

Self-Regulated Corporate Social Responsibility: The Impact on Employment Relations at European Corporations in South and Southern Africa: A Preliminary Overview (2009) 30 ILJ 2227

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Introduction

Corporate social responsibility (CSR) is a complex topic that has generated a host of policy documents and a vast literature. This article sets out to examine a very specific aspect of it: the impact of CSR as practised by European enterprises in South and southern Africa, particularly in the area of terms and conditions of employment. '[H]ow a company relates to its own people', it has been said, 'will be make or break in terms of its reputation as a corporate citizen. The issues affecting the workplace are wide-ranging and significant. Addressing them can go some way towards bridging the gap between the rhetoric of being 'an employer of choice' and the reality.¹ Conversely, 'how a company treats its people' may be seen as a litmus test of corporate values, pivotal to and emblematic of an enterprise's engagement with its socio-economic environment. In the employment arena, moreover, company policy is subject to close scrutiny and ongoing challenge by labour while, at the same time, employment legislation offers a ready frame of reference.

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From a southern African perspective, the focus on European enterprises can be explained by the fact that the European Union forms the region's largest source of foreign investment and largest trading partner.² The issue of CSR, however, is not high on the socio-economic agenda. In a region faced with huge developmental challenges this may seem surprising. It seems even more surprising against the background of the liberation struggles that convulsed the subcontinent until comparatively recently and the close relationship between the emergence of CSR and the experiences of that period.³

It is worth recalling that history briefly. A seminal moment was the notorious Sharpeville massacre in South Africa in 1960,⁴ which triggered calls for an economic boycott of the apartheid system. This was followed by campaigns for the economic isolation of the Portuguese colonial regimes in Angola and Mozambique as well as the white minority regime in what was then Rhodesia, which achieved a significant degree of success, South Africa, however, presented a harder challenge. Given the extent of foreign investment in this country (discussed in more detail below) and the relative strength of the apartheid state, most foreign multinational companies (MNCs) showed little inclination to heed the call for disinvestment. As mass resistance escalated, however, carrying on 'business as usual' became increasingly difficult. Out of these fires of struggle was born the worldwide movement for the economic isolation of apartheid and disinvestment from South Africa, which has been described as 'one of the first modern CSR campaigns'.⁵

The call for disinvestment highlighted a fundamental dynamic of the apartheid system. Apartheid had created an economy based on 'one of the most vicious forms of labour

exploitation in the history of capitalism'.⁶ On the one hand it offered highly profitable investment

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opportunities for employers, foreign as well as local, for as long as the government could maintain political control. On the other hand foreign investment was a vital source of economic and political strength to the regime. International revulsion at the excesses of apartheid, however, made it inevitable that the role of foreign companies in South Africa would come under the spotlight. In Europe, companies such as Shell and Barclays Bank became prime targets of the anti-apartheid movement. This, in turn, had consequences that might not have been expected: companies seeking to justify their presence in South Africa did so, inter alia, by adopting codes of conduct to establish their credentials as agents of progressive change.⁷ These experiences undoubtedly helped to lay a basis for the evolution of CSR in later years.

There were other growth points as well. Opposition to foreign investment in South Africa coincided with growing awareness of the role of MNCs elsewhere, especially in the third world. Campaigns aimed at curbing reprehensible practices - for instance, the anti-Nestlé boycott triggered by the company's promotion of breast-milk substitutes in less developed countries - were increasingly accompanied by political responses - for example, the United Nations' negotiations on a code of conduct for transnational corporations.⁸ Out of this process CSR emerged as a coherent (albeit contested) notion, seeking to strike a balance between standards demanded of business corporations by their critics and those deemed reasonable by their shareholders.

Paradoxically, these same processes may help to explain the lack of emphasis placed on CSR in post-apartheid South Africa, at least from the side of employers. Fig offers the following explanation:

'[T]he term "Corporate Social Responsibility" has been abandoned by most South African firms in favour of the term "corporate social investment". This has been done in order to divert attention from calls on business to redress the results of its historical contribution to the apartheid system. ... It also masks continuing

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inequalities and unsustainable practices. Business has responded weakly to the pressures for CSR Voluntary sustainability initiatives have not succeeded Firms need to reassess their legacies more honestly until which time their CSR contributions will be regarded as cosmetic and self-serving.'⁹

If this is so, can European corporations be expected to embrace CSR with fewer reservations and, perhaps, set higher standards that may ultimately become the norm?

CSR IN Europe

In Europe, certainly, CSR has a higher profile than in South Africa. Policy initiatives by the European Commission aimed at promoting CSR¹⁰ culminated in the launch of the European Alliance for Corporate Social Responsibility in March 2006. Backed by the European Commission, it is described as -

'an open alliance of European enterprises, for which enterprises of all sizes are invited to express their support. It is a political umbrella for new or existing CSR initiatives by large companies, SMEs and their stakeholders. It is not a legal instrument and is not to be signed by enterprises, the Commission or any public authority. It is a political process to increase the uptake of CSR amongst European enterprises'.¹¹

The vision of CSR embodied by the alliance is not confined to the activities of European enterprises within the EU itself. The *EC Communication* continues:

'The EU's vision of long-term prosperity, solidarity and security also extends to the international sphere. The Commission recognises the linkages between the uptake of CSR in the EU and internationally, and believes that European companies should behave responsibly wherever they operate, in accordance with European values and internationally agreed norms and standards.'¹²

Specifically, the commission links the implementation of CSR to the goal of promoting the achievement of the UN Millennium Development

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Goals. Benchmarks for this process include the ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy,¹³ the OECD Guidelines for Multinational Enterprises¹⁴ and the United Nations Global Compact.¹⁵ Thus defined, CSR encompasses a range of issues that are closely bound up with the operation of enterprises and are categorized in various way. The ten Principles of the United Nations Global Compact, for example, are divided into the following categories:

- human rights;
- labour standards;
- the environment; and
- anti-corruption.

These categories are wide-ranging and, from a legal point of view, complex and divergent. This is another reason for focusing the present enquiry on labour standards. Even this topic, however, spans a multiplicity of issues which, strictly, speaking, belong to different disciplines. The ILO Tripartite Declaration, for instance, covers no fewer than four main topics ('Employment', 'Training', 'Conditions of Work and Life' and 'Industrial Relations'), each of which is subdivided into a variety of subtopics ranging from the prohibition of forced and compulsory labour (which may be regarded as an aspect of human rights protection) to the promotion of safety and health standards which (like training) forms a relatively discreet subject in its own right. Within the area of 'labour standards', therefore, the article will concentrate on what may be considered the core issues of employment and labour relations: in particular, collective bargaining, minimum standards of employment and the protection of employees against unfair dismissal and discrimination. The ILO Tripartite Declaration, given its specific bearing on the regulation of employment rights, will form the primary point of reference in this context. From this standpoint the central question may be formulated as follows: how do European companies in Southern Africa apply policies based on CSR and on the ILO Tripartite Declaration in these core areas of employment and labour relations? Or, to put it differently, to what extent do the principles of CSR inform, or modify, their practices in these areas?

Of critical importance is the fact that compliance with CSR norms is voluntary rather than mandatory. From one perspective this is self-evident: CSR is defined as a set of criteria over and above that which the law requires - thus, a praiseworthy endeavour in which corporations, rather than merely meeting their legal obligations, 'go the extra

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mile'.¹⁶ To the extent that CSR criteria might be made binding - for example, in the form of a directive obliging EU member states to enact legislation in accordance therewith - CSR in the above sense would cease to exist; instead, legal regulation would expand to take its place.

