The Evolution of Corporate Social Responsibility
Reflections on the Constitution of a Global Law for Multinational Enterprises

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Is Corporate Social Responsibility (CSR) a matter of law? Despite the fact that the role of national states is being increasingly impinged upon by the process of globalization, the prevailing notion of law today continues to be based on the maintenance of the stability of the existing national structures. The function of law is still seen as consisting primarily in shielding expectations from the need to make all too many adjustments. By this means, it is intended that the law will contribute to the overall stability of society. What is central to CSR, however, is not the stabilization of relatively static structures. CSR is, essentially, a product of globalization. World society is a societal formation of a different order, and the function that it requires of the law is different from what a nationally segmented society demands: World society has no need for a legal system to stabilize structures whose nature is fundamentally static. Rather, the societal structures that predominate in the formation of world society are, for the most part, highly dynamic and constantly evolving. The question this poses then, is this: What is the function that should be assigned to the law vis-à-vis the highly dynamic structures of world society? The function of law in the globalized world is to provide support for the reorientation of dynamic expectations. CSR performs this legal function in a very specific manner: It supports the multinational enterprises in the process of adapting their behavior to the values in force in the various regions, sectors, or industries in which they are active.

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I. Global (Non-)Law?
The question whether or not the responsibility that large enterprises bear towards society is a matter of law remains a subject of controversy.1 The degree to which a large enterprise respects the principles of Corporate Social Responsibility (CSR) is treated as something entirely voluntary, as a sort of business decision on the part of a corporate enterprise to act in

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a manner that goes beyond what the law demands.\textsuperscript{2} This understanding of CSR as a voluntary decision is ubiquitous and is evident in virtually all treatments of the subject: in the OECD Guidelines for Multinational Enterprises;\textsuperscript{3} in the Communications of the European Commission on CSR, issued in 2002, 2006 and 2011, as well as, to some extent, in the Directives of the European Parliament and of the Council of 2013 and 2014;\textsuperscript{4} in the UN Global Compact;\textsuperscript{5} etc. If CSR is understood simply as a set of obligations that go beyond what is demanded by the law, then it makes little sense to frame the issue as a legal matter.

There is, however, no reason to simply accept this understanding of CSR. The fact that the discussion surrounding CSR has continued to intensify in recent years is not without consequences for the law.\textsuperscript{6} Quite the contrary: the ongoing debate makes it increasingly evident that, as far as the law is concerned, the various disciplines involved (economics, sociology, political science etc.) have allowed a categorical misconception to obscure their thinking. And the category that has been misconceived is that of the law itself – at least as it has been defined in the tradition of the past two centuries. In a nutshell:

1) The classic definition of law takes as its point of departure the function of the law in national states.

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\textsuperscript{6} Cf. Kerr/Janda/Pitts; McBarnet (FN 2), 9 et seqq.; Mahmudur (FN 2), 95 et seqq.
This means that it relies on the presence of static structures or – what comes down to the same thing – on the existence of a interweave of expectations, which remain constant, and with the task of the law being to maintain the stability of those structures, or those expectations, over time. Despite the fact that the role of national states is being increasingly impinged upon by the process of globalization, the prevailing notion of law today continues to be based on the continued stability of the existing national structures. The function of law is still seen as consisting primarily in shielding expectations from the need to make all too many adjustments. By this means, it is intended that the law will contribute to the overall stability of society.7

(2) What is central to CSR, however, is not the stabilization of relatively static structures. CSR is, essentially, a product of globalization. It did not develop in the context of the world order that was based exclusively on national states existing side by side; it came into its own only with the emergence of a global, world society.8 This is a society of a different order, and the function that it requires of the law is different from what a nationally segmented society demands: world society has no need for a system to stabilize structures whose nature is fundamentally static, since it is largely devoid of such structures. Rather, the structures that predominate in the formation of world society are, for the most part, highly dynamic and constantly evolving.9 The question this poses then, is this: What is the function that should be assigned to the law vis-à-vis the highly dynamic structures and concomitant expectations of world society?

