Enforcing Corporate Social Responsibility Codes Under Private Law: On the Disciplining Power of Legal Doctrine

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ABSTRACT

A central question in the debate on corporate social responsibility is to what extent CSR codes can be enforced among private parties. This contribution argues that this question is best answered by reference to the applicable doctrinal legal system. Such a doctrinal approach has recently regained importance in American scholarship, while it is still the prevailing method of legal analysis in Europe. Applying a doctrinal analysis of CSR codes allows for the possibility of private law enforcement, that is, enforcement by means of contract or tort, dependent on three different elements: the exact type of claim that is brought, the evolving societal standards about the binding nature of CSR codes, and the normative complexity of the doctrinal system itself. This approach allows for a typology of cases in which the enforceability of CSR codes can be disputed. It is subsequently argued that societal standards have not yet reached the stage where the average consumer who buys a product from a retailer can hold that retailer legally liable for violations of the norms incorporated in the code.

INTRODUCTION

There are many perspectives one can adopt in reflecting upon the enforcement of corporate social responsibility codes. Thus, self-regulation in the field of corporate social responsibility (CSR) has been looked at extensively from the sociological,[1] psychological,[2] ethical,[3]

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1. *See generally* Subhabrata Bobby Banerjee, *Corporate Social Responsibility: The Good, the Bad and the Ugly*, 34 CRITICAL SOC. 51 (2008) (analyzing the contemporary

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economic,[4] and business[5] perspectives, as well as from a plethora of different legal perspectives ranging from, *inter alia*, international and criminal law to environmental and private law.[6] This multidisciplinary approach reflects the nature of CSR itself, famously characterized by Archie Carroll as forming a pyramid of different (economic, legal, ethical, and philanthropic) responsibilities.[7] This focus on different perspectives in understanding CSR is in many ways unique for an academic subject: although countless topics in present-day academia lend themselves to be looked at from different angles, only a few are actually discussed in that way. At the same time, whether caused by paying particular attention to the nonlegal aspects or not, one striking aspect of most CSR literature is that it is often more focused on the *desirability* of legal enforcement rather than on its *viability*. In other words, many arguments from a social, political, or ethical standpoint can be put forward in favor of enforcing CSR codes, but these arguments are only relevant for the law if they are accepted as *legal* arguments. In this respect, CSR scholarship can suffer from the same drawback as

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discourses of corporate social responsibility); Gunther Teubner, *Corporate Fiduciary Duties and Their Beneficiaries: A Functional Approach to the Legal Institutionalization of Corporate Responsibility*, *in* CORPORATE GOVERNANCE AND DIRECTORS' LIABILITIES: LEGAL, ECONOMIC AND SOCIOLOGICAL ANALYSES ON CORPORATE SOCIAL RESPONSIBILITY 149 (Klaus J. Hopt & Gunther Teubner eds., 1984).

2. *See generally* Martijn W. Scheltema, *Assessing Effectiveness of International Private Regulation in the CSR Arena*, 23 RICH. J. GLOBAL LEGAL STUD. 263 (2014) (taking an economic, sociological, and psychological/behavioral approach rather than a purely legal approach to assess the effectiveness of international private regulation).

3. *See generally* Enrico Cavalieri, *Ethics and Corporate Social Responsibility*, SYMPHONYA EMERGING ISSUES MGMT., no. 2, 2007, at 24 (arguing that companies are part of a society that hopes for, conceals, and expresses culture and moral aspirations and values).

4. An overview is provided by Markus Kitzmueller & Jay Shimshack, *Economic Perspectives on Corporate Social Responsibility*, 50 J. ECON. LITERATURE 51 (2012).

5. *See generally* Esben Rahbek Pedersen, *Modelling CSR: How Managers Understand the Responsibilities of Business Towards Society*, 91 J. BUS. ETHICS 155 (2010) (developing a model of how managers perceive the responsibilities of business towards society).

6. The literature is abundant. Instead of and apart from many others, see ANNA BECKERS, ENFORCING CORPORATE SOCIAL RESPONSIBILITY CODES (2015); ANDREAS RÜHMKORF, CORPORATE SOCIAL RESPONSIBILITY, PRIVATE LAW AND GLOBAL SUPPLY CHAINS (2015); THE NEW CORPORATE ACCOUNTABILITY: CORPORATE SOCIAL RESPONSIBILITY AND THE LAW (Doreen McBarnet et al. eds. 2007); JENNIFER A. ZERK, MULTINATIONALS AND CORPORATE SOCIAL RESPONSIBILITY: LIMITATIONS AND OPPORTUNITIES IN INTERNATIONAL LAW (2006).