But, from another perspective this is precisely the point. The prohibition of discrimination on grounds of sex or religion may serve as an analogy. This, too, was once a 'principle' that fell beyond the scope of legal regulation and was left to employers to implement on a voluntary basis. Now, in addition to instruments of international law proscribing such discrimination, ¹⁷ special directives have been issued by the European Council to regulate its prohibition within the European Union. ¹⁸ In other words, voluntary application of principles of non-discrimination became replaced by legal rules. In precisely the same way, it may be argued, today's voluntary norms could and should be transformed into binding legal rules. This would not prevent individual corporations from continuing to 'go the extra mile' if legal requirements fall short of the standards they have set for themselves. It would, however, ensure a minimum level of compliance and, to that extent, remove CSR from the agenda of corporate competition.

From this standpoint the purely voluntary model of CSR adopted by the European Commission has been severely criticized. Non-governmental organizations and trade unions, in particular, felt 'enraged', 'ignored' and 'let down' by the outcome of five years of consultation and debate. ¹⁹ A member of the European Parliament summed up the position as follows:

'The European Commission says that public authorities should create an enabling environment for CSR yet opts out from any proposals for concrete action for itself, simply repeating generalisations which we have all read before.

The failure to build on extensive work since 2001 creates the risk that companies, as well as other interests, will walk away from the debate. If this is all the Commission can come up with, Europe risks being sidelined on a critical issue for the future of business, while the UN Global Compact and the Global Reporting Initiative take the lead on CSR.' ²⁰

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As an alternative, NGOs proposed the following 'principles for corporate justice':

- internationally agreed standards;
- the need for regulation;
- stakeholders' rights;
- independent checks and balances;
- transparency; and
- implementing corporate social responsibility throughout the supply chain. ²¹

While the existence of international and European guidelines create a notion of uniform standards, therefore, the reality is that each company is free to make its own choices as to the principles of CSR it wishes to adopt (usually set out in a code of practice) and how it proposes to implement them. An examination of general CSR guidelines will therefore give, at best, a partial answer to the question under discussion. To arrive at a definitive answer will require a study of each company, its code of practice and the implementation thereof. Given the multitude of European companies operating in Southern Africa and the difficulty of obtaining reliable information about their operations on the ground, such a project falls beyond the scope of this article. Instead, as a means of testing the implementation of CSR principles, a number of case studies of European companies operating in South Africa will be looked at. Despite the limitations of such an approach, it is hoped that the picture thus arrived at will give at least some indication of what is happening on the ground and, perhaps more importantly, help to identify questions that need further investigation.

Southern Africa: The Economic Setting

For present purposes, southern Africa is understood as comprising the 15 member states of the Southern African Development Community (SADC).²² Since CSR is ultimately concerned with the promotion of socio-economic development, it is important to start with an understanding of the socio-economic profile of the region. Two features are immediately striking. On the one hand, the region as a whole is characterized by extreme poverty and underdevelopment. On the other hand, there is extreme inequality within and among the various countries, with the bulk of wealth and economic resources concentrated in South Africa. These two features, it will be suggested, help to define the challenges presented to CSR in southern Africa.

Direct investment is an important indicator of development. By this

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standard, southern Africa emerges as extremely marginal. In 2003, the region attracted no more than 0.32% of the total of US\$9,046,287m of the global total of outward foreign direct investment. No less significantly, nearly all of this - that is, 0.30% of the global total or 96% of the southern African total - went to South Africa.²³ In addition, 25% of foreign direct investment in the remainder of SADC came from South Africa, making it the largest single source of such investment in the region.²⁴ Thus, not only does the bulk of foreign investment in the region flow to South Africa; a sizeable part of the regional economy outside South Africa's borders is controlled by South African investors.

Against this background, European investment forms a significant and growing part of foreign investment in South Africa. Total investment by European companies in South Africa increased from R7,646 billion in the three-year period 1994-1996 to R32,219 billion in the 19-month period 2003-September 2004.²⁵ British investment formed a large part of this, increasing from 30,2% of total European investment in 1997-1999 to 78.3% in 2003-2004.²⁶ While there may be technical reasons accounting for some of this growth,²⁷ it was further reinforced by the acquisition of a majority share in South Africa's largest banking group by the UK-based Barclays Bank in 2005. At a price of £2,9 billion (US\$5,5 billion), this represented the biggest single foreign investment in South African history.²⁸ It was also laden with symbolical significance: in 1986, following a boycott organized by the Anti-Apartheid Movement in protest against the bank's role in the apartheid state, Barclays became one of the few MNCs to disinvest from

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South Africa. Its return 19 years later marked a closure of that period, a return to 'business as usual'.

Law and Csr

CSR, as has been noted, is conceptualized as going 'beyond minimum legal requirements and obligations stemming from collective agreements in order to address societal needs'.²⁹ For reasons already explained, the focus of the article is limited to the core employment issues of collective bargaining, minimum standards of employment and the protection of employees against unfair dismissal and discrimination. The starting-point, therefore, must

be an assessment of the legal requirements³⁰ applicable to these core issues in the various Southern African countries which may be expected to serve as a baseline for CSR implementation in the area of employment relations.

This is no simple task. SADC contains no fewer than 15 states³¹ and, in common with much of the colonized world, these states have inherited a patchwork of legal systems from their former colonial masters.³² In recent years, however, commonalities have begun to emerge. Following independence, and since 1990 in particular, various countries in the region (including South Africa) have introduced new labour statutes guided by ILO standards contained in conventions ratified by those states. And, as in Europe a generation earlier, the evolution of SADC brought with it a growing focus on the harmonization of laws with a view to promoting economic integration and preventing unfair competition. An important milestone was the adoption in 2003 of a Charter of Fundamental Social Rights.³³ Expressly based on the relevant ILO conventions, the charter served not only to reassert the principles contained in those conventions within the context of SADC but also to extend them to all SADC member states, irrespective of whether they had ratified any or all of the conventions. Particularly important for present purposes is the charter's extensive array of rights relating to trade union organization and collective bargaining, the prohibition of discrimination against women in the workplace. Responsibility for the implementation of these rights rests with

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'national tripartite institutions and regional structures' which are charged with promoting 'social legislation' to give effect to the charter, while member states are required to 'submit regular progress reports to the Secretariat' of SADC.³⁴

Little information is available about implementation of the charter and more research would be needed to track the progress that has been made. It may, however, be assumed that the process is in its early stages. It is also true that certain countries - including South Africa - had enacted statutes giving effect to the relevant ILO conventions even before the charter was adopted. In practice, thus, the charter's significance is confined primarily to countries where such legislation has not yet been enacted.³⁵ Indeed, its impact is limited further by its non-enforceable nature. In this respect, it may be argued, it is little different from voluntary CSR norms. However, there is one important difference. As a document ratified by SADC member states, the charter has a resonance and authenticity in the region which the CSR codes of MNCs cannot replicate. Governments responsible for implementing the charter, moreover, are exposed to political pressures from which the shareholders and directors of MNCs are relatively immune.³⁶

For present purposes, therefore, the charter may be seen as a general yardstick against which CSR norms may be measured across the region as a whole. In South Africa itself the array of labour statutes enacted since 1995 provides a much more detailed and specific set of criteria for assessing the impact of CSR codes. The principal statutes are the following:

