maintaining the goodwill of its narrower and broader circle of stakeholders, on the other.[8] In order to improve the efficiency of decision-making procedures and to account for all relevant CSR risks, corporate management generally takes its orientation from tested, standardized guidelines. The business case for CSR is thus comparable to a cognitive expectation that has been adapted through learning as a consequence of disappointment.[9]

Where a compliance officer is able to correlate corporate social performance with financial performance, this increases the probability of a resultant strengthening of self-regulation and the inclusion of CSR implementation in the corporate strategy. Self-regulation, however, is not self-propelled, and is always in need of a nudge from the outside.

5. The gatekeeper as institutionalized external CSR enforcement mechanism

In principle, all that is normally required to bring about behavioural change is a nudge in the right direction; this also applies with regard to CSR self-regulation as a means of improving the functioning of the international capital markets, for example. The gatekeepers of the international stock markets could be encouraged to make conformity with CSR norms an obligatory prerequisite for listing. In this connection, the capabilities, role, and effectiveness of the various gatekeepers who qualify as monitors for the implementation of privately established CSR norms is analysed. This leads to the conclusion that stock-market listing authorities should more stringently impose sustainability and CSR requirements. In this way the self-regulating CSR soft-law mechanism could, through the interposition of structural control instances, gradually develop into a precursor to more binding legal structures, serving, as it were, as a *lex ferenda*.

[7] Susan Margaret Hart, "Self-regulation, Corporate Social Responsibility, and the Business Case: Do they Work in Achieving Workplace Equality and Safety?", 92, *Journal of Business Ethics* (2010), pp. 585-600, at p. 595: “According to the business case, effective cost-benefit techniques should lead to an economic rationale for CSR action”.

[8] Tom Cannon, *Corporate Responsibility* (London:Pitman Publishing, 1992), at pp. 89 *et sqq*.

[9] Cf. Niklas Luhmann, "Die Weltgesellschaft", in Niklas Luhmann (ed.), *Soziologische Aufklärung 2: Aufsätze zur Theorie der Gesellschaft* (Wiesbaden: VS Verlag für Sozialwissenschaften, 1971/2005), pp. 63-88, at pp. 66 *et sqq*.

"Further of interest here, also in terms of new forms of corporate control, is the role of intermediaries, in particular that of financial analysts and rating agencies, who could be increasingly deployed as guardians ("gatekeepers") to oversee access of corporations to the market."[10] The credibility enjoyed by the gatekeepers depends, not lastly, on the stringency and reliability of the standards they use for granting their seal of approval. If standardized reports are to be made publicly available to the stakeholders, the latter should be able to rely on the accuracy of the information contained therein. Their position is similar to that of investors who depend on informative and reliable reporting on the part of auditors and other monitoring authorities.

III. "Risk regulation" through corporate codes of conduct

Parallel to the binding national and international statutory prescriptions, there exists a "veritable potpourri"[11] of transnational standards that rely upon the involuntary assumption of responsibility and "self-commitment" of the MNEs. Central to these efforts to gain a degree of sway over corporate behaviour are sets of legally non-binding rules dubbed "corporate codes of conduct", which raise social and/or environmental concerns to a level commensurate with the other purposes pursued by such companies.[12]The formulation of such rules is, in many cases, the result of initiatives by national governments, international organisations, or NGOs, under which intergovernmental codes – such as the OECD Guidelines for Multinational Enterprises, for example – are negotiated internationally and ratified by the States signatory. In other cases, however, they are the result of initiatives by private associations, for the most part labour unions or investor associations, which create public pressure to induce the MNEs to accept restrictions on their behaviour in the form of codes of conduct.

[10] Christoph B. Bühler, *Regulierung im Bereich der Corporate Governance, Habil. Zürich* (Zürich/St. Gallen:Dike Verlag, 2009), at pp. 651 *et sqq*.

[11] Ludwig Gramlich/Cornelia Manager-Nestler/Kerstin Orantek/Doina Schwarz, "Corporate Social Responsibility als Rahmensetzung für strategisches Management? Eine juristische Perspektive", in Uwe Götze/Rainhart Lang (ed.), *Strategisches Management zwischen Globalisierung und Regionalisierung* (Wiesbaden: Gabler Edition Wissenschaft, 2008), pp. 99-128, at p. 109; cf. also Eva Kocher, "Codes of Conduct and Framework Agreements on Social Minimum Standards - Private Regulation?", in Olaf Dilling/Martin Herberg/Gerd Winter (ed.), *Responsible Business: Self-Governance and the Law in Transnational Economic Transactions* (Oxford UK/Portland OR: Hart Publishing, 2008), pp. 67-86, at p. 69.