7. Archie B. Carroll, *The Pyramid of Corporate Social Responsibility: Toward the Moral Management of Organizational Stakeholders*, BUS. HORIZONS, July-Aug. 1991, at 39, 40–43; *see also* Archie B. Carroll, *History of Corporate Social Responsibility: Concepts and Practices*, *in* THE OXFORD HANDBOOK OF CORPORATE SOCIAL RESPONSIBILITY 19, 33–35 (Andrew Crane et al. eds., 2008).

academic work on the subject of human rights, namely to be carried away by what is desired rather than discussing what is legally possible.[8]

This contribution aims to show that the question—to what extent legal enforcement of CSR codes (either of a global or a national nature) is possible—is best answered by reference to the applicable doctrinal legal system. Such a doctrinal approach has recently regained importance in American scholarship, while in Europe it has been and still is the prevailing—though often criticized—method that is used both by academics and practitioners. The by-product of this approach is that it highlights the "disciplining power" of legal doctrine. My claim is that the doctrinal system allows us to test any new topic, including the potential binding effect of CSR codes that challenges the boundaries of legal enforceability. This does not mean that ethical concerns or social norms do not play their part, but their proper role in determining enforceability is defined by the doctrinal system itself and not by any outside concerns. Put differently, the legal system is the best judge of which societal concerns should be incorporated in the law.

The focus of this article is on enforcing CSR codes in relationships among private actors, either companies or individuals. I do not deny that questions of enforceability of such codes can also be asked outside of private law, as in criminal law, international law, or financial law, but these are not discussed here. This is also the reason why I avoid the term "public" enforcement and use "legal" enforcement instead.

The discussion will unfold as follows. In Part I, I describe what it means to ask whether CSR codes can be enforced. It will show that this is in fact a highly complex question that, despite the international character of CSR norms, can only be answered within the framework of a domestic legal system. Part II substantiates which advantages can be expected from a doctrinal approach. This is elaborated upon in Part III, which takes up the relevance of well-established contract law doctrine for the enforceability of CSR codes. It concludes that CSR codes cannot, in principle, be enforced against actors other than the immediate contracting party.

I. THE ENFORCEABILITY OF CSR CODES: A MULTIFACETED QUESTION

For the sake of this contribution, CSR codes can be broadly described as guidelines that intend to describe companies'

8. *Cf.* Eric Posner, The Rise and Rise of Human Rights Scholarship in Law Reviews, ERIC POSNER (Mar. 11, 2014), http://ericposner.com/the-rise-and-rise-of-human-rights-scholarship-in-law-reviews/ ("[I]nternational law scholars think that human rights deserve vastly more attention than (say) trade law or even the United Nations. In truth, human rights law is of limited practical importance in international relations . . . .").

responsibilities in the areas of human rights, labor, the environment, and socially sensitive business in general. Although it is not impossible that such codes partly overlap with existing law, most of the rules contained therein will consist of "voluntary" duties, that is, duties that are not binding as a result of previous legislative or judicial intervention. CSR codes exist at both the international and national level, including the 2011 U.N. Guiding Principles on Business and Human Rights,[9] the 2011 OECD Guidelines for Multinational Enterprises,[10] the British 2014 Ethical Trading Initiative Base Code,[11] the 2008 Dutch Corporate Governance Code,[12] and the 2011 German Sustainability Code.[13] Businesses can decide to follow these public codes but can also draft their own tailor-made guidelines, examples of which include Coca Cola's Code of Business Conduct, Primark's Code of Conduct,[14] and many other individual supplier codes of conduct.

Although these sets of norms are primarily meant to prescribe a company's ethical obligations, the important question is whether they could also have a legally binding effect. Some argue that these codes (regardless of whether they are of a public or a private nature) reflect an emerging system of non-state law and could therefore be binding *as such*.[15] Others argue that private law "needs to recognize these corporate codes as evolving serious unilateral forms of regulation" and make enforcement possible.[16] My contention is that such statements

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9. Special Rep. of the Sec'y-Gen., Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework, Hum. Rts. Council, U.N. Doc. A/HRC/17/31 (Mar. 21, 2011) [hereinafter UN Guiding Principles].

10. Org. for Econ. Co-Operation & Dev. [OECD], OECD Guidelines for Multinational Enterprises (2011), http://www.oecd.org/corporate/mne/48004323.pdf.

11. ETHICAL TRADING INITIATIVE, THE ETI BASE CODE (2014), http://www.ethicaltrade.org/resources/eti-base-code.

12. CORP. GOVERNANCE CODE MONITORING COMM., DUTCH CORPORATE GOVERNANCE CODE: PRINCIPLES OF GOOD CORPORATE GOVERNANCE AND BEST PRACTICES PROVISIONS (2008), http://www.commissiecorporategovernance.nl/download/?id=606.