- The Labour Relations Act 66 of 1995 (regulating inter alia organizational rights, centralized and non-centralized bargaining, strikes and lock-outs, dispute resolution, dismissal, unfair labour practices and business transfers);
- the Basic Conditions of Employment Act 75 of 1997 (regulating inter alia working hours, leave, termination of employment, wage regulating measures in non-organized sectors, etc); and

- the Employment Equity Act 55 of 1998 (regulating inter alia the prohibition of unfair discrimination and the implementation of employment equity plans, including affirmative action measures). ³⁷

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Also of importance in the South African corporate environment is the Code of Corporate Practices and Conduct which companies listed on the Johannesburg Stock Exchange are required to comply with. Dealing with the responsibilities of boards and directors, accounting and auditing, internal audit and risk management, non-financial matters and questions of compliance and enforcement, the code represents a move away from 'single bottom line' to 'triple bottom line' and is said to be 'in line with best international practices'. ³⁸

To sum up: despite considerable differences in the labour law systems applicable in different SADC countries, the charter lays down a series of fundamental labour rights which all states in the region have endorsed. This offers a primary framework of reference for assessing the relevance and impact of CSR policies. In other words, CSR norms are likely to be meaningful to the extent that they establish requirements over and above those contained in the charter, and less meaningful to the extent that they restate principles already contained in the charter. ³⁹ Given the preponderance of economic and corporate activity in South Africa, however, any analysis of the impact of CSR in the region would need to pay special attention to this country, where a complex of labour statutes and collective agreements provides a detailed framework of reference for assessing the significance of CSR norms.

But, if the legal side of the comparative equation in Southern Africa is complex, the CSR side is even more so. While there are 15 different legal systems in the region, it has been noted that 390 of the world's 450 biggest corporations have a presence in southern Africa (and, no doubt, many more that do not belong to this category). More extensive research will be needed to establish the CSR policies adopted by these corporations and, in the case of European companies, their compliance with the EC guidelines. It may be assumed that numerous European companies have CSR codes ⁴⁰ and that, of these, many will deal in one way or another with the core employment issues that form the focus of this article. An analysis of all such codes, or even a representative sample, however, will require more extensive research than is possible at present. ⁴¹ Again, therefore, a broad approach will be followed. As noted already, the *EC Communication*

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identifies the ILO Tripartite Declaration as a specific benchmark for CSR compliance which, given its authoritative status in the field of employment relations, forms an appropriate point of reference. ⁴² By implication, European corporations are expected to adhere to its requirements. For comparative purposes, therefore, the relevant clauses of the Tripartite Declaration will be referred to as embodying the applicable CSR norms for present purposes.

It may be argued that this assumption may be somewhat optimistic in that, given the voluntary nature of CSR compliance, it is by no means certain that all or many companies may choose to apply these principles. By contrast, the legal comparator - at least in the case of South Africa - is relatively precise and verifiable. Having said that, however, it is equally true that -

- (a) to the extent that the charter is used as a point of reference it, too, will not reflect actual practice in countries where the relevant principles have not been implemented; and

- (b) even in countries where such principles have been made law, legal compliance and enforcement in many SADC countries is limited; also in South Africa there are areas of weakness, particularly in the small business sector. ⁴³

On the basis of the available information, therefore, any comparison between legal regulation (as reflected in the charter and South African labour legislation) and CSR norms (as reflected in the Tripartite Declaration) must be qualified as a comparison between 'best-case scenarios'. Both law and CSR may fare considerably worse in the real world than on paper. The exercise is nevertheless meaningful in that both sets of criteria represent agreed and legitimate objectives which will, to a greater or lesser extent, serve as a guide to policy making and practice. Indeed, social and legal objectives can only be expressed as that which has still to be achieved. The caveats noted above, however, do alert us to the need to be mindful of the distance between reality and objectives. It is a distance that should be diminishing to the extent that those objectives are realistic. Further research is needed to establish whether this is indeed the case or whether the objectives, or the means chosen to realize them, need to be revisited.

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What Does the Tripartite Declaration Hold Out?

Having identified the ILO Tripartite Declaration (which, by implication, European companies are expected to adhere to) as a paradigm for CSR implementation in the context of employment relations, what does it have to offer that the law (especially South African law) does not offer already?

The clauses of the Tripartite Declaration dealing with the aspects of employment relations cover a variety of topics:

- employment promotion;
- equality of opportunity and treatment;
- security of employment;
- training;
- wages, benefits and conditions of work;
- freedom of association and the right to organize;
- collective bargaining;
- consultation;
- examination of grievances; and
- settlement of industrial disputes. ⁴⁴

It must be emphasized that the abovementioned topics and clauses represent only a selection of principles which are apposite in the present context and that various other principles contained in the declaration may be no less important in certain situations. Even the limited range of principles that have been selected cannot be examined in detail. A number of aspects, however, deserve to be highlighted:

- Mass unemployment is one of the greatest problems in southern Africa, as in much of the developing world, not only as a fetter on social development but also as a drain on the strength of organized labour. Capital-intensive investment that not only fails to create new jobs but may destroy existing ones is a long-standing bone of contention. Against this background the call on MNCs to consult with national employers'

organizations and trade union federations prior to investing about their 'manpower plans', to have regard to labour-intensive technology where possible and take various other measures to generate employment implies an important reinforcement of collective labour relations. Though termed 'consultation', the effect is that trade unions would become part of a decision-making process with significant implications for the promotion of collective bargaining at enterprise level. ⁴⁵

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- MNCs are called on to 'give priority to the employment, occupational development, promotion and advancement of nationals of the host country at all levels in cooperation, as appropriate, with representatives of the workers employed by them or of the organizations of these workers and governmental authorities'. ⁴⁶ This is linked to a call to 'correct historical patterns of discrimination and thereby to extend equality of opportunity and treatment in employment'. ⁴⁷ Taken together, it is submitted, the above principles go even further than the extensive engagement with trade unions called for by South Africa's Employment Equity Act in designing and implementing employment equity plans. ⁴⁸ Rather than consultation, it calls for 'cooperation' with labour in implementing affirmative action measures, not only in general but in the context of job creation, and not only to remedy the effects of past discrimination but as part of a strategy to 'make qualifications, skill and experience the basis for the recruitment, placement, training and advancement of their staff at all levels'. ⁴⁹ The objective, it is suggested, is not only to achieve 'equitable representation [of black people, women and people with disabilities] in all occupational categories and levels in the workforce' ⁵⁰ but, in the process, to develop their full potential as a means of achieving the highest level of organizational effectiveness.
- MNCs are urged 'through active manpower planning [to] endeavour to provide stable employment for their employees and should observe freely negotiated obligations concerning employment stability and social security'. ⁵¹ This principle, it is submitted, supplements the guidelines contained in South Africa's (non-binding) Social Plan ⁵² aimed at managing the effects of job losses, especially by helping 'to reintegrate retrenched people into the economy, and ... to revitalise affected local economies'. ⁵³ Rather

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than the broad approach of the Social Plan, ⁵⁴ however, the focus is on creating 'negotiated obligations' - for example, collective agreements - at enterprise level. A legal framework already exists in South Africa and other countries for consultation between employers and trade unions about impending dismissals based on operational requirements which must, at least in the case of South Africa, include considerations of alternatives to dismissal. ⁵⁵ The abovementioned principle, however, calls for a far more pro-active approach. Arguably, in the light of the principles already discussed and the further principle that MNCs should provide 'relevant training' to their employees, ⁵⁶ it implies the concept of an 'internal labour market' and its regulation with a view, inter alia, to accommodating employees in the event of restructuring. Much more research is needed on the possibilities that this may open up; in particular, it is suggested, the precedent of German industrial relations and joint decision making between management and works councils in this particular context is important to consider. ⁵⁷ Differences between the industrial relations systems in Germany and South Africa in particular are rightly, if routinely, emphasized; by the same token, common realities and common challenges should not be ignored in seeking solutions appropriate to local conditions.

