

RESEARCH ARTICLE

Sexual Orientation, Human Rights, and Corporate Sponsorship of the Sochi Olympic Games: Rethinking the Voluntary Approach to Corporate Social Responsibility

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Multi-national enterprises (MNEs) have provided substantial sponsorship for the Sochi Winter Olympic Games despite a host-country government that has recently enacted stunningly harsh legislation aimed at the Lesbian, Gay, Bisexual, Transgender, and Intersex (LGBTI) communities within Russia. This is a Corporate Social Responsibility (CSR) problem. Should Europe address it through voluntary corporate compliance, Europe's historically preferred mode of promoting CSR? Or should Europe reconsider whether it can more effectively promote CSR compliance legislatively – and if so, by what kind of legislation? To honor the explicit and increased protections of human rights against sexual orientation discrimination in the Treaty of Amsterdam and the Charter of Fundamental Human Rights, more than voluntary, good intentions are needed. Particularly since the United States has effectively bowed out of enforcing CSR through the American federal courts, there now exists a regulatory lacuna that the European Commission is best situated to fill through the precision offered by judicious rulemaking. The article ultimately proposes an approach that combines the public-pressure engine that fuels voluntary CSR with public disclosures mandated by law to optimize the information and mobilization of public opinion and pressure – factors particularly noteworthy given the powerful “branding” benefits that MNEs seek through Olympic sponsorship.

Keywords: Corporate Social Responsibility; LGBTI rights; Olympic sponsorship; Russian Federation; European Commission; Treaty of Amsterdam; Charter of Fundamental Human Rights; California Supply-Chain Transparency Act; Mandatory Corporate Disclosure Laws

I. Introduction

Atos SE describes itself as “an international information technology services company with annual 2012 revenue of EUR 8.8 billion and 77,000 employees in 47 countries” that “delivers consulting and technology services, systems integration and managed services” across “Manufacturing, Retail, Services; Public, Health & Transports; Financial Services; Telecoms, Media & Technology; Energy & Utilities.”¹ Atos boasts of having an “A+” rating in Corporate Social Responsibility through its voluntary reporting process.² Atos also trumpets its sponsorship of the 2014 Winter Olympic Games in Sochi, Russian Federation.³ Indeed, its sponsorship is inextricably intertwined with an advertising campaign that fuses Atos' identity as a major Sochi Games sponsor with Atos' marketing aspirations: “Atos leads the technology effort for the staging of the Games.

¹ <http://atos.net/en-us/home/we-are.html>.

² Atos Receives The Highest GRI Rating Of A+ For Its 2012 Corporate Responsibility Integrated Report, Press Release (3 July 2013) <http://atos.net/en-us/home/we-are/news/press-release/2013/pr-2013_07_02_01.html>. Atos' annual CSR reports, which commenced in 2009, are available at <<http://atos.net/en-us/home/we-are/sustainability/sustainability-reporting/corporate-responsibility-report-2012.html>>.

³ <<http://atos.net/en-us/home/olympic-games.html>>.

This same effort and skills can help your company as you pursue record-breaking competitive advantage.⁴ By making the brand of Atos synonymous with “The Olympics,” Atos has achieved a *coup* in marketing⁵ of which few multi-national enterprises (MNEs) can boast.⁶

Yet in doing so, Atos—like the other MNEs that are sponsoring the Sochi Games—is aiding and abetting a host-country government that has recently enacted stunningly harsh legislation aimed at the Lesbian, Gay, Bisexual, Transgender, and Intersex (LGBTI) communities within Russia, as well as any non-Russians who, within the reach of Russian law-enforcement, speak out in any way supportive of the LGBTI community.⁷ This recent legislation in Russia is often referenced by the bland title “Article 6.21 of the Russian Code of Administrative Offenses,”⁸ but nests within Part 6 of that Code, which is more revealingly captioned “Administrative Offences Endangering the Health and Sanitary and Epidemiological Well-Being of the Population and Endangering Public Morals.”⁹ The Section itself carries the title, “Propaganda of Non-traditional Sexual Relations Among Minors.”¹⁰

Given some of the very serious allegations of aiding and abetting human rights violations that have been made against E.U.-based MNEs, the role of MNEs like Atos in supporting an international athletic competition that happens to be hosted in a non-E.U. member state that has passed a municipal law that restricts speech about matters of concern to the LGBTI communities in Russia and the E.U. might seem, by comparison, to be mild next to allegations of torture, extra-judicial killing, genocide, and mass imprisonment made against a wide array of other governments that MNEs have supported. However, when we examine the issue in its full context, the importance of the struggle by the LGBTI communities in Europe and elsewhere for recognition of basic human identities and human rights demonstrates that legislation targeting “disfavored” social groups must command our attention and elicit our great concern. The role of events like the Olympic Games as exercises in sanitizing the image of a national government which has embarked on persecution is too great to ignore or dismiss. Moreover, history itself commands that corporations confront the problem.

The specter of the 1936 Olympic Games in Berlin still casts a pall over the zone where international sport meets political power — as does the corporate sponsorship of those Games by the most iconic of American corporate brands, Coca-Cola.¹¹ This is by no means to suggest a crude comparison between the Third Reich

⁴ *ibid.*

⁵ See Daniel A Craig, Note, ‘Bad Sports: Has Olympic Brand Protection Gone Too Far?’ (2013) 9 *South Carolina Journal of International Law and Business*, 375 (observing that “[t]he Olympic rings are one of the most widely recognized symbols in the world, and ‘evidence shows that only certain religious symbols are more widely recognized around the world than the logo of the five interlaced rings’, representing a brand recently valued at US \$ 47.6 million”)(quoting Alexandre Miguel Mestre, TMC Asser Instituut, *The Law of the Olympic Games* (2009) fn 85).

⁶ A listing of the elite group of Official Worldwide Partners, Official Partners, Official Supporters, and Official Suppliers of the 2014 Sochi Games may be found at <<http://www.olympicsuniverse.com/winter-olympics/sochi-olympics-sponsors-2014.php>>.

⁷ For an English-language translation of § 6.21, see Erin Decker and Josh Wilson, Russia’s ‘Gay Propoganda’ Law: Russian Federal Law #135-FZ’ (13 Aug 2013) SRAS <http://www.sras.org/russia_gay_propaganda_law>. The term LGB, while common, is under-inclusive, because it omits transsexual and intersexual persons, who face similarly invidious forms of societal discrimination. See Rebecca Juro, ‘Chris Hayes and the Tunnel Vision of the Elites, “The Bilerico Project”’ (25 August 2013) <http://www.bilerico.com/2013/08/chris_hayes_the_tunnel_vision_of_the_elites.php> (noting that ‘the story of the new anti-LGBTI propaganda laws in Russia doesn’t begin and end with how they affect gays and lesbians since transgender Russians are every bit as much a target of those laws’); Daniel Gandert and others, ‘The Intersection Of Women’s Olympic Sport And Intersex Athletes: A Long And Winding Road’ (2013) 46 *Indiana Law Review*.

⁸ See eg Eric Sasson, ‘The Sochi Scandal Is Just Beginning: Just Because The Russian Government Says It Won’t Arrest Gay Athletes Doesn’t Mean The Olympics Controversy Is Over’ (*Salon* 13, August 2013) <http://www.salon.com/2013/08/13/the_sochi_scandal_is_just_beginning/>.

⁹ See Code Of Administrative Offences Of The Russian Federation, <<http://www.russian-offences-code.com/>>. The version of the Code in English translation available on that website has not yet been updated to reflect the enactment of Section 6.21. See <<http://www.russian-offences-code.com/SectionII/Chapter6.html>> Leading Russian-law scholar William E Butler writes of this Code that “[u]nder Russian legislation[,] anti-social behavior may be criminal, or it may fall into a category unknown to the Anglo-American legal world: administrative offenses.’ W E Butler, *Russian Law* (Oxford 3d ed. 2009) § 6.160. Butler notes that ‘[i]t is estimated that more than 30 million persons are brought to administrative responsibility in the Russian Federation each year.’ Id at § 6.161.

¹⁰ See Decker and Wilson (n 7).

¹¹ A fact that the present-day Coca-Cola Company neither denies nor seeks to explain, but simply relates as innocuous fact. See Coca-Cola and the Olympic Games: Our Partnership History, at <<http://mb.cision.com/Public/MigratedWpy/86051/733602/b2f6eeb214290b6d.pdf>> (stating that ‘Coca-Cola sponsored the 1936 Games, which were followed by a 12-year hiatus surrounding World War II’)(from the website of Cision, a public-relations software firm, see <http://us.cision.com/>); see Coca-Cola Ads In Nazi Germany, ‘Adbranch- Evolution of the Advertising Industry’ (*Adbranch*, Feb 25 2011)t <<http://www.adbranch.com/coca-cola-ads-in-nazi-germany/>>; Arnd Krüger and William Murray (eds), *The Nazi Olympics: Sport, Politics and Appeasement in the 1930s* (U Ill Pr 2003) p 42 (f n 98); Trevor Slack (ed), *The Commercialisation of Sport* (Routledge 2004), p 186.

and the Government of the Russian Federation, a false analogy readily refuted because it is grounded neither in logic nor in fact.¹² Indeed, such a false analogy would be an *ad hominem* attack against the very people who gave their lives in the millions to defeat the persecutions of the Reich. However, the issue of corporate support for governments that significantly restrict human rights must be considered. The legacy of corporate complicity in the rise and persecutions of human-rights oppressing governments — whether the in 1930s Berlin, 1960s South Africa, or 21st century Russia — is a continuing problem to which we cannot close our eyes or our minds.¹³ It was, is, and always will be, a problem of Corporate Social Responsibility (CSR). The ultimate question examined in this article is whether this CSR issue should be dealt with through modes of voluntary corporate compliance, the historically preferred mode of promoting CSR in the E.U.; or whether the E.U. should take this opportunity to examine whether it can promote CSR compliance more effectively by legislation that requires CSR as a matter of E.U. law, at least with respect to the vindication of fundamental human rights.

This article concludes that the latter course has become appropriate, particularly for two reasons among others. First, the explicit and increased protections of human rights against sexual-orientation discrimination in the E.U. Charter on Fundamental Human Rights (the “Charter”)¹⁴ and the European Convention on Human Rights (“the Convention”)¹⁵ demand more of corporations headquartered or operating in the E.U. than voluntary, good intentions, given the enormous powers they wield; these protections are only meaningful if they are vindicated not only in government action, but also, in the business of MNEs, which can have an even more profound impact on preserving those rights. Second, since the United States has effectively bowed out of providing a legal means by which CSR can be enforced against MNEs in American federal courts, there now exists a regulatory lacuna that the European Commission is best situated to fill by the precision offered through judicious rule-making, rather than the haphazard and unpredictable course of litigation in the municipal courts of any country.

The discussion proceeds in six additional sections. Section II examines the E.U.’s traditional approach to CSR, particularly with its implications for promoting CSR in protecting fundamental human rights when that protection clashes with powerful economic motives of profit-making. In Section III, we consider the evolution of the legal recognition of LBGTI rights in the E.U., both through the Convention and the Charter, and in decisions of the European Court of Human Rights and the European Court of Justice. A closer examination of the 2013 Russian legislation is undertaken in Section IV, particularly from the perspective of its effect on the objectives of the Convention and the Charter, and the dilemma it creates for MNEs such as Atos. From that groundwork, we evaluate in Section V the efficacy of voluntary CSR for protecting LBGTI human rights when MNEs are faced with incredibly lucrative opportunities as Olympic sponsors to overlook them or play down the effect of Russia’s legislation on them, and we consider whether a legal response by the E.U. would more strongly encourage compliance. Finally, in Section VI, a model for such

¹² See Arnd Krüger and William Murray (eds), *The Nazi Olympics: Sport, Politics and Appeasement in the 1930s* (U Ill Pr 2003).

¹³ See eg Matt Lebovic, ‘Will Olympics in Russia be a second “Nazi Games”? Rising anti-gay violence and repressive new laws are drawing comparisons between the Sochi 2014 winter games and Berlin 1936’, (*The Times of Israel* 13 August 2013) <<http://www.timesofisrael.com/will-olympics-in-russia-be-a-second-nazi-games/>>; Lisa Keen, ‘The Bottom Line On Olympic Sponsors’, (*Keen News Service*, 21 September 2013), at <<http://www.keennewservice.com/2013/09/21/the-bottom-line-on-olympic-sponsors/>>.

¹⁴ The Charter of Fundamental Human Rights of the European Union, <www.europarl.europa.eu/charter/pdf/text_en.pdf>.

¹⁵ <<http://human-rights-convention.org/>> For readers outside of the E.U., the distinction between the Charter and the Convention may be confusing. The Convention (circa 1950) applies to all 47 member nations of the Council of Europe (which includes Russia); the Charter (circa 2000) applies only in the 27 Council member nations that are also E.U. members. The ‘Charter’s prime objective is to make rights more visible,’ and rather than establishing ‘new rights,’ the Charter ‘assemble[s] existing rights that were previously scattered over a range of sources including the European Convention on Human Rights and Fundamental Freedoms (ECHR) and other Council of Europe (COE), United Nations (UN) and International Labour Organisation (ILO) agreements.’ While the Convention ‘is applied directly by the national courts of each’ Council of Europe ‘country and by the European Court of Human Rights (ECtHR) in Strasbourg,’ the Charter is enforced through rulings of the European Court of Justice (ECJ) in Luxembourg. However, the ECJ operates in a rather unique way with respect to the Charter, since it is typically not a court of first instance (except as to litigation by persons ‘directly and individually’ concerned by a measure of an E.U. institution or body), nor an international human rights court nor a court of appeal. Charter issues typically come before the ECJ when either the European Commission or an E.U. member’s national courts refer cases to the ECJ. The relationship between the ECtHR and the ECJ has also not entirely been clarified. While envisioned as one of ‘mutual respect’ and ‘cooperation,’ observers expect that ‘there should be a right of appeal from the ECJ to the ECtHR when an act of the EU is challenged for violation of a right enshrined in the’ Convention. See <http://www.eucharter.org/home.php?page_id=66>. The inter-relationships between the two courts are helpfully detailed in Elena Butti, *The Roles and Relationship between the Two European Courts in Post-Lisbon EU Human Rights Protection*, *Jurist*, 23 Sept 2013, <<http://jurist.org/dataline/2013/09/elena-butti-lisbon-treaty.php>>. As Ms. Butti notes, ‘cross-references between the two courts have been increasing over time,’ evidencing ‘a determination by both EU courts to avoid conflict with and to demonstrate deference to the other court, contributing to the creation of a ‘uniform human rights standard.’ Id.

regulation is proposed that strikes a careful *via media* between “suggested” and “coerced” CSR compliance. That model takes as its starting point the approaches taken by both an E.U. nation, and a non-E.U. jurisdiction, in using non-coercive law to encourage MNEs to take CSR more seriously, and synthesizes them into an approach that combines the public-pressure engine that fuels voluntary CSR with public disclosures mandated by law to optimize the information and mobilization of public opinion and pressure – factors particularly noteworthy given the powerful “branding” benefits that MNEs, like Atos, seek through Olympic sponsorship. Section VII offers concluding thoughts.