13. RAT FÜR NACHHALTIGE ENTWICKLUNG [COUNCIL FOR SUSTAINABLE DEVELOPMENT], THE GERMAN SUSTAINABILITY CODE (GSC): RECOMMENDATIONS OF THE GERMAN COUNCIL FOR SUSTAINABLE DEVELOPMENT (2012), https://www.nachhaltigkeitsrat.de/fileadmin /_migrated/media/RNE_The_German_Sustainability_Code_GSC_text_No_41_January_2012.pdf.

14. THE COCA-COLA CO., CODE OF BUSINESS CONDUCT: ACTING WITH INTEGRITY AROUND THE GLOBE (Apr. 2009), http://www.coca-colacompany.com/content/dam/journey/us/en/ private/fileassets/pdf/2012/11/COBC_English.pdf; PRIMARK, SUPPLIER CODE OF CONDUCT (2016), https://www.primark.com/en/our-ethics/workplace-rights/code-of-conduct.

15. *See, e.g.*, BECKERS, *supra* note 6, at 26–27. *See generally* Gunther Teubner, *Self-Constitutionalizing TNCs? On the Linkage of "Private" and "Public" Corporate Codes of Conduct*, 18 IND. J. GLOBAL LEGAL STUD. 617 (2011) (arguing that the intertwining of private and public corporate codes represent the beginnings of specific transnational corporate constitutions conceived as constitutions in the strict sense).

16. BECKERS, *supra* note 6, at 30.

reflect a preconceived opinion about the binding effect of CSR codes, while the answer to the question of whether they are legally binding can only be answered by reference to the existing law in a given situation. This calls for a brief exposition of the conceivable claims that can be brought among private parties for violation of CSR codes.[17] The variation lies in the potential plaintiffs, the possible ways in which CSR codes are used, the wording of the code, and the likely damage that can occur.

First, which potential plaintiffs come to mind when a company is sued for not complying with a CSR code? If, for example, garment company A states that it will observe a CSR code that ensures safe and hygienic working conditions in the manufacturing of the apparel it sells, but its suppliers or subsuppliers do not provide for a safe working place or clean toilet facilities for their employees, who could have an interest in enforcement? In fact, this could be anyone within the supply chain because all parties within the chain share one another's reputational risks. Thus, potential claimants could range from the consumer to A's retailers, and any other suppliers or subsuppliers and their employees within the chain. In addition, organizations representing consumers, employees, or even the general public could consider defending the general interest they have in compliance with CSR norms.

Second, the type of claim can differ depending on the way in which A uses the CSR code. The code could be incorporated in A's contract with its main supplier; could be referred to in that same contract, in an umbrella agreement, or in general conditions; could be mentioned on A's website; could be imposed upon A's business partner B as part of contracts that B concludes with third parties; and could be advertised toward government bodies, potential consumers, or the public in general as a code that A complies with.

Third, the wording of the norms incorporated in CSR codes is relevant for the question of enforcement.[18] Although companies may have an interest in keeping the wording that they use as vague as possible, reality demonstrates that different companies use different wording, reflecting different grades of self-commitment. So it does make a difference whether a company only promises to improve or strive for better working conditions among its suppliers, or firmly agrees to

17. For a more extensive and alternative categorization, see *id.* at 47–148 (examining whether corporate codes qualify as legally binding agreements, and, if so, what exact substantive legal obligations are created).

18. *Cf. id.* at 81–106, 233–48 (examining whether corporate codes qualify as enforceable unilateral promises through the study of German and English laws; examining which parties become bound by publicly declared social codes).

comply with all applicable local legal requirements at the supplier's location.[19]

Fourth, the type of damage (or, more generally, the effect of noncompliance) is important in assessing potential liability. The damage in the above example of not providing appropriate toilet facilities for employees cannot be compared to discrimination, the use of child labor, or an unsafe working environment of the type that resulted in the Bangladesh Rana Plaza garment factory collapse in 2013, which killed more than 1,100 workers. This could result in a claim for both economic and nonpecuniary damages.

All four factors make up for the great variety of potential claims that can be brought in case of noncompliance with CSR codes. This makes it obsolete to ask about their binding effect in general, because this will depend entirely on whether, in the given combination of these four factors, enforcement is possible. The sparse amount of cases in which a claim was filed show that the closer the relationship between the claimant and defendant, the higher the chances of success.

