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Governance, International Law & Corporate Social Responsibility

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**Governance, International Law &
Corporate Social Responsibility**

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Preface

There has been heated debate in recent years regarding the extent to which corporate social responsibility (CSR) may contribute to the promotion of core workers' rights, as embodied in ILO conventions or national law. The purpose of this volume is to contribute to this debate by discussing the legal dimensions of the issue.

In particular, an analysis the legal character of CSR is presented. Some authors argue that CSR involves "soft law" with limited effects on working conditions and workers' rights. They base this judgement on the fact that CSR does not involve any legal commitment on behalf of the enterprise. Others, on the contrary, consider that CSR is more appropriate than traditional legal instruments in view of today's globalised economies. Indeed, CSR would provide the kind of flexibility that firms need in order to adapt to globalisation, while still protecting workers adequately. Still others stress that soft and hard law are not mutually exclusive and that CSR can add a layer to the basic rights and protection provided by hard law.

The volume also discusses the possible legal consequences of the proliferation of private voluntary initiatives. In particular, if an increasing number of enterprises develop their own codes, the issue arises of whether there is a need for harmonising the different initiatives and for protecting the principle of predictability of law.

Another question discussed in the volume relates to the notions of "sphere of influence" and "complicity", as defined by the Global Compact. One of the principles of CSR lies indeed in the recognition by the corporations of the consequences of their actions outside of the company

itself (environment, local communities, supply chain, etc.) and in their liability for these actions. Following the same idea, the question of complicity arises when the corporation is not directly responsible for a human rights violation but, in a way or another, is proven to be indirectly involved in it. These two notions are strongly debated when referring to CSR, and it is the ambition of this book to participate in the discussion.

In sum, highly qualified researchers and officials from different backgrounds present here their views on CSR, the nature of the phenomenon, the factors behind its rapid growth the possible normative consequences.

Raymond Torres
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February 2008

Introduction

Rémi Clavet *

On 3 and 4 July 2006 the International Institute for Labour Studies at the International Labour Organization held a conference on “Governance, International Law and Corporate Social Responsibility”. The first aim of this fairly complex exercise was to define the sometimes rather blurred concept of corporate social responsibility (CSR) in the process of globalization, examining the position – real and potential – of international law in an area where the usual approach is highly voluntarist. The very expression “CSR” is controversial in its use of the term “social” or “societal” to describe the subjects covered. Initially, the expression referred to a “social” responsibility which included the innovative concepts of CSR, particularly in the environment field, but observers soon realized that there was an increasing tendency, particularly in academic writings, to confine CSR to the traditional concepts of labour law because of its “social” semantic reference, thus in the end excluding the innovative element of the overall approach to CSR. This is why authors, including the contributors to this book, writing in both French and English, tend to refer to corporate social/societal responsibility interchangeably.

The emergence of corporate influence in fields previously seen as sovereign prerogatives of the state – particularly the areas of soft law and human rights – has created a need for the main actors in international relations to get involved in CSR as an attempt to provide an ethical overall framework, and has forced many lawyers to venture out towards the very limits of law as they perceive it today. Most of the main international

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or regional institutions (the UN, particularly through the Global Compact launched by Kofi Annan, the European Union, the World Bank, the OECD and even the NGOs) have already put in place programmes entirely dedicated to creating and promoting an ethical code for and in partnership with businesses. Similarly, the Summit Declaration from the 2007 G8 summit in Heiligendamm reaffirms support for the work and precepts of the ILO and states that it is vital to strengthen the principles of CSR by promoting international labour standards, high environmental standards and better governance. In order to achieve this, the Declaration stresses the importance of cooperation between the OECD, the ILO and the Global Compact in order to give more visibility and more clarity to the standards relating to CSR.

If we had to explain the scope of CSR and what is meant by “social”, the whole philosophy behind it could be summed up in the “triple bottom line” theory (“people, planet, profit”): a business, no matter where it – directly or indirectly – carries out its activity, must be judged according to three criteria: how it treats its employees, how its activity affects the environment, and how much profit it makes. It can no longer be conceivable or acceptable – and this is the root of all the controversy about whether CSR should be based on voluntary measures or non-negotiable rules of law – for a business to resort to social dumping, sacrificing workers’ rights and the world around us in a sort of global, no-holds-barred race for maximum profit.

One point should be made straight away: for lawyers, particularly those of the Romano-Germanic school of thought, CSR is a sort of unidentified innovating object, bordering on the para-legal. It is its sources that still arouse controversy: whether the reference point is the Kyoto Protocol, the ten principles of the Global Compact or the OECD’s Guidelines for Multinational Enterprises, all of these are classified as “soft law”, and soft law is highly contentious. After all, as the lawyers mentioned earlier are only too keen to point out, how can we call “law” a voluntarist rule that abolishes rights and duties in favour of opportunities and recommendations?

The issue of soft law is the subject of a fascinating article written by Professor Duplessis for this book, which immediately challenges the reader with the following statement: “as a result of the growing use of soft forms of regulation and the number of different actors using them, consideration needs to be given to the role of soft law in today’s international legal system”. What is law and what is not law? The author feels that legal

obligations are becoming difficult to pinpoint and that the legal system is being plunged into uncertainty, its very existence threatened. Taking this same approach still further, Professor Javillier comments that in businesses CSR is not usually seen as “a matter for lawyers”. But far from seeing this as a threat to law, he instead sees the supporting role that CSR could potentially play in the practical application of international law, including in the fight to have human rights respected in the countries where the businesses concerned are based. However, he makes a point of highlighting both the limitations of this (CSR cannot take the place of state law) and the preconditions (appropriation is not the same as privatization) in international labour law.

This explicit corporate involvement in state prerogatives is also a point made by Professor Daugareilh, who goes so far as to talk about the business world having a real stranglehold on law. Like Monsieur Jourdain, firms think they are doing business, but they are actually producing norms. This situation is often explained by the fact that current international legislation has problems in providing an appropriate overall framework for all the activities of multinational companies, which sometimes take advantage of the diverse levels of protection offered in different countries. This appropriation of normative capacity is also noted by Eric Gravel who, as a senior lawyer in the ILO’s International Labour Standards Department, sees the challenge that this situation presents for the ILO. In his view, the ILO’s traditional standard-setting and supervisory system must continue to develop, particularly as “the more urgent the need for labour rules throughout the world, the more is expected from the ILO”.

According to Marianna Linnik and Professor Sune Skadegaard Thorsen, the need to have rules establishing corporate responsibility as real rather than optional can only be met if binding rules are introduced and if the law moves quickly to reoccupy an area previously held by communication and business. There is no doubt that the largest multinationals – particularly those that are the most “suspect” environmentally or in labour law terms (oil companies, fast-food chains, etc.) – know that they are already under the constant and sometimes highly critical eye of civil society. Any flagrant misconduct can lead to an immediate and very costly boycott, among other things. However, for companies not in the media spotlight, in other words the vast majority, the idea of imposing strict rules on themselves which go beyond the existing legal requirements is still highly unattractive in cost/benefit terms. This is why the authors

recommend transposing soft law into the hard law of the international treaties on which the triple bottom line is based, making them legally binding for everyone. Contrary to what a lot of people think, the multinationals mentioned earlier are often in favour of regulating CSR in this way, for one obvious reason: they are already applying these principles themselves, *de facto*, and want what is imposed on them by the media and economic considerations to be legally required of everyone, in order to avoid unfair competition from smaller companies which can develop a competitive advantage by practising social dumping clandestinely.

Gregorio de Castro's analysis looks at the European Union, a trail-blazer in the field of CSR, which seems to be a prime example of an institution that managed to anticipate the controversy about state prerogatives in law by making the Member States rather than businesses responsible for the whole idea of CSR as a voluntary concept. He points out that it is for the Member States to decide whether it is appropriate to have national legislation on CSR and what form it should take, with the European authorities merely proposing a general, harmonious framework which encourages all the members. Like France and Denmark, among others, large companies are now legally obliged to publish social and environmental information on their activities, in addition to their financial results. This move is a vital part of the overall approach of placing the normative aspects of CSR within a state framework, in order, as Yun Gao comments in her article, to avoid "arbitrary governance" in the supply chain by the multinationals. She explains that, in its current form, the main problem with CSR – whether applied through hard or soft law – lies in its monitoring system. The supply chain can sometimes be very long (either horizontally or vertically), there may be many sub-contractors involved, and the product processing stages may involve many different companies (leading to a problem of traceability). Monitoring the supply chain from one end to the other, particularly when it is spread around the world, is therefore a real challenge. Even supposing that a multinational applies the CSR principles strictly, either voluntarily or as a result of binding rules, how could it monitor whether its thousands of co-contractors also apply the same rules? The issue of supervision and monitoring is also the focus of Professor Zack's article, who sees international sub-contracting as the best way for multinationals to conceal the fact that they are pursuing financially advantageous social dumping practices. To counter this, he recommends giving the ILO a greater role in monitoring, declaring that the survival of standards depends not on their proliferation, but on compliance with them.

This book cannot claim to be an exhaustive investigation of the many complex issues relating to the links between law and CSR. We hope, however, that it will help to broaden the current debate about the different directions that might be taken by this subject which is so fundamental for the future of international law, the concept of governance and the business world's fascinating encounter with global responsibility.

Soft international labour law: The preferred method of regulation in a decentralized society

Isabelle Duplessis *

International law, and particularly labour law, incorporates various forms of social regulation with or without the status of law and originating from both public and private sources. A number of these forms of regulation are “soft” in nature and are known as *soft law*. This refers to the normative processes which frame relations between actors but without any legal constraint, which many people still often think means the same as judicial sanctions.¹

* Professor in the Faculty of Law at the Université de Montréal, Montreal, Canada. This paper was a contribution to the seminar on “Governance, International Law and Corporate Social Responsibility. Appropriation of International Labour Standards and Consolidation of the Rule of Law”, held by the International Labour Organization’s International Institute for Labour Studies in Geneva, Switzerland, in 2006. The research on which the text is based also received support from the INE Program of the Social Sciences and Humanities Research Council of Canada (SSHRC), as part of a project entitled “Les rapports dialogiques entre le droit constitutionnel et le droit international: effets sur les fondements de l’État et la représentation de la société civile dans un contexte de mondialisation” (Dialogic links between constitutional law and international law: effects on the foundations of the State and the representation of civil society in a globalised world).

¹ Soft forms of regulation are applied both in international society and in societies at national or even regional level, in the case of the European Union, for instance, through what is known as negotiated, contract or private law, between the actors directly involved. They embrace the trend towards decentralisation in the production and application of law and form part of a different theoretical model of legal positivism. As a legal phenomenon soft law should be seen as a network rather than a hierarchy in order to understand how it can both be “soft” and still retain the more traditional concept of law. This coexistence of both pyramid and network corresponds to the move from legislation to regulation and from government to governance. To improve and increase social coordination, some of today’s normative processes involve the actors concerned directly, even though they are not necessarily linked to the public sphere or to the institution of the state. On the problem of the network, see François Ost and Michel van de Kerchove, *De la pyramide au réseau? Pour une dialectique du droit*, Brussels, Publications des Facultés universitaires St-Louis, 2002. How can we explain this trend towards decentralisation in the production and application of law except as the result of a deeper crisis of authority in societies claiming to be egalitarian? “It may be possible to see in this relatively recent interest in soft law one of the new directions taken in law, or rather a change of perspective, particularly in domestic law, moving away from the monolithic perception of law as a hierarchical instrument of constraint, and viewing it also, and increasingly, as a way of achieving an idea of society that is shared with its subjects, negotiated, guiding law that is welcomed and approved rather than imposed, in democratic societies that are becoming increasingly complex and segmented”: Georges Abi-Saab, “Éloge du ‘droit assourdi’”. *Quelques réflexions sur le rôle de la soft law en droit international contemporain*, in *Nouveaux itinéraires en droit*. Hommage à François Rigaux, Brussels, Bruylant, 1993, pp. 59-68, p. 60.

The phenomenon of *soft law* has gathered pace over the last thirty years.² Although soft forms of regulation initially mainly governed the work of the international organizations, they now also cover some relations between states. They are also often used by non-state actors such as multinational companies, trade unions, pressure groups and other non-governmental organizations (NGOs) to regulate the international dimension of their relations. As a result of this growing use of soft forms of regulation and the number of different actors using them, consideration needs to be given to the role of soft law in today's international legal system. What is the function of soft law for decentralized societies such as we see in the international community, and what are the consequences of the proliferation of soft law for international labour law in particular?

Initially, *soft law* generated considerable unease among academics. Their intellectual disquiet was and still is legitimate, bearing in mind that the aim of all legal systems is to achieve legal certainty.³ By disrupting the theory of sources in international law and blurring the usual categories, soft forms of regulation are undoubtedly undermining the aim pursued by law of stabilising the international actors' expectations with regard to norms.⁴ Legal obligations are becoming difficult to pinpoint. What is law and what is not law? With the advent of normative relativism in inter-

² On the proliferation of soft forms of regulation in various fields of international law, see, among others, Kenneth W. Abbott and Duncan Snidal, "Hard and Soft Law in International Governance", (2000) 54 *International Organization* 421; Pierre-Marie Dupuy, "Soft Law and the International Law of the Environment", (1991) 12 *Michigan Journal of International Law* 420; Martha Finnemore and Kathryn Sikkink, "International Norm Dynamic and Political Change", (1998) 52 *International Organization* 887; Hartmut Hillgenberg, "A Fresh Look at Soft Law", (1999) 10 *European Journal of International Law* 499; Nico Krisch and Benedict Kingsbury, "Introduction: Global Governance and Global Administrative Law in the International Legal Order", (2006) 17 *European Journal of International Law* 1.

³ This unease is clearly to be seen in the article by Prosper Weil "Vers une normativité relative en droit international?", (1982) 86 *Revue générale de droit international public* 5. Weil criticises excessive softness or normative relativity in that it introduces too high a degree of uncertainty in the international legal system. His criticisms have generated considerable debate since they were published in the 1980s and were taken up more recently by Jan Klabbers, "The Undesirability of Soft Law", (1998) 67 *Nordic Journal of International Law* 381, and, by the same author, "The Redundancy of Soft Law", (1996) 65 *Nordic Journal of International Law* 167. Other lawyers, however, stressing the need to make norms more flexible so that they better reflect international reality and are more effective, have welcomed the emergence of soft forms of regulation: "For nearly twenty years, this debate has tried to focus on the costs and benefits of soft law. Some writers have enthusiastically endorsed this normative category, highlighting the need for flexibility and responsiveness to the contemporary need for accommodation between competing interests in a diversified and conflictual world community. Others have warned against normative relativism and the risk of conceptual confusion involved in the attempt to bring the region of 'law' merely political or aspirational concepts.": Francesco Francioni, "International 'Soft Law': a Contemporary Assessment", in Vaughan Lowe and M. Fitzmaurice (eds), *Fifty Years of the International Court of Justice. Essays in honour of Sir Robert Jennings*, Cambridge, Cambridge University Press, 1996, pp. 167-178, p. 168.

⁴ In blurring the usual categories, soft law supposedly weakens the communication function of law, which is designed to stabilise actors' future behavioural expectations of each other. This function has been underlined by both lawyers and sociologists, as Mark Van Hoecke points out in *Law as Communication*, Oxford – Portland, Hart Publishing, 2002, on page 65: "Law creates 'shared reciprocal expectations' (Fuller) or 'stabilised expectations of behaviour' (Habermas) or 'congruently generalized behavioral expectations' (Luhmann)".

national law, actors no longer know. The legal system is being plunged into uncertainty, its very existence threatened.

Confronted today not just with the existence of soft law, but with its proliferation in all areas of international law, we need to start thinking about how to link soft norms with the hard norms more traditionally found in law.⁵ Can both types of norms exist side by side? Do some actors simply use soft norms a way of getting round the law? Do they not actually weaken hard norms in international labour law, particularly those developed by the International Labour Organization (ILO) since it was set up in 1919? Or should soft law be seen as complementary within the legal system, improving the general effectiveness of international labour standards? If so, then in view of the decentralization of international society and the lack of a single authority laying down, interpreting and safeguarding the application of legislation by physical force if necessary,⁶ who should establish the links between soft and hard law, and how can the two be combined successfully?

These questions form the basis of our paper. We will start by discussing the concept of the binding force of law, since this tends to be the stumbling block in discussions on soft forms of regulation. A heuristic distinction will be proposed between formal soft law and material soft law, for greater clarity (Section I). We will then go on to examine how soft law is used by international actors and the consequences that this has for hard norms in international labour law (Section II). Finally, we will consider the role of the ILO in the new, combined use of soft and hard instruments in international labour law.

I. Soft law: A recent phenomenon, or one that has always been inherent in international labour law?

There is no uniform definition of soft law among public law specialists.⁷ It usually appears as a subsidiary category incorporating regulatory instruments which are not recognized by the theory of sources in

⁵ John J. Kirton and Michael J. Trebilcock, "Introduction: Hard Choices and Soft Law in Sustainable Global Governance" in John J. Kirton and Michael J. Trebilcock, *Hard Choices, Soft Law. Voluntary Standards in Global Trade, Environment and Social Governance*, Burlington, Ashgate, 2004, pp. 3-29, p. 11.

⁶ This definition echoes Max Weber's in his analysis of the modern state.

⁷ F. Francioni, *loc. cit.*, note 3, p. 167.

international law,⁸ the formal sources being listed in Article 38(1) of the *Statute of the International Court of Justice* (ICJ) of 1945.⁹ This sets out the normative instruments which the Court can apply in order to settle judicial disputes between states. It lists treaties, custom and general principles of law, which are all examples of what are known as hard, as opposed to soft, law. Essentially, what distinguishes “hard” obligations is that sanctions may be applied if they are breached.

This description of hard law was causing problems well before the advent of soft law and its more intensive use today. Given the decentralized nature of international society and the ICJ’s discretionary jurisdiction, was the requirement of judicial sanction and physical force commonly used to characterize legal norms actually appropriate at international level? Did the ICJ not rule on this subject that the existence of obligations that could be enforced by any legal process has always been the exception rather than the rule in international law?¹⁰ In this context, has it ever even been reasonable for public law specialists to use the concept of sanction to separate legal obligations from ethical ones?¹¹

⁸ On the upheaval caused by the emergence of soft law in the theory of sources in international law, see in particular R.R. Baxter, “International Law in ‘Her Infinite Variety’”, (1980) 29 *International and Comparative Law Quarterly* 549; A.E. Boyle, “Some Reflections on the Relationship of Treaties and Soft Law”, (1999) 48 *International and Comparative Law Quarterly* 901, p. 901; Robert Kolb, *Réflexions de philosophie du droit international. Problèmes fondamentaux du droit international public: Théorie et philosophie du droit international*, Brussels, ed. Bruylant and University of Brussels, 2003, pp. 58 and 59; Michèle Olivier, “The Relevance of ‘Soft Law’ as a Source of International Human Rights”, (2002) *Comparative and International Journal of Southern Africa* 289, p. 294; Alain Pellet, “Le ‘bon droit’ et l’ivraie – plaidoyer pour l’ivraie (Remarques sur quelques problèmes de méthode en droit international du développement)”, in *Le droit des peuples à disposer d’eux-mêmes: méthodes d’analyse du droit international. Mélanges offerts à Charles Chaudmont*, Paris, Pedone, 1984, pp. 465-493, p. 489; Eibe Riebel, “Standards and Sources. Farewell to the Exclusivity of the Sources Triad in International Law?”, (1991) 2 *European Journal of International Law* 58, p. 58; Karl Zemanek, “Is the Term ‘Soft Law’ Convenient?”, in G. Hafner, G. Loibl, A. Rest, L. Sucharipa-Behrmann and K. Zemanek, *Liber Amicorum Professor Seidl Hohenveldern – in honour of his 80th birthday*, The Hague, Kluwer Law International, 1998, pp. 843-862, pp. 843 and 844.

⁹ Article 38(1) reads as follows: “The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply: a) international conventions, whether general or particular, establishing rules expressly recognised by the contesting states; b) international custom, as evidence of a general practice accepted as law; c) the general principles of law accepted by civilised nations; d) subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law”: Annex to the United Nations Charter adopted on 26 June 1945, C.N.U.C.I.O., vol. 15, p. 365.

¹⁰ *South-West Africa cases (Ethiopia v South Africa; Liberia v South Africa) (Second Phase)*, judgment of 18 July 1966, ICJ Reports 1966, p. 3.

¹¹ G. Abi-Saab, loc. cit., note 1, p. 63: “[...] a proposed norm (or the instrument proposing it) is legal in so far as it can be applied by an international court; in other words, in so far as its effects, i.e. the rights and obligations arising from it, are amenable to the courts. The test of legality would thus be reduced to amenability. However, this is a highly restrictive criterion which is not consistent with legal reality, since it would disqualify many constitutional rules and even much of public law in general, not to mention international law [...]”.

1. The practice of soft law does not undermine the theory of the binding force of rules of law

Theory often measures the binding force of law by the existence of sanctions if the legal obligations involved are breached. This view over-determines our understanding of law and of soft forms of regulation. Seen from this angle, soft law appears to be an oxymoron,¹² contradicting the very idea of law by presenting legal rules which either have no binding force or whose binding force is ambiguous.¹³ Yet the absence of binding force by no means prevents soft law from being effective, thereby creating a cognitive dissonance between theory and practice.¹⁴

Certain parameters can be identified from academic writings which provide a clearer picture of what is usually meant by a legal rule without binding force. Their view is that soft law does not involve any precise behavioural obligations and does not entail any legal liability or even the obligation to desist or to make good any damage suffered by the parties as a result of its breach.¹⁵ Unlike obligations under treaty or customary law, which may be enforced by coercion by the person relying on them, a breach of soft law does not entail any sanction. Its application remains voluntary and is not amenable to the courts.¹⁶ Ultimately, soft law formulates imperfect legal obligations, since perfection is measured in legal theory by the existence of an enforceable sanction in the event of infringement.

This reduction of rules of law to the secondary aspect of whether legal sanctions and physical coercion can be applied to offenders is what lies behind both the intellectual unease created by soft law and the ontological problems of international law in the past.¹⁷ For some observers with little time for subtlety, all norms in international law are soft since

¹² F. Francioni, *loc. cit.*, note 3, p. 167.

¹³ G. Abi-Saab, *loc. cit.*, note 1, p. 60.

¹⁴ N. Krisch and B. Kingsbury, *loc. cit.*, note 2, p. 1.

¹⁵ R.R. Baxter, *loc. cit.*, note 8; Oscar Schachter, "Towards a Theory of International Obligation", (1968) 8 *Virginia Journal of International Law* 300, and, by the same author, "The Twilight Existence of Non-Binding International Agreements", (1977) 71 *American Journal of International Law* 296, p. 300; Wilhelm Wengler, "Les conventions 'non juridiques' (nichtrechtliche Verträge) comme nouvelle voie à côté des conventions en droit (Rechtsverträge)", in *Nouveaux itinéraires en droit: hommage à François Rigaux*, *op. cit.*, note 1, pp. 637-656, pp. 637 and 638.

¹⁶ Marcelo Dias Varela, "La complexité croissante du système juridique international: certains problèmes de cohérence systémique", (2003-2) XXXVI *Revue belge de droit international* 331, p. 358.

¹⁷ For an overview of the ontological problems of international law, see Friedrich Kratochwil, "Is International Law 'Proper' Law? The Concept of Law in the Light of an Assessment of the 'Legal' Nature of Prescriptions in the International Arena", (1983) LXIX *Archiv für Rechts- und Sozialphilosophie* 13. See also Nguyen Quoc Dinh, Patrick Daillier and Alain Pellet, *Droit international public*, Paris, 6th ed., L.G.D.J., 1999, pp. 83-92.

they cannot result in sanctions from the public authorities. But what are we to make of this propensity that people have to see all norms as commands, thereby risking discrediting public law as a whole? Why is the legal field always depicted as being pervaded by coercion? Are rules of law adopted solely in order to break people's will and force them to adopt a certain behaviour?

The answer to this last question is obviously no. Rather than prohibiting, some norms actually introduce rules allowing actors to exercise certain powers and rights. It has to be said, however, that the depiction of legal rules is usually based on the rather unthinking impression of law as a coercive order, rather than on its permissive potential. The penal function of legislation often seems to come first in the minds of lawyers and public alike. Soft law makes people apprehensive because it overturns the age-old views of legal norms as hierarchical commands and of law as a coercive order.¹⁸

Law as a whole is about more than just coercion. Regardless of whether it is hard or soft and whether or not it carries a sanction, a rule of law is primarily a tool designed to give overall direction to individual conduct within a given group.¹⁹ It proposes a sequence for the future occurrence and performance of human activities, and sets out a factual framework for judging whether events comply with this. In formulating how things should be, it reduces the scope of what is possible, stabilizes the actors' expectations and thus perpetuates the social order.

Of course, a norm can have a lot in common with a command and impose a rigid model of human behaviour. The international conventions protecting workers' rights which have been ratified by the ILO Member States are often seen, rightly or wrongly, as normative instruments that come under this category. However, a command is just one of many legal techniques for governing societies and directing people's behaviour, and for it to be applied in practice the actors concerned must, ideally, be quick to obey or submit.

¹⁸ However, long before the arrival and proliferation of soft law, 'hard' international rules – of treaty and customary law – had already unsettled lawyers, who tended to see rules of law as hierarchical commands from the sovereign power: Antony Anghie, *Imperialism, Sovereignty and the Making of International Law*, Cambridge, Cambridge University Press, 2004, pp. 40-48.

¹⁹ The observations that follow are largely drawn from the phenomenological analysis of rules of law by Paul Amssek, "La phénoménologie et le droit", (1972) 17 *Archives de philosophie du droit* 185, and, by the same author, "L'évolution générale de la technique juridique dans les sociétés occidentales", in Charles-Albert Morand (ed.), *L'État pulsif. Contribution à l'étude des instruments d'action de l'État*, Paris, Publisud, 1991, pp. 129-154.

As a legal technique a norm, unlike a command, can offer a flexible, non-authoritarian way of directing human behaviour, and compliance with its legal provisions is then seen as desirable rather than mandatory. A soft norm sets out guidelines that are deemed appropriate for the actors to follow, while at the same time organising how much discretion and room for manoeuvre they have. It nevertheless remains a legal instrument. The recommendations adopted within the ILO are an example of this technique.

From the outset international labour law has closely combined these two ways of directing behaviour. In contrast to the government of domestic societies, soft regulation was destined to become the technique of choice in an international society that has no hierarchical command and operates on the principle of the sovereign equality of states. In addition, the complex nature of some areas of regulation, particularly in the socio-economic field, creates situations which pre-established legal forms do not really cover. Soft law provides a system that is suited to the diversity and changing nature of these situations, which are difficult to subsume under a precise legal category. In that respect it has already for some time been a method of regulation that is inherent in international labour law.

A priori, soft law contradicts the image of law as a coercive order. However, it does bring consequences in international practice which conflict with theoretical assertions about the binding force of legal rules. Although it lacks sanctions, a soft norm has just as much “chance” of being enforced or successful and is just as genuinely effective as hard norms of treaty or customary law²⁰. In other words, the fact that it lacks binding force as defined in legal theory does not mean that it is not obeyed in practice. Under the impetus of the international actors, it seems rather to be becoming a key technique for global governance.

Soft law corresponds to an image of law where there is no one single threshold for determining what is legal, but a series of graduated norms. It acknowledges that there are many different places and methods for developing international law, and many different actors involved in doing so. In some circumstances it can even be in competition with hard norms of treaty or customary law within the legal system. The legal image underpinning soft law is perfectly in keeping with a decentralized society where the absence of a supreme legislative authority makes it inevitable that the

²⁰ A. Pellet, loc. cit., note 8, pp. 491 and 492.

various international actors will have different ways of developing law. Far from the formalist school of thought in which international law is solely the product of the will of the state, expressed in practice through the sources listed in Article 38 of the *ICJ Statute*, soft law has to be viewed from an objectivist approach which sees law as a reflection of social facts and the needs of international actors.²¹

In recent years state actors in particular have shown a preference for soft forms of regulation. This trend can be seen in international spheres of activity which are subject to rapid transformation as the global economy develops, or to pressures associated with the development of science and technology.²² Soft law makes it easy to adopt guidelines in uncertain areas which are dependent on technical advances or whose scientific validity is questionable. It also means that normative action can be taken on what may be politically controversial subjects, where states are unable to give firm undertakings even though these are urgently needed.²³

Compared with the traditional sources in law, particularly treaties,²⁴ soft law instruments are easier to negotiate and save time. They allow states to withdraw without penalty and have no mechanism for monitoring obligations.²⁵ Soft law is clearly justified because of its flexibility. Its main advantage is that it promotes international cooperation in fields which are, at present, naturally and socially too complex for normal decision-making processes, making them unsuitable for the automatic behavioural control that is inherent in the command as a normative technique.

²¹ The preferred approach is that described by A. Pellet, *id.*

²² Katia Boustany and Normand Halde, "Mondialisation et mutations normatives: quelques réflexions en droit international" in François Crépeau (ed.), *Mondialisation des échanges et fonctions de l'État*, Brussels, Bruylant, 1997, pp. 37-59.

²³ Where there are disputes or simply a lack of political will, soft law can sometimes be a delaying tactic. It temporarily masks the lack of real political agreement, but gives rise to fears for the actual nature of norms in future. Delaying tactics merely put problems off until later, when norms are applied in specific cases: R. Kolb, *op. cit.*, note 8, p. 293. Time may resolve some conflicts, but not all. The problem raised by using these tactics at international level lies in the lack of centralised courts to determine how the norms should be applied in practice. The disputes tend to remain latent, and even if they do one day come to light, they are not necessarily resolved even then.

²⁴ On the use by states of soft law instead of treaties in international law, see more particularly Michael Bothe, "Legal and Non-Legal Norms – A Meaningful Distinction in International Relations?", (1980) *Netherlands Yearbook of International Law* 65, p. 92; A.E. Boyle, *loc. cit.*, note 8; C.M. Chinkin, "The Challenge of Soft Law: Development and Change in International Law", (1989) 38 *International and Comparative Law Quarterly* 850; Malgosia Fitzmaurice, "The identification and character of treaties and treaty obligations between states in international law", (2002) LXIII *British Year Book of International Law* 141; T. Gruchalla-Wesierski, "A Framework for Understanding 'Soft Law'", (1984) 30 *McGill Law Journal* 37; H. Hillgenberg, *loc. cit.*, note 2; Alain Pellet, "The Normative Dilemma: Will and Consent in International Law Making", (1992) 12 *Australian Year Book of International Law* 22.

²⁵ Andrew T. Guzman, "The Design of International Agreements", (2005) 16 *European Journal of International Law* 579, pp. 591 et seq.

As well as sometimes being a reflection of the will of states, soft forms of regulation also account for the majority of the normative work of the international organizations, which are not able to use the command technique on states.²⁶ More recently, they have been used by actors who are atypical according to the standard definition of legal persons, to regulate the international dimension of their relations.²⁷ This new use also explains the proliferation of soft forms of regulation in recent decades. For entities such as multinational companies or NGOs, soft law actually extends the extremely limited circle of those entitled to be involved in developing international norms²⁸.

Legal theory must stop insisting on the narrow criterion of binding force for characterising legal norms and should instead measure their effectiveness. It must acknowledge this new international social distribution in its description of the legal system: indeed, given the current proliferation of soft law, such acknowledgement is actually becoming a necessity. Legal theory has to incorporate actors previously marginalized in the creation and application of international law, who have developed the practice of soft law as a way of organizing their relations on a normative level.

2. The distinction between formal soft law and substantive soft law

Most of the misunderstandings which make soft law controversial stem from the fact that it is never clear whether the term refers to the softness of the proposed norm itself or the elasticity of the instrument containing the proposal.²⁹ It is important to avoid confusion and distinguish the legal softness of the content of the norm from that of its normative

²⁶ Apart from the notable exception of decisions of the United Nations Security Council, adopted under Article 25 of the 1945 United Nations Charter, which are binding on the Member States.

²⁷ Although the name given to 'legal persons' varies over time and from one legal system to another, the legal person concept is common to all legal systems, both domestic and international, private and public. For a description of legal persons and the historical development of the international legal system, see in particular J.H.W. Verzijl, *International Law in Historical Perspective. Part II International Persons*, Leyden, A.W. Sijthoff, 1969. From the end of the 19th century the state became the main actor on the international stage. This is enshrined in classical theory, which declares the state to be the prime legal person, while at the same time excluding non-state actors from the production of international law: Agnès Lejbowicz, *Philosophie du droit international. L'impossible capture de l'humanité*, Paris, Presses universitaires de France, 1999. Against the background of this limited involvement in law-making, soft law began to be used at the start of the 20th century to describe the normative work of international organizations, which are subordinate or secondary persons compared with states. It is now similarly used to describe the normative work of atypical actors, which has clearly gathered pace since the 1990s.

²⁸ M. Dias Varella, *loc. cit.*, note 16, pp. 355 and 356.

²⁹ G. Abi-Saab, *loc. cit.*, note 1, p. 61.

medium. In the example of norms with an indeterminate injunctive structure, such as “if the states consider it reasonable” or “if appropriate”, the softness lies in the substance of the proposal.³⁰ The “soft law” is then substantive and refers to the normative density of the written wording of the obligations laid down in an instrument which, incidentally, may itself be hard. Soft provisions are extremely common in treaties, particularly international labour conventions.³¹ Despite their softness, their binding nature cannot be called into question because they are contained in an instrument of hard law.

Formal soft law, on the other hand, is a subsidiary category, and refers to normative instruments not included in the list in Article 38 of the *ICJ Statute*.³² The softness of resolutions of international organizations, of declarations, of joint instruments between states which are not in the form of agreements, of ICJ advisory opinions, of recommendations of quasi-judicial supervisory bodies or of codes of conduct adopted by multinational companies lies more in the legal medium rather than in the substance of the proposed norm, which may be extremely detailed. Formal soft law opens up the legal system to the involvement and normative activity of international organizations and atypical actors.

For many people, recognition of these soft forms of regulation within the legal system raises the nagging question of the binding force of law. Some soft norms are effective even though they do not result from any of the procedures covered by the theory of sources of international law, regarded by lawyers as the only ones which generate binding legal obligations.³³ Since they are not in themselves capable of conferring a binding status on the norms they convey,³⁴ the “elastic” instruments regularly used in practice by international organizations have suffered from this conception of the development of international norms. The view of ILO recommendations as the weak link in the organization’s system of

³⁰ R. Kolb, *op. cit.*, note 8, p. 58.

³¹ These soft legal provisions are not peculiar to international treaty law. They are found in every legal system: Jean Carbonnier, *Flexible droit: textes pour une sociologie du droit sans rigueur*, Paris, Librairie générale du droit et de la jurisprudence, 5th ed, 1983.

³² Alain Pellet, “Contre la tyrannie de la ligne droite. Aspects de la formation des normes en droit international de l’économie et du développement”, in D.S. Constantopoulos (ed.), *Sources of International Law*, Thessaloniki, The-saurus Acroasium, Vol. XIX, Institute of International Public Law and International Relations of Thessaloniki, 1992, pp. 287-355, pp. 346 and 347.

³³ K. Zemanek, *loc. cit.*, note 8, p. 844.

³⁴ A. Pellet, *loc. cit.*, note 32, p. 347.

standards and the poor relation of the conventions ratified by the Member States is a striking example of this.³⁵

Initially there was nothing to suggest that a hierarchy would be established between the normative instruments provided for in the ILO Constitution³⁶ and that recommendations would come to be seen as secondary to conventions. Article 19(1) simply gives the International Labour Conference the power to decide whether a proposal should take the form of an international convention or a recommendation where the subject dealt with, or an aspect of it, is not considered suitable for a convention at that time. The Constitution therefore provided the ILO with two guiding instruments instead of just one for promoting its values and principles of social justice. Recommendations fulfilled the vital function of exploring social reforms and serving as experimental measures³⁷ in fields where the economic and social facts were not easily subsumed under a pre-established legal definition. The aim was to enable everyone to benefit from the experiences of the many Member States. This approach relied on the normative provisions adopted in the ILO being gradually incorporated, through a mimetic process.

The educational aspect of these soft norms was intended to be strengthened in 1946 with an amendment to Article 19 and the introduction of new procedures for reporting on recommendations and unratified conventions. Regular examination of the recommendations would now ensure that the national legislatures had access to other countries' experiences and the lessons they had learnt. These procedures did not have the intended effect, however. Governments only rarely reported on the recommendations, and even today, when they do, it is more of a formal exercise and does not generate any major discussion at the Conference.³⁸

In actual fact the ILO has only ever partly observed the spirit of Article 19(1) of its Constitution in practice. The recommendations soon fell victim to the hierarchical view of their relationship with the conventions,

³⁵ The following observations on ILO recommendations are drawn from George P. Politakis and Kroum Markov, "Les recommandations internationales du travail: instruments mal exploités ou maillon faible du système normatif?", in Jean-Claude Javillier and Bernard Gernigon (eds.), *Les normes internationales du travail: un patrimoine pour l'avenir. Mélanges en l'honneur de Nicolas Valticos*, Geneva, International Labour Office, 2004, pp. 497-525.

³⁶ ILO Constitution and Standing Orders of the International Labour Conference, Geneva, ILO, 2001.

³⁷ International Labour Conference, Report II(1), report of the Conference Delegation on Constitutional Questions, 29th Session, 1946, p. 40.

³⁸ G. P. Politakis and K. Markov, loc. cit., note 35, p. 512.

particularly as they are often adopted in tandem. This “twinning”, intended to enable a minority of more socially advanced states to have stricter standards than the protection provided for in their national law, paradoxically helped to trivialize the recommendations. These have proved to be “b-conventions”, collections of provisions that the ILO constituents felt should be left out of the conventions, or reproductions of the conventions minus their binding force.

In most cases the recommendation has remained a second-rate instrument, in the shadow of the mother convention. It has been undervalued by the workers’ group in the ILO, which has systematically preferred to adopt conventions rather than recommendations, arguing that even unratified conventions have a greater chance of influencing the Member States’ national legislation and practices.³⁹ This claim about the respective effectiveness of recommendations and unratified conventions is more illusion than reality,⁴⁰ and paradoxically creates a hierarchy among the soft methods of regulation.

In the case of substantive soft law, the softness of the law comes not from viewing the instrument in the light of the list in Article 38 of the *ICJ Statute*, but from the substance of the norm itself. Hard law has always contained principles or provisions which are by definition flexible.⁴¹ It is not unusual to find a rule in a treaty accompanied by a condition such as “if the states deem it reasonable” or “necessary”. Despite their flexibility, such provisions of treaty law are binding, which is why they are to be distinguished from formal soft law. They simply allow a state leeway in exercising its power. The freedom of action which a soft provision grants to those to whom the norm applies may relate to the methods they can adopt in order to achieve a strictly defined objective. The obligation here is the result. In other cases the objective may remain flexible, while the mandatory behaviour will be strictly defined in detail.

All legal rules involve an element of softness because they must all, without exception, be interpreted. Nevertheless, some provisions are inherently more imprecise than others. Because it tends to be fairly general or permissive, substantive soft law creates anxiety in a decentralized society, where it is very difficult to apply. It suggests that the normative message sent to the international actors is being watered down, and therefore that the legal order is unstable. The risk of this is real, but soft law

³⁹ *Id.*, p. 503.

⁴⁰ *Id.*, p. 513.

⁴¹ M. Fitzmaurice, *loc. cit.*, note 24, p. 174.

must not be confused with non-normative provisions which do not prescribe any behaviour and have no practical application. These are emotional provisions or “empty shells”,⁴² not provisions of soft law. Unlike emotional provisions, substantive soft law does impose a certain behaviour on states, even if it is only to make efforts to achieve an objective. States undertake to act “whenever necessary”, “using the appropriate methods”, “as appropriate”, “to take all steps in order to” or “according to the resources available”. The legal obligation to make efforts is clear. It is the existence of these efforts rather than their outcome which ensures that the behaviour is legal.⁴³ Despite the softness of the provision, a third party can, if necessary, determine in practice what is reasonable and what measures should have been taken.⁴⁴

The *Employment Policy Convention, 1964 (No 122)*⁴⁵ is an example of soft provisions in the employment policy field. By its very nature the development of an employment policy cannot be governed by a precise set of legal rules which can be put into practice within a given period. The problems to be tackled are both economic and social and carry with them considerations of public interest; their solution requires a raft of measures coordinated over the long term. The normative instruments adopted in this field therefore tend to define the aims and general principles to be pursued and outline the various measures required for an employment policy to be progressively implemented.

The Convention provides that “with a view to stimulating economic growth and development, raising levels of living, meeting manpower requirements and overcoming unemployment and underemployment, each Member shall declare and pursue, as a major goal, an active policy designed to promote full, productive and freely chosen employment.”⁴⁶

⁴² For example, provisions of peace or friendship treaties proclaiming this or that do not contain any norm, since they do not impose any behaviour on the states concerned: Jean d'Aspremont Lynden, “Les dispositions non normatives des actes juridiques non conventionnels à la lumière de la jurisprudence de la Cour internationale de Justice”, (2003/2) XXXVI *Revue belge de droit international* 496.

⁴³ R. Ida, “Formation des normes internationales dans un monde en mutation. Critique de la notion de soft law”, in *Le droit international au service de la paix, de la justice et du développement*. Mélanges Michel Virally, Paris, Pédone, 1991, pp. 333-340, pp. 335-336; Oscar Schachter, “The Twilight Existence of Nonbinding International Agreements”, *loc. cit.*, note 15, p. 298.

⁴⁴ J. d'Aspremont Lynden, *loc. cit.*, note 42, pp. 502 and 503.

⁴⁵ This is one of the ILO's priority conventions. As at April 2006 it had been ratified by 95 Member States: www.ilo.org/ilolex.

⁴⁶ Article 1(1) of Convention No 122. Article 1(3) also encourages flexibility by referring to the national context: “The said policy shall take due account of the stage and level of economic development and the mutual relationships between employment objectives and other economic and social objectives, and shall be pursued by methods that are appropriate to national conditions and practices.”

The aim of the standard is thus defined in broad terms. However, Article 2 dictates what behaviour the Member States must adopt in developing their national employment policy, requiring them to “decide on and keep under review, within the framework of a coordinated economic and social policy, the measures to be adopted for attaining the objectives specified” and to “take such steps as may be needed, including when appropriate the establishment of programmes, for the application of these measures”. The freedom of action granted to states in this provision does not mean that there is no constraint as to the behaviour to be followed. The gradual attainment of rights which is characteristic of soft provisions cannot be interpreted as implying the right to delay making the required efforts indefinitely.⁴⁷ The existence of these efforts is subject to review by supervisory bodies. In this particular case, the Committee of Experts on the Application of Conventions and Recommendations may check the measures adopted by Member States which have ratified the Employment Policy Convention No 122. Persistent infringements may be subject to political supervision by the International Labour Conference Committee on the Application of Standards.

Article 19(3) of the ILO Constitution encourages the International Labour Conference to adopt a soft approach in developing international labour standards: “In framing any Convention or Recommendation of general application the Conference shall have due regard to those countries in which climatic conditions, the imperfect development of industrial organization, or other special circumstances make the industrial conditions substantially different”.⁴⁸ It is therefore not unusual for the Conference to introduce flexible provisions within conventions, which are adapted to the actual situation in the various Member States. There may be flexibility in the scope, which may be limited *ratione materiae* (agriculture, say) or *ratione personae* (category of workers). The flexibility

⁴⁷ From reading certain provisions of treaty law on economic and social issues, states may even be required to make best use of the resources they have, however modest. This situation was highlighted in a General Comment by the United Nations Committee on Economic, Social and Cultural Rights, E/1991/23, Annex II, on its interpretation of Article 2(1) of the 1966 International Covenant on Economic, Social and Cultural Rights, (1976) 943 UNTS 13: “Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realisation of the rights recognised in the present Covenant by all appropriate means, including particularly the adoption of legislative measures”. Hatem Kotrane, “La question de la justiciabilité des droits économiques, sociaux et culturels”, in Isabelle Daughareilh (ed.), *Mondialisation, travail et droits fondamentaux*, Brussels, Bruylant, L.G.D.J., 2005, pp. 231-263.

⁴⁸ This provision reflects the concerns of a number of Asian countries, whose tropical climate made it difficult to apply the international labour standard across the board: George P. Politakis, “Deconstructing flexibility in International Labour Conventions”, in J.-C. Javillier and B. Gernigon (ed.), *op. cit.*, note 35, pp. 463-496.

may lie in the definitions used.⁴⁹ It may also be structural, so that some parts of the convention are optional and others mandatory. Depending on its national situation, however, if a state cannot adopt a uniform approach to the convention, it can choose which parts it wishes to apply.⁵⁰

With the recent example of the Consolidated Maritime Labour Convention,⁵¹ flexibility has taken a new direction, demonstrating the dynamism of soft methods of regulation. The Convention closely combines both hard and soft norms, providing a mixture within the same instrument. There has been criticism of this conceptual flexibility. With a hybrid approach to standard-setting, is there not a risk of blurring the boundaries between international conventions and recommendations, thus diluting the normative message?⁵²

The flexibility shown in the Consolidated Maritime Convention may be something new, but it continues the ILO's longstanding practice of using different types of international regulation in order to achieve a complex social objective. The phenomenon of soft law, both formal and substantive, is not a recent one in the ILO. The Organization's Constitution made provision for flexibility from the very outset as a method of guidance for the development of international labour standards adapted to conditions in the different member countries. But although flexibility was encouraged, it has nevertheless provoked constant discussion about the binding force of the international labour standards and their effectiveness.⁵³ There have been calls since the end of the Cold War for greater flexibility in the ILO, but will these not ultimately weaken all the inter-

⁴⁹ As an example of flexibility in the definitions used, Article 1(b) of the Night Work Convention, 1990 (No 171) provides that "the term night worker means an employed person whose work requires performance of a substantial number of hours of night work which exceeds a specified limit. This limit shall be fixed by the competent authority after consulting the most representative organizations of employers and workers or by collective agreements".

⁵⁰ G. P. Politakis, *loc. cit.*, note 48, p. 474 et seq. By way of example, the Protection of Workers' Claims (Employer's Insolvency) Convention, 1992 (No 173) provides in Article 3(1): "A Member which ratifies this Convention shall accept either the obligations of Part II, providing for the protection of workers' claims by means of a privilege, or the obligations of Part III, providing for the protection of workers' claims by a guarantee institution, or the obligations of both Parts. This choice shall be indicated in a declaration accompanying its ratification".

⁵¹ The Consolidated Maritime Convention was adopted on 23 February 2006 at the 94th (Maritime) Session of the International Labour Conference in Geneva, by 314 votes in favour to none against, with 4 abstentions. It incorporates into one single normative instrument 38 conventions and 30 recommendations, as well as the fundamental principles listed in the Fundamental Conventions. It is innovative in combining both hard and soft provisions: one of its parts contains something resembling a recommendation. It also includes a simplified amendment procedure enabling the technical provisions to be updated quickly. Cleopatra Doumbia-Henry, "The Consolidated Maritime Labour Convention: A Marriage of the traditional and the new", in J.-C. Javillier and B. Gernigon (ed.), *op. cit.*, note 35, pp. 463-496.

⁵² G. P. Politakis, *loc. cit.*, note 48.

⁵³ *Id.*, p. 464.

national labour standards as interpreted by the supervisory bodies?⁵⁴ Is the purpose of these calls to sidestep hard law?

In the past the employers' group has continually supported flexibility in the development of international labour standards by advocating the adoption of recommendations rather than conventions.⁵⁵ The employers' position has barely changed over time, their aim being to replace all the conventions with a small number of soft instruments. The workers' group takes the view that this will result in too much softness and the disappearance of the international labour code altogether. But as Wilfred Jenks pointed out, in a different era, is not maximum flexibility achieved by having no norms at all?

The demands of the employers' group have been taken on board to the extent that the ILO's Governing Body reviewed, between 1985 and 1992, all the standards adopted by the Organization prior to 1985 except for the Fundamental and Priority Conventions.⁵⁶ In a context of globalization,⁵⁷ it would now be better if discussions in the International Labour Conference returned to the spirit of the ILO Constitution, which provides for two complementary methods of standard-setting, and concentrated on linking soft and hard norms pragmatically.

II. Consequences for international labour law of the private appropriation of methods of regulation

Reconciling soft and hard norms presents a particular challenge. The ILO is no longer the only organization to use soft law in developing international labour standards. In a return to an objectivist view of international law, which focuses on the function rather than the form of legal norms,⁵⁸ soft methods of regulation are now used by both public and pri-

⁵⁴ *Id.*, p. 495. The ILO's supervisory mechanisms are particularly elaborate and combine regular reporting with complaint procedures.

⁵⁵ G. P. Politakis and K. Markov, *loc. cit.*, note 35, p. 523.

⁵⁶ At the end of this detailed work 71 conventions, including the Fundamental and Priority Conventions, were regarded as "up to date". The others were to be revised, some being classified as temporary or obsolete.

⁵⁷ On the role of the international labour standards in a context of globalisation: International Labour Organization, *A fair globalisation: Creating opportunities for all*, report by the World Commission on the Social Dimension of Globalisation, Geneva, 2004; and in promoting decent work, International Labour Organization, *Decent Work*, report by the Director-General to the International Labour Conference, 87th Session, Geneva, 1999.

⁵⁸ Virginia A. Leary, "Form Follows Function": Formulations of International Labor Standards – Treaties, Codes, Soft Law, Trade Agreements", in Robert J. Flanagan and William B. Gould IV (eds), *International Labor Standards. Globalization, Trade, and Public Policy*, Stanford, Stanford University Press, 2003, pp. 179-205.

vate international actors, who often have no choice in the matter since hard law is not available to them. So what role do the soft forms of regulation have for the various international actors, and what are the consequences of this multiple development of norms for the international labour law developed by the ILO since it was set up in 1919?

1. The function of soft law for international actors

States often prefer soft methods of regulation in international relations because they are convenient in areas requiring normative action, but whose complexity makes them difficult to cover with formal sources of law. Although conscious of the need for cooperation, states may want to avoid the legal responsibility and supervisory systems that sometimes come into play if the provisions of a treaty are infringed.