- MNCs should ' provide the best possible wages, benefits and conditions of work, within the framework of government policies'. ⁵⁸
- In South Africa, as in other countries, collective bargaining is voluntary and, given the impact of global competition and ongoing workplace restructuring, trade union organization as well as collective bargaining coverage have come under growing strain. ⁵⁹ Of special importance, therefore, are the various principles urging MNCs to ensure that their subsidiaries engage in good faith collective bargaining with representative trade unions; for example -

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- to 'provide workers' representatives with such facilities as may be necessary to assist in the development of effective collective agreements', and
- to 'enable duly authorized representatives of the workers in their employment in each of the countries in which they operate to conduct negotiations with representatives of management who are authorized to take decisions on the matters under negotiation'. ⁶⁰

Taken together, it is submitted, the above (and other) principles call for significant extensions of workers' entitlements, protection and conditions of service over and above prescribed legal minima. This is particularly true in areas where the law is silent. Even in South Africa, for example, there is no legislation seeking to regulate job creation or job security in the private sector other than protection against unfair dismissal, nor is there any entitlement to training corresponding although employers have a duty to pay levies to sector education and training authorities for purposes of skills development. ⁶¹ Moreover, as noted above, there is no duty on employers to engage in collective bargaining and no national minimum wage. ⁶² In these and other areas the Tripartite Declaration urges MNCs to extend rights, benefits and protections which the law does not or cannot provide. It is true that the Tripartite Declaration is not legally binding and that compliance by employers is voluntary, as with CSR in general. Criticism of this weakness has already been noted. At the same time, the fact that guidelines cannot be enforced does not make them meaningless. Public commitment by an organization to a particular standard of conduct creates moral and political pressure to honour that commitment. Especially in the course of collective bargaining, it is submitted, CSR norms - including the above - can be used by trade unions as additional bargaining levers, in effect calling on the employer to make good its promises.

Is this what happens in practice? More generally, what is the picture on the ground? In conclusion, having dealt with the meaning of CSR on paper, it is necessary to look at the way it is implemented by European corporations in South and southern Africa.

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Some Case Studies

Reporting is an integral aspect of CSR, and a huge number of annual reports have been published by MNCs. ⁶³ Preliminary investigation, however, suggests that reports by European companies contain little information about the specific issues that form the subject of this article. ⁶⁴ More systematic analysis of the reports, and fieldwork to verify the data where necessary, fall beyond the scope of the article. For present purposes, therefore, a number of case studies will be looked at to gain at least some impression of the

implementation of CSR principles by the companies in question. All the examples, it will be noted, are from South Africa; information relevant to employment practices at European-owned companies in other southern African countries could not be accessed in the available time.

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¹ M Baker 'Managing CSR in the workplace' *Business Respect* 18 May 2003: available at http://www.mallenbaker.net/csr/CSRfiles/page.php?Story_ID=936.

² In 2004, the value of total EU imports was about €4,5bn (8% agriculture; 10% fish and 82% industry). EU imports are dominated by a few products such as diamonds (mostly Botswana), petroleum (Angola), fish and beef (Namibia), sugar (Swaziland) and tobacco. In 2004, total EU exports represented €2,8 bn: European Commission *Trade for Development EUSADC* (September 2005) at 4 at www.trade.ec.europa.eu/doclib/docs/2006/february/tradoc_127350.pdf. The extent of European investment is discussed below.

³ On the evolution of CSR, see *Comparative Report* at 13ff. For critical analysis from a trade union perspective, see International Confederation of Free Trade Unions (ICFTU) *A Trade Union Guide to Globalisation* (2 ed Brussels undated) at 5478 (hereafter *Globalisation Report*); available at www.icftu.org/pubs/globalisation/globguide.html.

⁴ On 21 March 1960, in the African township of Sharpeville, 69 people were killed when police opened fire on unarmed demonstrators who were protesting against the pass laws. For more information see <http://africanhistory.about.com/library/weekly/aa-SharpevilleMassacre-a.htm>

⁵ A Chatterji & S Listokin 'Corporate Social Irresponsibility' *Democracy* Winter 2007; available at <http://www.democracyjournal.org/printfriendly.php?ID=6497>.

⁶ International Development Research Centre 'The economic legacy of apartheid' http://www.idrc.ca/en/ev-91102-201-1-DO_TOPIC.html. On the evolution of the system, see C W de Kiewiet *A History of South Africa, Social and Economic* (Oxford 1941); S T van den Horst *Native Labour in South Africa* (Oxford 1942); E A Walker (ed) *The Cambridge History of the British Empire* vol VIII (2 ed Cambridge 1963).

⁷ For example, the Sullivan Principles adopted in 1977 required the following of US companies investing in South Africa:

- 1 Non-segregation of the races in all work facilities.
- 2 Equal and fair employment practices for all employees.
- 3 Equal pay for all employees doing comparable work.
- 4 Training programmes to prepare blacks for supervisory, administrative, clerical, and technical jobs.
- 5 Increasing the number of blacks in management and supervisory positions.
- 6 Improving quality of life for blacks outside the work environment in such areas as housing, schools, etc.
- 7 Working to eliminate laws and customs that impede social, economic, and political justice (added in 1984). See D Hostetter 'Movement Matters: American Antiapartheid Activism and the Rise of Multicultural Politics' (PhD thesis University of Maryland 2004); available at

<https://drum.umd.edu/dspace/bitstream/1903/1681/1/umi-umd-1651.pdf>; Chatter & Listokin.