For example, the University of Wisconsin's claim for breach of contract against its direct contracting partner Adidas for not complying with anti-sweatshop provisions requiring Adidas to provide certain benefits to workers producing college-branded apparel, led Adidas to pay compensation by way of settlement to 2,700 workers in Indonesia.[20] But when employees of Wal-Mart's foreign suppliers in China, Bangladesh, and Indonesia made claims to improve local labor conditions, they failed, even though Wal-Mart was eager to advertise that it only used responsible suppliers. The United States Court of Appeals for the Ninth Circuit found it impossible to regard the employees as third-party beneficiaries of standards Wal-Mart obliged its suppliers to use.[21] The recent class action by victims of the Rana Plaza

19. For empirical work on how companies use their codes, see generally Martin Herberg, *Global Legal Pluralism and Interlegality: Environmental Self-Regulation in Multinational Enterprises as Global Law-Making in* RESPONSIBLE BUSINESS: SELF-GOVERNANCE AND LAW IN TRANSNATIONAL ECONOMIC TRANSACTIONS 17 (Olaf Dilling et al. eds., 2008) (empirically using a homogenous set of actors to explore structures which constitute the common standard of conduct); LOUISE VYTOPIL, CONTRACTUAL CONTROL IN THE SUPPLY CHAIN: ON CORPORATE SOCIAL RESPONSIBILITY, CODES OF CONDUCT, CONTRACTS AND (AVOIDING) LIABILITY (2015) (focusing on the extent of legal responsibility and liability for CSR violations in the supply chains of multinational corporations in the Netherlands, England, and the state of California).

20. *See Adidas Lawsuit (re University of Wisconsin),* BUS. & HUMAN RIGHTS RES. CTR. (Jan. 1, 2001), http://business-humanrights.org/en/adidas-lawsuit-re-university-of-wisconsin#c18941.

21. Doe I. v. Wal-Mart Stores, Inc., 572 F.3d 677, 681–82 (9th Cir. 2009) ("Plaintiffs' allegations are insufficient to support the conclusion that Wal-Mart and the suppliers intended for Plaintiffs to have a right of performance against Wal-Mart under the supply

disaster and their families against Bangladesh and retailers, including Wal-Mart and JC Penney, on the basis that the defendants were aware of the unsafe conditions and failed to properly inspect the building, shared the same fate for lack of a sufficiently close relationship between the user of the CSR code and the alleged victims.[22]

Therefore, it does not make much sense to speak about enforcing CSR codes in general because each type of claim needs to be assessed separately. The geographical location at which the claim is assessed also has an impact. Although CSR is supposed to relate to international standards, it lacks an international mechanism to hold violators liable. One needs to turn to domestic remedies in order to establish whether enforcement is possible.[23] It is true that this also raises an issue of jurisdictional competence,[24] but more important for this contribution is that this makes the success of a claim dependent on different national substantive laws that can all differ with regard to the potential range of claimants, the damages they allow, and the legal consequences of the exact wording of the code.

I now turn to the important question of how to assess the binding effect of CSR codes within the context of some national law. In Part II, I wish to show that the doctrinal approach offers the best possible avenue to reach an outcome that is both legally and societally acceptable.

II. THE POWER OF LEGAL DOCTRINE

It is no secret that the doctrinal approach to law is no longer very much in vogue. Doctrinal work consisting of a systematization of the positive law from an internal perspective is frequently seen as too

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contracts. . . . We therefore conclude that Plaintiffs have not stated a claim against Wal-Mart as third-party beneficiaries of any contractual duty owed by Wal-Mart . . . ."). *See also infra* Section II.

22. Rahaman v. J.C. Penney Corp., Inc., No. N15C–07–174, 2016 WL 2616375, at *10 (Del. Super. Ct. May 4, 2016) ("Just as in Doe I v. Wal–Mart, Plaintiffs in this case have failed to allege facts to establish that Defendants owed Plaintiffs a duty of care. Defendants were not Plaintiffs' direct employer. Additionally, Plaintiffs have failed to demonstrate that an exception to the general rule for independent contractor liability exists. Plaintiffs' allegations are insufficient to prevent dismissal.").

23. *See, e.g.*, John Ruggie (Special Representative of the Secretary-General), *Business and Human Rights: Mapping International Standards of Responsibility and Accountability for Corporate Acts*, ¶¶ 22, 27, 29, 80, U.N. Doc. A/HRC/4/35 (Feb. 19, 2007).

24. Jurisdiction was a key issue in the well-known case of *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2013), in which the U.S. Supreme Court did not establish jurisdiction but rather applied a presumption of extraterritoriality to a claim under the Alien Tort Statute brought by foreign plaintiffs (Nigerian citizens) against foreign defendants (certain Dutch, British, and Nigerian) for alleged human rights violations in a foreign country (Nigeria).

positivistic and not creative enough. "Law and . . ." approaches, such as economic, empirical, psychological, and literary analysis of law, seem to have acquired a higher prestige in today's academia.[25] This development can be clearly detected in the United States but has also affected legal scholarship in Europe. However, partly influenced by criticism from legal practice,[26] a reverse trend is noticeable. The intellectual underpinning for this comes from the American "New Private Law" movement headed by John Goldberg and Henry Smith.[27] They argue that legal doctrine reflects the complex coherence of the law and is therefore indispensable to understand what the law is about.