In adopting soft instruments, states can end up by changing the rules of the legal system and introducing a new *modus vivendi*.⁵⁹ This then changes the international social order. Soft law strengthens the heuristic method between states.⁶⁰ A good example of this is how ILO recommendations are used as a laboratory for the benefit of the members' national legislation. Those initiating a new standard keep an exit route open, while they see whether their peers will adopt the behaviour suggested in the soft norm. They have no legal responsibility at this stage, and this makes it easier to experiment at national level. From the actors' point of view, therefore, should not soft law be seen as a cunning way of introducing essential legal changes in a decentralized international society? It is certainly a progressive source which is pushing international law to new levels. It has been said, for example, that it is a factor of constitutional adjustment in that it creates a new area of regulation within the system of positive law.⁶¹

The promotional approach adopted in the 1998 *ILO Declaration on Fundamental Principles and Rights at Work*⁶² plays a similar heuristic

⁵⁹ Soft law in a way acts as a peaceful method of normative change: E. Riebel, loc. cit., note 8, p. 72; M. Bothe, loc. cit., note, 24, p. 91.

⁶⁰ K. W. Abbott and D. Snidal, loc. cit., note 2. "Experience shows that both in domestic jurisprudence and in legislation or codification relevant to international law the existence of a body of soft law stimulates a mimetic process to the effect of reproducing the same prescription in an obligatory mode"; F. Francioni, loc. cit., note 3, pp. 175 and 176.

⁶¹ Fiona Beveridge and Sue Nolt, "A Hard Look at Soft Law", in Paul Craig and Carol Harlow (eds), *Lawmaking in the European Union*, London/The Hague/Boston, Kluwer Law International, 1998, pp. 285-309, p. 296. The dynamism in the processes of legal transformation generated by soft forms of regulation has often been commented on in international environmental law.

⁶² ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up, adopted by the International Labour Conference at its 86th Session, Geneva, 18 June 1998 ["the 1998 Declaration"].

role, but this time by encouraging the ILO to provide technical assistance for the Member States to help them respect fundamental principles and rights at work. “It is quite likely that these new forms of regulation have pedagogical and promotional merits. They are based on the cooperation, support and assistance, particularly technical assistance, which are now essential for any evaluation of the effectiveness of norms”.⁶³

Soft law operates as a discreet social architect,⁶⁴ promoting cooperation between international actors. The development of international law is already a responsibility shared between states (traditionally recognized as the only legal entities), international organizations and atypical actors.⁶⁵ The international organizations were the ones which initiated the move towards soft forms of regulation and are still the ultimate embodiment of “soft power”.⁶⁶ They were to cause major disruption in the way in which international law is created and presented to those to whom it applies. From the very first actions they took, the organizations had to choose a different method from the hierarchical command in order to encourage international cooperation. They went on to develop a consistent legal technique designed to persuade rather than to force their Member States to adopt compliant behaviour.⁶⁷

The international organizations would also encourage the proliferation of soft law by providing a forum for new state legal entities – former colonial states – or by joining forces with non-state actors not yet recognized as legal entities – NGOs and multinational companies.⁶⁸ The use of soft norms in the UN institutions has been notable since the 1960s, with the growth in the number of Member States emerging from the

⁶³ Isabelle Daugareilh, “La responsabilité sociale des entreprises transnationales et les droits fondamentaux de l’homme au travail: le contre-exemple des accords internationaux”, in I. Daugareilh, op. cit., note 47, pp. 349-384, p. 376.

⁶⁴ A term coined by G. Abi-Saab, loc. cit., note 1, p. 67. See also K.W. Abbott and D. Snidal, loc. cit., note 2, p. 423.

⁶⁵ Atypical actors are so called with reference to the traditional legal school of thought which regards states as the only legal entities. They include NGOs and multinational companies, and many people classify them in the wider category of international civil society. Sandra Szurek, “La société civile internationale et l’élaboration du droit international”, in Habib Gherari and Sandra Szurek (eds.), *L’émergence de la société civile internationale. Vers la privatisation du droit international?*, Paris, Pedone, 2003, pp. 49-75, p. 54.

⁶⁶ Ian Johnstone, “US-UN Relations after Iraq: The End of the World (Order) As We Know It?”, (2004) 15 *European Journal of International Law* 813.

⁶⁷ The normative activity of the international organizations particularly takes the form of the adoption of resolutions or recommendations addressed to their Member States. This happens alongside their activities in connection with the sources listed in Article 38 of the ICJ Statute. For this reason some authors have labelled the activity of the international organizations “law-making by subterfuge”, as was highlighted by José E. Alvarez, *International Organizations as Law-makers*, Oxford, Oxford University Press, 2005, pp. 595 ff in particular.

⁶⁸ The complementarity between the activities of the international organizations and those of the NGOs is recognised: Geneviève Burdeau, “La privatisation des organisations internationales”, in H. Gherari and S. Szurek, op. cit., note 65, pp. 179-197.

process of decolonization. The pluralism of the international community has necessarily led to certain legal changes. While still remaining centred on the state as a legal entity, the international community now includes states which are very different from each other and above all have glaring material inequalities.

Just as soft law resulted from the international organizations' need to establish the legitimacy of their normative activity in the face of sovereign states which rejected any supranational authority, so it also represented for the decolonized states in the 1960s and 1970s a tool for combating the international law drawn up by the developed countries. The new states were to use soft law in the construction of development law.⁶⁹ Excluded from the legal system and not having been involved in creating the rules of hard law, they would seek to change its substance through resolutions of the United Nations General Assembly. In this example, soft law served as a lever for changing positive international law, which still reflected only the interests of the developed countries. For states that had only recently become sovereign, soft norms were a revolutionary form of law and a weapon against the norms traditionally produced by the formal sources of law.⁷⁰

The international organizations would also encourage the representation of international civil society and the involvement of NGOs and the business world in international regulation.⁷¹ In a globalized world soft law would gain a new lease of life, but this time in the hands of atypical actors.⁷² These non-state actors are not recognized as legal entities, but from the 1990s in particular they would step up their activity at international level using the only normative procedure available to them, soft forms of regulation. Unlike sovereign states, these actors think of international norms not so much in territorial terms as in functional terms.

⁶⁹ A series of resolutions of the United Nations General Assembly on development law were approved in establishing a new international economic order: C. Chinkin, *loc. cit.*, note 24, p. 853 ff; M. Dias Varella, *loc. cit.*, note 16, p. 357.

⁷⁰ Particularly treaty and customary sources: René-Jean Dupuy, "Droit déclaratoire et droit programmatore – de la coutume sauvage à la 'soft law'", unpublished statement by the Toulouse Symposium on 16-18 May 1974, Société française pour le droit international. For a published English translation of this text, see "Declaratory law and programmatic law: from revolutionary custom to 'soft law'", in R.J. Akkerman, P.J. Van Krieken and C. O. Pannenberg (eds), *Declarations on principles, a quest for world peace (Liber Röling)*, Sijthoff, Leyden, 1977, pp. 247-257.

⁷¹ "[...] the starting point for NGOs' participation in modern forms of law-making came in the Paris Peace Conference in 1919, which established not only the terms of the peace following World War I but also the League of Nations. At the Conference at least four non-state groups played a role – labor unions, Jewish and Zionist organizations, women's groups, and the American Red Cross.": Steve Charnovitz, "Two Centuries of Participation: NGOs and International Governance", (1997) 18 *Mich. J. of International Law* 183. See also Steve Charnovitz, "The Emergence of Democratic Participation in Global Governance (Paris 1919)", (2003) 10 *Ind. J. Global Legal Studies* 45.

⁷² S. Szurek, *loc. cit.*, note 65, p. 49.

Their soft law is designed for the pragmatic purpose of regulating their transnational activities.⁷³

In the past, international actors all had their own reasons for using soft law. This multiple use sometimes resulted in changes to positive international law, something which the actors even actively sought, as we can see from the example of the decolonized states. Soft law can result in the creation of new rules of treaty law.⁷⁴ It can also promote the development of a customary rule by engendering an *opinio juris* on the subject, principles or systems it enshrines.⁷⁵ In such cases soft law is actually tantamount to pre-law in that it leads to the adoption of legal obligations under treaty law or the development of customary rules. This role is something that the decolonized states in particular have advocated as a way of changing hard law, in whose development they were not involved.

However, soft law is not merely an antechamber to treaty or customary law. For international actors it can also represent a parallel and more appropriate method of regulation than the formal sources of law.⁷⁶ The idea that soft law contains only pre-legal obligations and has nothing approaching the status of law must therefore be rejected out of hand,⁷⁷ since it ignores the gradation in the system of norms and the fundamental role of the practices of states and other international actors in the development of international labour standards. The legal effects of both soft and hard instruments vary, and consequently the actual form of the instrument is of very little relevance. There is no threshold of legality in a decentralized plural international society, and we must abandon this idea of law unless we wish it to consign it to a negligible role in global governance.

⁷³ Frans von der Dunck, "The Undeniably Necessary Cradle – Out of Principles and Ultimately Out of Sense", in G. Lafferranderie and D. Crowther (eds), *Outlook on Space Law over the Next 30 Years*, The Hague, Kluwer Law International, 1997, pp. 401-414, p. 410. Instead of the territorial approach to law developed in the 20th century by sovereign states when they still had the leading role in developing and applying law, each type of activity was now to be seen as organizing its own relevant area of regulation instead of occupying a predetermined territory.

⁷⁴ For instance, some UN resolutions initiated negotiations and the adoption of multilateral treaties protecting human rights, including the International Covenant on Civil and Political Rights adopted on 19 December 1966, (1976) 999 UNTS 107, and the International Covenant on Economic, Social and Cultural Rights cited earlier in footnote 47: F. Francioni, loc. cit., note 3, pp. 175 and 176.

⁷⁵ The ICJ acknowledged the contribution of the General Assembly resolutions to the development of customary rules in its Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion of 8 July 1996, ICJ Reports 1996, p. 226, para. 70: "a series of resolutions may show the gradual evolution of the *opinio juris* required for the establishment of a new rule". This contribution of soft law to the development of customary international labour law was also underlined by Véronique Marleau, "Réflexions sur l'idée d'un droit international coutumier du travail", in J.-C. Javillier and B. Gernigon (eds.), op. cit., note 35, pp. 363-409.

⁷⁶ H. Hillgenberg, loc.cit., note 2, p. 501.

⁷⁷ K. Boustany and N. Halde, "Mondialisation et mutations normatives: quelques réflexions en droit international" in F. Crépeau, op.cit., note 22, pp. 39 and 40.

The artificiality of having a strict demarcation between legal and pre-legal obligations can be clearly seen in the example of the unratified ILO conventions.⁷⁸ The conventions are, in theory, instruments of hard law and contain binding legal obligations. However, where they are not ratified, they undergo a drop in legal status, as it were, and become instruments of soft law. Yet despite this lesser status and the resulting lack of binding force, Article 19(5)(e) of the *ILO Constitution* lays down a procedure for the Member States to report to the ILO Director-General the position of their laws and practices in regard to the matters dealt with in the unratified convention. The states are required to say to what extent effect has been given to any of the provisions of the convention by legislation, administrative action, collective agreement or otherwise, and to state the difficulties which prevent or delay the ratification of the convention.

The function of soft law is to ensure the completeness of the legal system by incorporating the practices of the actors involved. It weaves a normative fabric that plugs the gaps in hard law, occupies the areas abandoned by the official legal channels and builds bridges between the different forms of international law-making generated by having a number of different international actors. Analysing hard law on its own merely provides a selective view of the international legal system, which has for a long time now combined both soft and hard norms.⁷⁹ The subject-matter dealt with in a soft instrument becomes subject to the expectations of members of the international community in more or less the same way as with hard norms, and regardless of whether there are sanctions involved.⁸⁰ While soft law may lack binding force as defined in legal theory, this does not mean that it does not have legal effects which are themselves the sign and product of ongoing cooperation and competition between the actors of an international community which now lacks comparability.⁸¹

⁷⁸ The Vienna Convention on the Law of Treaties, adopted on 23 May 1969, (1980) 1155 UNTS 354, similarly underlines the artificiality of having a single legality threshold. Article 18 provides for unratified treaties to have direct legal effect by requiring signatory states to refrain from acts which would defeat the object and purpose of the treaty in question.

⁷⁹ Soft law is said to be a sign of the maturity of the international legal system, which had to develop without any central authority issuing and applying the law on pain of sanction. "Ultimately, the coalition or co-existence of norms of varying degrees of normative 'density' should not be seen as a sign of the primitive nature of international law, but rather of its maturity, since it was able to develop an adequate and realistic array of cooperative instruments where effective sanctions are lacking": E. Riedel, loc. cit., note 8, p. 68.

⁸⁰ T. Gruchalla-Wesierski, loc. cit. note 24; H. Hillgenberg, loc. cit., note 2, p. 501; David A. Wirth, "Economic Assistance, the World Bank, and Nonbinding Instruments" in Edith Brown Weiss (ed.), *International Compliance with Nonbinding Accords*, Washington, American Society of International Law, Studies in Transnational Legal Policy, No 29, pp. 219-246, p. 222 to 225.

⁸¹ P.-M. Dupuy, loc. cit., note 2.

The interpretative role of soft law should not be overlooked when analysing the legal system. Soft law forms part of a wider legal debate and is indirectly involved in aligning the interpretations of the international community more closely and in linking soft and hard norms more harmoniously in international law. Hard rules of treaty and customary law must be interpreted in the light of all the rules of international law, including soft forms of regulation.⁸² Soft law brings the interpretation of hard norms up to date in line with changes resulting from the international actors' practices.⁸³

2. Consequences of soft law in international labour law

Soft forms of regulation thus form part of the legal system and have varying effects. They can sometimes help to interpret hard law or even influence its effectiveness. However, this influence of soft law on hard law can not only improve compliance with legal norms, it can also reduce it. Given the proliferation of soft law, it is the potential for reducing compliance that is often mentioned. What should we make of people's fears that soft law is used as a way of sidestepping or even cancelling out hard law? Does soft law necessarily have to have a harmful effect on international labour law? Do the calls for greater flexibility in the ILO have to be seen as an attempt to blunt international labour standards?⁸⁴

The tactic of blunting international labour law through the use of substantive soft law, in other words by including increasingly soft standards in the conventions, was criticized most recently in connection with precarious employment.⁸⁵ A study of the provisions of three conventions adopted in succession in the 1990s shows a rapid shift towards softness and a resulting reduction in the protection of workers' rights. The *Part-Time Work Convention, 1994 (No 175)* provides that measures must be taken to ensure that part-time workers receive the same protection as that

⁸² Ulrich Fastenrath, "Relative Normativity in International Law", (1993) 4 *European Journal of International Law* 305, pp. 314 to 316; K. Zemanek, loc. cit., note 8, p. 860.

⁸³ In the Case concerning the Continental Shelf (Tunisia/Libyan Arab Jamahiriya), judgment of 24 February 1982, ICJ Reports 1982, p. 18, para. 23 et seq., the ICJ considered that the "new accepted trends" in the Third United Nations Conference on the Law of the Sea could be "factors in the interpretation of existing rules".

⁸⁴ "There is little doubt that the drafters of ILO Conventions are under growing pressure to make Conventions as non-committal as possible, to draw up hortatory provisions which merely identify policy objectives but involve no, or almost no concrete obligations. In this sense, to describe the deliberate softening of international labour standards as flexibility is a misnomer. Flexibility should remain an exceptional technique designed to offer common-sense solutions to specific problems of application, and not a stratagem for scrapping legal commitment altogether." G. P. Politakis, loc. cit., note 48, p. 493.

⁸⁵ Leah F. Vosko, "Standard Setting at the International Labour Organization: The Case of Precarious Employment", in J. J. Kirton and M. J. Trebilcock, op. cit., note 5, pp. 134-152.

afforded to full-time workers, while the *Home Work Convention, 1996 (No 177)* provides for a national policy on home work which promotes, as far as possible, equality of treatment between homeworkers and other wage earners, taking into account the special characteristics of home work. There is then a clear slide towards softness in the *Private Employment Agencies Convention, 1997 (No 181)*, which abandons the aim of parity pursued by the earlier conventions, and merely promotes the adequate protection of workers employed by private employment agencies.

The slide towards softness on a formal level was also criticized when the International Labour Conference adopted its 1998 Declaration in response to the challenges posed by a globalization seen at the time in essentially economic terms.⁸⁶ Since the adoption of this soft instrument, the Member States have been required, merely by virtue of their membership of the ILO and where the relevant conventions have not been ratified,⁸⁷ to respect, promote and apply the principles relating to the following fundamental rights: freedom of association and the effective recognition of the right to collective bargaining, and the elimination of forced labour, child labour and discrimination in respect of employment and occupation.

The 1998 Declaration gave rise to concerns within the ILO about the effectiveness of hard rules in international labour law.⁸⁸ The negotiations leading up to its adoption exposed far-reaching differences between the ILO's constituents as regards the role of international labour standards in a context of globalization.⁸⁹ From what they say, they appear to have fallen back on a soft instrument in order to find a minimal con-

⁸⁶ International Labour Office, The ILO, standard-setting and globalization, report by the Director-General to the International Labour Conference, 85th Session, Geneva, 1997.

⁸⁷ The eight relevant fundamental conventions can be divided into four separate groups: the first includes the Forced Labour Convention, 1930 (No 29) and the Abolition of Forced Labour Convention, 1957 (No 105); the second includes the Freedom of Association and Protection of the Right to Organize Convention, 1948 (No 87) and the Right to Organize and Collective Bargaining Convention, 1949 (No 98); the third includes the Equal Remuneration Convention, 1951 (No 100) and the Discrimination (Employment and Occupation) Convention, 1958 (No 111); while the fourth and final group includes the Minimum Age Convention, 1973 (No 138) and the Worst Forms of Child Labour Convention, 1999 (No 182).

⁸⁸ Isabelle Duplessis, "The ILO Declaration on Fundamental Principles and Rights at Work: A New and More Efficient Form of Regulation?", (2004) 59-1 *Relations industrielles/Industrial Relations* 52.

⁸⁹ The discussion leading up to the adoption of the Declaration began in 1994: International Labour Office, *Defending Values, Promoting Change – Social justice in a global economy: An ILO Agenda*, report by the Director-General to the International Labour Conference, 81st Session, Geneva, 1994. This ILO report also followed on from negotiations to set up a new World Trade Organization and the developing countries' categorical refusal to include a social clause to be administered by the future international organization. For the content of the discussions on the 1998 Declaration within the ILO, see: International Labour Conference, *Consideration of a possible Declaration of principles of the International Labour Organization concerning fundamental rights and its appropriate follow-up mechanism*, ILC, 86th Session, 1998, (Report VII), pp. 3-10.

sensus on the ILO's standards-related work. In this respect the Declaration can rightly be seen as the outcome of political manoeuvring to draw a temporary veil over the dissension at the time. Soft law gives the impression of a shared determination and is a delaying tactic in that it puts off dealing with any differences that have emerged during negotiations on the adoption of international labour standards until those standards are applied. If there is no shared determination, then the future effectiveness of international labour standards has to be a matter of concern.

Criticisms of the Declaration relate not just to its softness, but also to its content and its potential to replace hard rules in international labour law.⁹⁰ From this point of view, the Declaration is a sort of Trojan horse within the international labour code developed by the ILO since 1919. The new regime is accused of focusing on principles instead of the rights laid down in the international conventions. Any idea of linking the principles and rights set out in the Declaration to the relevant conventions was also specifically rejected during negotiations on its adoption. The spirit of the new regime is promotional in its approach and is clearly different from the way in which the international labour standards as a whole have been interpreted by the ILO's traditional supervisory systems.

Beyond this overall slide towards soft form and substance, the ILO is also criticized for allowing the traditional supervisory systems to be sidestepped in favour of informal monitoring procedures, and for the fact that the rules are not binding and there is no sanction if they are breached. Unlike hard law, the image of soft law is automatically associated with an absence of supervisory systems or third parties ensuring its application. However, this image is not strictly accurate, particularly not in the ILO.

In addition to the procedures provided for in Article 19 of the ILO Constitution for reporting on recommendations and unratified conventions, a number of formal soft law instruments are also accompanied by a monitoring procedure. Some people may see these as informal compared with the traditional hard law supervisory systems, but if we take just the example of the follow-up to the 1977 *Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy*, amended

⁹⁰ Philip Alston and James Heenan, "Shrinking the International Labor Code: An Unintended Consequence of the 1998 ILO Declaration on Fundamental Principles and Rights at Work?", (2004) 36 *New York University Journal of International Law and Politics* 221; Philip Alston, "'Core Labour Standards' and the Transformation of the International Labour Rights Regime", (2004) 15 *European Journal of International Law* 457.

in 2000,⁹¹ we can see that soft monitoring procedures for soft norms certainly do exist. The background to the adoption of the Tripartite Declaration is reminiscent of the 1998 Declaration. In the 1960s-70s, the International Labour Conference had been unable to adopt a convention covering the activity and development of multinational enterprises even though this was urgently needed. The ILO Governing Body at the time preferred to adopt a soft instrument, the aim of which was to encourage the positive contribution of multinationals to economic and social progress. The Tripartite Declaration refers to the principles and rights of workers, and provides for a flexible procedure for reporting on the follow-up given to it and another for the examination of disputes concerning its application. However, this monitoring has so far been applied with varying degrees of success, and there are now fears about how well the 1998 Declaration on Fundamental Principles and Rights at Work will be monitored.⁹²

The debate about the merits of having soft monitoring of norms which are themselves soft brings us back to the question of the binding force of law and the effectiveness of international labour standards. In practice, is the distinction between soft and hard norms or the existence of a supervisory system rather than informal monitoring really important for ensuring compliance with standards? Some people believe that these distinctions are not relevant because the entire international labour code is soft:

⁹¹ Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy, adopted by the Governing Body at its 204th Session, Geneva, November 1977 [“the Tripartite Declaration”]. This Declaration was amended at the Governing Body’s 279th Session in November 2000.

⁹² The monitoring of the Declaration was developed on the basis of Article 19 of the ILO Constitution concerning the examination of unratified conventions. “The purpose of the Annual Review is to provide a yearly opportunity to examine the efforts made in accordance with the Declaration by Member States that have not yet ratified all ILO fundamental Conventions. The governments’ reports, the comments by employers’ and workers’ organizations and the replies to these comments by the governments concerned are compiled by the Office and reviewed and analysed in an ‘Introduction’ by an independent group of ILO Declaration Expert-Advisers appointed by the ILO Governing Body for more in depth discussion and possible follow-up”: Momar N’Diaye, “The Annual Review and the promotion of the 1998 ILO Declaration on Fundamental Principles and Rights at Work: Developments and initial impact assessment”, in J.-C. Javillier and B. Gernigon, *op. cit.*, note 35, pp. 411-461, p. 414. The practical repercussions of the technical cooperation introduced by the Declaration are beginning to be felt. In paragraph 3 the Declaration requires the Organization to help its Members to respect the fundamental principles and rights by rationalising the use of the ILO’s budgetary and human resources. The initial impact of this was generally positive. However, one worrying aspect has been highlighted: “For a number of countries, this implementation cannot be achieved without a regular and substantive support through technical cooperation. The major current gap in the Follow-up to the Declaration consists in its incapacity to meet the high demands expressed by governments and employers’ and workers’ organizations. The Declaration and its Follow-up cannot continue to raise expectations and not to respond to the majority of them. The Expert-Advisers and the Governing Body have several times reiterated their call for the donor community’s support to the Declaration’s follow-up, but with no tangible results”, M. N’Diaye, page 460. There is a reference to the discussions between constituents when the 1998 Declaration was adopted, and criticism of this soft instrument as a delaying political manoeuvre.

“The fact is that the techniques at the ILO were and are soft. To be sure, one sees the conventions referred to as ‘hard’ law, but this has to be taken as a reference to their status as ratified international treaties and not ‘mere’ private voluntary measures such as corporate codes; it is not about any real enforcement power. The ILO has never ‘enforced’ anything.”⁹³

There is no doubt that the discussions on the adoption of the 1998 Declaration and its impact on the practices of international actors illustrate an ambivalent attitude to law within the ILO since the end of the Cold War.⁹⁴ Western governments and employers have been uneasy about how some standards have been interpreted by the supervisory systems, particularly the interpretations of the right to strike issued by the Committee of Experts for the Application of Conventions and Recommendations and the Committee on Freedom of Association on the basis of Article 3 of the Freedom of *Association and Protection of the Right to Organize Convention, 1948 (No 87)*. This article provides that workers’ and employers’ organizations have “the right to draw up their constitutions and rules, to elect their representatives in full freedom, to organize their administration and activities and to formulate their programmes”. The workers, on the other hand, take the view that there has been too much hard law and not enough soft, a sort of legalistic “inflation” exemplified by the treatment of recommendations as the poor relations of conventions, and by the initially lukewarm response in discussions on the adoption of the 1998 Declaration.

The problem in the ILO is both a political one rooted in the ideological gap that opened up at the end of the Cold War, and an epistemological one rooted in a view of law in which the proliferation of soft law has made the concept of binding force more confused. The constituents’ opinions are overdetermined by the fact that international sanctions do not exist or are not effective. In fact, one thing is undeniable: the adoption of the 1998 Declaration and the technical cooperation developed

⁹³ Brian A. Langille, “Core Labour Rights – The True Story (Reply to Alston)”, (2005) 16 *European Journal of International Law* 409, p. 423, and a little later on page 434: “We can now put aside the point that this was an impossible assignment for the ILO as constituted – impossible because ILO conventions are neither binding nor enforceable”. Philip Alston criticises this short-sighted view of the supervisory systems and the law: “A much better understanding can be gained from the rapidly growing literature dealing with compliance mechanisms in international law which indicate clearly that formal legal enforcement, especially in the area of human rights, is a very minor part of the overall regime. It is untenable then for Langille to suggest that the ‘old’ ILO approach consisted of viewing law simply as an ‘enforcement mechanism’. Indeed a great deal of writing in the field of social rights has been devoted to the opposite viewpoint, one which emphasizes empowerment and mobilization”: Philip Alston, “Facing Up to the Complexities of the ILO’s Core Labour Standards Agenda”, (2005) 16 *European Journal of International Law* 467, p. 473.

⁹⁴ Breen Creighton, “The Future of Labour Law: Is There a Role for International Labour Standards?”, in Catherine Barnard, Simon Deakin and Gillian S. Morris (eds), *The Future of Labour Law. Liber Amicorum Bob Hepple QC*, Oxford and Portland (OR), Hart Publishing, 2004, 253-273, p. 264.

subsequently have helped to publicize fundamental principles and rights at work universally, both within and outside the ILO. They have been taken on board in a number of public initiatives, often in connection with free trade agreements.⁹⁵

While external public initiatives already meant that the ILO was facing an uphill task in finding the link between soft and hard standards needed for good global governance, private initiatives are likely further to complicate the problem. A number of codes of conduct adopted by multinational companies refer to the fundamental principles and rights of the ILO Declaration⁹⁶, but the linkage has yet to be properly established. Problems that have rightly been highlighted include the fact that companies pick and choose international standards to match their own private interests and those of their staff, the increase in the number of codes of conduct, and the fact that they are often not applied properly in practice. More and more multinationals are choosing the standards they want and ensuring their application, where necessary. Plural formulation of standards may in practice lead to conflicting interpretations of the content of international labour standards and the implosion of the international labour code⁹⁷. These soft norms may sometimes be monitored, but

⁹⁵ “In the past six years the Declaration and its standards have been invoked and relied upon in both regional and bilateral free trade agreements, often replacing more extensive lists of rights such as those used in the NAFTA and other older agreements. They have also been incorporated into, or provided the basis for, a wide range of labour-related provisions in soft law instruments such as the UN’s Global Compact, the OECD Guidelines, and the ILO MNE Declaration, as well as underpinning the policies of the World Bank, the International Finance Corporation, and the innumerable corporate and multi-stakeholder codes of conduct.”: P. Alston, *loc. cit.*, note 90, p. 518. On the incorporation of the ILO Declaration in free trade agreements in particular, see Cleopatra Doumbis-Henry and Éric Gravel, “Accords de libre-échange et droits des travailleurs: évolution récente”, (2006) 145 *Revue internationale du Travail*, No 3. On the role of publicity for the 1998 Declaration and its Follow-up, see M. N’Diaye, *loc. cit.*, note 92. One example of the public appropriation of the fundamental principles and rights set out in the 1998 Declaration was by the European Union in its Generalized System of Preferences: “The most promising linkage between the Declaration and the relevant conventions is to be found in the Regulation adopted by the European Union in 2001, which describes the arrangements to be followed in implementing the EU’s Generalized System of Preferences (GSP) for a three-year period until the end of 2004. The Regulation envisages the possibility of providing ‘special incentive arrangements’ to countries which demonstrate their commitment to the protection of labour rights by inter alia legislatively incorporating the substance of the standards laid down in what are described as the ‘fundamental’ ILO conventions. Under this formulation the key reference points are the conventions rather than the 1998 Declaration. In much of its work since 2001, however, the EU has focused more on the latter”: P. Alston, *loc. cit.*, note 90, p. 492. For an analysis of this appropriation by the European Union and of the real or supposed dangers of the fragmentation of international law: Joost Pauwelyn, “Europe, America and the Unity of International Law”, (March 2006), Duke Law School Legal Studies, Paper No 103; available at SSRN: <http://ssrn.com/abstract=893611>.

⁹⁶ On social initiatives by enterprises, see the BASI database: www.ilo.org/public/english/employment/multi/basi.htm. See also: Adelle Blackett, “Global Governance, Legal Pluralism, and the Decentered State: A Labor Law Critique of Codes of Corporate Conduct”, (2001) 8 *Indiana Journal of Global Legal Studies* 401; Jean-Michel Servais, “Normes internationales du travail et responsabilité sociale des entreprises”, in J.-C. Javillier and B. Gernigon, *op. cit.*, note 35, pp. 565-583.

⁹⁷ “[...] an important consequence of the Declaration has been to facilitate or validate the efforts of actors external to the ILO who seek to develop alternatives to the ILO’s own monitoring system. Now that the Declaration has endorsed a very limited group of standards, and mandated no particular definition of any of them, it is open to other actors to devise their own means by which to evaluate compliance with the relevant norms as they interpret them.”: P. Alston, *loc. cit.*, note 90, p. 510.

it has never yet been possible to tell whether international labour standards are effective in the field by looking at these private initiatives from outside.

This tendency towards a dilution of references brings with it the risk that the international labour code will itself be watered down, and the linkage of soft and hard norms presents very real problems. Cannot the 1998 Declaration play a polarising role between hard and soft norms?⁹⁸ Should it not be seen as an additional resource for ensuring greater respect for workers' rights?⁹⁹

III. Conclusion

Because its Constitution invites it to do so, the ILO has for some time preferred the adoption of soft law as a standard-setting technique in international labour law. The new element nowadays is the establishment of a parallel system for the formulation and implementation of core principles and rights by public and private actors. There is a real risk that rights in the labour field, as interpreted by the supervisory bodies since the creation of the ILO, will be watered down, particularly as the role of law in protecting workers seems to have been up for discussion since the end of the Cold War. What role should the ILO play in linking up soft and hard international labour law standards from public as well as private actors?

The ILO must as far as possible incorporate the soft norms developed by external actors. Just as the international actors have taken international labour standards on board, so the ILO must take their soft law on board and incorporate it in the legal system. Links should be created between soft and hard norms, and reference made to the conventions and recommendations as interpreted by the supervisory systems since

⁹⁸ Talking about the 1998 Declaration, Isabelle Daugareilh says: "It is therefore the only international instrument which, on social responsibility, proposes links between soft law and hard law, tangible points of contact between the private and the public, and consequently links between private rules on social responsibility and public rules on fundamental rights", *loc. cit.*, note 63, p. 377.

⁹⁹ Instead of seeing both forms of standard-setting as independent regimes, the complementary nature of soft and hard rules in international labour law (standards and supervisory systems) has been highlighted in the context of the ILO, in particular by Francis Maupain, "Revitalization Not Retreat: The Real Potential of the 1998 ILO Declaration for the Universal Protection of Workers' Rights", (2005) 16 *European Journal of International Law* 439 and, by the same author, "La 'valeur ajoutée' de la Déclaration relative aux principes et droits fondamentaux au travail pour la cohérence et l'efficacité de l'action normative de l'OIT", in I. Daugareilh, *op. cit.*, note 47, pp. 1-56.

1919.¹⁰⁰ If the international labour standards are to be revitalized soft norms (recommendations and declarations) and hard norms (conventions) must be linked together harmoniously, and the authority of the ILO's supervisory systems and their interpretations of the standards since the early 1920s must be promoted.¹⁰¹ On a political level, given the ideological gap that has opened up between the constituents since the end of the Cold War, discussions in the ILO should be refocused on its institutional mission and the spirit of its Constitution, so that consideration can be given to the role of the international labour standards in the promotion and respect of workers' rights.

Why give the ILO a leading role in linking soft and hard rules in international labour law? Where does it get its authority from? International organizations are generally the preferred bodies for achieving synergy, global governance and linkage between soft and hard norms in a decentralized international society.¹⁰² They encourage the developing countries to get involved in the creation and application of international norms.¹⁰³ As well as being a public and universal body in terms of state representation,¹⁰⁴ the ILO also enables civil society actors to create and apply international labour standards. Its tripartite composition promotes democratic debate and the consolidation of the rule of law.¹⁰⁵

¹⁰⁰ P. Alston, *loc. cit.*, note 93, p. 479.

¹⁰¹ Virginia Leary, "Lessons from the Experience of the International Labour Organization" in Philip Alston (ed), *The United Nations and Human Rights: A Critical Appraisal*, Oxford, Clarendon Press, 1991, 598-602.

¹⁰² Nicholas Bayne, "Hard and Soft Law in International Institutions: Complements, Not Alternatives", in J.J. Kirton and M.J. Trebilcock, *op. cit.*, note 5, pp. 347-352.

¹⁰³ The soft forms of social regulation are particularly well developed in financial and economic circles. The processes for adopting soft law often mean that the developing countries play no part in developing and applying soft norms in these sectors. The "[...] inequalities are compounded by the many important decisions on global governance which are taken outside the multilateral system. Limited membership groups of rich nations such as the Group of 7 (G7), the Organization for Economic Cooperation and Development (OECD), the Basel Committee and the Group of 10 (G10) within the IMF have taken important decisions on economic and financial issues with a global impact": report by the World Commission on the Social Dimension of Globalisation, cited earlier, note 57, para. 348. The Basel Committee on Banking Supervision, which involves the central banks and banking regulatory and supervisory bodies from the main industrialised countries, is an extremely interesting example here: Michael S. Barr and Geoffrey P. Miller, "Global Administrative Law: The View from Basel", (2006) 17 *European Journal of International Law* 15-46; Zaring, "Informal Procedure, Hard and Soft, in International Administration", (2005) 5 *Chicago Journal of International Law* 547; Katerina Tsotroudi, "International labour standards as a model for the future: The case of financial regulation" in J.-C. Javillier and B. Gernigon, *op. cit.*, note 35, pp.615-642, pp. 624-625; Lawrence L.C. Lee, "The Basle Accords as Soft Law: Strengthening International Banking Supervision", (1999) 39 *Virginia Journal of International Law* 1. The role of the developing countries is clearly marginal outside the multilateral system, and even in the WTO material inequalities disadvantage them in negotiations. General guidelines and recommendations on best practice, known as Basle Accords, are adopted by private actors and then signed by the states, which undertake to ensure that their own banking systems apply them. Civil society sets the standard, which is supported by the states before being applied by private actors on a domestic level.

¹⁰⁴ ILO website (www.ilo.org) consulted in April 2006: 178 states are members of the Organization.

¹⁰⁵ See in particular the Member States' obligation to submit conventions and recommendations to the competent national authority or authorities provided for in Article 19(5)(b) and (c) for conventions adopted by the International Labour Conference, and the reporting mechanism that accompanies it, and Article 19(6) (b) and (c) for recommendations.

The possible conflict between hard and soft norms need not be seen as a huge problem if it occurs within the framework of an international institution. There are always contradictions within any legal system, whether international or national. If there is a conflict or contradiction between two legal proposals within a legal system, which interpretation prevails will depend on the merits of the proposal and the power of the actor making it. Is the proposal consistent with the legal fabric that makes up international labour law? Does not the ILO have the necessary public authority to take the final decision on whether to adopt it, based on a century of developing an international labour code? Is it not an authority on meaning which can provide a great service for the world?¹⁰⁶

¹⁰⁶ On the philosophical concept of normative authority, see Myriam Revault d'Allonnes, *Le pouvoir des commencements. Essai sur l'autorité*, Seuil, Paris, 2006.

Corporate Social Responsibility and law: Synergies are needed for sustainable development

Jean-Claude Javillier *

What do we expect from (good) governance in today's world? We expect institutions, whether public or private, to be coherent and transparent. We hope that standards (especially international labour standards), will enable globalization to go together with effective respect for the rights of man,¹ to take account of social justice and to promote decent work for all. What do we expect from corporate social, or rather societal,² responsibility? We expect a practical reconciliation and a new balance, especially between economic activities, labour relations and the environment in daily life.³ The encounter between governance, legal norms and societal responsibility (not just corporate, but of organisations and institutions as well) is leading to complex links and unexpected synergies whose impact cannot be immediately measured but will undoubtedly change societies permanently. This is likely to give a fresh dynamic to the rights of man⁴ and labour rights throughout the world. There is

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¹ There is no doubt that labour rights and the rights of man are closely linked (see in particular James A. Gross, "Workers' Rights as Human Rights", Cornell University Press, Ithaca and London, 2003, 272 p).

² Terminology is obviously important. The risk is one of reducing CSR solely to its social aspects. While these are of immense importance, CSR cannot be understood unless account is taken of human rights and environmental issues. CSR is based in practice on three pillars (People, Planet, Profit, to use the Anglo-American terminology). The new links forged between these pillars may entail new dynamics, especially in the social arena. Synergies with law as regards all these issues need, however, to be sought in a creative and prudent way. This article will attempt to shed some light here.

³ From a political point of view, and in the global context of the G8, see paragraphs 21 to 28, "Investment and Responsibility – the Social Dimension of Globalization", of the Heiligendamm Summit Declaration, 7 June 2007.

⁴ The term "human rights" may well be preferable for gender issues to which particular attention needs to be paid. Every step has to be taken to ensure, in actual fact and in daily life, that equality between men and women is promoted. In this article, however, may a lawyer be forgiven for returning to the terminology of the United Nations: the rights of man.

then an immediate question: what “role” does – and will – law play and what role will lawyers be called upon to play as these changes take place?⁵

It is difficult at present to measure the overall normative impact of the geopolitical changes which took place on the eve of the new millennium, especially as regards relations between employers, workers and governments throughout the world and in every country and region. These encounters and synergies, in daily life and in practice, between systems of law, and obviously between common law and civil law systems, are, to some extent, already showing us the normative impact of globalization,⁶ and making us aware of the importance of globalization and the extent to which it is gathering pace in all fields.

The World Commission on the Social Dimension of Globalization⁷ has made it possible to measure differences in perceptions and also to observe a growing consensus around some important measures, with a particular stress on the need to link up levels of intervention, whether global, regional or local. Obviously, aspirations for future global governance involve a “remodelling” of the world order that generates new links between national and international competences as well as a new balance between economic and civic actors.⁸

Lawyers, aware of the close links between law, culture, economics and the environment, are facing far-reaching changes and have to assess the real impact of these changes on the norms – all kinds of norms – that surround them, even if they have not always taken part in their creation

⁵ What future does labour law have when faced with a large “standards market”? Points of view obviously differ (see in particular Alain Supiot, “Le droit du travail bradé sur le ‘marché des normes’”, *Droit social*, Paris, No 12, December 2005, p.1087; André Sobczak, “La responsabilité sociale de l’entreprise: menace ou opportunité pour le droit du travail?”, *Relations industrielles/Industrial Relations*, Quebec, Winter 2004, Vol. 59, No 1, p. 26.

⁶ Globalization is a term that may need to be qualified (see Jean-Bernard Auby, “La globalisation, le Droit et l’Etat”, Ed. Montchrestien, Clefs/politique, Paris, 2003, 154 p.); Robert J. Flanagan, William B. Gould IV (eds.), “International Labour Standards – Globalization, Trade, and Public Policy”, Stanford University Press, Stanford, 2003, 275 p. – Bob Hepple, “Social and Labour Rights in a Global Context – International and Comparative Perspectives”, Cambridge University Press, 2002 – Eric Loquin and Catherine Kessedjian (eds.), “La mondialisation du Droit”, LITEC, Proceedings of the Centre de recherche sur le droit des marchés et des investissements internationaux, Vol. 19, Paris, 2000, 612 p. – Bob Hepple, “Labour and Global Trade”, Oxford and Portland, Oregon, 2005, 302 p.

⁷ Set up at the initiative of Juan Somavia, Director-General of the International Labour Organization, this Commission is part and parcel of an institutional and intellectual dynamic which goes well beyond social issues alone. The reform proposals which have emerged are obvious proof of this. The report can be downloaded with a single mouse click (“A fair globalization: Creating opportunities for all”, Geneva, 2004, 188 p.): <http://www.ilo.org/public/english/wcsdg/docs/report.pdf>.

⁸ The work of Professor Mireille Delmas-Marty is obviously of great importance, whether on common law (Ed. du Seuil, Paris, 1994) or global law (Ed. du Seuil, 1998), as well as the Collège de France courses on the imaginative forces of law (Ed. du Seuil, 2004, 2006 and 2007). Also on “La dimension sociale de la mondialisation et les transformations du champ juridique”, at the conference held during the session of the ILO Governing Body in Geneva in November 2006 (International Institute for Labour Studies, Geneva, 2007, 11 p.).

or initial application. Depending on their backgrounds, their perceptions of this link and its consequences may differ substantially. The speed of the changes taking place and the wide range of locations in which they are taking place in some cases make it difficult or even impossible to gain the overview that would be needed for critical conceptual study and consistent doctrinal constructs. The impression is one of a major terminological disorder, a profound uncertainty about status and a radical calling into question of analysis methods. However, it is precisely at these moments of uncertainty (in some cases disarray in the case of legal doctrine) that critical analysis and comparative law (which helps to open up to problems and calls on creativity) are proving more indispensable than ever.⁹

We can certainly react to and develop stances on these normative changes. A first key question nevertheless has to be put: what norms are we talking about?¹⁰ We need to ask ourselves how methods can be changed in order to find out and understand how legal norms are being created and applied in the contemporary world. The impression given by lawyers' meetings and conferences, as well as dialogue between social partners and governments, is one of uncertainty about concepts and a lack of understanding of what is actually covered by the field of law. How difficult it is becoming to determine what is part of (real?) law! And yet the issue is so often one of norms. How tempting it is to qualify as norms all those practices that we would like to give a degree of permanence, a particular force, a scent of the ethical! The term is spreading and legal characterizations may be deeply affected by it.

There are obviously conflicting reactions to the inflation of regulations of all kinds, both public and private – that some would be only too keen to see, too quickly and superficially, as a hypertrophy of law. In some cases, there are pleas for better application of norms, without ruling out their contentious dimension; in others, the reaction is quite the opposite: the feeling that there is a failure of binding law and the growth of all kinds of alternatives giving priority to free choice and convenience, outside and

⁹ Pertinent methods and sufficient resources to apply them are needed. Obviously, the university and scientific situation differs from country to country. However, it seems to be the case that the proliferation of (small) research centres and a lack of planning are clear-cut obstacles to any development of comparative law which globalization is making so necessary. Similarly, particular attention needs to be paid to the permanent links that need to be forged with parliamentary institutions, so that comparative law can be taken into account in all their preparatory legislative work.

¹⁰ The development of legal norms, and the inadequacy of founding concepts, is at the core of the debate on which we are focusing. Much is to be learnt from the work of Professor Marie-Ange Moreau (in "Normes sociales, droit du travail et mondialisation. Confrontations et mutations", Ed. Dalloz, Collection "A droit ouvert", Paris, 2006, especially pp. 281 ff).

contrary to the law if need be (although the criteria for and the limits of such a choice have yet to be set). Why not? Better good than bad regulation. However, it is worrying to see how approximate the analysis is, failing, as it does, to reflect the complexity of law and norms in societies, and not just in the contemporary period. The working hypothesis that has to be adopted in any human society is undoubtedly that there are very complex links between the universes of the mandatory and the optional, the unilateral and the negotiated, the individual and the collective, the accepted and the constructed, the spontaneous and the institutional, and the rigid and the flexible.

At all levels (international, regional and national and local) the links between norms and practices, between creation and application, between adaptation and change, are extremely complex and in most cases ambivalent and changeable as well.¹¹ We all know, however, that a lawyer – like a diplomat – necessarily believes in the flexibility¹² (adaptable rules) and the invisibility (hidden norms) of social and institutional constructs, in the importance of what is not said (politically) and what is badly said (technically) in the regulations surrounding human societies. It is undoubtedly for that reason that the visible, emerging and cutting edge of norms cannot be taken as a criterion proving that there is a problem of law, or that this problem is pertinent. That prospect seems crucial for the issues on which we are currently focusing.

The impression is nevertheless that, for fashion or immediacy, we use concepts whose contours are far from precise and whose definition is far from being shared by everyone. Nevertheless, we can call for greater precision, for better determination of the elements taken into account for a characterization whose benefits will become evident in some cases only at a much later stage. We also have to refrain from any bad-tempered reactions. Bitterness is not a wise counsellor in the presence of an alleged, in some cases systematic, disregard for legal problems.

More dispassionately, readers are invited to look successively at two issues. In the first place at law in general. What potential links, articulations, frictions and even, in the extreme case, conflicts are being generated between corporate social responsibility and law? CSR and law: are

¹¹ And judges have undoubtedly not spoken their last (see Julie Allard and Antoine Garapon, “Les juges dans la mondialisation. La nouvelle révolution du droit”, Ed. du Seuil, la République des idées, Paris, 2005, 96 p.).

¹² Flexible law, in the very relevant words of Jean Carbonnier, the depth and modernity of whose work provide much food for thought (“Flexible droit: Textes pour une sociologie du droit sans rigueur”, LGDJ, Paris, 1982 and later editions).

these alien planets, worlds destined from the outset never to meet as though by fate? Could it be that CSR is able to change law (especially social, at a national, regional or international level)? Second, CSR always refers to norms, of different types and covering different fields. Whether the issue is one of human rights, the environment or labour relations, reference is in particular made – in documents of very different kinds from very different sources – to international norms from various institutions. Here again, there is no simple and certain answer. Reference to a norm, however serious, however explicit, does not put paid to controversy about the uses to which that norm can be put. Appropriating the norm requires a great deal of work. And it is delicate work, as will be stressed below. Lastly, the possible impact that the appropriation of these norms may have, not just on the dynamics of CSR, but also on the development of the normative system of the international organizations and in particular the ILO, needs to be examined. Although these are no more than simple medium- or long-term hypotheses, they are useful to keep in mind at a time when international labour law is passing through a period of far-reaching institutional, geopolitical and economic change.

I. Corporate Societal Responsibility and law

It is essential to clarify why CSR practices may or may not be located and develop outside the law. Various factors may be involved, in some cases deliberate strategies and in others contingent situations resulting from a given context. The first step is therefore to realise that analysing the development of CSR outside the law is highly complex, if we are to assess it correctly and not confuse situations which undoubtedly have nothing to do with one another. However, the counter-hypothesis also has to be envisaged: that of an encounter, whether intentional or fortuitous, with the law. As we know, the law, and especially its “harder”, i.e. repressive and contentious, manifestations, can crop up in any situation. The proliferation of legal disputes and the growing power of judges in many countries and continents cannot but bring about unexpected legal developments in corporate societal responsibility.

1. Outside the law

In a State governed by the rule of law, nobody can claim to disregard the law. No person, whether physical or legal, can ever consider

themselves to be “above” or “outside” the law. No institution, no actor, whether public or private, is able to get the better of the legal order or disregard all or part of the law and the technical elements which make it up. Any legal order, shaped by a democratic political system, is necessarily adversarial, and must in all cases recognise different interests and the freedom to express them within the limits of the law. Any legal norm, from its birth to its death, may be contested according to the procedures and within the context of the competent institutions. More generally, Professor Alain Supiot reminds us that “the legal order meets a need, vital for any society, to share a common state of duty which protects it against civil war”.¹³ Bearing these general considerations in mind, there is little doubt that disregard for the law would not be a scientifically convincing argument.

It is extremely important to analyse why CSR¹⁴ and the law should not, in theory, be linked and obviously to measure both the results and the impact that this has, over and above the practices of the moment. At least two factors may well explain the lack of a link between CSR and the law. First, the very conception of law, which everyone cannot but translate (albeit unconsciously) according to their experience and culture, and second, the very definition of CSR which has some repercussions in the field of law. In this respect, however, analysis has to be very cautious.

In substance, everything depends on the conception of law¹⁵ which is used. We all know that there are many versions of law, many differing perceptions, in both time and space. Comparative (in particular labour) law teaches us how inadequate or even irrelevant it is to look at norms on their own or in isolation. It is never enough to read a text, and even less to focus on a particular article or recital, to find out what is actually the law of any country. Comparing norms without looking at their place and their effectiveness is of little use. Law and non-law could then be readily opposed, just like light and shade or heaven and hell.¹⁶ Moreover, situa-

¹³ Alain Supiot, “Homo juridicus – Essai sur la fonction anthropologique du Droit”, Ed. du Seuil, La couleur des idées, Paris, 2005, p. 24.

¹⁴ Which involves taking account of the different “facets” of these practices, see in particular Marie-France B.-Turcotte and Anne Salmon (eds.), “Responsabilité sociale et environnementale de l’entreprise”, Presses de l’Université du Québec, Collect. Pratiques et politiques sociales et économiques, Québec, 2007, 228 p. – Revue Internationale de Gestion, “Responsabilité sociale de l’entreprise: débats actuels et perspectives”, HEC Montréal, Summer 2006, Vol.31, No 2, 144 p.- Courier de la Planète, “Quelle responsabilité sociale”, SOLAGRAL, Montpellier, 2001-Vol. IV, 72 p.

¹⁵ Whatever the case, the work of François Ost and Michel van de Kerchove is fundamental for the legal questions examined in this article (see “De la pyramide au réseau? Pour une théorie dialectique du droit”, Publications des Facultés universitaires Saint-Louis, Brussels, 2002, 587 p.).

