CORPORATE SOCIAL RESPONSIBILITY: GOVERNANCE GAIN OR LAISSEZ-FAIRE FIGLEAF?

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I. INTRODUCTION

In a world of good intentions, the emergence of the slogan "corporate social responsibility" (CSR) has been a particularly striking feature of the twenty-first century.[1] Thus, according to the European Commission:[2]

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1. For a helpful overview of some of the emerging literature, see A. Lockett, J. Moon & W. Visser, *Corporate Social Responsibility in Management Research: Focus, Nature, Salience and Sources of Influence*, 43 J. MGMT. STUD. 115 (2006).

2. Communication from the Commission *Concerning Corporate Social Responsibility: A business contribution to Sustainable Development* 5 (COM(2002) 347 final, Brussels, 2 July 2002), *available at* http://trade.ec.europa.eu/doclib/docs/2006/february/tradoc_127374.pdf, and see 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)) (Rapporteur: Philip Bushill-Matthews, FINAL A5-0133/2003, Apr. 28, 2003). This followed on from the European Commission's policy document *Promoting a European framework for corporate social responsibility: Green Paper* (COM(2001) 366 final, Brussels, July 2001), *available at* http://ec.europa.eu/employment_social/soc-dial/csr/greenpaper.htm.

The context for these strategy documents had been established earlier, through contributions which included N. Lebessis & J. Paterson, *Evolution in Governance: What Lessons for the Commission? A First Assessment* (European Commission Forward Studies Unit Working Paper, Brussels 1997), the Communication from the Commission to the Council, the European Parliament, the Committee of the Regions and the Economic and Social Committee, *The Competitiveness of European Enterprises in the Face of Globalisation—How it can be Encouraged* (COM(98) 718 final, Brussels, Jan. 20, 1999), *available at* http://aei.pitt.edu/3342, and contributions such as GLOBALIZATION AND SOCIAL GOVERNANCE IN EUROPE AND THE UNITED STATES (W. Bücherl & T. Jansen eds., 1999) (papers presented at a Round Table organized by The Forward Studies Unit and The Center for Applied Policy Research (CAP,

> There is today a growing perception among enterprises that sustainable business success and shareholder value cannot be achieved solely through maximising short-term profits, but instead through market-oriented yet responsible behaviour. Companies are aware that they can contribute to sustainable development by managing their operations in such a way as to enhance economic growth and increase competitiveness whilst ensuring environmental protection and promoting social responsibility, including consumer interests.

A variety of particular problems leading to negative market effects for significant brands are put forward as part of the incentive for commitment to CSR principles—whether involving the production by Adidas of famous name football shirts, or the production of Nike sports products in contexts involving questionable labor practices or the use of child labor,[3] or public health and welfare controversy arising in relation to items such as the powdered milk products of Nestlé.[4]

Munich) and with the support of the German Marshall Fund of the United States (European Commission Forward Studies Unit Working Paper, Brussels 1999).

3. *See*, *e.g.*, *Child labour scandal hits Adidas: Brutality, poor wages and 15-hour days in the Asian sweatshops*, THE OBSERVER, Nov. 19, 2000, *available at* http://www.guardian.co.uk/uk/2000/nov/19/jasonburke.theobserver (reporting on allegations before hearings of the European Parliament's Development Committee concerning the sports manufacturer Adidas practices in Indonesia and Thailand); *"We Blew It"—Nike Admits to Mistakes Over Child Labour*, THE INDEPENDENT, Oct. 20, 2001 (reporting that the sportswear company Nike admitted employing children in third world countries, with children as young as ten making shoes, clothing, and footballs in Pakistan and Cambodia).

4. The Nestlé circumstances illustrate vividly the potential reputational damage that can be caused by organized campaigns against a named producer, as well as the way in which such campaigns can result in direct intervention by international organizations, such as the World Health Organisation. As a major player in the formula-milk market, Nestlé, along with other leading formula companies were accused of acting in ways calculated to undermine breastfeeding mothers, giving out free samples of their products and targeting women directly through advertising campaigns. The marketing message was that formula was as healthy as breast—even though in some countries the women had no access to clean water to mix up the formula with. In some instances, cans of formula were being sold with the instructions in the wrong language for the women being targeted. After winning a legal action against the charity "War on Want," who, in 1974, had published a pamphlet in Switzerland under the title "Nestlé Kills Babies" (although the responsible charity was ordered to pay only a token fine), the company became the target in 1977 of a boycott of all Nestlé products in the United States, and the boycott quickly spread to Europe. In 1981, the World Health Assembly (the decision-making body for WHO) adopted the International *Code of Marketing of Breast Milk Substitutes*, calling it "a minimum requirement" to be adopted "in its entirety." In 1984, Nestlé agreed to implement the code, and the boycott was officially suspended by the groups who had done most to promote it. However, in 1988 the International Baby Food Action Network alleged that baby-milk companies were flooding health facilities in the developing world with free and low-cost supplies, and the Nestlé boycott was resumed in the following year. In 2000, Nestlé's chief executive said the company would ensure that labels always had instructions in the appropriate language—although campaigners claim that many aspects of the code continue to be violated, and argue that consumers should still boycott the company. For a detailed presentation of these events over the course of twenty years, see the special report *Milking it*, THE GUARDIAN, May 15, 2007, *available at* http://www.guardian.co.uk/business/2007/may/15/medicineandhealth. lifeandhealth.