This view aligns with what Europeans, perhaps unconsciously, regard as the underlying rationale of legal doctrine.[28] Doctrine represents the normative complexity of the law: the thousands of rules and decided cases, each with their own nuances organized as a system, show the many ways in which the law deals with conflicting arguments. Doctrine thus reflects how subtle the law often is and why a small change of the facts can lead to an entirely different outcome. Competent lawyers *make* things difficult, not to keep themselves busy, but because they know that subtle nuances are relevant. Joseph Singer put it like this: "Law is complicated because qualitative distinctions matter, and they matter at this level of detail."[29] The elaboration of the doctrinal system is therefore not an etheric activity unconnected to reality but an essential part of the legal activity aiming to capture the subtleness of the law and thus to help solve practical problems.[30] Reducing the law to principles or social policies cannot sufficiently express this complexity.

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25. The classic reference is to Richard A. Posner, *The Decline of Law as an Autonomous Discipline: 1962-1987*, 100 HARV. L. REV. 761 (1987). On this development in Europe, see JAN M. SMITS, THE MIND AND METHOD OF THE LEGAL ACADEMIC (2012).

26. *See, e.g.*, Richard Brust, *The High Bench vs. the Ivory Tower*, ABA JOURNAL (Feb. 1, 2012, 11:00 AM), http://www.abajournal.com/magazine/article/the_high_bench_vs._the_ivory_tower (statement of U.S. Supreme Court Chief Justice John Roberts) ("Pick up a copy of any law review that you see . . . and the first article is likely to be, you know, the influence of Immanuel Kant on evidentiary approaches in 18th century Bulgaria.").

27. *See* John C.P. Goldberg, *Introduction: Pragmatism and Private Law*, 125 HARV. L. REV. 1640 (2012) (discussing the connection between legal pragmatism and private law skepticism).

28. *See* Jan M. Smits, *What is Legal Doctrine? On the Aims and Methods of Doctrinal Legal Research* (Maastricht European Private Law Inst., Working Paper No. 2015/06, 2015) (seeking a better understanding of the aims and methods of doctrinal legal scholarship).

29. Joseph William Singer, *Normative Methods for Lawyers*, 56 UCLA L. REV. 899, 938 (2009).

30. *See* SMITS, *supra* note 25, at § 45; *cf.* Goldberg, *supra* note 27, at 1652 ("[B]eing nuanced about legal concepts can help us think through practical problems.").

With this, legal doctrine can also serve as a justification for the existing law. Succinctly put, if a rule does not fit into the system, it is not law. Here, the essence of the internal perspective on law comes out best: if the law is presented as a self-contained system of mutual references, the validity of norms can be justified by reference to this system itself. This is why Ernest Weinrib has argued that formalism is a theory of legal justification.[31] Formalism presupposes a view of law as an "immanently intelligible normative practice": a legal system is already justified by its own coherence that will have to be permanently readjusted on the basis of new judicial decisions, legislation, and changing societal views of what is right.[32]

Legal doctrine then legitimizes the new solution because it fits within the system that is accepted and used by the legal community. Put differently, systematic thinking is always based on the ideal of integrity because it requires legal solutions to be constructed in a way that best fits and justifies the law as a whole.[33] This is what I mean by the disciplining power of legal doctrine: it is not, at least primarily, extra-legal considerations that guide the search for the best outcome but rather the extent to which the outcome fits the system. The legal system functions as a filter or "reality check" that requires a legal actor to think through the legal acceptability of the proposed outcome. This does not mean that society's changing views of what is right should not play their part, but they always have to pass the test of legal doctrine before they can be elevated to having any legal significance. The underlying rationale for this view can be found in different directions. For one, it fits in with the common understanding of using the doctrinal system in order to ensure the consistency and predictability of the law. But a sound doctrinal underpinning is also necessary in order to obtain the approval of the legal community: it is unlikely that a court would enforce a CSR code with a mere reference to what is societally desired.

An illustrative example of this disciplining use of the doctrinal method is provided by the reasoning of the United States Court of Appeals for the Ninth Circuit in the case of *Doe v. Wal-Mart Stores*.[34] As already indicated, in this case, employees of Wal-Mart's foreign

31. *See* Ernest J. Weinrib, *Legal Formalism: On the Immanent Rationality of Law*, 97 YALE L.J. 949, 951-53 (1988) ("Formalism postulates that law is intelligible as an internally coherent phenomenon . . . . It affects one's view of the nature of legal justification . . . .").

32. Ernest J Weinrib, *The Jurisprudence of Legal Formalism*, 16 HARVARD J. OF L. & PUB. Policy 583, 583 (1993).

33. *See* Mathias M. Siems, *Legal Originality*, 28 OXFORD J. LEGAL STUD. 147, 150 (2008). *See generally* RONALD DWORKIN, LAW'S EMPIRE (1986) (explaining how the Anglo-American legal system works and on what principles it is grounded).