[12] Phillip H. Rudolph, "The History, Variations, Impact and Future of Self-Regulation", in Ramon Mullerat/Daniel Brennan (ed.), *Corporate Social Responsibility: The Corporate Governance of the 21st Century* (The Hague: Kluwer Law International, 2005), pp. 365-384, at p. 378: "Codes of conduct provide mechanisms for companies to enunciate clearly their values, principles, and expectations to those with whom they do business around the globe, and help harmonize the internal and external expectations of the company."

[13] Ibid., p. 371.

Corporate codes of conduct can take the form of pre-formulated proposals by independent organisations, to which companies may accede, or of a set of self-imposed rules of conduct by which to abide the MNEs express their commitment in their mission statements.[14]There are various models available on which a company that chooses to formulate its own code of conduct can orient itself.[15]The undertaking by a company to adhere to a code of conduct – whether by acceding to a pre-formulated code or by drawing up its own – is entirely voluntary, and the grounds for doing so can be many. Most often cited as the principal reason, next to the philanthropic wish to provide decent working conditions in production facilities, is the financial factor connected with risk management.[16]

The gap that comes about between assertable rights and voluntarily norm compliance gives rise to questions of internal enforceability and the liability of employees for failure to comply with corporate codes of conduct.[17]Externally, stakeholder rights based on the codes of conduct of companies in the supply chain are difficult to enforce in court. Another instrument increasingly being considered in the financial industry is the so-called code of ethics agreement between companies and their investors. These can include such things as selection criteria for companies whose shares are included in "ethical funds".[18]Possible means of enforcing such agreements, or of penalising failure to live up to them, could take the form of delisting the delinquent MNE from the stock exchange, or simply be the result of market forces that cause the company's shares to go down in value.[19]

[14] On the standardisation of codes of conduct see Carola Glinski, "Corporate Codes of Conduct: Moral or Legal Obligation?", in Doreen Mc Barnet/Aurora Voiculescu/Tom Campbell (ed.), *The New Corporate Accountability, Corporate Social Responsibility and the Law* (Cambridge: Cambridge University Press, 2007), pp. 119-147, at pp. 129 *et sqq*.

[15] Cf. voluntary commitment by business to manage its activities responsibly by the ICC's Commissions on Business in Society (2002), Making a positive and responsible contribution: A voluntary commitment by business to manage its activities responsibly; ICC's Commissions on Business in Society (2008), ICC guide to responsible sourcing: Integrating social and environmental consideration into the supply chain.

[16] Cf. Glinski, "Corporate Codes of Conduct: Moral or Legal Obligation?", *supra* note 14, at pp. 122 *et sqq*.

[17] Cf. Kerr/ Janda/ Pitts, *Corporate Social Responsibility: A Legal Analysis*, *supra* note2, at p. 155.

[18] Claes Lundblad, "Some Legal Dimensions of Corporate Codes of Conduct", in Ramon Mullerat/Daniel Brennan (ed.), *Corporate Social Responsibility: The Corporate Governance of the 21st Century* (The Hague: Kluwer Law International, 2005), pp. 385-399, at pp. 395 *et sqq*.

[19] Ibid., at p. 395: "Can the deviation from the Code of Conduct be used by investors as a basis, for instance, for a compensation claim or other legally enforceable sanctions? To the extent that the behaviour of the company also violates a contractual undertaking (for instance under listing contract with a particular market place) the possibility of legal sanctions is apparent (e.g. in the form of delisting at the initiative of the relevant stock exchange)."

1. Conduct risk regulation instruments

As Wright and Rwabizambuga note, "By supporting and adopting codes of conduct, firms can communicate their green credentials and signal a commitment to the environmental and social issues that are of great concern to the wider public, and the role they can play in addressing them."[20] In order for codes of conduct to realise their potential and exert a positive influence, it is, of course, vital, that once adopted they are also adhered to and properly implemented.[21]

The examples given in the table below offer an overview of the quasi-regulatory instruments that have been used in practice for dealing with corporate conduct risk, with a brief indication of the mechanisms for their implementation. All of the instruments are self-regulatory in nature, that is, the intent is for the proposed guidelines or codes drafted by international organisations or NGOs to be adopted directly by the companies, and for compliance therewith to be made an element of their corporate strategies.