Yet, is this really anything particularly new? One does not have to go back many years to recall the negative consumer impact upon major organizations such as Barclays Bank, during the period of sanctions against South Africa under apartheid, when public opinion was effectively mobilized to protest against the continuing business presence of particular firms under that regime.[5] Nor has this been the only context in which "consumer power" has been seen to "bite back" in response to various criticisms of a moral and ethical nature about the corporate behavior of "household names" in the global marketplace.[6]

Widely reported financial scandals and growing public perceptions of "fat cat" attitudes to corporate direction and management have also served to sensitize corporate leaders to the disapproval of stakeholders who are no longer confined to the shareholders of publicly quoted companies.[7] Thus, while the name of Enron has become almost synonymous in the public psyche with "misconduct in the boardroom,"[8] a plethora of "golden farewells" to senior managers or directors of City of London firms whose reported business performance suggests more incompetence than cause for reward has fuelled perceptions that such individuals have been neither accountable to, nor caring of, the interests of those in whose names

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5. For a retrospective assessment of this and related cases during the apartheid period, see N. John, *The Campaign Against British Bank Involvement in Apartheid South Africa*, 99 AFRICAN AFFAIRS 415 (2000).

6. For the reaction of corporate officers to the challenges of communicating "ethical investment" policies to investors, see the study undertaken by K. Hockerts & L. Moir, *Communicating Corporate Responsibility to Investors: The Changing Role of the Investor Relations Function*, 52 J. BUS. ETHICS 85 (2004).

7. An area that had already been attracting comment well before a group of high-profile corporate failures hit the headlines at the turn of the Millennium. *See*, *inter alia*, K. Hopt, *Self Dealing and Use of Corporate Opportunity and Information: Regulating Directors' Conflicts of Interest*, *in* CORPORATE GOVERNANCE AND DIRECTORS' LIABILITIES 285 (K. Hopt & G. Teubner eds., 1985), while, in relation specifically to issues of remuneration, see A. Cosh & A. Hughes, *The Anatomy of Corporate Control: Directors, Shareholders and Executive Remuneration in Giant US and UK Corporations*, 11 CAMBRIDGE J. ECON. 285 (1987), P. Gregg, S. Machin & S. Szymanski, *The Disappearing Relationship Between Directors' Pay and Corporate Performance*, 30 BRIT. J. INDUS. REL. 1 (1993), and the perceived challenges for company law presented by Charlotte Villiers, *Executive pay: beyond control?*, 15 LEGAL STUDIES 260 (1995).

8. A comprehensive collection of material relating to the Enron events can be accessed at the Web site of the U.S. Securities and Exchange Commission http://www.sec.gov/spotlight/enron.htm. For an interesting short note on the potential significance of the scandal that developed out of the accounting practices relating to Enron's bankruptcy in December 2001, see Simon Deakin, *Corporate Governance after Enron: The Return of History*, 14 THE EDGE 26 (2003). More recently, see, from varying perspectives, J. Coffee, *A Theory of Corporate Scandals: Why the USA and Europe Differ*, 21 OXFORD REV. ECON. POL'Y 198 (2005); D. McBarnet, *After Enron Will 'Whiter than White Collar Crime' Still Wash?*, 46 BRIT. J. CRIMINOLOGY 1091 (2006); and Antoine Rebérioux, *Does shareholder primacy lead to a decline in managerial accountability?*, 31 CAMBRIDGE J. ECON. 507 (2007).

they have conducted themselves in their business capacities.[9] Even more "scandalizing" have been the exploits in the United Kingdom and elsewhere of large numbers of first-generation directors of newly-privatized organizations—taking full advantage of what a former British Prime Minister is famously reputed to have described as the process of "selling off the family silver,"[10] followed by rapid divestment in the private sector to realize as personal gains the value of state subsidies or under-valuations made to ensure the success of the initial privatization process.[11]

When one then adds to these examples a number of environmental and "health & safety" catastrophes—such as the "EXXON Valdez,"[12] the events at Bhopal,[13] and the spread of "acid

9. Among numerous examples, see *The golden handshake to end them all*, THE INDEPENDENT, Mar. 4, 2004; *Green's Carlton bows out on a shameful note*, THE INDEPENDENT, Mar. 4, 2004 (commenting upon the departure of Michael Green, "shareholders had been dismayed at Mr Green's handling of ITV Digital, the collapsed pay-television channel that cost Carlton and Granada £ 1.2bn," from Carlton with a pay-out of £15.1 million); *BT chief Sir Peter to ring up windfall*, EDINBURGH EVENING NEWS, Jan. 4, 2002 (on the departure of BT's chief executive Sir Peter Bonfield, "widely blamed by City sources for the poor performance of BT's share price over the last year," departing from the company with a pay-out of £2 million together with £566,000 worth of "performance-related shares"); and, more generally, see the observations about the differential treatment of the public and the private sectors made in *Sitting pretty in the City*, THE GUARDIAN, Mar. 2, 2007.