II. The Traditional E.U. Approach to CSR Revisited from a Human Rights Perspective

A. Preliminary Note on the Varying Definitions of CSR, and the Working Definition for this Article

CSR has been described in an almost disorienting variety of ways. For example, CSR has been described in terms of its “primary elements” as composed of “human rights, environment, labor, and anti-corruption priorities.”¹⁶ Others have defined CSR through statistical examination of definitions gathered through literature review, out of which “five dimensions of CSR were identified through a content analysis of the definitions” and distilled as the environmental dimension, the social dimension, the economic dimension, the stakeholder dimension, and the voluntariness dimension.¹⁷ The first four dimensions “are merely different categories of impacts from business” – which in sum total reflect “the recognition that business, as a producer of economic wealth, does not only have economic impacts” – while the fifth dimension “implies that the business should perform above regulatory requirements ... [that] set the minimum performance level deemed acceptable.”¹⁸ Still others have defined CSR as

... the core ... idea that it reflects the social imperatives and the social consequences of business success. Thus, CSR (and its synonyms) empirically consists of clearly articulated and communicated policies and practices of corporations that reflect business responsibility for some of the wider societal good. Yet the precise manifestation and direction of the responsibility lie at the discretion of the corporation.¹⁹

Corporate discretion is exercised through the relative weights given to each element when managing the business “with ... regard for financial performance, environmental consequences, and social impact.”²⁰ The ways in which management of any given corporation uses its discretion in striking a balance is reducible to a number of archetypes: [1] the corporation that has “no ambition to be socially responsible and in fact [may] be out of compliance with applicable” law; [2] the corporation that merely “complies with applicable laws and perhaps engages in small amounts of generic corporate philanthropy, but does little beyond that”; [3] the corporation that “moves beyond bare compliance but only does so where it would be profitable,” “view[s] CSR primarily as a public relations matter, for particularly in consumer-focused industries, social responsibility attracts customers and social irresponsibility repels them,” and “incorporate[s] ... [CSR] considerations at all levels of their operations and decision making, but only act[s] upon them when it would benefit their financial bottom line”; [4] the corporation that “routinely balances economic, social, and environmental considerations” for reasons beyond compliance and profit out of a “motiv[ation] to ‘do good’” both for “constituencies and for the planet – while still producing returns for their shareholders”; [5] corporations that “integrate social responsibility principles into their strategy and business processes ... such that” CSR becomes “‘built in, not bolted on’”; and [6] corporations in which CSR “is fully integrated and embedded in every aspect of the organization,” in that these “companies also redesign or ‘reengineer’ their business models, financial institutions, and markets to identify and root out any underlying causes inconsistent with social responsibility.”²¹

¹⁶ David Scheffer and Caroline Kaeb, ‘The Five Levels of CSR Compliance: The Resiliency of Corporate Liability under the Alien Tort Statute and the Case for a Counterattack Strategy in Compliance Theory’ (2011) 29 Berkeley Int’l LJ 334, 334.

¹⁷ Alexander Dahlsrud, ‘How Corporate Social Responsibility is Defined: An Analysis of 37 Definitions’ (2008), 15 Corp So. Responsib & Environ Mgt 1, 2-4.

¹⁸ *ibid* p 6.

¹⁹ Dirk Matten and Jeremy Moon, “‘Implicit’ And “‘Explicit’ CSR: A Conceptual Framework For A Comparative Understanding Of Corporate Social Responsibility’ (2008) 33 Acad Mgt Rev 404, 405.

²⁰ Miriam A Cherry and Judd F Sneider, ‘Beyond Profit: Rethinking Corporate Social Responsibility and Greenwashing After the BP Oil Disaster’ (2011) 85 Tulane L Rev 983, 1010.

²¹ *ibid* at 1010-1013.

Considering what has been identified as CSR's "primary elements," "five dimensions," and "archetypes" of balancing among "financial performance, environmental consequences, and social impact," it becomes clear that CSR is "context specific for each individual business" and thus turns on the questions of "what are the specific CSR issues to be addressed and how to engage with the stakeholders" affected by those issues.²² Thus, it can be fairly said that CSR is itself defined by an overriding question of "how CSR is socially constructed in a specific context."²³

With these parameters in mind, this article sets out to "socially construct" CSR "in the specific context" of its human rights dimension. Because of the centrality of human rights to the E.U.'s very existence, the author's CSR working definition in the human rights context treats CSR's imperative to go beyond the minimal in protecting and promoting human rights to at least the level of the corporation that "routinely balances economic, social, and environmental considerations" for reasons beyond compliance and profit out of a "motiv[ation] to 'do good'" both for "constituencies and for the planet – while still producing returns for their shareholders."²⁴

B. The E.U.'s Approach to CSR

While CSR had been discussed to varying degrees in E.U. countries for a number of years²⁵, the "launch" of "a wide debate on how the European Union could promote corporate social responsibility at both the European and international level in the E.U." is the much-discussed Green Paper of 2001.²⁶ The Green Paper has been described as "neither binding nor explicit in its suggestions" since "EU green papers, by nature, are policy papers intended to stimulate discussion among interested nongovernmental actors in a specific policy area."²⁷ The debate sought here was discussion of the merits of a possible corporate code for the E.U., and from that discussion the objective was to "provide impetus for subsequent legislation."²⁸

On the subject of human rights, the Green Paper clearly envisions a dynamic area of CSR, one meriting great attention as CSR "has a strong human rights dimension" in which "[c]ompanies face challenging questions" that "presen[t] political and moral dilemmas" such as "how to identify where their areas of responsibility lie as distinct from those of governments ... and how to approach and operate in countries where human rights violations are widespread."²⁹ The Commission also recognized that "[t]he European Union itself has an obligation in the framework of its Co-operation policy to ensure the respect of ... human rights."³⁰ The link between CSR and the E.U.'s own self-conscious efforts to expand human rights protection is clearly established in the Council's observation that "[a]t a time when the" E.U. "endeavours to identify its common values by adopting a Charter of Fundamental Rights, an increasing number of European countries recognize their social responsibility more and more clearly and consider it as part of their identity."³¹ However, the E.U. Commission did not go farther, even as to human rights, in as much as it declared that "[a]t this [2001] stage the Commission does not wish to pre-judge the outcome of" the "debate on new ways of promoting corporate social responsibility" that would have inevitably

²² See Dahlsrud (n 17) 6.

²³ *ibid* at 7.

²⁴ *ibid* at 6.

²⁵ Jan Wouters and Leen Chanet, 'Corporate Human Rights Responsibility: A European Perspective' (2008) 6 *Nw J Int'l HR* 262, 273 and n 60; Pall A Davidsson, 'Note, Legal Enforcement of Corporate Social Responsibility Within The EU' (2002) 8 *Colum J Euro L* 529, 536-537.

²⁶ *Commission Green Paper on Promoting a European Framework for Corporate Social Responsibility*, COM (2001) 366 final (July 18, 2001) para , p 3 (hereinafter '2001 Green Paper'); see Pall A Davidsson (n 25) 537.

²⁷ Joshua M Chanin, "'The Regulatory Grass Is Greener': A Comparative Analysis of the Alien Tort Claims Act and the European Union's Green Paper on Corporate Social Responsibility' (2005), 12 *Ind J Global Leg Studies* 745, 768-769.

²⁸ *ibid* at 769 (quoting European Union Documents, Documents of Individual Institutions: European Commission).

²⁹ *EU Comm'n 2002 Green Paper*, para 52, p 13.

³⁰ *ibid*.

³¹ *ibid* para 8, p 4. These observations are congruent with the definition of 'Human Rights' offered in the Green Paper's appendix:

Human Rights are based on the recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world. They are defined in the Universal Declaration of Human Rights (1948). At the European level, Article 6 of the Treaty on European Union reaffirms that the European Union "is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States." In addition the European Convention of Human Rights adopted by the Council of Europe is legally binding in all Member States. Moreover, the European Charter of Fundamental Rights adopted in Nice in December 2000 is the instrument inspiring respect for fundamental rights by the European institutions and the Member States where they act under Union law.

ibid, p 24.

resulted had it “ma[de] concrete proposals for action.”³² Rather, the Commission posed sets of questions for consideration by various constituencies and on various specific issues³³ – and about the E.U. itself, the Commission posed the following questions:

The Role for the EU

What could the European Union do to promote the development of corporate social responsibility at European and international level? In particular, should the EU add value and complement existing socially responsible activities by:

- Developing an overall European framework, in partnership with the main corporate social responsibility actors, aiming at promoting transparency, coherence and best practice in corporate social responsibility practices?
- Promoting consensus on, and supporting, best practice approaches to evaluation and verification of corporate social responsibility practices?
- and/or by which other means?³⁴

Some of the ideas that the Commission hoped would come out of the kinds of debate it foresaw in the wake of the 2001 Green Paper were articulated in a separate undertaking by the United Nations, a U.N. Human Rights Council-sponsored report released in 2011, known by the name of the Special Representative, John Ruggie, who authored it, as the “Ruggie Report.”³⁵ The Ruggie Report has been described as the U.N.’s “most recent and ambitious attempt ... to develop a human rights framework to tame global capital.”³⁶ In the Report’s view, “the root cause of today’s human rights disasters is not the profit-maximizing imperatives of corporate capitalism but [rather] a ‘governance gap’ specifically created by globalization,” which [1] governments, for their part, can address “through market pressure—statutes to make ‘bad’ behavior cost more—and through laws ‘responsibilizing’ high level corporate officials, by increasing corporate and individual liability,” and which [2] MNEs, for their part, can address by implementing proactive measures that effectuate a corporate responsibility to “‘respect’” human rights, including by avoiding, through due diligence, “‘contribut[ing] to abuse’” of human rights.³⁷

Critics, however, have questioned whether “adopting voluntary, non-binding recommendations with no independent monitoring process, really constitute[s] evidence of ‘success’?”³⁸ They assert that “there is minimal evidence that” such approaches have “transformed, or will transform, the behaviors of Multinational Corporation (MNCs),” which function as “profit-seeking ‘amoral calculators.’”³⁹ Among the reasons for such a gloomy assessment include the sheer economic power wielded by large MNCs and the “‘increasingly symbiotic relationships’” between states and MNCs, which have become “the institution[s] [on which the state] now relies upon to provide employment, prosperity and economic growth (not to mention electoral success for the party in power).”⁴⁰

The problems with voluntary CSR—as currently understood to protect core European values from diminution by corporate activity (especially by corporate support of regimes that do not share those values)—is illustrated in this article by means of a case study of corporate support for Russia’s Sochi Olympic Games in the face of recent Russian legislation that a key European legal authority has found “incompatible with the underlying values of the” Convention “and to be violations of Articles 10, 11 and 14 of the” Convention. In

³² *ibid*, para 93, p 23.

³³ *ibid*, para 92, pp 22-23.

³⁴ *ibid*, p 23.

³⁵ UNHCR ‘Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie’ and Annex: Guiding Principles on Business and Human Rights: Implementing the United Nations ‘Protect, Respect and Remedy’ Framework (2011).

³⁶ Steven Bittle and Lauren Snider, *Examining the Ruggie Report: Can Voluntary Guidelines Tame Global Capitalism?* (Springer 2013) 21 *Crit Crim* 177, 178; Radu Mares, ‘Business and Human Rights After Ruggie: Foundations, the Art of Simplification and the Imperative of Cumulative Progress’, *The UN Guiding Principles on Business and Human Right 1* (2012) <<http://rwi.lu.se/wp-content/uploads/2012/06/Business-and-Human-Rights-After-Ruggie.pdf>>.

³⁷ Bittle and Snider, (n 36) at 181-182.

³⁸ *ibid* at 185.

³⁹ *ibid* at 186.

⁴⁰ *ibid* at 187. The last point is one that has attracted much attention in America after its Supreme Court ruled that corporations have free-speech rights that protect unlimited corporate financial support for candidates seeking elective office. See *Citizens United v. Federal Election Commission*, (2010) 558 US 310.

Section III, we examine the recognition of LGBTI rights in the E.U. We consider the Russian legislation at issue in Section IV. With this background and in this specific context, the viability of the E.U.'s completely voluntary approach to corporate social responsibility is evaluated in Section V.