- ⁸ L Segerlund *Corporate Social Responsibility and the Role of NGOs in the Advocacy of New Norms for Transnational Corporations* (University of Stockholm Sweden May 2005) at 9; available at www.ekohist.su.se/dokument/pdf/lisbethlic.pdf.
- ⁹ D Fig 'Manufacturing Amnesia: Corporate Social Responsibility in South Africa' *International Affairs* vol 81 no 3 May 2005. Thus, '[b]oth Woolworths and Shoprite [two major retail chains] have corporate social responsibility programmes, which focus on community projects and donations to charities': S Naidu Introduction to Human Sciences Research Council *Stability, Poverty Reduction and South African Trade and Investment in Southern Africa* (Proceedings of conference presented by the Southern African Regional Poverty Network Pretoria 29-30 March 2004).
- ¹⁰ In particular, following the European Council's appeal in March 2000 'to companies' sense of social responsibility regarding best practices for lifelong learning, work organization, equal opportunities, social inclusion and sustainable development': see European Commission Directorate-General for Employment and Social Affairs *Promoting a European Framework for Corporate Social Responsibility* (Green Paper July 2001) at 4.
- ¹¹ Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee *Implementing the Partnership for Growth and Jobs: Making Europe a Pole of Excellence on Corporate Social Responsibility* COM (2006 Brussels 22.3.2006) (hereafter *EC Communication*) at 3.
- ¹² at 5.
- ¹³ International Labour Office Geneva 4 ed 2006.
- ¹⁴ Organisation for Economic Co-operation & Development Paris 2000 revision.
- ¹⁵ United Nations 26 July 2000.
- ¹⁶ See *EC Communication* at 12. For criticism of what is termed a 'one-size-fits-all approach', see speech by UK Minister for Energy Malcolm Wicks as reported in *Hansard* 11 October 2005 columns 6061WH.
- ¹⁷ For example, the UN Universal Declaration of Human Rights 1948, ILO Convention on Discrimination in Employment and Occupation 111 of 1958, the UN Convention on the Elimination of All Forms of Discrimination against Women 1979 and various other instruments.
- ¹⁸ In particular, Directives 76/207/EEC and 2000/78/EC.
- ¹⁹ See S Gardner 'CSR in the EU - An alliance to narrow divisions?' *Ethical Corporation* (February 2007) at http://www.mvo-platform.nl/index.php?option=com_content&task=view&id=181&Itemid=45&lang=nl_NL.
- ²⁰ British Labour Euro MP Richard Howitt in *News from Labour* (press release dated 22 March 2006).
- ²¹ Gardner op cit.
- ²² That is, Angola, Botswana, the Democratic Republic of the Congo, Lesotho, Malawi, Madagascar, Mauritius, Mozambique, Namibia, the Seychelles, South Africa, Swaziland, Tanzania, Zambia and Zimbabwe.
- ²³ United Nations Conference on Trade & Development (UNCTAD) *World Investment Report 2006*. The same trends are reflected by the fact that, of the worlds 450 largest corporations, only 390 had subsidiaries or affiliates in southern Africa; and, of the latter, 287 (71%) were located in South Africa: C Jenkins & L Thomas 'Foreign Direct Investment in Southern Africa: Determinants, Characteristics and Implications for Economic Growth and Poverty Alleviation' CSAE/CREFSA October 2002, available at www.csaе.ox.ac.uk/reports/pdfs/rep2002-02.pdf. The picture is unlikely to have changed in recent years.
- ²⁴ R Rumney & M Pingo 'Mapping South Africa's Trade and Investment in the Region' in Human Sciences Research Council *Stability, Poverty Reduction and South African Trade and Investment in Southern Africa* (hereafter referred to as *SA Trade and Investment in Southern Africa*) at 1617. South Africa was also the largest single foreign investor in the remainder of Africa as a whole, the largest foreign investor in six SADC states and second or third largest in four more: at 1, 12 and 18.
- ²⁵ L Thomas & J Leape 'Foreign Direct Investment in South Africa: the Initial Impact of the Trade, Development and Cooperation Agreement between the EU and South Africa' CREFSA October 2005 at 9; available at rtfp.africonnect.com/media/fdi_in_rsa_crefsa.pdf.
- ²⁶ *ibid*.
- ²⁷ In particular, the relocation of the primary listing of the Anglo-American Corporation of South Africa from Johannesburg to London in 1999, thus transforming its massive southern African holdings into investment that is technically British. For a brief account, see http://www.angloamerican.co.uk/article/?afw_source_key=19ED07F3-C5AB-427C-BACE-6DABAC9037A7.

- ²⁸ See 'Barclays pays £2.9bn for SA Bank' at <http://news.bbc.co.uk/2/hi/business/4527171.stm>.
- ²⁹ *EC Communication* at 1.
- ³⁰ The term 'minimum legal requirements' is somewhat tautological in that a legal 'requirement', by its nature, already defines the minimum that is demanded.
- ³¹ Some analysis of the labour law regimes in various SADC states over the past 15 years is contained in a series of monographs published by the Institute for Development & Labour Law at the University of Cape Town. A number of these are listed at <http://www.labourlaw.uct.ac.za/publications.htm>. See also E Kalula & D Woolfrey (eds) *Southern African Labour Legislation* Labour Law Unit, University of Cape Town and Centre for International and Comparative Labour Law, University of Stellenbosch (1995).
- ³² C Fenwick & E Kalula 'Law and Labour Market Regulation in East Asia and Southern Africa: Comparative Perspectives' *International Journal of Comparative Labour Law and Industrial Relations* (Summer 2005) at 193ff.
- ³³ Available at http://www.sadc.int/key_documents/charters/social_rights.php.
- ³⁴ article 16 Charter.
- ³⁵ In addition, it provides a certain shield against the repeal or violation of existing charter compliant legislation.
- ³⁶ For example, the Southern Africa Trade Unions Coordinating Council includes implementation of the charter among the 'vital regional policy issues' which it is pursuing: see <http://www.satucc.co.bw/>.
- ³⁷ Other relevant statutes are the Occupational Health and Safety Act 85 of 1993, the Compensation for Occupational Injuries and Diseases Act 130 of 1993, the Skills Development Act 97 of 1998, the Unemployment Insurance Act 63 of 2001 and the Employment of Educators Act 76 of 1998.
- ³⁸ In the words of the chairperson of the committee responsible for drafting the code, Mervyn King SC: see Preface to *King Report on Corporate Governance for South Africa 2002* (Institute of Directors March 2002); executive summary available at http://www.ecgi.org/codes/code.php?code_id=106.
- ³⁹ This, of course, does not diminish the importance of CSR codes in countries where the corresponding requirements of the charter have not yet been enacted or implemented. It goes without saying that this will only be true to the extent that the CSR codes themselves are implemented.
- ⁴⁰ Of the 63 member corporations of CSR Europe in July 2005, for example, many are represented in South Africa and other countries of the region: see <http://www.csreurope.org>.
- ⁴¹ By way of illustration, extracts from a few codes dealing with employment relations are reproduced in Annexure A.
- ⁴² In this regard, see also chapter 4 of the OECD Guidelines and Principles 3 and 6 of the UN Global Compact.
- ⁴³ This is the consequence of a number of historical factors other than economic underdevelopment; for example, in certain countries, a legacy of one-party states and authoritarian rule, weak democratic structures and weak traditions of independent trade unionism. In general see Fenwick & Kalula op cit; E Kalula 'Beyond Borrowing and Bending: Labour Market Regulation and the Future of Labour Law in Southern Africa' in C Barnard, S Deaking & G Morris (eds) *The Future of Labour Law: Liber Amicorum Bob Hepple QC* (Oxford Hart 2004) at 275-87.
- ⁴⁴ The crucial issues of forced labour and child labour are omitted from the present discussion because it is assumed that European MNCs are unlikely to engage in such abuses. Both issues are, however, relevant in the context of fair trade and accountability of MNCs for the conduct of their suppliers. This, too, is a subject for further research.
- ⁴⁵ See clauses 16-20 of the declaration. 'Such consultation,' it is added, 'as in the case of national enterprises, should continue between the multinational enterprises and all parties concerned, including the workers organizations [after operations have commenced]': clause 17.
- ⁴⁶ clause 18.
- ⁴⁷ clause 22.
- ⁴⁸ As elaborated in chapter III of the Employment Equity Act 55 of 1998.
- ⁴⁹ clause 22. See, in this regard, the (South African) Code of Good Practice on the Integration of Employment Equity into Human Resource Policies and Practices (GN 1358 of 4 August 2005), which contains many guidelines relevant to the achievement of the last-mentioned principle (especially item 15). The emphasis in the code, however, is on the elimination of unfair discrimination and racial and gender imbalances rather than on the development of human potential.
- ⁵⁰ s 2(b) EEA.
- ⁵¹ clause 25.

