

Another Type of Deficit?

Human Rights, Corporate Social Responsibility, and the Shaping of the European Union's Linkage Strategy

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Abstract

This article engages with the European Union's continuing strategy, in the context of the economic crisis, of addressing the human rights deficit of the current economic model by promoting a multifarious normative linkage between the economic, market-driven sphere and the human rights-anchored social sphere. The article looks into issues of normativity associated with the EU linkage agenda and interrogates some of its institutional and conceptual elements. It contends that, while the linkage discourse depends on a multitude of actors and factors, the EU encompasses a number of features that – by entropy as much as by design – facilitate an interrogation of the normative set-up that currently holds between human rights and the market mechanisms. The first part of the article addresses the linkage or 'trade and' debate that carries distinct nuances within contemporary international economic law. In the second part, the potential as well as the challenges brought about by the EU as a socio-political entity highlight the bringing together of competing normative issues. Lastly, the article considers the EU conceptual inroads in developing the necessary tools for consolidating and addressing the linkage agenda. Through this analysis, the article highlights an essential, dynamic nexus and a search for normative synchronisation between the economic development model and the social model. It is argued that coupling this nexus with a conceptual rethinking can increase the chances of matching the so far rhetorical persuasiveness of the linkage discourse with the so far elusive conceptual coherence and policy consistency.

Keywords: human rights, corporate social responsibility, linkage strategy.

* Westminster International Law and Theory Centre, University of Westminster, London, United Kingdom. A first draft of this paper was presented at the workshop organised by the Centre for the Law of EU External Relations (CLEER) 'Linking trade and non-commercial interests: the EU as a global role model?', on 9 November 2012 at the TMC Asser Institute, The Hague. I am very grateful to the workshop participants as well as to Tamara Takacs, Andrea Ott, and Angelos Dimopoulos for the very insightful comments that helped me develop the paper further. Of course, all remaining mistakes are entirely mine.

A Introduction

The current economic crisis highlights the weaknesses of the economic model as presently promoted globally as a source of wealth and human development. At the same time, it also draws the attention to the wider implications of this model, of which a deficit of human rights is one. This article addressed the European Union's (EU) continuing strategy, in the context of the economic crisis, of addressing the human rights deficit of the current economic model by promoting a multifarious normative linkage between the economic, market-driven sphere and the human rights-anchored social sphere.

Speaking at the 1st United Nations Forum on Business and Human Rights, the EU CSR Coordinator (DG Enterprise and Industry) emphasised the EU's determination to influence the CSR agenda using its policy and legislative competences as well as its engagement in the global dialogue. On the same occasion, Stavros Lambrinidis spoke, from the newly created position of EU Special Representative for Human Rights, about the EU engaging in a 'peaceful revolution' by re-stating its commitment to human rights around the world through adopting a strategic framework for human rights in which CSR plays an integral part. Both statements¹ refer to the EU's role in the promotion of a linkage between the normative paradigm underscoring the free market economy system and the paradigm afforded by the international human rights law discourse. Could this role be that of a 'role model'? Such a question is rather complex, depending on many socio-political factors, the analysis of which is beyond the scope of this paper. However, we can hope to shed some light on this question obliquely, by looking into issues of normativity associated with the EU (and international) linkage agenda and by interrogating some of the institutional and conceptual elements of such a linkage within the EU context. This paper contends that, while the linkage discourse depends on a multitude of actors, the EU encompasses a number of features that facilitate an interrogation of the existing normative set-up that holds between human rights and market economy generally.

Three elements in particular contribute to such an interrogation: the dynamics of the EU competences and of the dialogue between the EU and the Member States regarding the linkage agenda, the EU process of 'constitutionalisation' of the human rights linkage, and, finally, the EU conceptual refinement of CSR. The first part of this paper re-visits the 'trade and' or linkage debate that started already some decades ago and which carries distinct nuances within contemporary international economic law.² This implies looking at the normative points of contact and at the normative tension that are inherent in the contemporary linkage agenda. Such normative conflicts still need to be addressed conceptually. The

- 1 Tom Dodd, Policy Adviser on CSR at the Directorate-General for Enterprise and Industry, European Commission. Panel contribution to the 1st UN Forum on Business and Human Rights, 4-5 December 2012, Geneva (conference notes with the author). Stavros Lambrinidis, EU Special Representative for Human Rights, Plenary Session contribution at the 1st UN Forum on Business and Human Rights, 4-5 December 2012, Geneva (conference notes with the author).
- 2 T. Cottier, J. Pauwelyn & E. Bürgi (Eds.), *Human Rights and International Trade*, Oxford, New York, OUP Oxford 2005, pp. 2 *et seq.*

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EU position as a global role model in linking the free market normative discourse on the one hand with the non-commercial social expectations on the other hand depends on its contribution to the resolution of these primarily conceptual tensions. In the second part, the potential as well as the challenges brought about by the EU as a socio-political entity will highlight the bringing together of normatively competing issues. Lastly, the paper will consider the EU conceptual inroads in developing the necessary tools for consolidating and addressing the linkage agenda.