III. Evolving Recognition of LGBTI Human Rights in the E.U.

A. Section 13 of the Treaty of Amsterdam, and Rulings by the European Court of Human Rights (ECtHR)

Some of the first rulings of the ECtHR to find that the Convention prohibits discrimination against gay persons came at the turn of the last century.⁴¹ The Treaty of Amsterdam's Section 13 empowered the European Commission to prohibit discrimination against LGBTIs⁴², but the Commission has legislated slowly, and in a piecemeal fashion.⁴³ Nonetheless, the Commission inaugurated nearly 15 years of progress to the present, in which LGBTI rights have taken on enhanced significance within the E.U. For example, commentators have recognized the strong role played by the decisions of the ECtHR in catalyzing change in member nations:

The ECtHR has become increasingly progressive on LGBTI issues. It has found violations of the European Convention against countries that criminalize consensual same-sex conduct, that impose a higher age of consent for gay men, that prohibit lesbians and gay men from serving in the military, and that restrict the ability of transsexuals to change identity documents or to marry someone whose sex is opposite to their newly-acquired gender. For all these issues, the Court reversed one or more earlier decisions rejecting challenges to these policies. This pattern suggests a high degree of judicial discretion or "agency." Yet these shifts in ECtHR jurisprudence also track similar progressive trends in the national laws and policies of Council of Europe (CoE) member states.⁴⁴

The ECtHR's work has affected the legal work of other bodies in the E.U. For example, in October 2013, the European Court of Justice ruled that gays count as a "social group," who are eligible for asylum in E.U. member countries if they can demonstrate persecution.⁴⁵ "Faced with asylum requests from three gay men from Senegal, Sierra Leone and Uganda, the Dutch State Council asked the CJEU whether homosexual people were considered a 'particular social group' within the meaning of the Directive [on Asylum Qualifications]."⁴⁶ That Directive provides that refugee status may be claimed by "any person who, owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country."⁴⁷ In response to the Dutch State Council, the ECJ ruled that "[h]omosexual applicants for asylum can constitute a particular social group who may be [considered]

⁴¹ See eg, ECtHR Salguero da Silva Mouta [1999] App no 33290/96 paras 34-36; ECtHR Fretté [2002] App no 36515/97 para 26.

⁴² Dimitry Kochenov, 'Democracy and Human Rights - Not for Gay People? EU Eastern Enlargement and Its Impact on the Protection of the Rights of Sexual Minorities' (2007) 13 Texas Wesleyan LR (forthcoming); T J Langekamp, 'Finding Fundamental Fairness: Protecting the Rights of Homosexuals under European Union Accession Law' (2003) 4 San Diego In'tl LJ 437. For the legal situation prior to the Amsterdam treaty, see B Carolan, 'Rights of Sexual Minorities in Ireland and Europe: Rhetoric versus Reality' (2001) 19 Dickinson J Intl L 387.

⁴³ Dimitry Kochenov, 'Gay Rights in the EU: A Long Way Forward for the Union of 27', Croatian Yearbook of European Law and Policy 3.3 (2007), 469-490, at 471 (observing that 'other EC legislation, such as Directive 2004/38/EC on the free movement of citizens,13 Directive 2003/109/EC on the free movement of third-country nationals who are long-term residents,14 and Directive 2003/86/EC on family reunification15 all f[e]ll short of ensuring full protection for gay rights'.

⁴⁴ Laurence R Helfer and Erik Voeten, 'International Courts as Agents of Legal Change: Evidence from LGBTI Rights in Europe' (November 3, 2012) International Organization, Vol. 67; available at SSRN: <<http://ssrn.com/abstract=1850526> or <http://dx.doi.org/10.2139/ssrn.1850526>>.

⁴⁵ Judgment in Case C-199/12, C-200/12, C-201/12 X, Y, Z v Minister voor Immigratie en Asiel; see 'Homosexuality And Asylum: Bigotry By Degrees—The Level Of Persecution Determines When Gays Can Claim Asylum In Europe', (*The Economist*, 16 Nov 2013) <<http://www.economist.com/news/europe/21589914-level-persecution-determines-when-gays-can-claim-asylum-europe-bigotry-degrees>>; 'When And Where Is Being Gay Grounds For Asylum?', (*The Economist*, 19 Nov 2013) <<http://www.economist.com/blogs/economist-explains/2013/11/economist-explains-13>>.

⁴⁶ 'EU Court Of Justice Rules Sexual Orientation Valid Ground For Fear Of Persecution In Asylum Procedures', European Parliament's Intergroup on LGBT Rights (7 Nov 2013) <<http://www.LGBTI-ep.eu/press-releases/eu-court-of-justice-rules-sexual-orientation-valid-ground-for-fear-of-persecution-in-asylum-procedures/>>; Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted.

⁴⁷ Court of Justice of the European Union, Homosexual Applicants For Asylum Can Constitute A Particular Social Group Who May Be Persecuted On Account Of Their Sexual Orientation, Press Release No 145/13, (Luxembourg, 7 November 2013).

persecuted on account of their sexual orientation,” and “[i]n that context, the existence of a term of imprisonment in the country of origin sanctioning homosexual acts may constitute an act of persecution per se, provided that it is actually applied.”⁴⁸ In addition, the ECJ emphasized that in evaluating asylum requests from LGBTI persons, an E.U. member state “cannot reasonably expect, in order to avoid the risk of persecution, the applicant for asylum to conceal his homosexuality in his country of origin or to exercise reserve in the expression of his sexual orientation.”⁴⁹

B. The E.C.’s 2010 “Toolkit” to Promote LGBTI Human Rights, and the Director-General’s Report on Trans and Intersex People Discrimination on the Grounds of Sex, Gender Identity and Gender Expression

The ECtHR’s rulings have also anticipated regulatory policy-making by the European Commission. After the European Commission introduced a “a non-binding toolkit to promote LGBTI people’s human rights in June 2010,”⁵⁰ a panel of experts advising the European Commission’s Directorate-General for Justice issued their landmark report on *Trans And Intersex People Discrimination On The Grounds Of Sex, Gender Identity And Gender Expression*.⁵¹ In that report, special note was made of the strength of protection under E.U. human rights law for the LGBTI community, both in Art. 19 TFEU (which is the most general legal provision on non-discrimination in the Convention, entitling the E.U. to take action to combat “discrimination based on sex ... or sexual orientation”), as well as in international human rights law, which reflects growing “recognition that gender identity and gender expression constitute a separate ground of discrimination” and “that the ECtHR has recognised transsexuality as a protected stand-alone ground under Art. 14 ECHR.”⁵² The report observed that “[s]adly, discrimination against trans and intersex people remains wide spread and takes many forms” and that “at the level of EU law itself,” it should be “argue[d] that the term ‘discrimination on grounds of sex’ should be interpreted even [more broadly], so as to include more forms of discrimination on grounds of gender identity as well as discrimination on grounds of gender expression and discrimination against intersex people.”⁵³ The next, and most recent, step on this path occurred in 2013, when the “EU’s 27 foreign affairs ministers adopted a ground-breaking global policy,” called the LGBTI Guidelines, which instructed E.U. diplomats around the globe “to defend the human rights of LGBTI people.”⁵⁴ As described by the European Parliament’s Intergroup on LGBTI Rights, “[t]he Guidelines will be binding,” and “[t]he EU’s diplomatic efforts will revolve around four priorities,” which include “[e]liminat[ing] discriminatory laws and policies, including the death penalty”; “[p]romot[ing] equality and non-discrimination at work, in healthcare and in education”; “[c]ombat[ing] state or individual violence against LGBTI persons”; and “[s]upport[ing] and protect[ing] human rights defenders.”⁵⁵

Europe has shown resolve in making good on these missions. However, challenges remain, particularly among their new E.U. members in Eastern Europe.⁵⁶ The latest test, and first after adoption of the Guidelines, came at the end of November 2013, when Ukraine was scheduled to sign an association agreement with the E.U. -- but this would have obligated Ukraine to embrace the LGBTI Guidelines and to make appropriate

⁴⁸ *ibid.*

⁴⁹ Judgment in Case C-199/12, C-200/12, C-201/12 *X, Y, Z v Minister voor Immigratie en Asie*. However, as noted in the pages of *The Economist*, “[t]he notion of “benign criminalisation” is extremely dangerous’ and that “the court missed a chance to say” that “that criminalising people “for who they are” is itself persecution’. ‘Homosexuality And Asylum: Bigotry By Degrees—The Level Of Persecution Determines When Gays Can Claim Asylum In Europe’ (*Economist*, 16 Nov 2013) <<http://www.economist.com/news/europe/21589914-level-persecution-determines-when-gays-can-claim-asylum-europe-bigotry-degrees>>.

⁵⁰ Meps Welcome New Toolkit To Defend LGBTI People’s Human Rights (30 June 2010) <<http://www.LGBTI-ep.eu/press-releases/meps-welcome-new-toolkit/>>. The purpose of the toolkit is described as to permit “the future European External Action Service (EEAS) and EU Member States to actively work towards the decriminalisation of same-sex relations throughout the world, to further denounce discrimination on grounds of sexual orientation and gender identity, and to support human rights defenders in repressive area’, *Id.*

⁵¹ Silvan Agius and Christa Tobler, *Trans and Intersex People: Discrimination on the Ground of Sex, Gender Identity and Gender Expression* (June 2011)(report financed by and prepared for the use of the European Commission, Directorate-General for Justice).

⁵² *ibid.*, at 5, 87.

⁵³ *ibid.* at 87.

⁵⁴ ‘EU Foreign Affairs Ministers Adopt Ground-Breaking Global LGBTI Policy’ (24 June 2013) <<http://www.lgbt-ep.eu/press-releases/eu-foreign-affairs-ministers-adopt-lgbt-guidelines/>>.

⁵⁵ *ibid.*

⁵⁶ Conor O’Dwyer, ‘From Conditionality to Persuasion? Europeanization and the Rights of Sexual Minorities in Post-Accession Poland’ (2010) *European Integration* 32.3 229-247; see D Kochenov, ‘Democracy and Human Rights - Not for Gay People? EU Eastern Enlargement and Its Impact on the Protection of the Rights of Sexual Minorities’ (2007) 13 *Texas Wesleyan LR* (forthcoming).

amendments to domestic legislation in order to comply. Calling it a tango between E.U.-responsibilities and public opinion in Ukraine, an editorialist recently observed that “[a]lthough the government submitted a bill in April which would amend the labour code and prohibit discrimination based on sexual orientation in the work place, the [Ukrainian] parliament has not yet managed to bring it to a vote” and in fact, is stalling because of national elections in 2015 and a “highly conservative” electorate, 79.4 percent of whom “are against same-sex relationships.”⁵⁷ Under threats of crippling Russian sanctions on Ukraine’s imports if Ukraine joined the E.U. as scheduled on 29 November 2013, Ukraine’s then-president, Viktor Yanukovych, renounced the previously negotiated association agreement,⁵⁸ insinuating instead that Ukraine might join a rival customs union organised by Russia.⁵⁹ While LGBTI rights were not the only (nor probably even the decisive) factor in Ukraine’s decision to walk away from the association agreement, Russia obviously wishes to exercise cultural and moral, as well as economic, sway within the former Soviet sphere of power. Indeed, the signal that the E.U. took human rights in Ukraine quite seriously came most strongly from what the E.U. might have done—but in fact did not do—to appease the Yanukovych government; in the words of an editorialist:

... [T]he EU has—just—emerged from this squabble without seriously compromising its attachment to the rule of law and human rights. Having unwisely been drawn into a tug-of-war with Russia, it was tempted, for example, to ditch its demand for the release of Yulia Tymoshenko, the opponent whom Mr Yanukovych has imprisoned. Doing so would have suggested to both current and aspirant members of the EU that its talk of rules and democracy was so much cant.⁶⁰

It is no great stretch of the imagination to see that the participation of major E.U.-based corporations in sponsoring Olympic Games in Russia — on the heels of the most breathtakingly and blatantly discriminatory anti-LGBTI message sent in Russia’s post-1917 history — risks, in equal measure, reducing the E.U.’s blossoming commitment to LGBTI rights to just “so much cant.” Clearly, particularly as studies such as those of O’Dwyer indicate⁶¹, change in attitude and treatment of LGBTI communities within parts of the E.U. itself will take economic action, in addition to political progress. And that economic action best comes from the power of Foreign Direct Investment (FDI) that sits in the hands of Western Europe’s great MNEs.⁶²

IV. Russia’s “Scarlet Letter”⁶³ Legislation Directed Against the LGBTI Community Specifically and Advocates for Human Rights Generally

Often referenced by the bland title “Article 6.21 of the Russian Code of Administrative Offences,”⁶⁴ but codified within Part 6 of that Code (“Administrative Offences Endangering the Health and Sanitary and Epidemiological Well-Being of the Population and Endangering Public Morals”⁶⁵), Article 6.21 proclaims its subject

⁵⁷ Bogdan Globa, ‘Opinion: The EU-Ukraine tango on gay rights’ (25 Oct. 2013) <<http://euobserver.com/opinion/121897>>; see also the world map with survey results by country at Global Acceptance of Homosexuality, Pew Research Group, Global Attitudes Project (4 June 2013) <<http://www.pewglobal.org/2013/06/04/global-acceptance-of-homosexuality/>>.

⁵⁸ ‘Ukraine and The EU: Stealing Their Dream—Viktor Yanukovych Is Hijacking Ukrainians’ European Future’, (*The Economist*, 30 Nov 2013) <<http://www.economist.com/news/europe/21590977-viktor-yanukovych-hijacking-ukrainians-european-future-stealing-their-dream>>.

⁵⁹ Ukraine And The European Union: Day Of The Gangster Pygmy—Why, Despite The Appearance Of Defeat, Europe Might Have Won The Battle Of Ukraine, (*Economist*, 30 Nov 2013) <<http://www.economist.com/news/leaders/21590902-why-despite-appearance-defeat-europe-might-have-won-battle-ukraine-day>>.

⁶⁰ *ibid.*

⁶¹ Conor O’Dwyer, ‘From Conditionality to Persuasion? Europeanization and the Rights of Sexual Minorities in Post-Accession Poland’ (2010) *European Integration* 32.3: 229-247.

⁶² See eg Beate Sjaafjell, ‘Internalizing Externalities In E.U. Law: Why Neither Corporate Governance Nor Corporate Social Responsibility Provides The Answers’ (2009) 40 *Geo Wash Int’l L Rev* 977, 980-981, 987-989, 991-993, 1024.

⁶³ The reference is to one of the most famous enduring American literary works of the 19th century, authored by Nathaniel Hawthorne. The letter was affixed to the clothing of women in Puritan communities in Colonial New England as a form of shaming punishment for adultery. See Dennis Foster, ‘The Embroidered Sin: Confessional Evasion in The Scarlet Letter’, 25 *Criticism* 141 (1983) <<http://digitalcommons.wayne.edu/criticism/vol25/iss2/4>>.