(3) The function of law in the globalized world is to provide support for the reorientation of regularly changing – or dynamic – expectations.10 In keeping therewith, the goal of CSR (as the expression of such a global legal system, a system of world law) is to channel the evolution of expectations in world society in such a way that those expectations do not become factors of social difference in the global environments. In other words, CSR performs the function of law in a very specific manner: What is expected of the multinational enterprises (MNEs) is that they “adjust” to the values in force in the various regions, sectors, or industries in which they are active, even as those values constantly evolve.11 What we are dealing with, in discussing CSR, is thus a form of “global pluralism”.12 How can the MNEs be induced to differentiate their internal structures in such a way as to enable their often innumerable subsidiaries to adjust themselves, individually, to the respective social environments in which they operate?13 As an example: A company such as Shell should conduct itself in Nigeria not according to the standards that apply in the Netherlands, but in keeping with Nigerian values.14

In a word: CSR is a means for furthering a highly differentiated strategy for integrating MNEs into the world economy.

environments in which they are active. This is to be achieved by making available legally instrumentalized mechanisms to aid in the search for those particular “values” that are specific to the regions, sectors or industries in which they operate and which are to be applied respectively by their many subsidiaries when they carry out those operations. CSR may be considered as a form of global law in the sense that the objective behind it is to stimulate cognitive processes that are of importance for world society.

II. On the Genesis of CSR

1. The Example of a Practical Example: CSR-Law of the Union

The description of CSR as a form of global law demands first a clarification of the distinction that is being drawn between global law and traditional law, as it has developed in the context of the nation-state. Law at the global level can no longer be understood as a listing of provisions intended as a means of directly influencing behavior. Rather, law at the global level is network law, that is, a relational context that creates connections between norms originating in any number of different environments and of the most highly variegated descent. World law is interlegality. In support of this thesis, rather than an abstract argument, I would like to offer an example taken from actual practice. Such an example is provided by the CSR efforts of the European Union. 16

The development of European CSR can be broken down into three phases: 17 the first phase was the commencement of a European dialogue on CSR. It was opened with the publication in 2001 of the European Commission’s “Green Paper” on the social responsibility of corporations. 18 There, the interested parties were called upon “to express their views on how to build a partnership for the development of a new framework for the promotion of corporate social responsibility, taking account of the interests of both business and stakeholders”. 19 The main objective in this first phase was, “to raise awareness and stimulate debate on new ways of promoting corporate social responsibility”. 20

In the second phase, the Commission, in a Communication dated 2 July 2002, 21 furnished an overview and analysis of the commentaries it had received on the Green Paper. The outcome of the consultation process was seen as sobering. The Commission could only take note that the interested parties were deeply divided: While the MNEs were unreserved in their support of maintaining the voluntary character of CSR, the trade and labor unions as well as civil society organizations were equally emphatic in their conviction that voluntary measures would not be sufficient

for the protection of citizen rights. Most importantly, however, the Commission decided to depart from a proposal by the European Parliament in the matter: While the latter had favored an international CSR regulatory authority, the Commission resolved instead upon the formation of an open forum (European Multi-Stakeholder Forum on CSR [hereinafter: “CSR EMS Forum”]), which would institutionalize only the ongoing CSR dialogue between the interested parties. The aim of the CSR EMS Forum was defined as the promotion of “transparency and convergence of CSR practices and instruments”. The primary means for achieving this aim was to be the exchange of experiences and of good practices, to be conducted between the parties at the EU level.