¹⁶ It may be that law is becoming hell (at least procedurally). It is even more sure that non-law is hell: its corollary is always violence, corruption and discrimination. All situations that CSR is precisely designed to combat.

tions are never as clear-cut as those captivated, and undoubtedly reassured, by binary systems would like to believe. There is no legal system that could claim that its norms are fully and permanently effective. In almost all countries, there are “pockets” of non-law, areas (thematic and geopolitical) where law is ineffective. Systems for supervising the application of international conventions and especially that of the ILO,¹⁷ which is undoubtedly the oldest and most sophisticated,¹⁸ would seem to bear this out. The effectiveness and efficacy of the international labour standards, and in particular the fundamental and priority standards, presuppose some legal and political conditions which always need to be analysed in depth.¹⁹

For those wondering about the many causes and reasons for the development of practices of corporate social responsibility, the question of the effectiveness of law is an immediate one. In practice, one of the problems faced by enterprises²⁰ operating in different countries is that there may be different – or no – normative frameworks for their activities. This obviously does not just or chiefly apply solely to social questions, and labour relations in particular. The rule of law concerns human rights and environmental issues as much as it does labour relations. CSR practices at an international level may therefore be the result of a twofold quest: on the one hand, to establish a general framework through which any failure to apply international, particularly labour, standards can be remedied (without replacing them), albeit in a pragmatic and partial way, and on the other hand, to standardize some practices in the fields covered by CSR when this cannot be achieved rapidly or adequately enough through national law or even management practice.

¹⁷ From this point of view, the study (not just from a legal but also from a sociological point of view) of “cases of progress” is extremely instructive for anyone wishing to measure the degree of effectiveness (often gradual) of international labour standards. It is also essential to analyse the industrial relations systems and the institutions of each country to avoid taking account solely of “positive law” resulting from legislation.

¹⁸ This does not mean that adaptations and reforms are not needed. The ILO’s constituents, in a consensual and cautious – and therefore slow – way, have been initiating these changes for some years. Nobody knows at present how far they will go. Too far would be a mistake: a complete overhaul against a backdrop of bad faith on the part of some member countries, with no possible return (in the present international constitutional situation). Not far enough would leave the door open to reasonable criticisms of serious dysfunctions and a growing loss of legitimacy.

¹⁹ An opportunity to stress the rarity, as well as the importance of analysis work by lawyers based on situations in the field (see Chrysal Aguidioli Kenoukon, “Effectivité et efficacité des normes fondamentales et prioritaires de l’OIT: Cas du Bénin et du Togo”, Preface by J.-C. Javillier and Post-face by J.-P. Delhomene, International Institute for Labour Studies, Research Series No 113, ILO, Geneva, 2007, 154 p.).

²⁰ The same applies, more generally, to all private actors (employers’ organizations and workers’ trade unions or even non-governmental organizations) intending to develop their activities in a given territory. The existence of the rule of law conditions any real and sustainable development of normative autonomy (whether this involves the creation or the application of unilateral or negotiated standards) on the basis of which CSR can be seriously developed. It should be borne in mind that there are no circumstances under which CSR can claim to replace the functions that a state should carry out, or be prejudicial to the state’s sovereignty. Tough words? An absolute imperative for global governance and the sustainable development of enterprises themselves.

Very often, the impression (especially among our economist colleagues) is that the rule of law goes without saying and is in some ways the common situation throughout the world. The experience of a lawyer travelling the world (and looking in detail at the situation in the “field”) is obviously very different: the rule of law is the exception. Such a situation – dramatic as it is for citizens – should not lead us to conclude – and even less to rejoice – that there is a general failure of law. What it illustrates is the complexity of implementing any legal norm and of developing any institution. Various kinds of conditions (political, as well as cultural and economic) are needed for law to be effective and efficacious.²¹ There is no normative magic: law is not a spell through which a social reality can be changed!

The legal institutions cannot function in a satisfactory or sustainable way or perform their tasks, which are often wider-ranging and more complex than their strictly technical remit,²² when corruption or even violence hold sway, and when, more generally, human rights are neither inbred nor institutionally protected. The prevailing view is that such situations have obvious links with poverty. From this point of view, studying the informal economy²³ is illuminating. The latter is sometimes seen as proof of the failure or inadequacy of legal norms. Obviously, some of these norms may be out of kilter with economic and social circumstances and may therefore lead to problems of evasion of the law. It would nevertheless be wrong to conclude from this that law has been rejected. For those studying the relations between law and the informal economy, and wishing to reflect its reality through surveys and interviews with the people living in this economy, the opposite seems to be the case. There is an unrelenting quest for the rule of law. What people want is the ability

²¹ In a rule of law there are very subtle links between institutions at all levels. In substance, it is when this rule is absent – whether totally or partially – that it is possible to see the importance of the links, often so invisible, which connect the various institutions not only at state level but also in the private sphere. Legal certainty (which is itself never absolute – and is undoubtedly less certain in democratic situations) is itself shaped by the coherence of these institutional linkages. The creation of legal norms by enterprise is an issue which necessarily has to be taken into account in this discussion of legal certainty.

²² It is for this reason that care needs to be taken with “economic” analyses of law. The method used to take account of the multiple justifications and consequences of a legal norm is always decisive in the same way as for an institution. Indicators in the normative field have to be constructed on the basis of the problems and techniques formulated by the parties involved themselves. This highlights the pressing need for dialogue between lawyers and economists (a dialogue which is, at present, far from adequate from a conceptual or a substantive point of view). This is particularly topical in the context of the international institutions (of all “persuasions”). Hence the importance of policies based on a capacity-building approach (see Robert Salais and Robert Villeneuve (eds.), “Développer les capacités des hommes et des territoires en Europe”, Preface by Odile Quintin, Ed. ANACT, Lyon, 2006, 456 p.).

²³ This highlights how important and pertinent consensus between the ILO’s constituents is (see Report VI, “Decent work and the informal economy”, ILC, 90th Session, ILO, Geneva, 2002 and Report of the Commission, dated 20 June 2002). This consensus is obviously facilitated by the Office, which has undertaken a whole range of analysis work and has published many works on the informal economy, offering considerable technical and scientific help for lawyers.

to benefit from legal protection, from equal access to institutions (especially legal) and more generally from equal treatment in all fields (especially taxation and banking). Exclusion from the law leads to situations of violence and humiliation. Particular situations and socio-economic constraints have to be taken into account in a complex way if there is to be a gradual integration into law.²⁴

Similarly, CSR practices reflect a quest for normative linkage and harmonization which has up to now been lacking. In practice, law does not just aim to achieve a given result; it is also intended to prevent widely differing and contradictory treatments of the same, or similar, situations. Such a goal is obviously true of CSR as well: it involves the introduction of internal or external procedures aiming to reduce as far as possible, and if possible to eliminate, differences and their impact. Overall, there is more or less a desire for linkage (heteronomous or autonomous): which leads us to consider the various ways in which such a “standardization” may be introduced into very different normative contexts.

Standardization seems to go hand in hand with verification, auditing²⁵, or even certification²⁶. How can the effectiveness of a norm, whether heteronomous or autonomous, be ensured?²⁷ How can the violation of norms from a whole range of actors, in very different contexts and frameworks, be prevented? The societal nature of corporate responsibility requires in-depth and comparative analysis. It would seem that the “stakeholders” in the effectiveness of the norm are not necessarily the same for human rights, the environment or even labour relations. One possible hypothesis, however, is that the links forged between, and the complementary work of, the actors in contemporary society is enhancing the rule of law both nationally, regionally and internationally.

²⁴ For the legislator wishing to help to develop the rule of law by progressively “standardizing” particular situations, the dilemma is often one of deciding on the pace at which the normative framework is to be developed and the degree to which norms are to be adapted to particular situations. In many cases, such a legislative approach is interpreted in two ways: provisional exception and adaptation, or permanent questioning of the general nature of the legal norm. In the social field, it is easy to see how tricky this is for employers’ organizations and for workers’ trade unions.

²⁵ See the concise and stimulating work of Martine Combemale and Jacques Igalens, “L’audit social”, PUF, “Que sais-je?”, No 2399, Paris, 2005, 127 p.

²⁶ Legal sociologists will question the practical importance now assumed by “ISO standards”. In some cases, there is a degree of confusion between these standards and those of the ILO (or “ILO standards” as we sometimes hear). Certification is in some cases seen as the best – and future – channel for achieving a new and pragmatic law. This is obviously highly questionable when there are no procedural guarantees or these guarantees are inadequate because there is no rule of law. It also has to be borne in mind that a major competitive market is involved here. The question has been put: what line should the ILO (its Secretariat, the Office and its Training Centre in Turin) take in this area, what role should it play and what resources should it mobilize?

²⁷ For comparative analysis, readers may consult the wide-ranging work of COMPTRASEC in Bordeaux and in particular, Philippe Auvergnon (ed.), “L’effectivité du droit du travail: à quelles conditions?”, Proceedings of the International Seminar, Université Montesquieu-Bordeaux IV, Bordeaux, 2005, 371 p.

The same may be said as regards sanctions. The link between economics, the environment, human rights and social issues is expanding the type and the practical force of sanctions in the broad sense. In this case as well corporate societal responsibility is a normative laboratory. Responsibility has to be taken in certain areas which cannot be regulated by conventional legal instruments. CSR is necessarily part and parcel of a strategy to develop an element of constraint in areas where there is autonomy, but whose limits always need to be measured.

Sooner or later,²⁸ CSR becomes a serious and undoubtedly more dispassionate practice, requiring particular attention to be paid to law for obvious and complex reasons which will be examined briefly below.

2. Meeting the law

In one way or another, law has to be taken into account when defining CSR. Whether in a regional (the European Union in particular²⁹) or international context, the definition of CSR seems to be more than a simple fact, as it is a strategic and obviously political orientation. However, the definitions given up to now should not be considered definitive, especially as regards the links forged with law. By their nature, these definitions are evolving. Those familiar with tripartism will be aware that interpretations may differ widely depending on points of view.³⁰ For the ILO, however, “CSR is a way in which enterprises give consideration to the impact of their operations on society and affirm their principles and values both in their own internal methods and processes and in their interaction with other actors”.³¹ From a legal point of view, the second part of the sentence is worth consideration: “CSR is a voluntary, enterprise-driven initiative and refers to activities that are considered to exceed compliance with the law”.³²

²⁸ Just one word on “later”: in similar situations (which are actually very common) legal treatment in most cases tends to distort issues (as a result of rash characterizations), and leads to an often fruitless search for appropriate ways of settling disputes (which have come before the courts but have reached deadlock, in some cases with no permanent solution for the parties involved).

²⁹ An impressive number of documents have been produced and meetings held on these issues. The method, as well as the content, of European strategies obviously attracts attention. These strategies should not be seen as unique, however, nor as entirely relevant for the rest of the world. This is particularly true when they come up for debate within an international organization such as the ILO. The content and the significance of the debates on CSR differ considerably depending on whether one is in Brussels, Washington or in particular in Beijing.

³⁰ ILO, “The promotion of sustainable enterprises”, Report VI, International Labour Conference, 96th Session, Geneva, 2007, p. 115.

³¹ ILO, *op. cit.* (p. 115, Box 7.1), which refers to the 295th Session of its Governing Body, Subcommittee on Multinational Enterprises, March 2006, document GB 295/MNE/21.

³² ILO, *op. cit.*

A double commandment is therefore engraved on the tablets of CSR: Thou shalt simply apply legislation; *Thou canst then practice CSR*. CSR is something which follows on from the mandatory: a key element in its definition. There is therefore no question of evading “hard” law. CSR is, by definition, rooted in the premise that enterprises will apply the law in full. No CSR without exemplary citizenship. The civic enterprise is obviously one which in no way tries to evade the application of legislation, especially as regards human rights, the environment and labour relations. CSR therefore has a relationship with law which is quite the contrary of ignorance, or even worse of evasion or circumvention.

Is this not the crux of the matter? It seems to go without saying that CSR can never be considered as a strategy to weaken the legal order and relevant provisions on human rights and the environment or on labour law and industrial relations. Following on from law means that any substitution of law, and more widely positive law, by CSR is to be censured. It is therefore necessary to build, in differing and carefully chosen ways, on an existing legal foundation specific to each country, but also resulting from regional and international legal orders. CSR therefore involves the prior and full recognition of the sovereignty of states and also of subjection to their law. However, such a statement cannot but raise some questions, or rather some concerns, especially from the point of view of workers’ trade unions³³ and also of non-governmental organizations, as situations are far from being as simple as some communications and works to popularize CSR might lead us to think.

Is the CSR movement worrying lawyers? Are we facing a potential regulatory “tsunami”? Could the terra firma of law be submerged by the seas of CSR? With “soft” law (soft and gentle as it is) sweeping “hard” law, in other words “real” law, aside as it passes? Charters³⁴, Declarations, Codes, Principles: how many different words are there to indicate that there can no longer be any question of binding law? The definition of

³³ See the publications of the ILO’s Bureau for Workers’ Activities (ACTRAV), in particular “Corporate social responsibility: Myth or reality?”, Labour Education 2003/1, No 130. Throughout the world, unions are publishing major studies on CSR (in Japan, see the wealth of work on CSR published by Rengo, Tokyo, 2007, in Japanese, 298 p.).

³⁴ In some countries more than in others (because of their Romano-Germanic legal culture) there is lively debate and in some cases radical academic analysis (see in particular Semaine Sociale Lamy, “Charte éthique et alerte professionnelle en débat”, Supplement No 1310, 4 June 2007, 90 p., and in particular the report by Paul-Henri Antonmattei, pp. 5-17, concerned for a “traitement de la juridicité ‘sociale’ des chartes d’éthique” (“social” treatment of the legal nature of ethical charters) – A. Sobczak, “Réseaux de sociétés et codes de conduite. Un nouveau modèle de régulation des relations de travail pour les entreprises européennes”, Preface by Silvana Sciarra and Postface by Catherine Del Cont, LGDJ, Bibliothèque de droit social, Vol. 38, Paris, 2002, 382 p. – N. Causse, “La valeur juridique des Chartes d’entreprise au regard du droit du travail français”, Preface by D. Berra, PUAM, 2000).

CSR given above also rightly stresses that it is a voluntary initiative driven by enterprises. It is evident from that part of the sentence that what is imposed (on enterprises) is not part of CSR. It is also true that the strength of CSR lies in the fact that it can be freely chosen by enterprises, whether in the areas of human rights, the environment or labour relations. However, can it be concluded from the fact that enterprise initiative is voluntary that no legal characterization will henceforth be relevant or even used? Such a view is hasty and technically very risky. Obviously, the legal system applied to the “instrument” adopted to formalise and implement enterprise initiative is absolutely crucial. It is undoubtedly this lack of characterization – which will be examined in detail below – that gives the impression, or for some people makes it certain, that there can never be any question of legal characterization (in terms of “hard” law). It goes without saying, however, that depending on the method used, it is extremely likely and even probable that there will be a rapprochement (and contact) with hard law.

Could it be that CSR as a managerial corollary to law could have the aim, and ultimately the effect, of submerging state law?³⁵ Has the time come for normative autonomy (by private actors, and in particular global enterprise) to take precedence over heteronomy (as it is limited by territorial factors and the relative inability of some states to ensure that legislation is effectively applied, just as international organizations cannot ensure that their norms are applied in member countries)? Here again, could the rise in power of a law so soft that it is not really law marginalize this other law which alone deserves the name as it is “hard” (and pure?) since it is subject to sanctions (in principle at least).

Some words are now being used as though they are self-evident, and so frequently that they are now part of common and even scientific vocabulary throughout the world.³⁶ However, from the point of view of national, regional or even international law, it is risky to accept some distinctions which may help to generate confusion – more in some legal

³⁵ Is it the case that a number of corporate practices are now bringing about a change of perception of labour law, especially in countries in which labour law is codified? A law which is no longer imposed, but which is designed to create new management dynamics (for human resources in particular)? From codification to regulation: new spaces for normative creativity and experimentation? Opinions differ widely. In some cases there is furious debate with the result that legal science can hardly get a word in.

³⁶ In labour and social security law and in domestic and international law (see Frans Pennings (ed.), “Between Soft and Hard Law. The impact of International Social Security Standards on National Social Security Law”, *Kluwer Law International*, The Hague, 2006, 325 p. – Alain Supiot et al, “Protection sociale et travail décent. Nouvelles perspectives pour les normes internationales du travail”, *Semaine Sociale Lamy*, Paris, Supplement No 1272, 4 September 2006, 99 p.).

systems than in others, moreover – and to support perceptions of the law which are not really in keeping with its reality and complexity in all societies.

Hard or soft? This distinction seems more relevant to us, as it is always law which is at issue. For those endeavouring to analyse the effectiveness of law as rigorously as possible, such a distinction may prove hazardous, leading, as it does, to misleading preconceptions about the application – or lack of application – of legal norms. It is certainly possible to decide on various criteria though which normative elements can be divided into “hard” and “soft”, for the most part on the basis of the criterion of state sanctions which are automatically applied to a total or partial failure to apply the norm. However, comparative studies³⁷ teach us that it is difficult to perceive the real and precise effect of many sanctions, and encourage us to be extremely cautious in using any such assessment of effectiveness to decide on the “hardness” or “softness” of a legal rule. Sociologists of law will naturally be inclined not to consider this “hardness” or “softness” solely in terms of the status of the norm in a given legal order according to technical criteria determined solely by lawyers. To which lawyers might reply: not just by economists or sociologists either.

In the case of “hardness”, the expectation is that the state will apply constraints in the event of a total or partial lack of application. “Hard” law, through its very conception, is therefore immediately integrated into the state legal order. To some extent it is therefore taken into account automatically, with no prior characterization in this respect, by the competent legal authorities. However, “softness” may be seen as weakness and imperfection in some legal systems and as flexibility and potential in others, if we can put it that way. Soft option or learning curve? From the incentive-driven optional to the sanction-driven binding?³⁸ There are so many different perceptions throughout the world of the benefits and drawbacks of norms, but those who disregard the importance of the links between cultures (not just legal) and law are taking an untenably

³⁷ Comparisons between types of norms and regulations more generally, but also comparisons between legal systems which each have their own specific features, especially as regards the hierarchy of sources of law.

³⁸ Bearing in mind that, whatever the legal system and the conception of “hard” or “soft” law, it is the term “legal” – and therefore the concept of law itself – that may cause concern or be considered as an obstacle to dynamic autonomy and self-regulation. It is litigation that is really the problem here – the risks of intervention by the state judge which are often difficult for lawyers themselves to control. In the labour relations order, it is possible to see the extent to which avoiding third-party intervention (especially by state judges) is a long-standing strategy which is still current in some countries both on the part of enterprises and their organizations and on the part of workers’ trade unions. In this perspective, methods of alternative dispute resolution (ADR) need to be carefully analysed as their importance seems to be growing throughout the world, to some extent as a result of CSR.

thoughtless line. These links explain why perceptions of and reactions to norms, and in particular international labour standards, may differ and the extent to which the universal requires in-depth thinking about societies.³⁹ CSR therefore encourages us to deepen our analysis of these crucial links between cultures and law.

Generally speaking, law is not necessarily – to be diplomatic – the most widely shared concern from the point of view of the management of enterprises and labour relations. Using “soft” law might well be in keeping with such situations, where CSR practitioners have legal options in mind, but they are only one possible element of CSR and a very ancillary one at that. The aim is not at all to evade the law, but rather to keep it in an ancillary role. Only those elements of law which are able to help build a dynamic or to meet procedural requirements for strategy adaptation are then included.⁴⁰

The risk undoubtedly lies in the use of the concept of the norm in situations where legal status is obviously not in question. Such a use often results from an inadequate knowledge of what law actually is and what a norm may generate technically. For some CSR practitioners, speaking about “soft” law is undoubtedly a kind of incantation to conjure up autonomous practices and initiatives and creative management. It goes without saying that this may lead to major misunderstandings about what law actually is. This may then be followed by mutual and radical criticism between lawyers and managers.

In many situations, it may well be that the gap between hard and soft is small. How many supposedly strict rules have barely been applied at all, or given a relative, differentiated and gradual application! How many state codes have there been, so triumphant looking and perfectly formulated! Just reading them – like a liturgy – seems to be enough to crush the hostile forces of lack of effectiveness. On the other hand, the softness and flexibility of a legal rule are not at all contradictory to rigour,

³⁹ See in particular the stimulating analysis of universalism by Professor Jean-Michel Servais, in “Normes du droit universelles et cultures nationales”, Proceedings of the International Seminar cited above, COMPTRASEC, pp. 349-371.

⁴⁰ It would then be possible to speak of “reactive” or “potential” law rather than “soft” law, a norm becoming legal when a need to place it on a formal or general footing is felt. Law is to some extent required to make its “appearance” at a moment yet to be determined: a regulation incorporating hidden or even adopted norms. In truth, the question of recourse to law is not at all specific to these CSR situations. Lawyers (too) often have the impression that law is something permanent. In most cases, law appears only on demand. There are so many cases in which, without an interested (legal or physical) person calling for a norm, there would never have been any question of “hard” law in practice. There is some ambiguity here: it may be concluded – generally speaking – from a lack of sanctions (or litigation) that the legal norm has been fully achieved or its marginal nature demonstrated, but this would obviously not be appropriate.

or to effectiveness and efficacy. Let us hope that the key continues to be the distinction between law and non-law. “Soft” and “hard” cannot be the criterion. The appropriation of a legal norm, as we will see below, is undoubtedly the most likely way to achieve sustainable effectiveness, especially in the face of changing economic, environmental and social situations.

What is the state of play as regards these links between CSR and international norms? How can they be better organised? What role should lawyers play in and outside enterprise and even in international organizations? Obviously, the sole aim of the following lines is to call on everyone to rally together to bring about better linkages and potential synergies. While there are opportunities, they also represent major challenges (especially for international organizations such as the ILO). Why not play your part, with enthusiasm as well as rigour, in shaping a new dynamic for the application of international standards, especially labour standards?

II. International standards and Corporate Social Responsibility

Since we are talking about societal responsibility, it goes without saying that the pertinent international standards will not just be social and, as has already been observed, that a number of international organizations producing standards will be involved.⁴¹ Those working in human rights and environmental fields also need to be included. Consequently, the framework cannot be provided by a single international organization, but by several, each of which has its own history and particular features from the point of view of the formulation, implementation and supervision of the application of standards. For lawyers and legal sociologists, the main interest of CSR lies precisely in the fact that it never falls within a single technical and institutional world, but is always at the crossroads of institutional and disciplinary paths.

The existence of institutional “families” (such as the UN family) may well mean that better synergies, or even the integration and consol-

⁴¹ On the particular nature of the ILO, see Jean-Michel Bonvin, “L’Organisation internationale du travail. Etude sur une agence productrice de normes”, PUF, Sociologies, Paris, 1998, 338 p.

idation⁴² of international standards (on human rights as well as labour), may be on the cards in the relatively long term, although gradually and not without problematic moments. The situation undoubtedly differs in the area of environmental standards, since they are developed through summits and conferences, and there is at present no institution for this family which is competent in these fields. The UN family cannot be seen, however, as the catch-all for every issue. There are two reasons: first, other international organizations are playing an important role as regards CSR, especially in the context of activities relating to multinational enterprises (the OECD for instance⁴³); second, the impact that non-governmental organizations are likely to have on standardization (the International Organization for Standardization, OIN-ISO, for instance).

When referring to law (norms and principles) the first – and undoubtedly the most crucial – strategy is to promote the appropriation of international standards. Persuasion and constraint are necessarily part of the implementation of any norm, especially international labour standards.⁴⁴ These standards therefore need to be very seriously and rigorously acculturated among the actors who have erupted on the national as well as international normative scene, for whom they were previously “terra incognita”. This appropriation is no easy matter, so it is important to devise methods and institutions through which it can be facilitated. It then leads to a normative dynamic which, in one way or another, tends to create new norms and to produce regulations which may well have a major impact on the normative systems of international organizations, especially the ILO.

1. Appropriated standards

Along the demanding and uncertain path towards making law effective, appropriation is undoubtedly a key stage. In a rule of law (which is always imperfect as it is permanently being built and improved), such a stage seems to go without saying or even be superfluous. A legal rule should be enough on its own: the constraint to apply it

⁴² This concept (consolidação, for Brazil) is important as it involves simplifying, bringing together and enhancing technical systems which, over the years and following reforms, have often lost their pertinence and force. Recent conventions adopted by the ILO (maritime sectors and fisheries) highlight the normative revival brought about by consolidation.

⁴³ It is important for a rigorous comparative study of declarations on multinational enterprises (OECD and ILO) to be carried out, especially as regards their impact. What a fascinating prospect for future research and theses!

⁴⁴ See in particular Francis Maupain, “Persuasion et contrainte aux fins de la mise en œuvre des normes et objectifs de l’OIT”, in *Les normes internationales du travail: un patrimoine pour l’avenir. Mélanges en l’honneur de Nicolas Valticos*, Preface by Juan Somavia, ILO, 2004, pp. 687-709.

is evident and produces the expected effects in almost all circumstances. However, experience shows that legal rules, and the principles on which they are based, are constantly under review: to give them full practical scope, preparatory work, education, acculturation and lastly appropriation are crucial. A legal rule should never just constrain; it also has to convince as it must in a democratic order. The importance of this stage of appropriation of a norm is even more essential and delicate if its beneficiaries are not the institutions for which it was originally intended.

We shall look in more detail at some legal norms in order to find out what conditions are needed for appropriation. International labour law provides an excellent stock of experience as regards CSR practices.⁴⁵ It is fairly often the case that enterprise codes, ethical charters and international framework agreements⁴⁶ refer expressly to international conventions or to their principles, to recommendations, to declarations or even to the ILO's codes and practical manuals.⁴⁷ Such references can be traced back to the referral to these international standards in UN strategies to involve enterprises. The UN Global Compact⁴⁸ thus "invites companies to embrace, support and enact, within their sphere of influence, a set of core values in the areas of human rights, labour standards, the environment, and anti-corruption". In the case of labour standards, it is obviously the International Labour Organization to which reference needs to be made. Over the years a whole movement has come about with a view to promoting wider dissemination, and easier appropriation, of the principles of the pertinent international standards. The French website on the Global Compact bears witness to this⁴⁹. The 1998 Declaration on Fun-

⁴⁵ See Jean-Michel Servais, "Normes internationales du travail et responsabilité sociale des entreprises", in *Mélanges en l'honneur de Nicolas Valticos*, op.cit., pp. 565-584. It should be borne in mind that the universal nature of international labour standards is set out in very simple and thorough presentations (see ILO, "Rules of the Game: A brief introduction to international labour standards", International Labour Standards Department, Geneva, 2005, 96 p.).

⁴⁶ Although numbers are not (at present) very large, and although the majority of the enterprises concerned are European, attention needs to be focused on the conclusion of such IFAs, and monitoring of their application. Such an analysis should not just be legal or principally legal, but should also cover industrial relations. From this point of view, the research by Konstantinos Papadakis in the context of the ILO's International Institute for Labour Studies is essential (see K. Papadakis (ed.), "New Instruments of Social Dialogue and Regulation: An emerging transnational industrial relations framework?", forthcoming, André Sobczak, "Legal Dimension of International Framework Agreements in the Field of Corporate Social Responsibility", in op. cit.).

⁴⁷ Enough stress can never be placed on the considerable practical impact that such codes have in very different fields, especially as regards occupational health and safety. For those working to combat HIV/AIDS, the code of practice and the practical guides published by the ILO (such as those for judges and magistrates and the labour inspectorate) are extremely valuable instruments even though pertinent and useful criticisms can be made with a view to the technical improvement of these documents; see the rallying criticisms by Professor Edwin Cameron, Supreme Court of Appeal of South Africa, "Legislating an epidemic: The Challenge of HIV/AIDS in the world of work", ILS Lecture, Geneva, 19 June 2007, forthcoming, to be published on the site <http://www.ilo.org/public/english/inst/index.htm>.

⁴⁸ <http://www.unglobalcompact.org/>.

⁴⁹ See in particular the Guide to the Nine Principles: http://www.institut-entreprise.fr/fileadmin/Docs_PDF/Global_Compact/boite_outils/Guide_detaille_9_principes.pdf

damental Principles and Rights at Work⁵⁰ is part and parcel of this movement, which is certainly not new.⁵¹

In CSR practices, the degree and the method of appropriation of the standards to which reference is made are no easy matter. Different enterprise departments may approach principles and standards in different ways, and there may be a lack of mutual comprehension. It may well be that reconciling communication, management and (internal) legal advice approaches is a complex practice requiring ongoing adjustment. Here again, legal issues may be perceived in different ways, whatever the culture, size and sector of activity of the enterprise. The appropriation of standards cannot, however, be left solely to lawyers within and outside enterprise. No legal rule is in practice destined solely for legal technicians. The fate of any legal rule is to be appropriated and adapted, in one way or another, by those to whom it directly or indirectly applies. The task of lawyers is therefore to play their part in this appropriation by various methods, while keeping in mind the limits that any shifts in the norm must necessarily have.

A twofold risk is undoubtedly to be avoided when CSR is implemented in different parts of an enterprise: on the one hand, paralysis caused by taking the law into account and, on the other, emancipation allegedly justified by the norm in question (in some cases misunderstood or used for some extraneous purpose, or merely seen as a temporary expedient). Appropriation (which is not privatization) and dissemination (which is not distortion) have to go together. CSR in no way means that issues are no longer rooted in the law.

How, in practice, can norms, especially legal norms, be taken into account in a structured and coherent way and how can this be facilitated? In-house legal departments – which vary considerably from enterprise to enterprise as do the surrounding legal systems – are responsible for evaluating legal risks (of all kinds and obviously in the fields concerned by CSR) and proposing all kinds of measures to eliminate or reduce these risks. Who is then responsible for initiating and developing CSR and its resulting instruments? When legal departments are at the core of such a

⁵⁰ http://www.ilo.org/dyn/declaris/DECLARATIONWEB.INDEXPAGE?var_language=EN.

⁵¹ Facilitating the appropriation of principles and norms is part of the political balance that any such document necessarily has to enshrine (see Article 3). It is an opportunity to stress the extent to which technical cooperation is indispensable if international labour standards are to be effective. This cooperation (including the mobilization of resources outside the ILO) is offered to constituents. In the framework of CSR, it is true that specific problems are raised by the situation of enterprises.

process, finding links between technical activities, the ability to put forward proposals and ethics may raise problems. CSR is thus an opportunity to reflect on the purpose and limitations of a legal department in an enterprise and its links with outside consultancy offices and lawyers⁵². This may raise fresh problems concerning the work of lawyers, especially as regards human rights and the environment, in and outside enterprise. The work of lawyers' offices (in the broad sense) called upon to advise enterprises on CSR undoubtedly needs to be analysed in detail.⁵³

Whether lawyers inside or outside enterprise are involved, the appropriation of norms has to include a knowledge of the institutions which have created the norms and are responsible for supervising them. Looking just at the example of the standards devised and applied by the International Labour Organization, this appropriation work not only involves analysing and understanding the actual content of these norms, but also their tripartite context. In practice enterprises, like non-governmental organisations, have to carry out a normative "transposition" if they intend to refer to these instruments (of all kinds) in a serious and practical way. As has already been mentioned, these standards are intended for governments, as their wording attests.⁵⁴ It hardly needs stressing how important drafting is if texts are to be correctly applied. Legislative drafting has made considerable progress.⁵⁵

Training in international law (especially labour law) is therefore indispensable, and there is no doubt that international organizations will increasingly mobilize around it. These organizations are best able to present not only the body of norms referred to in the very diverse practices of enterprises, but also and undoubtedly the spirit of these norms.

⁵² More generally, see the stimulating work by Halina Ward, "Corporate Responsibility and the Business of Law", *Globalt Ansvar*, Government Offices of Sweden, September 2005, 41 p.

⁵³ The guide published by the Council of Bars and Law Societies of the European Union is of particular interest, "Corporate social responsibility and the role of the legal profession. A guide for lawyers advising on corporate social responsibility issues", Brussels, First update, April 2005, 29 p. (http://www.ccbe.org/doc/En/guidelines_csr_en.pdf).

⁵⁴ A great deal of information is contained in the "Manual for drafting ILO instruments", Office of the Legal Adviser, ILO, Geneva, 2006, 140 p.

⁵⁵ The teaching and research programmes of faculties of law throughout the world are revealing from this point of view. It may be that there is a close link between the quality of parliamentary legislative work and the development of legislative drafting in faculties and schools of law. The ILO's experience in this respect is very illuminating: comparative law and international labour standards have helped pave the way for legislative reforms throughout the world whose effectiveness and efficacy obviously owe much to such "upstream" work. However, in a period of far-reaching social and economic change, it goes without saying that creativity and adaptability to change are an absolute must if legal cooperation of this kind is to continue to be pertinent. This gives us an opportunity to call for practical experience of labour law for international officials. There is no doubt that mobility needs to be encouraged and organised in better ways between international civil servants and the widest possible range of legal activities, in public and in private sectors. Field experience also needs to be encouraged (in the ILO's offices throughout the world).

Referring to a convention or to its principles requires an understanding of its institutional and procedural environment.⁵⁶ The ILO publishes so many documents.⁵⁷ Yet so much mystery surrounds their production, their status and their scope! This is true, for instance, of the reports by the Committee of Experts on the Application of Conventions and Recommendations. This is a body which is not tripartite – in an organization in which tripartism is the rule – and which cannot be seen as a court able to interpret international labour standards. It is a body whose aim is to establish doctrine and whose ILO analyses are (for the most part) accepted by constituents in their tripartite decisions. The analysis work in such reports may not always be in keeping – although this has to be seen in context – with the very practical and daily questions which CSR may raise in enterprise. The observations made in such reports are designed in practice for states, which have sole responsibility for the application of international labour standards in their territories. The same comment can be made about the Committee on Freedom of Association of the ILO's Governing Body, which is tripartite: it is certainly not a judicial body having direct decision-making powers, using adversarial methods, and applying a procedure offering full guarantees for the enterprises which may be involved.⁵⁸ Here again, the work involved is undoubtedly doctrinal (tripartite in this case).⁵⁹ CSR can nevertheless draw on this work in a substantive and ongoing way.

Those who wish to refer to international labour standards in a relevant way consequently need to carry out prior work to assimilate institutions and sources.⁶⁰ This cannot take place solely from “outside” but

⁵⁶ From the employers' point of view, there is much food for thought in the excellent analyses by Alfred Wiskirchen and Christian Hess, in “Employers' handbook on ILO standards-related activities”, ILO, Bureau for Workers' Activities (ACT/EMP), Geneva, 2002, 157 p.

⁵⁷ From so many to too many ... this is a step that must not be taken without rigorous (technical) and dispassionate (political, if possible) analysis.

⁵⁸ Even though some recent procedural reforms are intended to remedy various shortcomings from this point of view.

⁵⁹ Doctrine which may be presented systematically by the Secretariat, in the form of a digest on Freedom of Association, republished from time to time (ILO, “Freedom of Association. Digest of Decisions and Principles of the Freedom of Association Committee”, Fifth (revised) edition, Geneva, 2006, 287 p.).

⁶⁰ Care needs to be taken as regards the possibilities of providing technical support, as matters stand at present in the international institutions, for the very practical questions that company lawyers in charge of implementing CSR practices may well pose. There undoubtedly needs to be an analysis of the competences and remits of the international institutions to avoid any confusion, or even worse any disappointment and radical criticism in terms of competences that might ensue. It may well be that the CSR practices and the various questions raised at this time have an impact on the working methods of international organizations. The development of CSR may therefore involve, in the long term, changes in the working methods of secretariats (especially the ILO) and systems for supervising the application of international standards (for the ILO). Let us hope for improvements to and a new dynamic for the supervisory systems or even systems for following up the application of standards.

involves scientific and educational support from the international organization itself. In this respect, it is good that CSR practices are now mobilizing the competent departments and officials of the International Labour Office.⁶¹ The current mobilization of the ILO's Training Centre will certainly also be of key importance.⁶²

2. Generated standards

CSR practices, which are never very far from law as we have endeavoured to show above, will generate legal norms themselves. Voluntary practices at the outset; imposed norms sooner or later? Could this be the legal fate for CSR? Obviously, care needs to be taken from the outset to highlight the differing contexts, uncertain impacts, and unpredictable numbers of reactions from the actors directly and indirectly involved in CSR practices. Thinking is then needed as regards the creation of legal norms in connection with CSR. There are no social practices which do not have some impact on the legal system in which they are being developed.

The dialectic between the strategies of private actors and the legal system is always very complex and is undoubtedly exacerbated by the proliferation of actors and by the diversification of methods of regulation of contemporary societies. In many ways, CSR may generate norms a substantial proportion of which will have repercussions not only on the legal order in which they are developed, but also beyond that, in areas which have not as yet been subject to normative supervision or to a system of industrial relations which is still being structured. This could well lead in the medium or long term to new methods of regulation at international level, especially in the social field.

It is undoubtedly from the procedural point of view that CSR will bring about developments that none of the legal orders concerned can ignore. The application of charters and codes of conduct has already been mentioned. The fact that an enterprise is linked to other enterprises

⁶¹ As regards CSR, the issue of tripartism – especially as regards training – is no simple matter. More generally and at national level, the question of training in labour law raises tricky questions about the role that employers' organizations and workers' trade unions may/should play. Is joint training possible? Is it not the case that law is always part of a strategy (on the part of both employers and unions)? Can the state or governmental element manage to impose a degree of "neutrality" in educational and technical areas? There have been many different responses throughout the world to training, especially for (non-professional) labour judges. In the case of CSR, moreover, human rights and environmental issues complicate the matter as a result of the inclusion and influence of non-governmental organizations.

⁶² The role played by the Centre based in Turin (<http://www.itcilo.org>) is of great importance for the development of training on CSR. The educational methods of this Centre may in practice make it possible to provide a better response to these demands, although participation by ILO officials is obviously crucial.

throughout the world in a production chain obviously complicates matters.⁶³ International framework agreements have also been concluded.⁶⁴ The legal name that they are given does not matter,⁶⁵ as all these situations entail monitoring, verification, supervisory and certification practices, or, in a word, follow-up.⁶⁶ Obviously, all these issues form part of a quest to regulate and structure practices that use very different methods in very different places. The common hypothesis is that the specific features of different orders – especially as regards corporate management and perimeters – are controlling the creation of concepts and procedures through which a set of practices can be made coherent.

This brings us back to those areas in which differences of legal contexts, or even more radically the lack of a rule of law, involve the implementation of a kind of autonomous normative set-up, having only relative links with different legal systems, or even being visibly incompatible with these systems. The same is true of the dispute resolution methods that people might wish to apply in comparable situations.⁶⁷ These are therefore areas of law which are generated voluntarily and whose results may prove to be immediately perceptible. In the human rights field, and in industrial relations and the environment, it may well be that norms and procedures can achieve results in keeping with CSR commitments and help to develop a rule of law. While potential conflicts between generated norms and public policy are not new, they could become more frequent.

⁶³ See in particular Ivanka Mamic, "Implementing Codes of Conduct. How Business Manages Social Performance in Global Supply Chains", Greenleaf Publishing and ILO, Geneva, 2004, 429 p.

⁶⁴ In this respect, and in many others, it is essential to refer to the work of the International Organization of Employers (IOE), see "International Framework Agreements. An Employers' Guide", IOE, Geneva, Updated version (September 2005), 14 p.

⁶⁵ The importance of private international law arguments has to be stressed. However, it is not certain that these arguments are really leading to debate, including legal debate, since they relate primarily to international industrial relations. A law to be invented? That will depend on the will of the actors, whether they are employers or unions.

⁶⁶ For an analysis of techniques and sources of information on the monitoring of international labour standards, see the important North American studies by the National Research Council of the National Academies, "Monitoring International Labor Standards. Techniques and Sources of Information", The National Academies Press, Washington DC, 2004, 291 p. (<http://www.nap.edu>).

⁶⁷ The importance of alternative resolution methods will be obvious to anyone aware of their development throughout the world. The work of John T. Dunlop and Arnold M. Zack is important here and very topical (see "Mediation and Arbitration of Employment Disputes", Jossey-Bass Publishers, San Francisco, 1997, 223 p.). It is essential to measure the dynamics of such methods and their contribution to the development of a rule of law. It is also indispensable to look at the reality of these practices and to express some reservations about certain forms of bilateral international cooperation under which countries are receiving support – financial in particular – for the introduction of these alternative methods, without there being any real acculturation or a thought-out articulation with other dispute resolution methods. Here as elsewhere, the best intentions as regards cooperation may lead to the worst of results (i.e. make no contribution to the development of the rule of law and of democracy).

There are certainly expectations of CSR, in any case, especially as regards rights and freedoms, and these expectations are particularly high since in many situations (lack of a rule of law, informal economy) it is impossible to benefit from these rights and freedoms in practice. There is a real conflict between a desire for regulation and the possibility of achieving a norm within a given legal system, and this is not always fully appreciated when CSR is being devised in the context (in most cases) of a rule of law.

Many legal regulations and norms have a genuine content only in a certain context, particularly in a system of industrial relations, and it is futile to think that labour standards can be effective other than in this context. This is particularly true of industrial relations. Everyone knows that there are different conceptions and methods of freedom of association as enshrined in the relevant international labour standards. The strength of the international standard on freedom of association is precisely that it transcends the particular features of this or that system of industrial relations. In the case of freedom of association, what needs to be covered by law is its essence: independence, capacity and protection against any power that might be tempted to refute its legitimacy or even to limit its exercise in circumstances other than those reasonably enshrined in the international standard.

At some point, however, the recognition of a principle and even more the assimilation of international legal rules may lead to social demands which may be expressed in the form of legal claims. What will happen when CSR practices call into question a national legal norm which apparently runs counter to the regulation pledged by CSR?

This is undoubtedly more of a problem when norms which are not unilateral but negotiated, or even contractual, are involved. Detailed legal analysis is needed in particular when concluding an international framework agreement.⁶⁸ It is nevertheless useful to question in advance what its precise status is from the point of view of national law in particular.⁶⁹ Moreover, it is far from easy accurately to determine what practical methods will be used to deal with any legal disputes which may arise when it is being implemented. This raises the classic question of the scope of

⁶⁸ Even though, as will be agreed, law is not necessarily the main concern of employer and worker negotiators throughout the world.

⁶⁹ In particular because of clauses specifying which law is applicable and possibly which courts are competent to hear disputes as to its interpretation or application.

national law in relation to international contractual norms on industrial relations and labour law. Could reference to an international labour convention (such as Conventions Nos 87 and 98) make it possible to call into question enterprise practices and regulations or even state regulations? Could CSR call into question the conventional (national) hierarchy of sources of law? Could CSR seriously disturb legal systems not just in the social field, but also as regards human rights and environmental law? Only the future will tell how widespread these CSR practices become and how rigorously they are applied, thereby generating normative outcomes on a scale which international law (labour law in particular) is at present unable to achieve using its traditional mechanisms. This would be a surprising revenge of heteronomy on autonomy internationally, and would undoubtedly also lay the foundations for new links between international legal norms and domestic law.

From another point of view, CSR practices could well develop a social dynamic and industrial relations at national level. Some states are now intending to encourage such practices, using very different methods which nevertheless express a shared desire to educate, and to bring about social innovation and a new link between public action and private initiatives. This can be seen, for instance, from legislation on social audits, social labels, ethical investment and socially responsible restructuring.⁷⁰ The international community should focus on pooling and promoting “good practice” in all these fields. Here again, it has to be stressed that such state initiatives, resulting from CSR practices, cannot be developed solely in the field of labour law. Company law is undoubtedly concerned by many measures which apply its techniques. If enterprise is to be sustainable, legal and accounting techniques which enable CSR practices need to be implemented.⁷¹

Lastly, since we have been looking at generated norms, it remains to be said that the question of international standards specifically on CSR is receiving urgent doctrinal attention⁷² and discussion in the United Nations institutions. It has been stressed that initiatives are voluntary and

⁷⁰ For overall problem-setting and an analysis of good practices, see Nikolai Rogovsky (ed.), “Restructuring for corporate success. A socially sensitive approach”, ILO, Geneva, 2005, 141 p.

⁷¹ See the important work of the 96th International Labour Conference on the promotion of sustainable enterprises (op. cit.), <http://www.ilo.org/public/english/standards/relm/ilc/ilc96/pdf/pr-15.pdf>.

⁷² More generally, Isabelle Daugareilh provides us with a wealth of analysis in the work which she edited, “Mondialisation, travaux et droits fondamentaux”, Bruylant, Brussels and LGDJ, Paris, 2005, 384. There is much food for thought in her remarkable foreword, “L’impact de la mondialisation sur les droits fondamentaux de l’homme au travail”, pp. XI-XXXIX.

include measures which necessarily go beyond law. However, there have long been proposals, in different forums, to enshrine the legal responsibility of enterprises internationally. More precisely, in recent years, the Sub-Commission on the Promotion and Protection of Human Rights of the Human Rights Commission has been working towards the solemn proclamation of new standards on the responsibility of transnational and other enterprises.⁷³ Will CSR be framed by such norms in the future? Those working for sustainable development have no doubt: enterprises cannot in the long term evade their legal responsibilities, especially their obligations to promote and ensure human rights, and more generally the fundamental principles and rights of human beings at work – whether or not their economic activities are framed by a rule of law.

III. Conclusion

Consequently, in many ways and for very complex reasons, CSR cannot disregard law, whether national, regional or even international. Nobody can disregard the links, synergies and questions arising from law. However, these various encounters with law are also leading to very different international experiments with regulation. A consensus seems to be emerging, especially a tripartite consensus within the ILO: CSR can contribute to an appropriation of norms on human rights, labour relations and the environment, but should not lead to the privatisation of matters which should remain the normative heritage of humanity,⁷⁴ for the simple reason that the enterprise cannot replace states, and cannot claim to create a rule of law through its own initiatives and instruments. Enterprise cannot in particular create a “private” international labour law which conflicts with the law emanating from the legitimate international institution, i.e. the International Labour Organization.

⁷³ Norms on the responsibilities of transnational corporations and other business enterprises with regard to human rights, adopted at the 22nd Session, on 13 August 2003. Since then Professor John G. Ruggie, as Special Representative of the Secretary-General of the United Nations, has presented an interim report (E/CN.4/2006/97), followed by a second report to the Human Rights Council in Geneva on 28 March 2007, on the issue of human rights and transnational corporations and other business enterprises. Supporters of new international legal norms in this field saw a trend towards “soft law” in this report. Everything still depends, here again, on the meaning attributed to this term. In any case, there is little doubt that the debate on the status of potential norms in this field is far from over.

⁷⁴ See Jean-Claude Javillier and Bernard Gernigon (eds.), “Les normes internationales du travail: un patrimoine pour l’avenir”, op. cit., ILO, International Labour Standards Department, Geneva, 2004, p.709.

If they are aware of the existence of these pitfalls, opportunities then open up that employers and workers, employers' organizations and workers' trade unions have to seize by taking up the many challenges discussed above. Lawyers need to find very practical ways of reconciling tradition and modernity, heteronomy and autonomy, pragmatism and rigour. However, CSR also calls upon the international institutions, and in particular the ILO and its secretariat, the International Labour Office, to breathe life into new normative dynamics.

Albert Thomas raised fundamental questions on the 10th anniversary of the ILO, in a preface to a work written by the Office's officials at that time.⁷⁵ "The world in which we live and labour is full of new ideas, still uncertain, badly perceived, and confused (...). Will our international institutions be able to translate them into practice? That is the question for the future. It is by that light, in any case, that they will have to find their way and define their duties".⁷⁶

⁷⁵ It should be noted that these officials remained anonymous, and provided rigorous technical analyses in a very simple way and with a marvellous style. Albert Thomas also notes that the ILO's officials "have not agreed to be named here. They wished to produce an impersonal and simple work, which as effectively as possible improves understanding of our institution" (p. V). A work to read and think about.

⁷⁶ Preface, "The International Labour Organization: The First Decade", ILO, Geneva, 1931, p. XV.

Corporate norms on Corporate Social Responsibility and international norms¹

*Isabelle Daugareilh**

Corporate social responsibility has apparently come to stay in the European business world and now occupies a specific position in corporate organisations, as well as their industrial and financial strategies. Corporate social responsibility, especially its international and social dimensions, which will be the sole focus of the following discussion, represent a very direct challenge to national and international law.

It is certainly true that the scope of application national labour legislation no longer corresponds to the structure of transnational companies or their fields of operation. National law is only applicable within individual countries and its effectiveness depends on the resources available to national organisations for monitoring application of the norms. Transnational companies take advantage of the diverse levels of protection they offer workers in different countries. The effectiveness of national law is also determined by the value placed by society on legal norms. In contrast, international law is agreed by states, with scrupulous respect for their sovereignty. The impact of international law on national legal systems depends on a formal commitment by each state and the real resources they are able and/or decide to devote to the practical imple-

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¹ The following analyses form part of the ESTER European research project on the social responsibility of European transnational companies, coordinated by Isabelle DAUGAREILH. This article is a short and updated version of an published analysis under the title: "La dimension internationale de la responsabilité sociale des entreprises européennes: observation sur une normativité à vocation transnationale" in M.A.Moreau, F.Cafaggi, F.Francioni, La dimension pluridisciplinaire de la responsabilité sociale de l'entreprise, PUAM, Aix-Marseille, 2007, p.275-307.

mentation of these international commitments. States remain key players in international law whereas they have ceded their significant role in the globalized economy to transnational companies. There is a real paradigm shift between the legal world, with its borders and states, and the business world, where constraints and obstructions due to national borders have been removed to facilitate the free circulation of capital, goods, and services.

Initiatives taken under the heading of social responsibility may thus be considered a response to the problem that, on a global level, globalized companies have no legal status, so they are not subject to a common legal system, and are not, as corporations, liable for damage they cause or risks they generate on a social level. It is, thus, possible to put forward the hypothesis that social responsibility is the first form of regulation applicable to globalized enterprises.²

If this is the case, social responsibility has a complex, ambiguous relationship with law³, as it generates types of regulation in areas where legislation should exist or, in some cases, actually does.⁴ It deals with issues which are already covered by conventions, resolutions, or recommendations on an international level, or positive law on a national level. It, therefore, deliberately sets itself up in competition with international labour law and national legislation. Social responsibility forms the basis of new forms of self-regulation⁵ by companies, who produce their own resources or reference documents, based, to a great extent on social law sources. There may or may not be a relationship with the existing legal system and, if there is, it is really ambiguous, as it aims both at closeness to the rule of law and separateness from it, or even its marginalization. This ambiguity comes to a head when corporate social responsibility is the subject of a global framework agreement⁶, signed by company management and trade union organizations.