- ⁵² GN 1590 of 23 July 1999, reflecting an agreement adopted at the Presidential Job Summit in 1998.
- ⁵³ item 2.2 Social Plan.
- ⁵⁴ Described as 'a basket of instruments characterised by focused programmes directed at achieving short, medium and long term goals [and requiring] the participation of labour, government and business and will involve interventions at various levels': item 3.2 Social Plan.
- ⁵⁵ s 189 Labour Relations Act 66 of 1995.
- ⁵⁶ See clause 30, reproduced under *Case study 1* below.
- ⁵⁷ See J-P Segal, A Sobczak & C-E Triomphe *Corporate Social Responsibility and Working Conditions* (European Foundation for the Improvement of Living and Working Conditions 2003) and, especially, the German case studies at 32ff; available at www.eurofound.europa.eu/pubdocs/2003/28/en/1/ef0328en.pdf. In general, see W Lecher 'European works councils and direct participation: the dual shift as a challenge to the German industrial relations system' in R Markey & J Monat (eds) *Innovation and Employee Participation Through Works Councils* (Ashgate Aldershot 1998) at 49ff.
- ⁵⁸ clause 33.
- ⁵⁹ For a recent overview of the position and the potential relevance of CSR in this context, see D du Toit 'What is the Future of Collective Bargaining (and Labour Law) in South Africa?' (2007) 28 ILJ 1405.
- ⁶⁰ clauses 51 and 52. See also clauses 49-50 and 53-55.
- ⁶¹ In terms of the Skills Development Act 97 of 1998 and Skills Development Levies Act 9 of 1999.
- ⁶² It is true that most sectors are covered either by collective agreements or, in the case of several poorly unionized sectors, by sectoral determinations issued by the Minister of Labour in terms of the Basic Conditions of Employment Act 75 of 1997. There is, however, no guarantee that the wages, benefits and conditions laid down by such agreements and determinations are 'the best possible'. Implementation of clause 33 (above) by MNCs could have the effect of exerting a corrective pressure on wages and conditions in areas where they are excessively low.
- ⁶³ On one website alone, 14,882 reports from 3,945 companies can be accessed: see <http://www.corporateregister.com/>.
- ⁶⁴ In the case of Barclays plc, for example, the only relevant information is the following: 'In South Africa, Absa runs a full set of training programmes, and in 2006 a total of ZAR 118 million was invested in the training of 21,000 employees': Barclays plc *Corporate Responsibility Report 2006*; available at <http://www.barclays.com/CRreport 2006>.

Case study 1

The information was obtained from a telephonic interview in early 2007 with a full-time shop steward serving as chairperson of a shop steward's council covering three factories owned by a European MNC. The interviewee wished to remain anonymous.

The union appeared to enjoy a generally satisfactory bargaining relationship with the company. However, they had experienced one major problem. For seven to eight years, the interviewee stated, they had been negotiating with the company about the introduction of a training programme that would provide employees with recognized qualifications. The company, however, provided 'basic training' only and gave ad hoc responses to union requests.

There was also a perception on the union's part that the training of some employees was at the expense of others - for example, that some employees were provided with more skills in order to downgrade other jobs, and that the number of team leaders had been reduced 'to pay for training others'.

The information is obviously limited and incomplete and in need of further investigation. In this regard the Tripartite Declaration provides the following point of departure:

'In their operations, multinational enterprises should ensure that relevant training is provided for all levels of their employees in the host country, as appropriate, to meet the needs of the enterprise as well as the development policies of the country. Such training should, to the extent possible, develop generally useful skills and promote career opportunities. This responsibility should be carried out, where appropriate, in cooperation with the authorities of the country, employers' and

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workers' organizations and the competent local, national or international institutions.' ⁶⁵

⁶⁵ clause 30.

Case study 2: Akzo Nobel

The information was obtained from a detailed study conducted by a specialist South African research institute under the auspices of the Dutch trade union federation, FNV, between 2002 and 2006. ⁶⁶ The research included interviews with shop stewards, a trade union official and management, whose attitude was described as 'very open'. ⁶⁷ Akzo Nobel had only 111 employees at three plants left after closing some plants in 2001. The collective bargaining relationship between management and the union appeared to be positive and no work stoppage had occurred since 1997. Casual labour is used only on an ad hoc basis and temporary employees are used only to meet production increases. ⁶⁸

Complaints and problems reported from the side of employees were, in general, of the kind that normally arise in the employment relationship and are addressed through collective bargaining. Some concerns were expressed about the lack of adequate discussion or negotiation about the introduction of new technology and restructuring. While feeling that management did not take sufficient initiative in raising these issues with the union, however, shop stewards stated that the problem arose 'in part from their ignorance and from their not requesting meetings in a timely fashion to address the issues'. ⁶⁹

In general, the company's compliance with labour legislation and international labour standards was not in question and, in some respects, minimum standards were exceeded. Thus -

- the normal work week is 40 hours, in contrast to the 45 hours permitted by s 9 of the Basic Conditions of Employment Act (BCEA);
- minimum wages are 55% higher than the minimum required by the sectoral collective agreement to which the company is subject;
- financial grants are given towards the education of employees' children;
- maternity leave of up to six months is provided, with 33% of salary paid for the first four months, in contrast to the four months' unpaid maternity leave required by s 25 of the BCEA. ⁷⁰

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It does not follow, however, that these relatively generous conditions of service are necessarily due to the CSR factor. Trade unions in larger companies are frequently able to negotiate terms and conditions of employment over and above the legal minimum. The more important question, it is submitted, is the extent to which CSR principles may predispose a company to accepting bargaining outcomes that are relatively favourable to employees.

⁶⁶ *Summary Company Monitor Akzo Nobel South Africa 2003*, research done by NALEDI in cooperation with SOMO, FNV Bondgenoten; commissioned by FNV Mondiaal (June 2003); available at www.companymonitor.org/download/publications/AkzoSouthAfricasummary2003EN.pdf.

⁶⁷ *Akzo Report* at 2.

⁶⁸ at 23; see also at 4.

⁶⁹ at 4.

⁷⁰ Employees on maternity are entitled to maternity grants of up to 58.64%.

Case study 3: Unilever

As in the case of Azko Nobel, the source of the information is a study by a South African research institute commissioned by the FNV. ⁷¹ The management of Unilever (South Africa) declined to participate in the research and provided comment on the final draft only in response to a request by the management of Unilever in the Netherlands. ⁷² Apart from documentary sources, therefore, much of the direct information contained in the report was obtained from employees and trade unions.

According to the available information, the company was employing 2,862 employees at seven plants in Gauteng and KwaZulu-Natal as compared with 5,100 in 2002 - a reduction of over 40%. It furthermore appeared that some 29% of employees were described as 'casual' or 'temporary'. Casual labour is employed by means of labour brokers, mainly in less skilled positions. At one plant casual workers have been employed for up to ten years. At another plant the introduction of casualisation was halted by union opposition. ⁷³

Specific attention was paid to the company's CSR policy. Since management did not respond to the questionnaire on the subject, most of the information was obtained from shop stewards. At one plant, it appeared, the newsletter contained details of 'current CSR activities'. At another a social investment committee (see below) had been established, including shop stewards, but had not met since 2004 due to management's 'diaries being full'. At a third plant there was no feedback process apart from 'occasional information' about the company's contribution to the fight against AIDS. At a fourth plant the shop stewards received general expenditure figures on 'CSR activities' but no reports had been provided since Unilever took over the plant in 2003. By contrast, it was reported, the local company which had owned the plant previously had communicated in more detail. ⁷⁴