⁶⁴ See eg Eric Sasson, ‘The Sochi Scandal Is Just Beginning: Just Because The Russian Government Says It Won’t Arrest Gay Athletes Doesn’t Mean The Olympics Controversy Is Over’ (*Salon*, 13 Aug 2013), <http://www.salon.com/2013/08/13/the_sochi_scandal_is_just_beginning/>.

⁶⁵ See Code Of Administrative Offences Of The Russian Federation, <<http://www.russian-offences-code.com/>>. The version of the Code in English translation available on that website has not yet been updated to reflect the enactment of Section 6.21. See <<http://www.russian-offences-code.com/SectionII/Chapter6.html>> Leading Russian-law scholar William E Butler writes of the this Code that ‘[u]nder Russian legislation anti-social behavior may be criminal, or it may fall into a category unknown to the Anglo-American legal world: administrative offenses.’ William E Butler, *Russian Law* (Oxford 3d ed. 2009) § 6.160. Butler notes that ‘[i]t is estimated

unreservedly as “Propaganda of Non-traditional Sexual Relations Among Minors,”⁶⁶ but its true legal effect requires more discerning examination. A fascinating opportunity for Russia to explain this new law transpired at the Parliamentary Assembly of the Council of Europe at Strasbourg in October 2013, where Sergey Naryshkin, Speaker of the State Duma of the Russian Federation made the following remarks:

Another law that is often criticised abroad concerns propaganda about non-traditional sexual relations among minors. Many who comment on this law – whether deliberately or not – omit or forget the words in the title “among minors.” That is a distortion of the content and the motivation for the law’s adoption. Concerns have been voiced that it could become an instrument of discrimination against minorities. I do not share those concerns, not only because there is a lack of relevant examples. People of non-traditional orientation do not face any restrictions on any grounds in their work, education, social or political activities. They are free to shape their life in accordance with their preferences. However, before they come of age, children should not be forced into anything or subjected to propaganda.⁶⁷

Of course, when pressed to articulate “the evidence that the State Duma” relied on in enacting Section 6.21, “especially in regard to the Venice Commission’s clear statement that children need objective, relevant information on sexuality,” the Russian Speaker replied, “I am ready to repeat my answer a third time, if you insist.”⁶⁸ But the casual response of the Speaker overlooked the gravity of the question. As many readers of this *Journal* will well know, “[t]he European Commission for Democracy through Law – better known as the Venice Commission as it meets in Venice – is the Council of Europe’s advisory body on constitutional matters” and “provide[s] legal advice to its member states and, in particular,” helps “states wishing to bring their legal and institutional structures into line with European standards and international experience in the fields of democracy, human rights and the rule of law.”⁶⁹ The Venice Commission had already identified the very weaknesses with this law that Speaker Naryshkin refused to address. The Venice Commission noted not only that “the provisions under consideration are not formulated with sufficient precision so as to satisfy the requirement ‘prescribed by law’” such that its scope “seems not to be limited to sexuality explicit content, but to apply to legitimate expressions of sexual orientation,” but also that the Russian enactment turned fundamental principles of the Convention on their heads:

[To assert] “public morality”, the values and traditions including religion of the majority, and “protection of minors” as justifications for prohibition on “homosexual propaganda” fail[s] to pass the essential necessity and proportionality tests as required by the ECHR. Again, the prohibitions under consideration are not limited to sexually explicit content or obscenities, but they are blanket restrictions aimed at legitimate expressions of sexual orientation. The Venice Commission reiterates that homosexuality, as a variation of sexual orientation, is protected under the ECHR and as such, cannot be deemed contrary to morals by public authorities, in the sense of Article 10 § 2 of the ECHR. On the other hand, there is no evidence that expressions of sexual orientation would adversely affect minors, whose interest is to receive relevant, appropriate and objective information about sexuality, including sexual orientations.⁷⁰

The Venice Commission stated most emphatically that “the aim of these measures is not so much to advance and promote traditional values and attitudes towards family and sexuality but rather to curtail nontraditional ones by punishing their expression and promotion,” and thus Section 6.21 is “incompatible with ‘the underlying values of the ECHR’, in addition to their failure to meet the requirements for restrictions prescribed by Articles 10, 11 and 14 of the” Convention.⁷¹

that more than 30 million persons are brought to administrative responsibility in the Russian Federation each year.’ Id at § 6.161.

⁶⁶ See Decker and Wilson (n 7).

⁶⁷ Verbatim Record Of The Address By Chairperson Of The State Duma Of The Federal Assembly Of The Russian Federation Mr. Sergey Naryshkin And His Answers To The Questions From The Parliamentarians At The Session Of The Parliamentary Assembly Of The Council Of Europe (Strasbourg, 1 October 2013), available at <http://www.coe.mid.ru/doc/ve_011013.htm>. In a similar vein are Mr Naryshkin’s comments in response to various pointed questions from other delegates, including Mogens Jensen (Denmark), Ms Karlsson, and Mr Villumsen (Denmark).

⁶⁸ *ibid* (remarks of Mr Villumsen and Mr Naryshkin).

⁶⁹ Council of Europe–Venice Commission, <http://www.venice.coe.int/WebForms/pages/?p=01_Presentation>.

⁷⁰ European Commission For Democracy Through Law, Op 707/2012 (On The Issue Of The So-Called “Propaganda of Homosexuality” In Light of Recent Legislation In Some Member States of the Council of Europe), paras 79, 80.

⁷¹ *ibid* para 82.

Accordingly, there can be no doubt that Russia's Administrative Offenses Code 6.21 has a serious effect on the objectives of European human rights policies in general, and its LGBTI policies in particular – and it should have therefore created a soul-searching dilemma for MNEs such as Atos. At a time where the ECJ has focused attention on the persecution of homosexuality as a potential basis for granting asylum applications in the E.U., the Russian enactment is little more than a discriminatory law, thinly veiled with a veneer of pretext. While the Russian government speaks of the law in terms of “protecting minors” and repeats assurances that Russia will not discriminate against LGBTI athletes who attend the Sochi Olympics⁷², other groups outside of Russia see the farce for what it is. For example, public health officials at the 2013 Meeting of the European AIDS Clinical Society (EACS)⁷³ denounced the law as “discriminatory” and as an “imped[iment] [to] individuals with HIV from seeking care.”⁷⁴ At a press conference, EACS member Tamás Bereczky described Section 6.21 as “purportedly directed against propaganda for minors, but, in fact, we know that, in practice, this law is being ostensibly used for the persecution of gays in general.”⁷⁵ University students in Europe have insightfully decoded the law as one “strik[ing] to the very core of prejudice based on sexual orientation”:

Not only does it perpetuate the fallacy that sexual orientation is a choice, but it encourages dangerous connotations between homosexuality and sexual offences. Such discriminatory attitudes are clear from the wording of the act, including prohibition of ‘creating non-traditional sexual attitudes.’ The laughable idea of ‘creating’ a sexual identity within another demonstrates the frightening stupidity of such discrimination, which blatantly ignores reality in pursuit of a fictitious ‘traditional’ sexual orientation.⁷⁶

How, then, should the E.U. deal with corporations, such as Atos, which remain steadfast in supporting a regime – a member of the Council of Europe, no less – that continues to legislate against the very human rights principles on which the Convention and the Charter are founded? In Section V, *infra*, the efficacy of leaving CSR to purely voluntary, corporate self-regulated efforts is examined, and rejected, as is coercive efforts to use litigated compliance; in Section VI, a public-opinion driven-model of CSR social reporting, facilitated by an independent agency established by the E.U., is proposed.

V. Can Corporate Complicity in Assisting Regimes that Violate Core European Values be Effectively Managed by a Voluntary Approach to CSR?

“The EU and Member States,” a commentary recently observed, “are in the driver's seat of advancing the global CSR discussion and its implementation.”⁷⁷ This responsibility carries with it a sizable burden, however. “[B]usinesses and government trade facilitators must review and recommend how they are going to meet the challenge of a CSR policy that while at once championing the charge of social responsibility can, at the same time, create a barrier to actualization.”⁷⁸ For example, the emphasis on voluntary CSR since the 2001 Green Paper issued has now made it “common” for “European MNEs . . . to have special CSR or sustainability departments.”⁷⁹

Other recent scholarship has argued for more aggressive policing of E.U. companies' commerce with regimes in which a company directly aids and abets a non-E.U. nation in violating the kind of rights protected by the Convention and the Charter.⁸⁰ For example, in examining the role of Trovicor GmbH in providing technological infrastructure and maintenance services to the Assad regime in Syria that permits the regime “to track individuals' movements, access electronic files, and even detain and torture members of the opposi-

⁷² See eg Stephen Wilson, ‘Sochi 2013: Olympic Boycott Not Necessary, Russia Says, Vowing To No Discrimination Against Gays, Huffington Post—Canada’ (*Huffington Post*, 22 Aug. 2013) <http://www.huffingtonpost.ca/2013/08/22/sochi-olympic-boycott_n_3794775.html>.

⁷³ See 14th European AIDS Conference (October 16-19 2013) Brussels, Belgium, at <<http://www.eacs-conference2013.com/index.php?id=40>>.

⁷⁴ ‘Highlights From EACS 2013: Russian Anti-Gay Propaganda Law Concerns HIV Experts,’ (*Infectious Disease News*, 16 Oct 2013) at <<http://www.healio.com/infectious-disease/eacs-2013-resource-center/russian-anti-gay-propaganda-law-concerns-hiv-experts>>.

⁷⁵ *ibid*.

⁷⁶ Joe Marshall, ‘Russia's Precarious Minority And A Chilling Reversal Of Liberalization’ (21 Aug 2013) *The Student Journals* <<http://www.studentjournals.co.uk/comment/politics/2295-russia-s-precarious-minority-and-a-chilling-reversal-of-liberalisation>>.

⁷⁷ Tim Breitbarth and Phil Harris and Rob Aitken, ‘Corporate Social Responsibility In The European Union: A New Trade Barrier?’ (2009) 9 *J Public Affairs* 239, 252.

⁷⁸ *ibid*.

⁷⁹ *ibid* at 251.

⁸⁰ See Rishi R Gupta, ‘Comment, Germany's Support Of Assad: Corporate Complicity In The Creation Of The Syrian Surveillance State Under The European Convention On Human Rights’ (2013) 28 *Am U Int'l L Rev* 1357, 1359, 1374-1386.

tion” by “tracking a speaker’s location and identity”,⁸¹ a commentator argues “the [Convention] provides the ECtHR jurisdiction over the extraterritorial effects of a corporation’s actions through the state agent theory” and that “Germany violated its positive obligation to respect the rights in Article 8 of the [Convention] by failing to regulate the Germany company ... after it facilitated the creation of a Syrian surveillance state.”⁸²

Of course, such allegations of direct violations of the Convention by supplying regimes with equipment and services used to effectuate human rights violations are distinguishable from the indirect facilitation of human rights violations, inconsistent with the Convention, by means of cooperating with a foreign sovereign in sponsoring a world-wide propaganda event while that same sovereign aggressively seeks to deny human rights to the LGBTI community within its borders. Particularly when the corporate entity—such as Atos—is a citizen of an E.U. country that not only is *not* boycotting the propaganda event, but is, to the contrary, *sending an official delegation to participate* in it⁸³, theories of direct-liability will be swept aside by the political cover offered by the home-state government’s sovereign policies. Moreover, theories of direct liability would in any event falter because the corporate support for the propaganda event is not, within the understanding of causation in either the common-law of torts or the civil-law of delict, the cause of the objectionable legislation, nor is that legislation a product of the corporate sponsorship. Rather, the relationship—while clear—between corporate support for the regime as it actively works to deny human rights to the LGBTI community, is also attenuated; and it would be very difficult for any member of the Russian LGBTI community, or any individual or organization that spoke favorably of the LGBTI community in Russia and was thereafter punished under Section 6.21 of the Administrative Offences Code, to show that corporate sponsors of a contemporaneous propaganda event were legal causes of their injury.

Indeed, efforts in the United States to impose direct corporate liability for aiding and abetting regimes that violate human rights have been mixed, at best, and may be entirely foreclosed by two recent rulings of America’s Supreme Court concerning the two U.S. laws most often invoked by victims in such cases, the Alien Tort Statute (ATS)⁸⁴ and the Torture Victims Protection Act (TVPA).⁸⁵ First, the TVPA has been interpreted not to apply to corporate entities.⁸⁶ Second, the ATS has been interpreted not to apply to rights violations that do not occur in U.S. territory,⁸⁷ and it remains unclear whether the ATS applies to corporations *at all* after one influential American federal appeals court held that it does not.⁸⁸ Furthermore, major efforts to use litigation to hold accountable MNEs who supplied the tools that propped up South Africa’s Apartheid Regime — from IBM-supplied identification card systems to Ford and Chrysler police vehicles⁸⁹ — have been interminable, prolix, unwieldy, and ultimately, will fail under the U.S. Supreme Court’s new, territorially-limited interpretation of the ATS.⁹⁰ Thus, while some scholars have proposed that the E.U. needs to do what too many of the American courts have hesitated to do — declare unequivocally that the corporation should be considered an actor subject to international law, and that those corporations that qualify as MNEs are to

⁸¹ *ibid* at 1359-1360 and (n 7) (citing Monitoring The Opposition: Siemens Allegedly Sold Surveillance Gear To Syria (*Spiegel Online Int’L*, 11 Apr 2012) <<http://www.spiegel.de/international/business/ard-reports-siemens-sold-surveillance-technology-to-syria-a-826860.html>>); see Nicole Perlroth, Researchers Find 25 Countries Using Surveillance Software (*The NY Times*, 13 March 2013) <http://bits.blogs.nytimes.com/2013/03/13/researchers-find-25-countries-using-surveillance-software/?_r=0> (noting that ‘Privacy International and other groups filed complaints with the Organization for Economic Cooperation and Development against Gamma Group and Trovicor GmbH, a German company that also sells surveillance software’); Chloe Shuffrey, Our OECD complaint against Gamma International and Trovicor (5 Feb 2013) Privacy Int’L, <<https://www.privacyinternational.org/blog/our-oecd-complaint-against-gamma-international-and-trovicor>>.