10. A criticism of the policy of privatization being undertaken by the United Kingdom government under Prime Minister Margaret Thatcher, made in the course of a speech by former Prime Minister Harold Macmillan to a Tory Reform Group dinner, on November 8, 1985, at the Carlton Club, London. As Macmillan put it, "First of all the Georgian silver goes. Then all that nice furniture that used to be in the saloon. Then the Canalettos go."

11. For trenchant criticisms of successive United Kingdom government policies of privatization, and a wide range of examples where corporate behavior is alleged to have fallen below acceptable standards, presented in crusading fashion with proposals for reform, see A. Mitchell & P. Sikka, *Taming the Corporations* (Association for Accountancy & Business Affairs, Basildon 2005).

12. For a brief outline of the events which took place in 1989, when the oil tanker *Exxon Valdez* struck Bligh Reef in Prince William Sound, Alaska, spilling more than eleven million gallons of crude oil, see the United States Environmental Protection Agency Web site *at* http://www.epa.gov/oilspill/exxon.htm. The incident is widely considered to offer an outstanding example of "what not to do" in the event of a crisis. In an action brought against Exxon Mobil by fisherman, property owners and others affected by the spill, the company was initially ordered to pay $5 billion in punitive damages, in addition to $287 million for economic losses. In December 2006, the U.S. 9th Circuit Court of Appeals lowered the damages to $2.5 billion because of Exxon Mobil's "prompt action to clean up the spill and compensate the plaintiffs for their losses." Subsequently, on May 23, 2007, the U.S. 9th Circuit Court of Appeals refused an application by the company for a larger panel of judges to reconsider the decision in relation to the amount of punitive damages, declaring that "While the award is large, it addresses what must be characterized as extremely reprehensible misconduct." The hugely damaging environmental effects of the spill are still reported to be continuing—see, inter alia, S. Lovgren, *Exxon Valdez Spill, 15 Years Later: Damage Lingers*, NAT'L GEOGRAPHIC NEWS, Mar. 22, 2004, A. Mitchell & P. Sikka, *Taming the Corporations*.

13. On December 3, 1984, methyl isocyanate gas leaked from the Union Carbide India Limited plant in Bhopal, India. According to the state government of Madhya Pradesh, approximately 3,800 people died and several thousand other individuals experienced permanent or partial disabilities as a consequence of the leak. Following investigation by Union Carbide

rain" across large swathes of northern Europe[14]—it is, perhaps, little surprise that there have emerged repeated calls for improvement in the standards of behavior of those entrusted with the management and direction of corporate affairs in the modern capitalist marketplace.

Undoubtedly, the emergence of "corporate social responsibility" as a rallying slogan has been a matter of significance during recent years. However, the phenomenon also stands accused of providing a "fig leaf" for corporate license—the accusation being that mere incantation of "good principles" is no substitute for action to improve perceived corporate governance shortcomings. Indeed, in certain quarters, the incessant mantra of "CSR principles" meets with little more than the cynical adjudication that "If you repeat a lie often enough, it takes on the quality of received wisdom."[15]

In the brief comment that follows, some remarks are offered on the notion and definition of "corporate social responsibility," after which some examples of "CSR in practice" are considered, before the problems of measuring "CSR" activities and their outputs are addressed. A concern is expressed about the growing emergence of "CSR auditing" mechanisms and the legitimacy of these, after which fears are voiced about the "voluntarist approach" to corporate governance and regulation that has been developing since the turn of the century.

experts and a separate committee of experts working on behalf of the Indian government, it was concluded that a large volume of water had been introduced into the tank containing the gas which, in turn, caused a chemical reaction that forced the chemical release valve to open and allowed the gas to leak. An independent investigation by engineering consultants determined that the water could only have been deliberately introduced into the tank, since safety systems were in place and operational that would have prevented water from entering the tank by accident. In May 1989, Union Carbide and Union Carbide India Limited entered into a $470 million legal settlement with the Government of India, which represented all claimants in the case. The settlement was affirmed by the Supreme Court of India, which described it as "just, equitable and reasonable," and settled all claims arising out of the incident. For a detailed presentation of the litigation issues arising out of the event, see U. BAXI, INCONVENIENT FORUM AND CONVENIENT CATASTROPHE: THE BHOPAL CASE (Indian Law Institute, Bombay 1986), and the comments of P. Muchlinski, Book Review, 36 INT'L & COMP. L.Q. 694 (1987).

14. The problem of "acid rain" emerged as a significant trans-national issue in the last quarter of the twentieth century. In particular, it has been established that acid rain can increase the acidity of lakes, dams and streams and cause the death of aquatic life, as well as increase the acidity of soil, water and shallow groundwater. Acid rain has also been linked with the death of trees in Europe and North America. For an indication of the extent of the contamination in northern Europe, see the material on the United Nations Environment Programme Web site *at* http://maps.grida.no/go/graphic/acid_rain_in_europe.

15. "Repeat a lie a thousand times and it becomes the truth. . . ." This version is usually credited to Dr. Joseph Goebbels, Propaganda Minister of the German Third Reich.