In its written response (referred to above) the company stated that

'[i]n South Africa, Corporate Social Responsibility is generally taken to mean Social Investment. We are therefore not surprised that our Shop Stewards misunderstood the researcher'. ⁷⁵ As instances of such investment, management mentioned three separate projects for combating the HIV/AIDS pandemic and its consequences that it was involved in as well as the 'Nelson Mandela Scholarship scheme whereby we grant scholarships to individuals from Previously Disadvantaged Communities'. ⁷⁶

It also appeared that the unions were generally aware of the existence of the company's business principles and codes of conduct but had not been given copies. All policy documents obtained by the researcher were in English only. Trade unions were not aware of any manager responsible for ensuring compliance with such codes nor of any process for monitoring them. ⁷⁷

Trade union rights, in general, appeared to be respected by management. However, some allegations were made of conduct by management amounting to violations of the principles of CSR enjoined by the European Commission and, in some cases, of the relevant labour statutes. These include allegations of -

- victimization of union members and shop stewards at one plant by assigning them 'tougher tasks and the more difficult shifts' and, at another, by offering more incentives to (white) non-union members; ⁷⁸
- 'on-going threat by management to shift the South African operations overseas'; ⁷⁹
- difficulty in obtaining relevant information and more autocratic management at one plant; ⁸⁰ and
- 'racial discrimination' at one plant 'in that whites are favoured for promotion, and are sometimes paid higher than black workers who are in the same job grade'. ⁸¹

In general, the information is not sufficiently detailed to make conclusive findings as to the extent of Unilever's compliance with the principles of the Tripartite Declaration. As at Akzo, various conditions of service were more favourable than the legal minimum. Working hours, for example, ranged from 40 to 43 hours per week, and entry level wages ranged from the industry minimum of R3,500 per month to R4,800 per month at one plant, while six months' maternity leave was granted on 50% pay. ⁸² This might be seen as compliance with CSR principles even though it might be no more than the outcome of collective bargaining in the ordinary course. On the other hand, several of the allegations mentioned above would, if proven, constitute clear violations of the CSR criteria the company is expected to adhere to. Reliance on casual labour over extended periods of time, for instance, would be conflict with the principle of assuming 'a leading role in promoting security of employment, particularly in countries where the discontinuation of operations is likely to accentuate long-term unemployment'. ⁸³

- ⁷¹ *FNV Company Monitor Research Report 2006 Unilever South Africa* by D Pillay of the National Labour & Economic Development Institute (NALEDI) commissioned by FNV Bondgenoten with support from SOMO; available at [www.companymonitor.org/download/publications/UnileverSouthAfricaResearchreport .pdf](http://www.companymonitor.org/download/publications/UnileverSouthAfricaResearchreport.pdf).
- ⁷² *Unilever Report* at 1.
- ⁷³ at 10-11.
- ⁷⁴ at 12.
- ⁷⁵ *ibid.*
- ⁷⁶ *ibid.* Pointing out that the examples of 'CSR' given by management consist exclusively of 'philanthropic activities', the researcher comments that 'it would be incorrect to suggest that CSR in South Africa always means social investment. From a South African NGO perspective, for example, CSR is generally understood as a company having good policies and practices on corporate governance, environment issues, labour matters, community engagement, etc': at 13.
- ⁷⁷ *ibid.*
- ⁷⁸ at 15. Such conduct, if proven, would be a violation of the protection of employees and trade union members contained in s 5 of the Labour Relations Act.
- ⁷⁹ at 16. Management's response was that 'benchmarks are not shared as a threat but as part of our good industrial relations practices. It is a fact of life that investment will always go to those who perform better': at 17. See in this regard clause 53 of the Tripartite Declaration, which states that MNCs, 'while workers are exercising the right to organize, should not threaten to utilize a capacity to transfer the whole or part of an operating unit from the country concerned in order to . . . hinder the exercise of the right to organize'.
- ⁸⁰ at 16.
- ⁸¹ at 33. If proven, such conduct would amount to a breach of the prohibition of unfair discrimination contained in s 6 of the Employment Equity Act.
- ⁸² at 23-25.
- ⁸³ clause 25 Tripartite Declaration.

Case study 4: Cape plc

The final case study is interesting not so much for what it reveals of employment practices at a British owned company in South Africa but for the light it sheds on the liability of the multinational holding company in the event of violation of employees' rights by a subsidiary company. If it is accepted that CSR implies a standard of accountability over and above that required by law, it would seem to follow that European companies should be no less accountable for the implementation of CSR by their affiliates and subsidiaries abroad.

The case, which enjoyed widespread media attention, arose from the claim for damages by some 3,000 plaintiffs arising from the injuries and death of South African miners as a result of conditions at asbestos mines owned by a British company, Cape plc, prior to 1979. ⁸⁴ Action was instituted in the late 1990s. The following is a brief summary of the protracted litigation that ensued:

'The plaintiffs commenced proceedings for compensation in the UK courts, but were immediately met by a barrage of interlocutory motions, including an

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application for a stay of proceedings on the ground of *forum non conveniens*. ⁸⁵ The defendant argued that the case should be heard in South Africa. After no less than three first instance hearings, two appeals to the Court of Appeal and finally a House of Lords decision, the defendant's application for a stay was denied; the plaintiffs would get their day in a UK court.' ⁸⁶

The House of Lords, in other words, upheld the principle that a British company could be sued in the British High Court for damages arising from wrongful conduct by its South African subsidiary on the basis of its negligence in not preventing such conduct. This ruling was extended by the subsequent decision of the European Court of Justice in *Group Josi Reinsurance Co SA v Compagnie d'Assurances Universal General Insurance Co*⁸⁷ that, in terms of article 2 of the Brussels Convention, 'the rules of jurisdiction in the Convention may be applied to a dispute between a defendant domiciled in a Contracting State and a plaintiff domiciled in a non-member country'.⁸⁸ The rule in question is that such a person (including a company) is to be sued in the courts of the state where the person is domiciled, irrespective of the nationality of the parties. Claims by employees of European corporations or their southern African subsidiaries, therefore, may be brought in the relevant European country on the basis of any liability attaching to the European company.⁸⁹

Conclusion

The available information does not permit definitive findings as to the impact of CSR principles at European corporations in southern Africa in the sense of terms and conditions of service over and above minimum legal requirements, in accordance with the Tripartite Declaration. The picture emerging from a very limited sample of European companies in South African broadly confirms what might have been expected; that is -

- in certain respects European companies, in common with many other companies where collective bargaining takes place, appear to be 'good employers' in the sense of offering terms and conditions of employment above the legal minimum; but

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- in other respects European companies 'break the rules' of CSR and, in some cases, are alleged to break the law.

Much more extensive research would be needed to establish whether this picture holds good across a broader spectrum. If it does, it might lead to the cynical conclusion that CSR is much ado about nothing: whether an employer is expected to observe it or not makes little difference in practice.

Richard Meeran, representative of the Cape plc claimants cited above, is on record as stating that progress is being made towards 'globally applicable, legally enforceable, minimum standards for multinational corporations' but emphasizes that 'such regulations would be irrelevant if they are not binding [in] national law'.⁹⁰

This observation encapsulates the view that CSR will remain 'much ado about nothing' unless and until it is lifted beyond its purely voluntary status. Unless this happens, certainly, companies will be free to disregard it without necessarily suffering any adverse consequences.

If this is so, the question is not so much whether it is desirable for CSR norms to become binding but how this may come about.