² G. Murray, G. Trudeau, "Une régulation sociale de l'entreprise?" *Relations industrielles/Industrial Relations*, 2004, p.3. C. Gendron, A.Lapointe, M-F.Turcotte, " Responsabilité sociale et régulation de l'entreprise mondialisée", *Relations industrielles/Industrial Relations*, 2004, p.73.

³ See A. Sobzak, "La responsabilité sociale de l'entreprise: menace ou opportunité pour le droit du travail", *Relations industrielles/Industrial Relations*, 2004, p.26.

⁴ B. Saincy, "La RSE entre mode managériale et exigences de la société: le rôle des pouvoirs publics", *Les Petites Affiches*, 2004, p.18. N. NOTAT, "La responsabilité sociale des entreprises", *Futuribles*, 2003, p.11.

⁵ See D. O'Rourke, "Outsourcing Regulation: Analysis Nongovernmental Systems of Labor Standards and Monitoring", *The Policy Studies Journal*, vol.31, 2003, p.1.

⁶ See our article "La negoziazione collettiva internazionale", *Lavoro e Diritto*, 2005, vol.4.

Social responsibility, presented as voluntary practices “that exceed legal obligations”⁷, tends to generate norms created by companies themselves for that sole purpose. The production of corporate norms on social responsibility is intense, multifarious, and varied, in form, content, and scope. Beyond the exercises in rhetoric generated by social responsibility, empirical research among European enterprises identified development processes, or even the “maturing” of some of these norms⁸, which are beginning to show signs of “judicial control”. These signs were not present in all the cases investigated. When they existed, their content varied from one company and country (culture and legal system) to another. In any case, all companies try to resist this judicial control by various means or, if it is inevitable, to channel it in directions that favour their own interests.

Even if it is still difficult, both theoretically and empirically, to establish a tangible boundary between non-law and law, the hypothesis of increasing judicial control of social responsibility may be considered to be partially proven, provided we accept the principle of the plurality of sources of social law. Indeed, certain corporate norms on social responsibility attempt to “mimic” law by borrowing both its organizational and material rules. Under certain conditions, they may be regarded, if not as sources of law, at least as capable of having legal effects.

In this way, companies show that they have understood that, in the context of globalization, it is possible, or even necessary, to produce not only goods but also rules. However, instead of defining one space for products (the economy) and another for rules (law), they decided to combine the two: piggyback rules on products, play with rules, etc. Indeed, CSR may lead to a veritable takeover of international law by commerce. Companies may be considered “legal entrepreneurs”, in the same way as Howard Becker speaks of “moral entrepreneurs”⁹. Corporations, with their codes, charters, international framework agreements, and other tools created to demonstrate their social responsibility, produce norms that may be considered law, but for economic and legal reasons. The challenges and externalities of this production of norms represent an interesting innovation and adaptation of the institutional theory of enterprises

⁷ European Communities Commission, Commission Communication concerning corporate social responsibility: a business contribution to sustainable development, Brussels, COM (2002) 347 final 2002. European Commission, Promoting a European framework for corporate social responsibility, Brussels, Green Paper, July 2001.

⁸ This development process is quite striking. Indeed, our research demonstrated that most European enterprises started to develop social responsibility policies and norms starting in 2002.

⁹ Becker, H, *Outsiders*, Paris, éd. Métailié, 1985.

in the context of globalization. The question is, therefore, to know how the law (and the institutions that create it), having registered how the economic players who draw their “legitimacy as legal entrepreneurs” from the absence of common global legislation, may react to ensure that – international – law is not reduced to the state of goods and that the internationalization of law achieved during the 20th century is not replaced by modern forms of feudalism in the early 21st century¹⁰?

If there is one characteristic shared by the proliferation of corporate normative initiatives on CSR, it is certainly their infinite diversity. The reason for this is simple. These voluntary practices are not subject to any legal obligation and correspond to a vaguely-defined concept that covers a vast field. However, empirical research showed that two models could be distinguished on the basis of the conditions under which the corporate CSR norm was drafted and adopted, as these factors determined their type, content, and implementation. An examination of the type of norm, its content, and the method of implementation provides indications for measuring the legal impact of corporate CSR norms, although this appreciation has no universal value and may vary from one legal system and judge to another. Empirical research, investigating a small sample of European multinationals¹¹, revealed that the conditions under which a CSR norm was adopted determined: (I) its degree of permeability to international law and (II) its usefulness for international law.

I. The permeability of corporate CSR norms to international law

Corporate CSR norms have a wide variety of content for at least three reasons. The first two concern the number of fields potentially covered by CSR and the way ownership is taken by each company. Finally, considering the social aspects alone, the content varies according to whether the norm is adopted unilaterally or following negotiation with a

¹⁰ Economic considerations are taking precedence over political power as host states sign contracts with transnational companies that include commitments on legal issues (e.g. a clause on the stability of current law). This dominance is reinforced by the creation of “corporate territories”, where transnational companies (for better or for worse) act as legislators and judges in their own causes, setting up implicit or explicit “non-interference” agreements with local governments.

¹¹ The qualitative survey covered 28 multinational corporations in seven European Union member states, in the context of the ESTER research programme, coordinated by I. Daugareilh and funded by the European Commission (6th FPRDT).

partner representing the employees or an NGO. Research revealed that, compared with negotiated agreements, unilateral norms often had a more limited scope, with more restricted, less precise content, very frequently expressed in vague concepts and expressions, with very little legal impact, or even lacking any potential for legal effect. The content of negotiated norms also varied, depending on the partners involved and their objectives. Irrespective of the type of norm, unilateral or negotiated, the issues covered from a labour or, more generally, a social standpoint, referred to international law, which was simply mentioned in most cases (1), or, more rarely, directly cited (2).

1. References to international law

One observation is immediately striking: very few CSR norms totally ignore international public institutions and their norms. The second key feature is that the various CSR instruments developed by companies refer to a series of international sources, mainly developed in the context of UN organisations. Two types of sources are mentioned by almost all companies and are certainly the most influential in international law: the UN Global Compact¹² and the ILO norms. This is certainly the common feature of both unilateral and negotiated CSR norms.

These references are, no doubt, first and foremost, an exercise in rhetoric. Quite clearly, most of the time, companies are only half-hearted in their references to ILO norms and international law in general. References to the international ILO conventions, especially in unilateral norms, are not detailed, but merely indicated by restating their respective titles or aims (i.e.: a “light” version). Indeed, some CSR norms restrict these references to a general formula, such as: “the main ILO conventions”, which possibly constitutes an implicit reference to the agreements presented in the 1998 Declaration on fundamental principles and rights at work. The Global Compact acted as a trigger-factor, raising corporate awareness of human rights issues, and is expressed in very “soft” language, without any threat of sanctions or disapproval, simply requiring compa-

¹² The Global Compact, launched by the UN in 1999 and joined by around a thousand companies to date, relies on the cooperation of several organisations: United Nations, ILO, UNDP, and enterprises. The text is founded on universal values and based on ten principles taken from the Universal Declaration of Human Rights, the ILO conventions, and the Rio Declaration on the Environment. The principles defined do not refer to international agreements, or the 1998 ILO Declaration. These principles are as follows: – support and respect human rights; ensure that their own companies are not complicit in human rights abuses; uphold freedom of association and the right to collective bargaining; eliminate all forms of forced labour; abolish child labour; eliminate all forms of discrimination at work; support a precautionary approach to environmental challenges; undertake initiatives to promote greater environmental responsibility; encourage the development and diffusion of environmentally friendly technologies; work against all forms of corruption.

nies to state that they have joined it. References to the ILO may thus seem, relatively speaking, to indicate a “higher level of commitment” towards fundamental rights.

While the so-called fundamental ILO conventions¹³ are only rarely cited (mainly but not systematically in international framework agreements¹⁴), the ILO Tripartite declaration of principles concerning multinational companies and social policy, revised in 2000, is never mentioned, at least among the panel of companies investigated. It is, however, considered to be the most appropriate ILO norm for corporate social responsibility¹⁵.

The third most-cited international sources after the UN and ILO norms are the OECD guidelines for multinational companies¹⁶. Like the other international sources, they are simply mentioned. Finally, among the companies included in this survey, a few other international legal sources were mentioned very occasionally, such as the 1948 UDHR, the 1967 Declaration on the elimination of all forms of discrimination towards women, the 1959¹⁷ Declaration on children’s rights, or the collected practices on health and safety.

Although this research concerned companies of European origin, there was no mention of European law, with the exception of a few references in the field of health and safety. Apparently, norms and rules introduced by European Union legislation, apart from those on health and safety, have not had any impact on the drafting and development of CSR policies in non-EU countries, or the establishment of CSR rules by European transnational companies. However, an examination of the CSR norms of European companies, particularly negotiated agreements, reveals that European social law has an impact on their understanding of non-discrimination, social dialogue and its objectives, employment,

¹³ ILO Conventions n°138 on minimum working age, n°29 (on forced labour), and n°105 (on the abolition of forced labour), as well as n°87 and n°98.

¹⁴ For example, the Volkswagen agreement, signed in 2002, does not cite any of these conventions, or any other international norms, even the Global Compact, although the key points in the text concern the right to organise, non-discrimination, freedom of labour, and the prohibition of child labour.

¹⁵ ILO, Guidelines to the Tripartite Declaration of Principles concerning multinational enterprises and social policy, multinational enterprises programme, ILO, Geneva, 2002.

¹⁶ The OECD guidelines, adopted by 30 states, are one of the four CSR instruments in the Declaration on international investment and multinational companies. It is a multilaterally approved, non-binding code of conduct. Chapter IV of this instrument, devoted to employment and labour relations, covers eight topics. The first concerns fundamental rights, including the five principles of the 1998 ILO Declaration, which, like the related international conventions, is not cited. This list of Principles does not include any explicit references to international law, simply using the formula of compliance with “applicable legislation and regulations as well as current practices”.

¹⁷ These texts are mentioned in the EDF framework agreement.

training, etc. Although European law is never explicitly mentioned, it is nevertheless “exported” via what can be described as corporate culture¹⁸. It is certainly not improbable that a European approach to the fundamental social rights enshrined by the ILO should be detected in the CSR norms analyzed.

It is reasonable that references should be made exclusively to international sources as these corporate norms are intended to be applicable on a global level. The ILO norms, at least those corresponding to the fundamental conventions, are considered by the companies concerned to be suited to this scale and, apparently, capable of meeting the challenges of globalization. Beyond this highly practical approach, it would be reasonable to hypothesize that these ILO norms could provide a source for law common to all humanity¹⁹.

In any case, the “authentication” and integration of international sources of law into these CSR norms does not generate corporate obligations (in the legal sense) towards international public institutions. Indeed, international sources merely represent reference points and guidelines for socially responsible behaviour. The application of these norms may be enforceable in practical situations, but via channels other than those of international labour law, depending, in particular, on the precision of their provisions but also their specific references to international law.

Finally, considering the extraordinary diversity of international law, companies do very little “international law shopping”, either due to lack of knowledge or pragmatism²⁰. Furthermore, there has been a polarization on ILO norms in the social dimension of CSR, particularly in global framework agreements, where the 1998 ILO Declaration has become the global “social standard”²¹. The players recognize them as powerful tools for developing structure and consistency and do not hesitate to appropriate part of the text.

¹⁸ Ph. D’Hirbarne et al, *Cultures et mondialisation- gérer par-delà les frontières*, éd Seuil, Paris, 1998.

¹⁹ Referring to the publication by M.Delmas-Marty, *Trois défis pour un droit mondial*, éd. Du Seuil, Paris, 1998.

²⁰ A. Suptot, “Du nouveau au self-service normatif: la responsabilité sociale des entreprises”, in *Analyse juridique et valeurs en droit social*, submitted to J. Pelissier, Dalloz, Paris, 2004, p.541.

²¹ See I. Daugareilh, A. Sindzingre, *Stratégies de développement et réactualisation des droits économiques et sociaux*, Conseil économique et social, Comité des droits économiques, sociaux et culturels, 25th session, Geneva, May 2001, E/C.12/2001/5, GE.01-40956 (F). See also, I. Duplessis, “La déclaration de l’OIT relative aux droits fondamentaux au travail: une nouvelle forme de régulation efficace?”, *Relations industrielles/Industrial Relations*, 2004, vol.59-1, p.52.

2. Appropriation of international labour law

While the fundamental rights enshrined in the 1998 ILO Declaration²² now constitute the basis of all internationally negotiated agreements in transnational companies, each text emphasizes, in particular, that freedom to unionize is a key element. Compared to any other text on workers' fundamental rights, the ILO Declaration has the advantage of being an international text with a universal scope, in contrast to more ambitious documents with a merely regional scope (European Union Charter on Fundamental Rights). Today, all the fundamental ILO conventions referred to in the 1998 ILO Declaration (conventions Nos. 29, 87, 98, 105, 100, 111, 138, and 182²³) form an integral, basic part of international framework agreements. These corporate norms incorporate not only the basic texts of the conventions, but also all the work done by the ILO in defining and interpreting them, which has a significant impact from a purely legal standpoint.

A tendency was also observed in international agreements to add other ILO conventions besides the six fundamental texts. This is the case, for example, of ILO convention 135 on the protection of worker representatives, as well as conventions on working conditions, wages, employment, and social protection.

On the issue of working conditions, global agreements include clauses on health and safety at work designed in two different ways. Either they are expressed in terms of ILO norms and, in this case, several conventions, recommendations, or collections of practices are cited as references²⁴, or they adopt a more European approach, focusing on prevention, staff training, and social dialogue. In certain cases, employee health and safety are given such high priority that they are enforceable on

²² Prohibition of forced labour, freedom to unionise and the right to collective bargaining, non-discrimination, and prohibition of child labour.

²³ Convention No. 29 on forced labour, 1930, convention No. 105 on the abolition of forced labour, 1957, convention No. 87 on freedom to unionise and protection of trade union rights, 1948, convention No. 98 on the right to organise and collective bargaining, 1949, convention No. 100 on equal pay, 1951, convention No. 111 on non-discrimination (employment and professional), 1958, convention No. 138 on minimum working age, 1973, and convention No. 182 on the worst forms of child labour, 1999.

²⁴ The standard agreement of the International Trade-Union Federation IFBWW proposes an approach to working conditions in reference to the ILO conventions on health and safety (convention No. 155), asbestos (convention 162), health and safety in the construction industry (convention No. 167), as well as the collection of practical ILO guidelines on health and safety in forestry work and another on the safe use of synthetic glass-fibre insulating materials.²³⁹ This standard IFBWW agreement has been signed with the following companies: Faber-Castell, Skanska, IKEA, Ballast Nedam, and Hochtief.

contractors and are the subject of indicators applicable to the entire production chain, particularly those concerning industrial accidents²⁵.

The right to work – employment – is a fundamental human right which is difficult to implement, especially in situations of economic crisis or staff reductions justified by global competition. This right is difficult to express in a text like the 1998 ILO Declaration, but may become more substantial when it is conceived in a particular timeframe in a corporate group. Its present situation in the social law of certain European Union member states leads us to consider that, on an individual level, every worker has the right to reclassification in case of corporate restructuring, while, on a collective level, the staff representative bodies have a right to be informed and, possibly, consulted on corporate business and financial plans that have repercussions on employment. These rights, initially based on precedent and founded on the obligation to implement agreements in good faith (according to article 1134 of the French civil code), have also been applied outside France, pursuant either to European social law or a global framework agreement, like the one Danone was a forerunner in drafting and implementing.

Other fundamental rights are simply alluded to in more recent agreements, without specifically citing any international conventions or texts. The right to wages in return for work and social security are among the basic elements in the concept of decent work developed by Juan Somavia, referred to explicitly or implicitly in some international agreements. These rights are presented in such a way that they do not constitute an obstacle to corporate development. Some IFAs also borrow concepts from the ILO, like decent work, that provide a foundation for social security rights²⁶. IFAs also make use of derivative concepts, such as decent working conditions (in terms of working hours or wages).

International framework agreements on CSR and, to a lesser extent, unilateral norms (code of conduct, ethics charter, etc.) are highly permeable to certain international labour or human rights norms, incorporating topics from international law associated with economic globalization, which are presented as a bulwark against the continuous deterioration of the contractual situation of employees in both rich and poor countries.

²⁵ The most comprehensive agreement on this subject is certainly the one on social responsibility signed by EDF in January 2005. A comparable agreement was signed by Rhodia with ICEM. In the automobile industry, the Renault agreement with IMF is on similar lines.

²⁶ E.g. the EDF, Rhodia and Peugeot agreements.

Apparently, global framework agreements on CSR are almost exclusively and explicitly based on international law and are presented as extensions of the normative efforts of ILO in the “territories covered” by globalized companies. Probably one of the major contributions of corporate norms on CSR is that they promote the extension of the international “empire of law”²⁷. However, the “most sophisticated” corporate norms on CSR also demonstrate the European appropriation of international law²⁸. Having said this, can the rights and principles concerning workers’ social rights included in CSR be implemented in a practical way? In particular, do the fundamental social rights enshrined in international labour law, which suffer from an effectiveness deficit, gain anything from inclusion in corporate CSR norms?

II. Are CSR norms useful for international law?

CSR norms may be useful to international law if, beyond paying lip-service to it in terms of content and values, they contain provisions for monitoring application and penalties that cannot be effectively applied via international labour law, or even by states themselves (1). However satisfactory they may be or seem, these provisions are subject to limitations of various types that once again raise the issue of international regulation of corporate social responsibility (2).

1. Are there ways of applying CSR norms in the service of international law?

Internal implementation of CSR norms is organized in one or both of the following ways: via the chain of command and/or via social dialogue. Implementing the social commitments of CSR via the chain of command is a feature common to both negotiated and unilateral corporate norms, and is frequently the only method envisaged by the latter. Indeed, codes of conduct are modified for this purpose. Some companies have decided to mobilize the management to promote compliance and

²⁷ I.Daugareilh, “La responsabilité sociale des entreprises transnationales et les droits fondamentaux de l’homme au travail: le contre-exemple des accords internationaux”, in I.Daugareilh, *Mondialisation, travail et droits fondamentaux*, op.cit. sp. p.383.

²⁸ .Daugareilh, “Les accords cadres internationaux: une réponse européenne à la mondialisation de l’économie” in M. Decolanges et B. Saincy, *Les nouveaux enjeux de la négociation sociale internationale*, éd. La découverte, Paris, 2006, p.116.

implement corporate social commitments. These commitments are presented as duties, subject to incentive-type penalties. Although they are not yet covered by clauses in employment contracts, they may nevertheless be considered as defining the way an employment or agency contract should be carried out, thus constituting a contractual obligation, liable to result in disciplinary or contractual sanctions in case of non application. Observations revealed that only managers in charge of business entities or establishments were concerned by these actions, as well as managers of departments responsible for signing and applying business contracts with third-parties (suppliers, etc.) or involved in the process of manufacturing and marketing products.

This hierarchical view of CSR leads to the setting up of specific structures for implementing CSR without any employee representation, not required to report to any employee representative bodies, even on issues involving fundamental social rights. Furthermore, when these norms provide mechanisms for employees to lodge a complaint with an ad hoc structure in case of a dispute concerning a principle, value, or right established in the code of conduct, these by-pass existing employee representation systems.

Social dialogue is only envisaged as a means of implementing CSR norms in the case of global framework agreements. These include several clauses on specific points. One distinctive feature of the most recent international framework agreements is their focus on CSR implementation, emphasizing four aspects: the signatories, led by the company, are responsible for circulating information on the framework agreement itself; effective implementation of the objectives set, and the rights and principles established by social dialogue between the staff representative bodies in the entities belonging to the signatory company and the management; warning procedures in case of non-compliance with these commitments; regular assessment and reports on application of the agreement. Some agreements provide for the setting up of a special body in charge of monitoring application of the agreement and interpreting it in case of dispute²⁹.

Social dialogue of this type may be centralized and only exist in reality at the parent company's head office. It may also be decentralized and

²⁹ For example, the EDF framework agreement includes an annex on the Committee for dialogue on social responsibility, specifically defining its composition in terms of management and employee representation, meetings, and resources made available (annual budget, time allocation, working language, and circulation of documents).

include not only information and consultation of employee representative bodies in all the entities within the group, but also the negotiation of collective bargaining agreements in compliance with local law, which may be considered to confirm local application of the framework agreement. Signing these types of local agreements resolves all the legal issues involved in determining the applicable law, as well as the type and legal effects of the global framework agreement³⁰. It is certainly premature to assess the effects of social dialogue set up by global framework agreements. However, it is possible to hypothesize that this process confirms the workers' rights obtained by the framework agreement on CSR concerning essential issues resulting from globalization of the economy, such as outsourcing³¹ or relocation, that affect employment and working conditions everywhere the company operates, including the head-office country.

Irrespective of the implementation channel used, application of a CSR norm issued by the parent company within the group itself is not automatic, due to the transnational scope of application and the structural complexity of globalized companies. The first problem occurs if the legal definition of a corporate group³² is not the same in all the legal systems concerned, while another issue concerns the legal value and scope of the CSR norms³³, including global framework agreements. Finally, implementation of the CSR norm by the company's co-contractors is the Achilles heel of transnational norms of conduct adopted under the heading of social responsibility.

The co-contractors of a company that issues a unilateral or negotiated CSR norm are identified in various ways, without any specific description or definition, and include suppliers, service providers, industrial partners³⁴, and subcontractors. They are often difficult to identify precisely and exhaustively, and the CSR norms are of varying relevance for the different categories. Generally, the company's commitments towards them are less precise. The formulae used are generally restricted

³⁰ Voir I.Daugareilh, "La négociation collective transnationale", *Travail et Emploi*, 2005, p.69.

³¹ Collective bargaining in some sectors and companies concerning socially-responsible outsourcing may also be credited to global framework agreements on CSR.

³² Although it does not provide a precise definition, the French law dated 4 May 2004 indicates that a group consists of a dominant company and other subsidiary entities. According to article L.132-19-1 of the French Labour Code, it is up to a group agreement to define "its scope of application, consisting of some or all of the companies in the group".

³³ See I.Daugareilh, *La négociation collective internationale*, op. cit. I.Desbarrats, "La valeur juridique d'un engagement dit socialement responsable", *JCP*, éd. E, 2006, No. 1214.

³⁴ The concept is so vague it may cover joint-ventures, etc.

to mentioning compliance with principles equivalent to those in the CSR norm or indicating that the company will promote certain principles and values, e.g. those established by the Global Compact.

In a few framework agreements, some of the workers' rights specified by the transnational agreement are extended to cover certain co-contractors identified by the signatories, i.e. suppliers, service providers, or subcontractors. These commitments only cover some of the workers' rights specified by the CSR norm, e.g. health and safety at work and some or all of the rights enshrined in the fundamental ILO conventions. This partial extension of global framework agreements to third parties requires the signatory company to make much more extensive and quite different provisions for implementation than those otherwise envisaged. These cover three areas: informing co-contractors³⁵ and circulating the negotiated CSR norm, revising business contracts to include clauses that may act as "mini social clauses", thanks to the penalties for non-compliance specified by the framework agreement (e.g. non-renewal or termination of a business relationship), and monitoring compliance in the companies concerned. Inspection, normally intended to be without warning, is systematically required for industrial accidents in one of the agreements, by means of reporting on the basis of indicators established jointly by the signatories of the framework agreement and applicable to subcontractors³⁶.

One significant result currently being achieved by CSR norms is the new, self-imposed duty of the parent company to know (or find out) about the working and employment conditions in their various operations. This totally new supervisory power, exercised by the parent company via the CSR norm, is a sign of erosion of the principle of autonomy, with its well-known pernicious effects in terms of social law. A second positive development in companies with norms applicable to their commercial network is brought about by communicating the CSR norm to suppliers and subcontractors, obliging them to make a commitment to guarantee fundamental rights. A third achievement concerns the implementation of global dialogue forums on the application of CSR norms, i.e., discussing workers' social rights irrespective of the law governing their employment contracts and beyond any national or international legal obligations. A fourth positive effect of CSR norms is that they have

³⁵ Expressed as a contractual commitment by the signatory company.

³⁶ This is the case of the EDF agreement.

given impetus to the expansion of social dialogue on a local level, leading to the setting up of staff representative bodies, negotiations, and the signing of national collective bargaining agreements transposing international framework agreements on CSR to local situations. Another effect specific to international framework agreements is they may be used to settle a collective labour dispute at a supplier's premises by signing a collective labour agreement.

It is, therefore, possible to credit CSR norms, implemented starting in around 2002, with a certain number of effects that demonstrate their true effectiveness from an industrial relations standpoint and may also have an impact on a legal level, if only via business contracts with suppliers and subcontractors or employment contracts with managers and corporate executives. However, this potential effectiveness and efficiency of CSR norms is still marginal, unsystematic, and limited. It does not, therefore, provide a satisfactory solution to the relative ineffectiveness of international law and, more generally, the gaps in the legal liability of transnational companies that social responsibility is supposed to fill. Should the issue of regulating transnational companies be put back on the agenda?

2. Is there a need for international regulation of transnational companies?

Several sectors of society, including companies themselves, were found to be in favour of international regulation of the business of transnational companies. Indeed, it is a myth that companies are hostile to any type of regulation. Our empirical research revealed that transnational companies felt that international regulation requiring mandatory compliance with social obligations would be acceptable, subject to certain conditions, particularly on the issue of competition. These conditions concern the objective of the obligations. In light of the above observations, there is no doubt that companies have now accepted the idea of compliance with the four fundamental social rights in the 1998 ILO Declaration. But what exactly do they mean by this and how can it be implemented in practice? The ILO may have a role to play in helping companies understand this concept, as they already do with their member states and judges in various countries. The draft ISO social norm in the process of being adopted offered the ILO an opportunity to sign an agreement with ISO, stipulating that everything related to the ILO's field of competence should remain their exclusive jurisdiction, in terms of

references, definitions, monitoring application, etc. One of the specific problems solved by the draft ISO standard is that of language, making it possible to refer to the content of an international -ILO- convention, without citing it directly. In order to do that, it is necessary to understand its content, scope, and meaning. This opens up a whole area for corporate training that offers a major opportunity for the ILO. Companies show the greatest interest in international regulation to monitor the application of norms.

Indeed, it is important not to underestimate the risk that companies and employee organisations (trade union) will lose their enthusiasm – or power – to implement and monitor CSR norms in view of the huge extent and complex ramifications of transnational corporate networks. In the very short term, companies will be obliged to admit that they cannot, for reasons of efficiency and resources, take sole responsibility for monitoring the implementation of their own CSR norms. They will recognize the need to reinforce or update government or management/employee monitoring methods on a level above that of the company, for example, by setting up an international inspection organization for specific sectors.

Furthermore, successes achieved in or around companies are unlikely to be applied generally unless a public body decides to take action. Both companies and employee organisations felt that these rights could only be generalized via a public norm. CSR norms are unlikely to be sustainable on a local level in the long term if they remain outside the local legal system or do not receive “support” from the local authorities, in one form or another. This is a challenge for CSR norms themselves and the rights they institute, whether or not they are fundamental rights.

The fact that companies are now confronted with the legal and economic risk of not complying with their own commitments on CSR should focus attention on the basic issues that led to the development of CSR practices: the implementation and monitoring of international norms to ensure that the social rights enshrined in international legislation would truly be applied in practice. However, that does not settle the issue of the legal liability of transnational companies, which, for the moment, can only be dealt with in two ways, via extraterritorial application of national liability laws or international legislation with direct effect, establishing direct or indirect liability. Both channels, i.e. the appropriation of international social law by companies, with the increasing involvement of institutions like the ILO or legal liability of companies for violation of – social – fundamental rights protected by a United

Nations text³⁷ are both compatible and necessary to each other Empirical research into CSR shows, in any case, that the business world is no longer irreversibly, unanimously hostile to regulation, if only for economic reasons.

³⁷ See United Nations, Human rights commission, Human rights norm for transnational corporations and other business enterprises, Economic and social council, adopted in the 22nd session on 13 August 2003, E/CN.4/Sub.2/2003/12/rev.2, 26 August See comments: E.Decaux, "La responsabilité des sociétés transnationales an matière de droits de l'homme" in *Les Figures de l'internationalisation pénale en droit des affaires*, RSC, 2005, p.789.

Is the appropriation of international labour standards by new actors replacing or complementing the ILO's traditional standards-related work?

Eric Gravel *

I. Introduction

While the International Labour Organization (ILO) to a very large extent held a monopoly over the setting, implementation and supervision of international labour standards for most of the 20th century, that monopoly may nowadays appear to be a thing of the past. Labour standards, as well as various mechanisms and procedures for supervising the actual implementation of these standards, have proliferated internationally as a result of the growing numbers of new actors to which globalization is leading. Some feel that this appropriation of international labour standards by public and private actors is taking place in parallel, and others in competition, with the ILO's traditional standards-related work and supervisory bodies. What role should the ILO play in respect of these new players who are contributing to further develop international labour law? Should the ILO's traditional standards-

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related work be continued in its current form? Could and should its supervisory system go beyond the changes made to it up to now in order make its standards more effective and efficient so that they have an even more significant impact on workers' lives? Should the ILO sit on the sidelines and watch these new developments or should it try to forge and, in some cases, pursue and consolidate partnerships and new synergies with international actors? This article will attempt to give a brief review of recent developments in standards-setting activities and the ILO's traditional supervisory system and to suggest some avenues that could be explored to contend with the changes surrounding international labour standards and in particular their appropriation by new actors.

II. Is the ILO's traditional supervisory system still workable?

The foundations of the supervisory system devised by the ILO are set out in the initial text of the 1919 Constitution; this system has been enhanced and diversified in recent decades. Since the very essence of any international supervision has to involve the collection of information on measures taken by governments to implement their undertakings, Article 22 of the ILO Constitution originally required governments to supply reports on the application of ratified conventions. In 1926, it was felt necessary to organize how these reports were to be examined and the ILO had to find a way of assessing the extent to which ratified labour standards were being applied in the ILO's member States at that time. At its 8th Session, the Conference adopted a resolution establishing a committee responsible for examining the reports submitted, thus marking the birth of what was to become one of the ILO's most important and influential bodies: the Committee of Experts on the Application of Conventions and Recommendations. The purpose of this Committee of Experts, made up of eminent jurists from different geographical areas, legal systems and backgrounds, was to provide impartial and technical assessment of the extent to which international labour standards were being applied. As time has passed, it has become the main body for regular supervision of the application of standards,¹ and its work is the cornerstone of the ILO's standards supervision system.

¹ The other pillar of regular supervision of standards is the International Labour Conference's Committee on the Application of Standards which will be examined below.

The work of the Committee of Experts has undoubtedly had a significant impact and has brought about undeniable advances over the years as can be seen from the many cases of progress and concrete change in the various legal systems of the ILO's Member States, following constructive dialogue between the Committee and the governments of those States. There is absolutely no doubt that many people, employers as well as workers, have profited in most cases in a very permanent way from the legal and social changes that compliance with international labour standards, following comments by the Committee of Experts, has brought about.² Moreover, the fact that the quality of the evaluations and recommendations of this venerable Committee of Experts, which celebrated its 80th birthday in 2006, has been acknowledged and that these evaluations and recommendations are, in the opinion of legal experts, an invaluable source of reference, highlights the positive role that it has played for many years.

Nevertheless

The question of whether this Committee and the other bodies with which it works can continue to operate as efficiently, in the medium and short term, as in the past, should be raised. The more urgent the need for labour rules throughout the world, the more is expected from the ILO and the more evident the limits of the standards supervision system inherited from 1919 become. The procedure for examining the reports that States submit on the application of standards is in practice a victim of the rising number of these reports and the relatively formal way in which they are examined, which makes it difficult to place the resulting comments in any kind of hierarchy. The simplifications introduced to remedy this, and in particular the fine-tuning of the periods covered by reports, which has made it possible to lengthen, on several occasions over the last fifty years, the reporting cycle for the submission of reports (which are now in principle two years for "fundamental and priority" conventions and five years for "technical" conventions), have helped to keep the system in place, without examining whether it is still relevant or

² Since 1964, the Committee of Experts has listed cases in which governments, responding to its comments, have amended their legislation or practices in order to ensure that ratified conventions are fully effective. These cases are commonly known as "cases of progress" and some of the most significant cases have been studied. See in particular Eric Gravel and Chloé Charbonneau-Jobin, *The Committee of Experts on the Application of Conventions and Recommendations: Its dynamic and impact*, Geneva, ILO, 2003; see also *The impact of international labour conventions and recommendations*, Geneva, ILO, 1977.

whether the substantial resources which ILO channels into it could be otherwise employed.³

The fact that preparing reports for submission is such a laborious and complex task means in some cases that the relevant authorities of some Member States are sending in incomplete reports or reports which lack the required quality, sometimes reducing this supervisory procedure to little more than a bureaucratic exchange between the International Labour Office and the authorities of the country in question.⁴ Victims of their own success and in particular of campaigns to promote the ratification of various conventions (especially the fundamental conventions), the future of the ILO's supervisory bodies, and the Committee of Experts in particular, if they continue to work in the same way, is a matter of some concern. The Committee of Experts, for instance, examined 180 reports from 26 Member States in 1927 at its first session. On that date, the Conference had adopted 23 conventions and 28 recommendations and there were 229 ratifications. Nowadays, with 180 Member States and over 7,400 ratifications, the Committee of Experts needs to examine some 3,000 reports at each of its yearly sessions. Although ratifications are likely to increase more slowly, they will undoubtedly increase in the future and so will the number of reports.

In the early 1980s, moreover, around 90% of the reports due from governments under Article 22 of the Constitution were actually received. Nowadays, the Committee of Experts receives only 60 to 65% of the reports due. Despite major efforts recently, it manages to process only around 65% of the reports received and has to defer close on one third of them to the following year, for reasons as diverse as the late submission of reports by governments, the need to translate some communications and legislation supplied in their original language, the submission of incomplete information or its excessive workload (the Committee had to defer examination and processing of 712 dossiers in 2006, which will be

³ See in this respect the criticisms of Alain Supiot, "Le devenir des normes internationales du travail", at the meeting of the Group of Independent Experts on standards-related activities and decent work: Prospects in the field of social security, Geneva, ILO, December 2003. See also the comments of Breen Creighton: "... the traditional system is in a state of crisis of such magnitude as to raise serious questions about its future role and relevance" in "The Future of Labour Law: Is there a role for international labour standards?", C. Bernard, S. Deakin and G. Morris (eds.), *The Future of Labour Law* (2004), p.253.

⁴ See in this respect the serious criticisms recently made by Brian Langille: "... Pick your language – the system is broken. ... At its worst, it is simply a system in which taxpayers pay lawyers in domestic departments of labour to compile reports about laws 'on the books' which are sent to other (international) lawyers and then committees in Geneva, without ever achieving any traction with the real world during or after the process at all." in "Core Labour Rights – The True Story (Reply to Alston)", *European Journal of International Law*, Vol. 16, No. 3, June 2005, pp. 458-459.

added to the dossiers expected for 2007). Every year, some 70% of the reports actually received by the Office arrive late, well beyond the deadline by which governments should send in their annual reports, which considerably complicates the Committee's task. In a few years time, bearing in mind the ongoing increase in the number of ratifications and reports, the Committee of Experts, as the cornerstone of the supervisory system, will no longer be able to absorb and process over half the reports that it should examine.⁵

At present, moreover, more than one third of the reports due for examination by the Committee of Experts concern conventions which are no longer up to date or which have interim status. It should be borne in mind here that a Working Party on policy regarding the revision of international labour standards, set up by the Governing Body in the mid-1990s, held its first session in November 1995. Over seven years, the group reviewed all the conventions and recommendations adopted prior to 1985 on a case-by-case basis; it completed its task in March 2002. On the basis of its recommendations, the Governing Body decided that ratification of 71 conventions and 71 recommendations should be promoted and that 60 conventions and 68 recommendations were obsolete.⁶ In November 1996, after the Working Party had drawn up the list of instruments considered to be obsolete, the Governing Body debated their possible abrogation, leading to the adoption by the Conference of the 1997 Constitutional amendment under which conventions no longer making a useful contribution to attaining the ILO's objectives could be abrogated. Unfortunately, ratification of this important tool, which should have helped to rationalize all the ILO's standards, has been disappointingly slow; this is especially surprising as there was no controversy about its adoption, for which there was overwhelming support. A total of two thirds of the ILO's 180 Member States have to ratify the amendment if it is to come into force. On 31 December 2006, i.e. nearly ten years after its adoption, the 1997 Constitutional amendment had been ratified (or accepted) by only 90 Member States, whereas 121 need to do so if it is to come into force.⁷ While this is a key instrument in ensuring that the International Labour Code is credible, as it ensures that stan-

⁵ See William Simpson's critical analysis of the supervisory system in "Standard-setting and supervision: A system in difficulty", in *Les normes internationales du travail: un patrimoine pour l'avenir – Mélanges en l'honneur de Nicolas Valticos, Jean-Claude Javillier and Bernard Gernigon* (eds.), Geneva, ILO, 2004, p.47 ff.

⁶ Bearing in mind developments since the work of this Working Party, 75 conventions, 78 recommendations and 5 protocols are now considered to be up to date.

⁷ ILO Governing Body, doc. GB.297/12, 297th Session, Geneva, November 2006.

dards are pertinent and kept up to date, it does not seem to be much of a priority in government agendas, with the repercussions described above on the work of the Committee of Experts.

The work of the Committee of Experts, especially through the publication of its annual report, is nevertheless paramount as the regular supervisory system for standards is largely based on this body. In practice, the Committee's annual report, adopted in December, is presented to the following session of the International Labour Conference. The Conference Committee on the Application of Standards, a tripartite standing committee of the Conference, then discusses and examines the report and selects a number of cases for debate. The governments concerned by the comments are invited to reply to the Committee and to provide information on the cases selected. In most cases, the Conference Committee adopts conclusions inviting governments to take specific measures to resolve a problem or to agree to a mission to the country or technical assistance from the ILO. In June 2005, for instance, the Conference Committee examined the cases of 25 Member States relating to conventions which they had ratified. In 19 of these cases, the Committee offered a mission (in the form of technical assistance or direct contacts) in its conclusions.⁸ There have actually been more than ten missions to date in order to ensure that conclusions are followed up. As well as obtaining tangible results from the point of view of resolving the problems brought up during the Conference debate, these missions have helped to breathe new life into relations and dialogue between the countries involved and the ILO's supervisory bodies, and have had a positive impact in that they have enhanced social dialogue nationally. These missions have also helped to change countries' perceptions of the ILO and pave the way for new partnerships based on mutual undertakings: in return for increased efforts by these countries to implement ratified conventions, the Office provides the necessary technical assistance and cooperation. While the Committee of Experts on the Application of Conventions and Recommendations and the Conference Committee on the Application of Standards, which were set up at the same time, in some cases take different approaches, dealings between them have always taken place in an atmosphere of mutual respect, cooperation and responsibility. In recent years in particular, they have forged closer ties, and have drawn on each other's work. It is therefore important for the Committee of Experts to be able

⁸ International Labour Conference, Provisional Record, No. 2, 94th Session, Geneva, 2005.

to carry out its work properly in future, although, as matters stand at present, this may seem to be compromised.

As a result, unless there is a substantial increase in the Committee of Experts' secretarial resources, which seems fairly unlikely in a period in which the ILO is being asked further to rationalize its human and financial resources, or a complete overhaul of its working methods, including the way in which it handles government reports under Article 22 of the Constitution, the present system, as formally set up, may well suffocate. And it seems very unlikely that new arrangements regarding the reporting cycle will be enough to safeguard this system in the long term.

Much the same can be said of the other mechanisms and bodies of the ILO's supervisory system, where current figures and trends lead to the same conclusions. In the case of the Committee on Freedom of Association, as a result of its renown and excellent reputation, and in particular as a result of efforts to improve awareness and visibility among the social partners and efforts to promote the many training programmes offered by the ILO on freedom of association, there has been a very significant increase in the number of complaints lodged before the Committee in recent years. Despite ongoing changes and improvements to its working methods, in particular enabling better filtering of complaints, the number of cases before the Committee increased from 122 in 2001 to 176 in 2006. While the Committee dealt with an average of slightly more than twenty cases per meeting (held over two days, three times a year) a few years ago, it now has regularly to deal with up to 40 cases.

As regards use of the procedure set out in Article 23 of the Constitution, under which workers' and employers' organizations may forward their comments on legislation and practices in respect of ratified conventions and comment on the reports submitted by the governments of their respective countries, the number of communications has also boomed in recent years from some 250 comments each year in the early 2000s to over 500 in 2006. There has also been a clear-cut increase in recourse to the complaint procedure set out in Article 24 of the Constitution.

If, therefore, the Committee of Experts and the ILO's other supervisory mechanisms and bodies are to remain efficient and possibly even survive, deeper analyses need to be pursued about the working methods of all the cogs in the system; clear-cut and maybe daring choices will have

to be made by the ILO and its constituents if this supervisory system is to survive.

III. Dwindling motivation on the part of States

In the case of the ILO's standards-setting activities, and in particular the adoption of international labour conventions, it should be borne in mind that conventions represent a compromise between different interest groups and the States ratifying them have to make a formal commitment if they are to be binding. In this respect, the number of ratifications of newly adopted instruments has been dwindling for twenty-odd years. Since the mid-1980s, ratification levels for these conventions have been very disappointing. Ratifications vary between three (for instance for the Social Security (Seafarers) Convention (revised), 1987 (No. 165)) and 21 (for instance for the Seafarers' Hours of Work and the Manning of Ships Convention, 1996 (No. 180)). The only real exception is the Worst Forms of Child Labour Convention, 1999 (No. 182), which seems to be the tree concealing the wood. In practice, one has to go back to the Asbestos Convention, 1986 (No. 162), adopted over 20 years ago, to find an acceptable number of ratifications for a convention, i.e. 29. The upshot is that with 180 Members, the ILO is continuing to adopt binding international-law instruments which 90 to 95% of these Members are failing to ratify.⁹

This dwindling motivation on the part of States would tend to suggest that ratification levels are unlikely to increase. As the above figures suggest, willingness to ratify is declining for reasons which appear to have less to do with ideology or the small number of topics proposed for the adoption of new standards that have a rallying effect, than with practical considerations linked to the absorption capacity of administrations, in both developing and developed countries, making them less willing to shoulder the workload connected with the supervisory system and in par-

⁹ See the statistics put forward by Breen Creighton in 2004 according to which, leaving aside Convention No. 182, the average number of ratifications per convention over 25 years is 16.05 out of a possible 178. B. Creighton, *loc.cit.*, note 3, p.260. On the future of the ILO's standards-related work, see also Simon Deakin, "Learning or Diversity? Reflections on the Future of International Labour Standards", in *Protecting Labour Rights as Human Rights: Present and Future of International Supervision*, Proceedings of the International Colloquium on the 80th Anniversary of the ILO Committee of Experts on the Application of Conventions and Recommendations, Geneva, 2007, pp. 239-245.

ticular the submission of periodical reports.¹⁰ This attitude does not seem to be borne out, however, by the impact of the 1998 *Declaration on Fundamental Principles and Rights at Work* on ratification levels of the fundamental conventions, which seems to be due to some extent to the fact that, although the same administrative workload is involved, Member States consider that it is in their interest to opt for due and proper ratification that provides them with a greater moral benefit. In addition, some consider that ratification, because it is voluntary, cannot act as an effective counterweight to competition, which is exerting a downward pressure on working conditions and social protection in all the Member States. This might well devalue conventional standards-related action based on both States' voluntary acceptance and goodwill, underpinned by persuasion.¹¹

Should the adoption of binding instruments such as conventions therefore be abandoned and replaced largely by soft-law instruments of which the 1998 Declaration is one of the most striking recent examples, in order to draw up international labour law?¹²

While soft law may lack binding force as defined in legal theory, this does not mean that it does not have legal effects which are themselves the signs and products of ongoing cooperation and competition between the actors of an international community which now lacks comparability.¹³

The 1998 Declaration obviously gave rise to concerns within the ILO about the effectiveness of binding standards in international labour law. The negotiations leading to its adoption exposed far-reaching differences between the ILO's constituents as regards the role of international labour standards in a context of globalization. Some people felt that the Declaration was the outcome of political manoeuvres to mask

¹⁰ See Francis Maupain, "Persuasion et contrainte aux fins de la mise en oeuvre des normes et objectifs de l'OIT", in *Les normes internationales du travail: un patrimoine pour l'avenir – Mélanges en l'honneur de Nicolas Valticos*, Jean-Claude Javillier and Bernard Gemigon (eds.), Geneva, ILO, 2004, pp.694-695.

¹¹ See the analysis of these arguments by Francis Maupain, loc.cit., note 10, pp.688-689.

¹² Some people felt that the distinction between conventions and recommendations should be abolished and replaced by the adoption of framework conventions such as the recent Promotional Framework Convention No. 187 on Occupational Safety and Health adopted by the International Labour Conference in 2006. See, in this respect, the comments by Bob Hepple, "Does law matter? The future of binding norms", in *Protecting Labour Rights as Human Rights: Present and Future of International Supervision*, Proceedings of the International Colloquium on the 80th Anniversary of the ILO Committee of Experts on the Application of Conventions and Recommendations, op.cit. note 9, pp.221-232.

¹³ Isabelle Duplessis, "La mollesse et le droit international du travail: mode de régulation privilégié pour société décentralisée", presented at the seminar: Governance, International Law and Corporate Social Responsibility, Geneva, July 2007, p. 19; see also, P.-M. Dupuy, "Soft Law and the International Law of the Environment", *Michigan Journal of International Law*, 1991, No. 12, p. 420.

dissension and aiming to find a minimal consensus about the ILO's standards-related work. Criticisms of the Declaration related not just to its flexibility but also to its content and its potential to replace binding standards in international labour law.¹⁴

These criticisms nevertheless proved to be largely unfounded. Nine years after its adoption, the significant increase in the number of ratifications of the fundamental conventions, largely attributed to the promotional effect of the Declaration, thus subjecting the countries concerned to the traditional supervisory system, undoubtedly highlights one of the Declaration's useful effects. Viewed in terms of combining resources in order to improve respect of workers' rights, the Declaration has acted as a point of contact and connection between soft law and hard law.¹⁵

While the Declaration was initially addressed to Member States, calling on them to implement enacting measures, the general way in which it was formulated meant that it could be used as a direct reference by the new world actors. It has helped to define the principles to be followed, common to the ILO and the major international financial institutions, in their action at country level. A recent example illustrating this development is provided by the Bretton Woods Institutions. On 12 December 2006, in a meeting with representatives of international trade union organizations held in Washington DC, the President of the World Bank announced that the Bank would, in all the infrastructure projects that it financed (representing a budget of US\$ 8 billion per annum), pursue its cooperation with the various development banks in order to progress and implement the provisions on fundamental principles and rights at work set out in the ILO Declaration.¹⁶ This development is part and parcel of ongoing cooperation between the ILO and the World Bank on its performance standards, and in particular of discus-

¹⁴ Isabelle Duplessis, *loc.cit.*, note 13, p.21; see also Philip Alston and James Heenan, "Shrinking the International Labour Code: An Unintended Consequence of the 1998 ILO Declaration on Fundamental Principles and Rights at Work?", *New York University of International Law and Politics*, 2004, No. 36, p. 221; and Philip Alston, "Core Labour Standards and the Transformation of the International Labour Rights Regime", *European Journal of International Law*, 2004, No. 15, p. 457.

¹⁵ Isabelle Duplessis, *loc.cit.*, note 13, p.25; see also Isabelle Daugareilh, "La responsabilité sociale des entreprises transnationales et les droits fondamentaux de l'homme au travail: le contre-exemple des accords internationaux", in I. Daugareilh (ed.), *Mondialisation, travail et droits fondamentaux*, Bruxelles, Bruylant, L.G.D.J., 2005, p.376; and Francis Maupain, "Revitalization not Retreat: The Real Potential of the 1998 ILO Declaration for the Universal Protection of Workers' Rights", *European Journal of International Law*, 2005, No. 16, p. 439.

¹⁶ Official minutes of the meeting of 13 December 2006 in Washington DC between Mr Paul Wolfowitz and representatives of the International Trade Union Confederation.

sions on practical ways of cooperating in future to implement those standards. Generally speaking, development banks seem to be increasingly interested in including international labour standards in their lending operations.¹⁷ It should also be borne in mind that the Declaration has been echoed in the social charters adopted by various regional bodies (for instance within the European Union, the social-labour declaration of the common market of the south, MERCOSUR, and the North American Free Trade Agreement (NAFTA)).

IV. A new normative reference

As a normative reference, the 1998 Declaration offers considerable inspiration for the new international actors, whether public or private, concerned by international labour standards. For instance, multinational enterprises are increasingly drawing on the Declaration's rights and principles to draw up the criteria governing their reports or social audits. Moreover, enterprises have drawn up thousands of codes of conduct, growing numbers of which refer to the Declaration's rights and principles.

In this respect, the global (or international) framework agreements between multinational enterprises and international trade union federations, which are visible signs of a degree of globalization of social dialogue, seem to offer interesting prospects. Since the 1990s, these international instruments have proliferated as a trade union response to the multinationals' codes of conduct and a tangible result of corporate recognition of a global union partner. A basic code of labour practice drawn up by the former International Confederation of Free Trade Unions (ICFTU) and several international trade union federations in 1998 states that multinational enterprises should undertake to respect the fundamental labour standards set out in the 1998 Declaration in all their operations and in the operations of their subsidiaries and should impose the same obligation on their subcontractors.¹⁸ Some fifty or so global framework agreements have been signed to date by multinationals and inter-

¹⁷ ILO Governing Body, doc. GB.297/13, 297th Session, Geneva, November 2006.