II. DEFINING "CORPORATE SOCIAL RESPONSIBILITY"

In their key Communication of 2002, *Corporate social responsibility: A business contribution to sustainable development*, the European Commission presented CSR as:[16] "a concept whereby companies integrate social and environmental concerns in their business operations and in their interaction with their stakeholders on a voluntary basis." As with all other efforts to spell out the notion (at the European Union level, as well as in the context of the activities of the United Nations, the OECD, and various other supranational bodies), particular note should be taken of the word "voluntary." Thus, actions within the framework of CSR are seen as complementary to, rather than as a part of, normative regulatory processes. For many commentators, indeed, this has developed into yet another laboratory in which to test propositions about the efficacy and desirability of so-called "soft law" forms of regulation, in preference to more traditional "hard law" regulatory approaches. This has immediately given rise to controversy over the impact of any such actions—with more pessimistic observers commenting on the absence of sanctions to underpin any voluntary undertakings, while others prefer to stress the advantages of voluntary commitments in terms of flexibility, nuanced self-regulation, and what are presented as "mature" corporate governance frameworks.[17]

The European Council's ensuing *Resolution of the Employment and Social Policy Council on CSR*,[18] drew inspiration from the European Commission's earlier Communication, in which were laid out what have come to be described as received "principles" of CSR—involving:

> recognition of the voluntary nature of CSR; a need for credibility and transparency of CSR practices; a focus on activities where Community involvement adds value; a balanced and broad approach to CSR, including economic, social and environmental issues as well as consumer interests; attention to the specific needs and characteristics of SMEs; and support of, and compatibility with, existing internationally agreed instruments. . . .

Once again, the emphasis is upon the "voluntary nature" of any actions—this time taking into account any existing "internationally

16. COM(2002) 347 final, *supra* note 2, at 7.

17. *See*, *e.g.*, the concerns expressed by the European Trade Union Confederation (ETUC), Press Release, ETUC Office of Press and Communications, Corporate Social Responsibility and European Trade Unions: Danger of a Rift (Mar. 14, 2006), *available at* http://www.etuc.org/2190.

18. Council of the European Union, *Resolution of the Employment and Social Policy Council on CSR* (Brussels, Dec. 2–3, 2002).

agreed instruments." In fairness, however, it should be noted that the European Council did go on to emphasize that: "CSR is behaviour by business over and above legal requirements, which should continue to be properly enforced," as well as observing that:

> globalisation has created new opportunities for enterprises, but it also has increased their organisational complexity; therefore policies on CSR should focus not only on single undertakings, but also on their subsidiaries and subcontractors; the debate on CSR must be seen in the wider context of corporate governance and accountability; in order to be effective, CSR should be a part of a concerted effort by all those concerned towards meeting shared objectives, including social and civil dialogue in accordance with national law and practice; undertakings should address not only the external aspects of CSR, but also the internal aspects such as health and safety at work and management of human resources.

These latter observations built upon the proposition by the European Commission that: "an increasing number of firms have embraced a culture of CSR."[19]

Despite the wide spectrum of approaches to CSR, there is large consensus on its main features. Thus, it is suggested that:

- CSR is behavior by businesses over and above legal requirements, voluntarily adopted because businesses deem it to be in their long-term interest;
- CSR is intrinsically linked to the concept of sustainable development: businesses need to integrate the economic, social, and environmental impact in their operations; and,
- CSR is not an optional "add-on" to business core activities—but about the way in which businesses are managed.

Not dissimilar values can be seen elsewhere, as, for example, in the context of the 1999 *OECD Principles of Corporate Governance*,[20] where it is observed that:

> Corporate governance relates to the internal means by which corporations are operated and controlled. While governments play a central role in shaping the legal, institutional and regulatory climate within which individual corporate governance systems are developed, the main responsibility lies with the private sector.
>
> A good corporate governance regime helps to assure that corporations use their capital efficiently. Good corporate governance helps, too, to ensure that corporations take into

19. COM(2002) 347 final, *supra* note 2, at 5.
20. ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, OECD PRINCIPLES OF CORPORATE GOVERNANCE (OECD Publications Service, Paris 1999).

> account the interests of a wide range of constituencies, as well as of the communities within which they operate, and that their boards are accountable to the company and the shareholders. This, in turn, helps to assure that corporations operate for the benefit of society as a whole. It helps to maintain the confidence of investors—both foreign and domestic—and to attract more 'patient', long-term capital.

Further evidence of the interest aroused by concerns for improved corporate governance and the promotion of values that can be broadly considered under the rubric of CSR may be seen in the development of standards for benchmarking corporate behavior in various dimensions. Particular mention should be made here of progress towards "SA 8000," and a range of like developments, purporting to set measures against which corporate behavior may be assessed in pseudo-empirical terms.[21]

At the level of the European Union, the approach has been for the European Commission to develop a publicly proclaimed strategy for promoting CSR, under which the phenomenon is promoted in seven areas: (i) increasing knowledge about the positive impact of CSR on business and societies in Europe and abroad, in particular in developing countries; (ii) developing the exchange of experience and good practice on CSR between enterprises; (iii) promoting the development of CSR management skills; (iv) fostering CSR among SMEs; (v) facilitating convergence and transparency of CSR practices and tools; (vi) launching an EU-level Multi-Stakeholder Forum on CSR; and, (vii) integrating CSR into Community policies

The developed shape of that approach has most recently been set out in a 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 Social Responsibility*.[22]

21. Social Accountability International's SA8000:2001 standard was developed in 1997 and has become the most widely recognized standard in this field. In June 2004, the International Standards Organisation (ISO) agreed to progress with a new work item on social responsibility, which it was said would be intended to provide practical guidance to "assist organizations in addressing their social responsibilities while respecting cultural, societal, environmental and legal differences and economic development conditions."