⁸² Rishi R Gupta (n 80) at 1360, 1361.

⁸³ ‘France Opposes Games Boycott Over Anti-Gay Law: France’s Sports Minister Has Said It Would Be Wrong To Boycott The 2014 Winter Olympics In Russia Over Moscow’s Adoption Of A Contentious Law That Bans Gay “Propaganda” For Minors’, (*The Local: France’s News in English*, 13 Aug 2013) <<http://www.thelocal.fr/20130813/france-opposes-games-boycott-over-anti-gay-law>>.

⁸⁴ 28 USC § 1350.

⁸⁵ 106 Stat 73, note following 28 USC § 1350.

⁸⁶ *Mohamed v Palestinian Authority*, 132 S. Ct 1702 (US 2012). The Court noted that individual corporate directors, officers, employees or agents could be held personally liable under the statute. That is often, however, of little utility to torture victims, since identifying specific corporate agents as the wrongdoers is a daunting—often impossible—task, as is providing individual knowledge of entity wrongdoing, and since remedies against the individual actors often cannot approach the adequacy of entity liability.

⁸⁷ *Kiobel v. Royal Dutch Petroleum Co*, 133 S Ct 1659 (US 2013); see Jeffrey A Van Detta, ‘Some Legal Considerations For EU-Based MNEs Contemplating High-Risk Foreign Direct Investments In The Energy Sector After *Kiobel v. Royal Dutch Petroleum* and *Chevron Corporation v. Naranjo*’ (2013) 9 South Carolina J. Int’l L & Bus, 162.

⁸⁸ *Kiobel v. Royal Dutch Petroleum Co* (US 2013) 621 F.3d 111 (2d Cir 2010), *aff’d* on other grounds, 133 S Ct 1659; see Matteo M Winkler, ‘What Remains of the Alien Tort Statute After *Kiobel*?’ (2013) 39 NCJ Int’l L & Com Reg 171.

⁸⁹ See *In re South African Apartheid Litigation*, 346 F Supp 2d 538 (SDNY 2004), *rev’d sub nom Khulumani v Barclay Nat Bank Ltd*, 504 F 3d 254 (2d Cir 2007).

⁹⁰ *Balintulo v Daimler AG*, 727 F 3d 174 (2d Cir 2013).

be treated as quasi-sovereigns when their actions touch and concern a government regime's policies that either violate international law or are repugnant to the instruments of the E.U.⁹¹—the dependency of the E.U. member states on corporate activity to generate employment and prosperity makes such heavy-handed enforcement untenable as a practical matter.⁹²

What does this mean for other kinds of coercive measures that various E.U. or Council of Europe bodies, or member state legislatures, might be urged to consider as vehicles for CSR enforcement? Regardless of the viability of a court-oriented campaign to combat corporate complicity in extolling an Olympic host nation in the midst of increasing human rights violations, the tension with E.U.'s human rights policy created by Russia's legislation remains strong. Indeed, if anything, the tension between the E.U.'s policies and the Russian legislation became both evident and acute with the November 7, 2013 release of the ECJ's ruling, discussed in Section III.A above, that will permit LGBTIs facing persecution in their home country to apply for asylum in an E.U. member nation. It did not take long for the implications of this ruling for Russian LGBTIs and advocates for LGBTIs' legal and social equality in Russia to see that this ruling may very well open E.U. doors to Russians seeking asylum in E.U. member nations.⁹³ Nor did it take long to see how much difficulty individual E.U. member nations will have in dealing with their human rights obligations when it comes to the actions of their eastern neighbor.

A perfect example of how tensions among E.U. obligations, member-states' ambitions, and Russian power distort meaningful government action comes from the recent "about-face" by Dutch Foreign Minister Frans Timmermans. In response to legislative inquiries, "Timmermans sent a letter to [the Dutch] parliament," in which, news reports stated, he observed that "[t]he [Russian] anti-homosexuality propaganda law has a stigmatizing and discriminatory effect and contributes to a climate of homophobia" and "[t]he circumstances of the LGBTIs, including the possible consequences of the new law, will of course be considered in evaluating asylum requests," and may establish violations of protected rights that "would lead to the issuing of an asylum permit."⁹⁴ Yet, within 48 hours after those reports circulated, the Dutch Foreign Minister retreated entirely from this position, telling RAI Novosti (a Russian news company which President Putin summarily dissolved in December 2013⁹⁵) that his comments had been "misinterpreted" and taken out of context, and declaring that LGBTIs in Russia are *not* being persecuted.⁹⁶

One can hardly expect the E.U. authorities to regulate – or punish – corporate support for regimes hostile to principal aims of E.U. human-rights policies if E.U. member nations themselves cannot muster the

⁹¹ See eg Sorcha McLeod, 'Corporate Social Responsibility Within The European Union Framework' (2005) 23 Wis Int'l LJ 541, 551-552 ("Yet the two-pronged basis on which corporations resist the imposition of legally-binding norms is first, that they are not subjects of international law, and second, that to do so would shift responsibility from states to private actors. In the absence of voluntary corporate compliance with CSR norms, what is the solution?").

⁹² One might well ask at this juncture about the possibility of direct action against the IOC for its award of games to a nation not compliant with core values contained in instruments such as the ECHR. In reality, such a strategy portends even less favorably. While recognizing that over the past 100 years, the IOC's motives, incentives, and commitments have frequently contradicted the fundamental principles of the Modern Olympic Movement, set out in the Olympic Charter, effectuating change through the use of the courts has been futile '[a]s national courts have been unwilling to rule against the IOC,' and thus other change mechanisms must be found 'so that the Olympic Movement's fundamental values of fairness and equality always prevail.' Jennifer Ann Cleary, 'A Need To Align The Modern Games With The Modern Times: The International Olympic Committee's Commitment To Fairness, Equality, And Sex Discrimination' (2011) Case W Res L Rev 1285, 1287 (2011)(footnotes omitted).

⁹³ See eg, Sunnivié Brydum, 'European Court Declares Gays Can Seek Asylum In EU'—The European Court Of Justice Declared That Sexual Orientation Is A Fundamental Characteristic For Which Many People In Nations Around The World Are Persecuted, And Can Now Seek Asylum In The European Union, Advocate Com' (*Advocate*, 7 Nov 2013) <<http://www.advocate.com/news/world-news/2013/11/09/european-court-declares-gays-can-seek-asylum-eu>> (Thursday's ruling could also have implications for LGBT people from other nations with laws criminalizing an LGBT identity who want to seek asylum in the EU, including Russia, which enacted a nationwide ban on "propaganda of nontraditional sexual relations" earlier this year); Esther Tanquintic-Misa, 'Gays Can Seek Asylum In EU', (*IBTraveler*, 11 Nov 2013) <<http://au.ibtimes.com/articles/521021/20131111/gays-lgbt-lesbian-asylum-eu.htm#Upjz3Y3QEmv>>; see also Paul Sonne, 'Russian Gays Look To U.S. For Asylum' (*Wall St J*, 16 Aug 2013), at <<http://online.wsj.com/news/articles/SB10001424127887324139404579016692141360158>> (efforts by Russian LGBTIs to seek asylum 'may become more common as Russia moves ahead with controversial antigay regulations, which have led some to call for a boycott of the 2014 Winter Olympics in Sochi' including 'the so-called gay propaganda bill, which punishes those who publicly inform minors that "nontraditional relationships" are OK,' as well as 'new laws [that] ban adoptions by same-sex couples and criminalize actions that insult the "religious feelings" of Russian believers').

⁹⁴ 'Dutch Say Russian Gay Rights Violations May Warrant Asylum' (*Reuters*, 5 Nov 2013) <<http://www.reuters.com/article/2013/11/05/us-netherlands-russia-gays-idUSBRE9A40LT20131105>>; 'Dutch Foreign Minister: Russia Does Not Prosecute Against Gay People – There Is No Ground For Asylum', (*PinkNews*, 11 Nov 2013) <<http://www.pinknews.co.uk/2013/11/11/dutch-foreign-minister-russia-does-not-prosecute-against-gay-people-there-is-no-ground-for-asylum/>>.

⁹⁵ Steven Lee Meyers, 'Without Notice, Putin Dissolves A News Agency', *N.Y. Times* (10 Dec 2013), at A1.

⁹⁶ Dutch FM: 'Gays In Russia Not Prosecuted, Don't Need Asylum In Netherlands' (*RT News*, 10 Nov 2013) <<http://rt.com/news/netherlands-minister-russia-gay-asylum-508/>>.

political will to confront them directly. Nonetheless, simply because complex questions of diplomacy and public policy may inhibit official government action, there is no reason to simply abandon E.U.-facilitated efforts to promote CSR. Indeed, none of the foregoing should be seen as suggesting that E.U. law has no role to play in Atos's decision to remain a sponsor of the Sochi Olympic Games. What has been established simply is that Sochi sponsorship is a CSR problem that is not to be addressed practically under the rubric of direct liability for violations of the Convention or the Charter, or even by other kinds of punitive regulation by recalcitrant member-state governments.⁹⁷

In Section VI, we examine an alternative to an entirely voluntary approach to CSR on the one hand, and a coercive approach on the other hand, and consider the significance of that *via media* approach for dealing with situations such as the one presented by Atos's role as a high-profile sponsor of the Sochi Winter Olympic Games.

VI. A Via Media Between "Suggested" and "Coerced" CSR? The Potential for an Independent Human-Rights Scoring Authority and Required "Human-Rights Labeling"

A. The Disclosure Approach to Regulation

The discussion of CSR within the E.U., as elsewhere, has generated debate over whether CSR should be accomplished by "hard" law or "soft" law.⁹⁸ A better question, however, is how governments can combine both approaches in thoughtful ways to achieve a realistic middle-ground that incorporates elements of both hard and soft law.⁹⁹ For some time, social disclosure by corporations, to achieve corporate social transparency, has been viewed as one such middle way.¹⁰⁰ The goal of social disclosure is two-fold, and synergistic: organizational transparency and stakeholder engagement.¹⁰¹ Organizational transparency is essential to "contributing to an ongoing stakeholder dialogue."¹⁰² That dialogue, in which "corporations and their stakeholders" discuss "appropriate firm behavior," is the essence of stakeholder engagement.¹⁰³ What has become known as "disclosure-based regulation" has proven valuable because disclosure requirements are enacted with less difficulty, cost, and unintended consequences than substantive regulation, and "disclosure schemes comport with the prevailing political philosophy" by "preserv[ing] individual choice while avoiding direct governmental interference."¹⁰⁴

⁹⁷ For a passionate argument laying out a roadmap for advocates to use in bringing such direct-liability cases before municipal courts in the EU by relying on EU instruments, customary international law, and the municipal law of delict in individual EU member-states, see Liesbeth F H Enneking, 'Crossing The Atlantic? The Political and Legal Feasibility of European Foreign Direct Liability Cases' (2009) 40 *Geo Wash Int'l L Rev* 903.

⁹⁸ See eg John J Kirton and Michael J Trebilock (eds) *Hard Choices, Soft Law: Voluntary Standards in Global Trade, Environment and Social Governance* (Ashgate 2004) 23-30, 189-190 (defining 'hard' law as government-enacted rules versus 'soft' law as voluntary measures undertaken by corporations, often with the encouragement of governments or Inter-Governmental Organizations). Extensive, contextual discussions comparing 'hard' law and 'soft' law approaches to CSR issues are found at id, Chapters 16-19.

⁹⁹ See eg Larry Catá Backer, 'From Moral Obligation To International Law: Disclosure Systems, Markets And The Regulation Of Multi-national Corporation' (2008) 39 *Geo J Int'l L* 591, 597-601.

¹⁰⁰ Eg Cynthia A Williams, 'The Securities and Exchange Commission and Corporate Social Transparency' (1999) 112 *Harv L Rev* 1197, 1273-1296. The term first entered corporate discourse through R E Freeman's 1984 book, *Strategic Management: A Stakeholder Approach*, id at 853, 884. The idea, however, of a corporation owing responsibilities to persons beyond shareholders is considerably older. See E Merrick Dodd Jr, 'For Whom Are Corporate Managers Trustees?' (1932) 45 *Harv L Rev* 1145, 1147-48 'An obvious play on the word "stockholder"', the stakeholder 'approach sought to broaden the concept of strategic management beyond its traditional economic roots, by defining stakeholders as "any group or individual who is affected by or can affect the achievement of an organization's objectives." The purpose of stakeholder management was to devise methods to manage the myriad groups and relationships that resulted in a strategic fashion.' Edward R Freeman and John McVea, 'A Stakeholder Approach To Strategic Management', Darden Business School Working Paper No 01-02 (2001) (n 4) <http://ssrn.com/abstract=263511>. A long-running debate exists in corporate law between those who believe the corporation's sole or primary purpose is to maximize shareholder profit, the "shareholder primacy" theory, and those who believe a corporation must honor all of its constituents' interests, including the concerns of employees, creditors, customers, and society at large, the "stakeholder" theory. Lisa M Fairfax, 'The Rhetoric of Corporate Law: The Impact of Stakeholder Rhetoric on Corporate Norms' (2005-2006) 31 *J Corp L* 675. While the stakeholder approach has its limits — eg applying only to those 'human beings in a business firm or who engage in transactions with the firm,' Eric W Orts & Alan Strudler, 'The Ethical and Environmental Limits of Stakeholder Theory' (Apr 2002) 12 *Bus Ethics Qtrly* 215, 215-216 — 'stakeholder theory has been critical to helping CSR scholars identify and specify the social obligations of business'. Jill A Brown, and William R Forster, 'CSR And Stakeholder Theory: A Tale Of Adam Smith' (2013) 112 *J Bus Ethics* 301, 31. For a comprehensive view of European perspectives on stakeholder theory, see Maria Bonnafous-Boucher and Yvon Prequeux (eds), *Stakeholder Theory: A European Perspective* (Palgrave Macmillan 2005).