The third phase began with the commencement of activities by the CSR EMS Forum. The real problem with the underlying concept of the CSR EMS Forum, however, was identified accurately by one of the Forum’s participants: “What the experience of the Forum showed … are the limits of a method which consists in bringing together a range of stakeholders with so different views, in the hope that they will arrive at a consensus through discussions facilitated, but in no way pre-empted or directed, by the Commission. This method, which in theory might be praised for its openness, leads in fact to a situation where any final agreement will be based, not on the outcome of a rational discussion based on the law of the best argument … but rather on the few items on which the participants can agree, without betraying the mandate of their respective constituencies.” With that, the experiment with the CSR EMS Forum has, if nothing else, at least served to demonstrate that the “ideal-speech-situation” model, as hypothesized in discourse theory, is not overly productive when dealing with global issues (such as that of CSR). The decisive difference in the new approach taken by the Commission lies in the fact that there is no longer any attempt to bring all of the interested parties together under the same roof; instead, the new Forum is set up as an alliance made up – exclusively – of members of the European business community: “This is an open Alliance for enterprises sharing the same ambition: to make Europe a Pole of Excellence on CSR in support of a competitive and sustainable enterprise and market economy.” This change is remarkable for a number of different reasons.

2. Cognitive Resources, Operative Links, Civil Society Governance

(1) To begin, it is worth noting that the Commission’s decision to reconfigure the composition of the European Alliance (as a new incarnation of the CSR Forum), is nothing else than setting the foundations for a coherent normative discourse. This discourse, which is structured as the activity of an organization – that is, in the institutionalized form of a “Forum” – is intended as a means of promoting, generating, and naming cognitive resources for the MNEs, in order to achieve the following objectives: (i) increasing knowledge about the positive impact of CSR on business and […] society, 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 […] MNEs; (v) facilitating convergence and transparency of CSR practic-
III. CSR as a Form of World Law

1. CSR in Legal Perspective

The first question to be examined concerns the extent to which it is possible to attribute to CSR a legal character. As a point of departure, it is worth recalling that the European Commission’s actions with regard to CSR constitute an element of the social dialogue foreseen in the first section of article 151 of the TFEU as an objective to be promoted. There are, to be sure, no formal rules for the structuring of this dialogue, in the sense that the social partners are not accorded any specific rights to be heard (art. 154 TFEU) or to conclude contractual agreements (art. 154 section 4 and art. 155 TFEU). Despite the fact that this informal social dialogue is not made subject to any explicit rules in art. 151 et seqq. TFEU, the prevailing opinion in the literature is that it falls under the authority of the Commission. The Commission can thus be said to have resolved upon the measures governing the organization of CSR practices on the basis of the unwritten but recognized authority vested in it by the Treaty. And it exercised that authority in its Communication dated 22 March 2006 by initiating a highly specific process for producing law. This process merits closer examination:

2. Cognitive Resources as a Legal Concept

With the European Alliance for CSR, the Commission gave birth to a legal institution for generating cognitive resources. What this suggests is that cognitive mechanisms are being built into what was considered, until now, to be the fundamentally normative structure of legal systems. These modifications in the design of law also bring about a shift in its function: its operational success depends less on the degree to which it ensures compliance with positive legal and tools ….” Without the organizational restructuring of the Alliance, the production of these cognitive resources would not have been possible. For this, the fate of the CSR EMS Forum provides ample evidence.

(2) In the global society, these cognitive resources play a very specific role: They function as normative supports for creating the structural conditions necessary for enhancing the learning capacity of globally operative actors. In other words, the MNEs make use of the cognitive resources produced by the European Alliance for CSR as a means of scouting out the global social context in which they move.

(3) Finally, the transition from the CSR EMS Forum to the European Alliance for CSR also brought to light a last, indispensable component of world law, a phenomenon that can be described as a process of differentiation. The exclusion of stakeholders who had originally been admitted to the dialogue in the Forum caused them to realign themselves into an informal authority, which can be qualified as a civil society governance mechanism. Their expulsion transforms their role, from that of an “insider” to that of an external monitor that functions as a kind of an admitted very loose and lightweight – equivalent to Weber’s “coercion agents”. The foregoing observations raise a number of issues requiring further clarification.

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34 Cf. Luhmann (FN 10), 78 f.