34. Doe I, 572 F.3d at 681–85.

suppliers brought an action claiming that Wal-Mart was liable for not complying with the labor standards specified in its supply contracts. While plaintiffs in this foreign liability claim[35] referred to emerging societal views about the importance of corporate social responsibility, the court undertook a meticulous inquiry into the possible grounds for civil liability. In doing so, the court applied well-established doctrines in the law of contract and tort with reference to California law and the relevant Restatements. Apart from the question of whether the wording of the code imposed any obligation on Wal-Mart, the court rejected the plaintiffs' argument that they were third-party beneficiaries of the standards in Wal-Mart's supply contracts was rejected on the ground that the obligation for suppliers to comply with standards is an obligation between Wal-Mart and its suppliers and not one between Wal-Mart and the plaintiffs. Similarly, the court rejected the claim that Wal-Mart was the joint employer of claimants as this would have required Wal-Mart to have had control over day-to-day employment, and this was not the case. The third argument, based on tort law, that Wal-Mart negligently breached a duty to monitor its suppliers, was similarly dismissed given that such a duty could not be found in existing laws. Finally, the court also held that Wal-Mart was not unjustly enriched by the mistreatment of suppliers' employees. A claim in restitution can only lie if it is unjust for the person receiving the benefit to retain it and a prior relation between the enriched and the impoverished exists, neither of which was the case here.

This example shows the disciplining power of the doctrinal system in deciding enforceability of CSR codes. This does not mean that one needs to agree with the reasoning of the California court. One may wonder, in particular, whether the court should have paid more attention to the fact that Wal-Mart and its suppliers are part of the same supply chain, and parties within this chain could, under some circumstances, be identified with each other for the sake of civil liability.[36] For example, if parties within the chain share each other's profits and liabilities (which will depend on the exact design of the relationships among the various parties) and operate in a coordinated way toward the outside world, one cannot exclude that liability of the

35. *See generally* Liesbeth F.H. Enneking, *Crossing the Atlantic? The Political and Legal Feasibility of European Foreign Direct Liability Cases*, 40 GEO. WASH. INT'L L. REV. 903 (2009) (providing an overview of current communal political, legal, and practical circumstances in Europe that affect the feasibility of foreign direct liability cases before courts in the European Member States).

36. *See, e.g.*, L.K.L. Tjon Soei Len, The Effects of Contracts Beyond Frontiers: A Capabilities Perspective on Externalities and Contract Law in Europe (2013) (unpublished Ph.D. thesis, University of Amsterdam) (on file with University of Amsterdam).

foreign supplier vis-à-vis its employees could also lead to liability of the Western company. For example, in the law of negligence, societal views of what is required from a multinational company can enter the legal system through social norms such as what can be expected from a prudent or reasonable person. We will see that contract law employs similar notions of evolving societal standards. However, whether one specific domestic law can be stretched to reach a desired effect will be dependent not only on the extent to which society considers a certain type of liability appropriate, but also on how it can be accommodated within the existing doctrinal system.[37]

To further substantiate this point, I will now consider one possible head of liability for enforcing CSR codes. Part III, thus, will be devoted to asking which possibilities general contract law offers for accommodating such codes. My goal is to show how the enforceability question can be answered by reference to well-established contract law doctrine.

III. CSR CODES AND CONTRACT DOCTRINE

An important part of the contract law doctrine deals with distinguishing between enforceable and non-enforceable promises. The search for the foundation of binding promises is, in many respects, the core question in the intellectual history of the field.[38] This is not the place to discuss the many different theories that have been put forward and that have sought the basis for contractual liability in factors such as intention, reliance, declaration, *Geltungserklärung*, speech act,[39] promise, or benefit.[40] This is an ongoing discussion that receives new

37. *See* BECKERS, *supra* note 6, at 39-213 (offering an impressive analysis of potential grounds of liability, ranging from contractual third party rights, negligence, contract with protective effect vis-à-vis third parties, and *culpa in contrahendo* to assumption of responsibility and unfair commercial practices).

38. *See* JAMES GORDLEY, FOUNDATIONS OF PRIVATE LAW: PROPERTY, TORT, CONTRACT, UNJUST ENRICHMENT 289–306 (2006) (examining why promises or expressions of will are binding and whether a party could be bound without a promise as a result of preliminary negotiations). *See generally* JAMES GORDLEY, THE PHILOSOPHICAL ORIGINS OF MODERN CONTRACT DOCTRINE (1991) (tracing the development of modern contract law and positing that the fundamental concepts and doctrines of private law stem from the attempted synthesis of Roman legal texts and the moral theology of Thomas Aquinas).

39. Anna Beckers ultimately regards a CSR code as a speech act or a performative act that not only *describes* but also *changes* social reality. *See* BECKERS, *supra* note 6, at 47–107. However, the problem with speech act theory is that it does not make clear whether parties have at all made use of a rule of contract law. Rather, it is the context that decides whether such an act was performed.