22. 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 Social Responsibility* (COM(2006) 136 final, Brussels, Mar. 22, 2006).

At the heart of the EU thinking is the creation of a so-called "European Alliance on CSR," the rationale for which is expressed in terms that:

> Acknowledging that enterprises are the primary actors in CSR, the Commission has decided that it can best achieve its objectives by working more closely with European business, and therefore announces backing for the launch of a European Alliance on CSR, a concept drawn up on the basis of contributions from business active in the promotion of CSR. The Alliance is an open alliance of European enterprises, for which enterprises of all sizes are invited to express their support. It is a political umbrella for new or existing CSR initiatives by large companies, SMEs and their stakeholders. It is not a legal instrument and is not to be signed by enterprises, the Commission or any public authority. It is a political process to increase the uptake of CSR amongst European enterprises.

Underpinning this initiative have been, "several years of public debate and consultation with all stakeholders, most particularly in the context of the European Multistakeholder Forum on CSR, which presented its final report in 2004."

The broader context for all of this has been a number of international texts and documents addressed to business, emanating both from global organizations, such as the United Nations or the OECD, and from regional bodies, such as the Council of Europe or the European Union.[23]

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23. In particular, mention may be made of the *ILO tripartite declaration of principles concerning Multinational Enterprises (MNEs) and social policy* (1977, revised 2000); the *OECD guidelines for MNEs* (1976, revised 2000), *available at http://www.investment.gov.eg/MOI_PORTAL/OtherSpeeches/OECDGuidelines.pdf*; and the UN *Global Compact* (2000). Reference should also be made to a variety of texts of more general application, including the UN *Declaration on Human Rights* (1948), *available at* http://www.un.org/Overview/rights.html; the *International Convention on civil and political rights* (1966), *available at* http://www.unhchr.ch/html/menu3/b/a_ccpr.htm; the *International Convention on economic, social and cultural rights* (1966), *available at* http://www.unhchr.ch/html/menu3/b/a_cescr.htm; the Council of Europe *Convention for Protection of Human Rights and Fundamental Principles* (1950), *available at* http://www.hri.org/docs/ECHR50.html; the EU *Charter of Fundamental Rights* (2000), *available at* http://www.europarl.europa.eu/charter/pdf/text_en.pdf, and its 2007 successor [OJ 2007/C 303/01]; the Council of Europe *Social Charter* (1961, revised 1996), *available at* http://conventions.coe.int/treaty/en/Treaties/Html/163.htm; the ILO *Declaration on fundamental principles and rights at work* (1998); the *Rio Declaration on Environment and Development* (1992), *available at* http://www.unep.org/Documents.Multilingual/Default.asp?DocumentID=78&ArticleID=1163, and its *Agenda 21* (1992); the *Johannesburg Declaration* and its *Action Plan for Implementation* (2002); the *UN guidelines on consumer protection* (1999), *available at* http://www.un.org/esa/sustdev/publications/consumption_en.pdf; the *EU Sustainable Development Strategy*, as adopted by the European Council at the Gothenburg Summit (2001); and the *Aarhus Convention on access to information, public participation in decision making and access to justice in environmental matters* (1998), *available at* http://www.unece.org/env/pp/documents/cep43e.pdf. One of the most interesting of recent

III. EVIDENCE OF CSR AT WORK

What emerges very clearly from the outset is that there have been a huge range of "high-profile" declarations—including so-called "CSR Reports"—by many major international companies and multinational corporations.[24] Indeed, annual reports by companies are littered with references to specific activities being undertaken in the name of CSR,[25] while a number of organizations have also established Web sites to disseminate the message of their commitment to the cause.[26]

All of these are clear indications that, even to put it at the very lowest, companies "cannot be seen NOT to be embracing the rhetoric of CSR." Indeed, it is also the case that many, if not most, major companies now possess a "director for CSR" or some equivalent—albeit that this role is often combined with other responsibilities, such as "compliance" or the position of legal counsel.

It is also evident that, at governmental level, there has been evidence of enthusiasm for the rhetoric of (and, arguably, the values promoted by) CSR.[27] Quite early, this has even been approached to the extent where the United Kingdom has, for a number of years, had a designated "Minister for CSR" (with a department producing annual reports on progress in promoting CSR initiatives).[28] Indeed, in one of its most recent presentations – a publication of May 2004 entitled *Corporate social responsibility: a government update*—the

documents has been the 2003 United Nations' *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights* (U.N. Doc. E/CN.4/Sub.2/2003/12/Rev.2). For comment on this, see, *inter alia*, D. Kinley, J. Nolan & N. Zerial, *The politics of corporate social responsibility: Reflections on the United Nations Human Rights Norms for Corporations*, 25 COMPANY & SECURITIES L.J. 30 (2007).