B Linkage Issues and Normative Tensions

Domestic governments have a long history of linking both economic and trade demands with social and environmental expectations within the same social policies. In particular, the welfare state concept was influenced to a certain extent by such a marriage of goals.³ This does not mean that inasmuch as the modern welfare state is concerned, there have been no conflicts between the various normative platforms. Some of these platforms promoted less state interference and promised a trickle-down approach to social welfare, while others maintained that the only scope of trade liberalism would be that society benefits in a more direct and obvious way from its processes. In spite of these tensions, governments, still in charge of the regulatory orchestra, managed to a certain extent to keep the main normative conflicts among the various spheres of social action under control. However, in the context of the globalising market economy, proposing a socio-politico-economic entity such as the EU as a role model of a 'peaceful revolution' that links organically market economy to social agendas is likely to add new challenges. Joining these agendas on the domestic platform has never been without difficulties. Joining them at the regional and global international economic level raises new problems, given the absence of solid institutional mechanisms that would ease the eventual embedding of the market processes in society at a global scale.⁴

Nevertheless, a linkage discourse has been developed as an answer to various signals of conflicting expectations and to unsatisfactory normative set-ups on the international economic arena. Human rights, labour standards, corporate and global governance, and the environment have thus become sources of normative negotiations, transplants that – conscientiously or not – aim at a change of the normative paradigm in international economic law.⁵ All these elements inevitably have an important impact on trade and investment policies. The linkage agenda denotes a multitude of dimensions. It implies proactive human resource manage-

3 P. Pierson (Ed.), *The New Politics of the Welfare State*, Oxford University Press 2001, pp. 1-15.

4 J. Kirshner, 'Keynes, Capital Mobility and the Crisis of Embedded Liberalism', *Review of International Political Economy*, Vol. 6, No. 3, 1999, pp. 313-337, at 326 *et seq.*

5 A. Voiculescu, 'Human Rights, Corporate Social Responsibility and International Economic Law: In Search of Strong Answers to Strong Questions?', in A. Perry-Kessaris (Ed.), *Socio-Legal Approaches to International Economic Law: Text, Context, Subtext*, London, Routledge 2013, pp. 222-234.

ment, training and career development, employee participation, quality of working conditions in general and along the supply chains in particular, support to local and general interest causes, respect for the human rights, and elimination of child labour. Linking an environmental component to the internal normative logic of market economy implies the incorporation of exogenous considerations such as pollution prevention, protection of water resources, and biodiversity, to mention only a few, into the design, manufacturing, and distribution of products. Lastly, linking a governance component implies the firms' respect for shareholders, customers, suppliers and other stakeholders alike, transparency, prevention of corruption practices, consumer protection, and integration of CSR in the supply chain.⁶ These linkages challenge the segmentation of the public sphere and, to a certain extent, challenge the neo-liberal division of social responsibility within the various segments. It is against this backdrop of social expectations for the normative rearrangement of the public sphere that the business and human rights agenda came to life. This took place predominantly through the corporate social responsibility discourse and, lately, through the translation of all components of CSR into the language of human rights.

The issue of linkage areas draws importantly on the concept of normative spheres.⁷ By normative spheres we refer to those sets of concepts and propositions that are used for guiding social action in a particular area. In this sense, one can understand the ethical sphere and the legal sphere as distinct normative spheres.⁸ Equally, however, one can speak of the normativity of other discourses, such as research or religion as social practices. From this point of view, one can also speak of the normativity of the market economy as a relevant sphere of social practice, referring to those concepts and propositions – such as the (market-shaped) supply and demand tenet, the market-driven allocation of goods, the prevalence of private property rights – that guide social action such as it is produced by the free market economic discourse and in particular by the neo-liberal economic discourse.⁹ In this paper, the focus is in particular on the points of contact and tension between the normative set of propositions regulating the market discourse and the human rights normative framework that purports the protection of the individual human being and of communities from the abusive exercise of any type of power, irrespective of their position within the economic market. Human rights themselves, therefore, already display a rather complex type of

6 J. Moon et al., *Analysis of the National and EU Policies Supporting Corporate Social Responsibility and Impact. Working paper 2. Deliverable to 'IMPACT Project' funded by the Directorate General for Research, European Commission (Framework 7 Program)*, 2012, <<http://csr-impact.eu/documents/documents-detail.html?documentid=5>>.

7 S. Robertson (Ed.), *Spheres of Reason: New Essays in the Philosophy of Normativity*, Oxford, Oxford University Press 2009.

8 T. Spaak, 'Legal Positivism, Law's Normativity, and the Normative Force of Legal Justification', *Ratio Juris*, Vol. 16, No. 4, 2003, pp. 469-485.

9 For the link between the latter and the market structures, see Harvey's definition of neo-liberalism as "political economic practices that proposes that human well-being can best be advanced by liberating individual entrepreneurial freedoms and skills within an institutional framework characterized by strong private property rights, free markets and free trade". D. Harvey, *A Brief History of Neoliberalism*, Oxford, Oxford University Press 2007, p. 2.

normativity. On the one hand, the human rights discourse draws upon the deep natural law, ethically inspired normativity, and on the other hand it feeds upon the procedural capacity of the law for 'stabilising normative expectations'.¹⁰

Given the rather distinct development of the various normative discourses, in particular of the free market economy discourse and of the human rights discourse, a solid conceptual framework is required to warrant the grafting of new, ostensibly exogenous normative parameters onto what otherwise may appear as operationally autonomous normative systems.¹¹ The international trade and cooperation system, focusing predominantly if not exclusively on economic parameters and a profit-oriented and commodification rationale,¹² is an example of such an operationally autonomous normative system, as is the human rights system.¹³

The demand for a re-conceptualisation that would address the normative/cultural clashes between market economy and human rights has generally been addressed in two ways. Firstly, a reformulation of the exogenous normative parameters – the *corpus alienum* – has taken place, in ways that try to negotiate or conceal the fundamental conflicts.¹⁴ This would function as a 'normative transplant'.¹⁵ The proposed argument of the 'business case for human rights' and of the 'business case for CSR' is a good illustration of this approach.¹⁶ Much of the human rights and CSR discourse within the business and management environment is indeed premised on the rather precarious conceptual tenets of this contention that proposes CSR and human rights social demands as primarily 'good for business'. This line of argument may largely be seen as a 'normative immunosuppressant', deployed so as to prevent the rejection of the exogenous normative