40. *See generally* ROBERT A. HILLMAN, THE RICHNESS OF CONTRACT LAW: AN ANALYSIS AND CRITIQUE OF CONTEMPORARY THEORIES OF CONTRACT LAW (1997) (compiling,

impetus every time a new societal phenomenon needs to be "tested" against the prevailing theory. In the last few decades, these phenomena have *inter alia* included letters of intent, comfort letters, and unilateral promissory statements of government bodies.[41] In this respect, CSR codes are only the next type of document that contract law doctrine needs to accommodate.

It is useful to make a distinction between the theoretical foundation of contractual liability and the criteria used in practice for establishing such liability. Even though modern legal systems tend to focus on the intention to create legal relations and require *consensus ad idem*,[42] in reality a whole set of objective factors play a role in assessing whether a binding contract actually exists. These factors include the proximity between the person making the declaration and the addressee, whether the addressee could reasonably understand the declaration in question as reflecting the promisor's intention to be legally bound and how easy it is for the addressee to investigate this, whether the transaction would be beneficial or detrimental to each of the parties, what is customary in a certain branch, and the expertise and experience of the parties. In brief, the court is looking for a *good reason* to hold the promise binding and employs a multifactor approach to realize this.[43]

This approach can also be used to assess the binding effect of CSR codes. The proximity between the user of the CSR code and the claimant, as previously demonstrated in the *Doe v. Wal-Mart* case, already poses a limit to contractual enforceability.[44] This can be substantiated by reference to three possible situations. The least

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presenting, and evaluating a wide variety of theoretical work on contract law, including the relationship between a promise and a benefit).

41. *See generally* JOHANNES KÖNDGEN, SELBSTBINDUNG OHNE VERTRAG: ZUR HAFTUNG AUS GESCHÄFTSBEZOGENEM HANDELN [SELF-BINDING WITHOUT CONTRACT: LIABILITY THROUGH BUSINESS-RELATED CONDUCT] (1981) (discussing classical societal phenomenon which seek the basis for contractual liability).

42. *See* PRINCIPLES OF EUROPEAN CONTRACT LAW ch. 2, § 1, art. 2:101 (EUROPEAN UNION 1998) ("A contract is concluded if the parties intend to be legally bound, and they reach a sufficient agreement without any further requirement."); RESTATEMENT (SECOND) OF CONTRACTS § 2(1) (AM. LAW INST. 1981) ("A promise is a manifestation of intention to act or refrain from acting in a specified way, so made as to justify a promisee in understanding that a commitment has been made.").

43. *See* P.S. ATIYAH, ESSAYS ON CONTRACT 40–72 (1986) (discussing the moral and legal approach to hold a promise as binding). *See generally* JAN M. SMITS, CONTRACT LAW: A COMPARATIVE INTRODUCTION (2014) (treating contract law as a discipline that can be studied on the basis of common principles and methods without being tied to a particular jurisdiction or legal culture).

44. Although the term "proximity" is mostly used in the context of tort law, it also plays an essential role in the law of contract in that it requires the promisor and the promisee to be in a sufficiently close relationship to justify the promise being legally binding.

problematic situation is when two companies simply agree in their contract that one will comply with a CSR code and the other brings a claim for noncompliance. In this case, the code is likely to have become part of the contents of the contract, giving rise to a performance action (for example, enforcement of the specified labor standards) and possibly to actions for termination or damages. The fact that the two parties act in a commercial context adds to the presumption that they have the intention to be legally bound.[45]

The most problematic situation is when a company indicates to the outside world that it considers itself bound to a CSR code, but the party pursuing the remedy is not in any direct relationship with that company. The previously mentioned case of the employee working for a supplier in Bangladesh (as in the American case of *Doe v. Wal-Mart Stores*) is a good example: this employee will not be able to bring a claim against the American company for lack of a contractually relevant relationship between claimant and defendant. I have argued above that this could be different in the case in which parties within the supply chain can be identified with each other because they share profits and liabilities and operate in a coordinated way toward the outside world, but this will be an exceptional case.

The third, intermediate, situation consists of the average consumer buying a product from a retailer (say Wal-Mart, Primark, or H&M) that declares it is complying with CSR codes, but in fact it is not. Does this allow the consumer to bring a claim for performance or damages? Proximity is not a problem in the proposed multifactor approach, but examination of the other factors shows that a claim is not evident.[46]

First and foremost, it must be questioned whether the consumer could reasonably understand the CSR code to reflect the company's intention to be legally bound. This is a matter of how a reasonable person would consider the binding effect of such a code. The often vague and open-ended wording of the code plays a role here, but the more important point is what social conventions dictate about the binding status of CSR codes. They surely contain committing language aiming to win trust among consumers, but these commitments are not necessarily regarded as legally binding in society. In the reflection of the average consumer, they will be more about the intention of retailers to *morally* do good than to *legally* be bound. The fact that CSR codes are generally seen as containing voluntary norms does not help.[47]

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45. *See* SMITS, *supra* note 43, at 71.