24. As well as by international business representative organizations, such as Business for Social Responsibility, CSR Europe, and the International Business Leaders Forum.

25. While many companies also post reports about their own CSR commitment and activities with systems such as the "GRI Register" operated by Global Reporting Initiative (GRI).

26. Including, for example, Microsoft's so-called "EMEA Corporate Citizenship Home," located at http://www.microsoft.com/emea/citizenship, or the "responsibility" section of Nike's Web site http://www.nikebiz.com.

27. This is apparent around the globe—whether in Australia, Canada, Singapore, or the United Kingdom—while many national governments also commit themselves to participation in regional initiatives promoting CSR practices.

28. Although it may be noted that the longevity of those appointed to this particular post is not particularly impressive—with an "attrition rate" of more than one office-holder a year! The United Kingdom government has consistently made great play of its commitment to CSR, as evidenced in the claim by Douglas Alexander MP, Former Minister of State for E-Commerce and Competitiveness, speaking to the PIRC Socially Responsible Investment Conference on March 18, 2002, that "This Government has an ambitious vision for CSR: to see private and public sector organisations in the UK taking account of their social and environmental impact, and taking action to address the key challenges in their areas of operation. Therefore the Government has done more than simply celebrate the success of business initiatives in the field of CSR. Instead we are helping to create the environment in which this journey can take place."

responsible Minister makes that claim that, "The UK is increasingly seen as one of the leading contributors internationally on CSR thinking and practice."[29]

The key question, however, is whether the rhetoric is translating into changed action, measurable gains in various social aspects of corporate activity, and demonstrable improvements in the engagement of corporate activity and decision making with social issues. To date, direct independent evidence to support a judgment one way or the other on these points has been difficult to come by, although, in the European Union context, the European Commission has published case studies indicating a variety of examples in which the virtues of a CSR approach are said to be demonstrated to beneficial effect.[30] Albeit on the basis of a small sample of twenty-five case studies, the European Commission opines that:

> What is striking about the 25 companies . . . is the clear benefits to business that are coming through as a consequence of adopting CSR principles. Some of these firms report increased sales or reduced costs, but almost all of them stress the intangibles—their reputation has improved, and with it their relations with their local communities. Their customers are more satisfied and more loyal and, perhaps best of all, their employees are happier and better motivated.

So far as "the bigger picture" is concerned, however, doubts remain as to how substantiable many of the CSR claims made by companies may turn out to be. Leaving aside the temptation to "discount" some of those claims as over-optimistic or exaggerated, one of the principal reasons for such uncertainty lies in the difficulty for analysts to measure in meaningful terms the results of particular CSR initiatives—a problem exacerbated by the fledgling status of any methodology for undertaking such an evaluative process.

IV. MEASURING CSR IN PRACTICE

One of the most controversial emerging areas of debate in relation to CSR initiatives has been the issue of how to measure what is being done, particularly where it is recognized that many of the

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29. United Kingdom Department of Trade and Industry, *Corporate Social Responsibility: A Government Update* (HMSO, May 2004). This 2004 document followed earlier presentations of United Kingdom government CSR initiatives, in the Department of Trade and Industry publications *Business and Society: Developing corporate social responsibility in the UK* (HMSO, March 2001) and *Corporate Social Responsibility Report 2002* (HMSO, May 2002).

30. *Responsible entrepreneurship: a collection of good practice cases among small and medium-sized enterprises across Europe* (Office for Official Publications of the European Communities, Luxembourg 2003).

claimed initiatives carry a highly aspirational, and often value-judgment-laden, character.[31] As has already been seen from the 2003 presentation of EU case studies, emphasis is placed by proponents of such initiatives upon "the intangibles" (described in various dimensions). By contrast, hardened critics point to a plethora of "self-auditing techniques," and what is sometimes alleged to be a process by which "targets" are set with an eye only to what it is already known will be achieved, thereby ensuring that the proclaimed corporate ambitions take on the quality of self-fulfilling prophesies.[32]

Some of the important issues that fall to be considered in this context were addressed by the EU in their 2002 document on CSR.[33] So, too have useful critical evaluations been offered in relation to so-called "social accountability audits."[34] Meanwhile, more wide-ranging critiques have been offered in relation to the need for what has been described, in the European context, as "adjudicating the Market."[35]

Indeed, in recent years, there has been a notable development of a new "market" in the purported measurement and reporting of "CSR gains," with a host of management consultants, financial services providers, accountancy firms, and the like having all been keen to develop yet another "services provision" limb to their activities.

As one recent European forum has proclaimed:

> CSR standards and instruments such as the ILO core labour conventions, the OECD Guidelines for Multinational Enterprises, the Global Reporting Initiative (GRI), the EU's Eco-Management and Audit Scheme (EMAS), SA8000 and AA1000 can be used as an aspiration/guide for implementing CSR into companies' daily management practices. Furthermore, private standardization bodies are also developing standards that incorporate social and environmental aspects.[36]

31. For recent approaches to this developing phenomenon, see the work of M. Hopkins, *The measurement of corporate social responsibility*, MHC INT'L LIMITED NEWS, Nov. 2000; M. Hopkins, *Measurement of Corporate Social Responsibility*, 6 INT'L J. MGMT. & DECISION MAKING 1 (2005); along with the contribution of J. McClenahen, *Defining Social Responsibility*, MANUFACTURING & SOCIETY 6 (2005).