- 10 G.P. Calliess & M. Renner, 'Between Law and Social Norms: The Evolution of Global Governance', *Ratio Juris*, Vol. 22, No. 2, 2009, pp. 260-280.
- 11 B. Jessop, 'The Social Embeddedness of the Economy and its Implications for Economic Governance', in F. Adaman & P.J. Devine (Eds.), *Economy and Society: Money, Capitalism and Transition (Critical Perspectives on Historical Issues)*, Montreal, Black Rose Books 2002, pp. 199-222.
- 12 S. Frerichs, 'Law, Economy and Society in the Global Age: A Study Guide', in A. Perry-Kessaris (Ed.), *Socio-Legal Approaches to International Economic Law: Text, Context, Subtext*, London, Routledge 2013, pp. 36-49, at 48.
- 13 N. Whiteside & A. Mah, 'Human Rights and Ethical Reasoning: Capabilities, Conventions and Spheres of Public Action', *Sociology*, Vol. 46, No. 5, 2012, pp. 921-935.
- 14 T. Epps & A. Green, *Reconciling Trade and Climate: How the WTO Can Help Address Climate Change*, Cheltenham, Edward Elgar Publishing Ltd 2010; K. Bagwell & R.W. Staiger, 'The WTO as a Mechanism for Securing Market Access Property Rights: Implications for Global Labor and Environmental Issues', *Journal of Economic Perspectives*, Vol. 15, No. 3, 2001, pp. 69-88.
- 15 Bearing in mind that, while legal transplants may support a wider normative transplant, they are by no means identical or simultaneously successful. See A. Watson, *Legal transplants: an approach to comparative law*, Athens, University of Georgia Press 1993, pp. 21 *et seq.*
- 16 Kurucz *et al.*, for instance, identify four categories of benefits that firms may attain from engaging in CSR activities: (1) cost and risk reduction, (2) gaining competitive advantage, (3) developing reputation and legitimacy, and (4) seeking win-win outcomes through synergistic value creation. Cited in A.B. Carroll & K.M. Shabana, 'The Business Case for Corporate Social Responsibility: A Review of Concepts, Research and Practice', *International Journal of Management Reviews*, Vol. 12, No. 1, 2010, pp. 85-105, at 95.

parameters¹⁷ brought forward by the human rights and the CSR discourses.¹⁸ This approach may leave the system weaker rather than stronger, its life course depending on normative immunosuppressants. ‘Good for business’ cannot be proposed as the overriding principle without ignoring a more human development-oriented system of social values.

A second approach to addressing the normative points of tension between trade and human rights on the CSR platform is to create a certain normative indeterminacy that, at best, offers some limited opportunity for change while at worst creates a smokescreen and conceptual confusion preventing genuine change. Referring, for instance, to the various CSR-induced terms used increasingly in the international human rights and CSR arena despite their indeterminacy, Wheeler writes about “concepts imprisoned in their contemporary context, waiting for a time of moral commitment to give them the force of real intent”.¹⁹ An example in this sense is the human rights and development talk displayed in the international trade circles.²⁰

Of course, both of the above strategies – often part of a mixed approach – can bring more problems than solutions. While a certain level of normative indeterminacy may be constructive in the case of diplomatic negotiations related to a regional conflict, the same approach is unlikely to be long-term fruitful when the issue at stake is itself a normative point of tension referring to the realisation of imperative universal human rights values for instance. Similarly, transplanting normative parameters from the human rights discourse into the trade and business arena often puts forward questions and problems related to the operationalisation of the transplanted parameters (problems other than the immediate ‘rejection’ issues mentioned above). A normative transplant of human rights values into the trade and business discourse risks to unsettle the trade framework and business patterns of governance – which may not be an altogether undesirable outcome – as well as to subvert the consistency (never absolute) of the transplanted human rights values.

While the international trade structures are strewn with declarative statements focusing on social and environmental issues for instance, the reluctance as well as the difficulty with which the international trade dispute resolution system handles social and environmental issues²¹ are also acknowledged. Similarly, outsourcing the fulfilment of social expectations related to human rights, labour, and environment to a system more versed in assessing contractual rather than social

17 Analysing the ontological tenets of neo-liberal globalisation and human rights, O’Connell speaks about the former creating an “inhospitable battlefield, devoid of empathy and solidarity”. P.O’Connell, ‘On Reconciling Irreconcilables: Neo-Liberal Globalisation and Human Rights’, *Human Rights Law Review*, Vol. 7, 2007, pp. 483-509, at 497.

18 D.J. Vogel, ‘Is There a Market for Virtue? The Business Case for Corporate Social Responsibility’, *California Management Review*, Vol. 47, No. 4, 2005, pp. 19-45; Carroll & Shabana 2010, p. 100.

19 S. Wheeler, ‘Corporate Respect for Human Rights: As Good as It Gets?’, in A. Perry-Kessaris (Ed.), *Socio-Legal Approaches to International Economic Law: Text, Context, Subtext*, London, Routledge 2013, pp. 209-221, at 221.

20 P. Uvin, ‘From the Right to Development to the Rights-Based Approach: How “Human Rights” Entered Development’, *Development in Practice*, Vol. 17, No. 4-5, 2007, pp. 597-606.