¹⁰¹ David Hess, 'Social Reporting and New Governance Regulation: The Prospects of Achieving Corporate Accountability through Transparency' (2007) 17 *Business Ethics Qtrly* 453, 454-455.

¹⁰² *ibid* at 453, 454-455.

¹⁰³ *ibid* at 453, 454-455.

¹⁰⁴ Paula J Dalley, 'The Use and Misuse of Disclosure as a Regulatory System' (2007) 34 *Fla St L Rev* 1089, 1092, 1093

Social disclosure has been seen to be of particular benefit to “the overall human rights project” in at least three ways.¹⁰⁵ First, it is argued that corporate disclosure will “result in behavior modification on the part of decision makers.”¹⁰⁶ Second, it is also argued that social disclosure has special value “in its ability to empower socially conscious shareholders who will be equipped with information that can be used to engage corporate management in dialogue and influence corporate decisions.”¹⁰⁷ Third, other groups – consumers, workers, and social activists, for example – are, it is argued, likewise empowered to engage with the corporation in a variety of spheres over the impact of the corporation’s business practices as they are relevant to the concerns of each group.¹⁰⁸

Corporate social reporting and related transparency approaches to CSR also present a number of challenges. First, there is the challenge of precisely which corporations should be subject to reporting requirements, a question which itself involves clearly defining the policies to be served by the reporting measure(s). Next, there is the question of identifying the audience(s) at whom the information is aimed, and structuring reporting requirements accordingly. Then, there is the question of scope – i.e., exactly just what kind of information should be reported, and how it will be verified? Fourth, there is the issue of presentation – that is to say, what does the reporting requirement need to contain in order for members of the target audience to be able to make meaningful comparisons and contrasts among companies based on the information reported? Fifth, what are the consequences for non-compliance – e.g., failing to report, making inadequate disclosures, or submitting misleading disclosures? Sixth, there is the question of what, if any, consequences or further actions should apply based on the substantive content of the disclosures themselves, and whether such follow-up is to be carried out by corporate stakeholders and the public generally, by government, or by some (carefully thought-out) combination of both? While a trend of “convergence” in CSR reporting among the world’s 250 largest corporations has been observed, the convergence has tended to coalesce around a pattern that may not be sufficiently broad to consistently satisfy “[t]he motivations driving CSR reporting,” which “tend to be a mixture of rational and strategic reasons as well as socially conscious values and even moral or ethical dimensions,” and could instead enable “corporations to engage in a manner of reporting that is chiefly strategic in nature” or that merely provides “ritualistic comfort to stakeholders.”¹⁰⁹

Yet, despite these challenges, the consensus is emergent that CSR disclosures do have discernible impact on stakeholder groups, including consumers.¹¹⁰ There is also evidence that compelled disclosure can be effective in motivating stakeholder groups – particularly when a governmental body not only compels the disclosure, but also shapes its content.¹¹¹ However, even under those optimized circumstances, care and sensitivity to both culture¹¹² and cognitive psychology¹¹³ must be exercised by regulators, to ensure that the message of the disclosures remains coherent, and the ways in which the disclosures are expressed are mentally digestible by the target audiences. Indeed, “cognitive overload” is a phenomenon that has been

¹⁰⁵ Aaron A Dhir, ‘The Politics of Knowledge Dissemination: Corporate Reporting, Shareholder Voice, and Human Rights’ (2009) 47 *Osgoode Hall LJ* 47, 81.

¹⁰⁶ *ibid.*

¹⁰⁷ *ibid* at 65-76, 81.

¹⁰⁸ *ibid* at 64 n 69 (citing David J Doorey, ‘Who Made That? Influencing Foreign Labour Practices through Reflexive Domestic Disclosure Regulation’ (2005) 43 *Osgoode Hall LJ* 353, 375, 376).

¹⁰⁹ Iris H-Y Chiu, ‘Standardization in Corporate Social Responsibility Reporting and a Universalist Concept of CSR – A Path Paved with Good Intentions’ (2010) 22 *Fla J Int’l L* 361, 364, 391-392; see Birgitta Schwartz and Karina Tilling, ‘“ISO-lating” Corporate Social Responsibility in the Organizational Context: A Dissenting Interpretation of ISO 26000’ (2009) 16 *Corp Soc Resp & Envtl Mgmt* 289,29; Ralph Hamann and others, ‘Universalizing Corporate Social Responsibility? South African Challenges to the International Organization for Standardization’s New Social Responsibility Standard’ (2005) 110 *Bus & Soc’y Rev*.

¹¹⁰ See eg Bill Libit, ‘The Corporate Social Responsibility Report and Effective Stakeholder Engagement, Harvard Law School Forum on Corporate Governance and Financial Regulation’ (28 December 2013) <<http://blogs.law.harvard.edu/corpgov/2013/12/28/the-corporate-social-responsibility-report-and-effective-stakeholder-engagement/>>; Julie Pirsch and Shruti Gupta and Stacy Landreth Grau, ‘A Framework for Understanding Corporate Social Responsibility Programs as a Continuum: An Exploratory Study’ (2007) 70 *J Bus Ethics* 125.

¹¹¹ See eg Ryan Jaslow, ‘Study: Graphic Tobacco Warning Labels More Effective At Delivering Anti-Smoking Message’ (*CBS News*, 15 June 2012) <<http://www.cbsnews.com/news/study-graphic-tobacco-warning-labels-more-effective-at-delivering-anti-smoking-message/>>.

¹¹² See Peggy Simcic Bronn and Albana Belliu Vrioni, ‘Corporate Social Responsibility and Cause-Related Marketing: An Overview’ (2001) 20 *Int’l J Advertising* 207 (‘Clearly, countries that adapt practices perceived as successful in other countries without researching their own consumers’ attitudes cannot hope to succeed based on the same premises’).

¹¹³ See Troy A Paredes, ‘Blinded By the Light: Information Overload and Its Consequences for Securities Regulation’ (2003) 81 *Wash U L Q* 417, 418-419, 434-443.

observed in the increasing number and detail of disclosures required under securities-regulation laws¹¹⁴, which provides an important, and tempering, lesson for the advocates of corporate social reporting.¹¹⁵

In the next section, two paradigm examples of compelled, rather than voluntary, corporate social reporting are examined, and from those examples, the broad outlines of a proposal for Commission-mandated corporate human-rights disclosure and communication are derived. In this proposal, the author does not purport to have “all” of “the answers,” or even a significant part of them. The proposal is, it is hoped, a launching point for further dialogue within Europe about creating a system under which E.U.-based corporations are held to account to their stakeholders and the consuming public generally concerning the extent to which they are aiding and abetting regimes that fall short in significant ways of honoring the commitment to human rights that Europe has made in the Convention and in the Charter.

B. An Approach to Employing Disclosures in Regulating Corporate CSR to Promote Human Rights: Learning from, and Improving upon, Section 116 of France’s Nouvelles Régulations Économiques and California’s Transparency in Supply Chains Act of 2010

In looking for solutions outside of the “box” formed by political and economic realities, there must be a middle road – the proverbial *via media* – between a vision of CSR that involves merely appealing to the “better angels” of the natures of those who run MNEs¹¹⁶, and a more prescriptive vision recalling the wisdom of James Madison that “[if] men were angels, we would need no laws.”¹¹⁷ While “[t]he law, when enforced, can be used to punish,” or “to articulate social norms and standards” or even “to define and impose responsibilities,” it “can also, however, be used to change incentives.”¹¹⁸ Indeed, “[w]hen designed and implemented properly, a good law establishes an incentive structure to align legal responsibility with the actors most able to change a set of results – actors who possess the information, the institutional capacity, and the practical ability to make a difference in a situation our society seeks to improve.”¹¹⁹

Two constituencies of European MNEs have both a practical ability and institutional capacity to “make a difference” about how those MNEs interact with regimes that are not upholding European human-rights values: [1] those with whom the MNEs do business (customers, contractors, suppliers, vendors, distributors, *et cetera*) and [2] institutional shareholders and the investing public generally. The challenge – and the opportunity – is for the E.U. to legislate a system by which those constituencies will be put in possession of information about an MNE’s activities that raise concerns under the Convention and the Charter.¹²⁰ That approach will require legislation to determine [1] what body will receive competency to make such determinations; [2] how such determinations will be communicated to the target constituencies; and [3] what the constituencies, and others, may do with such information to exert pressure on the MNE to bring its actions (or its failures to act) into conformance with the fundamental values of the Convention and the Charter.

As a first step, it will be important for the E.U., through an appropriate legal instrument, to make it clear that, as Professor Ivar Kolstad has argued, for human rights to be vindicated while corporations chase profits on a globalized plane, MNEs must have more than merely “negative duties” not to violate human rights; they must bear “positive duties to use their powers to pressure governments into performing their assigned duties.”¹²¹ Having made that positive duty obvious, even if not hitherto adopted as E.U. law, the E.U. can

¹¹⁴ *ibid* at 444-462.

¹¹⁵ Professor Parades discusses an array of those lessons, see *id* at 473-484.

¹¹⁶ The phrase comes from the last line of President Abraham Lincoln’s First Inaugural Address (4 March, 1861) available at <<http://www.bartleby.com/124/pres31.html>>.

¹¹⁷ Statement Of Senator Patrick Leahy (D-Vt.), Hearing On ‘Secret Law And The Threat To Democratic And Accountable Government’ Before The Subcommittee On The Constitution, United States Senate Judiciary Committee, April 30, 2008, at <http://www.judiciary.senate.gov/hearings/testimony.cfm?id=e655f9e2809e5476862f735da139cdb5&wit_id=e655f9e2809e5476862f735da139cdb5-0-1> (paraphrasing The Federalist No 51)>.

¹¹⁸ Shannon Raj, ‘Note, Blood Electronics: Congo’s Conflict Minerals and the Legislation That Could Cleanse the Trade’ (2011) 84 S Cal L Rev 981, 982.

¹¹⁹ *ibid*.

¹²⁰ See eg Eric A Engle, ‘Corporate Social Responsibility (CSR): Market-Based Remedies for International Human Rights Violations?’ (2004) 40 *Williamette L Rev* 103, 120-121 (noting the role of shareholder activism and labelling schemes in pursuit of CSR).

¹²¹ Ivar Kolstad, ‘Human rights and positive corporate duties: the importance of corporate–state interaction’ (June 2012) 21 *Business Ethics: A European Review* 276 <<http://onlinelibrary.wiley.com/doi/10.1111/j.1467-8608.2012.01654.x/full>>; accord Letnar Cernic Jernej ‘Two steps forward, one step back: the 2010 report by the UN Special Representative on Business and Human Rights,’ *German Law Journal* 11.11 (2010): 1264-1280, 1276(‘The obligation to protect human rights includes the obligations of corporations to protect persons from human rights violations and to support the protection of human rights by employing the corporation’s expertise and resources to protect the human rights of individuals and local communities where they operate’).

establish a means of implementation that avoids the limited efficacy of the hortatory while eschewing the cost, complexity, complications, and corporate resistance that would attend to prescriptive regimes.

Models for such regulation that strike a careful *via media* between “suggested” and “coerced” CSR compliance, have been implemented by both an E.U.-member nation, France, and by a non-E.U. jurisdiction, the American state of California, in using non-coercive law to encourage MNEs to take CSR more seriously.¹²² Each of these approaches is examined in turn, and then a model, derived from these examples, is set out for addressing corporate conduct that aids or abets regimes that act inconsistently with the human-rights values enshrined in the Convention and the Charter.

1. Section 116 of France’s *Nouvelles Régulations Économiques*

The European CSR movement directly influenced France’s Assemblée Nationale to adopt Section 116 of France’s *Nouvelles Régulations Économiques* (NRE), and a subsequent implementing decree.¹²³ The NRE mandated that in their annual reporting, publicly-traded French corporations must disclose information in four general areas, including “information, the detail of which” was to be determined “by a decree of the Council of State,” concerning “how the company takes into account the social and environmental consequences of its activities.”¹²⁴ The subsequent decree required additional reporting on human resources, labor standards, and community interests – three issues of interest to corporate stakeholders.¹²⁵ Included among the required “community interests” disclosures are descriptions of how the company “takes into account the territorial impact of its activities as far as employment and regional development are concerned,” as well as “the methodology utilized by the company’s foreign subsidiaries to account for the impact of their activities on regional development and populations.”¹²⁶

This NRE-mandated social disclosure is not, of course, nor intended to be, a panacea for the concerns that prompted its enactment in the first place.¹²⁷ As Professor Dhooge has observed, the NRE-mandated social disclosures are “incomplete and highly dependent on corporate interpretation and stakeholder utilization of the proffered information.”¹²⁸ Specifically, criticism has been leveled at the NRE’s limited scope that embraces only companies publicly listed in France, imposes much lessened reporting requirements on their foreign subsidiaries, and leaves unaddressed whether there is a reporting obligation as to international operations beyond France’s borders.¹²⁹ Also, the omission of the interests of some relevant stakeholders – such as consumers and national and local governments – has drawn criticism.¹³⁰ Similarly, the NRE-mandated social disclosures leave a great deal “dependent on the interpretation of the reporting companies of the scope of their obligations” and requires only that companies disclose “the procedures undertaken to account for the impact of their activities on surrounding communities,” rather than any active engagement not only in respecting community rights, but also, in “contribut[ing] to their realization.”¹³¹ Even more significantly, no disclosure appears to be required to inform consumers and other stakeholders whether “their products and services are ... utilized to commit human rights violations.”¹³²

Perhaps the greatest concern expressed by critics is the “absence of reporting standards or guidelines.”¹³³ In reporting their social disclosures, companies have not been advised “with any degree of detail how this is to be accomplished” – such as by providing “a rating system or formula for measuring compliance with the social indicators listed in the implementing decree,” despite the “plethora of reporting frameworks,

¹²² Other individual EU member nations have adopted various kinds of social and/or sustainability disclosure reporting, as discussed in Cynthia A Williams and John A Conley, ‘An Emerging Third Way? The Erosion of the Anglo-American Shareholder Value Construct’ (2005) 38 *Cornell Int’l LJ* 493, 502-503 (discussing measures adopted in England, Belgium, Germany, Denmark, Netherlands, Norway, and Sweden). It is worth noting, too, the role of social disclosures in a non-E.U. member state that nonetheless is a member of the British Commonwealth -- Australia – which had its own legislative actions concerning corporate social disclosures. See Paul von Nessen, ‘Australian Efforts To Promote Corporate Social Responsibility: Can Disclosure Alone Suffice?’ (2009) 27 *UCLA Pac Basin LJ* 1, 20-34.