32. An approach which is by no means confined to the realms of corporate behavior—as can be observed in the context of the so-called "open method of co-ordination" (OMC) established by the Member States of the European Union for developing the European Employment Strategy since 1997.

33. COM(2002) 347 final, *supra* note 2.

34. S. Courville, *Social Accountability Audits: Challenging or Defending Democratic Governance?*, 25 L. & POL'Y 269 (2003).

35. M. Everson, *Adjudicating the Market*, 8 EUR. L.J. 152 (2002). For an interesting assessment of the potential for developing a framework for CSR audit, which includes consideration of the available literature in the field, see R. Morimoto, J. Ash & C. Hope, *Corporate Social Responsibility Audit: From Theory to Practice*, 62 J. BUS. ETHICS 315 (2005).

36. European Multistakeholder Forum on CSR, *Corporate Social Responsibility: Final Results and Recommendations* 10 (Final Report, Brussels June 29, 2004).

Such emerging "audit function" activities have quickly moved on into attempts to establish "benchmarks" and "success ratings" by reference to which individual company performance can be presented to what is regarded by many as an increasingly gullible public.[37]

However, at the same time, this process has been leading to serious question marks being raised over the competence and motivations of the various bodies undertaking such measurements. What is it that makes a privately-developed "benchmark" valid as a measure against which the acceptability of particular corporate behavior or activities can or should be judged? Is such "benchmarking" a suitable vehicle with which to determine the extent to which private corporations should be "left to their own devices" in the global marketplace? Are adequate (or any) safeguards in place where potential conflicts of interest arise between "business efficacy" and "social protection"? What should be the limits (if any) to "self-regulation" of business practices? What legitimacy is there for self-appointed regulators to act in place of "State" or "democratically-evolved" authorities?

Perhaps more significantly, there is also concern that a proliferation of "voluntary" systems of self-assessment, backed up increasingly with paid-for certification, have the potential severely to undermine established global standards—and, in particular, the framework of international labor standards established over a period of more than eighty years by the ILO.

This has been giving rise to concern in some quarters that "accreditation"—without independent and internationally agreed or approved bases for the judgmental approval granted by such accreditation—is enabling companies to argue for "greater freedom" in their activities, including exemption from a variety of regulatory impositions in respect of social policy areas such as labor law,[38] health and safety at work,[39] and social security (including pension provision)[40] arrangements.

37. For comments on this development in the context of SA8000, see M. Miles & L. Munilla, *The Potential Impact of Social Accountability Certification on Marketing: A Short Note*, 50 J. BUS. ETHICS 1 (2004).

38. See the warnings sounded by C. Barnard, S. Deakin & R. Monks, *Reflexive Law, Corporate Social Responsibility and the Evolution of Labour Standards: The Case of Working Time* (ESRC Centre for Business Research, University of Cambridge, Working Paper No. 294, December 2004).

39. Consider the material presented in Report 210 of the European Agency for Safety and Health at Work, *Corporate social responsibility and safety and health at work* (Luxembourg 2004), and see the context set by M. Mansley (Claros Consulting), *Health & Safety Indicators for Institutional Investors. A report to the Health and Safety Executive* (Feb. 28, 2002).

Nor is the escape to "voluntary self-regulation" on the parts of major corporations worldwide the only matter of concern. The relentless rise of the phenomenon of "corporate social responsibility" is seen, in some quarters, as one, among a number, of relatively recent phenomena being utilized to justify moves away from traditional regulation and policing of corporate activity and decision making.[41] Instead of familiar interventionist regulation, sanctioned through administrative controls or legal means, the call is for what is sometimes referred to as "a light touch" regulation, leaving business largely free to develop its own regulatory regimes, through increasing reliance upon "codes of conduct" and the like.[42]

Similar concerns are voiced in relation to shifts away from "social policy" to what is described as "employment policy"—as is sharply evidenced in the context of the European Union since 1997.[43] Elsewhere, a concentration upon "social dialogue" in place of more traditional "collective bargaining" has also been identified as having the potential to undermine more familiar "hard" forms of regulation and policing for corporate activity.[44]

At a time when corporate governance is addressed increasingly in terms of a loss of faith in "self regulation," it is a matter of concern

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40. For an example that is said to introduce CSR practice into this area, see the United Kingdom's Occupational Pension Schemes (Investment) Regulations 1996, which require pension scheme trustees to state their policy regarding the extent to which social, environmental or ethical considerations are taken into account in the selection, retention, and realization of investments.