A clue is provided by the decisions in the *Cape plc* and *Group Josi* cases cited above, establishing that European companies may be legally accountable for wrongful conduct by their subsidiaries in other countries. A fortiori, it seems, European companies should be held

accountable for any failure by their southern African subsidiaries to adhere to CSR norms to which they are subject.

Given that there is no question of legal liability at this stage, other mechanisms would have to be found to call European companies to account. It is submitted that collective bargaining - either in the relevant European country or by way transnational bargaining structures - offers a means of addressing the issues and, potentially, creating machinery for regulating the implementation of CSR policies in accordance with the Tripartite Declaration. Though this is a broader question, it is important to note the view expressed by the International Confederation of Free Trade Unions:

'Whereas most corporate social responsibility (CSR) exercises are voluntary efforts (promises or claims), the adoption of framework agreements (FAs) - agreements between international trade union organizations and multinational enterprises on basic shared principles - can be seen as the start of international collective bargaining. In fact, FAs should be considered more as global industrial relations, rather than as a part of CSR, in spite of the fact that signing a framework agreement is an important way for a company to show it is behaving in a socially responsible manner.' ⁹¹

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The International Labour Organization, in turn, has given attention to the evolution of international collective bargaining structures. The following passage from a recent report is instructive:

'Some of the responses [by trade unions] to globalization in the labour relations field are attempts at coordination and institution building along the new dimensions and contours of the market. This appears to be taking three forms. The first of these are actual attempts at international collective bargaining. For example, the European construction trade unions are attempting to coordinate efforts to negotiate the first pan-European collective labour agreement in that sector. In the shipping industry, a pioneering international collective bargaining agreement was reached this year between the International Transport Workers' Federation and the shipping employers' organization (International Maritime Employers' Committee). The agreement covers wages, minimum standards and other terms and conditions of work.

The second are forms of coordination in both an international and regional context. In the transport sector, the development of airline alliances (Star, One World, etc.) and the concentration of airline catering and ground handling services in a few major global companies (some belonging to major airlines) has caused the International Transport Workers' Federation to set up working parties for each of the alliances, bringing together all affiliates dealing with any of the alliance companies in order to coordinate collective bargaining strategies.

The third are framework agreements that support the realization of organizational rights. Some multinational companies and international trade union federations are negotiating international framework agreements....' ⁹²

According to another major study, 'a combination of decentralisation and transnational bargaining within transnational firms' is the most probable scenario for future industrial relations systems within Europe. ⁹³ It concludes that '[i]t may over time become natural for unions in production units in different countries within large transnational firms to cooperate, in order to strengthen their bargaining position towards the employer. The motivation would be to counter the threat of the employer to move production to the most low-cost unit'. ⁹⁴

Collective bargaining, rather than legal regulation in the traditional sense, emerges as a primary guarantor of the implementation of CSR norms from this perspective. Such an approach has the advantage of conceptualizing CSR not as an additional item on an already overcrowded socio-economic agenda but as part and parcel of the collective bargaining agenda. The implication is that European and southern African trade unions should engage with a view to identifying, amongst their other common concerns, the CSR issues that need to

be placed on their common bargaining agenda. Collective agreements have legal effect in many countries, including South Africa. CSR norms enshrined in collective agreements would be legally enforceable. This would avoid the potential legal and political obstacles of seeking to achieve the same outcome by means of legislation.

Annexure

EXAMPLES OF CSR PRINCIPLES APPLICABLE TO EMPLOYMENT RELATIONS

1 *Extract from Unilever's Code of Business Principles:*

Employees: Unilever is committed to diversity in a working environment where there is mutual trust and respect and where everyone feels responsible for the performance and reputation of our company. We will recruit, employ and promote employees on the sole basis of the qualifications and abilities needed for the work to be performed. We are committed to safe and healthy working conditions for all employees. We will not use any form of forced, compulsory or child labour. We are committed to working with employees to develop and enhance each individual's skills and capabilities. We respect the dignity of the individual and the right of employees to freedom of association. We will maintain good communications with employees through company based information and consultation procedures.

2 *Introduction to 'Stakeholder Reporting - Employees' from Absa's Corporate citizenship and sustainability at 407:* ⁹⁵

Absa believes that the key to the future lies in fully empowered, innovative and proactive employees, who, as stakeholders of the Group, assist in shaping and honing the future of Absa in a sustainable way.

Absa aims to ensure a conducive and transparent culture that values diversity and enables the optimisation of the individual and collective human capital in the Group. Leadership is seen as key in making the culture of the Group come alive.

Culture and leadership transformation is supported by world-class people management processes, which are benchmarked internationally, to ensure that the required talent is attracted, recruited, developed, managed and retained in an integrated way. The core of this integrated approach lies in Absa's employee value proposition, 'we value our people'. The Absa culture and all Absa's human capital policies, practices and actions bear testimony to this single statement.

3 *'Responsibilities to Employees' from Shell's General Business Principles:*

To respect the human rights of our employees and to provide them with good and safe working conditions, and competitive terms and conditions of employment.

To promote the development and best use of the talents of our employees; to create an inclusive work environment where every employee has an equal opportunity to develop his or her skills and talents.

To encourage the involvement of employees in the planning and direction of their work; to provide them with channels to report concerns.

We recognize that commercial success depends on the full commitment of all employees.

- ⁸⁴ For a detailed discussion, see R Meeran 'Cape Plc: South African Mineworkers' Quest for Justice' 2003 *International Journal of Occupational & Environmental Health* at 218-29; available at hesa.etui-rehs.org/uk/newsevents/files/CapeMiners.pdf. The author was a legal representative of the claimants in this matter. Although the events giving rise to the claims took place long before the principle of CSR had been formulated, the callous disregard for workers' safety displayed by the employer was deplorable by any standard. Meeran notes that 'Cape actively and intensively lobbied to conceal the nature and extent of the health risks associated with asbestos exposure, in particular the risks associated with exposure to blue asbestos': at 219.
- ⁸⁵ That is, a common-law defence available to a defendant in England on the basis that an English court is not an appropriate forum for the matter to be heard because there is a more appropriate forum in another country.
- ⁸⁶ C D Bougen 'Time to Revisit *Forum Non Conveniens* in the UK? *Group Josi Reinsurance Co v UGIC*' (2001) 32 *Victoria University of Wellington Law Review* 705 at 712.
- ⁸⁷ [1999] ILPr 351, discussed in Bougen op cit.
- ⁸⁸ Bougen at 708.
- ⁸⁹ Bougen points out that, while the *Group Josi* judgment 'does not expressly address the issue of the application of the Convention to a situation where there is a conflict of jurisdiction between the courts of a Contracting State and those of a non-Contracting State, it most certainly should be seen as an important step in the right direction': at 713.
- ⁹⁰ M Allie 'Legal Victory Sparks Hope For Tighter Controls On Multinationals' in *RELAY: Communicating Research* at <http://www.panos.org.uk/global/featuredetails.asp?featureid=1090&ID=1022>.
- ⁹¹ *Globalisation Report* at 95.
- ⁹² ILO report paras 32-34. European Works Councils also set a certain precedent in relation to transnational working relationships among trade unions and employees: see, for example, Booth et al at 164.
- ⁹³ Booth Burda Calmfors Checchi Naylor & Visser *What do Unions Do in Europe? Prospects and challenges for union presence and union influence* Report for the Fondazione Rodolfo De Benedetti (undated) available at www.frdp.org/images/customer/report1_17giugno00.pdf.
- ⁹⁴ *ibid* at 181.
- ⁹⁵ Absa is the South African subsidiary of Barclays Bank plc.