Corporate Social Responsibility guidelines and standards	
In implementation of the Lisbon Treaty, the European Commission has issued a Green Paper for promoting a European framework for corporate social responsibility, COM (2001) 366 final. In addition, the Multi-stakeholder Forum on Corporate Social Responsibility has been set up to provide an institutional platform for dialogue.	International deliberations and the institution of a multi-stakeholder forum.
The declaration on international investment and multinational enterprises is addressed to Member State governments upon whom it is incumbent to implement ratified Directives. The *OECD-Guidelines for Multinational Enterprises* operate at the private sector level.	Multilateral agreement, implemented and monitored by national contact points.
The **UN Global Compact** offers MNEs ten guiding principles, to which they may voluntarily accede.Progress reports are required as a prerequisite to use by the participants for labelling and publicity. In addition, regular multi-stakeholder forums are organised to promote mutual exchange.	Non-governmental listing and labelling of participants; organisation of meetings for exchanges between decision-makers
The **G3 Guidelines** published by the Global Reporting Initiative help make sustainability reporting more uniform.	Non-governmental standards for reporting and ranking

[20] Christopher Wright/Alexis Rwabizambuga, "Institutional Pressures, Corporate Reputation, and Voluntary Codes of Conduct: An Examination of the Equator Principles", 111, *Business & Society Review* (2006), pp. 89-117, at p. 95.

[21] Xavier Dieux/François Vincke, "La responsabilité sociale des entreprises, leurre ou promesse ?", *Revue de Droit des Affaires Internationales* (2005), pp. 13-34, at p. 21. „Il est important qu'un code fasse l'objet d'une véritable adhésion de la part de toutes les parties constitutives de la société, afin que l'application de règles soit reconnue comme parfaitement légitime, sincère et rigoureuse. Il serait vain, en effet, d'essayer d'imposer par la seule voie hiérarchique un texte qui n'aurait fait l'objet d'aucune concertation avec les collaborateurs de l'entreprise et (éventuellement) avec leurs représentants syndicaux."

Results are published on the GRI website and serve as the basis for indexing initiatives.	results
The **ISO 26000** social responsibility guidelines were not originally intended for certification or labelling purposes, could, however, take on that function at some later point.	Non-governmental labelling with auditing standards
The Corporate Code of Conduct of the **Fair Labour Association** (FLA) was modelled on the ILO's guiding principles.	Non-governmental labelling with monitoring
The **ICC Guide to Responsible Sourcing** provides guidelines designed specifically with the supply chain in mind.	Simple recommendations without monitoring
The **Equator Principles** are used in the financial industry for benchmarking purposes in lending as a means of better assessing the risks attaching to certain investments and applying social and environmental criteria to financing projects.	Benchmarking and guidelines for responsible investment

A clear distillation of the substantive content of normative value contained within the vast and growing body of guidelines for ethical corporate behaviour is hardly possible. The situation is best described as having given rise to what may be termed metaphorically as a CSR isotope[22] – whereby, out of this globally networked, unstable interactivity between a complex web of international and transnational norms, new rules for regulating and securing global commercial exchanges and financial infrastructures are constantly emerging and successively imposing themselves. This network operates globally within the flexible framework provided by evolving national legislation and voluntary non-governmental standards from a wide range of initiatives. The network of which this "radioactive" CSR isotope is composed, is capable of reactive bonding. Engaging in a constant information exchange, it registers the demands of society, and adapts itself accordingly with the native agility of a self-regulating system.[23]This network of perpetual intercourse between international legal systems and soft law at the interface of business, law, and politics, provides an on-going impetus for the further development of CSR instruments.

[22] Schneuwly, *Corporate Social Responsibility an der Schnittstelle von Wirtschaft, Recht und Politik: Transnationales CSR-soft law im globalen Kontext*, *supra* note 1, at pp. 46 *et sqq*.:"The term isotope is used for nuclides whose nuclei contain an equal number of protons (in the analogy: elements of hard law, such as legal statutes and international conventions), but different numbers of neutrons (in the analogy: elements of soft law, contributed by NGO initiatives). On this model, not unlike the unstable carbon molecule C_{14}, CSR instruments behave like radioactive elements in a constant process of decay and transmutation."