41. The emphasis upon CSR as a "voluntary" phenomenon is epitomized in the approach demonstrated by the United Kingdom's Energy Minister, Malcolm Wicks (who also held responsibilities for CSR matters), to the effect that, "We want to provide the right policy framework to support it while letting business decide how to apply it . . . The position of Government is that CSR is something over and above the legal requirements and we feel it's best as a voluntary activity . . . Where the society judges that something is so crucial there should be at least a minimum standard, then we should legislate for it. But I would see CSR as the social policies of companies and essentially something that is added to that." Indeed, in relation to the issue of what enforcement measures should be utilized in order to ensure the efficacy of CSR, the Minister went so far as to declare that, "It could be something of a non-sequitur if you enforced CSR—it then becomes legal policy rather than CSR." Address to the conference "CSR 2006: Emerging Risks and Evolving Responsibilities," Chatham House, London, Mar. 14, 2006.

42. For observations on some of the limits for such an alternative approach to regulation, see D. Nitsch, M. Baetz & J. Hughes, *Why Code of Conduct Violations go Unreported: A Conceptual Framework to Guide Intervention and Future Research*, 57 J. BUS. ETHICS 327 (2005).

43. See the contributions in JOB CREATION AND LABOUR LAW: FROM PROTECTION TOWARDS PRO-ACTION (M. Biagi ed., 2002), and, in particular, the observations of this author in A. Neal, *From 'Bad Boy' to European Role Model?—The Strange Legacy of United Kingdom Employment Policies since the Single European Act*, *in* JOB CREATION AND LABOUR LAW: FROM PROTECTION TOWARDS PRO-ACTION 269 (M. Biagi ed., 2002).

44. *See*, *e.g.*, the comments of this author in A. Neal, *We Love You Social Dialogue—But Who Exactly Are You?*, *in* FONDAZIONE GIULIO PASTORE, LA CONTRATTAZIONE COLLETTIVE EUROPEA: PROFILI GIURIDICI ED ECONOMICI 113 (2001).

that social policy (including health and safety of workers, and protection of the environment) should apparently be treated in a diametrically opposed manner. Particularly in the field of labor standards and employment protection, the language of "the market" has not been received enthusiastically by the actors on the industrial relations stage—even employers recognizing the need to recruit, retain, and motivate scarce highly-skilled staff. In consequence, it may be suggested that the proposition that "best practice" and "voluntary codes" offer a superior (or even equivalent) option to long-established frameworks for achieving the balance between labor and capital remains, to put it at the lowest, in need of evidential underpinning.

V. GOVERNANCE GAIN OR LAISSEZ-FAIRE FIGLEAF?

This brief comment can do little more than raise some of the questions that might usefully be posed in relation to the dramatic emergence of "corporate social responsibility" as a modern approach to the need for corporate regulation and monitoring of business behavior and governance. However, one or two observations may be offered as a contribution to the debate that this author considers to be somewhat overdue.

As a first observation, it is, of course, true that, if one were to confine the discussion to the theoretical or moral level, the underlying propositions justifying the promotion of CSR are widely regarded as being attractive and are to be welcomed. Once one embraces "the global marketplace" in entrepreneurial terms, it is hard to criticize the proposition that the world should be populated by "good employers," "responsible enterprises," and "accountable managers/directors." Just as one may choose to applaud "good husbands," "faithful wives," or "honest politicians," the values embedded in such aspirational desires are often said to reflect the views of "the public," "consumers," or a variety of other groups within society.

Unfortunately, the "real world"—and, in particular, a market-driven world in which, "The main function of an enterprise is to create value through producing goods and services that society demands, thereby generating profit for its owners and shareholders as well as welfare for society, particularly through an ongoing process of job creation,"[45] leaves even the less cynical observer to question whether it is really the case that "new social and market pressures are

45. COM(2002) 347 final, *supra* note 2, at 7.

gradually leading to a change in the values and in the horizon of business activity,"[46] of a kind that is adequately equipped to deliver social justice, employment security, and environmental protection of a high quality.

There is sufficient emerging evidence that an increasing reliance upon regulatory policies and mechanisms associated with the mantra of "corporate social responsibility"—along with increasing focus upon market-oriented "employment policy" at the expense of traditional "social policy"—carries the seeds of destruction for a regulatory framework that can effectively hold the balance between the "economic" and the "social" dimensions of work, welfare, and the environment.

Increasingly "sophisticated"—but ultimately self-defining and (arguably) self-serving—benchmarking and accreditation processes bring with them the further danger that regulators, seduced by an ostensibly objective "audit-trail" approach to corporate performance and regulatory compliance, will retreat from their role of regulators and enforcers of social and environmental standards. Such an approach would lead to a situation in which only high-profile "scandals," evidencing the shortcomings of predominantly self-regulatory social protection mechanisms, would bring about effective intervention into an otherwise "laissez-faire" environment more reminiscent of the developing markets of the 1890s than the globalized social economies of the early twenty-first century.

What is needed, it may therefore be suggested, is a much more robust and critical evaluation of the costs and the benefits of this new phenomenon, in all of its guises. Against such an evaluation, policy-makers and legitimated regulators should be able to develop modern and appropriate regulatory approaches that respect the competing interests of the diverse actors in "the global market" while, at the same time, maintain the delicate balance between the "economic" and the "social" dimensions of modern productive society. To this end, the "traditional" regulators and guardians of "social justice" need to become involved in a much more pro-active manner than has so far been witnessed, lest, by default, the guru of "voluntary self-regulation" fatally disrupts that delicate balance once and for all.

46. *Id.*