¹²³ See the best English-language source for NRE Section 116 and implementing decree 2002-221, Lucien J Dhooge, ‘Beyond Voluntarism: France’s *Nouvelles Régulations Économiques*’ (2004) 21 *Az J Int’l & Comp L* 441, 443-452.

¹²⁴ *ibid* at 449 (quoting Law No. 2001-420 of May 15, 2001, JO, May 16, 2001, Art 116, p 7776).

¹²⁵ *ibid* at 450.

¹²⁶ *ibid* at 450-451 (citation omitted).

¹²⁷ *ibid* at 466.

¹²⁸ *ibid* at 475.

¹²⁹ *ibid* at 476-477.

¹³⁰ *ibid* at 478.

¹³¹ *ibid* at 482.

¹³² *ibid*.

¹³³ *ibid* at 483.

principles and protocols” that are available.¹³⁴ This leaves companies uncertain of what disclosures comply, unable to make meaningful comparisons between their disclosures to those of other companies, and with stakeholders who will have little ability to verify that the disclosures made are candid or to compare various companies’ disclosures meaningfully.¹³⁵

Thus, while NRE Section 116 was, and remains, a landmark regulation as “the first legal requirement in any nation that firms develop and publicly report a ‘triple bottom line’” (i.e., social and environmental, in addition to economic),¹³⁶ the actual output from regulated companies has been both variable and confirmatory of the criticisms. For example, one study of the filings of 36 regulated French companies, suggests that although “companies succeeded in reporting some version of the required information,” the responses “varied considerably in form, content, length, and depth,” with some reports containing “only qualitative analysis and no quantitative measures,” and a majority that did not subject the data and its sources “to verification comparable to that applied to financial accounting information.”¹³⁷

2. California’s Transparency in Supply Chains Act of 2010

The state of California chose to promote national, indeed trans-national, efforts to eliminate slave labor in the production of products by enacting a state statute known as the California Transparency in Supply Chains Act of 2010 (“CTSCA”).¹³⁸ As described in a recent article by Professor Jonathan Todres, CTSCA “mandates that any manufacturer or retailer with worldwide annual gross receipts of at least \$100 million that is ‘doing business’ in the State of California disclose on its website its policies on, and measures undertaken to, combat forced labor and trafficked persons in its supply chain.”¹³⁹ The Attorney General of California is authorized to seek an injunction against any corporation that does not comply¹⁴⁰, which will have the effect of making corporate officers and directors personally liable for contempt of court (a jailable offense in the United States) if they do not then bring the corporation into compliance. The benefits of laws such as CTSCA are explained well by Professor Todres:

[The Act] represents an important first step in securing broad-based private sector involvement in the fight against human trafficking. Mandating disclosure on internal policies makes information available to consumers, investors, and other businesses. In turn, they can make purchasing or other decisions with this additional information....

If investment services start considering company responses to the [Act] when providing investment advice to clients, businesses will have even greater motivation to take additional actions to combat

¹³⁴ *ibid* at 483-484.

¹³⁵ *ibid* at 484-485; for subsequent studies in French that evaluate the impact of Section 116’s disclosures in various contexts see eg Salma Damak-Ayadi, ‘Le Reporting Social Et Environnemental Suite À L’application De La Loi NRE En France’ (2010) *Comptabilité-Contrôle-Audit* 53; Fabrice Mauléon, ‘Les Obligations Réglementaires En Matière De Communication Extra Financière Des Entreprises: La Gestion Des Risques De Contentieux Par La Transparence’ (2008) 2 *Vie & Sciences de L’entreprise* 44; Franck Cochoy, ‘La Responsabilité Sociale De L’entreprise Comme «Représentation» De L’économie Et Du Droit’ (2007) 1 *Droit et société* 91.

¹³⁶ Mary Lou Egan and others ‘France’s Nouvelles Regulations Economiques: Using Government Mandates For Corporate Reporting To Promote Environmentally Sustainable Economic Development’ (2003) (n 10) (presentation at the 25th Annual Research Conference of the Association for Public Policy and Management, Washington DC) <<http://www.bendickegan.com/pdf/EganMauléon-WolffBendick.pdf>>.

¹³⁷ *ibid* at 14.

¹³⁸ California Transparency in Supply Chains Act of 2010, SB 657, 2010 Reg Sess, 2010 Cal Legis Serv Ch 556 (West 2010) (codified at Cal Civ Code § 1714.43).

¹³⁹ Johnathan Todres, ‘The Private Sector’s Pivotal Role In Combating Human Trafficking’ (2012) 3 *Cal L Rev Circuit* 80, 81. Specifically, the act requires covered corporations to

[A]t a minimum, disclose to what extent, if any, that the retail seller or manufacturer does each of the following:

- (1) Engages in verification of product supply chains to evaluate and address risks of human trafficking and slavery. The disclosure shall specify if the verification was not conducted by a third party.
- (2) Conducts audits of suppliers to evaluate supplier compliance with company standards for trafficking and slavery in supply chains. The disclosure shall specify if the verification was not an independent, unannounced audit.
- (3) Requires direct suppliers to certify that materials incorporated into the product comply with the laws regarding slavery and human trafficking of the country or countries in which they are doing business.
- (4) Maintains internal accountability standards and procedures for employees or contractors failing to meet company standards regarding slavery and trafficking.
- (5) Provides company employees and management, who have direct responsibility for supply chain management, training on human trafficking and slavery, particularly with respect to mitigating risks within the supply chains of products.

Cal. Civ Code § 1714.43(c).

¹⁴⁰ Cal Civ Code § 1714.43(d).

trafficking and slave labor in their supply chains. Pressure from and campaigns by human rights organizations that highlight companies which are not doing enough in their eyes could further press manufacturers and retailers covered by the California law to do more. Over time, this disclosure law could spur meaningful changes in the private sector. Whether that happens will depend in large part on the response to companies' disclosure by investors, customers, human rights organizations, and anti-trafficking advocates.¹⁴¹

The California law has been criticized for leaving the nature and extent of the minimally compliant disclosures ambiguous¹⁴², which some (but not all) corporations have seized upon to provide little information¹⁴³, and which, at a minimum, will need to be strengthened by interpretative regulations from the Attorney General's Office.¹⁴⁴ Some commentators have proposed specific revisions to laws like CTSCA, including a federal version that has been discussed in the U.S. Congress,¹⁴⁵ and these proposals should be studied carefully by any E.U. body that might consider a similar enactment directed at certifying the human-rights compliance of any government or government-sponsored undertaking in which an E.U. corporation participates.

3. Synthesis: An E.U.-Mandated Human Rights Scoring and Labeling System to Publicize the Extent of Individual E.U. Corporate Harmony with E.U. Human Rights Norms, both Internally and in Foreign Investments and Collaborations

Distilling all of the foregoing discussions about CSR, LGBTI rights in the E.U., and the promise of social disclosure/transparency as an approach to regulating E.U. corporate CSR in the pursuit of promoting human rights, the following proposal is made:

1. The European Commission should propose a corporate disclosure regulation law to the European Parliament that requires companies with any E.U.-based operations to disclose whether they do business with, or participate as sponsors of, political entities that fall short of full compliance with the norms established by the Convention and the Charter. The law must also provide for the creation and implementation of a human-rights record "scoring and labeling" system that the products, services, advertising, and other business activities of each corporation must integrate so that the prescribed labeling is noticeable and conspicuous to stakeholders, customers, consumers, and the general public.¹⁴⁶
2. To further its impact, the law should provide for an authority whose work will be in creating and implementing a scoring and labeling system to give real meaning to a disclosure law.
3. The authority would have two principal missions. First, to provide independent, neutral ratings of how well the laws and practices of national governments and government-backed projects or

¹⁴¹ Todres (n 139) 97 (footnotes omitted).

¹⁴² *ibid* 95-97.

¹⁴³ See *id* Professor Todres has surveyed corporate disclosures made pursuant to CTSCA, and explained the range of disclosures that companies are making pursuant to it:

'Although the full impact of any new law can take years to assess properly, because the [Act] requires companies to post their disclosure on their websites, it is possible to obtain an early picture of initial responses to the new law. Based on this early limited evidence, it appears businesses are responding to the [Act] in one of four ways. First, some businesses are detailing policies and measures in place, evidencing a commitment to combating human trafficking and use of slave labor in their supply chains. Second, some businesses are providing disclosure that suggests they may not have undertaken significant steps to date but are committing to particular actions to fulfill the intent of the new law. Still other companies are disclosing that they are taking steps, but their disclosure merely tracks the statutory language and states they are doing what the law seeks without providing any details on how they are accomplishing this. Finally, it appears that at least a few companies understand the law literally as only requiring disclosure, and its disclosure reports that it is undertaking none of the measures the law sets out to combat human trafficking and the use of slave labor in its supply chains.'

ibid at 95 (footnotes omitted).

¹⁴⁴ See *id* at 96 ('Although at least some companies' counsel have indicated that merely confirming the company is or is not doing anything with regard to the measures outlined in the California Transparency Act technically constitutes compliance, the state Attorney General might decide otherwise').

¹⁴⁵ Sophia Eckert, 'The Business Transparency On Trafficking And Slavery Act: Fighting Forced Labor In Complex Global Supply Chains' (2013) 12 J Int'l Bus & L 383, 399-403, 407-414.

¹⁴⁶ For commentators discussing the need for social disclosures to be mandated, rather than voluntary, see Joshua A Newberg, 'Corporate Codes Of Ethics, Mandatory Disclosure, And The Market For Ethical Conduct' (2004) 29 Vt L Rev 253, 294 (fn 201) (citing authorities).

undertakings accord with both the fundamental values, as well as specific provisions, of the Convention, Charter, and related instruments and policies. It is, of course, understood that foreign governments and undertakings are not actually subject to the Convention, Charter, and other E.U. instruments and policies. The purpose of this activity is to put E.U. corporations on notice that their disclosure obligations are triggered, and to alert the public to look for such disclosures. CSR ratings¹⁴⁷ and indices¹⁴⁸ have been developed by private concerns for a number of years now, and those private-sector methodologies can inform the authority's effort to establish a human-rights rating system. This will require much more than merely appropriating the private-sector ratings systems, for "diversity characterizes the field of sustainability reporting, with a variety of disclosure practices and different standards of reporting being developed and promoted."¹⁴⁹ Moreover, the authority will need to devise extensive and coordinated strategies to publicize the ratings system and gain — and hold — the relevant audiences' attention in order for the scoring and labeling system to be more than ephemerally effective.¹⁵⁰

4. The second mission of the authority will be to prescribe the nature, duration, and location of the disclosures that E.U. corporations must make — and to determine how the authority can translate that information into a cognitively digestible labeling regime. This is not uncharted territory, of course. The E.U. has previously rolled out labeling in a variety of contexts, including genetically-modified foods,¹⁵¹ regional culinary traditions,¹⁵² and energy-consumption by consumer products.¹⁵³ That experience should prove invaluable. That does not mean, however, the project can be simply replicated from the other European labeling regimes. Substantial questions will have to be carefully vetted and considered, such as:
 - a. Would the authority use disclosure of a particular human-rights violation, or a particular kind of human rights violation, as the basis for labeling? Or would the authority simply issue ratings, with the scoring system designed to reflect various kinds of human rights violations in a country's (or a company's) record?
 - b. Would the authority mandate disclosure, and correlative labeling, for corporate assistance to, or collaboration with, foreign regimes that do not fully embrace E.U. human rights standards? How would that labeling differ, if at all, from the labeling of more direct human-rights violations by the company itself?

¹⁴⁷ See eg Aaron K. Chatterji and David I Levine and Michael W. Toffel, 'How Well Do Social Ratings Actually Measure Corporate Social Responsibility?' (2009) 18 *J Econ & Mgt Strategy* 125; Charles J Fombrun, 'Measuring Corporate Social Responsibility' (January 2005) 7 *Corp Reputational R*, 304. It is worth noting here that CSR ratings have come to be seen as stabilizing offsets to adverse events, such as product recalls. See Dylan Minor and John Morgan, 'CSR As Reputation Insurance: Primum Non Nocere' (2011) 53 *Cal Mgt Rev* 40.

¹⁴⁸ Cory Searcy and Doaa Elkhawass, 'Corporate Sustainability Ratings: An Investigation Into How Corporations Use The Dow Jones Sustainability Index' (2012) 35 *J Cleaner Production* 79; Steven Scalet and Thomas F Kelly, 'CSR Rating Agencies: What Is Their Global Impact?' (2010) 94 *J. Bus Ethics* 69; Maria Gjolberg, 'Measuring The Immeasurable? Constructing An Index Of CSR Practices And CSR Performance In 20 Countries' (2009) 25 *Scandinavian J. Mgt* 10; Avshalom Madhala Adam and Tal Shavit, 'How Can a Ratings-Based Method for Assessing Corporate Social Responsibility (CSR) Provide an Incentive to Firms Excluded from Socially Responsible Investment Indices to Invest in CSR?' (2008), 84 *J Bus Ethics* 899.