2. Risk management as a nudge for self-regulation

Finally, the application of a broad combination of a variety of corporate codes of conduct can be a useful risk management[24] hedging instrument for MNEs that often find themselves in the international spotlight. Based on a cost-benefit analysis, a calculation is made of the risks and potential profits involved in circumventing or respecting environmental and safety regulations, in order to determine whether the potential costs resulting from damage claims, financial penalties, and reputational harm, constitute an acceptable or an excessive business risk.[25]

As noted above a business case can also be used as a means of evaluating CSR investments and serve as a nudge towards implementing CSR standards. A further question that arises is whether, and in what way, the enforcement of voluntarily adopted standards can have a self-regulatory effect on the global market. To begin, it should be kept in mind that reliance on self-regulation in a free market can be considered legitimate only where it occurs within the framework imposed by public governments (banking and stock exchange law, anti-trust law, public economic policy). questions arise, in particular, with regard to the enforcement of penalties. The chances for the success or failure of self-regulation in a globalised economy and the assurance of rational risk management by private actors will be the subject of the following remarks.The central question here is how unilaterally adopted standards and soft law texts can be defined so as to guarantee that actual compliance is assured.[26]Experience has shown that a fine mesh of penalties is needed in order to achieve full recognition of paralegal (soft law) norms.[27]Risk management mechanisms within the MNEs themselves is probably the most effective method of achieving voluntary implementation of soft law, since it touches on the very core of the companies' existence, that is, their financial well-being. The

[23] It should be recalled that CSR norms, as soft law, are flexible, and can be revised every 3 to 5 years. Thus, for example, both the OECD Guidelines and the GRI Guidelines have already been revised twice in order to adapt them to developments in the revolution of CSR.

[24] On the concept of risk management, see Phillip H. Rudolph, "The History, Variations, Impact and Future of Self-Regulation", in Ramon Mullerat/Daniel Brennan (ed.), *Corporate Social Responsibility: The Corporate Governance of the 21st Century* (The Hague: Kluwer Law International, 2005), pp. 365-384, at pp. 376 *et sqq*.

[25] Susan Margaret Hart, "Self-regulation, Corporate Social Responsibility, and the Business Case: Do they Work in Achieving Workplace Equality and Safety?", 92, *Journal of Business Ethics* (2010), pp. 585-600, at p. 595. "According to the business case, effective cost-benefit techniques should lead to an economic rationale for CSR action".

[26] Martin Herberg, *Globalisierung und private Selbstregulierung: Umweltschutz in multinationalen Unternehmen* (Frankfurt/New York:Campus Verlag, 2007), at p. 76.

[27] Cf. ibid., at p. 24.

enforcement potential and the limits of self-regulation inherent in "social control systems" must also be taken into consideration.

Non-formal norms can regulate the behaviour of human beings without the need for strict laws, since social ties themselves can serve as an enforcement mechanism.[28]Social intercourse normally proceeds on the informal level of self-evident social expectations, so that a great many rules of behaviour are in constant operation on their own strength, with no requirement of intervention on the part of public authorities. Explicit guidelines or "rules of law" are not always necessary and, where too strictly applied, actually tend to be counter-productive, since the more cunning will always do their best to stretch the law to its outer limits.[29]A more effective means of achieving enforcement *without law*[30] is provided by civil regulation.These more flexible forms of regulation – also termed CSR drivers – use social control, normally in the form of public pressure, to put out warning signs in the marketplace.ZADEK defines civil regulation as a lose form of social collectivity that constantly informs the market and sets trends.[31]It should be emphasised that society can pass judgement on companies even without the aid of democratically imposed norms, thus exerting an unconscious control over supply and demand.[32]

"In their early stage, civil regulations are quintessentially organic and often volatile systems of rules. Indeed, they can best be understood as non-statutory regulatory frameworks governing corporate affairs. They lie between the formal structures of public (statutory) regulation, and market signals generated by more conventional individual and collective preferences underpinned by the use and exchange value of goods and services."[33]

28 Robert C. Ellickson, *Order without Law: How Neighbors Settle Disputes* (Cambridge MA/London:Harvard University Press, 1991), at p. 123.

29 Michael L. Michael, "Business Ethics: The Law of Rules", John F. Kennedy School of Government, Harvard University, Working Paper No. 19, at p. 32.