35 This interweave of norms originating in highly divergent sources, often termed interlegality, is, in fact, the most salient identifying feature of world law; cf. on this question, Amstutz (FN 16), 213 et seqq.


37 McBarnet (FN 2), 9 et seqq.


What we are dealing with — in our example — is a symbiotic constitution of world law: Recursive constitutional loops. The construction of world law creates opportunities that can be taken up by the structures specific to world society.41

One aspect of his thesis is clear: the process that we are dealing with is symbiotic in nature. World law constructs itself by means of a dynamic interlinkage with the laws of nation-states.42 But how?

3. The Construction of World Law: Recursive Constitution

What we are dealing with — in our example — is a situation of reciprocal stimulation by two separate normative systems.43 On the one hand, there is the European legal system, or, more concretely, the CSR dialogue — as set in motion by the European Commission — which produces cognitive resources, and by that means places its “normative capital” at the disposal of world society for use in constructing its own — global — system of law. Conversely, there is also a recursive process at work, by which world law links back up with the operations of European CSR law in its constant efforts to adapt its production of cognitive resources to developments in the structures of world society. In this way a particular form of network is created that links the two spheres: Although there can be no direct interference in the world legal system by European law or in the European legal system by world law — the communications of the European legal system are not automatically incorporated into world law and vice versa — each of the two systems constitutes a “portion of necessary environment” for the other.44 In other words, without the participation of European CSR law, there can be no world law (in that sector), and without the participation of world law, there can be no development of European CSR law. The two legal systems are thus partners in a process of co-evolution. In this sense the relationship between them resembles what may be termed a recursive constitutional loop.45

But what is it precisely that takes place when European law penetrates interactively into world law? What becomes of the cognitive resources that the European CSR dialogue generates? I have already noted that what matters for the structures of world society is not (or at least not primarily) the stabilization of normative expectations, but the enhancement of the capacity of normative expectations to learn and adapt. This new function of law in world society results from the highly dynamic nature of communication in that society, which is better dealt with by deploying cognitive processes than by clinging to existing expectations.46 In order to perform this function, world law must operate as a medium of conversion: It must find a way to adapt broadly formulated, and intentionally general cognitive resources such as to enable them to cushion the concrete disappointments that arise in global society. In other words, it must make use of the cognitive resources as the raw material with which to “quickly and surely construct new expectations” in situations where disappointments typically occur in global social communications.47 One of the possible means by which it can perform this function is by transforming the cognitive resources used by European law into relatively simple models for use in world law — as a means of


41 The likelihood of spontaneous self-regulation on the part of the multinationals is held to be highly doubtful by Emesah/Ako/Okonnah/Ogechukwu (FN 13), 243 and 253 et seq., who take the recent and ongoing financial crisis as a case in point.


43 Cf. Mahmudur (FN 2), 106 et seqq.


45 Cf. Amstutz/Karavas (FN 33), 663 et seqq.

46 Luhmann (FN 10), 79; similarly Slaughter Anne-Marie, A New World Order, Princeton NJ 2004, 10: “…we need global rules without centralized power but with government actors who can be held to account through a variety of political mechanisms”.

47 Luhmann (FN 10), 72.
The MNEs have a dual structure, which is itself a reflection of the structure of world society. They are localized within the existing national or regionally segmented systems, but function, at the same time as structures specific to world society. At the global level, they are capable of building ephemeral substructures, as circumstances require, adapting their internal structures, or creating new ones (mergers and de-mergers of subsidiaries), to meet needs that arise locally. This rearrangement of their own internal structures also has consequences for the outside world. Each new stage in this never-ending process of restructuring results in changes in the relationship of the MNEs with the various local environments in which they are active. In this way it is possible to ensure that the observational awareness of the MNEs is able to keep pace with the evolution of the local environments in which those enterprises operate. The objective of world law is then to induce the MNEs into “learning” from their dealings with those environments. Or, more precisely: its purpose is to promote the full use of those cognitive opportunities that arise out of the ongoing regeneration of relationships between the MNEs and their environments. But how is this to be accomplished? An examination of the way in which European CSR law has penetrated world law reveals the use of a very subtle strategy: the instruments of CSR produced in the European social dialogue give rise to cognitive models of world law that bring about a previously unknown level of transparency in the structures of world society, thus transforming the underlying logic of their dealings with the world from something static (obligatory) to something dynamic (observational). In order to elaborate on this notion, we must first briefly analyze the logic of the transparency strategy itself. The question to be answered is: Why transparency (as a central objective of world law)?