21 See Tom Dodd intervention at the UN 1st Forum, *supra* note 1.

justice claims might not bring the desired result. These weaknesses of the linkage process so far suggest the need for a more deep-seated ‘peaceful revolution’ approach that would address what some would call ancillary market and political failures²² and that ultimately would stimulate a more organic socialisation of the economic actors.²³ A credible solution therefore to the issues of linking trade and human rights normative platforms would address the normative tensions at a deeper level, eliminating the need for what otherwise may feel as normative inter-regnum transplants. In the next section, we will look into the institutional and conceptual potential of the EU agencies to address convincingly the expectations for social justice and to propose a viable new paradigm of social goals and social responsibilities to be undertaken in the international and European trade and cooperation. In order to be successful, this paradigm should allow for the recognition of the epistemic and normative distinctiveness of the linked normative areas.²⁴

One way in which the risk of normative rejection can be minimised is by negotiating among the various sets of normative parameters in order to emerge with one set of consistent and compatible values. In this sense, the notion of ‘development’ has often come across as a platform that brings together international trade and investment as well as human rights, while the CSR discourse itself has built bridges based on the notion of ‘sustainable development’. Certainly, in this context, convergence of vocabulary should not be confused with convergence of views and meaning.²⁵ There is still a lot of work to be done in putting in agreement the various meanings with which the word ‘development’ and other related notions are deployed by the various international, European, and civil society agencies in order to achieve a common language.

A second type of approach – with which the EU must be fairly conversant within its own internal market – is based on consensus-building processes.²⁶ The linkage between trade and labour standards offers an interesting example in this sense, with negotiations aiming to build the linkage by focusing on process-

22 See for instance Brown writing about the ILO-WTO normative clash regarding labour rights, “... Taking steps to reduce forced labor, child labor, and discriminatory behavior, or to support free association and collective bargaining will often have a mixture of effects. Realizing the potential efficiency, equity and humanitarian benefits of core standards may depend on first correcting ancillary market or political failures”. D.K. Brown, ‘Labor Standards: Where Do They Belong on the International Trade Agenda?’, *Journal of Economic Perspectives*, Vol. 15, No. 3, 2001, pp. 89-112, at 97.

23 A. Voiculescu, “‘Etiquette and Magic’: Between Embedded and Embedding Corporate Social Responsibility’ (November 2013, Special Issue ‘Harnessing the Regulatory Capacity of a Social Sphere: Perspectives on Transnational Risk Regulation’), *Studies in Law, Politics, and Society*, 2013.

24 F.J. Garcia, ‘The Trade Linkage Phenomenon: Pointing the Way to the Trade Law and Global Social Policy of the 21st Century’, *University of Pennsylvania Journal of International Economic Law*, Vol. 19, No. 2, 1998, pp. 201-208.

25 C. Geertz, *Local Knowledge*, Waukegan, Illinois, Fontana Press 2010, p. 221; W. Twining, ‘Have Concepts, Will Travel: Analytical Jurisprudence in a Global Context’, *International Journal of Law in Context*, Vol. 1, No. 1, 2005, pp. 5-40, at 34-35.

26 F.J. Garcia, ‘Globalization and the Theory of International Law’, *International Theory*, Vol. 11, 2005, pp. 9-22.

related standards. The latter have a greater chance of an emergent consensus than outcome-related standards, which would be much more difficult to negotiate within the present international trade framework.²⁷

However, the universalist, value-based approach and the consensus building one often manage to merge with respect to linkage issues. In the case of the link between trade and labour standards, for instance, the human rights arguments are often combined with a more practical, consensus-building approach.²⁸ An equally interesting and challenging issue to mention here though is that in the case of the linkage between human rights and free market discourses, one is faced with two universalist discourses rather than one only. Both human rights and the international trade discourses propose competing universalist claims that challenge the finding of a common lexicon of values.²⁹ The values proposed through the essentially universalist discourse of human rights come into competition and conflict with the neo-liberal market paradigm when proposed as equally and objectively universal. To put it in O'Connell's words, "[even] if we just confine ourselves to the foundational document of the international human rights regime, the Universal Declaration of Human Rights (UDHR), we can see that the ontological foundation of the human rights approach is completely at variance with the view underpinning the neo-liberal project".³⁰ The search for a conceptual framework that would work in practice is, therefore, not easy, and the answer cannot be superficial. Could the EU contribute to the debate in a distinct way towards a paradigm change? In the next section, we will look into the specificity of the EU normative and regulatory mosaic in order to identify potential signals of problematisation of the existing normative paradigm associated with the free market economy model.

C The EU's Institutional Linkage Potential and Challenges

Several factors influence the potential of the EU to problematise the business and human rights agenda and to affect the international debate related to the linkage between international trade and investment on the one hand and social issues on the other hand. These factors feature prominently in the European corporate social responsibility debate of the last decade. Admittedly, this debate does not overlap completely with the human rights linkage debate. The two are, however, intimately dependent on each other conceptually. First of all, the human rights discourse has been increasingly deployed to conceptualise the CSR normative expectations. This took place not only with respect to issues related to wider civil, political, and socio-economic values inspired by the international human rights covenants but also with respect to labour standards, increasingly conceptualised as labour rights, as well as with respect to environmental protection, increasingly

27 Brown 2001, p. 92.

28 *Ibid.*, p. 93.

29 See Jessop 2002, p. 199.

30 O'Connell 2007, p. 498. See also p. 507, section 5D.

conceptualised as environmental rights. The human rights discourse became, therefore, the privileged normative discourse in the conceptualisation of CSR.