46. *But see* BECKERS, *supra* note 6, at 175 (reaching a different outcome and arguing in favor of legislative intervention to regulate third-party rights).

47. Voluntarism, which "impl[ies] that CSR exclusively covers the domain 'beyond the law,'" figures prominently in Jan Eijsbouts' list of CSR characteristics. *See* JAN EIJSBOUTS,

A second relevant factor in this respect is that the reasonable consumer will understand that to make these obligations binding in law would create a great burden for the retailer. The law is generally suspicious of altruism and presumes that a party will only bind itself if it is to gain from the transaction.[48] Any consumer must understand that when buying apparel or other products at competitive prices in the familiar retail outlets, a commitment to promote socially responsible business may reflect the retailer's ethical concerns but is not a legally enforceable guarantee that CSR norms are in fact kept.[49] This could be different in specialized stores that are visited by consumers who go there, not for a cheap bargain, but for the sake of buying socially responsible manufactured products such as fair trade coffee or clothing. Research shows that people are willing to pay more for such products;[50] if they in fact *do*, and make the conscious choice to buy at a higher price in order to act in a socially responsible way, it also raises the buyers' expectations of the seller.

The latter case shows how societal views and legal doctrine interact. What qualifies under the law as reasonable expectations of contracting parties is directly influenced by social norms.[51] In most cases, the company's promise toward consumers to act socially responsible is at best morally binding. This does not mean that no sanctions exist if a company does not comply with a CSR code, but these are at best economic or social sanctions. However, that is not to say that they are any less effective in fighting corporate human rights violations: insofar as potential contracting partners, banks, and investors require proof of effective compliance with CSR norms before entering into business with

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CORPORATE RESPONSIBILITY, BEYOND VOLUNTARISM: REGULATORY OPTIONS TO REINFORCE THE LICENCE TO OPERATE 12 (2011).

48. On gratuitous transactions and altruism, see SMITS, *supra* note 43, at 70.

49. *But see* Hugh Collins, *Conformity of Goods, the Network Society, and the Ethical Consumer*, 22 EUR. REV. PRIV. L. 619 (2014) (expressing a different and cautious view and asking whether the reasonable expectations of consumers include reference to the means of production up the supply chain and an expectation that the goods will not be produced through the use of labor that is employed under conditions that violate European Union labor laws, international labor standards, and human rights law).

50. *See* Robert Gielissen, *Why Do Consumers Buy Socially Responsible Products*?, 2 INT'L J. BUS. & SOC. SCI., no. 3, Jan. 2011, at 21 (2011) (taking a qualitative approach to answering why consumers buy socially responsible products, often at higher costs).

51. This will be associated with the incorporation of evolving business practices in the binding contract, a topic much discussed in the US in the context of Article 2 of the Uniform Commercial Code, but equally relevant in Europe where these practices enter the legal system through open-ended concepts such as good faith and reasonable parties. *See* U.C.C. § 2 (AM. LAW INST. & UNIF. LAW COMM'N 1977).

a party, there exists an obvious incentive to do the right thing.[52] This is less so with the average consumer, who is in most cases more motivated by the low price or the quality of the product than by its provenance.

CONCLUSION

Enforcement of corporate social responsibility comes in many varieties of both a legal and a nonlegal nature. The possibility of private law enforcement—that is, enforcement by means of contract or tort—is dependent on three different elements: the exact type of claim that is brought, the evolving societal standards about the binding nature of CSR codes, and the doctrinal system. First, the claim can vary depending on the potential plaintiffs, the possible ways in which CSR codes are used, the wording of the code, and the damage that occurs. Second, societal standards inform us how business and consumers consider CSR codes. Although these standards are permanently evolving, they have not yet reached a stage where the average consumer who buys a product from a retailer can legally hold that retailer liable for violations of the norms incorporated in the code. Third, this outcome is guided by an application of the criteria used in legal doctrine to distinguish between binding and nonbinding promises. Factors such as the proximity between the person making the declaration and the addressee, whether the addressee could reasonably understand the declaration in question as reflecting the promisor's intention to be legally bound, and whether the transaction would be beneficial or detrimental to each of the parties serve to guide us toward the appropriate conclusion. The doctrinal approach thus allows us to carry out a "reality check": no matter how noble our intentions in defending the binding effect of CSR codes, we need the disciplining power of legal doctrine to keep our feet on the ground.

52. *See* Mark Kawakami, *Pitfalls of Over-Legalization: When the Law Crowds Out and Spills Over*, 24 IND. J. GLOBAL LEGAL STUD. 147 (2017) (focusing on consumer empowerment to discuss the potentially higher effectiveness of social sanctions in the CSR field).

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