¹⁸ Reynald Bourque, "Les accords-cadres internationaux et la négociation collective internationale à l'ère de la mondialisation", research forming part of the work of the ILO's International Institute for Labour Studies, Geneva, 2004, p.10.

national trade union federations.¹⁹ These framework agreements are normally supervised by representatives of the signatory parties, but in some cases an existing representative structure such as a European or worldwide works council takes on this task. What is particular to these global framework agreements is that they set out procedures for supervising their application involving trade union organizations or bodies for transnational dialogue, whereas unilateral standards, such as codes of conduct, do not systematically include the issue of their supervision and, if they do, this supervision is often devolved to the enterprise's in-house management. Interestingly, the most recent global framework agreements include a substantial part on the application of the agreement and supervision of compliance. The range of agreed procedures and bodies responsible varies from one agreement to another, especially as regards the composition of these bodies, whether or not they are permanent, their powers and the frequency of their work.²⁰

Although some people consider that it is difficult to assess the effectiveness of global framework agreements because most of them are so recent and so little experience has been gained as regards their application, some factors seem to show, generally speaking, that the procedures for applying and supervising these agreements have been followed and that their effects are positive overall.²¹ Some 15 global framework agreements were analyzed in detail in an ILO publication dating back to 2003, the *Guide to the Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy*. This guide showed that almost all these agreements took up the 1998 Declaration's fundamental principles, including the elimination of child and forced labour, equality at work and respect of the freedom of association and collective bargaining.²²

Although most of the instruments of social responsibility used by enterprises refer in practice to various international sources, two types of

¹⁹ The first agreement was signed in the Danone agri-foodstuffs sector in 1988, followed by the Accor hotel chain in 1995. The number of agreements signed each year only really started to grow from 2000 onwards. France Telecom is the latest company to sign a global framework agreement with an international union federation. Covering over 200,000 employees throughout the world, this framework agreement, signed on 21 December 2006 by the French multinational, UNI (global union) and telecommunications unions throughout the world, imposes the ILO's fundamental standards throughout the group, including the right of association and collective bargaining, the absence of discrimination at work, and the prohibition of forced labour and child labour.

²⁰ See Isabelle Daugareilh, "Expérience d'entreprises en matière de responsabilité sociale des entreprises", paper presented at the seminar: Governance, International Law and Corporate Social Responsibility, ILO, Geneva, July 2006, p.12; see also, I. Daugareilh, "La négociation collective internationale", Travail et emploi, 2005, p.69.

²¹ Reynald Bourque, loc.cit., note 18, p.17.

²² See http://www.ilo.org/public/libdoc/ilo/2002/102B09_135_engl.pdf.

source are mentioned by almost all enterprises: the United Nations Global Compact and certain ILO standards. The fundamental rights covered by the 1998 Declaration nowadays provide the basis for any internationally negotiated agreement within a multinational enterprise.

In the case of free trade agreements, another illustration of this new normative dynamic is that it is becoming common practice to mention respect for labour standards, and in particular the 1998 Declaration, in such agreements; the Declaration is also being used in negotiations as a way of making globalization fairer by extending its benefits to all. It would seem that the debate is now focusing on the most effective mechanisms and procedures for achieving this goal. Since labour law provisions were first included in trade agreements, starting with NAFTA and the Central America – Dominican Republic Free Trade Agreement (CAFTA-DR), and continuing via the European integration process, it has become normal practice to include labour rights in these types of agreement, whether bilateral, multilateral or regional, and to refer explicitly to certain of the ILO's international labour standards. Moreover, while almost all free trade agreements containing labour provisions make provision for cooperation between the parties in this area, some of them set up new institutional mechanisms to achieve successful cooperation and technical assistance and are part and parcel of a new conception aiming to supplement conventional trade sanctions and incentives.²³

V. Effectiveness and efficacy

As can be seen, there are many references to the ILO's 1998 Declaration in the current normative context that the new international actors have appropriated. This would seem to show that although it lacks sanctions, soft law may have as many chances of application and success and is just as genuinely effective as hard convention-based or customary law.²⁴

²³ For a study of free trade agreements and workers' rights see Cleopatra Doumbia-Henry and Eric Gravel, "Free trade agreements and labour rights: Recent developments", *International Labour Review*, Vol.145 (2006), No. 3. See also, "The World Trade Organization and Labour Rights: Man bites Dog", in *Social Issues, Globalisation and International Institutions, Labour Rights and the EU, ILO, OECD and WTO*, edited by Virginia Leary and Daniel Warner, *International Studies in Human Rights*, Vol. 84, Martinus Nijhoff Publishers, p.157 ff.

²⁴ Isabelle Duplessis, *loc.cit.*, note 13, p.7; see also Alain Pellet, "Le bon droit et l'ivraie – plaidoyer pour l'ivraie (Remarques sur quelques problèmes de méthode en droit international du développement)", in *Le droit des peuples à disposer d'eux-mêmes: méthodes d'analyse du droit international. Mélanges offerts à Charles Chaumont*, Paris, Pedone, 1984, pp.491-492.

The fact that soft law lacks binding force as defined in legal theory does not seem to mean that it is not respected in practice. Under the impetus of these new international actors, it seems rather to be becoming a key technique for global governance.²⁵ It is no longer enough for a rule to be legitimate and fair, nor for it to have been adopted in the legal form required by the competent authorities. It also has to be effective, which means in particular that it is correctly and effectively applied by those to whom it is addressed; for that purpose, the latter have to have judged it acceptable. This is what legal theoreticians conventionally call effectiveness, i.e. the fact that the prescriptions contained in a norm are fully respected, which is both an aspect of and a condition for its efficacy.²⁶

In practice, therefore, does the distinction between a soft standard and a hard standard, or the existence of a supervisory mechanism rather than informal monitoring, really have an impact on compliance with the standards and principles laid down by the ILO? Perhaps it is enough for the rule of law to be effective and efficacious and lead to increased respect for and better application of the rights, principles and values defended by the ILO?

VI. Appropriation and privatization of standards by new actors: A threat or an opportunity for the ILO?

While external public initiatives mean that the ILO is already facing an uphill task in finding the link between binding and non-binding standards needed for good global governance, private initiatives further complicate the problem. The new element seems nowadays to be the establishment of a parallel system for the formulation and implementation of core principles and rights by public and private actors. There is a real risk that rights in the labour field, as interpreted by the supervisory bodies

²⁵ Isabelle Duplessis, *loc.cit.*, note 13, p.7.

²⁶ See the comments of Frédéric Rouvillois in the debate in France following the adoption of the Law of 30 June 2004 on Whit Monday as an unpaid day of solidarity for employees, in *La lettre de la fondation pour l'innovation politique*, No. 13, Paris, June 2005. See also the comments of Brigitte Stern, according to whom the effectiveness of legal norms is not a strictly legal concept but more a sociological concept which measures the actual degree of implementation of legal norms in practice. As the goal of rules is that they are applied, effectiveness merely involves finding out if they are being applied, something which is not necessarily measured by the possibility of punishment for failure to respect them. B. Stern, "Réflexions sur le parallélisme dans la mise en œuvre des droits économiques et des droits sociaux", in *Protecting Labour Rights as Human Rights: Present and Future of International Supervision*, Proceedings of the International Colloquium on the 80th Anniversary of the ILO Committee of Experts on the Application of Conventions and Recommendations, *op.cit.*, note 9, pp.121-124.

since the creation of the ILO, will be diluted. What role should the ILO play in linking up international labour law standards from public as well as private actors?²⁷ The proliferation of actors, the diversification of sources and the appropriation of international standards at national, regional or even corporate level now seem to be unavoidable developments and will probably be permanent. Some people have welcomed private initiatives in the form of codes of conduct and social labels set up under pressure from consumers as an important development. This development may indeed offer considerable potential. At present, however, it is too anarchic and normative references are too arbitrary; as a result, international labour standards may be placed on a relative footing or the integrity of their content threatened.²⁸ This tendency towards a dilution of normative references has already been seen in several contexts. A number of the codes of conduct adopted by multinational enterprises refer to the fundamental principles and rights of the ILO's 1998 Declaration; in many cases, however, any coherent linkage is taking time to find. Problems that have rightly been highlighted include the fact that companies pick and choose international standards to match their own private interests and those of their shareholders, the increase in the number of codes of conduct, and the fact that they are often not applied properly in practice. Plural formulation of standards may in practice lead to conflicting interpretations of the content of international labour standards and the implosion of the international labour code.²⁹

In the case of trade agreements, moreover, the fact that some of these agreements, particularly those signed by the United States in recent years, among other things exclude rights relating to non-discrimination, while making express reference to the respect and promotion of the rights and principles set out in the ILO's 1998 Declaration, has led some detractors to worry that this kind of formulation of standards may become so decentralized that it leads to an extremely confused situation in which enterprises, for instance, proclaim resolute adherence to fundamental labour standards, while being entirely free to interpret their content.³⁰ In

²⁷ Isabelle Duplessis, *loc.cit.*, note 13, pp.24-25.

²⁸ Francis Maupain, "L'OIT: quelle efficacité face à la mondialisation?", in *L'efficacité des normes internationales face à la mondialisation et en matière de liberté syndicale*, Symposium of 31 October 2002 under the auspices of the Association Française pour l'Organisation internationale du Travail, p.11.

²⁹ Isabelle Duplessis, *loc.cit.*, note 13, p. 24; see also Philip Alston, *loc.cit.*, note 14, p. 510.

³⁰ Philip Alston, "Facing up to the Complexities of the ILO's Core Labour Standards Agenda", *European Journal of International Law*, 2005, No 16, p. 470.

this context, the threat posed by a “pick and choose” approach should not be underestimated.³¹

Moreover, in the context of corporate social responsibility, if there is one trait that is emerging from the proliferation of corporate normative initiatives, it is one of infinite variety. These are voluntary measures which are not subject to any legal obligation and which are shaped by a notion whose terms remain hazy and cover vast fields.³² The result is that corporate social responsibility should not in principle be seen as a substitute for governmental action to enforce respect for workers’ fundamental rights and labour law and ensure that they are applied. In this respect, moreover, the voluntary initiatives which seem to have the best chance of success are those based on democratic forces and the democratic process, involving all the stakeholders and interested parties. Talking to themselves, as many enterprises have done through the unilateral adoption of codes of conduct intended to revamp their image, is not the same as concern for the respect of workers’ rights. Even though consultants and outside auditors may be called in to try to certify the effectiveness of these codes, it may well be that these enterprises are still talking to themselves.³³

Some observers are also of the view that enterprises are using codes of conduct and other types of private standard in the labour field in order to redefine or give a new interpretation to existing standards, with a view to reducing the responsibilities that would normally be incumbent on them. Workers and their representatives must ensure that private standards and self-regulation do not ultimately replace ILO standards, which are justified and globally recognized as a result of their tripartite adoption procedure, or standards adopted by governments. The challenge is to ensure that standards devised for social auditors and inspectors in the private sector are compatible with the best practices of labour inspection, encourage a culture of compliance with the law and are in keeping with the spirit and practice of sound industrial relations. Others consider that this is a task for the ILO.³⁴ Since enterprises are showing a growing interest in international labour standards, and since they currently lack

³¹ See, in this respect, the analysis by Cleopatra Doumbia-Henry and Eric Gravel, *loc.cit.* note 23, p. 225.

³² Isabelle Daugareilh, *loc.cit.* note 20, p. 3.

³³ Michael Sebastian, Editorial in *Corporate social responsibility: Myth or reality*, Labour Education 2003/1, No. 130, ILO, Geneva, 2003, pp.VI-VII.

³⁴ See, in this respect, the analysis by Dwight Justice, “Corporate social responsibility: Challenges and opportunities for trade unionists”, in *Corporate Social Responsibility: Myth or reality*, *op.cit.*, note 33, pp.8-10.

any authoritative body in this field, increasing numbers of private companies have leapt into the breach to advise enterprises, even though they often do not really understand the implications of standards for the private sector.

Faced with this situation, the ILO has to pursue and intensify the efforts that it has made up to now, setting up regular consultations and discussions, especially in the ILO Governing Body's Subcommittee on Multinational Enterprises. In this context, it is interesting to note that at the November 2006 session of this Subcommittee held during the Governing Body's session, there was a proposal from employers and workers to draw up a concrete programme to help enterprises achieve the principles linked to international labour standards and the ILO's Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy.³⁵ It was noted that such a programme might include, among others: research on the impact and value of private monitoring and assessment methods; tools to help countries to strengthen local inspection in respect of labour issues; identification of opportunities for public/private partnerships for inspection and enforcement; collaboration with the International Training Centre of the ILO to develop training materials for auditors and companies on labour standards; advice and guidance on assessment methods that refer to ILO instruments.³⁶ These proposals are especially pertinent as one of the challenges facing the ILO is in practice to ensure that the non-state actors attempting to influence corporate practices interpret international labour standards in a coherent and accurate way that reflects how they have been interpreted over the years by the ILO's supervisory bodies. At the March 2007 Session of the ILO's Governing Body, the Subcommittee on Multinational Enterprises continued its discussions and decided that the aim of the above programme could be to provide enterprises with tools and information enabling them better to understand and apply fundamental labour principles and rights at work and to offer support to those deciding to take action in this field. For instance, a one-stop shop for assistance could be set up within the ILO to reply to questions from enterprises and offer them more detailed information on the application of international

³⁵ It should be borne in mind that the Declaration on Multinationals is the only instrument in the area of corporate social responsibility which is based on universal principles and standards and which has the support of employers, workers and governments.

³⁶ See ILO Governing Body, doc. GB.297/13, 297th Session, Geneva, November 2006.

labour standards from the point of view of their own activities and the activities of their supply chain. This type of service would provide enterprises with easier access to the ILO's wide range of resources and competences in this field.³⁷ The follow-up to this important programme and these various proposals will undoubtedly be crucial for the ILO in terms of its stance towards these new actors and the role that it could play in this changing situation.³⁸

Can the ILO support the standards emanating from other organizations, if they are likely to help to achieve its own objectives? Although the challenge for the ILO is to keep its central role and leading position as the organization authorized to draw up standards for the working world and therefore to reject any approach that simply involves managing corporate social responsibility, the potential benefits that could come from the application and supervision of international standards by new or non-traditional bodies in this field should not be underestimated. Enlargement of the forces involved in this exercise and taking on certain responsibilities is being welcomed in some quarters.³⁹ This enlargement includes a growing number of activists and members of non-governmental organizations, many of whom are young people who are no longer willing to accept breaches of and attacks on workers' rights, wherever they may be on the planet. Technological advances have had major repercussions on the working world and have substantially increased the ability of individuals to keep abreast of what is happening in the rest of the world. These new actors have also emerged on the scene because, in some cases, the capacity of the traditional actors has been weakened. This is especially striking in the developing countries or those countries whose economies are in transition, which have had to make budget cuts in public services which, in some cases, have substantially reduced the resources available for supervision of labour standards and labour inspection. In the light, moreover, of the challenges facing the ILO's traditional supervisory system, and in particular the limits on its resources, the emergence and proliferation of new actors in the field of international labour standards who, without replacing the mechanisms already in place, are

³⁷ See ILO Governing Body, doc. GB.298/MNE/4, 298th Session, Geneva, March 2007.

³⁸ The ILO has also recently drawn up a Resource Guide on Corporate Social Responsibility, which has links to various publications and international labour standards. It looks in particular at multinational enterprises' codes of conduct, labour relations and child labour. See <http://www.ilo.org/public/english/support/lib/resource/subject/csr.htm>.

³⁹ See Werner Sengenberger's stance in "Labour Standards and Globalization", in *Globalization and the Future of Labour Law*, edited by John Craig and Michael Link, Cambridge University Press, 2006, pp.347-348.

taking up the baton by creating new synergies with these mechanisms, can be seen as a tremendous opportunity.⁴⁰

While it can no longer claim exclusivity, the ILO nevertheless has to retain primacy over the formulation, interpretation and application of labour standards, not just because it can legitimately do so – an important argument in the political construction of globalization – but also because it possesses experience and expertise in this field – a crucial argument in the technocratic construction of globalization.⁴¹

VII. Creating new partnerships

In his report to the International Labour Conference in 2004, the ILO's Director-General pointed out that while non-public actors had undertaken a whole range of initiatives in recent years to include various social values in the world economy, in particular labour standards, human rights and environmental protection, their methods were very diverse: adoption of codes of conduct, guidelines on outsourcing, reports on the inclusion of the social dimension or sustainability, participation in certification programmes and multi-stakeholder partnerships intended to provide for monitoring and verification. Although these fields of activity complemented action by the public authorities, they could not, however, replace it. In its report published in 2004, the World Commission on the Social Dimension of Globalization reflected the opinion being put forward in some sectors that voluntary initiatives of the type based on the United Nations Global Compact could not be credible unless they were transparent and accountable, requiring systems for evaluating results,

⁴⁰ In this respect, see Werner Sengenberger's conclusions: "The diversification of agents dealing with international labour standards has been harshly criticized by labour lawyers and others on the basis that such activities will result in a loss of coherence in standard setting, monitoring and control. If a variety of new actors establish their own labour standard regimes, they would restrict their concern selectively to some international labour standards and neglect others. Appropriate independent monitoring and transparent verification (auditing, inspection, etc.) of private action can go some way to prevent degradation of international labour standards. The ILO itself has still to come to grips with the new realities that confront the classic system of international labour standards, and in particular the mosaic of actors and means of action. The proliferation of actors also provides new opportunities for international labour standards. There is an urgent need to take the case for standards beyond the realm of diplomats, experts and the tripartite constituents of the ILO to the national and international levels. Nothing could be more encouraging for the future of international labour standards than a growing number of young people caring about and advocating good labour conditions at home and abroad in the ILO's tradition of peaceful and considered action." *loc.cit.*, note 39, p. 353.

⁴¹ Marie-Anne Frison-Roche, "The joint need for an analogous regulation of labour relations and globalized markets" in *The future of work, employment and social protection – The dynamics of change and the protection of workers*, Proceedings of the France/ILO symposium, Peter Auer and Bernard Gazier (eds.) (Lyon, 2002, p.188.

public information and supervision. In this respect, the ILO's Director-General considered that it was necessary to bolster the operation of these voluntary initiatives so that they contributed to the objectives and values defended by the ILO.⁴²

Indeed, the ILO offers a unique forum for analysis, social dialogue and policy design as regards these issues. Its tripartite structure means that the labour policies and standards that it draws up have a particular legitimacy in the working world. There are already a number of programmes supporting private multi-stakeholder initiatives from one angle or another: industry-based partnerships in the export sector, dialogue to identify ways of enhancing the contribution of multinational enterprises in their places of operation. The Office has a stock of information on this issue: online database on voluntary initiatives (www.ilo.org/basi), various training materials, user guides and manuals on the inclusion of labour standards and principles in voluntary initiatives. The ILO is well placed further to develop this capability through knowledge building, cooperative work and social dialogue.⁴³ Such forms of global social dialogue are developing on a voluntary basis among the global players concerned. They warrant further research by the ILO and other bodies to determine their potential to promote productive relations between workers and managers, and facilitate the resolution of disputes between them. As the World Commission recommended in its 2004 report, the ILO should closely monitor all such developments and provide the parties concerned with advice and assistance when required.⁴⁴

For instance, in the case of global framework agreements, a number of observers consider that the ILO should be the forum for studying this kind of normative instrument which involves all the parties. Even though the notion of global framework agreements is growing, it could still be further promoted. The ILO has to continue to provide its assistance by promoting and supporting global social dialogue. After all, the prerequisite for this type of agreement is global dialogue between unions and enterprises. Where could it be better organized than in the sole United Nations agency with a tripartite structure? The foundation for playing such a role has been laid by the ILO's Tripartite Declaration on Multi-

⁴² A fair globalization: The role of the ILO, Report of the Director-General on the World Commission on the Social Dimension of Globalization, International Labour Conference, 92nd Session, Geneva, 2004, pp.26-27.

⁴³ *Idem*, p.27.

⁴⁴ A fair globalization: Creating opportunities for all, Report by the World Commission on the Social Dimension of Globalization, Geneva, 2004, paragraph 566, available at <http://www.ilo.org/public/english/wcsdg/docs/report.pdf>.

national Enterprises and Social Policy.⁴⁵ As mentioned above, however, global mechanisms for supervising multinational enterprises still leave much to be desired. The OECD's Guidelines for Multinational Enterprises have recently been stepped up to try to ensure greater transparency on the part of these enterprises.⁴⁶ Some people consider that the ILO should perhaps look at this issue in greater depth: it already supervises compliance with its standards by governments, so why should it not take a further step in the direction of enterprise activities? Supervising corporate social responsibility is certainly within the experience of the ILO.⁴⁷ It should not be forgotten, however, that the concept of corporate social responsibility has developed partly because of the divide between national legislation and its practical application. The ILO could perhaps channel more resources into drawing up tools to help countries to improve national labour inspection, and deploy greater efforts to train inspectors and other advisers involved in supervising compliance with labour standards within enterprises, as has been proposed in the discussions of the Subcommittee on Multinational Enterprises.

Moreover, a number of representatives of international trade union federations have brought up the possible role that ILO representatives could play in the application of global framework agreements as a facilitator or mediator between the parties, or even the referral to the ILO's Committee on Freedom of Association of complaints relating to the application of global framework agreements in respect of trade union rights.⁴⁸ It is now up to the ILO's constituents to decide whether or not this is, in their view, a direction that it should take.

⁴⁵ Ian Graham. "Labour agreements go global", in *Corporate social responsibility: Myth or reality?*, op.cit., note 33, pp.19-21.

⁴⁶ All 30 OECD members have adhered to the Guidelines (Australia, Austria, Belgium, Canada, Czech Republic, Denmark, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Italy, Japan, Republic of Korea, Luxembourg, Mexico, Netherlands, New Zealand, Norway, Poland, Portugal, Slovakia, Spain, Sweden, Switzerland, Turkey, United Kingdom, United States) as well as Argentina, Brazil, Chile, Estonia, Israel, Lithuania and Slovenia.

⁴⁷ See in particular the stance taken by Philip Jennings, "Corporate social responsibility – new morals for business?", in *Corporate social responsibility: Myth or reality?*, op.cit., note 33, p.36.

⁴⁸ Reynald Bourque, loc.cit. note 18, p.21.

VIII. Conclusion

As in the past, the ILO has to continue to develop. As the then Director-General said in 1998, the ILO Declaration on Fundamental Principles and Rights at Work was a response to the challenges posed by a globalization seen at the time in essentially economic terms. According to a number of observers, following the rejection of the idea of social clauses by the newly created World Trade Organization, and called upon by its own institutional remit, the ILO had to react rapidly to regain the initiative for social justice rather than suffering a gradual marginalization within the international system.⁴⁹ The years that followed showed that the ILO had managed to meet this challenge. The launch of the World Commission on the Social Dimension of Globalization in 2001 was part and parcel of this trend.

Moreover, the decent work agenda, set up for purely internal purposes in 1999, has become a world agenda. What was initially no more than a concept to enable the ILO's tripartite constituents to modernize and reform its structures has in the space of a few years become a programme which has been taken up by politicians, workers, civil society and the business community throughout the world.⁵⁰ A recent illustration of this new dynamic is that, in September 2005, over 150 Heads of State and Government meeting at the United Nations World Summit made full and productive employment and decent work for all one of the central objectives of relevant international and national policies in paragraph 47 of the outcome document. They also expressly affirmed the fundamental principles and rights at work and explained the key role of decent work in development strategies and poverty reduction.⁵¹ In addition, the Ministerial Declaration from the debate of the High-Level Segment of the United Nations Economic and Social Council (ECOSOC) of 2006 again brought the issue of decent work to the highest political level.

In the context of globalization, some consider that there has been a shift from labour power to capital power. In this respect, some take the

⁴⁹ Isabelle Duplessis, "La Déclaration de l'OIT relative aux droits fondamentaux au travail: une nouvelle forme de régulation efficace?", *Industrial Relations*, Vol. 59, No 1, Winter 2004, p.2.

⁵⁰ See in this respect the comments of the ILO's Director-General to the International Labour Conference in June 2006, Provisional Record, International Labour Conference, 95th Session, Geneva, 2006.

⁵¹ See paragraph 47 of the resolution adopted at the High-level Plenary Meeting by the General Assembly of the United Nations at its 59th session, September 2005, which also refers to the elimination of the worst forms of child labour and forced labour and the full respect of fundamental principles and standards at work.

view that any intervention in the labour market using artificial rules runs counter to economic law. In their view, any improvement to wages, employment and working conditions necessarily has to be determined by the pace of economic growth. Wage increases, improved labour force participation and jobs, and reduction of child labour and working hours cannot be the outcome of legislation but of higher national revenue.⁵² However, in a world in which wealth is no longer created by work but for the most part by speculation, it seems illusory to believe that market economic forces are a universal answer.

While the permanence of the values which it defends bears witness to the relevance and topicality of its institutional remit, the ILO nevertheless has to continue to develop and try to find ways of re-inventing itself to meet the new challenges posed by the proliferation of recent actors who have appropriated some kind of normative action. Faced with a supervisory system for the application of international labour standards which seems to have come up against some limits, it has to step up its links with these new actors. Its tripartite structure, which is its traditional strength, has to enable it to make daring choices to meet the developments that globalization is bringing about.

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⁵² See Werner Sengenberger's comments on these arguments in "Le rôle des normes internationales du travail dans la gestion de l'internationalisation de l'emploi", paper given at the Joint France/ILO Conference, 2005, on The internationalization of employment: a challenge for a fair globalization?, Annecy, April 2005, p.5.

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ILO and CSR – minimum human rights standards for corporations

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I. Introduction

Corporate Social Responsibility (CSR) has developed immensely over the last decade and has brought about the growth of many voluntary initiatives and Codes of Conduct, as expressions of the willingness of corporations to abide by human rights and contribute to sustainable development. Despite these initiatives, there are continuous reports of human rights violations by corporations. In the eyes of many, this leaves no choice but to introduce legally binding minimum CSR standards.

The first truly international attempt to introduce such standards was initiated by the UN Sub-Commission on Human Rights with the Draft UN Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights (UN Norms).¹

However, this instrument caused a lot of controversy and did not find support by most other UN agencies. The debate surrounding the UN Norms demonstrated that even the organisations that believe that corporations need to become more accountable, disagree on the means

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¹ The Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights were adopted by the Sub-Commission on the Protection and Promotion of Human Rights in August 2003 and were received by the Commission on Human Rights at its 2004 session.

of how this is to be brought about. As a result, initiatives to introduce obligatory standards for corporations have not been successful.

In light of this, this paper is directed at the ILO, a UN specialised agency that appears to have repeatedly rejected the notion that corporations should assume international obligations beyond core labour rights. Thus ILO, which essentially shares the goals of other UN agencies and organisations, has not appeared supportive of such wider initiatives, although they would seem to contribute to the realisation of ILOs mandate: “the promotion of social justice and internationally recognized human and labour rights”.²

This paper will seek to demonstrate that the ILO ought to support initiatives to institute minimum CSR obligations for corporations that reflect all of the human rights standards agreed to by the international community as expressed in the International Bill of Human Rights. This will be done by first, outlining the weaknesses in the voluntary approach to CSR that has been adopted by many actors, including the ILO, and showing that there is a need for minimum CSR standards for corporations. It will go on to propose that the approach of the ILO to CSR, which is limited to labour rights, is also insufficient and a broader approach that encompasses all basic human rights is necessary. Without going into detail on enforcement mechanisms, the paper will then propose that an instrument that outlines minimal CSR standards for corporations should be based on the principled approach, via the triple bottom line and as defined by internationally accepted standards. Finally, the paper will make recommendations to the ILO on how it could change its attitude towards CSR and support future initiatives to introduce minimum standards that include internationally accepted human rights.

II. Defining Corporate Social Responsibility

The term Corporate Social Responsibility (CSR) has been defined by many actors to mean voluntary initiatives and initiatives that go beyond the law. However, semantically, “responsibility” does not correspond well with voluntarism. Further, the consequence of this perception

² International Labour Organisation, ILO Mandate. Available at: <http://www.ilo.org/public/english/about/mandate.htm> (2000), accessed on 06/12/06.

creates an oxymoron: “It is not the social responsibility of a corporation to comply with the law!” Actually such voluntary initiatives could be better described as Corporate Social Opportunities. These involve a proactive approach, where companies go beyond basic compliance and use their resources to actively support sustainable development, mainly for branding purposes and to create a competitive edge. Although the authors recognise these voluntary initiatives as valuable endeavours and essential to actually achieve sustainable development, this type of activity does not adequately describe Corporate Social Responsibilities. Corporate Social Opportunities may be seen as part of CSR, but the picture would not be complete before CSR includes a set of non-negotiable standards relating to how business treats its stakeholders and the environment; standards that all companies have the obligation to observe.

1. Corporate Social Responsibility should not be defined as only “beyond the law”

Numerous organisations have approached CSR as voluntary initiatives and have not been willing to consider CSR containing non-negotiable responsibilities of corporations towards society. The EU has described CSR as “a concept whereby companies integrate social and environmental concerns in their business operations and in their interaction with their stakeholders on a voluntary basis” (emphasis added).³ The ILO has published and worked with voluntary CSR instruments⁴ however did not support the Draft UN Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights (UN Norms), an initiative by the UN Sub Commission to introduce compulsory minimum standards of CSR.⁵ Similarly, the International Chamber of Commerce (ICC) and the International Organisation of Employers (IOE) have defined CSR to mean voluntary measures and have not supported any attempts to develop compulsory

³ European Commission's Green Paper, Promoting a European Framework for Corporate Social Responsibility, Employment and Social Affairs, 2001, 8.

⁴ For example the ILO was supportive of the Global Compact, a UN initiative which outlines CSR principles, to which companies can assign to on a voluntary basis. See also, Tripartite Declaration of Principles Concerning Multinational Enterprises (MNE) and Social Policy, adopted in 1977 by the ILO governing body and the fourth edition was released in 2006. Available at: <http://www.ilo.org/public/english/employment/multi/tripartite/declaration.htm> (2006), accessed on 06/11/06

⁵ The Royal Institute of International Affairs (Chatham House), Human Rights and Transnational Corporations: Beyond the Norms? 2004, p1: In discussing the debate surrounding the UN Norms Geron writes “A further difficulty arose from the difference of opinion within the UN itself: the ILO wrote a letter (when the Norms were being discussed in Geneva) distancing itself from certain aspects of the Norms.”

minimum standards to bind corporations.⁶ They argue that international law is designed to bind governments and should not be used to enforce standards on corporations.⁷ However, assigning international obligations to corporations is not unprecedented and a number of international conventions that legally bind companies are already in force.⁸ Corporations also have rights under international conventions⁹ and it is only appropriate for these to be extended to reciprocal obligations under international law.

2. Minimum obligatory standards in Corporate Social Responsibility

There are a many reasons for adopting minimum CSR standards for corporations. First of all, companies themselves would benefit from such initiative. Standards would assist corporations by clarifying their responsibilities, so that companies are no longer subject to arbitrary allegations and demands from various stakeholders.¹⁰ Companies would further be assisted by a clear reference document outlining their responsibilities, as this would limit costs associated with supply chain management, a process that more and more companies are engaging in, in response to the growing pressure by civil society to ensure that there are no human rights violations throughout the supply chain.¹¹ In fact, support for the introduction of minimum standards have come from corporations themselves with the hope that standards would level the

⁶ See International Chamber of Commerce, ICC comments on the European Commission Green Paper "Promoting a European Framework for Corporate Social Responsibility", Document 141/43 final, prepared by the Group on Business and Society, Department of Policy and Business Practice, 2001; International Organisation of Employers, CSR: an ongoing engagement. Available at: <http://www.ioe-emp.org/en/policy-areas/csr/index.html>, accessed on 06/11/06.

⁷ International Chamber of Commerce and International Organisation of Employers, Joint views of the IOE and ICC on the draft "Norms on the responsibilities of transnational corporations and other business enterprises with regard to human rights", 2003, 2. Available at: <http://www.unhchr.ch/Huridocda/Huridoca.nsf/3d1134784d618e28c1256991004b7950/918bbd410b5a8d2cc1256d78002a535a?OpenDocument>, accessed on 15/12/06.

⁸ See, The International Convention on Civil Liability for Oil Pollution Damage, adopted 21 June 1993; Convention on Civil Liability for Damage resulting from Activities Dangerous to the Environment, Lugano, 21.VI.1993.

⁹ United Nations Conference on Trade and Development, The Social Responsibility of Transnational Corporation, U.N. Doc. UNCTAD/ITE/IIT/Misc.21, 1999, 9. Available at: <http://www.unctad.org/en.docs.poiteitm21.en.pdf>, accessed September 2004. Cited by Sune Skadegaard Thorsen and Annemarie Meisling, 'Contemporary Directions for Business on Human Rights', 2004, 9. Available at www.lawhouse.dk, accessed on 22/11/06.

¹⁰ Sune Skadegaard Thorsen and Annemarie Meisling, The Norms and the Responsibilities of Transnational Corporation and Other Business Enterprises with Regard to Human Rights, 2003. Available at www.lawhouse.dk, accessed on 22/11/06.

¹¹ Ibid.

playing field between the companies that have accepted wider corporate responsibilities and their competitors that continue to ignore it.¹²

Furthermore, it is no longer enough for only governments to have human rights obligations under international law, as many companies are now more economically powerful and influential than states. Companies represent one third of the world's one hundred most powerful entities and often the government that host them, especially in the economic developing world, lack the ability to ensure that corporations abide by minimum standards.¹³ The introduction of minimum CSR standards internationally would not only ensure that corporations respect the rights of the people and the environment that they affect, but it would also positively impact on the rule of law globally, providing the needed leverage to encourage governments to abide by their international obligations.¹⁴

The final reason for implementing minimum obligatory standards for corporations is that it has become clear that the voluntary approach will never lead to the universal observation of minimum CSR standards. There are continuous reports on the violation of basic human rights and environmental standards by corporations that continue to ignore their corporate social responsibilities. It is still only a minority of companies that have implemented CSR codes of conduct and it should be evident that the rest will not take the standards seriously until they become grounded in law.¹⁵

12 See McBeth, 'Are we speaking the same language? Corporate perceptions of human rights responsibilities', Third ISBEE World Congress Paper, Business and Human Rights Session, 2: "In considering whether corporations ought to have legally binding human rights obligations, a surprising number of corporations replied in the affirmative, citing reasons such as certainty in dealing with suppliers and instituting a level playing field against rogue operators."

13 In a study conducted in the year 2000, it was found that out of the world 100 largest economic entities, 29 were corporations. Press Release, United Nations Conference on Trade and Development, Are Transnationals Bigger than Countries? TAD/INF/PR/47Dec, 2002, 8. Available at <http://www.unctad.org/Templates/Webflyer.asp?docID = 2026&intItemID = 1>, accessed on 28/02/03. Cited by Paul Redmond (see n 16 below, 73).

14 Thorsen and Meisling, (see n. 9 above)

15 See International Council on Human Rights Policy, Beyond Voluntarism: Human rights and the developing international legal obligation of companies, Versoix, Switzerland, 2002, 142; Irene Khan, Novartis Foundation Website for Sustainable Development. Available at: http://www.novartisfoundation.com/en/publications/proceedings/human/symposium_human_rights/speeches/speech_khan.htm (2006), accessed on 15/12/06.

III. The composition of the minimum standards of CSR

In determining the minimum standards of CSR, the authors recommend the consideration of the following questions: What areas are vulnerable to being effected by corporations? And, are these areas so fundamental that the protection of them should not be left to national governments alone, but should be a matter of joint, global responsibility?¹⁶

1. Labour rights or international human rights?

For decades, the ILO has been working towards the realisation of primarily four core labour rights globally: the freedom of association, elimination of compulsory labour, elimination of child labour and the elimination of discrimination. It is undisputed that these rights should be included as minimum CSR standards. However, the authors do not agree that they should form the basis of CSR as, in the words of Sir Geoffrey Chandler, “there are a few companies today which do not confront human rights problems”.¹⁷ All the rights in the International Bill of Human Rights¹⁸ should be addressed by minimum CSR standards, as they are all vulnerable to being affected by corporations, whether by being affected directly, or by companies being complicit in their violations, for example:

- The right to health

Pharmaceutical companies have been accused of violating the right to health by using their monopoly to deny patients in the developing world life saving drugs. In 2001, forty-two pharmaceutical companies filed a dispute in the South African court against the Government and President Mandela for potentially violating their patent rights by providing cheap, generic medication to its citizens. Two large NGOs, Oxfam and Médecins Sans Frontières, campaigned against their conduct, contending that if the corporations won the case, many South African’s

¹⁶ Paul Redmond, ‘Transnational Enterprises and Human Rights: Options for standard setting and compliance’ 37 *International Law*, 70.

¹⁷ Sir Geoffrey Chandler, ‘Keynote Address: Crafting a Human Rights Agenda for Business’, in Michael K. Addo (ed), *Human Rights Standards and the Responsibility of Transnational Corporations*, 1999, 40. Cited by Paul Redmond (see n. 16 above, 71).

¹⁸ Bill of Rights is comprised of the Universal Declaration of Human Rights (see n 33 below), the International Covenant of Civil and Political Rights and the International Covenant of Economic Social and Cultural Rights (see n 34 below).

would be denied critical life-saving medication; exemplified through HIV/AIDS medicine. This triggered a media campaign, which severely damaged the reputation of the pharmaceutical corporations by describing them as “grasping and ruthless – even evil”.¹⁹ The immediate response of companies was to increase donations and reduce prices. However, this response will not foster long-term solutions²⁰ and it is necessary to institutionalise minimum CSR standards, which address the right to health, in order for all of the companies to keep this issue on the agenda even after media attention declines.

- The rights of Indigenous Peoples

On numerous occasions extractive companies have violated the rights of indigenous peoples, who live on or are affected by the land that is subject to excavation. For example, the Australian owned company BHP was mining in the OK Tedi Mine in New Guinea and was directing 80,000 tons of ore and 120,000 tons of waste rock into the OK Tedi River daily.²¹ Nearly all the fish in the river died allegedly as a result of toxicity, 176 square kilometres of forest were destroyed and 30,000 to 50,000 of the Min People, who lived in the rainforest along the river, were displaced. The company established an OK Tedi Development Foundation with the aim of ensuring the livelihood of the indigenous peoples affected by the mine.²² However, this initiative did not restore the river and the livelihood of the Min people back to its original state. This incident and others like it can be prevented in the future by the institutionalisation of minimum CSR standards that address the rights of Indigenous Peoples.

- The freedom of expression

Google, Yahoo! and Microsoft have all been accused of contributing to the violation of the freedom of expression through their collabo-

¹⁹ Pilling, David, ‘Patents and Patients’, *Financial Times*, 17/18 February 2001, 6.

²⁰ Sune Skadegaard Thorsen, *The Right to Health – The South Africa case*, 2003. Available at: <http://law-house.cmsup.dk/?ID=193>, accessed on 15/12/06.

²¹ Earthworks and Oxfam America, *Dirty Metals: Mining Communities and the Environment*, 2004, 8. Available at www.nodirtygold.org/pubs/DirtyMetals_HR.pdf, accessed on 17/07/04.

²² See OK Tedi Development Foundation, 2001. Available at: www.oktedi.com/odf/, accessed on 15/12/06.

²³ OpenNet Initiative, *Internet Filtering in China in 2004-2005: A Country Study*; 14 April 2005, p4. Available at: <http://www.opennetinitiative.net/studies/china/>. Cited by Amnesty International, *Undermining Freedom of Expression in China: The Role of Yahoo! Microsoft and Google*, 2006, UK. Available at http://www.amnesty.org.uk/uploads/documents/doc_17068.pdf, accessed on 06/11/06.

²⁴ Amnesty International, *Undermining Freedom of Expression in China: The Role of Yahoo! Microsoft and Google*, 2006, UK, 4, 16. Available at http://www.amnesty.org.uk/uploads/documents/doc_17068.pdf, accessed on 06/11/06.

ration with the Chinese government, which has sought to control the content of the internet since its introduction in 1994. Experts have considered that the internal filtering system employed by the Chinese government is the most technologically sophisticated system of Internet filtering in the world.²³ These systems were primarily designed by foreign companies to target and block phrases such as “human rights”, “democracy” and “freedom”.²⁴ Yahoo! was one of the first Internet companies to enter the Chinese market and has admitted to providing the Chinese authorities with material that lead to the arrest of two journalists for activities that included the dissemination of information related to the government response to the Tiananmen Square massacre.²⁵ Microsoft responded to directions by the Chinese government and blocked the users of MSN space from using particular terms in the title when creating a blog. Words such as “freedom of expression”, “Tibet Independence” and “Falun Gong” were blocked, producing an error and a message that translates to “You must enter a title for your space. The title must not contain prohibited language, such as profanity. Please type a different title.”²⁶ Similarly, in January 2006 Google launched Google.cn, a self-censoring search engine for China.²⁷ All these activities clearly violate the freedom of information and expression of both the Chinese citizens and others who seek to communicate with the Chinese via the Internet. Therefore, minimum CSR standards need to go beyond labour rights to also protect the freedom of expression of citizens in the international community.

- The right to housing

Beyond the right to health, corporations have been accused of violating other economic and social rights, and in the case of Caterpillar, the right to housing. Caterpillar has continued the sale of bulldozers that have been used by the Israeli government to destroy hundreds of homes and possessions of Palestinians living in the Occupied Territories and Israeli Arabs in Israel.²⁸ Although, Israel has recently announced its intention to suspend the policy of “punitive” house demolition, other homes remain under threat of being destroyed.²⁹ Many demolitions have been

²⁵ Ibid, 18.

²⁶ Ibid, 20.

²⁷ The regular Google.com is still available to Chinese users but is highly censored. Ibid, 21.

²⁸ Amnesty International, Act Now to Stop Caterpillar Inc. from Selling Life-Destroying Bulldozers to Israel. Available at: <http://www.amnesty.ie/user/content/view/full/4285/>, accessed on 06/11/06.

²⁹ Ibid.

carried out using specialised D9 series bulldozers, especially designed by the company for military purposes.³⁰ Caterpillar was accused of complicity in the violation of the right to housing of thousands of people, despite the CSR statement made on the company's website that it strives "to contribute towards a global environment in which all people can work safely and live healthy, productive lives, now and in the future".³¹ This demonstrates that it is not enough for companies to adopt voluntary CSR codes of conduct and that there is a need for the institutionalisation of minimum comprehensive CSR standards that address all of the human rights in the International Bill of Rights.

In answering the two questions presented above – What areas are vulnerable to being affected by corporations? And, are these areas so fundamental that the protection of them should not be left to national governments alone, but should be a matter of joint, global responsibility?³² The authors contend that all universal human rights encompassed in the International Bill of Human Rights are vulnerable to being affected by corporations. Further, these rights have been declared by the international community as so fundamental that their realisation should not be left to governments alone.³³ It is, therefore, imperative that universally acknowledged human rights form the basis of minimum CSR standards.

2. International standards or indirect legal instruments?

Indirect legislation, by which countries agree to implement domestic laws on minimum CSR standards, will not provide for universal protection of fundamental human rights and a universal approach is required. There are already a number of international instruments, including the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic Social and Cul-

³⁰ Ibid.

³¹ Caterpillar, 'Safety and Environmental Responsibility: Code of Conduct', 2006. Available at <http://www.cat.com/cda/layout?m=78200&x=7>, accessed on 06/11/06.

³² Redmond, (see n 16 above, 70).

³³ See the preamble of the Universal Declaration of Human Rights, adopted and proclaimed by General Assembly resolution 217 A (III), 183rd plen mtg, 10 December 1948, UN Doc A/810 at 71: "the General Assembly proclaim this Universal Declaration of Human Rights as a common standard of achievement for all peoples and all nations, to the end that every individual and every organ of society, keeping this Declaration constantly in mind, shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance, both among the peoples of Member States themselves and among the peoples of territories under their jurisdiction" (emphasis added). Available at <http://www.un.org/Overview/rights.html>, accessed on 07/11/06.

tural Rights (ICESCR), which require states to implement legislation to prevent human rights violations also by third parties.³⁴ However, this has only been adhered to in a limited way and human rights abuses by non-state actors continue without redress. In fact, one of the purposes of implementing minimum CSR standards is to compensate for the fact that states have not fully lived up to their obligations under international conventions. Only a small number of states have introduced legislation that addresses particular aspects of CSR. For example, the French government passed the New Economic Regulations Law, which obligates companies to report annually on the social, environmental and financial consequences of their activities³⁵ and mandatory corporate environmental reporting is required, to various degrees, by legislation in e.g. Australia, Belgium, Denmark, Sweden and the Netherlands.³⁶ These legal initiatives, although worthwhile, do not address all universal human rights and do not provide for legal redress mechanisms for victims of violations within the state and abroad.

Only legislation with an extra-territorial element, which allows victims abroad to bring claims against corporations in their home countries, could provide for adequate legal redress. However, the practical application of the Alien Torts Claim Act (ATCA) in the United States (the only country with this type of legislation) has demonstrated that there are formidable obstacles to regulating the offshore activities of corporations, and especially of their foreign affiliates.³⁷ It has been speculated by the US courts that the reach of the ATCA will be narrow and will probably be limited to US incorporated parents of translational groups in prescribed “special circumstances”.³⁸ Even though, the introduction of such legislation by all states would be a positive development, such legislation would not affect the majority of corporations.³⁹ Only international legislation would allow for the enforcement of minimum CSR principles univer-

³⁴ International Covenant of Civil and Political Rights, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966, 999 United Nations Treaty Series 171, Art 2, (entered into force 23 March 1976); International Covenant of Economic Social and Cultural Rights, adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966, 993 United Nations Treaty Series 3, Art 2 (entered into force 3 January 1976).

³⁵ See, www.occes.asso.fr/fr/comm/nre.html. Cited by Jonathan Lux, Sune Skadegaard Thorsen and Annemarie Meisling, Chapter 11 ‘European Perspectives’, 16.

³⁶ See Mansley M, *Open Disclosure: Sustainability and the Listing Regime*, Claros Consulting, 2003. Available at: http://www.foe.co.uk/resource/reports/open_disclosure.pdf. Cited by Michael Kerr and Marie-Claire Cordonier Segger, *Legal Strategies to Promote Corporate Social Responsibility and Accountability: A pre-requisite for Sustainable Development*, Legal Brief, CISLD, 2004, 7.

³⁷ Redmond, (see n 16 above, 72).

³⁸ *Ibid*, p72.

³⁹ *Ibid*, p86.

sally. International standards, as opposed to national legislation, would also help to ensure a level playing field between corporations in regards to human rights obligations, as states cannot be expected to enact CSR legislation in a consistent manner.

IV. ILOs “protectionist” approach

Throughout numerous meetings, the ILO expressed that the discourse on human rights, as part of corporate social responsibility, should be limited to those core labour rights outlined in the Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy.⁴⁰ During international meetings discussing the accountability of multinational corporations in relation to proposed UN Norms, the ILO repeatedly rejected the notion that corporations should assume wider responsibilities than those of core labour rights.

One can only guess what motives drive this approach, considering that a wider focus on basic human rights would include the protection of core labour rights and also promote other rights of their key constituents, mainly those of labourers and employees. One possible explanation could be that the ILO has now worked for decades to ensure that, in particular, a few basic labour rights become respected and protected around the world. Since it is still far from achieving this goal, it may believe that a collaborated international focus on these rights alone would bring them closer to their universal realisation. However, this approach is not consistent with the decision of 171 states that human rights, including labour rights, are universal, indivisible and interdependent and interrelated, as set down in the Vienna Declaration.⁴¹ By promoting labour rights at the cost of the other human rights outlined in the International Bill of Human Rights, the ILO may actually be seen as acting contrary to the Vienna Declaration and the will of the international community.

An alternative cause for the hostility towards the breadth of human rights as represented in the Norms could be the result of the ILO and

⁴⁰ Tripartite Declaration of Principles Concerning Multinational Enterprises (MNE) and Social Policy, (see n 4 above).

⁴¹ Vienna Declaration and Program of Action, adopted by the World Conference on Human rights on the 25th of June 1993, Article 5, A/CONF.157/23. Available at [http://www.unhchr.ch/huridocda/huridoca.nsf/\(Symbol\)/A.CONF.157.23.En?OpenDocument](http://www.unhchr.ch/huridocda/huridoca.nsf/(Symbol)/A.CONF.157.23.En?OpenDocument), accessed on 6/11/06.

other labour organisations partaking in an ongoing historical experience, where rights and standards for workers have been achieved after long and hard-negotiated struggles.⁴² They are therefore sceptical towards the Norms, as an international instrument that claims to provide the solution for the global protection of human rights. However, the ILO does not have anything to lose from partaking in this collaborated effort to develop minimum human rights standards for corporations, which may also bring about increased protection of core labour rights that are all part of the International Bill of Human Rights.

Another cause of this attitude may be habit, which has been institutionalised within the organisation. The ILO has had a continuous and very strong focus on promoting a limited number of rights and building experience and capacity in relation to these rights. This may have created a drive within the Organisation towards securing these particular rights and, as a result, it may be difficult for the ILO to contemplate a wider approach. To counter this, capacity building within the Organisation may be required.

It is possible that the hitherto presented instrument itself contributed to this problem. The Norms failed to specify or clarify how the wider human rights of employees would be protected, beyond core labour rights and an additional three labour standards, which were interpreted through ILO conventions. Thus the instrument failed to clarify to the ILO the exact benefits that would be conferred upon employees if the full range of human rights contained in the Norms were implemented.

Nonetheless, it is difficult to understand why the ILO would oppose binding minimum standards for corporations in relation to the wider scope of human rights. After all, one can hardly disagree that employees would benefit from comprehensive human rights protection. The authors appreciate that fundamental labour rights, such as freedom of association and freedom from discrimination, are crucial to the empowerment of employees in asserting leverage with the more powerful representatives of capital, namely corporations. Practitioners and academics engaged with the wider scope of human rights and business appreciate the diligent work of the ILO in relation to these principles.

⁴² See Friedrich Ebert Stiftung, The UN Norms: a necessary tool for Corporate Social Accountability or one shot too far? Panel discussion, side-event to the 61st Commission on Human Rights, FES Geneva Office, German Forum on Human Rights, Hotel Epsom Manotel, Geneva, 12 April 2005, 2-3. Available at <http://www.fes-geneva.org/reports/61%20Human%20Rights%20Commission/Report%20UN%20Norms%20new.doc>, accessed on 17/10/06.

However, the resistance against wider responsibilities for corporations may prove to be counterproductive to empowering workers in relation to other equally important rights.

V. Proposed approach

The proposed approach for establishing CSR standards is the “principled approach”, which should be based on the triple bottom line and defined by internationally accepted conventions. There have been numerous papers, which have discussed the possibilities for enforcement of CSR principles.⁴³ This paper will not focus on enforcement but will rather discuss the substance of such an instrument. Furthermore, it is not necessary to subscribe to a method of enforcement at this stage. The authors believe that standards should first be introduced as voluntary principles and integrated into the business sphere, while enforcement mechanisms are developed by the international community, before a final adoption as legally mandatory standards.⁴⁴

1. The “principled approach”

Considering the approaches, which have been used by corporations to develop CSR codes of conduct, the authors favour the “principled approach” over the “stakeholder” or “issues” approaches and believe that it ought to be employed as a basis for developing compulsory minimum standards. Under the “principled approach”, corporation would align their behaviour with key international principles, as defined by the international community.