In the past two decades of intense development of linkages at the European level, the Commission has consistently seen human rights as part of both an internal and an external dimension of the CSR processes.³¹ This was incontestably linked to a trade and development dynamics that was proposed both as an enlightened approach to the market and, at the same time, as a policy meant to tame this very market through protecting workers, the environment, and stakeholders while stimulating innovation and increasing productivity. This approach was rooted in the EC Treaty and the Treaty on European Union and subsequently in the consolidated version of the Lisbon Treaty provisions that set out the protection and promotion of human rights as one of the main objectives of the Union. In this sense, Article 21 TEU can be seen as both a potential constitutional path and agenda setting for the EU external relations objectives. As constitutional path, the EU Treaty provisions can facilitate the mainstreaming of the human rights clause into all of the EU trade, development, and cooperation agreements and can stimulate the development of a monitoring infrastructure related to the clause. At least at the level of the political rhetoric, if not constitutional aspirations, the clause is therefore understood to guide all EU business activities. Since the mid-1990s, for instance, this clause has been regularly associated with a ‘suspension’ clause³² that in principle governs an agreement even with respect to human rights issues that may be unrelated to the actual direct object of the agreement.³³ To a certain extent, this renders the trade and cooperation agreements into potential vehicles of human rights policies,³⁴ albeit built on a tenuous rationale.³⁵ Further on the path of implementation of the human rights clause, the European Parliament’s (EP) initiative to associate the clause with compliance mechanisms that would regulate all external trade and development agreements should also be mentioned. Commenting on the Commission’s 2001 initiative on CSR, the EP Report advanced the idea that a public human rights report and a

31 J. Fudge, ‘The New Discourse of Labor Rights: From Social to Fundamental Rights’, *Comparative Labor Law & Policy Journal*, Vol. 29, 2007, pp. 29-66, at 43; but also R. Howse & M.J. Trebilcock, ‘The Fair Trade-Free Trade Debate: Trade, Labor, and the Environment’, *International Review of Law and Economics*, Vol. 16, No. 1, 1996, pp. 61-79, at 65.

32 European Commission, ‘Agreements Containing a Suspension-Human Rights Clause’ (2011) <<http://ec.europa.eu/world/agreements/viewCollection.do?fileID=58582>> last accessed on 10 April 2013.

33 H. Hazelzet, ‘Suspension of Development Cooperation: An Instrument to Promote Human Rights and Democracy?’, *European Centre for Development Policy Management*, 2005, pp. 1-23.

34 L. Bartels, ‘Human Rights and Sustainable Development Obligations in EU Free Trade Agreements’, *University of Cambridge Legal Studies Research Paper Series*, Vol. 24, 2012, pp. 1-20, at 5 *et seq.* Related to this potential, see also the EU Special Representative for Human Rights, Stavros Lambrinidis speaking at the 2012 UN Forum on Business and Human Rights about the number of bilateral CSR and human rights dialogues that speak of the commitment “to make respect for human rights a reflex” (speech notes with the author), *supra* note 1.

35 E. Jones, ‘Competitive and Sustainable Growth: Logic and Inconsistency’, *Journal of European Public Policy*, Vol. 6, No. 3, 1999, pp. 359-375.

sustainability and social impact report should constitute mandatory requirements for all businesses under the EU trade policy.³⁶

I Constitutionalising Linkages?

The evolution of the human rights and CSR agenda in the EU development cooperation agreements is a good illustration of the evolution of the EU's linkage strategy. While agreements creating special conditions for trade and investment have constituted an important item on the EC/EU international agenda from the very beginning, it is only in the past decade that this agenda has seen an increased presence of the linkage issues and in particular of those issues couched in the language of human rights.³⁷ Emphasising the inescapable link between the EU's trade and development cooperation activities and the human rights impact of those activities, the European Commission acknowledged the social dimension of the globalisation of the free market economy.³⁸ Aiming to address this dimension in some of the EU development cooperation agreements, the Commission affords business organisations and other stakeholders active agency status via the principle of participation. This principle has the potential to empower agreement stakeholders, including business organisations, to use the human rights clause as well as the implicit social agenda of the agreements in order to pursue complementary interests.³⁹ Of course, the success of such provisions will continue to depend on the political commitment of the signatory governments as well as on the coincidence of interests between the various actors and, in particular, between business actors and social stakeholders.⁴⁰

The EU agreements appear, therefore, to be complemented with a normative toolkit rooted in the human rights clause and the participation principle, all enhanced by the constitutional platform provided by Treaty provisions stating that Union's action on the international scene:

... shall be guided by the principles which have inspired its own creation, development and enlargement, and which it seeks to advance in the wider world: democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, the principles

36 European Parliament, *Report on the Commission Green Paper on Promoting a European Framework for Corporate Social Responsibility (COM (2001) 366 – C5-0161/2002 – 2002/2069(COS)), A5-0159/2002 Final*, Luxembourg, European Parliament, 2002, p. 14.

37 A. Hadfield, 'Janus Advances? An Analysis of EC Development Policy and the 2005 Amended Cotonou Partnership', *European Foreign Affairs Review*, Vol. 12, No. 1, 2007, pp. 39-66, at 43.

38 European Commission, *Communication on the social dimension of globalisation: the EU policy contribution on extending the benefits to all [COM (2004) 383 Final]*, 2004, p. 6, <http://ec.europa.eu/europeaid/what/social-protection/documents/1com_2004_383_final_en.pdf>; European Commission, *Implementing the Partnership for Growth and Jobs: Making Europe a Pole of Excellence on Corporate Social Responsibility [COM(2006) 136 final]*, Brussels, European Commission, 2006, <www.eea.europa.eu/policy-documents/com-2006-136-final> last accessed on 17 November 2012.

39 Hadfield, *supra* note 37, 38. See, for instance, the provisions of the Article 2 and Article 9 in the Cotonou Agreement between the EU and the ACP countries.