¹⁴⁹ Mohamed Chelli and Yves Gendron, 'Sustainability Ratings and the Disciplinary Power of the Ideology of Numbers' (2013) 112 *J Bus Ethics* 187. Chelli and Gendron also observe that although 'a number of agencies have sought to bring a sense of order in the field through the production of sustainability ratings, ... heterogeneity,' rather than homogeneity, 'characterizes the methods that they use.' *Id* at 187-188. For an overview of the major CSR indexing and ratings approaches, see Alexis Cellier and Pierre Chollet, 'The Impact Of Corporate Social Responsibility On Stock Prices: An Event Study Of Vigeo Rating Announcement', ANR Program: Potentiel regulatoire de la RSE (2010) <http://www.kadinst.hku.hk/sdconf10/Papers_PDF/p232.pdf>.

¹⁵⁰ See eg Alexis Celliera and Pierre Cholleta, 'The Impact of Corporate Social Responsibility Rating Announcement On Stock Prices: An Event Study On European Market', Universite Paris-Est, Institut de Recherche en Gestion (2011) <<http://citeseerx.ist.psu.edu/viewdoc/download?rep=rep1&type=pdf&doi=10.1.1.225.3990>>; Sankar Sen and C B Bhattachary, 'Does Doing Good Always Lead to Doing Better? Consumer Reactions to Corporate Social Responsibility' (2005) 38 *J Marketing R* 225; see also Alex Wang, 'The Effects Of Firms' Advertising Disclosures As A Reflection Of CSR Practices On Consumer Responses' (2011) 7 *Social Resp J* 592.

¹⁵¹ See eg Valery Federici, 'Genetically Modified Food and Informed Consumer Choice: Comparing US and EU Labeling Laws' (2010) 35 *Brook J Int'l L* 515; Yves Tiberghien, 'Competitive Governance and the Quest for Legitimacy in the EU: the Battle over the Regulation of GMOs since the mid-1990s' (2009) 31 *J Euro Integr* 289; Rachele Berglund Bailey, 'A Tale Of Two Systems: A Comparison Between US And EU Labeling Policies Of Genetically Modified Foods' (2009) 15 *San Joaquin Agric L Rev* 193; Jean-Christophe Bureau and Egizio Valceschini, 'European Food-Labeling Policy: Successes And Limitations' (2003) 34 *J Food Distr Res* 70.

¹⁵² Gsela Welz, 'Contested Origin: Food Heritage and the European Union's Quality Label Program' (June 2013) 16 *Food, Culture, & Soc'y* 265, 267-268.

¹⁵³ Stefanie Lena Heinze and Rolf Wüstenhagen, 'Dynamic Adjustment of Eco-labeling Schemes and Consumer Choice — the Revision of the EU Energy Label as a Missed Opportunity?' (2012) 21 *Bus Strat Env* 60.

- c. How would a disclosure or rating appear on a company's products, services, and promotional materials? Should it be of a "demerit" nature—a warning, in effect, of the corporation's dalliance with human rights-violators? Or should it be a mark of distinction – reserved for those corporations who do business only with human-rights respecters? In addition to the European experience with genetic-modification and culinary-cultural heritage ratings, the use of labels – colloquially known sometimes as "union bugs" – to identify products manufactured by employees who belong to a labor union is a long-standing practice and has generated considerable experience from which the envisioned authority might draw.¹⁵⁴ The authority will also need to be cognizant of research on the archetypes of consumer responses to CSR disclosure.¹⁵⁵
 - d. How would the disclosure or rating appear in the company's advertising? How would the format of the disclosure or rating be adjusted for the particular nature, and target audiences, of various media – e.g., for internet, print, broadcast communications (e.g., television, CATV, radio) or other tangible medium (signs, billboards, banners et cetera)? The disclosure or rating would have to be simple and straightforward. Media and advertising experience and expertise would be needed in order to identify and address the practical difficulties in implementing the ratings and disclosures in different kinds of media.
 - e. What level of business transactions or collaboration between the company and a sovereign that is non-complaint with European human-rights values would have to be present before the disclosure and labeling requirement is triggered? As just one of many paradigms that would have to be considered, would a European company whose products are distributed in one of the 32 U.S. States that retains the death-penalty have a disclosure and labeling obligation?¹⁵⁶ (Contrast that hard case with the relatively more direct and therefore straightforward case of an MNE, one of whose subsidiaries was—at least before the E.U.'s ban¹⁵⁷—selling pharmaceutical chemicals to State penal authorities for use in carrying out the death penalty within that State.)
5. To insulate it from the distorting and wearying effect of lobbying, the authority would need to have both expertise and remoteness from Brussels or Strasbourg – it would hardly do if the authority were assailable by the onslaught of lobbying that American law firms, among others, have directed at other E.U. officials, for example.¹⁵⁸ The authority should be able to seek advisory opinions from the Venice Commission about whether particular practices or laws are incompatible with European

¹⁵⁴ See eg A Bug's Life, Social Design Notes (3 Jan 2003) <<http://backspace.com/notes/2003/01/a-bugs-life.php>>; Jeff Rosen and Susan Parker Sherwood, 'Look for the Union Label: A Celebration of Union Logos and Emblems—Online Exhibit', Labor Archives & Research Center, San Francisco State University Leonard Library, <<http://www.library.sfsu.edu/about/depts/larc.php>>; 'University Of California Librarian Calls For Union Labels To Increase Worker Visibility—Archivist Wants To See Updated, Expanded Use Of Graphics To Energize Labor Movement', (*California Teacher*, Nov/Dec 2005) <http://www.docspopuli.org/articles/UnionLabels/Use_the_union_label.html>; Heidi Thorne, 'Union Made Promotional Products' (*PWP Blog*) at <<http://pwptoday.com/union-made-promotional-products-what-is-a-bug/>>; Monroe M Bird and James W Robinson, 'The Effectiveness of the Union Label and "Buy Union" Campaigns' (2013) 25 *Indus & Lab Rel Rev* 512.

¹⁵⁵ See eg Lois A Mohr and Deborah J Webb and Katherine E Harris, 'Do Consumers Expect Companies To Be Socially Responsible? The Impact Of Corporate Social Responsibility On Buying Behavior' (2001) 35 *J Consumer Affairs* 45.

¹⁵⁶ Such as the sale of Michelin tires in the US State of North Carolina, which retains the death-penalty. See 'USA: Maryland joins global trend against the death penalty' (*Amnesty Int'l*, 2 May 2013) <<http://www.amnesty.org/en/news/usa-maryland-joins-global-trend-against-death-penalty-2013-05-02>>; Sharon McCloskey, 'North Carolina Adopts A New Death Penalty Protocol' (*NCWatch*, 5 November 2013) <http://www.ncpolicywatch.com/2013/11/05/north-carolina-adopts-a-new-death-penalty-protocol/>; see also *Goodyear Dunlop Tires Operations, SA v Brown*, 131 S Ct 2846 (US 2011)(describing factually similar, limited distribution of Goodyear Luxembourg Tires, SA, Goodyear Lastikleri TAS (Goodyear Turkey), and Goodyear Dunlop Tires France, SA products in North Carolina).

¹⁵⁷ See eg Chris Woolston, 'Death Row Incurs Drug Penalty—Bid To Use Common Anaesthetic For Executions Threatens To Cut Off Supply To US Hospitals' (*Nature*, 22 Oct. 2013) <<http://www.nature.com/news/death-row-incurs-drug-penalty-1.13996>>; 'Death Penalty Opposition: EU Set to Ban Export of Drug Used in US Executions', (*Der Spiegel Online International*, 12 Dec 2011) <<http://www.spiegel.de/international/europe/death-penalty-opposition-eu-set-to-ban-export-of-drug-used-in-us-executions-a-803238.html>>.

¹⁵⁸ See Eric Lipton and Danny Hakim, 'Lobbying Bonanza as Firms Try to Influence European Union' (18 Oct 2013) (*NY Times*, (18 Oct 2013), <<http://www.nytimes.com/2013/10/19/world/europe/lobbying-bonanza-as-firms-try-to-influence-european-union.html>>. Indeed, the kind of remoteness that comes to mind is that of the Nobel Prize Committee, which Alfred Nobel took out of Sweden and in his will entrusted to a jury of ex-Norwegian parliamentarians:

After all, imagine you had to invent a jury with integrity and a lack of vanity or need for limelight. You couldn't go too wrong with a group of Norwegian ex-politicians.

This may have been what Mr. Nobel had in mind when he selected Norway as the state to deliver his peace prize. In contrast to Sweden, where the prizes for science are awarded, Norway never aspired to rule other nations and, from very early on, supported the idea of internationalism and peace conferences.

human-rights norms, and to act on those opinions by imposing “human-rights disclosure labeling” requirements on MNEs who are supporting the government progenitors of the offending practices.

Admittedly, these are only some – surely not all – of the questions and challenges that the European Commission, and the newly created authority, would have to address. But the promise of enlisting corporations to use their vast power and influence to improve human-rights observance in non-E.U. countries to the European level will make the difficulty of the journey worthwhile.

Imagine, for a moment, the impact of a uniform, well-publicized, and prominent system of human-rights disclosure labeling, displayed in every advertisement for an MNE, in all media; in every investment prospectus in notices to shareholders, customers, clients, vendors, et cetera; on all corporate web presences; on the packaging of any product that the MNE is involved in producing; on all of the MNE’s parent and subsidiaries’ websites; and in guides promoted and made readily available throughout the E.U. The power of such a regulatory approach is particularly strong around Olympic sponsorships, which are all about MNEs getting a huge “boost” to the value and goodwill generated by their own brand in the process of associating it with the Olympic brand. However, as recent studies have shown, the affiliation of an organization’s brand with the Olympic brand is tempered by the role of “attribution judgments of the consumer into the evaluation of organizational CSR practices”: “[W]hen consumers perceive CSR to be implemented for strategic reasons” – rather than societal and stakeholder-driven values – the effectiveness diminishes “and can even cause ‘diminishing returns’ for the organization.”¹⁵⁹ In short, the “lift” that an MNE’s brand expects to receive by sponsoring a foreign government undertaking will be muted or effectively cancelled out by the disclosure that the activity is one that the neutral authority has identified as that of a government that does not conduct either governance or lawmaking (or both) in accordance with European human-rights values and provisions of European law – which is a revelation consistent with contemporary movements focusing on CSR in corporate marketing generally.¹⁶⁰

Although sketched out only in broad strokes, the approach proposed here in concept combines the public pressure engine that fuels voluntary CSR with public disclosures mandated by law to optimize the information and mobilization of public opinion and pressure – factors particularly noteworthy given the powerful “branding” benefits that MNEs, like Atos, seek through Olympic sponsorship.¹⁶¹

VII. Concluding Thoughts on the Road Traversed, and the Road Ahead

If the sometimes elusive-to-define concept of CSR is to mean anything, it surely means that corporations must be committed to supporting human rights across the board, not only in their home countries and host nations, but in any sovereign whose land and people the activities of a corporation touch and concern. Europe’s commitment to human rights generally, and to the human rights of LGBTI individuals among its citizens and the citizens of the world specifically, is being undermined and dishonored by seemingly innocuous conduct in which Europe’s major corporations are engaged. Atos SE’s sponsorship of the Sochi Winter Olympic Games is an instructive, but by no means exclusive, example of the problem. Examining it has allowed us to “socially construct” CSR “in the specific context” of its human rights dimension. Because of the centrality of human rights to the E.U.’s very existence, the author’s CSR working definition in the human rights context has treated CSR’s imperative to go beyond the minimal in protecting and promoting human rights. On that basis, the author set out, in Section VI, a proposal for developing an approach to employing disclosures in regulating CSR to promote human rights – an approach learning from, and improving upon, Section 116 of France’s *Nouvelles Régulations Économiques* and California’s Transparency In Supply Chains Act of 2010. In

Jochen Bittner, ‘Don’t Blame The Norwegians’ (*N.Y. Times*, 11 Oct 2013) <<http://www.nytimes.com/2013/10/12/opinion/the-problem-with-the-prize.html>>.

¹⁵⁹ Matthew Walker and others, ‘Social Responsibility and the Olympic Games: The Mediating Role of Consumer Attributions’ (2010) 9 *J Bus Ethics* 659, 675.

¹⁶⁰ See eg Patrick E Murphy and Magdalena Oberseder and Gene R. Laczniak, ‘Corporate Societal Responsibility In Marketing: Normatively Broadening The Concept’ (2013) 3 *Acad Marketing Sci.* 86; see generally Anne Ellerup Nielsen and Christa Thomsen, ‘Corporate Social Responsibility (CSR) Management and Marketing Communication: Research Streams and Themes’ (2012) 49 *Hermes—J Lang & Comm Bus* 49.

¹⁶¹ Indeed, Atos has already had some experience with sponsorship dilution: their sponsorship of the Paralympic Games in the UK led to unwanted publicity of their role in making controversial “fitness to work assessments” under contract with the UK’s Department of Work Pensions. See Nina Lakhani and Jerome Taylor, ‘Hundreds Protest Against Paralympics Sponsor Atos As Anger About Its Role In Slashing Benefits Bill Intensifies’ (*The Independent*, 29 Aug 2012) <<http://www.independent.co.uk/news/uk/home-news/hundreds-protest-against-paralympics-sponsor-atos-as-anger-about-its-role-in-slashing-benefits-bill-intensifies-8092512.html>>; see ‘Disabled People Protest Against Atos Role In Paralympics’ (*The Guardian*, 31 Aug 2012) <<http://www.theguardian.com/society/video/2012/aug/31/disabled-protest-atos-paralympics-video>>.

making the proposal, the author does not purport to have “all” of “the answers,” or even a significant part of them. The proposal is, it is hoped, a launching point for further dialogue within the E.U. about creating a system under which E.U.-based corporations are held to account to their stakeholders and the consuming public generally about the extent to which they are aiding and abetting regimes that fall short in significant ways of honoring the commitment to human rights that Europe has made in the Convention and in the Charter.

Thus, to borrow an *apropos* passage from one of Winston Churchill's most famous orations, “Now this is not the end. It is not even the beginning of the end. But it is, perhaps, the end of the beginning.”¹⁶²

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¹⁶² Winston S. Churchill, 'A Speech At The Lord Mayor's Day Luncheon At The Mansion House', London, 9 November 1942, in *War Speeches: The End of The Beginning* 265 (1943)

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