The overall purpose of CSR law, as a kind of triple bottom line, is to motivate the MNEs to conduct themselves in a manner that is appropriate to their respective social environments. Novartis, Wal-Mart, Vodafone and the others of their like, tend to see themselves, and to comport themselves, in keeping with the Western conception of business culture, which not seldom places them on a collision course with local customs, values and standards of behavior in Asia, South America, Africa and elsewhere. Wherever there is a constellation of circumstances that may give rise to such conflicts, there is a need for CSR instruments that can serve to promote the formation of a network between corporate and local cultures; for this to take place, however, transparency in the circumstances that prevail in the social environments where the MNEs operate is not sufficient. And it is precisely here that world law comes into play: by functioning as a network, linking the legal and proto-legal, or social, norms of the nationally or regionally segmented systems from which the MNEs originate, with the corresponding norms of the local environments in which they develop their activities. In order to produce this weave of interlegality, world law must bring about a very special kind of transparency: transparency that is capable of setting in motion mechanisms of self-reflection within the structures of world society. This conception of transparency is founded on the notion that the cognitive models of world law are constructed in such a way as to stimulate operations of observation in the MNEs – operations that induce them to take cognizance of the relationship between the legal, proto-legal or social norms of the MNEs’ respective countries of origin.


and those of the local environments in which their subsidiaries conduct business.

5. Enforcement of CSR

One question remains (and it is, of course, by far the most difficult issue in CSR): why should the MNEs even bother to react to the cognitive models world law places at their disposal?54 This is the central focus of the criticism leveled at the voluntary approach to CSR. Some critics have seen in this evidence of “a loss in the relevance of classic state orders.”55 Also from a purely practical point of view, the difficulties of enforcement are all too obvious. Why should the MNEs respect world law (as I have defined it here)? There is nothing that even comes close to resembling a world society enforcement authority currently in place.56 Nevertheless, there is one essential point that critics have failed to consider: world law is civil society law! It is not the product of any (state or other) organizational will, but the fruit of blind evolution, what Hayek terms a spontaneous order.55 World law grows wildly, unplanned, in the maelstrom of world society communications. And because of this, it is dependent upon the forces of world society for its enforcement.

A comprehensive discussion of those forces is obviously not possible here.57 Briefly, however, the essential points can be summarized as follows: The complex web of relationships that arises between territorially segmented structures and world society structures leaves the latter open to a number of social influences that can have a disciplinary effect on their behavior.57 In the case of the MNEs (as world society structures) there is a wide range of occasionally more, occasionally less diffuse civil society forces to which they are subject. First, there is the market, which – as tellingly analyzed by Polanyi in his theory of the countermovement – contributes to the growth of social forces that constantly seek to reconstruct the “protective cover of cultural institutions.”58 Also to be considered is the issue of product reputation, which presently depends upon a large number of social factors (and, not lastly, upon such innovations as quality control labels, seals of approval, consumer rankings, etc.).59 Public opinion – in particular as driven by the mass media – is another social force that can in many cases have a disciplinary effect on corporate behavior. Mention must also be made in this context of the threat of scandal, which has often been particularly effective in focusing greater attention on human rights issues in the world.60 A complete list of all such

52 One attempt to come to terms with the issue is the notion of Corporate Social Performance, which attempts to link economic efficiency with sustainable productivity; cf. Méti Domène, Corporate Social Responsibility Theories, in: Crane Andrew et al. (eds.), The Oxford Handbook of Corporate Social Responsibility, Oxford 2008, 49 et seqq.; Wood Donna J., Corporate Social Performance Revised, Academy of Management Review 1991, 691 et seqq. Recent studies on Socially Responsible Investment (SRI) have shown that it is, in many cases, economically worthwhile for the MNEs to follow the CSR trend.