40 Multi-Stakeholder Forum, 2009, 7 *et seq.*, <www.ec.europa.eu/enterprise/csr/index_forum.htm>.

of equality and solidarity, and respect for the principles of the United Nations Charter and international law.⁴¹

These features generate a platform for regulatory mechanisms and normative frameworks that reinforce the search for an organic linkage of trade and human rights within the CSR discourse. From this shaky yet persistent platform, business organisations appear both under the normative obligation to abide by national legislation and international standards and to be empowered with a (complementary) human rights agency. This means that the various normative elements increasingly get situated on a wide spectrum between voluntarism and regulatory patronage, between a (traditional) CSR voluntary platform and ‘command and control regulation’.⁴² In this context, law and regulation acquire an increasing role, though not always the traditional one. Voluntary CSR policies are induced through ‘smart’ regulatory mechanisms that foster ‘voluntary’ CSR initiatives. As McBarnet puts it, “new legal tools are being evolved, and old ones used creatively, to make what businesses have perceived as voluntary, or beyond the law, in fact legally enforceable”.⁴³ Through complex moves combining stimuli for voluntary action and ‘smart’ regulatory initiatives, the EU adds complexity to the dynamics of normative and regulatory expectations while catering for a search for a deeper compliance momentum.

II The Dynamics of the EU Domestic and Regional Debate

The dynamics of the linkage issues within the EU depends both on the EU institutional drive that formulates and encapsulates ‘constitutional’ instruments such as the human rights clause and upon the way in which the debate develops at the Member States level. The various domestic CSR and human rights initiatives have the power to inform, influence, and stimulate the EU institutional debate. In this sense, the domestic EU channel of CSR initiatives is developed across various dimensions. There is, first of all, a host of research and policy development initiatives at the Member States and regional levels that contribute to a certain linkage narrative. In a number of EU Member States, CSR and human rights linkage issues have gained a stable place on the public policy agenda. This echoes as much as influences the EU institutional discourse on human rights and business. Reflecting the importance of these domestic signals, the European Commission has put into place a High-Level Group of National Representatives on CSR that functions as a two-way channel for information and good practice dissemination between Member States and the EU institutions. Such channels, some more formalised than others, contribute to the process of normative negotiation and to the search for a linkage equilibrium that can be reflected in policy.

41 Article 21 TEU under Title V, Chapter 1 ‘General Provisions on the Union’s External Actions’.

42 Moon *et al.* 2012, p. 5.

43 D.J. McBarnet, ‘Corporate Social Responsibility Beyond Law, Through Law, for Law: The New Corporate Accountability’, in D.J. McBarnet, A. Voiculescu & T. Campbell (Eds.), *The New Corporate Accountability: Corporate Social Responsibility and the Law*, Cambridge, Cambridge University Press 2007, pp. 9-58, at 31.

The last European Commission report mapping the national public policy initiatives and frameworks across the EU Member States identified a number of important areas where the domestic contribution has been most notable for implementing as well as feeding into the EU linkage policy. Among the dimensions identified in the EC report⁴⁴ are the socially responsible supply chain management, with a special focus on human rights; reporting and disclosure frameworks focusing on CSR, human rights, and the environment; the use of CSR mechanisms in addressing climate change; the embedding of CSR in the policies and culture of small- and medium-sized enterprises; the development of socially responsible investment mechanisms; the design and implementation of socially responsible public procurement frameworks; and the dissemination and reinforcement of the CSR-strong environments through the educational channels at all levels.⁴⁵

However, the EU Member States do not offer a uniform socio-economic and political context for the linkage debate. The mosaic of initiatives depends largely upon the various economic and market models practised in each Member State. This will inevitably influence the Member States' choice of linkage instruments. Using the typology designed by Fox, Ward, and Howard,⁴⁶ these choices could be classified in four broad categories. Some Member States will favour predominantly domestic policies that endorse voluntary CSR policies⁴⁷ as 'baseline' policies. This approach favours the use of the market forces as the main tool of guiding normative choices.⁴⁸ Other Member States, characterised by the presence of strong governments, with the willingness to intervene and correct the market, will favour facilitation. This approach requires a more active and creative governmental input, involving schemes that enable and incentivise business organisations to engage with new normative parameters emerging from the linkage horizon.⁴⁹ Another distinct ground for linkage initiatives is the one offered by government set-ups based on a tradition of consensus and deliberation on public policies, a tradition that would favour partnering-type CSR policies. In this case,

44 For the design of the typology, see R. Steurer, 'The Role of Governments in Corporate Social Responsibility: Characterising Public Policies on CSR in Europe', *Policy Sciences*, Vol. 43, No. 1, 2010, pp. 49-72.

45 European Commission, *Corporate Social Responsibility: National Public Policies in the European Union*, European Commission, 2010, <<http://ec.europa.eu/social/BlobServlet?docId=6716&langId=en>> last accessed on 10 April 2013.

46 T. Fox, H. Ward & B. Howard, *Public Sector Roles in Strengthening Corporate Social Responsibility: A Baseline Study*, Washington DC, The World Bank Group 2002 <<http://pubs.iied.org/pdfs/16017IIED.pdf>> last accessed on 22 April 2013.

47 According to Knudsen *et al.*, this type of policies would cover general information campaigns, websites, political rhetoric, award, and labeling schemes. J. Knudsen, J. Moon & R. Slager, 'Government Policies for Corporate Social Responsibility in Europe: Support and Institutionalization', 2012, pp. 18 *et seq.*, <<http://papers.ssrn.com/abstract=2176347>> last accessed on 1 April 2013.