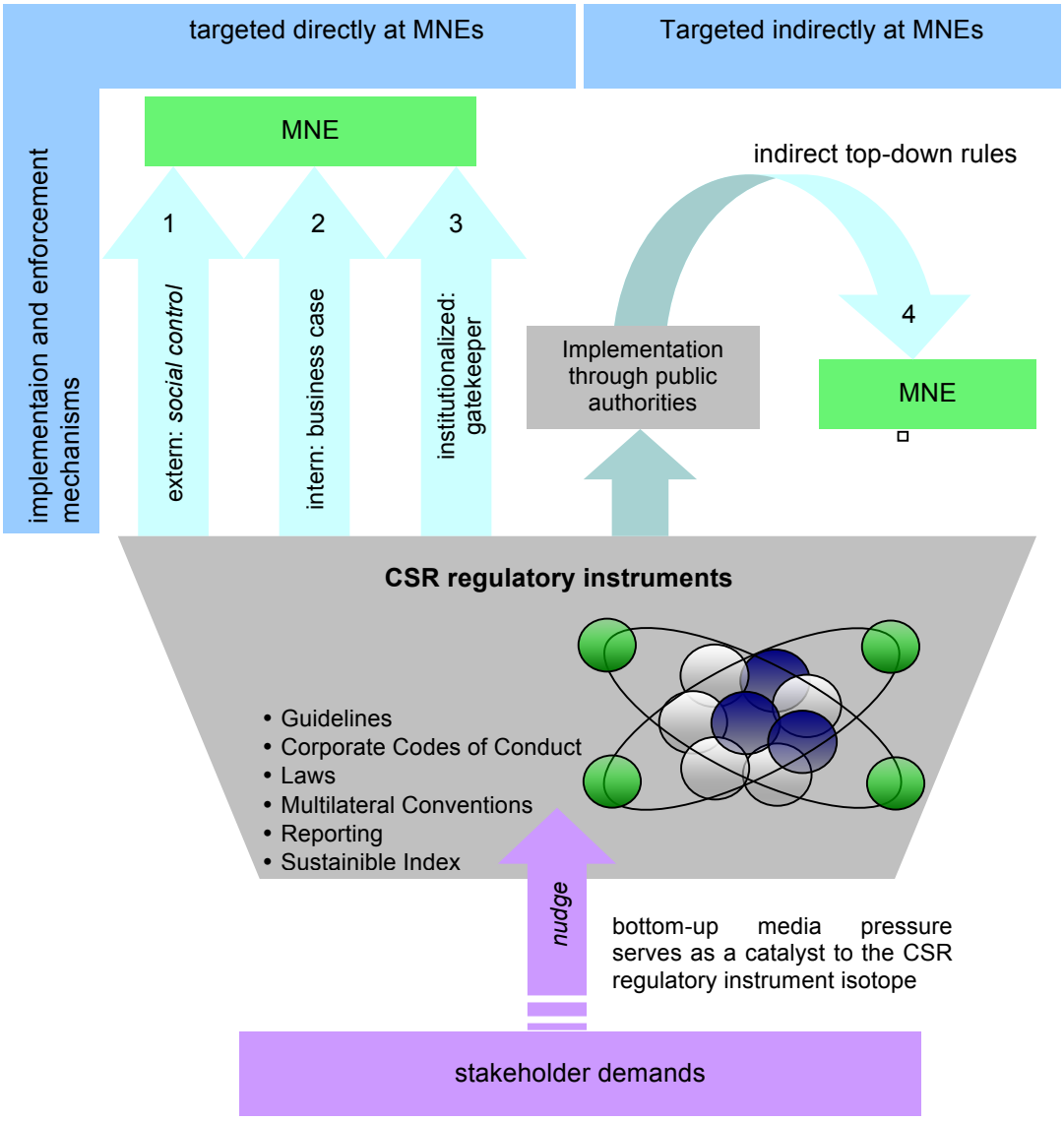
30 *CSR without law* is here understood as soft law, which in terms of the binary code of "law – no law" must be characterised as "no law", so that other means of enforcing CSR norms must be sought. Cf. Niklas Luhmann, Das Recht der Gesellschaft (Frankfurt:Suhrkamp Verlag, 1995), at pp. 166 *et sqq*.

31 Simon Zadek, *The Civil Corporation* (London:Earthscan, 2007), 81.

32 Ellickson, *Order without Law: How Neighbors Settle Disputes*, *supra* note 28, at p. 130. "The existence of legal rules is usually easier to prove than is the existence of norms (...) Norms are harder to verify because their enforcement is highly decentralized and no particular individuals have special authority to proclaim norms." Dawn Story/Trevor Price, "Corporate Social Responsibility and Risk Management?", *Journal of Corporate Citizenship* (2006), pp. 39-51, at p. 40. "Independently these standards help organisations to address their social responsibilities while providing a structured framework to ensure legislative compliance and opportunities for financial sustainability."