53 Luhmann (FN 7), 581.

54 Muchitinski Peter T., Multinational Enterprises and the Law, Oxford 2007, 123 et seqq.


59 The effects of reputational issues are increasingly preponderant in the mediated world of today; it is with this in mind that the PR strategies of the multinationals attempt to draw greater attention to their various CSR measures. Cf., on this, the risk management study by Kyle Beth/Ruggie John Gerard, Corporate Social Responsibility as Risk Management: A Model for Multinationals, Corporate Social Responsibility Initiative Working Paper No. 10, Cambridge, MA 2005, <http://www.hks.harvard.edu/m-rcbg/CSR/publications/workingpaper_10_kyle_ruggie.pdf>. The question as to whether a corporation could permit itself to ignore the then incipient trend toward social responsibility was raised as early as the 1960s; cf. Davis Keith, Can Business Afford To Ignore Social Responsibility? California Management Review 1960, 70 et seqq.; Tricker/Tricker (FN 5), 59.

IV. Coda

To summarize my main points:

(1) While up until the 1970s, CSR was seen primarily as a subject for economics, business management, sociology and, to a certain extent, political science, it has since that time also come to be recognized as a potential subject for law, as well. The legal analysis of CSR encounters certain difficulties, however, which cannot be resolved if the orthodox understanding of law is maintained.

(2) For this reason, it must be underscored that CSR is largely a product of globalization. In this way it becomes clear that CSR can only be understood in legal terms by abandoning the notion that the function of law is tied to the political construct of the nation-state, where its role is to stabilize expectations. In world society, the law takes on a new function, which consists in the providing of direction for cognitive processes.

(3) The European efforts to promote CSR furnish a concrete illustration of the way in which law performs its function in world society. That function is constructed around three pillars: (a) the institutionalization of a forum for the production of cognitive resources, through the CSR Alliance; (b) the deployment of those cognitive resources by the MNEs in order to initiate CSR learning processes in the global space; and (c) the galvanization of civil society governance mechanisms to exert pressure upon MNEs, and thus constrain them to adopt CSR policies.

disciplinary forces cannot, of course, be provided here. For present purposes, however, there are two essential points to be noted: The first is that these social considerations are capable of exerting sufficient pressure on the MNEs to ensure that they do, in fact, make use of the cognitive models furnished to them by world law. Similarly, the fact must be underlined that this pressure is exerted by global society, and is, as such, fully congruous with the nature of world law. In this sense, the forces referred to (market, reputation, public opinion, etc.) are, in essence, civil society governance mechanisms.

The development of such mechanisms is the purpose behind the strategy being pursued by the European Commission with the help of the European Alliance for CSR. By excluding certain stakeholders from the social dialogue through this platform, the Commission has helped bring about a differentiation of social forces that otherwise would most likely have remained largely paralyzed in that dialogue. Anticipating the objection that the civil society governance mechanisms just described are far less certain than the traditional instruments of law enforcement, I would reply, with Luhmann: “One may lament that, as the product of a highly developed legal culture, which informs our expectations, this is an inadequate response to the problem. It has, however, often been noted that the world legal order is more similar in form to those of tribal societies, such that it is obliged to do without organized punitive authority and genuine definitions of legal offenses based on known rules.”

The oblique strategy underlying European CSR also demonstrates another truism: less can sometimes be more – even when it comes to the law. An absence of statutory norms need not be synonymous with lawlessness.


62 Cf. Amstutz/Karavas (FN 33), 668 et seqq.

63 Luhmann (FN 60), 222.