48 D. Brown & J.S. Knudsen, *How Do Domestic Institutions Influence Corporate Social Responsibility (CSR)?: An Examination of Government Policies and Company Initiatives in Denmark and the UK*, Rochester, New York, Social Science Research Network 2012, <<http://papers.ssrn.com/abstract=2139898>> last accessed on 1 April 2013.

49 Fox *et al.* 2002, p. 3 cited by Knudsen *et al.* 2012, p. 20.

public agencies participate in the scheme or act as convenor for private participants.⁵⁰ Last but not least, governments with stronger propensity towards a rule-based approach to economic and social management will be generally more likely to develop mandating policies. These instruments can involve the setting of minimum standards for the business conduct. The mandating government will be promoting certain perspectives on CSR through regulatory tools that fall nevertheless short of a 'command and control' approach.

Endorsing, facilitating, partnering, or mandating such a variety of economic and policy models represents both a challenge for the normative linkages associated with human rights and CSR and a strength of the EU model. This model is now compelled to refine its linkage narrative in a much denser and demanding normative environment. Through the Member States' participation, the range of concepts and linkage formulas is greatly enriched in a constitutional set-up designed to stimulate nuanced normative conversations across the rich economic governance spectrum identified by Fox, Ward, and Howard.

III The Linkage Discourse and EU Conceptual Dynamics

There are a number of elements, therefore, that contribute to the EU linkage debate and to the European voice in the linkage debate. There is a complex institutional structure, where the European Commission, European Parliament, the Council of the European Union, as well as the European courts bring their own institutional voice to the linkage debate. Second, there is a semi-constitutional, treaty-based set-up that can represent a fertile ground for refining linkages. Third, the complex socio-economic and political domestic mosaic, displaying varied approaches to the relationship between the state and the market, offers challenging voluntary/regulatory arrangements that can foster creativity and flexibility in addressing the linkage issues.

Apart from these elements, the evolution of the conceptual framework that facilitates the linkage debate and, ultimately, the linkage itself is also meaningful. The conceptual platform upon which the EU has built its CSR, human rights, and, more generally, its linkage strategy and policy has known various stages. While CSR and linkage signals have been present earlier, these issues have indeed come firmly on the EC/EU agenda in the mid-1990s, with Jacques Delors' European Commission Presidency. During this period, several appeals were made, inviting businesses to take an active part in the shaping and resolving of the problems related to Europe's economic and social agenda and in addressing Europe's structural problems such as social exclusion and unemployment. In this context, for about a decade, the European Commission's strategy was supported predominantly by an endorsement rhetoric and by attempts to use the market forces in order to provide for the linkage being made. Businesses were therefore invited to find themselves solutions for integrating social and environmental expectations into their normative frameworks. In the years following Jacques Delors' intervention, for instance, business adopted the European Business Declaration against Social Exclusion (calling for the development of a European network for the

50 Knudsen, Moon & Slager 2012, pp. 22 *et seq.*

exchange of information and experience). One year later, in 1996, the European Business Network for Social Cohesion was created, and in 1997 there were initiatives for engaging businesses against racism. Many other similar initiatives were also supported by the EU at the domestic level. It is with this kind of initiatives and the 'new development model' initiated by Jacques Delors that a European linkage agenda started taking shape,⁵¹ with both an internal and an external market vision.

Conceptually, however, this was also just the beginning of a long road. The domestic signals received by the Commission concerning the linkage agenda were mixed and the international context complex. The Commission therefore pained to make both the social and the business case for CSR and for linking the social and the economic agendas more generally on the internal as well as on the external market. The chosen formula for CSR promoted 'going beyond legal obligations' in the social sphere, on the premise that this would have a direct impact on productivity and innovation.⁵² As to the EU linkage agenda addressing international trade and cooperation, the Commission has been arguing already since the early 2000s that merging the social and economic agendas could "contribute to ensure that the international trade markets function in a more sustainable way".⁵³

However, this kind of position was far from settling the normative points of tension between the market agenda and the social expectations related to that agenda. How were these tensions to be resolved? The European signals were – and to some extent remain – mixed. The Commission made it clear in its 2001 Green Paper that business engagement with the various normative conundrums would be at the heart of its linkage agenda. The terms of this engagement were largely reflected in the Commission's definition of CSR as:

... a concept whereby companies integrate social and environmental concerns in their business operations and in their interaction with their stakeholders *on a voluntary basis* (emphasis added).

At the same time, echoing signals received from various Member States, the European Parliament, and other stakeholders, the Commission also acknowledged the need for a better EU regulatory framework for voluntary action and that this need should be reflected in the European linkage agenda.⁵⁴ This was consistent with previous positions taken on linking CSR and business at the EU policy level. The Commission, for instance, persistently argued that CSR should not be used as a

51 Jones 1999, p. 359.

52 European Commission, *Communication on promoting core labour standards and improving social governance in the context of globalization [COM (2001) 416]*, Brussels, European Commission, p. 19.

53 European Commission, *Communication concerning corporate social responsibility: a business contribution to sustainable development [COM(2002)347 final]*, Brussels: European Commission, 2002, p. 9, <www.eea.europa.eu/policy-documents/com-2002-347-final> last accessed on 17 November 2012.

54 European Commission, *Implementing the Partnership for Growth and Jobs: Making Europe a Pole of Excellence on Corporate Social Responsibility [COM(2006) 136 final]*, *supra* note 38, p. 2.

substitute to taking legislative measures in the area of social rights or environmental standards.⁵⁵

These signals from the European Commission established a specific normative dynamic between two distinct approaches. First of all, we have an approach to the linkage areas specific to CSR based on voluntary negotiations of normative parameters. This encouraged the development of policies based on an endorsement and facilitation approach, dominated by the use of the market forces in order to encourage businesses to resolve the normative conflicts between the market demands and the social ones. The second type of signals, however, also encouraged linkage policies, but these focused instead on regulatory instruments for resolving the points of tension. This creates an environment favourable to mandating policies, which set out specific norms that ought to be internalised by the economic actors themselves. As to the processes of internalisation, they are left up to the specific business organisations, industry, or trade structures.