The stakeholder approach is problematic, as it may bring more grievances to a company than benefits. Under this approach a company would clarify its corporate social responsibilities by conducting a large scale consultation with a range of stakeholders, such as its employees, shareholders, local community, NGOs, business partners, etc. This process will inevitably raise the expectations amongst these groups that the company will be able to address the issues that they raise. However,

⁴³ For more on enforcement mechanisms see Sune Skadegaard Thorsen and Annemarie Meisling, *Contemporary Directions for Business on Human Rights*, 2004. Available at www.lawhouse.dk, accessed on 22/11/06.

⁴⁴ *Ibid.*

it is evident that a corporation will never be able to fulfil even a fraction of their concerns and the approach may well lead to risks of losing reputation and creating animosity amongst the stakeholders involved. Notwithstanding this dilemma, the question needs to be raised as to whether it is possible to establish the methodology for stakeholder engagement, which truly enables the representation of the corporation's key stakeholders. Therefore, the authors suggest that the "principled approach" is adopted and that corporations align their CSR initiatives with internationally and politically agreed priorities and proactively decide how far they are able to contribute before they engage their stakeholders for the purpose of enabling the company to implement its defined commitments.

The "issues approach" is also not recommended by the authors, as it is perceived as retroactive and does not adequately protect a given corporation from social scrutiny and loss of reputation. Under this approach companies define their corporate responsibility with reference to the more arbitrary defined attacks that were raised by stakeholders. This approach has historically been adopted by corporations, which have found themselves in the crossfire of media and NGO criticism. Companies employing this approach will adjust their CSR policies to address the issues that have arisen. However, these companies will not be well equipped to prevent future violations from taking place. As the majority of issues raised relate either to violations of basic human rights or environmental degradation, corporations are likely to experience that efforts made retroactively will not mitigate reputation loss, once the harm has occurred. On the other hand, if a company adopts the "principled approach" and integrates the fuller considerations into the way it does business, it will increase its abilities to avoid engaging in behaviour that will evoke criticism. It will also be empowered to respond adequately to undue criticism, by demonstrating that it has abided by human rights and environmental principles agreed to by the international community, and to justified criticism by appreciating and demonstrating knowledge of the issues at hand.

Finally, the "principled approach" is the only approach that will lead to universal standards amongst corporations. If all corporations were to adopt the "issues" or the "stakeholder" approach, CSR codes of conduct will differ from company to company, reflecting the individual results of the stakeholder engagement or issues identification processes. This would not provide for a level playing field in relation to essential parts of cor-

porate social responsibilities, and would make it even harder to agree, yet alone enforce, standards internationally. The “principled approach” will satisfactorily form the basis for coherent, enforceable and acceptable universal CSR minimum standards.

2. The triple bottom line and international conventions

The authors propose that the principles are derived from the triple bottom line thinking and defined by international conventions. The triple bottom line (otherwise known as the three Ps: People, Planet and Profit) provides a way for businesses to contribute to sustainable development by evaluating their effect on people, the environment and the economy. Companies will be expected to account for and possibly perform audits against standards agreed to under the three bottom lines, which will help them understand, and subsequently better manage their impact.⁴⁵

The authors contend that the “three Ps” should be extrapolated for corporations with reference to international conventions. Accordingly, minimum standards under the Profit limb would reflect the principles in the UN Anti-Corruption and Bribery Convention, and supplemented with emerging universal standards such as International Accounting Standards, anti-trust and money-laundering conventions. The “Planet” part would refer to instruments such as the Kyoto Protocol, the Johannesburg Action Plan, the Rio Declaration and the UN Biodiversity Convention. Finally, the “People” bottom line would be defined by the International Bill of Human Rights, which also addresses labour rights. This would provide solutions for companies and their conduct in relation to the economy, including the economy of the community; their relation to the external environment, including biodiversity; and their relation towards human beings, including relationships with employees, suppliers, customers, local communities and other stakeholders. The remainder of this paper will focus on the “people” bottom line, with the hope that “planet” will be elaborated upon by environmental experts, and similarly, “profit”, by primarily economists.

⁴⁵ John Elkington, ‘The triple bottom line for twenty-first-century business’ in John Mitchell (ed), *Companies in a World of Conflict*, The Royal Institute of International Affairs, Chatham House, Earthscan Publications Ltd, London, 1998, 32-69. See this article for further details on how to conduct auditing under the three criteria people, planet and profit.

3. Redefining international human rights obligations for corporations

Obligations within international conventions are framed with reference to state behaviour and need to be translated for corporations. If the principles are to become legally binding, and especially, if corporations become liable for “complicity” with human rights violations, the principles need to be clearly defined, as well as limited, in order for companies to know exactly what their obligations are. The authors propose that the obligation be translated in accordance with the following six criteria presented to the Business Leaders Initiative on Human Rights (BLIHR):

1. Binding obligations should not exceed binding obligations on governments neither horizontally (scope of obligations) nor vertically (depth of obligations)
2. Only human rights proclaimed as such should be addressed, i.e. not including corruption, environment, tax payments, anti-trust or similar issues as withheld in the Norms; although they may influence human rights performance of a given country, they are not human rights as such
3. Internationally agreed principles in relation to human rights shall not be neglected (universal, indivisible, interrelated and interdependent)
4. Primary responsibility of the state shall be acknowledged by a confined interpretation of human rights obligations in relation to corporations
5. Binding obligations have to be clearly described in a business context; corporations should be able to reasonably foresee which actions to abstain from
6. Minimum obligations must withhold an adequate escape clause for corporations addressing situations where local laws contradict human rights obligations. Business cannot be expected to breach national laws.⁴⁶

In accordance with these criteria, most of the obligations in the International Bill of Human Rights would have to be translated for corporations, creating a universal minimum for corporate behaviour. For

⁴⁶ Sune Skadegaard Thorsen, proposal principals of translation to BLIHR, Oct 2006 – not published.

example, the prohibition against torture, inhumane and degrading treatment could be translated to obligate companies.

1. To respect and protect the right to freedom from inhumane or degrading treatment by
 - abstaining from using verbal or corporal abuse in disciplining employees,
 - ensuring that persons providing security services for the business are trained in responsible use of firearms and how to use force only when strictly necessary and only to the extent proportional to the threat, and
 - ensuring that business security arrangements are used only for preventive or defensive services.
2. In particular to ensure, in writing, the free, prior and informed consent of any test persons employed by operations, production or product development.⁴⁷ Most rights in the International Bill of Human Rights may be translated into a language that will make sense to corporations. However, some rights would rarely apply to the direct sphere of influence of business. Corporations should not become responsible for ensuring equality before the law or the right to a fair trial, and unless a company is responsible for operating privatised prisons and detention centres, corporations would not be responsible for the rights of detainees, prohibition against imprisonment for non-fulfilment of contracts and the right to seek asylum. Corporations should primarily be concerned with not becoming complicit in the violation of such rights.

4. The role of the legal profession

If the triple bottom line is defined with reference to international conventions, lawyers will have a larger role to play in ensuring that their corporate clients abide by minimum CSR standards, in the same way that they abide by other national and international law.⁴⁸ Up until now, law firms, with some exceptions, have been reluctant to get involved in CSR.

⁴⁷ The suggested 'translations' are derived from interpretation of the international covenants, their authoritative commentaries, the Norms, and various material on human rights and business, including the Human Rights Compliance Assessment Quick Guide Tool from the Danish Institute of Human Rights and HOM, the voluntary principles on security and human rights, SAI 8000, the Amnesty model code of conduct etc.

⁴⁸ See, The International Convention on Civil Liability for Oil Pollution Damage and the Convention on Civil Liability for Damage resulting from Activities Dangerous to the Environment (see n 8 above).

The general responses of lawyers to CSR have included: “It has nothing to do with law!”, “It is not a concern for us!” and “It is interesting, but we do not have time to develop a new field!”⁴⁹ However, the introduction of compulsory minimum standards would necessitate the cooperation of the legal sector. Not only will law firms be subject to minimum CSR standards themselves but other companies will look to them for guidance on how to integrate these legal principles into the way they do business. Lawyers are encouraged to make their clients aware of both Corporate Social Responsibilities and Opportunities, i.e. how they can utilise their resources to best contribute to sustainable development, by going above and beyond their responsibility of observing minimum standards, but remain in line with the internationally agreed priorities and frameworks for sustainable development.

VI. The ILO should adopt a human rights approach to CSR

The ILO should adopt a human rights approach to CSR in order to better promote the universal protection of core labour rights. As Philip Alston notes in his compendium “Labour Rights as Human Rights”:

“Given the way in which the power and resources have been distributed amongst the key players...there is little reason to expect that labour rights will be accorded anything near the sort of priority which is inherent in the very notion of human rights”.⁵⁰

The ILO could embrace all initiatives to institute universal human rights protection to better promote their agenda and to protect their key constituency, employees.

1. The ILO and the UN Norms

The ILO can enrich the debate on how to best implement minimum CSR standards for corporations by contributing their wealth of knowledge and decades of experience in implementing the basic human

⁴⁹ Sune Skadegaard Thorsen, ‘Lawyers – facing corporate responsibilities’, speech delivered at a seminar on “Governance, International Law and Corporate Social Responsibility”, organised at ILO Headquarters, Geneva, July 2006.

⁵⁰ Philip Alston, *Labour Rights as Human Rights*, Oxford University Press, 2005, 23.

rights of employees. However, the ILO chose to take the back seat in the discussions during the debate of Draft UN Norms.⁵¹ Even when certain businesses have taken leadership positions in the debate accepting an extension to their responsibilities in relation to human rights,⁵² the ILO has not actively supported their endeavours. It was also disappointing to see that while the UN Sub Committee was in favour of minimum standards for business and drafted the Norms, the ILO, another UN agency, did not support their efforts and showed a negative attitude towards the creation of broader minimum standards;⁵³ this in spite of the fact that the instrument diligently outlined core labour obligations.⁵⁴

The authors believe that the ILO would gain from changing a perceived negative attitude to appreciating the exponentially increased focus on CSR, which has brought about unprecedented opportunities for collaborations between employees and employers, in relation to enhancing minimum standards for employees on a broader scope, yet including the ILO minimum standards. The Organisation could actively support initiatives that seek to define the wider social responsibilities of corporations and leave a corporate driven mantra that CSR only contains voluntary initiatives. ILO's unique competences in relation to developing such standards and not least implementing them will enlighten and qualify the ongoing debate and ensure that it continues with increased momentum in the coming years.

2. Opportunity for reform

Furthermore, participating in this process could help the ILO combat some of the criticism, which has been generated towards the Organisation. A number of people have come to criticise the ILO for being unsuccessful and have even described it as a “slow, cumbersome and low-profile institution”.⁵⁵ One of the possible reasons for this perception is that the tripartite institution of the ILO, although served the world order of the 1920s when the ILO was created, is no longer seen as effective. John Alston, in his book “Labour Rights as Human Rights” described this phenomenon:

⁵¹ See The Royal Institute of International Affairs (see n 5).

⁵² See Business Leaders Initiatives on Human Rights. Available at: <http://www.blihr.org>, accessed on 4/11/06.

⁵³ Ibid.

⁵⁴ See The Norms (n 1).

⁵⁵ Financial Times, March 24, 1999, 3. Cited by Cooney, ‘Testing Times for the ILO: Institutional Reform for the new International Political Economy’, 20 Comp. Lab. L. & Pol’y J. (1999) 365, 368.

“The famous tripartite system looks less and less like an accurate reflection of the actual model of industrial relations. In relation to workers its emphasis upon established trade unions, which represent an ever-diminishing proportion of the most workforces and are ill-equipped to pick up the slack in relation to the informal sector and self-employed (home based) workers, is increasingly anachronistic. In relation to governments, its assumption that governments will represent the national interest and provide a counter-balance to employers and workers is more and more fraught as governments seek to shrink the public sector, unleash the private sector, and are ever more likely to be preoccupied by the need to attract private foreign investment at almost any cost. The third pillar, the employers, has also been transformed to the growth of giant transnational corporations whose importance is poorly recognised in the traditional ILO system and by the rise of outsourcing, which makes it ever more difficult to locate the real employer in any given situation.”⁵⁶

As corporations have become more powerful than some of their host governments, it is no longer enough for the ILO to encourage states to sign and become bound by conventions on labour rights protection. One way that the ILO can reform its approach in order to address this power-shift is by supporting the institutionalisation of minimum human rights obligations for corporations.

The ILO Tripartite Declaration of Principles for Multinational Enterprises and Social Policy that was published in 1977 may also be perceived to be ineffective. It is unusual that a declaration which was published almost 30 years ago and deemed successful in content, has until today not been transformed into binding principles. Furthermore, as an instrument, the declaration could be perceived to be toothless as systematic labour abuses appear not to have decreased since its introduction. The ILO could support initiatives to create minimum CSR standards, as it is likely that a legally binding instrument will have more impact than such a voluntary instrument.

3. Responding to the needs of employees

Employees around the world would benefit immensely from the ILOs support of minimum human rights standards for corporations. If the ILO consulted workers around the globe it is likely to find that many

⁵⁶ Philip Alston, (see n 50 above, 22-23), with reference to Cooney (see n 55).

of them need their human rights protected from violations by corporations beyond their traditional labour rights, for example: workers in South Africa would benefit from their right to health being protected in relation to the HIV virus;⁵⁷ women in the Dominican Republic's Export Sectors would want their right to a family life protected so that they are no longer subdued to mandatory pregnancy tests as part of the hiring procedure and fear dismissal on the grounds of pregnancy;⁵⁸ and workers in Brazil could benefit from private sector contributions to the "zero hunger" program.⁵⁹ All employees would benefit, to varying degrees, from universal human rights protection and the ILO, as the UN specialised agency designated to uphold their interests, should support the introduction minimum CSR standards.

4. Legal developments

Considering the enormous power concentration that corporations have gained through recent years and will continue to gain in the coming years of the development of market economies globally, it seems unavoidable that minimum standards will eventually be established for corporations. The ILO is presented with an opportunity to partake in a process that has the potential to substantially improve the standards for workers around the world. The Organisation has the unique competence and expertise to make a significant contribution to the formation and institutionalisation of this process and the authors believe that it should embrace this challenge.

VII. Conclusion

This paper has sought to demonstrate that the ILO ought to abandon their traditional approach to CSR, as voluntary and limited to core labour rights, and support initiatives to create legally binding minimal CSR standards that include all internationally recognised human rights.

⁵⁷ See p. 4: 'The Right to Health'.

⁵⁸ Human Rights Watch, Dominican Republic: U.S. Trade Pact Fails Pregnant Women. Available at: www.hrw.org/english/docs/2004/04/21/domini8474.htm, accessed on 15/07/04.

⁵⁹ J. Ziegler, Special Rapporteur of the Commission on Human Rights on the right to food, The Right to Food, 2003. Available at: [www.unhchr.ch/Huridocda/Huridoca.nsf/0/a0abf6e040272ce7c1256dc000371f47/\\$FILE/N0348416.pdf](http://www.unhchr.ch/Huridocda/Huridoca.nsf/0/a0abf6e040272ce7c1256dc000371f47/$FILE/N0348416.pdf), accessed on 16/07/04, 19.

The approach of the ILO, as well as some other Organisations, that CSR is only beyond the law is counter-productive and does not reflect the reality of CSR initiatives. CSR is still under development as a moving target and currently is not confined to either voluntary or compliance standards. Considering that CSR explicitly concerns corporations, it is our experience that no corporation makes its commitments operational by using a distinction between voluntary and mandatory norms. Instead, CSR could include a level playing field in addition to what is merely considered expected or even desirable behaviour by business, i.e. beyond the essentials⁶⁰ expected from any corporation in the world. The level playing field would benefit from an international legal foundation.

It is recommended that the ILO adopt an approach to minimum CSR standards that is based on the principled approach, the triple bottom line and defined by international conventions. Such an approach would adequately reflect the ideals of the international community and the current world order, where corporations are frequently found to be independent of and more economically powerful than states.

Of course, organisational reform requires time and resources and the authors acknowledge that it is a lot easier to write about change than to implement it. The EU Multi-Stakeholder Forum on CSR to the full extent mirrored these difficulties and finished up with a result that was less than productive. One of the outcomes reinstated the voluntarism of CSR and was perceived by many stakeholders to be retrogressive.⁶¹ If the ILO is to engage in successful reform that is to yield desired results, it will need to direct time and resources into substituting old attitudes and habits within the organisations with new and fresh perspectives on the role that CSR can play in the modern world.

Accordingly, the first thing that the ILO could do on Monday is to commence a process of revising its position on CSR. It could identify the business case for the Organisation, in terms of providing better protection for employees, and redesign its strategies in relation to addressing the wider scope of human rights. The ILO could utilise other UN resources such as the United Nations Global Compact⁶² and consult various Special Rapporteurs, including the Special Rapporteurs on specific Human

⁶⁰ Confer BLIHR report number 3 on the use of the terms essential, expected and desirable.

⁶¹ See, EU Multi Stakeholder Forum on CSR. Available at: http://forum.europa.eu.int/irc/empl/csr_eu_multi_stakeholder_forum/info/data/en/csr%20ems%20forum.htm, accessed on 15/12/06.

⁶² See <http://www.unglobalcompact.org/>.

Rights. Finally, it could schedule consultations with other relevant stakeholders, such as human rights NGOs and CSR experts, in order to identify how the ILO could best contribute to increasing the accountability of corporations.

By reforming its approach to CSR, as this paper proposes, and by supporting, or even instigating initiatives to make corporations legally accountable for the violation of minimum CSR standards, the ILO could better protect employees around the world and implement its commitment to promote “social justice and internationally recognized human and labour rights”.⁶³

⁶³ International Labour Organization, ILO Mandate (See n 2 above).

Corporate Social Responsibility and restructuring in the EU: A historical overview of recent developments

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This article aims to contribute to an increasingly important debate taking place at the national and international levels on the subject of Corporate Social Responsibility (CSR). The rise of CSR in the European socio-political arena has been triggered by the development of new models of governance, the breakdown of traditional social contracts and the new role of corporations in modern day societies. The present review provides an overview of the recent evolution of CSR in the context of the political agenda of the European Union (EU). The article also explores the relationship between CSR and European restructuring policy with a view to minimising the negative social and employment effects arising from situations of structural change.

I. About the origins of CSR

Over the last decade the concept of CSR has merited a great deal of attention from policy makers, social partners and the business community across the EU. What started in the early 1990s as an appeal by political leaders for the business community to take part in the fight against

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social exclusion quickly turned into a much wider policy debate about corporate ethical behaviour in the 21st century.

Although often considered a relatively new concept, examples of responsible business behaviour in Europe can be traced back to the days of the Industrial Revolution. It was during this historical period that certain entrepreneurs of the time took a paternalistic approach to their business conduct by devoting more attention to social and human aspects of enterprise management. One such pioneer was the Scotsman Robert Owen, who in the early 1800s set up a series of social villages around his textile mills in Lanarkshire (Scotland). These villages catered for the education of employees and their children as well as providing health care, food cooperatives, banking facilities and leisure activities. The doctrine of 'Owenism' became so popular that it was soon exported across the Atlantic to the USA where similar practices were introduced in a number of cotton farms.

It was to be in North America that corporate social responsibility found its next champion. The business theorist of Norwegian origin, Thorsten Veblen, wrote about the concept of enterprise accountability back in the 1920s in his widely quoted book, *The Engineers and The Price System*¹. Another father of early corporate social responsibility theory was the German economist Karl William Kapp. During his long stay in the USA, Kapp published his most acclaimed work, 'The social costs of private enterprises'² in the 1950s, in which he openly criticised the lack of social and environmental conscience of American enterprises.

More recently, during the 1980s and early 90s, many multinational companies worldwide awoke to the concept of CSR after being surprised by public responses to issues they had not previously thought were part of their business responsibilities. In this context, numerous corporate scandals resulting from malpractice and careless enterprise behaviour gave rise to an increasing number of civil society organisations and interest groups calling for companies to be more accountable and responsible for their actions. These pressure groups have successfully organised themselves over the years, often on a global scale, and have started to exert considerable pressure on corporations to improve their social responsibility vis-à-vis the communities in which they operate.

¹ The Engineers and the price system – Thorsten Veblen, 1921.

² The social costs of private enterprises – Karl William Kapp, 1950.

In parallel to civil society campaigns, corporate social responsibility has also featured prominently in political debates over the last decade, mainly as a result of accelerated globalisation. In most of the developed world, governments have launched significant political initiatives in an attempt to address CSR and engage in meaningful joint projects together with business, trade unions and interest groups. As a result of these developments, CSR is high on the corporate and political agendas and the concept is reshaping business strategies and operations in unprecedented ways.

II. CSR in the European political debate

In Europe, the debate on responsible business conduct reached the European policy arena in the early 1990s. It was the then president of the European Commission (EC), Jacques Delors, who first planted the seed of CSR at European level, as part of his relentless drive to involve the European business community in the construction of the European Union (EU). In 1993, President Delors launched a powerful appeal for business to take part in the fight against social exclusion. This resulted in a strong mobilisation of European business networks and proved to be the beginning of a long road towards the development of a European agenda on CSR.

With the completion of the Single Market in 1993, the EU political priorities of the mid to late 90s shifted in focus towards strengthening social and employment policies through enhanced political coordination. This drive would eventually lead to the EU being granted new competences in the field of employment and social affairs, as reflected by the Amsterdam Treaty of 1997.

As a result of these changes in the EU treaties, renewed impetus and power was granted to the European institutions. Greater political emphasis was placed on promoting wider citizen participation in the labour market, fighting social exclusion, regenerating socially deprived areas, providing better vocational training and ensuring that redundancies arising from business restructuring were minimised and/or avoided.

These main lines of policy action became the basis for a manifesto entitled “European declaration of business against social exclusion” signed voluntarily by members of the European Business network for

Social Cohesion and the European Commission in January 1996. This document constituted an important milestone in the CSR debate in Europe, since it led to the establishment of CSR-Europe³ – a European umbrella organisation on CSR aimed at raising awareness and mutual understanding among national members on the principles of CSR. Furthermore, this manifesto became the building block upon which CSR policies were to be promoted in future years.

Clearly a wind of change was blowing through Europe and further concerted actions at EU level soon demonstrated a true commitment to the promotion of a greater sense of social responsibility among European business. In this context, one key initiative was the creation of an expert group in 1998 (the Gyllenhamar Group) charged with analysing the economic and social consequences of industrial change in Europe.

The final report⁴ from the Gyllenhamar Group contained a range of specific recommendations to EU institutions, national governments and social partners:

- set up an observatory on Industrial Change (nowadays the European Monitoring Centre on Change, based in the European Foundation in Dublin)⁵;
- promote social dialogue on industrial change and its effects (including the information and consultation employee representatives);
- encourage large companies to produce annual ‘change management reports’ on their employment policies, providing information on which structural changes are foreseen and how they will be managed;
- ensure that closures and collective redundancies are accompanied by joint efforts by companies, employee representatives and public authorities to agree to social plans, modernisation programs and mobilisation strategies.

The speed and consequences of industrial change in Europe as a result of globalisation have been triggered by newly emerging and often interrelated drivers that have redefined the world economy. Increased competition resulting from free trade, technological developments, demographic movements, liberalisation of financial markets, demo-

³ See, <http://www.csreurope.org>.

⁴ *Managing Change – High level group on economic and social implications of industrial change. Final report 1998.* European Commission.

⁵ <http://www.emcc.eurofound.eu>.

graphic challenges and environmental concerns, can be identified as the major forces shaping the present enterprise environment.

These pervasive changes have mostly translated themselves into higher levels of company restructuring activity. Indeed, few companies escape the need to restructure at some point in time as it is an almost fundamental prerequisite for guaranteeing survival and competitiveness. However, it is the negative economic, social and psychological consequences for regions and their workers that the EU has been fighting to avoid and which the concept of CSR can help in preventing, or at least it may alleviate undesired hardship.

III. Lisbon 2000 and the launch of a European framework on CSR?

In an attempt to respond to the numerous challenges resulting from globalisation and industrial change, the leaders of the EU launched the so-called “Lisbon Agenda”⁶ which sets out a ten year objective to make Europe:

“the most competitive and dynamic knowledge-based economy in the world, capable of sustainable economic growth, with more and better jobs and greater social cohesion”⁷.

The Lisbon goals are to be achieved by: preparing the transition towards a knowledge-based society and economy; modernising the European social model and investing in human resources and the fight against social exclusion; pursuing sound macro-economic policies; and by promoting sustainable development principles and policies⁸.

The document also set specific targets with regard to employment in particular:

- An overall employment rate of 70% by 2010
- An employment rate for women of over 60%
- An employment rate of 50% among older workers
- Annual economic growth around 3%

⁶ The Lisbon European Council – An agenda of social and economic renewal for Europe. Contribution of the European Commission to the special European Council, March 2000.

⁷ The Lisbon European Council – an agenda of social and economic renewal for Europe. Contribution of the European Commission to the special European Council in Lisbon on 23-24 March 2000.

⁸ This last objective was introduced as a result of the European Council meeting in Gothenburg in 2001.

The Lisbon agenda is articulated through a novel instrument in European policy making known as the Open Method of Coordination (OMC). This is based on a system of benchmarking and exchange of best practice tools for meeting the various targets set by the EU in the areas of employment, education, environment and investment in research and development. The OMC allows each Member State to advance at its own speed and according to individual national political priorities. The progress of each country is then evaluated by the European Commission on a yearly basis, building on the analysis of the National Reform Programs for Growth and Employment.

The Lisbon process also aims to foster a strengthening of public-private partnerships, whilst clearly recognising the key contribution to be made by the business community in achieving these goals through CSR principles. As part of this process and for the first time in its history, the European Council addressed firms directly in:

“a special appeal to companies’ corporate sense of responsibility regarding best practices on lifelong learning, work organisation, equal opportunities, social inclusion and sustainable development”⁹.

It was this declaration that introduced a whole new notion and vision on how European leaders expected companies to behave and perform in the 21st century. The text also served to underline the EU’s commitment to the principles of social justice, non-discrimination and sustainable growth.

The momentum gathered at European level as a result of the Lisbon Agenda lead the EC to issue a much downloaded Green Paper on CSR entitled *“Promoting a European Framework on corporate social responsibility”*¹⁰. This public consultation document defines the concept of CSR and outlines the important contribution that this practice can make in helping the EU achieve the goals of the Lisbon strategy.

The document described CSR as:

“a concept whereby companies integrate social and environmental concerns in their business operations and in their interaction with stakeholders on a voluntary basis.”

⁹ Presidency conclusions, European Council 23-24 March 2000.

¹⁰ Promoting a European Framework on Corporate Social Responsibility – European Commission, Directorate General for Employment and Social Affairs, 2001.

More importantly though, the Green Paper encouraged the EU to launch and lead a debate on CSR not only within Europe but globally. Thus, the EU presented a vision for growth and wealth creation based on the pursuit of the perfect equilibrium between social, economic and environmental policies.

Divided into two main parts, the Green Paper aimed to clarify the concept of CSR, whilst proposing ways of taking the debate forward. The first section consists of an analysis of the internal and external dimensions associated with CSR, the former covering issues to do with human resources management, health and safety, adaptation to change and management of environmental impacts and natural resources. The latter part deals with the impact of business behaviour on local communities, business partners, suppliers and consumers, human rights, and global environmental concerns.

In a second section, the document presents a holistic approach towards corporate social responsibility and deals with management practices, reporting and auditing mechanisms, quality of work issues, social and eco labels and socially responsible investment. In an annex the consultation process is presented and stakeholders invited to respond and react.

The consultation process proved to be a real success with over 250 responses received. All the actors involved in the procedure, notably employers, trade unions and civil society and the European institutions welcomed the Green Paper and confirmed its usefulness. However, there were significant differences amongst the views of the respondents.

The business community underlined the voluntary nature of CSR and pointed to the need for developing its content at the global level. Employers also emphasised the fact that there would not be “one size fits all” solutions and that any attempts to regulate CSR would be counter-productive in helping achieve the Lisbon goals. It was therefore clear that employers were determined to water down any move by the EU to legislate or introduce further administrative burdens on companies.

As far as the trade unions and civil society were concerned, the voluntary nature of CSR initiatives would not be enough to guarantee workers’ and citizens’ rights. Instead, both of these stakeholder groups called for the establishment of minimum standards and the development of a level playing field. Furthermore, they advocated for effective mechanisms

to be set up to ensure a company's accountability for its social and environmental actions.

An official Communication by the EC quickly followed the consultation process initiated by the Green Paper in an attempt to keep CSR high on the political and business agenda of the 21st century. This new document, entitled "CSR a business contribution to sustainable development"¹¹, summarised the outcome of the Green Paper exercise, whilst also positioning the subject in the context of the larger EU policy agenda for the future.

The most noteworthy development in the new Communication, although not entirely surprising, was the absence of any reference whatsoever to the establishment of a European framework on CSR. The interests of industry and the business lobby had clearly prevailed over those of trade unions and civil society. From this moment on, judging from the content of the Communication, the CSR debate was to be based on the exchange of positive practices, awareness raising and the promotion of the transparency of the tools.

Establishing a framework on CSR at EU level was always going to be an awkward task due to the large number of policy areas covered by the concept, namely enterprise, social, employment, fiscal, environment, trade, consumer protection, health and safety, foreign relations, human rights and development. Moreover, the lack of political mandate by the EU in many of these areas made it extremely difficult for the European institutions to introduce any kind of legally binding measures in respect of CSR.

IV. The role of the European multi-stakeholder forum on CSR

In order to overcome the limitations on the EU's power and the impossibility of drafting legislation in the field, the European Commission set up a multi-stakeholder forum on CSR (EMS Forum) and invited all relevant stakeholders to participate in its activities. Chaired by the European Commission, the aim of the EMS Forum was to further pro-

¹¹ Corporate Social Responsibility: A business contribution to sustainable development. COM (2002) Final.

mote CSR through raising levels of understanding and fostering a dialogue between the business community, trade unions, civil society organisations and other stakeholders.¹²

According to its mandate and official terms, the EMS Forum on CSR would also promote innovation, transparency and convergence of CSR practices and instruments through:

- improving knowledge about the relationship between CSR and sustainable development (including its impact on competitiveness, social cohesion and environmental protection) by facilitating the exchange of experience and good practice and bringing together existing CSR instruments and initiatives, with a special emphasis on ESM-specific aspects;
- exploring the appropriateness of establishing common guiding principles for CSR practices and instruments, taking into account existing EU initiatives and legislation and internationally agreed instruments such as OECD Guidelines for multinational enterprises, Council of Europe Social Charter, ILO core labour conventions and the International Bill of Human Rights¹³.

This last point ratified the idea that the development of new European level legislation was not regarded as an objective of the work of the EMS Forum. Instead, the declaration establishing the EMS Forum invited stakeholders to make use of, and refer to, existing international charters as a semi-legal basis for conducting their activities. This can be regarded as a missed opportunity for the EU to issue a joint text or put forward a multi-lateral agreement which could be used as a reference for actors worldwide, thus raising the EU's international political profile on matters of CSR.

Although the prospect of developing new legislative initiatives was off the European CSR agenda, public and political expectations with regard to the potential impact of the EMS Forum and its recommendations were high from the beginning. This was the first time that such a large platform for discussion involving so many different actors had been established at EU level.

¹² For a full listing of members, go to http://forum.europa.eu.int/irc/empl/csr_eu_multi_stakeholder_forum/info/data/en/CSR%20Forum%20composition.htm.

¹³ http://forum.europa.eu.int/irc/empl/csr_eu_multi_stakeholder_forum/info/data/en/csr%20ems%20forum.htm.

However, after twenty months of work (October 2002 -June 2004), the final report was far from concise and the exercise failed to deliver much concrete substance. In this context, the final recommendations called for future initiatives to be articulated around three main areas: raising awareness and improving knowledge on CSR; developing the capacities and competencies to help mainstream CSR; ensuring an enabling environment for CSR.

These relatively general priorities helped to keep the CSR debate alive but unfortunately were not accompanied by specific instruments that would have enabled the implementation of more tangible measures. Furthermore, the final report did not consider it necessary to establish monitoring and evaluation mechanisms that could allow for easy comparisons of progress made and facilitate reporting. Instead, responsibility for developing possible CSR schemes lay with the stakeholders themselves and relied on their proactiveness for advancement.

It would be fair to say that the work of the EMS Forum was limited by a number of factors from the outset. First, the broad number of policy issues covered by the concept of CSR made this a very politically sensitive exercise. Second, there was perhaps not enough specific focus on the desired outcomes and some lack of leadership by the EC in this respect. Third, the extremely lengthy and burdensome consultations and work methods, based on plenary sessions and four roundtables, made for awkward coordination of procedures. Finally, the enormous number of participants, points of view and interests turned the EMS Forum into a lobbying platform and not necessarily a place for cooperative discussion.

In spite of these shortcomings, the EMS Forum did create some positive spin-offs, such as placing the issue high on the agenda of governments and business and integrating CSR principles in existing and new policy initiatives and processes (in particular, through tripartite and bipartite social dialogue). Discussions at EU level also gave rise to an increase in the amount of scientific and academic research on the subject and the emergence of numerous CSR-related bodies, organisations and specialised consultancies.

According to a national representative of an employers' organisation participating in the EMS Forum, the initiative also allowed those involved to reach a consensus on the main international and EU references on CSR and to differentiate between tools for companies and tools for public actors. Moreover, it helped in achieving a baseline under-

standing encompassing all aspects or constitutive elements of CSR desired by employers and in identifying drivers of and obstacles to CSR practices, as well as agreement on brief recommendations for action.¹⁴

By contrast the joint declaration issued by ETUC, the Social Platform and Amnesty International was much more critical of the entire process. These organisations accused the process of being “*imbalanced and following a unilateral approach to CSR that only takes into account the views of a single actor*”¹⁵, that being a clear reference to the business community.

In any case, the European drive on CSR has resulted in a top down effect with numerous national level debates taking place on this subject in recent years. The different approaches developed by the former EU 15 Member States can be clustered into the following different models.

| Model | Characteristics | Countries |
|--------------------------------|--|--------------------|
| Partnership | Partnership as a strategy between sectors for meeting socio-economic challenges | DK, FI, NL, SE |
| Business in the Community | Soft intervention policies to encourage company involvement in governance challenges affecting the community | IE, UK |
| Sustainability and citizenship | Updated version of existing social agreements and emphasis on sustainable development Partial regulation | DE, AT, FR, BE, LU |
| Agora | Creation of discussion groups for the different social actors to achieve public consensus on CSR | ES, PT, GR, IT |

Source: A. Kakabadse & M. Morsing for EABIS 2006¹⁶

¹⁴ CSR in the EU: state of affairs – Presentation by Emanuel Julien to the CCEUR seminar. Geneva, 5 June 2006.

¹⁵ ETUC, Social Platform, Amnesty International declaration 09/03/2006.

¹⁶ Corporate Social Responsibility: Reconciling aspiration with application. European Academy of Business in Society, 2006.

V. Repositioning CSR in the context of the renewed Lisbon strategy 2005

The mid-term review of the Lisbon process in 2005 alerted European leaders to the slow progress made by Member States in the preceding five years in terms of moving closer to the goals and targets set out in the original document. A taskforce lead by the former Dutch Prime Minister, Wim Kok, and charged with evaluating the Lisbon Agenda concluded that *“disappointing results are to be explained by an over-charged agenda, mediocre coordination, irreconcilable priorities and the absence of political will”*.¹⁷

Only one year earlier, in 2004, a new European Commission took office for a five year period. The elected President Jose Manuel Durão Barroso, was quick to express his deep concern for the poor advancement shown by the EU in catching up with the Lisbon targets since 2000, particularly as regards employment creation and economic growth.

Against this backdrop, the EU reacted with a refocused and renewed plan for taking forward the original goals set out in Lisbon. The main objective would be to improve on the articulation and operationalisation of the European and national level structures so as to make them function more efficiently and meet the agreed Lisbon targets. It was necessary to align vision and action if the process was to be fruitful.

The adoption by the European Council in 2005 of the first ever set of “Integrated Guidelines for Growth and Jobs”¹⁸ was to be a key part of this fresh impetus towards enhanced coordination of policy instruments. Political efforts, as foreseen by the new integrated guidelines, should address the following three areas:

- knowledge and innovation for growth;
- making Europe a more attractive and competitive place to invest and work;
- creating more and better jobs.

European government leaders recognised that the increasingly competitive business climate faced by enterprises as a result of globalisation was forcing many companies to restructure their operations. A wave of

¹⁷ Working together for growth and job: a new start for the Lisbon strategy. European Commission 2005.

¹⁸ Integrated guidelines for growth and jobs 2005-2008, COM (2005) Final 141.

panic and uncertainty largely exaggerated by vested interests of politicians and consultants started to spread across the EU as a result of accelerated outsourcing and off-shoring of business activities, mergers and acquisitions, and plant closures. The direct impact on job losses and falling employment levels raised alarm bells as to the social and economic consequences of restructuring. Not only was the EU failing to meet its targets of creating jobs, but many low value-added jobs in traditional industries were being relocated to emerging economies with cheaper labour and production costs.

The Integrated Guidelines for Growth and Jobs recognised this reality as an inevitable consequence of economic progress and market integration whilst adding that:

*“when restructuring and relocation occur they have destabilising consequences on the citizens and communities affected ... in those cases all instruments should be mobilised ... to provide adequate security and safety nets”*¹⁹.

In relation to CSR, the Integrated Guidelines also recognised the need for Member States to *“encourage enterprises in developing corporate social responsibility”*. This message was further reinforced by the conclusions of the March European Council of 2005 where leaders underlined that, *“in order to encourage investment and provide an attractive setting for business and work the EU must complete its internal market and make the regulatory environment more business friendly, whilst business must in turn develop its sense of social responsibility”*²⁰.

Only a few months after the adoption of the Integrated Guidelines, the European Heads of State met in Hampton Court under the UK presidency of the EU, in October 2005. This meeting further confirmed the new direction adopted for European policy, as part of a larger response to the challenges posed by the phenomenon of globalisation. The summit produced a declaration which for many analysts marked a turning point vis-à-vis the political future of the EU.

The priorities identified in the declaration signed at Hampton Court clearly reflected a strong push towards a more enterprise-friendly Europe and a reinforcement of market economies. Strengthening

¹⁹ Common actions for growth and employment: the Community Lisbon program. European Commission com (2005) 330 final.

²⁰ Communication to the Spring European Council (2005). Working together for growth and jobs – A new start for the Lisbon strategy.

Europe's enterprise capacity and competitiveness through the removal of potential obstacles to business activities and the modernisation of frameworks was regarded as the best way to meet the challenge of globalisation. Among the main lines of action presented at Hampton Court were:

- Completing the internal market, including for services, telecoms, energy and financial services;
- Delivering more open and fairer markets within the EU through the continued implementation of competition and state aid rules;
- Encouraging enterprise, through conditions which allow European business, particularly small and medium sized firms, to be set up and flourish;
- Improving the regulatory environment at the EU level to free business and citizens from unnecessary costs of red tape;
- Opening third country markets for European producers, in particular through the completion of the Doha round negotiations;
- Assuring the proper functioning of EMU as a key precondition to creating growth and jobs;
- Improving economic governance and strengthening coordination of economic and social policies.

It is against this political backdrop of boosting employment and growth as set out by the renewed Lisbon Agenda that the CSR debate will now be positioned in the EU. Consequently, the EC launched a new Communication on CSR in early 2006 – “Implementing the partnership for growth and jobs: making Europe a pole of excellence on CSR”²¹.

This new Communication was drafted by Directorate General for Enterprise and not Employment and Social Affairs as had been the case with the first one launched in 2001. The decision could be interpreted as a change of ownership of CSR policy within the European Commission in an attempt to connect better with the business community and provide political coherence to the messages emerging from the revised Lisbon process and the Hampton Court declaration.

The result is a text that recalls the voluntary nature of CSR whilst also stating that “an approach involving additional obligations and

²¹ “Implementing the partnership for growth and jobs: making Europe a pole of excellence on CSR” COM (2006) 136 Final.

administrative requirements for business, risks being counter-productive and would be contrary to the principles of better regulation”.

The possible introduction of legislative and/or administrative measures is still not an option being considered. Instead the new approach to CSR will be based on an “open coalition of cooperation” aimed at further fostering the exchange of positive practices in line with the conclusions of the 2002 Communication. The central piece of this new process is a political structure also launched as part of the Communication and known as the “European Alliance on CSR”. This Alliance serves as a political umbrella for new or existing CSR initiatives by large companies and their stakeholders. Moreover, the document also recalled that the Alliance, “is not a legal instrument and is not to be signed by enterprises, the Commission or any public authority”²².

Whilst the European employers, represented through UNICE and UEAPME, welcomed the content of the new Communication, the European Trade Union Confederation (ETUC) and civil society representatives were quick to express their disappointment. In the views of the latter, an opportunity had been missed to establish some minimum standards with which companies could comply. Furthermore, the ETUC once again accused the Commission of “adopting an unbalanced, unilateral approach that gives undue weight to the interests of industry and business”²³.

Whilst this criticism might be too harsh, it would be fair to say that the Alliance will only prove its worth if its actions deliver added-value and demonstrable positive impact in the behaviour of companies. Only time will tell whether this is the case.

It is clear that European Social Partners do not see eye to eye on the subject of CSR and as result joint initiatives and partnership based cooperation in this area have suffered in the past. Equally, future actions are likely to be developed in a unilateral manner and risk putting at peril the very principles of the European Social Dialogue process.

In December of 2006 the European Commission organised a follow-up meeting of the European Multi-stakeholder Forum on CSR in order to present practices and progress made on CSR by stakeholders at

²² Implementing the partnership for growth and jobs: making Europe a pole of excellence on CSR' COM (2006) 136 Final – pg 3.

²³ <http://www.etuc.org>.

national level. Little is known as to the future operating structure or mandate of the revamped EMS Forum for the coming years or indeed whether the process will be continued. With legislation totally off the agenda, the challenge will be to find approaches that inspire more enterprises to engage in CSR and integrate the concept into their core business conduct.

VI. Introducing social responsibility in restructuring processes

The rapid expansion of economic globalisation and the rise in corporate restructuring resulting from this phenomenon has been closely related to the European debate on social responsibility. Indeed, it was the CSR Communication of 2002 that triggered a consultation process among the European Social Partners on the issues of corporate restructuring, which concluded with the publication of a set of “Orientations for reference in managing change and its social consequences”²⁴ issued in 2003.

Also, in 2005, the European Commission launched its latest Communication on “Anticipating and accompanying restructuring in order to develop employment: the role of the European Union”²⁵. This document reiterates the need for companies to develop socially responsible methods for addressing restructuring as a way of reducing the negative social impacts that global business competition may cause on European workers.

Another important development emerging from this Communication has been the creation of a European Restructuring Forum, charged with the objective of identifying and analysing socially responsible restructuring at sectoral, regional and enterprise levels. The Restructuring Forum serves as a vehicle for exchanging practices on how to best understand, anticipate and manage the effects of restructuring.

Although the Forum has already met three times in plenary sessions over the course of 2005-2006, it still lacks a clear remit. Moreover, the

²⁴ http://ec.europa.eu/employment_social/social_dialogue/docs/orientations_en.pdf.

²⁵ Anticipating and accompanying restructuring in order to develop employment: the role of the European Union. European Commission COM (2005) 120 final.

European employers represented by UNICE have repeatedly asked the European Commission for an official document outlining the purpose and mandate of the Forum and voiced its concern over the absence of a clear set of guidelines on its working structure and exact objectives. Equally, the ETUC has expressed its scepticism as to the usefulness of the Restructuring Forum and shares the employers' criticism concerning the lack of a precise direction as to its work.

Regardless of the difficulties in launching a structured debate on restructuring through the European Forum, it is undeniable that the topic is still a major source of concern for regional and national governments due to its impact on employment levels and the economic fabric of the affected areas(s). The on-going relocation of resources from industry and into services carries with it inevitable effects on company staffing levels, resulting in redundancies during negative cycles and expansive recruitment in times of economic boon.

Three main drivers can be identified as having a direct influence on restructuring activity in Europe.

- Increased competition – deriving from growing trade liberalisation, the power of financial markets, more demanding and better informed consumers;
- Technological developments – allowing for faster innovation, greater emphasis on research and development activities and enabling new forms of organising work (core and peripheral enterprise functions), as well as fuelling competition;
- Demographic change and sustainability of social welfare models – associated with ageing workforces and low fertility rates, migration flows and skill shortages in an increasing number of economic sectors²⁶.

In recent years it has become widely accepted by social partners and policy makers that restructuring is a necessary occurrence in the life cycle of a company, as it can serve to increase competitiveness and on occasions even prevent firms from insolvency. However, it is the mismanagement of such a process and the disregard for socially responsible approaches to restructuring which is of concern in the European and national policy debate. The lack of respect for legislative procedures and the negative

²⁶ Own elaboration.

employment and social effects associated with irresponsible restructuring practices can not only be harmful for the reputation of the company, but perhaps more importantly, cause long-term damage for workers and affected regions.

As a result of these developments, enterprises are often caught in the middle of a complex new picture. On the one hand, society expects companies to be more responsible in their internal and external behaviour vis-à-vis all stakeholders. On the other hand, companies themselves are adapting to a constantly mutating environment, where addressing social responsibilities and achieving shareholder value are often difficult goals to balance. These internal and external pressures have led to a greater recognition of the benefits associated with social responsibility. Unfortunately though, CSR strategies are still too often being developed as ad hoc policies and not regarded as a long-term strategic business goal.

Traditionally, restructuring has been associated with the loss of jobs and considered as the easiest and quickest way of cutting costs to guarantee business survival. As of late, though, and largely as a result of the revised Lisbon strategy objectives and the CSR debate, greater emphasis has been placed on developing alternative ways of restructuring. Business creation initiatives arising from restructuring processes and socially responsible restructuring methods are becoming important actions that governments are promoting and companies incorporating into their wider CSR agendas. The concept of socially responsible restructuring can be defined as “the use of one or more approaches to consciously take into account the interests of all the organisations’ stakeholders”²⁷.

An important aspect of responsible restructuring is “the willingness of all those involved, but in particular employers, to go beyond the legal frameworks, to ensure that negative consequences involving possible workforce reductions are minimised and/or avoided”²⁸.

²⁷ Support measures for business creation following restructuring. European Foundation for the Improvement of Living and Working Conditions. 2006.

²⁸ Restructuring for corporate success: a socially sensitive approach. ILO. N. Rogovsky et al 2005.

VII. EU Policy on restructuring: Creating the right framework conditions for corporate responsibility

As it has been mentioned, the EU has dedicated a great deal of attention to the issue of restructuring over the last decade in an attempt to develop a socially sound and coherent policy message and strategy. Expert groups have been set up, structures and specialised bodies put in place at the European and national levels and the scientific knowledge in this field has grown substantially.

In terms of policy, four main options can be identified for addressing macro and micro economic restructuring:

- i) Laissez-faire – whereby economic adjustment is best achieved by the market;
- ii) Prevention – based on protectionism and subsidies for firms;
- iii) Compensation – providing social security payments and adjustment funds for firms;
- iv) Active – based on matching workers to jobs, retraining, mobility, limited welfare benefits and the active promotion of competitiveness²⁹.

With these options in mind, the EU appears to have chosen a two-pronged approach based on fostering industrial change and alleviating its potential negative effects. The policies combine the active and the compensatory approaches.

First, policies at EU level have focused on promoting structural change, notably through the reform of the Common Agricultural Policy (CAP), the drive to complete the internal market, a more open trade policy through the mechanisms of the World Trade Organisation and the strengthening of competition policies.

Second, and largely in an attempt to accompany this change, the EU has developed numerous initiatives and tools to address the negative effects of restructuring, namely through the European Employment Strategy (active policy approach), the Structural Funds (mix of compensation and active) and the European Global Adjustment Fund (compensation).

²⁹ Restructuring and Employment in the EU: concepts, measurement and evidence. European Foundation for the Improvement of Living and Working Conditions 2006.

As part of this strategy, the EU has also issued a considerable body of policy in the last three decades. This legislation mostly sought to safeguard the rights of the employees through enhanced information and consultation processes. The role of the Social Dialogue at European and national level has also flourished as a result of these legislative developments.

The main Directives issued to this respect are as follows:

- Collective Redundancies 98/59/EC;
- Transfer of Undertakings 2001/23/EC;
- Employer Insolvency 2002/74/EC;
- European Works Council 97/74/EC;
- Information and Consultation of Employees 2002/14/EC;
- Cross Border Mergers 2005/56/EC.

This body of legislation is unique to the European Union and a demonstration of the sincere commitment by the European Social Partners and policy-makers to protecting the rights of European workers so far as is possible. However, whilst legislation introduces certain obligations that companies must fulfil and it also guarantees certain rights for those negatively affected by restructuring, it can neither prevent all job losses nor always guarantee responsible behaviour by employers.

VIII. Nurturing job creation in restructuring situations – a socially responsible alternative

Legislation is one element among many for addressing the consequences of restructuring. If companies are to pursue responsible restructuring practices aimed at minimising negative social costs, it is vital that the right framework conditions are created so that such schemes can be implemented.

There can be no better cure for redundancies resulting from restructuring than to have a healthy enterprise base capable of replacing lost jobs. No social program can rival the business sector when it comes to creating employment, wealth and innovation that improve standards of living for citizens. However, business cannot do this alone and a level playing field is necessary, as well as the development of the right frame-

work conditions, so that job creation may be stimulated in restructuring processes. Government-lead plans to reduce the hardship of job loss are fundamental in meeting the challenge of turning a threat into an opportunity.

In this context, Governmental initiatives developed at EU and/or national level establishing favourable conditions to support business creation in restructuring processes can be grouped into three categories:

- 1) **Regulatory initiatives:** legislative measures aimed at encouraging the creation of new enterprises following restructuring. Governments in consultation with employer associations and employee organisations play an important role in defining the legal and regulatory environment within which companies restructure. These regulatory initiatives may refer to existing national legislation that favours new business creation following restructuring.
- 2) **General public support measures:** policies aimed at encouraging the start-up and development of new and small enterprises by those people negatively affected by restructuring processes. These can be classified according to two main sub-categories:
 - direct support measures – intended to assist unemployed people or people threatened by unemployment who want to set up their own business or take over an existing one;
 - indirect support measures – intended to foster the creation of new business or the take over of existing ones by people affected in restructuring processes. This type of support is not provided directly to affected persons but rather to intermediary organisations that develop activities to promote new business among people hit by restructuring.
- 3) **Specific ad hoc public measures:** these include public interventions at sectoral, regional, or even individual enterprise level (although often the lines between these three levels are blurred). In these ad hoc interventions, support for business creation is often used to alleviate the negative social impacts of restructuring. Interestingly also, a large proportion of these ad hoc measures underpin existing public-private partnerships created to address the needs of specific restructuring processes³⁰.