III. Conclusion

As shown in the diagram below, there are fundamentally three complementary possibilities for implementing and enforcing CSR norms: (1) social control and civil regulation; (2) business case and risk management; and (3) gatekeepers. These three private sector enforcement mechanisms have a direct self-regulatory effect on multinational enterprises. For the sake of completeness, a fourth mechanism has also been noted, which, contrary to the non-governmental mechanisms mainly focused upon here, affect the multinationals only indirectly through top-down public regulatory rules.



[33] Simon Zadek, *The Civil Corporation*, *supra* note 31, at p. 81.

The first three pillars are based entirely on private law, and work to create direct pressure on multinational corporations to conform with CSR principles. These are set forth in a wide variety of guidelines and other regulatory instruments drafted, for the most part, by NGOs. This sheer inexhaustible wealth of CSR regulatory instruments (represented in the diagram by the basket) can be broken down into a number of principal categories, including corporate codes of conduct, guidelines, sustainability reports, and indexes.

Socio-politically generated media pressure (1) places corporations under a practical constraint to adopt measures in conformity with CSR principles. The multinationals react by putting into place CSR measures defined in internal corporate codes of conduct, or by appropriating codes and guidelines drafted by an external watchdog organizations. In order to avoid reputational damage, corporate management draws up a business case (2) to weigh the risks and introduce (implement), where appropriate, CG and CSR codes within the company. Specialized CSR compliance officers are tasked with reporting on CSR compliance inside the company.

These internal self-monitoring procedures (2) are conducted under the watchful eye of stakeholder associations (NGOs), which serve as external enforcement instances by means of social control and civil regulation (1). The efforts of such activist groups to impose social control and civil regulation on large corporations primarily through the use of media pressure has nevertheless come in for criticism grounded in the fact that external CSR enforcement is characterized by a disregard for fundamental democratic values.

A more structured role, by contrast, is played by the gatekeepers (3) of the international securities exchanges. As quasi-institutionalized external CSR enforcement mechanisms, they are in a position to demand that large corporations comply with CG – and, as now proposed, also CSR – disclosure requirements, as a condition for listing. Gatekeepers, too, arose as a result of the expectation gap, and play a constructive role in promoting CSR implementation and enforcement through increased transparency. Because the gatekeepers of the securities exchanges channel the most important flows of capital, and are thus able to exercise a degree of oversight over the most important listed corporations, the requirements they fix in the domain of CSR have the most direct and most significant influence on sustainability. It is with this in mind that the article here being presented places particular emphasis on the importance of further developing this function in the sense of a *lex ferenda*.

Finally, it is notable that – in a manner similar to what may be observed in the network mechanisms of investor protection – within this globally networked interactivity, sustained by

a complex web of international and transnational norms, new rules for securing global commercial exchange are constantly emerging and succeed in imposing themselves. This network mechanism operates globally, supported by the stabilizing influence of national regulatory regimes, and helps to promote sustainable investment worldwide by creating transnational standards, which although voluntary in nature are increasingly viewed as obligatory by major corporations.[34] The contractual network is a reaction to the demands of global society and, as such, perpetually adapts itself as those demands change. This on-going network relationship between international legal systems and investment instruments, operating at the interface of business, law, and politics, guarantees the continued promotion of sustainable investment in the developing world.

[34] Marc Amstutz, "Zwischenwelten: Zur Emergenz einer interlegalen Rechtsmethodik im europäischen Privatrecht", in Gunther Teubner/Chrisitan Joerges (ed.), *Rechtsverfassungsrecht: Recht-Fertigungen zwischen Privatrechtsdogmatik und Gesellschaftstheorie* (Baden-Baden: Nomos, 2003), pp. 213-237, at p. 235: in other words, "the many autonomies of private law are embedded heterarchically, polycentricly, polycontextually in a 'poietic' network, not by means of formalisation, not by means of materialisation, but 'procedurally,' that is, by setting a procedure in motion whose evolution is guided by metanorms". Cf., in this regard, also the CSR isotope model as proposed by Anne Mirjam Schneuwly, "CSR Regulierungsinstrumente an der Schnittstelle von Wirtschaft und Recht", in Anne Mirjam Schneuwly (ed.), *Aktuelle Regulierungsformen an der Schnittstelle zwischen Wirtschaft und Recht: Tagungsband des 11. Graduiertentreffen im internationalen Wirtschaftsrecht in Freiburg (Schweiz) 2010* (Stuttgart: Richard Boorberg Verlag, 2011), pp. 47-64, at pp. 47 *et sqq*.