This dynamic voluntary/regulatory relation established with the Commission's 2001 Green Paper position on CSR registered recently, however, a somewhat unexpected turn. The Commission's well-crafted CSR definition from the 2001 Green Paper, focusing on social and environmental concerns, on the business interaction with stakeholders and, most importantly, founded on the notion of voluntary action, was sublimated in the Commission's new definition, as simply: "... the responsibility of enterprises for their impacts on society".⁵⁶

Doing away with enumerating the domains of desirable normative linkage, giving up on prescribing 'integration' of exogenous parameters into the business operations, the Commission brought instead the 'R' into the CSR, thus affirming the market actor's responsibility for impact.

The move away from a definition focusing on voluntary action to a definition centred on the notion of 'responsibility for impact' is presented by the Commission not simply as a reformulation for the sake of clarity but as a move towards 'a modern understanding' of CSR. The key elements related to the conceptual 'modernisation' of the notion of CSR are not only that 'impact' now covers potentially much more but also, very importantly, that the key notion of voluntarism, persistently assimilated so far by business actors and the various international economic agencies with the notion of CSR, has now been written out of the EU definition.

Some portrayed the change in the Commission's definition of CSR as a mere quest for clarity, while others – ignoring the documented dynamic relationship between norms and regulations⁵⁷ – chose to ignore the re-definition of this key linkage instrument on the basis that the Commission's 'Renewed Strategy

55 European Commission, *Communication on promoting core labour standards and improving social governance in the context of globalization* [COM (2001) 416], *supra* note 52, p. 10.

56 European Commission, *A renewed EU strategy 2011-14 for Corporate Social Responsibility: Communication from the Commission to the European Parliament, The Council, the European Economic and Social Committee and the Committee of the Regions*; COM(2011) 681 final, 2011, <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2011:0681:FIN:EN:PDF>> last accessed on 6 November 2012.

57 McBarnet 2007.

2011-14' would be 'legally non-binding' anyway.⁵⁸ Generally, however, business actors perceived the reformulated definition as a 'paradigm shift' in the European policy on CSR and declared it regrettable that "the voluntary engagement of companies is no longer seen by the Commission as a key feature of CSR".⁵⁹

The conceptual re-centering that appears to take place through the Commission's 'Renewed Strategy 2011-14' aims to further increase the impact of the EU CSR policy. For this purpose, on the one hand, the Commission emphasised 'the need for a balanced multi-stakeholder approach', for enhanced transparency and for further promoting the 'market reward for responsible business conduct' (including through the use of investment and public procurement policies). On the other hand, the Commission also emphasised 'the need to consider self- and co-regulation schemes' as an important dimension of the normative settling, 'complementary regulation' as support to 'voluntary' action, as well as the need for paying 'greater attention to human rights', now seen as a 'prominent aspect of CSR'. Both these directions are proposed against the backdrop of further conceptual consistency afforded by 'international principles and guidelines'.

Of course, although the Commission is hoping for 'an increasingly coherent global framework',⁶⁰ the conceptual consistency of the linkage framework remains elusive for the time being. There is, however, a consistency of 'linkage pointers' within the EU strategy. The Commission's 'Renewed Strategy 2011-14' refers to a set of five international linkage/CSR initiatives that business and economic actors are expected to work with and embed in their activities: the updated OECD Guidelines for Multinational Enterprises, the United Nations Global Compact, the ISO 26000 Guidance Standard on Social Responsibility, the ILO Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy, and the United Nations Guiding Principles on Business and Human Rights.⁶¹

D Conclusions

A peaceful linkage revolution? It is possibly not the first paraphrase that would come to mind. However, as this paper tries to show, there are elements within the EU socio-political ecosystem that create conditions for the interrogation of the existing normative set-up within the globalised market economy system. Through the mosaic of national economic governance models, EU has a constant supply of ideas, policy models, and challenges that enrich the debate. On the other hand, its competency has allowed it to work towards a 'constitutional' rooting of the

58 N. Croquet, *EU Strategy 2011-14: Climate Change Insights*, 2011, Climate Change Insights, <www.climatechangeinsights.com/tags/eu-strategy-201114/> last accessed on 17 November 2012.

59 Eurocommerce, 'EuroCommerce Position Paper on CSR Strategy' <www.eurocommerce.be/media/docs/CSR/ECPositionPaperCSRstrategy07.03.2012.pdf> last accessed on 6 November 2012 (emphasis added).

60 Dodd, *supra* n 1.

61 European Commission, *A renewed EU strategy 2011-14 for Corporate Social Responsibility: Communication from the Commission to the European Parliament, The Council, the European Economic and Social Committee and the Committee of the Regions; COM(2011) 681 final, supra* note 56, p. 6.

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human rights linkage. Last but not least, the EU interrogated its own definition of CSR – currently a key discourse in the linkage debate – and decided that it did not like it any longer. Through the new formulation, it took a bold conceptual step, raising the normative bar, while at the same time it encouraged the link to existing key international initiatives. This connection to the international platform affords the EU both support and influence. Setting out a dynamic linkage between the economic development model and the social model and coupling this with a conceptual rethinking may just increase the chances of matching the so far rhetorical persuasiveness of the linkage discourse with conceptual coherence and policy consistency.