³⁰ Support measures for business creation following restructuring. European Foundation for the Improvement of Living and Working Conditions. 2006.

Other important support measures aimed at mitigating the negative employment and social consequences of restructuring can also be found at the company level. In most cases these tools are the result of negotiations between management and workforce representatives. Among the most frequent measures are: support for spin-offs set up by the restructuring enterprise; support (guidance and/or financial) for restructured personnel who decide to set up a new enterprise usually in a different line of business; and reindustrialisation strategies intended to generate employment opportunities for those people affected by a restructuring.

Further options available to enterprises include internal and external outplacement services; start-up support units; employee mobility support; early retirement schemes (partial and part-time); public-private partnership employability models; flexible leave and subcontracting of workers for specific periods of time.

Unfortunately, evidence of socially responsible business creation initiatives resulting from restructuring processes still remains rather limited across the EU. This can be attributed to a number of factors, including a lack of entrepreneurial spirit among Europeans, the preference of employees to work for an employer, existing legal and administrative barriers, limited access to finance and seed capital and the preference by many workers to take early retirement.

Therefore, the documentation and dissemination of successful restructuring is vital in order to demonstrate that restructuring does not always have to lead to job losses. Equally important is the evaluation of these support programs in order to analyse strengths and weaknesses and ways of improving and adapting them to changing socio-economic circumstances.

IX. Conclusions

CSR in Europe has emerged as an important concept in direct response to the rapidly changing world of business and corporate governance. No other region in the world has launched such an extensive and ambitious political strategy to promote CSR among so many stakeholder groups. The range of initiatives, projects, discussion forums and approaches reflects the commitment of all those involved in the debate to incorporate CSR into their daily work agendas. This wide diversity of

working methods and ideas is also a demonstration that there is no “one size fits all” solution when implementing CSR policies and that tools have to be developed according to specific circumstances.

The political objectives launched through the EU’s Lisbon agenda in 2000 and its follow-up review in 2005, aimed at managing the challenge of globalisation, regard CSR as a fundamental concept which European companies should internalise. CSR is a key issue when confronting the enormous technological and demographic changes as well as the increase in business competition that has taken place in the last couple of decades. These developments have accelerated the rate of business restructuring with worrying employment consequences for workers.

In order to respond to this challenge, the EU has invested heavily in encouraging firms to adopt responsible conduct when restructuring. Reality has demonstrated that CSR and restructuring policies are very much shaped by political and institutional structures, legal frameworks, social traditions, industrial relations models, business education and management styles. It has been proved that when restructuring is done in a socially responsible manner the negatives are substantially reduced for all parties: the image and reputation of the company, the socio-psychological effects for workers and the economic fabric of the affected territory. If restructuring processes can be managed in such a way that they may contribute to new business creation opportunities, then both the firm and society at large will benefit from these responsible practices.

In any case, it is essential that CSR practices are considered part of the DNA of the organisation so that they can be aligned with long-term business strategy. Evidence shows that most action by companies in the field of CSR still focuses on short term objectives. Not only is this approach a waste of resources and effort but more importantly it is a waste of an opportunity for firms to become more competitive and to perform better.

Companies need to start thinking in terms of business sustainability and realising the benefits of strategic CSR. If the success of a company is tied to the success of the territories where it operates, this relationship can become mutually reinforcing. Thus, the more closely a social issue is tied to the business of a company, the greater the opportunity to leverage the firm’s resources and benefit society.

In the context of business, no social issue is more closely linked to a community than that of employment, since it is the best guarantor of

prosperity, social inclusion and improved living standards. Therefore, by managing restructuring in a socially responsible manner, companies will be improving their overall social responsibility, as well as the adaptability and employability of workers. For this reason, it is time for all parties concerned to stop thinking in terms of “corporate social responsibility” and to start thinking in terms of “corporate social interaction”.

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“Secondary Effect” in implementation of Corporate Social Responsibility in supply chain

GAO Yun

“A corporation is an abstraction. It has no mind of its own any more than it has a body of its own; its active and directing will must consequently be sought in the person of somebody who is really the directing mind and will of the corporation, the very ego and centre of the personality of the corporation”

Lord Haldane in Lennard’s Carrying Co let v Asiatic Petroleum Co Ltd AC 705

I. Introduction

Is CSR a response to compensate the failure in the enforcement of international labour standards through traditional mechanism? The objective of the ILO, among other things, is to achieve social justice as well as to provide a common ground on which fair competition between Member States is ensured. To prevent any nation from increasing its competitiveness in the international market by exploiting workers, this social ground has to be constructed at universal level and international labour standards (Hereafter ILS) are adopted as the principal instruments to be implemented at a global scale. However, before this ambitious goal can be realised, the waves of globalisation ignoring country borders have taken away capital and brought into migrant workers.

Meanwhile, international law on foreign investment was developed in an environment where foreign investment was presented as vulnerable

to nationalisation and expatriation, and has therefore been focusing on establishing principles to protect foreign corporations' rights, including fair and equitable treatment, removal of obstacles for investment, non-nationalisation and other promotional and protective principles. Disproportionably little attention is given to obligations to be imposed on corporations. While multinational corporations (MNCs) are becoming unprecedentedly powerful in globalisation, international law on foreign investment has not so far developed the appropriate balance between the protection of corporation's rights and the obligations to be respected by MNCs.

When protected capital becomes mobile at global level, nationally clustered labour market is transformed into a globalised labour market. What globalisation has changed compared with industrialisation is the vulnerability of workers, especially those at the end link of a global production chain. The vulnerability of workers is aggravated by a weakened collective bargaining system plus a restriction of state interventions through direct statutory regulations, both of which are consequences of globalisation. Employers have no longer need to confront workers, and a collective bargaining system cannot function like before when employer-employee had to confront each other face-to face in a direct employment relationship. In globalisation era, even if workers are organised, they may find the place of their bargain counterpart on the other side of table is empty or occupied by the wrong person with whom to negotiate. State is struggling to help confused workers to identify in law and in practice the genuine employer in more and more diversified production systems, so that it can impose appropriately due responsibilities on the right person. However, some complications have to be taken into account, for example, the dual status of a sub-contractor in a sub-contracting system: compared with his contractor, the subcontractor is vulnerable to exploitation, while compared with his downstream sub-contractor, he is employer. In addition, it is never an easy task for law enforcement to trace an employer in a cross-border production system situated beyond its territory. Finally, the question remains open as to how far we should go to identify existence of a *de facto* employment relationship? Should one consider General Motor's responsible for those who produce metal and other raw materials in Peru under reported forced labour conditions? Or, as claimed by plaintiffs in the pending case, Nestlé's as liable for its use of trafficked child labour in the Ivory Coast?

Thus a series of questions must be posed: Do we need new rules of the global game? Who will be the ruler-makers? What mechanism needs

to be established to implement rules? Who is running in a race to bottom in a context of globalisation?

While a debate on the role, objectives and boundary of labour law has been opened to address the “global crisis of labour law” and seek innovative propositions to reform traditional hard law, a CSR movement initiated by non-state actors for their voluntary compliance with principles recognized by international community has fascinated everybody. While business actors insist that CSR be a voluntary commitment, other actors including trade unions, NGOs, and consumers however wish to put a range of responsibilities, sometimes representing different requirements from different interest groups, on the shoulder of enterprises. The CSR agenda can also be used by a range of actors whose demands and interests cannot be pursued through the traditional legal and judicial mechanisms. Those who are disappointed by the ineffectiveness of hard law to address certain problems also turn their expectations to the movement of CSR, which result in some questionable problems of consistency in the substance of the CSR agenda.

This article does not aim to enter into detailed discussion on the content of CSR, but rather observes, from perspectives of suppliers situated at the bottom of global production chain, some effects produced in the implementation of CSR in supply chain by MNCs. While CSR still contains much uncertainty in substance, and the development of implementation mechanisms is in its infancy, the application of CSR is unavoidably characterised by its experimental nature. However, some “secondary effects” and unexpected outcomes in its implementation, especially as a consequence of unclearly defined application scope and obscurely identified duty holders, already allows for a summary review which can hopefully be reflected in future discussions on both substantive and procedural issues of CSR.

II. The Development of hard law and CSR: Convergent, divergent or parallel?

For its proponents, CSR is an unstoppable tendency related to globalisation. Hard law originated from soft law. The boundary between custom and law is rarely clear. Today’s voluntary initiatives may evolve into tomorrow’s binding regulations. Corporations, wherever they are established, under whichever jurisdiction they are set up, have first of all

legal obligations to respect hard law. Hard law continues to play its role. The assertion by a state of extraterritorial jurisdiction to apply its laws to alleged violations of human rights by multinationals illustrates how it can safeguard its control over multinationals with a justified competence¹. In place of trying to distinguish in vain between hard and soft law, such proponents advocate giving concrete substance to the initiatives encompassed in CSR and to ensure that they are effectively implemented. For them, CSR is either going beyond observance of law by enterprises or complementing lacunas of law.

For its opponents, the dysfunction of hard law in regulating globalised production is sometimes leading the protection of workers into an impasse. State power in traditional mechanisms for law enforcement, limited by territoriality, finds those assumed to be its legal subjects for respecting law to be out of its reach. Many corporations have abandoned their home state to minimise labour costs, usually accompanied by a motivation of evading rigidity of labour market regulations in home state. Production is transferred to countries where their requests for flexibility in law can be conveniently met.

Law also has nationality. Millions of migrant workers exploited by corporations, not being able to find a justice in law, have to count on discretionary respect for business ethnics by employers. Under these circumstances, trade unions have every reason to worry that those who possess capital are taking advantage of the weakness of hard law and are taking over the territory formerly occupied by the state. CSR represents essentially an invasion from private actors into an area traditionally monopolised exclusively by the state. A particular concern is that private actors are acquiring international legal personality and presenting themselves as the subjects of international rule-making under the pretext of better corporate governance to adopt and implement rules facilitating their sole purpose of maximising profits; the principle of rule of law is becoming decoration.

Currently, a corporation can rarely be held liable even for the most serious violation of human rights under international criminal law in

¹ The Unocal litigation was the first in which it was held by the U.S courts that the Alien Tort Claims Act (ATCA) could apply to private corporations, *John Doe v. Unocal Corp.*, 963 F. Supp. 880 (C.D. Cal. 1997). Information concerning other allegations attempting to hold MNCs liable for human rights violations can be found on the website: <http://www.laborrights.org/>.

international courts². The extended application of the Alien Torts Claims Act to MNCs’ violations of human rights by the US has milestone significance; still no case law has ever established the liability of MNCs. A handful of allegations were either settled or are still pending. The lack of international sanctions permits MNCs to continue investing in developing countries without fear of apprehension by international organisations. By suggesting that “unless MNCs are taking criminal action, they will not be accountable under international human rights law”³, some commentators advocate establishment of an international mechanism to enforce international law applying to all peoples, states, and non-state actors, rather than leaving this to a *laissez faire*, approach that risks diluting the value recognized by international law. Compared with this “harder law” approach, others, however, prefer to initiate an approach that fully acknowledges corporations’ responsibilities towards society but seeks to shape it into mandatory standards. This has led directly to the birth of the UN Draft Norms on the Responsibilities of Transnational Corporations and other Business Enterprises with regard to Human Rights.

CSR is described on the website of the ILO as “a way in which enterprises give consideration to the impact of their operations on society and affirm their principles and values both in their own internal methods and processes and in their interaction with other actors” and CSR is “a voluntary, enterprise-driven initiative and refers to activities that are considered to exceed compliance with law.”⁴ It is not evident to define the linkage between law and CSR from this description: what is the nature of this “enterprise-driven initiative” and how does it differ from law in substantive content? Whether the initiative is seeking processes of private standard-setting in parallel to ILS is the principal concern of trade unions whose role would risk being excluded in this unilateral initiative. Trade unions further emphasize that business has no political legitimacy to redefine and reinterpret its own responsibilities towards society⁵. In addition, the question to be raised is whether the principles

² The Chief Prosecutor from the International Criminal Court has declared that he intends to pursue bringing multinational corporations before court for their violations that form part of the remit of the Court.

³ Claudia T. SALAZAR, *Applying International Human Rights Norms in the United States: Holding Multinational Corporations Accountable in the United States for International Human Rights Violations under the Alien Tort Claims Act*, St. John’s Journal of Legal Commentary, vol. 19:1, march 2004, Anita, From Nunumberg to Myanmar.

⁴ <http://www.ilo.org/public/english/employment/multi/corporate/index.htm>.

⁵ The Social Responsibilities of Business in a Global Economy, International Confederation of Free Trade Unions, Eighteenth World Congress, Miyazaki, 5-10 December 2004, 18GA/E/6.7.

and values espoused by the enterprises themselves are consistent with those universally recognized by international community. There is no convincing guarantee to believe that “their” principles and values will not diverge or conflict with ILS and national law.

As ILS are a form of labour law negotiated at the international level and adopted by all of the ILO’s constituents together including employers, we can argue that ILO has been providing opportunities to employers to integrate their opinions throughout the process of drafting international labour norms. In this sense, international labour standards have absorbed the values and principles recognised by employers. Meanwhile, one of the functions of law is to allow those physical and legal persons to predict the legal consequences of their conduct. Implicit exigency of self-discipline and self-regulation from these persons addressed by law has constituted an integral part of compliance with law. The need for an additional unilaterally launched CSR claimed to be self-regulation instrument would be difficult to justify. Many thus see it as a tool granting employers the freedom to pick and choose legal obligations. In addition, ILS are also said to be not as hard as people think: many ILO Conventions lay down a baseline including only universally applicable minimum standards but leave much room for flexibility to Member States. Especially, the 1998 Declaration together with other instruments recently adopted by ILO, such as the Maritime Convention, show a stronger tendency of flexibilization of ILS by adopting an approach of “firmness in rights, softness in application”. In this sense, sufficient “softness” has been incorporated into ILS.

On the other hand, the content of most CSR initiatives appears just to reaffirm the values recognized by ILS. All kinds of guidelines, model Code of Conducts and agreements, initiatives, no matter how voluntary they declare to be, still take ILS and/or national law as benchmarks.

An emphasis is frequently made by CSR promoters is the distinction between “principles” and “standards”, which was also an issue clarified by ILO Legal Advisor during the discussions to adopt ILO’s 1998 Declaration on Fundamental Rights and Principles at Work. The fact that “Principles” appears in an ILO instrument is especially criticized by some commentators as one of the factors contributing to “soften” ILS⁶.

⁶ Philip Alston, “Core Labour Standards” and the Transformation of the International Labour Regime, *European Journal of International Law*, 2004, Vol. 15 No. 3, 457-521.

The same CSR promoters stress that CSR exceeds legal obligations where standards are laid down but requires business respect only principles. In other words, CSR is not bound by hard law but is intended to be guided by broader principles. However, not all lawyers may share this “either, or” distinction between law and principles, knowing that even a law adopted with the most concise language may still under some specific circumstances need to be interpreted under the guidance of relevant principles. Principles are in fact the soul of law and the law renders principles reliable. The interdependence between law and principles may be difficult to separate artificially. Other lawyers seem to be more inspired by examining CSR from the angle of source of law: what the hierarchy is within ILS, what the hierarchy is within soft law including CSR, where to place CSR between national laws in conformity or conflicts with ILS, whether the relationship between ILS and CSR will turn out to be a question of “chick first or egg first”.

From enterprises’ perspective, when hard law is lacking or in conflict with ILS, enterprises then have interests in finding a response to justify their voluntary compliance with labour norms adopted at international level in their conduct and operations. Those good corporations will wish to have a “clean” image distinguishing them from other “bad” corporations. CSR is first of all a tool and a strategy of self-protection against accusations from NGOs, customers and trade unions, and subsequently becomes initiative of self-regulation and self-monitoring. It should not be forgotten that the ILO 1998 Declaration on Fundamental Rights and Principles at Work was finally an initiative from employers.

How to define the nature of CSR depends on your angle and level of observations: certain principles and rules emerging as new norms and exploring “extra-legal” responsibilities could be seen as a parallel sideline to hard law for standard development, though without yet being recognized as legally binding; when CSR confronts national law non-complying with international standards, it could be divergent from hard law; a range of CSR initiatives generally based on principles already internationally recognized can eventually develop into common values to be accepted by the international community. In this sense, CSR converges with hard law. Different interest groups may draw different conclusions. Much uncertainty on the substantive content as well as on the nature of CSR will require much more research and studies both at international and national level. If we may cautiously conclude that the labour aspects of the CSR agenda are, as claimed by many employers, on principle

consistent with or even interweaved with ILS, the procedure to be followed and mechanism to be used for enforcing ILS will be a very pertinent question to address. Most ILO Conventions lay down a very detailed procedure to be followed for effectively putting these norms into effects. These procedures are designed to fit into law enforcement systems of the state safeguarded by coercive power, and cannot be followed by non-state actors.

The delivery of the substantive content of ILS has relied on the existence of an employment relationship. However, this vehicle of employment relationship cannot deliver this content properly in a globalised production system. The diversified employment forms render the employment relationship more nebulous than ever. In addition, the territoriality of labour law restricts its application to MNCs.

Globalisation provides employers with not only cheaper labour but also an opportunity to evade the high social costs. Social obligations disappear in the air in the process of off shoring, subcontracting, outsourcing and delocalisation. Business actors are exonerated from obligations vis-à-vis employees as well as the jurisdiction of its country of origin which is limited by territoriality. As for the host country, either the country lacks the capacity to establish a comprehensive legal system and enforce laws, or it compromises social justice to welcome investment, especially when workers' primary concern is to survive, even in extreme exploitation conditions. "Social dumping" is occurring both within countries and at transnational level: an American company may find the unfair competition is from its compatriot by making recourse to delocalised supply chain fed by forced labour. In the biggest trafficking case ever dismantled in the US, the owner of a "labour camp" involving more than 200 trafficking victims was supplier to two famous garment brands in the US⁷; at the same time, products branded "Made in France" can not give any guarantee that it is not produced by irregular migrants trafficked to France. In other words, the race to the bottom is being run not only amongst individual countries but also by individual corporations who are gaining competitive advantage in international markets by a "mobile exploitation". The world is being transformed into a complex global net in which plural actors' respective interests are mingled with each other. Considering all these factors, ILS are more important than

⁷ United States v. Kil Soo Lee, No. 05-10478, <http://www.usdoj.gov/crt/briefs/lee.pdf>.

ever for providing a “social ground” for every actor active in the international market. However, the governance based on territoriality is being fundamentally challenged, facing up to the complex modes of contemporary production systems.

It was in this context that the ILO’s 2006 Conference adopted the Recommendation 198 on Employment Relationship to address the abusive practices to evade obligations in an employment relationship. The Recommendation suggests that national policy should “combat disguised employment relationships in the context of, for example, other relationships that may include the use of other forms of contractual arrangements that hide the true legal status” and “ensure standards applicable to all forms of contractual arrangements, including those involving multiple parties, so that employed workers have the protection they are due”⁸. However, this effort rests in a form of recommendation that has no mandatory effects.

What mechanism can be set up for implementing CSR is thus left in the hands of corporations. If the application mechanism for ILS is becoming flawed because of globalisation, CSR is however born handicapped. CSR initiatives generally identify the substantive content of enterprises’ responsibilities but rarely identify a standard in procedure to follow so that enterprises can effectively put CSR into application. Can CSR find a more proper procedural solution to ensure the deliverance of its content generally presented as consistent with ILS?

III. Application scope and duty holder(s) of CSR: Private governor of supply chains or self-regulation of MNCs?

When different actors in both the international and national community are struggling to find a comprehensible definition for CSR and to identify the line separating this soft law from hard law, if there is any, we may be interested in learning more about the current situation of implementation of CSR. No matter how broadly it covers issues in its substantive content and how vague its definition is, CSR cannot remain

⁸ R198 Employment Relationship Recommendation, adopted 15 June 2006 <http://www.ilo.org/ilolex/english/recdisp1.htm>.

a piece of paper, even if either a Code of Conduct has been beautifully formulated or an agreement has been written in the most concise legal language. CSR still needs to be implemented and a mechanism aiming to ensure the effective implementation of CSR still needs to be set up.

In the assumption of its consistency with principles contained in ILS, CSR commitment has moved into implementation in different countries in different rhythms.

In spite of ILO's tripartite spirit reflected in the whole process of adopting ILS, the effective implementation of ILS still relies on national domestic mechanism. States were traditionally duty holders having the primary responsibilities for ensuring respect for labour standards. It is however a challenge to define exactly who should be the duty holders in application of CSR.

The first question is who are the subjects expected to implement CSR and who can verify (if supervise is not an appropriate word for describing the control on a voluntary engagement) the situation of its performance.

CSR is said to be a one of the important ways today in which enterprises affirm their principles and values, both in their own internal processes and operations and in their interaction with other actors. The subject of implementation is therefore enterprises. The question remains to be defined is which enterprises. Today's enterprises are no longer single-nationality enterprises. We have been witnessing an intensified down-sizing, contracting-out or out-sourcing and off-shoring by corporations to narrow activities related to core business, to reduce and externalise labour costs, and thereby maximize profits. Modern corporations include various entities both legally and economically highly non-homogeneous: vertically, from upstream financial institutions, purchasers, recruitment agencies, suppliers, to downstream distributors, licensees or distributors; horizontally, multinationals have grown beyond national boundaries and established in different forms of investment including joint ventures and multiple branch offices in a worldwide web. We are often surprised how supplicated a multinational corporation's internal and external relationships can be in globalisation era.

Unfortunately, these non-homogeneous internal and external business partners do not always share the same vision of or interests in their responsibilities towards society. They are first of all bound by national legal obligations in the countries under the jurisdiction of which they are

established. While the baseline of legal obligations is different, these actors’ voluntary engagements must be different too.

A distinction of internal and external is certainly relative. There are no precise criteria to be used to define which partners/stakeholders should be included in a multinational’s internal core structure while others be excluded as external actors. Some, though they have delocalised manufacture from the home state and are established in the host country through different forms of direct investment, still keep direct control on the corporation’s operations and conduct, while others having outsourced the production to local suppliers may have only very limited influence on the conduct of suppliers.

The implementation of CSR depends on the extent to which a multinational can exercise a significant degree of influence over the activities of internal and external actors. However, in many cases, it is may be not possible to define the nature as well as the degree of influence of multinationals over all the relevant relationships. With the corporation’s employees situated at the core, suppliers and subcontracts in the next circle, then maybe international buyers and distributors add another circle, and customers and other society members as a whole, a multi-circle sphere centred by MNC is constructed. The outer MNC’s control intends to reach, the less its influence will be. This is about the degree of influence by MNC. However, another more problematic aspect of the application scope of CSR is the nature of the relationships between MNC and various stakeholders.

Although not absolute, a distinction still needs to be made, among other things, between two types of relationships almost always co-exist in an enterprise’s daily operations: the first is a enterprise’s “internal relationship” vis-à-vis its own employees with whom there is an existence of employment relationship; within employment relationship, the application of both labour norms and CSR are ensured, since the enterprises have to confront and bargain with their employees in adopting their employment policies. The outcomes of a collective bargaining process can very well allow employers to go beyond obligations laid down by law for extra engagement for improving their own employees’ working conditions. In the meantime enterprises have both competence and modality to put these policies into place within the boundary of their effective control.

The second relationship comes from enterprises’ interactions with those actors with whom the relationship is ruled by commercial contracts

only. For those enterprises that have realised a “production without factory”, the commercial contractual relationship is the pre-dominant one while the employment relationship is reduced to minimum. How to ensure application of CSR by these actors with whom the enterprises have sometimes only a purchasing contract only seems more problematic.

The establishment of a commercial contract is driven by economic interests. Little consideration is given to labour standards when calculating the price of labour in a labour market where competition is fierce. The price for labour is not calculated based on the respect for the countries’ labour regulation, but rather remains variable depending on how vulnerable workers are so that you could squeeze out their labour to secure your profits. The most convenient place is where labour regulations are mostly poorly enforced, or well enforced with migrant workers or workers in informal economy excluded by labour protection. In most cases these contracts between two commercial contracting parties do not include any provisions dealing with labour issues. The nature of commercial contract deviates from the principle included in the CSR and excludes any consideration to secure a “decent price” ensuring decent work.

The second issue we may question is about efficacy of application of CSR by this bias. Under certain circumstances, especially when a multinational has a dominant position in the market, the exercise of control of a multinational over its partners through a commercial contractual relationship risks turning out to be arbitrary and abusive. When CSR is usually unilaterally imposed, independent of labour issues, by corporations to their contractual partners who are keen to obtain the contract, these partners are seen as actors having no choice but passively to obey MNCs. What is neglected is that suppliers have also their full autonomy to adopt their own CSR policies in taking into consideration of law of the host country, as commonly referred in CSR documents, that national law and local practices constitute the baseline of CSR policies, and which implicates CSR standards can vary from one country to another, from one individual enterprise to another. The practice of associating a commercial contract with application of CSR amongst suppliers is criticized as a “transformed protectionism” by developing countries. It is seen as the strategy realising Western countries’ intention in the inclusion of labour clause under WTO system: in place of a collective sanction, a sanction is being imposed on an individual basis. A supplier will be penalised by losing orders from his buyer or by the termination of contracts for his non-respecting labour norms in production. For those promoting link-

ing social clause with commercial interests, this modality appears effective and efficient and even better targeted.

Commercial contract per se generally does not address labour concerns, or even becomes incompatible with any efforts of suppliers to meet MNCs requests of compliance. This is reflected by an effect which is called “straitjacket” observed in many field studies on implementation of CSR⁹: suppliers in labour intensive sectors are encouraged or obliged to improve working conditions but receive little incentives to do so. Suppliers are expected to shoulder the burden in terms of cost but little attention is given to the question of “shared responsibility”. Suppliers under considerable pressure to produce on tight margins and delivery schedules are often confronted with the dilemma of “double standards” contain two contradictory requirements from MNCs: “please improved your workplace conditions” versus “meet our contract conditions or else”.

It is also worth noting that, although these non-homogeneous enterprises are linked by a globalised production/ distribution chain, the degree of their maturity as well as capacity are so different that harmonized standards for all will remain a challenge. Like a natural person, an enterprise can also obtain both commercial and social maturity. An enterprise becomes more responsible after having experienced reputation crisis, witnessed loss of investment as a consequence of boycott from NGOs and consumers, and even confronted legal liability before courts. Meanwhile, an engagement going beyond legal obligations costs money, if not for a long-term perspective at least for a short term. Not all enterprises, especially small-middle size enterprises having a dependence on export can afford the bill for the costs spent in improving working conditions and fairer treatment of workers.

The next clarification we have to seek is about the role of MNC in application of CSR that will reflect the fundamental question: is CSR an instrument for self-regulation of MNC, or is it a tool to be used by MNC to regulate others as a private governor?

In accentuating that the degree of autonomy of entities within MNCs in relation to each other varies widely from one to another¹⁰, ILO’s Tripartite Declaration of Principles concerning Multinational

⁹ Peter Utting, Corporate Responsibility and Labour issues in China: Reflection on a Beijing Conference, the Journal of Corporate Citizenship, issue 10, Summer 2003.

¹⁰ Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy, Para 6.

Enterprises and Social Policy does not venture to give out a precise definition nor the scope of MNCs. However, it is mentioned at several places, including MNCs should respect equality of opportunity and treatment of “their staff at all levels”¹¹; ensure training for “all levels of their employees”¹²; respect freedom of association of “workers employed by multinational enterprises as well as those employed by national enterprises”¹³; take measures to promote “workers employed by multinational enterprises. Obviously, though the criterion used to define employment relationship can vary from one host country to another and the scope of the relationship can be broader in a country than another depending to domestic regulations, the instrument wishes to restrict the application within the sphere where the employment relationship between MNGs and their own employees has been established, which appears rather realistic under current development of CSR implementation system.

Compared with the voluntary nature of ILO’s Tripartite Declaration, the UN draft Norms on the Responsibilities of Trans-national Corporations and other Business Enterprises with regard to Human Rights (Hereafter Norms) represents a first attempt to set up mandatory standards with direct responsibilities to be imposed on transnational corporations (hereafter TNCs). It sets a broad application scope centred by TNCs which includes “contractors, subcontractors, suppliers, licensees, distributors, and natural and other legal person that follow these or substantially similar Norms”. In addition, it requests that TNCs and other business enterprises shall “cease doing business” with these actors not complying with Norms. Whether this “one-size fitting all” approach can accommodate sufficiently the diversity of all stakeholders who vary in type, size, location, ownership, and interests was one of the main subjects of discussion during the draft process.

However, as discussed above, what role do we wish to attribute to TNCs when applying CSR? By promoting CSR, we aim to impose duties on TNCs vis-à-vis their workers and the society as a whole but not to authorize TNCs to control others, being aware of the risk of abuse of power by these actors becoming more and more already uncontrollable. By stating that TNCs have responsibility not only to promote and respect of human rights, but also “ensure the respect and secure the fulfilment”,

¹¹ Para 22.

¹² Para. 30.

¹³ para. 42.

the Norms places two different sets of duties on the shoulder of TNCs: TNCs have to ensure its self-application of Norms as the principal duty holder. Meanwhile, in considering TNCs as “core actor” imposing the respect for Norms on other “non core actors”, TNCs’ are empowered as governors, and should behave as supervisors for the application of Norms. Other business actors have no choice but to obey the authority of TNCs. The Norms seems wish all application of the provided standards be surrounded by the “centeredness” of TNCs. The approach empowers TNCs as a “CSR leader” in enforcement of the Norms. Except a suggestion of “stop and go”, how to ensure TNCs apply the content of the Norms to other business actors is left unaddressed.

We count on CSR to prevent and eliminate abusive labour practices by each enterprise, including of course MNCs themselves. To attribute the role of a “private governor” to MNCs may lead to unpredictable effects, not only because it is based on a presumption that MNCs are “good citizens” having acquired enough credibility in social responsibility so that to behave as such, but also because mechanisms ensuring implementation in many MNCs are still deeply flawed, without mentioning the possibility that the legitimacy of MNCs interventions in certain areas attaining certain level would be challenged by public actors especially in host countries.

The proliferation in substance of CSR at both national and international level is remarkable. However, in requesting MNCs to take too broad responsibilities going beyond their effective capacity will only lead to a poor implementation. Facing up to the pressure from requirements of public, a simplistic method for MNCs to implement their promises is to “outsource responsibilities and duties”.

IV. Secondary effects produced in implementation of CSR: A “from bottom to top” perspective

As observed by some authors, much public discourse on CSR is narrowly focused on the treatment of workers in manufacturing factories in developing countries producing goods for MNCs in textile, clothing and footwear sectors¹⁴. CSR is usually narrowed as a tool to be used to deal

¹⁴ Jill Murray, Corporate Social Responsibility: an overview of principles and practices, Working Paper No. 34, Policy Integration Department, ILO Geneva.

with suppliers in developing countries only. It is worth examining some “secondary effects” produced in implementing CSR in developing countries, which is directly or indirectly related to the proliferation of inconsistent CSR standards in overlapping areas as well as the discretionary interpretation of these standards by different MNCs.

Who should be the beneficiaries through the implementation of CSR? No doubt CSR with respect to labour issues is designed for a better protection of workers that is also helpful for enterprises that care for their long-term strategy to win in competition. The paradox is that when a CSR policy is adopted, consultations with workers in supply chain rarely take place. Very frequently, striking words “lies”, “sweatshops” are used to describe suppliers as monstrous “cheaters” in implementation of multinational’s CSR policies¹⁵. Less simplistic studies however seek a response to a situation appearing difficult to understand: why suppliers who can benefit the most from the compliance with CSR requested by their business partner do not cooperate with MNCs? Why suppliers do not make themselves happy and MNCs happy?

Suppliers situated at the bottom of global supply chain have “from bottom to top” perspectives for CSR which is different from or contrary to those of MNCs. CSR is perceived by suppliers in developing countries especially SMEs as a luxury imported from Europe and the US too expensive to afford. This CSR is neither their own voluntary, nor in their capacity to implement.

The key dilemma in the refusal of cooperation with MNCs in implementation is that these suppliers are feeling forced but not spontaneously, imposed by not encouraged, to apply CSR. This appears to be a problem of implementation but in fact a problem of substantive content of CSR. The notable unwillingness in implementing CSR in supply chain then turns out to be against the voluntary nature of CSR as commonly accentuated by employers. We consider a law is good when it achieves a successful enforcement, because it is based on the willingness from the majority of society to respect it once adopted. A law adopted with little democratic consultation with stakeholders who are assumed to respect it will encounter much difficulty in enforcement. It is the same principle for CSR. It is crucially important to define who will implement it and the degree of willingness and capacity of these subjects in imple-

¹⁵ Dexter Roberts and Pete Engardio Secrets, Lies, and Sweatshops. BusinessWeek November 27, 2006.

mentation. The simplified approach of “outsourced responsibilities”, but not “shared responsibilities”, demonstrate how difficult it is for MNCs to ensure the application of CSR, especially when commercial interests enter into direct conflicts with the compliance with CSR.

Most field studies observe positive outcomes of using CSR as a promotional tool to raise awareness of suppliers for respect for labour standards as well as the role of CSR in preventing abusive exploitation. A negative impact however can come from its enforcement by MNCs. ILO’s field study on implementation of Codes of Conduct shows clearly that there is often disagreement between suppliers and buyers about who should pay the added cost associated with implementing codes. In the areas of health and safety, paying of overtime and increased wages, these costs can be substantial for suppliers running on tight margins. Agreement can not always be reached after difficult negotiation and dialogue. However, the question is left open in some sectors where MNCs have less leverage and suppliers are smaller with tighter margins¹⁶. Other field studies give answer to the question: some suppliers struggling to survive will transfer the pressure in tight margins and delivery schedules to workers¹⁷.

Moreover, the confusion of suppliers caused by the inconsistency in CSR standards from different MNCs can be observed. It becomes normal that one supplier producing at the same time for several MNCs is imposed seven or eight different standards on the same issue. When monitoring is conferred to auditing firms, authentication fees are exorbitant for suppliers. The implementation of CSR is sometimes reduced to the presentation of a certification charged on the basis of the number of employees. The costs spent for repetitive controls according to different MNCs different requirements, some times amount to hundred controls during a period of one year, represent a significant quantity of costs for SMEs and a heavy burden on them¹⁸. We can very well imagine how these costs will be transferred to workers who are supposed to be beneficiaries of CSR implementation. It is also observed that while MNCs are promoting CSR on one hand, the delivery schedule and price given out are more and more tight on the other hand. Unconvinced suppliers see

¹⁶ Ivanka Mamic, *Implementing Codes of Conduct: How Businesses Manage Social Performance in Global Supply Chain*, 2004, ILO.

¹⁷ “Report on Influence of CSR and its Authentication on Chinese Companies”, February 2005, China Enterprise Confederation (CEC).

¹⁸ *Idem*.

MNCs as the beneficiaries profiting from a vicious competition in developing countries¹⁹.

To deal with the race to bottom run by both MNCs and suppliers, the solution addressing fundamental cause would be to empower workers. However, CSR seems to be able to do little in countries where freedom of association is considered as taboo and collective bargaining is less established.

The paradoxical phenomena arising in the process of implementation of CSR bring us back to the discussion related to the nature of CSR: is CSR just a concept or a set of substantive norms. If it is only a concept, it is not enforceable; if it is the latter, its content is too ambiguous and its application scope too vague to ensure its implementation. As discussed above, it may be more appropriate to limit its application scope within the parameters of MNCs where the pre-condition of existence of employment relationship has been set up. Up to now, there is still a serious lack of evaluation on the impact of CSR movement within these parameters. If the outcomes of CSR implementation at this level are proved successful, we may consider progressively moving the application to a supply chain with a carefully sought-out mechanism. The above-mentioned “secondary effects” prove that the conditions may not be mature for MNCs to rush to their supply chain for implementing their CSR policies. These policies can very well fit into their agenda to better treat their “core employees” but are producing little effectiveness or even reverse effects in improving workers’ conditions in supply chains. Many MNCs have seen CSR in supply chain as responsibilities to be transferred to suppliers but not their own duties vis-à-vis workers in the supply chain. They consider their role as a private authority but do not bother to confront the workers of their suppliers. CSR is a commitment and can be realized within the competence of its subjects. Any artificial implementation exceeding the current capacity of subjects will risk being distorted.

Some may argue that the enforcement of hard law could have also encountered as much unwillingness of suppliers to cooperate and inefficiency as the implementation of CSR. This is certainly true. It is then interesting to observe the following case which challenges profoundly the motivation of MNCs to promote CSR. Do we really trust MNCs’ good will in such a way that we confer the role of “private governor” to them?

¹⁹ *Idem.*

V. Confrontation between CSR and hard law: A Chinese scenario

Rarely has a national labour law caused so much echo especially at national but also at international level. Chinese, European, American and international workers and employers organizations, concerned governments, NGOs, international organizations are all mobilized to participate in the debate. Although the process has evaluated into a political discourse between different interest groups rather than a technical consultation between labour experts, it provides a precious opportunity to observe a confrontation between CSR of MNCs and hard law at national level as well as MNCs' choice between responsibility and profits when they feel their sole objective of maximizing profits is being directly threatened.

Foreign investment has been playing a key role in contributing to the Chinese economic boom. At the beginning of its opening, China made enormous efforts to attract and protect foreign investment: hundreds of laws and regulations related to all forms of foreign investment were adopted. Most of them provide more favorable conditions to foreign than to domestic enterprises. Around one hundred bilateral investment treaties have been concluded to promote foreign investment. However, the measures regulating treatment of foreign investment is oriented to providing favorable conditions and privileges to foreign companies including facilitating their establishment and providing them tax incentives, etc. A well-established legal framework removing obstacles of foreign investment and protecting foreign corporations' rights is in absolute disproportion with the level of binding regulations imposed on foreign corporations. Labour regulations are particularly rarely addressed. Although the principle of sovereignty applies and foreign investment should in principle respect labour norms in hosting country, no labour legislation was followed until a Labour Code was adopted as late as 1994. Still there the application scope of this Code is originally limited to Chinese state-owned enterprises. It provides many labour law principles that are not really enforceable. Other labour regulations were progressively adopted but there is much to be improved in labour legislation and enforcement. For a long time, foreign investment operated effectively in a labour market approximate non-regulated one. An extreme flexibility of labour force has been a key element contributing to the transformation of China into a world workshop. However, workers are the direct

victims bearing consequence of non-regulation of labour market. The number of disputes has increased ten-fold between 1995 and 2004 and become more and more characterized by acute conflicts.

As a country attracting the most foreign direct investment and producing for the whole world, the promotion of CSR is originally initiated by MNCs investing in China. On the one hand, Chinese companies expanding to transnational size or those having the ambition to do so are trying to catch up with the pace of experienced multinationals by promoting CSR. On the other hand, SMEs having a dependence on export have all interests in satisfying their business partners' requests. It is no wonder how much publicity CSR has been receiving in China. Many business leaders are talking about CSR without questioning what it implies for Chinese companies, how to implement it, and the linkage with national legislation.

Centered by the Labour Code adopted in 1994, a package of labour legislation has been adopted consecutively. Labour law is traditionally low on the legislative agenda but the law-making process has very recently been accelerated, coupled with other measures adopted to improve the protection of workers' rights. The Government seems determined to adopt a hard law approach as response to globalization, in leaving multiplication of CSR initiatives in the hands of employers. The legislative efforts have been culminated by the birth of the draft Labour Contract Law which is claimed as the core of the Labour Code and which should have been adopted immediately after the adoption of the Labour Code in 1994. The Draft Law is generally regarded as protective vis-à-vis workers by providing standards on setting up labour contracts, restricting abusive labour termination, empowering workers to negotiate over employment policies.

The number of opinions received by the legislative body amounted to a record in the history of pre-legislation consultation with the public. Some of the comments from US and European based MNCs were interpreted by many groups as coming out strongly against the draft law²⁰. Both American and European Chambers of Commerce made critical comments including, among other things, demanding unilateral authority over workplace policies and procedures because "requiring the consent of the trade union before such changes can be made overly burden-

²⁰ Behind the Great Wall of China, *Global Labour Strategies*, also *Undue Influence: Corporation Gain Ground in Battle over China's New Labour Law*, March 2007, *Global Labour Strategies*.

some”²¹, stating the consequence if the draft is adopted as “negatively impact the PRCs competitiveness and appeal as a destination for foreign investment²²” and concluding “we doubt whether it is necessary to carry out such significant changes”²³. The tension was further aggravated by an “unexpected” intervention of a group of human resource managers of US enterprises who were said to have threatened to divest from China if the draft law was enacted. The incident, coupled with the continuous the corporations “lobbying” activities, was broadly mediatised both in China and at international level, and is causing reactions from Chinese trade unions, NGOs, international trade unions as well as trade unions and governments of MNCs’ home countries²⁴. Some of them have strongly criticized the position of the MNCs operating in China.

Inevitably, China has every reason to be transformed into a battle field where hard law has to confront the challenges from soft law. We are currently witnessing an unprecedented debate surrounding the draft Labour Contract Law in China as well as the incidents taking place during its consultation process. The comments on the draft law may be technically constructive but this technical aspect seems to have little importance in this story. The central question goes beyond technical aspects of the draft law but focuses on the role and the power of the MNCs in Chinese and global economy. The major concern is that people see how influential MNCs can be when their fundamental interests of making profits enter into conflicts with the protection of workers. Many commentators rightly pointed out that the behavior of MNCs in China is in direct contradiction with CSR commitments that they have been promoting for years, and the conduct of MNCs just confirms the mistrust from those who doubt with multinationals’ motivation in promoting CSR.

Some labour academicians name the situation as “the unprecedented crisis of labour law in the context of globalisation”²⁵ and recall strengthening labour legislation, empowering workers and reinforcing the cooperation between trade unions of different countries for joint

²¹ U.S -China Business Council comment on the Draft Law p. 4.

²² Comments and Suggestions on Revision to Labour Contract Law, American Chamber of Commerce in Shanghai, April 19, 2006.

²³ *Idem*.

²⁴ The Chinese Draft Contract Law – a global debate, Hélène Ahlberger Le Deunff, CSR Asia Weekly Vol. 3 Week 17

²⁵ Liu Cheng, the Crisis of Labour Law in the Context of Globalization and its Solutions, 22 May, 2006.

actions. Furthermore, “There is a trend to criticize labour law with human resource management theory and confuse or even replace labour law with CSR” and some trans-national corporations “in theory, they criticize labour law with human resource management theory, and want to replace labour law with CSR. In practice, they compel governments to deregulate the trade unions to concede by way of capital shift. These behaviours are producing sweatshops all over the world, including both developing and developed countries”²⁶

If this conflict in CSR versus labour law represents the confrontation between host government and MNCs, there are other confrontations between different groups representing and combating for their own interests in a developing country affected by the globalization like China: local companies versus MNCs, Local workers versus MNCs, Local workers versus Local employers. Actors in labour market are pluralized and there are conflicts and overlapping between their interests: local companies situating in the middle of supply chain have at the same time the status of employer and employee, and may wish to be organized to from one hand bargain with their MNCs buyers against a “sweat price” and the other with their workers; local government may intervene by requesting MNCs to respect regulations on trade unions amongst their workers locally engaged; local workers may wish to request for improvement of working conditions directly from their employers and indirectly from MNCs. Whether either tradition hard law or the CSR or the combination of the both can respond to the complication of relations between multiple actors seems not to be a question to be resolved by one group of people only.

VI. Conclusion

This article does not aim to identify the substantive content of CSR, nor formulate suggestions or recommendations for a better implementation. It aims to share some different visions of CSR from those suppliers situated at the end link of a global production chain and who are voluntarily or involuntarily becoming the agents of implementation. It also aims to explore the unintended effects produced in practice through implementation of CSR, which demonstrate that a lacuna in procedural

²⁶ Liu Cheng, *Legal Protection of Workers' Human Rights in China*, p. 3, 2006.

norms for application of CSR may lead discretionary and arbitrary practices in the supply chain vis-à-vis suppliers and even abusive practices vis-à-vis workers.

What globalization does not change is the vulnerability of workers. Nothing can stop employers' voluntary engagement in improving treatment of workers. However, CSR has its limit since it shares exactly the same weaknesses of hard law in terms of lack of a mechanism to put the concrete content of labour norms into effect. It cannot become the sole, reliable and especially not a universal response to address the core problem of correcting workers' vulnerability. Too much reliance on soft law will just aggravate workers' situation. An artificial enforcement in supply chain going beyond the boundary of scope of MNCs by using their dominant position in the economy has been proved not only to be ineffective but also to risk producing effects contrary to the original objectives of CSR. Up to now, considering both the complicated context under which the movement starts up and the complex system in which it is intended to be implemented, it is impossible to give a simplistic response to the question whether CSR is a good or bad thing or the effects produced by CSR at global level is positive or negative. Also, there is a lack of consistent criteria to evaluate the impact of the implementation of CSR at global but not only at individual company level. CSR as it is for the time being, as a product of compromise from different interest groups in a transitional phase to a fair globalization, should have only a temporary mandate focusing on promoting the concept and raising the awareness of business actors. However, the rest of its functions, especially when it is about fulfillment and enforcement of the principles it contains, deserve a very cautious advancement.

Where is law in development? The International Labour Organization, cooperative law, sustainable development and Corporate Social Responsibility

Hagen Henry¹

“L’ institution économique qui a le plus d’avenir dans le monde contemporain est la société coopérative” (Barnes)²

I. Introduction

According to its mandate, which is unique among the international organizations,³ the International Labour Organization (ILO), almost from its inception, has taken part in the development of cooperatives all over the world.⁴ Among other activities the ILO has promoted the legal framework required for this type of association whose members “meet their common economic, social and cultural needs and aspirations through a jointly owned and democratically controlled enterprise.”⁵

¹ COOP Programme Manager, International Labour Office, Genève.

² Barnes, William S., *La société coopérative. Les recherches de droit comparé comme instruments de définition d’une institution économique*, in: *Revue internationale de droit comparé* 1951, 569 ff.

³ cf. ILO Constitution, Article 12.3.

⁴ one year after its inception in 1919 the ILO established a Cooperative Branch.

⁵ cf. ILO Recommendation No.193 on the promotion of cooperatives (Recommendation 193), ILC 90-PR23-285-En-Doc, June 20, 2002, Para.2.

Since 2002, therefore, the ILO has recognized cooperatives as enterprises, and recommends that this type of enterprise be granted legal person status. The ILO is thus in favour of a multiplicity of legal forms for enterprises.

This contribution aims to examine the possible link between cooperative law and sustainable development in order to draw some general conclusions about the twin concept of “law and development”. The hypothesis which lies behind this approach is that appeals to enterprises to assume their corporate social responsibility (CSR) – and except for possible contractual obligations it is only a matter of appeals – would be more successful if CSR were a complement to legal obligations rather than a substitute for them.

The title of the present contribution “Where is law in development?” alludes to the title of a dossier prepared by Michel Virally in 1974 entitled “Où en est le droit dans le développement” (What is the status of international law in development?).⁶

This is not a game of words. The interesting point in our context is less the fact that Michel Virally’s work continued a systematic discussion⁷ on the important function of law, and thus on the role of lawyers in development. The more interesting point is that Michel Virally and his colleagues had no doubts about this function and about the inextricable link between development and law. While this debate⁸ cast no doubt upon the existence of this link, the ever more frequent references today to norms other than law do so.⁹ This is the background to the title of this contribution.

It is sufficient here to refer our readers to the abundant literature on the link between law and development,¹⁰ and to merely indicate some of the epistemological arguments which justify a discussion of the subjects

⁶ Dossier de l’Institut des Sciences Juridiques du Développement, Université de Paris V, Paris 1974.

⁷ As for the history of this discussion, cf. Henry, Hagen, *Co-operative Credit Societies Act, India, 1904. A Model for Development Lawyers?*, in: *100 Years Co-operative Credit Societies Act, India, 1904*, ed. by Hans-H. Münkner, Marburg: Marburg Consult 2005, 135 ff., footnote 19.

⁸ As part of the discussion on the New International Economic Order which was triggered by the so-called oil crisis in 1973.

⁹ for example: “ethics”, “legitimate action”, “fair”. In the discussion on a constitution for the European Union frequent reference is being made to “community of values”, whereas the first President of the European Community, Hallstein, used to refer to “legal community”. Hofmann (Gunter, *Ein Mann für die Elite. Der Politologe Michael Zürn ist Direktor der neu gegründeten Hertie School of Governance*, in: *Die Zeit*, 22.4.2004, 18) and Kaube (Jürgen, *Keiner schlafe. Jeder regiere: Wozu eine “Hertie School of Governance”?*, in: *Frankfurter Allgemeine Zeitung*, 24.4.2004, 33) give other examples for this shift.

¹⁰ cf. footnote 7.

mentioned in the second part of our title. What permits us to tackle the link between development and law is the fact that we have already linked them through our perception of the two concepts. For if it is true that without peace there can be no development,¹¹ and that without justice there can be no peace,¹² and if it is also true that the principal function of the law, independently of time and space, is to render justice,¹³ then it follows that there is an epistemological link between development and law.

Since the 1970s profound socio-political, socio-economic and socio-psychological changes, the results and causes of what is known as globalization, have perturbed the law, or rather the perception and concept of law, much more than they have marked the concept of development. Because of these changes, the law is in danger of losing its functionality in relation to development.

Before discussing this risk, the present contribution aims to demonstrate that law can serve development. The example of cooperative law illustrates the case.

II. Law in the service of development: Cooperatives, sustainable development and cooperative law

1. Sustainable development

By “development” we mean change directed towards the realization of human rights.¹⁴ This statement of meaning saves entering into countless definitions. It reminds us that the simple affirmation of these objectives does not constitute their realization. On the contrary, the efforts made to proclaim human rights may make us used to disregarding the

¹¹ cf. for example ILO Constitution and United Nations Charter.

¹² cf. for example Kaufmann, Arthur, *Gerechtigkeit – der vergessene Weg zum Frieden*, München: Piper 1986.

¹³ Supiot (Alain, *Homo juridicus. Essai sur la fonction anthropologique du Droit*, Paris: Seuil 2005, 24) writes: “L’œuvre juridique répond au besoin, vital pour toute société, de partager un même devoir-être qui la prémunisse de la guerre civile”.

¹⁴ cf. Bryde, Brun-Otto, *Die Rolle des Rechts im Entwicklungsprozeß* in: *Die Rolle des Rechts im Entwicklungsprozeß*, ed. by Bryde and Kübler, Frankfurt am Main: Alfred Metzner Verlag 1986, 9 ff. (10). Cf. also the principles of the Global Compact.

For the continued effort to refine the concept, cf. Severino, Francesca, *The Term Development in the Thesauri of International Organisations*, in: *The European Journal of Development Research*, Vol.19, 2/2007, 327 ff.

importance of their real implementation. Our definition indicates that development is a movement towards objectives which are not yet attained and it includes the greatest number of concrete goals, such as the establishment of the rule of law and of democracy, the reduction of poverty, etc.

Among the specific goals to be reached through development efforts is that of sustainable development.¹⁵ The 96th session of the International Labour Conference 2007 endorsed this goal and linked it to enterprise promotion by the ILO. The provisional record of this Conference recognizes the link between the concepts of sustainable enterprises and sustainable development in its wider sense, integrating the economic, social and environmental aspects.¹⁶ To this should be added the aspect of political stability which must have been implied by the Conference in its frequent references to peace as a prerequisite for sustainable development.

Positive as it may be, this recognition of the link between the concepts of “sustainable development” and “sustainable enterprise” cannot hide its weakness: the text speaks of “social” instead of “societal”; it includes the environment – which is a condition for action – in a series of variables which can be manipulated as we please; there is a danger of reinforcing a misunderstanding permitting a concept of enterprise which would not, per se, include the element of sustainability.

Since 1995 the cooperative principles elaborated by the International Cooperative Alliance (ICA)¹⁷ include that of “Concern for community” according to which cooperatives “work for the sustainable development of their communities through policies approved by their members.”¹⁸ This principle, together with the other ones elaborated by the ICA, is incorporated in ILO Recommendation No. 193.

2. The functionality of enterprise types in relation to sustainable development

2.1 General

In a free market economy all enterprises have the possibility of acting in favour of sustainable development. And many do so. But this

¹⁵ not to mention but the MDG (Goal 7).

¹⁶ ILC 96-PR 15-2007-06-0102-Fr.doc., Introduction, Para. 8; Conclusion Para.3.

¹⁷ the ICA regroups some 220 cooperative organizations in 84 countries. It is an association under Swiss law, the largest and possibly oldest NGO in the world.

¹⁸ 7th cooperative principle, ICA Statement on the cooperative identity, in: International Co-operative Review, Vol. 88, no. 4/1995, 85 f.

fact does not tell us whether the distinctions that can be made between different types of enterprise, particularly between different legal types, transforms this potential into an increased probability of realization. In other words, the question is whether one specific legal structure lends itself better than another one to a particular goal. This point should not be confused with the question of whether the pursuit of sustainable development can (and should) be formulated as a legal obligation for enterprises. With regard to the latter question, the laws of thermodynamics which govern the transformation of non-renewable natural resources, tell us that it is probably impossible to formulate legal obligations concerning them. But that does not exclude seeking to give enterprises a legal structure in such a way as to increase the probability that they will contribute to realizing the political goal of sustainable development. Here lies the difference between the economic analysis of the law, which economists call for, but which certain layers do not seem to appreciate,¹⁹ and a legal analysis of the economic, for which we propose to develop the tools.

Our hypothesis is that the legal structure of an enterprise is not neutral; this is true not only of the immediate (economic) goals to be attained, but also of the more general (political) objectives which today include that of sustainable development.

2.2. Cooperative societies

In another context we concluded that – however imperfectly – the structure and operation of cooperative societies lend themselves well to answering the needs for economic security, social justice, attention to natural resources and political stability, thus to the four requirements of sustainable development.²⁰

To say that the structure and operation of cooperative societies lend themselves well to the pursuit of sustainable development – does this amount to saying that only the legal formalization of cooperatives, i.e. granting them the status of legal persons, would produce these effects?

¹⁹ Posner, Max Weber. As for doubts as to the validity of the approach, cf. lately Gazal-Ayal, Oren, *Economic Analysis of Law in North America, Europe and Israel*, at: <http://www.bepress.com/rle/vol3/iss2/art11>

²⁰ cf. Henry, Hagen, *Challenges and Opportunities of Globalization for Cooperatives and Cooperative Law*, published in Spanish as “Retos y oportunidades de la globalización para las cooperativas y el marco legal cooperative”, in: CIRIEC 18/2007, 124 ff. Cf. also Birchall Johnston, *Cooperatives and the Millenium Development Goals*, ILO Cooperative Branch & Policy Integration Department and Committee for the Promotion and Advancement of Cooperatives, Geneva: ILO 2004 (limited to fewer, but more precise goals) and “Zukunftsperspektiven für Genossenschaften. Bausteine für typgerechte Weiterentwicklung”, ed. by Hans-H. Münkner und Günther Ringle, Bern: Haupt 2006. It might be rewarding to reread William Kapp in this context.

Almost 60 years ago Barnes had no hesitation in answering this question in the affirmative. He wrote: “The simple existence of a (cooperative) institution is ... never sufficient by itself: it is necessary to add the weight of the law to complement the process. It is the role of the lawyer to work out the details of the institutional structures in society”²¹ Numerous ILO documents seem to agree on this point by stressing the importance of “legal institution building” to compensate for the “low level of organization”.

Lawyers should refuse to judge whether only the legal formalization of cooperatives, that is making them legal persons, produces positive effects for sustainable development. This question falls into the empirical domain of economic science.²² For lawyers the question is whether the structure of cooperatives envisaged by cooperative law – that is their normative underpinning – is compatible with sustainable development and whether it orients cooperatives to work towards this development. In order to answer this essential question, lawyers can only resort to experience gained in time and space, with all the imponderables that this implies.

Before we can reach a conclusion on the role of law in development we must first ask “What is law?”.

2.3. The functionality of law in relation to development

No lawyer is unaware of Hart’s résumé concerning the definition of law:²³ “Few questions concerning human society have been asked with such persistence and answered by serious thinkers in so many diverse, strange and even paradoxical ways as the question ‘What is law?’” And Tamanaha adds: “There is no ‘law is’ ... it has no essence”²⁴

But can we talk about a link between development and law, of a function of law and thus a role of lawyers in development unless we have previous ontological knowledge of the essence of law?²⁵ However that may be, let us note the following: among the range of phenomena governing our behaviour we find law,²⁶ everywhere or almost every-

²¹ Barnes, *op. cit.*, 570 (translation by the author).

²² in German we call this ‘Strukturwissen der Transaktionsökonomie’

²³ Hart, Herbert L.A., *The Concept of Law*, Oxford: Oxford University Press 1961, 1

²⁴ Tamanaha, Brian Z., *A Non-Essentialist Version of Legal Pluralism*, in: *Journal of Law and Society* 2000, 296 ff. (313). Cf. also Assier-Andrieu, Louis, *Le droit dans les sociétés humaines*, Paris: Nathan 1996, 40.

²⁵ cf. the proceedings of the 2007 Conference of the Association Internationale de la Philosophie du Droit (IVR).

²⁶ the others being ethics, religion and moral.

where²⁷ in time and in space; law is an instrument par excellence for the implementation of public economic policy;²⁸ it is through their legal structure that economic institutions²⁹ deploy a great, if not their greatest, potential, a fact which is rarely clarified,³⁰ to fulfill its obligation to contribute to eradicating the negative consequences of informality,³¹ the ILO cannot dispense with the law because only natural or legal persons are subjects of law and may only as such participate in market transactions.

But the development function of the law is not limited to the legal structuring of institutions, aiming to give them the status of legal persons or market actors. Without itself being reality, the law is a “constantly renewed way of envisioning reality ... An intermediary between the world of tangible facts and the ideal world”³² At the same time as it permits a continuous rebalancing of the different forces operating in a society, law represents an equilibrium between these visions. This is the functionality of law in development.³³

By law we mean therefore that set of phenomena by which a group arrives, in a peaceful way, at a consensus on these visions, by which it constantly renews the consensus – which has become the foundation of

²⁷ doubts expressed by Sinha, Surya Prakash, Non-Universality of Law, in: *Archiv für Rechts- und Sozialphilosophie* 1995, 185 ff.

²⁸ Assier-Andrieu, op.cit., 39 f.; Barnes, op.cit., 574; Kemmerer, Alexandra, *Ordnungskraft*, in: *Frankfurter Allgemeine Zeitung*, 11.1.2007, 40, referring to Eberhard Schmidt-Aßmann; Wassermann, Rudolf, *Sprachliche Probleme in der Praxis von Rechtspolitik und Rechtsverwirklichung*, in: *Zeitschrift für Rechtspolitik* 11/1981, 257 ff. (258).

²⁹ among the many definitions of ‘institutions’ the one by North seems to be the most widely known. He writes: institutions are “humanly devised constraints that structure political, economic, and social interactions. They consist of both informal constraints (sanctions, taboos, customs, traditions and codes of conduct) and formal rules (conventions, laws, property rights)” (North, D., *Institutions*, in: *Journal of Economic Perspectives* 1991, 97 f.). Granger (Roger, *La tradition en tant que limite aux réformes du droit*, in: *Revue internationale de droit comparé* 1979, 37 ff. (44 et 106)) writes: “L’institution peut être définie comme le regroupement de règles de droit, agencées selon un certain esprit, autour d’une idée ou fonction centrale dont elles sont les instruments de réalisation. “Whereas North represents rather a sociological/economic view, Granger is close (cf. especially p.106) to the “General System Theory” (cf. for example Bertalanffy, Ludwig von, *Perspectives on General System Theory*, ed. by Edgar Taschdjian, New York: George Braziller 1975). We prefer the definition by Granger.

As for the culture specific elements of legal persons, cf. Henry, Hagen, *Les “hors traduction” en droit. L’exemple des coopératives comme personnes juridiques en milieu africain*, (forthcoming). Cf. also Suptot, op.cit., 53.

³⁰ to my knowledge, the link between economic development and the attribution of legal status to economic entities has not been researched. Only Fikentscher (Wolfgang, *Modes of Thought*, Tübingen: Mohr 1995, pp. 183, 219, 258 ff., 359, 372, 379, 387, 470 f. et passim) frequently mentions this link. Cf. also Wenke, Hans, *Geist und Organisation, Recht und Staat*, Heft 241, Tübingen: Mohr 1961. Cf. also the writings of Mary Douglas. Through an interdisciplinary approach the economic analysis of law, of which Posner was one of the pioneers, should finally be complemented by a legal analysis of the economic. Cf. also Javillier, Jean-Claude, *Responsabilité sociale des entreprises et Droit: des synergies indispensables pour un développement durable*, in: *Governance, Droit International & Responsabilité Sociétale des Entreprises* (forthcoming), pp. 54 ff., around footnote 128.

³¹ cf. lately ILO GB, 3/2007, *Committee on Economic and Social Policy: “informality is gaining ground and remains a great challenge”*.

³² Assier-Andrieu, op.cit., 38, referring to Gurvitch (translation by author).

³³ there is a link between Human Rights, development law and comparative law which should be utilized.

its political order – and upon the respect of which it insists in order to ensure its continuity.

This balance is never achieved once and for all. It will depend, moreover, on the concept and the perception of the law that members of the group create for themselves during this process. As we mentioned at the beginning of our contribution, globalization disrupts these concepts and perceptions. The technological innovations of recent decades act primarily on the effects produced by the conditions of time and space on our lives. They imply a reorientation within new time frames and a spatial reorganization of social life. Already the time periods and distances may be reduced to nothing.³⁴ To a greater and greater extent technological innovations allow not only deperiodizations, but also detemporalizations, not only deterritorializations, but also the despacialization of life.

To capture the disruptions which affect our ideas about law we propose the concept of internormativity. By this we mean two concomitant phenomena, that is the interconnection of the different “rules”³⁵ of behavior and the process of juridicization³⁶ and of dejuridicization of these rules, i.e. their movement from law to non-law and vice versa.³⁷

One expression of globalization is the fact that the interconnection of the different rules of behavior no longer plays only at the national level. While the conditions of time and space gave rise in the past to a multitude of legal systems spread across the globe like a mosaic, we are now experiencing what Emongo (Interculture, No. 33, 1997) calls interculture.³⁸ That is to say that the multitude of internormativities in the world is reproduced in ever smaller spaces. Within the space of a state, the

³⁴ cf. the writings of Paul Virilio.

³⁵ in quotation marks as the juridical is also to be found outside of “rules“.

³⁶ Sally Falk Moore (Law as Process. An Anthropological Approach, (London: Routledge and Kegan Paul). Also in: Law and Society Review, Vol.7, 1973, 719-746, cited by Bentzon, Agnete Weis, “Negotiated Law – the Use and Study of Law Data in International Development Research”, Access, Control and Management of Natural Resources in Sub-Saharan Africa – methodological considerations, ed. by Christian Lund and Henrik Secher Marcussen, International Development Studies, Occasional Paper no.13, (Roskilde: University Press 1994), 92-108): “Processes of regularization give social reality permanent form (organization), order and predictability.” Cf. also Diamond, Stanley, “The Rule of Law Versus the Order of Custom”, Social Research 38, 1971, 42 ff.

³⁷ these processes are neither good nor bad per se. In addition, their direction does not depend on political will only. Cf. Prantl, Heribert, In welcher Welt wollen wir leben?, in: Universitas 6/2007, 555 ff. (558).

³⁸ Emongo, Lomomba, L’interculturalisme sous le soleil africain: L’entre-traditions comme épreuve du noeud, INTER culture, no. 133, 1997, 10, describes the intercultural as follows: “... le fait interculturel n’a rien à voir avec la seule cohabitation plus ou moins harmonieuse, la coexistence pacifique sans plus. L’interculture ne s’épuise ni dans la recherche d’un consensus universel, ni dans un modus vivendi universel, qu’il soit éthique, social, du droit international, etc. Le fait interculturel est la toile d’araignée dans sa totalité, c’est le donné par excellence dont est concerné chaque fibre, chaque chose, tout ce qui est, le divin, le cosmique, l’humain.” Cf. also Obiora, L. Amede, “Toward an Auspicious Reconciliation of International and Comparative Analyses”, in: The American Journal of Comparative Law 1998, 669 ff.

dominant political order, we are in the presence of several divergent inter-normativities, based on cultural assumptions which are very different from each other. The state has become too small an entity for global actors, and too big to manage the intercultural experience of today.³⁹

With regard to the movement from law to non-law and vice versa, we are confronted by a paradox. On the one hand there is a juridicization of practically all social links and relations. On the other hand, the manner in which this juridicization takes place will eventually deprive law of its juridical content, which will make it more difficult – if not outright impossible – to act in favor of sustainable development. After “cooperative law in the service of sustainable development” we therefore now move on to “law against development”.

III. Law against development

The current mode of juridization is that of harmonizing laws. Taken to its extreme, this is also the most thorough method of dejuridization. On the basis of a long tradition,⁴⁰ this mode may be explained today by two aspects of globalization, namely the legal policy aspect and the economic aspect.

As regards legal policy, the spatial reorganization of social life determines the trend in the legislative processes: from the national level to the regional, international and supranational, and from the public sphere to the production of standards by private bodies.⁴¹ National law has lost its exclusive role in the legal systems. The distinction between national and international law is no longer operational. The transnationalization of material law, rather than of the legislative process, has become a reality. This trend was already discernible in the 1950s.⁴²

³⁹ cf. Koizumi, Tetsunori, Cultural Diffusion, Economic Integration and the Sovereignty of the Nation-State, in: *Rechtstheorie*, Beiheft 12, 1991 (?), 313 ff.

⁴⁰ for more details, cf. Henrÿ, Hagen, *Kulturfremdes Recht erkennen. Ein Beitrag zur Methodenlehre der Rechtsvergleichung*, Helsinki: Forum Iuris. Veröffentlichungen der Rechtswissenschaftlichen Fakultät der Universität Helsinki 2004, mainly footnote 147.

⁴¹ cf. Bogdandy, Armin von, *Gubernative Rechtsetzung. Eine Neubestimmung der Rechtsetzung und des Regierungssystems unter dem Grundgesetz in der Perspektive gemeineuropäischer Dogmatik*, Tübingen: Mohr Siebeck 1999; id., *Democrazia, globalizzazione e il futuro del diritto internazionale*, in: *Rivista di diritto internazionale* 2004, 317 ff.

⁴² already Jessup, Philip C., *Transnational Law*, Yale University 1956 and Schnorr, Gerhard, *Das Arbeitsrecht als Gegenstand internationaler Rechtsetzung*, München: Beck 1960.

As for the economic aspect, we are witnessing a profound transformation of the system of production: from the production of goods and services to the production of knowledge, which is very capital intensive. Only a global capital market can support this production. In order to yield returns which are attractive to investors, the markets have to deregulate and submit themselves, more and more, to the rules of the world financial market.⁴³ The harmonization of economic law, in general, and of the law of enterprises, in particular, including cooperatives,⁴⁴ are both the desired preconditions for this and the desired consequences.

This harmonization certainly permits cooperatives to participate in the markets on the same footing as other types of economic organization. But it also produces effects which might threaten the distinctive character of cooperatives,⁴⁵ thus weakening their capacity to promote sustainable development.

The harmonization of cooperative law is only one example among many other procedures and mechanisms⁴⁶ which aim beyond harmonization at the unification, even the uniformization and homogenization of laws.⁴⁷ This homogenization culminates in the patenting of the results of research in biotechnology⁴⁸ and leads to what is faintly reflected in our monstrous expression: “verschriftlichte Vereigentumsgesetzlichung aller Rechte und allen Rechts.”

The homogenization of laws works against development. The paradigm of sustainable development is an expression of the principle of diversity, and diversity is the source of life. The principle of diversity has two aspects, namely biodiversity and noodiversity, or cultural diversity. Although this principle does not require the protection or the preservation of particular types of economic organization, the only way of

⁴³ the transformation of stock exchanges in the form of associations into stock companies is the most striking example of this evolution.

⁴⁴ in a double sense: harmonization of cooperative laws across national borders and the harmonization, if not homogenization, with the law on capital centered companies. Cf. Henry, Hagen, Retos y oportunidades ..., op.cit., footnote 22.

⁴⁵ pour plus de détails, voir note en bas de page 20.

⁴⁶ cf. Henry, Kulturfremdes Recht ..., op.cit. pp.111 ff. To mention also the concomitant loss of languages and of laws. As for the first mentioned phenomenon, cf. Millán, José Antonio, Las lenguas del mundo, in: El País, Babelia, 24.2.2007, 12 f.; Mit jeder aussterbenden Art verlieren wir Millionen Jahre Evolutionsgeschichte”, in: Frankfurter Allgemeine Zeitung, Mai 2007, N2; Müller-Jung, Joachim, Selbst Entzücken ist hierfür ein zu schwacher Ausdruck, in: Frankfurter Allgemeine Zeitung, 18.1.2007, R 12.

⁴⁷ the unification of laws remains the supreme goal of comparative law. Cf. footnote 40.

⁴⁸ cf. lately Lasserre, Sylvie, L'or vert, in: Le temps, 29.8.2007, 14 f. and Tempsteigerung, in: Neue Zürcher Zeitung, 7.6.2006, 26.

respecting the principle is by including knowledge of the maximum number of types in the traditions. Only concrete practical experience will consolidate this knowledge.⁴⁹ Therefore it is not sufficient⁵⁰ to concern ourselves with biodiversity. Without cultural diversity, including legal diversity, biodiversity may certainly be protected but it cannot be preserved.

The situation is complicated by profound socio-psychological changes caused by the necessary reorientation within the new time frames. The progressive individualization of human beings, already begun by urbanization and its phenomena of massification and of social distancing, continues through the exponential multiplication of possibilities for one-time contacts with others.⁵¹ Clearly, in such situations confidence as the foundation of law cannot be established on the basis of familiarity. On the other hand, the easy contacts provided by the new forms of communication make possible the continuous (re)negotiation of the relationships between individuals and/or legal entities.⁵² This gives rise to an empiricization of the law.⁵³ If there is no will to establish lasting relationships, that leads in the long term to a de-institutionalization of the law and finally to its deconceptualization.

IV. Conclusion

What is the choice for ILO?

“Fair globalization” or “une mondialisation juste”?⁵⁴ “Normes” or “standards”?

Is this another game of words? A preference for a particular language, or even a culture? Not at all! “Juste” is part of the legal world; “fair” relates to morals or ethics.

⁴⁹ it only seems to be a paradox. Cf. Henry, *Kulturfremdes Recht ...*, op.cit., 98; Millán, op.cit.

⁵⁰ but it is vital. Cf. Hulot, Nicolas et Hubert Reeves, *Il est urgent de protéger la nature*, in: *Le Monde*, 16.2.2007, 20; Rifkin, Jeremy, *El primer espacio político transnacional del mundo*, in: *El País*, 24.3.2007, 16.

⁵¹ for more details, cf. Henry, Hagen, *On Similarities and Differences in Thinking: A German Lawyer in Finland*, in: *Nordic Law – Between Tradition and Dynamism*, ed. by Jaakko Husa, Kimmo Nuotio and Heikki Pihlajamäki, Antwerp – Oxford: Intersentia 2007, 65 ff. and Kirsch, Guy, *Die Eliten sollten Vertrauen in der Gesellschaft besonders ernst nehmen*, in: *Neue Zürcher Zeitung*, 26./27.8.2006, 13.

⁵² the idea is not new. “Negotiated law” was already discussed in the 1980s.

⁵³ cf. in this sense Henry, *Co-operative Credit ...*, op.cit.

⁵⁴ cf. “Une mondialisation juste. Créer des opportunités pour tous”, Genève: O.I.T., Commission mondiale sur la dimension sociale de la mondialisation (sur l’initiative du DG de l’O.I.T., Juan Somavia), at: www.ilo.org/public/french/wcsdg/docs/report/pdf.

The problems posed by implementing law should not be sufficient reason for abandoning the idea of law having a function in development. The popularity of ILO's NATLEX site⁵⁵ shows how many people need information about law. The functionality of law in relation to sustainable development is certainly weakened.⁵⁶ The implementation of law in states living the "intercultural" requires much imagination on the part of lawyers.⁵⁷ The new types of legislative processes and mechanisms diminish for the time being the chances of stabilizing political systems through the participation of the greatest number.⁵⁸ But the mere fact of reducing the range of enterprise types by an excessive homogenization of laws means that the pursuit of sustainable development becomes more difficult.

The socio-psychological foundation of law has to be reinvented. The nature of law and of legal institutions is that they reduce the possibilities for human nature to lead people to act against the common interest. The same applies to the behavior of enterprises. This is the meaning that we would like to give to a sentence – very Kantian –⁵⁹ written by J.-C. Javillier, to whom we pay homage through this contribution. He writes: "L'entreprise pour être durable requiert la mise en oeuvre de techniques juridiques et comptables qui rendent possible les pratiques de RSE" ("For an enterprise to be sustainable legal and accounting techniques must be in place which facilitate the practice of corporate social responsibility").⁶⁰

⁵⁵ according to an oral information by NORMES 24.8.2007, NATLEX is one of the most frequently visited sites of the ILO.

⁵⁶ for additional arguments, cf., Henry, *Co-operative Credit ...*, op.cit.

⁵⁷ some indications may be found at the end of our article entitled "Thesen zur Ent-Rechtlichung sozialer Beziehungen am Beispiel der Bodenrechtsgesetzgebung in Afrika südlich der Sahara", in: *Social Strategies. Monographien zur Soziologie und Gesellschaftspolitik. Monographs on Sociology and Social Policy*, Vol. 41, ed. by N.N., Bern u.a.: Peter Lang (forthcoming).

⁵⁸ cf. Henry, *Retos y oportunidades ...*, op.cit., footnote 22.

⁵⁹ Kant Immanuel, *Zum ewigen Frieden*.

⁶⁰ Javillier, op.cit., 85.

Seeking workplace fairness and the rule of law through ADR

Arnold M. Zack *

We convene during these two days of meetings in confirmation of the shrinking world of 21st century Globalization. We gather as activists in a universal effort to extend the rule of law and workplace fairness. Whether such meetings occur in Europe, Africa, North America or China, the message is the same. We seek to extend to the working citizens of the world, the protections of basic human rights that are reflected in national laws, in national constitutions, in Corporate Codes of Conduct and in international treaties including those set forth in ILO Conventions. That effort has been going on, in the ILO context, since its creation in 1919 with China as one of its founding members. Throughout the intervening years, despite our differing legal and economic traditions, there has been an ongoing struggle between corporations and governments in the arena of worker rights and protections. In the period since the end of the Second World War that struggle has been exacerbated by the breakdown of national and tariff boundaries and by the explosion of multinational corporations and global trade. We now are united in facing the consequences of that explosion on the workplace, on the lives of citizens and in their access to the rule of law within their countries.

We must all certainly agree that exploitation of children at work and forcing humans to work against their will, are and have long been wrong for any society. Such improper practices should be extinguished. Such has been the legitimate goal of the developing states over the centuries, a goal

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that becomes ever more pressing as more and more people move from rural and farming traditions into the fast track of factory work for international commerce.

States enshrine and enhance protections of basic human rights in their Constitutions and/or their statutes and develop laws and procedures to assure these basic human rights for their citizens and their enforcement through the rule of law. States properly undertake to protect their citizens against encroachment and violation of these rights, whether by enterprises, individuals, or corporate institutions which disregard or deliberately violate their employees inherent right to enjoy these protections. Too often the primary motivation for the violation of such rights is the drive to maximize profits for the benefit of the employers or enterprise owners and shareholders, whether based locally or in another country.

Those differing objectives between capital, with a goal of profit maximization and government with a goal of protection of its citizens' welfare, are not new. But compliance with the rule of law is not automatic. Rather it has always been subject to evasion and challenge and efforts to thwart its intent and reach, and requires constant vigilance.

The rule of law has always required administration through procedures geared to protect and enforce those fundamental human rights enshrined in a nation's constitution or as specified for protection by national statute. Achievement of those goals has come through the development of judicial structures and procedures to require compliance and to punish violations of the law. Merely outlawing proscribed conduct even with the most Draconian of punishments in statutes and ordinances, does not automatically achieve the eradication of inhumane workplace conduct. It would be nice if one could simply Google to achieve workplace equity. I think we will all agree that the ideal labor rights dispute resolution mechanism has yet to be perfected, and I am not sure reliance on a nations existing legal enforcement mechanism is sufficient to bring total accountability for violation of labor rights.

States may set forth all the protections they deem appropriate to protect their citizens through their constitutions and in their statutes and, indeed, may prescribe the most sophisticated procedures for investigating and punishing violations of basic human rights, and they are encouraged to do so. But such written protection is not a sufficient guarantee that any government can achieve its proclaimed ideals or its moral objec-

tives in protecting workers in the workplace on their own. Compliance with objectionable laws is not guaranteed.

In an ideal society the enterprises will conform to the law and treat their employees in accordance with the law, as community responsible participants in a law abiding state. If such compliance were a universal standard, we need not be here. The more pressing reality is that enterprises, particularly corporate, do not always see it in their self interest, or the interest of their stockholders to willingly adhere to the constitutionally and statutorily prescribed norms of community behavior. Some do, with peripheral challenges to what they may view as over-reaching government when their disputes are adjudicated in the societies judicial system, with compliance therewith assumed, as expected of good corporate citizens. And some do it out of a sense of morality but are unfairly tested in their good works when their less scrupulous competitors wrest even greater profits out of exploitation of their employees.

It would be a far more gracious world if corporations would recognize the balance between accountability to their stockholders and accountability to the public interest. But too many are unwilling and too arrogant to play by these societal rules and norms. And governmental power and resources for judicial oversight of the rule of law have not kept up with the rapid explosion of factory jobs to effectively police the evaders.

I suggest there are two main reasons for the shortfall, the first being the attitude, motivation and commitment of the increasingly powerful and too often unscrupulous multi national enterprises unwilling to be regulated by the legal constraints, and the second being the attitude, motivation and commitment of the countries where these enterprises are located, and to which they move their enterprises. Workers are eager for jobs but reluctant to run to government to challenge the owners of factories that create them.

As to the first, in addition to the motivation and commitment of the enterprises which employ workers in alleged violation of basic human right as well as national constitutions, laws and regulations, may be the inherent injustice of capitalist employment. The historical legacy of capitalist enterprises, indeed the primary objective for the creation of the enterprise is the maximization of profit.

Corporate enterprise has evolved over the decades as national economies have flourished. Many have become good corporate citizens,

but many others have increased their capacity and efforts to resist reform statutes, and administrative and judicial supervision and restraint. For some corporations their sheer size and political influence dominates the political environment in which they operate, enabling them to flout the law, with minimal risk of being held to task. Corporate takeovers and more recent newspaper accounts of crack downs on some corporate wrongdoers such as Dennis Koslowski of Tyco, Bernie Ebbers of World-Com and Kenneth Lay and Jeffrey Skilling of Enron, show that although laws may in some cases bring justice in the criminal sense, they may be inadequate to assure the benefits foreseen by protective statutes calling for corporate social responsibility. The impact on workers at Enron who lost their jobs, pensions and futures, or those at GM and airlines who have lost their pensions, health care and promised retirements, highlight the determined quest for maximized profit for their investors and top management while disregarding their proclaimed responsibility to community and their own loyal employees. Laws exist to protect workers, pensions and health care benefits for employees. Nonetheless wily corporate leadership too often manipulates or avoid the laws for their personal self interest with scant regard to any obligations under theories of social responsibility. In some cases the course taken is direct violation of the law. In other cases it is evasion of the law, or manipulation of the legal system to achieve results that violate the basic precepts of the social contract. Some get caught, some get penalized and to some extent the Constitution, legal protections and administrative and judicial enforcement machinery do work. But so many do “get away with it” that it undermines that essential component of the social contract: the cooperation and respect anticipated for the respective roles of management and labor in an industrial society. But the response of the others that trouble us the most, are those who too often are unwilling to remain in domains where the socially responsible laws are enforced and who seek to move their whole enterprises or to subcontract or outsource component of their manufacture to other countries with less stringent laws, or disregard for the enforcement thereof. Sometimes these managers are driven by personal or corporate greed, but other times they are driven by the need to survive amidst the unending competition that is a relentless function of our shrinking economic globe.

I was born in the shoe manufacturing city of Lynn Mass, at one point the major footwear provider for the United States. It was not corruption or greed that closed the shoe factories of Lynn including that where my father labored. It was the economic demand of improving

access to raw materials and shifting markets. The statutory protections afforded to the workers in the shoe mills, could not compete with the economic reality of the market place. Those factories are now all gone, first to St. Louis and then abroad. And now, in 2007 we find those shoes made primarily in China. The one city of Dungchuang with 1400 shoe factories produces one billion pairs of shoes per year. China in 2004 produced 6,5 billion pairs of shoes, 55% of the worlds output.

Do the protective labor laws of Massachusetts or the US still apply? Of course not. Do the laws of China apply? Yes. Are they the same? Of course not, due to different wage standards, overtime provisions, health-care benefits, concepts of worker rights or even of freedom of association and collective bargaining and on and on. Should such transnational moves be prohibited to protect the legal rights of workers? Should the legal rights of the country from which the work is shifted be required of the new country so it can be applied to these new workers? Of course not. One cannot halt the movement of commerce to new markets, to improved access to raw materials, to a more efficient or lower cost work force or to greater technology. Nor can one impede the right of the enterprises to take advantage of more favorable national laws. Inevitably, and almost by definition, corporations will continue their effort to maximize profits, in legal and perhaps questionable or even illegal ways. And it is illusory to expect that corporations will suddenly all become good citizens. Even when companies espouse corporate social responsibility: their number one aim continues to be the pursuit of profit. That suggests that they will not always willingly adhere to the laws and regulations of the nations to which they move. Corporations have not only the power to bring jobs and factories to new locations to help provide wage employment for the new industrial society which continues to attract rural agricultural and migratory labor. They also have the power to bring out of poverty those who had had no jobs and those whose agricultural employment has been lost to unfair agricultural tariffs and protectionism imposed to protect the agricultural workers of Europe and North America. And unfortunately, in too many countries they continue to have the power to influence and circumvent the laws and to avoid their enforcement by threatening to move to a still lower wage country next door when confronted with the prospect of enforcement of local wage and protective laws.

And this raises the second impediment to achievement of Social responsibility, the attitude, motivation and commitment of the govern-

ments in the countries to which these corporations move. The new host governments seek the new factories to help overcome unemployment, to counteract stresses of internal migration, to achieve more wage income to fuel economic development, to improve the living standards of their citizens, and to increase the prospect of enhanced international trade from new exports. New factories mean more steady jobs for more people, more income to their citizens, often indeed their first access to wage jobs from a deteriorating agricultural base and from the tragedy of traditional migratory labor. The opening of new factories should also provide unique opportunities for further enhancing the benefits to the new wage earners by ensuring humane working conditions through protective legislation. Will the new host countries fulfill their mandate to enforce and uphold the laws so exquisitely crafted to protect the basic human rights of this new class of wage earners? The societal norms of the world as proclaimed in the ILO conventions cries out for them to do so. The written constitution and statutes of the host country may likewise call on them to do so. The will of the civil servants is also presumably to do so. The protection pledged to wage earners by all these institutions expects them to do so. But too often we hear stories of government officials who are thwarted in their efforts to impose such protective legislation. Sometimes it is at the urging of corrupt higher officials; sometimes it is inherent in the conditions in the Ministries themselves. The Minister of Labor in one Southeast Asian country told me, "our mediators have to take gifts; their government salaries are so low". Sometimes it is out of unspoken fear that the factory may move elsewhere or that the official may be in jeopardy for merely doing his job. Thus I think we all realize that the most beautifully drafted constitution and set of laws, together with the most effective administration and judicial appeals process does not magically bring adherence to the law, especially in the field of human rights, where the marginal benefit of implementing the law may be outweighed by the political and economic imperative of turning ones cheek to allow the treachery of capitalistic enterprise to prevail.

Certainly it would be preferable if the corporations took the high road to participate in Employee Stock Ownership Plans, or if they put employee representatives on their Boards of Directors, or voluntarily participated in German style Co-Determination Schemes. One could wishfully assert that a corporation pursuing profits at the expense of social accountability could not be expected to live long. However I think the opposite may be true, that the life expectancy of such a responsible company may be less than that of its unscrupulous competitors who are more

hardnosed, more susceptible to the ease of operations sustained by graft and corruption, and less willing to adhere to concepts of social accountability. The prospects of constitutional, statutory, administrative and judicial provisions prevailing for the protection of workplace rights in too many areas of the world is mere wishful thinking, let alone a panacea, and indeed prospects for such protection of the rule of law are in grave jeopardy in our profit driven, highly malleable corporate world.

Does this mean that all hope is lost, that corporations will always adhere to their dark side? That governments and statutes and standards are meaningless and that we are on an inevitable race to the bottom?

Hopefully not.

There are two areas outside the traditional role of legislatures and the courts, where the rule of law has made its mark. The first is within the realm of the ILO itself, and the second has been in the realm of the marketplace. In each area, the relationship has not been one of strict law enforcement under rule of law, but rather in the realm of voluntary compliance with the higher ideals of corporate social responsibility.

Since its June 1998 announcement of the Declaration of Fundamental Principles and Rights at Work, the ILO has undertaken a laudable effort to spread its word and influence. At the 87th Session in June 1999, the Director General issued his Report on Decent Work highlighting the importance of the ILO and its Conventions as well as technical assistance, in improving working conditions, providing the platform for international debate and for normative action on workplace social policy affecting the world of work.

After reviewing its positive role over the decades, and the economic changes that have come with globalization, the growth of new non-governmental organizations which are pursuing goals consistent with those of the ILO, and the growing interest of other international organizations in improving workplace fairness, the Director General noted:

“It is a moment when the ILO must once again display its historic capacity for adaptation, renewal and change. The moment of opportunity will not last indefinitely. To take advantage of it however, the ILO has to overcome two persistent problems”.

He then cited first, the institutional reluctance to develop a set of operational priorities among the “exceptional richness of the ILO mandate” and those programs which have “diluted the ILO’s impact, blurred

its image, reduced its efficiency and confused the sense of direction of its staff". The second problem he cited is the burden of the external political and economic changes as well as globalization, which have "led to a greater fragility of consensus among the ILO's tripartite membership" and underscored the need for internal consensus, support and commitment, if the ILO is to assert its proper and potential external influence.

If the ILO is to realize its full potential as the conscience of the world on issues of inherent workplace rights, it must disentangle itself from excessive reliance on governmentally imposed rule of law and continue to pursue its lofty, yet pragmatic ideals through more extra legal means, as do so many organizations with like goals who also espouse and seek implementation of the ILO Conventions. The report extols the activity of NGOs and other civil society associations and notes that the tripartite partners "can greatly benefit from the advocacy skills and resources of civic associations...often in the areas where ILO's own constituents are less represented or not directly involved" Certainly trade unions and employer groups work with such NGOs on the national level; there should be developed a means for them to do the same thing on the international level where national trade unions may lack the credibility, strength and resources that NGOs have to fulfill the ILO mandate.

In his report, the Director General repeatedly stresses the need for the ILO to be able to "respond rapidly to emerging problems or opportunities" citing "abrupt economic crisis or change, natural calamity, a sudden social movement or the aftermath of conflict".

This present session underscores the need for innovation and promptness to "act fast and decisively to consult and cooperate with the other organizations concerned" and to overcome the lassitude inherent in a century old organization where the reality of societal responsibilities, capabilities and talents have moved beyond its original tripartite vision. The rule of law for such an international institution dictates that new tools be innovated and crafted to meet its long term goal of achieving workplace fairness but in the context of a new economic world. One area where the rule of law has made its mark has been by responsible citizenry setting guidelines and norms for society that are more within grasp and to endorse innovative procedures despite the lethargy and historical blinders of the national and even international legal establishments. There are numerous examples on the national level, where the public, guided by standards of fairness set forth in regional or national statutes and ILO conventions, has provided an even more effective pressure on

corporations than have the governments which historically would be expected to bear that primary responsibility. One has only to think back to the Cesar Chavez-led boycott of the grape farms and grape vendors of California. His publicity campaign throughout the US and indeed the world, invoked sufficient consumer pressure on the vineyards and distributors to force them grant the right to organize and engage in collective bargaining, rights assured by the laws of California and the US. It was public pressure that brought conformity to state and national laws and ILO Conventions 87 and 98. Indeed that boycott even extended abroad to where California grapes were sold to have foreign consumers of the American product, by their boycott of grapes join in pressuring the grape growers to conform to the requirements of the California statutes.

That international effort was not the working of international law, but rather an international pressure to force employers to conform to state and national law. We all recognize the weakness of not having international law to mandate the operations and human relations component of contemporary international corporations. International bodies such as the WTO, virtually all regional trade agreements and the banks have dragged their feet by declining to make labor standards a prerequisite for their international funding decisions. Only in February of this year did the World Bank undertake to give some recognition to some of the core labor standards.

What other international rule of law can be invoked to achieve workplace protections in a highly mobile international economic environment? The ILO throughout its near century of operations has been the proponent for workplace fairness and has indeed relied on the support of its member states, as well as the labor and management partners therein to establish its nearly 200 Conventions. There is no better barometer of motivation and commitment to workplace fairness than the implementation of ILO conventions throughout the world. While of minimal practical binding impact on the member countries, even those which have ratified them, the Conventions have been the conscience of the world in the field of workplace fairness. Even in the United States, although we have ratified only 2 of the 8 core conventions, the ILO norms have served as the models for federal legislation which has been a most effective means of controlling forced and child labor, protecting against discrimination, and assuring freedom of association and the right to collective bargaining. Indeed in May 2007 the ILO Fundamental Standards were included as a prerequisite for a number of upcoming Free Trade Agreements.

The same disconnect between endorsement of the conventions and national adherence occurs on the other side as well. Many of the countries which have adopted the largest number of conventions, and thus moving them from the realm of international ideals to national commitments, are often the countries with the most porous record of protecting workplace rights. But the most enduring aspect of the Codes and of their ILO sponsorship is that they provide a societal gauge of what is fair and humane in the workplace. And in the international sphere, even more perhaps than in the national sphere, that international standard has been the rallying cry for unions, NGOs and consumers to provide more meaningful pressure to those corporations which ignore or willingly violate national laws to maximize their profits at the expense of their workers.

That history is now well known. Students and consumers in the US and other countries raised societal consciences as to the exploitation that was occurring in the factories where brand name products were being made under abusive conditions. In the US, the students initiated a nation wide boycott of the logo companies that produce \$5 billion in logo wear for American colleges and universities. That attracted the attention of the brands and turned them around. The students and consumers did what national laws were unable to do; they provided a very real threat to the income and ability of those corporations to continue to maximize their profits on the backs of their employees.

As a consequence of their efforts the students and consumers have shown the way. They have provided a more effective process for bringing conformity to international labor standards, and presumably even to the unenforced laws of the countries where many of the factories are located. Organizations such as SA8000 and Fair Labor Association have developed corporate codes of conduct, now numbering more than 260 by the ILO's count, which are becoming more and more common and becoming more and more important to corporations which are beholden to the increasingly politically sensitive consumers of their products. But we all know that the core of their efforts and success has been in garments, sportswear and toys, all extremely consumer sensitive. And we also know that those products constitute only 5 % of international trade.

The question we now all face is whether corporations producing commodities in factories beyond the reach of these consumer market pressures, will feel the same commitment to adhere to the ILO conventions for workplace fairness. Is there a constituency for the conditions under which freight containers are made, or for the manufacture of tire

rims, or for those toiling in coal mines or working in dam building or even those building computers and automobiles in countries with lax, or inadequate, or corrupt labor law enforcement? Hopefully, the public support for Codes of Conduct in the few existing commodities of production will stimulate interest in applying pressure in other fields of manufacture. I think we all recognize the power and determination of international corporations as they scour the world for factories to meet their consumer demand and to meet their stockholder demands for maximized profit. I think we all too recognize the failure of national and international governments to impose a rule of law on such evasive legal entities as they pursue their profit in the most susceptible countries. But what we are only beginning to recognize is that there is a point at which the international standards of workplace fairness promulgated by the ILO can be used by society not in a court of law but in the corporations' own sensitive market places to bring about conditions of workplace equity. Perhaps our best hope may be by using the power of those players in pushing for workplace fairness, to encourage the unions, the NGOs and the conscientious employers to use the marketplace as the responsible instrument of choice for achieving the rule of law. That, I suggest, would be a fruitful and timely undertaking for the International Institute for Labor Studies as a sponsor of this session.

In his report the Director General identified the role of the Institute to "promote policy research and public discussion on emerging issues of concern to the ILO and its constituencies." He then goes on to urge "better utilization of its capabilities for future ILO program development" What could be of greater concern than undertaking to expand the role of the ILO in ensuring conformity to its own Labor Standards? This session is a welcome opportunity to discuss the issues. But how about stretching the envelope a bit to explore cooperation with NGOs on regional or global bases, as the Director General noted already occur on national grounds. Even if there may be obstacles to doing this within the ILO itself, the Institute could be the arm of the ILO cooperating with other willing organizations such as the Permanent Court of Arbitration to explore cooperation with NGOs in the mutual efforts to improve Convention compliance. Holding a meeting on increasing Core 8 compliance with participation from unions, managements, governments and NGOs on a global or even regional basis would offer opportunities to secure the alliances and relationships with other social actors and civil society associations urged in the Decent Work report. The Institute is clearly encouraged to undertake innovative programs on page 17 of that

report. Why not implement the outreach to NGOs that is encouraged on page 16 of that same report? If we are all to be committed to do something to prevent or deter the race to the bottom, shouldn't we start now?

I offer three modest proposals which might help meet the humanitarian and statutory enforcement of workplace rights, with emphasis on voluntarism and corporate self interest in the globalized marketplace.

The first is exploration of an international monitoring program where the ILO or some affiliated free standing institution would provide neutral monitoring of corporation commitments to adhere to international labor standards. Monitoring has been a voluntary undertaking of the Code sponsors in some cases, with varying degrees of dedication. In effect the monitoring efforts often substitute for weak or missing enforcement by local governments of protective legislation. Those monitoring efforts which are sensitive to consumer pressure such as in garments, toys, and sports goods tend to be the most diligent, but unfortunately as noted earlier, those consumer sensitive fields constitute only some 5% of world trade. There are some enterprises which seek to benefit from a public perception of Code compliance with minimal follow through. In some cases there is mere internal posting and publicity, espousing Codes but no external monitoring, while in the best of cases the monitoring is done by outside enterprises. These of course are funded by the Code sponsor itself. And not all corporations sponsored and funded monitors are likely to be enthusiastic about pushing their benefactor into compliance with Conventions 87 and 98, to be more compliant and cooperative in pushing its supplying factory employees to encourage Freedom of Association and the Right to Collective Bargaining. Additionally, the sheer size of the multinational enterprises often makes such monitoring spotty or ineffective. Companies such as Disney with 13,500 supplying factories would be hard pressed to have a monitoring institution sufficiently large and surveillance sufficiently routine, to provide effective objective monitoring in the 52 countries where they have supplying factories.

Certainly the ILO has set the world's standards with its promulgation of the Conventions. Wouldn't it be exhilarating for the ILO to have the tools and wherewithal to call to task corporations which proclaim their adherence to the Conventions, but fail to live up to those commitments? Imagine a team of experts in various aspects of factory work, knowledgeable in conventions and national statutes, conversant in local languages, who would be on tap to provide regular monitoring of supplying factories throughout the world. Imagine the prestige and world-

wide support it would engender among consumers of all types of products and services to be assured that the goods and services they consume were made under fair labor standards and that there was indeed a level playing field in international trade and commerce.

That may be a tall, and perhaps unattainable order but the ILO is in fact doing it in one country with the endorsement of the Brands, with the endorsement of the national government and, apparently to the relief of the factories and industry that is being monitored by it.

That is what is being done currently by the ILO in the its Better Factories Cambodia project to the obvious pleasure and relief of the Cambodian garment factories who avoid excessive and repetitive visits by individual brand monitors in favor of periodic ILO monitoring assuring independent and verifiable surveys of factories, to assure compliance with ILO Core Conventions. The number of inspections is reduced, the efficiency and productivity of the factories is enhanced by less frequent interruption for inspections and the integrity of such inspections is assured as being of the highest international standards.

While a worldwide monitoring role for the ILO may be currently beyond reach, the success of the Cambodian project provides encouragement for the ILO, perhaps through the Institute, to research the prospects of it being done in other countries, following the Cambodian model. One Central American country convened a conference of all manufacturing sectors to examine the prospects of a national Code of Conduct for all its output including therein exploration of a national monitoring program. Perhaps by utilizing the establishment of an independent institution, administered perhaps by the Permanent Court of Arbitration, the implementation of such a monitoring program might be undertaken for other countries, for code promulgators such as SA8000 or through agencies such as CAFTA for regional conglomerates of countries and corporations. The Corporations seeking such endorsement of their bona fides would hopefully be willing to fund such undertakings, individually or through payment into a fund because of the higher profile the affiliation would provide for their products and the new markets it would open. International institutions such as the regional or World Bank would also be encouraged to endorse and lend support to their contracting entities because of the benefits of social responsibility it would lend to their investment ventures.

Those companies or countries partaking in such ILO encouraged monitoring programs could then proclaim with credibility their adher-

ence to and compliance with ILO Conventions. Having the ILO as an active participant in such a project would encourage corporate participation because of the enhanced image of corporate responsibility that would flow from its involvement to its marketing and sales efforts throughout the world.

The second suggestion is for the development of an international roster of mediators working in cooperation with the ILO, NGOs and the Permanent Court of Arbitration to be available as a resource to help resolve conflicts in the areas of ILO concern particularly in implementation of the Core 8 Standards, if the sponsors of Corporate Codes of Social Responsibility were to establish grievance procedures within their Corporate Codes to permit individuals and groups to challenge whether a Corporation is indeed living up to its proclaimed standards of compliance with national laws and ILO Conventions. With such internal complaint procedures offering assistance of outside independent mediators to resolve persisting complaints of corporate violation of law and convention, it might be possible to peacefully and voluntarily secure compliance with both the standards of the Codes and national law. Such a mediation roster with mediators qualified in local languages, recruited, trained and administered by the Permanent Court, or through some independent entity developed by research conducted by the Institute, might become a valued ally in minimizing or resolving issues of factory compliance with corporate or “brand” proclamations of law and Convention compliance. The development of such a body would permit rapid response to complaints of workplace inequity and statutory violation. It would clearly help to level the playing field among corporations selling to the world market.

The third proposal is in the development of a national labor arbitration structure, a move already contemplated for incorporation in the proposed revision of Chinese labor laws. The exciting undertaking of the Peoples Congress to improve its legislation assuring workplace fairness makes such an undertaking not only timely but promising. The evidence shows a commitment by the government and party to stronger enforcement of existing labor law protections. Arbitration, particularly if coupled with preliminary mediation, is an enticing and hopeful procedure for overcoming the current exploitation of Chinese workers. The ILO through its Institute would be a logical resource for researching and helping to develop such a program. The current profile of corporate evasion of national protective workplace laws by declining or challenging worker

protest and complaints has led to a rampant series of worker protests over law evasion by employers. Workers lack the resources to match those of the factories in using the existing legal processes with corporate lawyers outmaneuvering employees in the courts and through extended legal appeals.

The development of a roster of independent arbitrators from which the parties could jointly select a single arbitrator with the power to conduct informal and less legalistic hearings, and with the authority to issue binding and enforceable judgments in cases involving violation of workplace laws would quell much of worker unrest and protest over statutory violations. Indeed recognition that complaints could be readily and inexpensively resolved in a single hearing and with an enforceable judgment could well eliminate much of the cause of the increasing number of workplace protests that many assert are plaguing China's economic and industrial advance, while certainly enhancing China's image as a protector of the legal rights of its factory workers. China's labor code has the requisite protections on the books. The failing appears to be in the availability of a process for achieving rapid and fair resolution of those complaints on a local level. The ACFTU could exercise a valuable and image enhancing role in representing workers in receiving complaints of statute violation and in providing representation at arbitration hearings.

This is not an undertaking to encourage collective bargaining or to endorse workplace agreements. Rather it is a simple matter of providing a more expeditious process for enforcement of existing, but violated legal rights. It is a proposal for an expeditious procedure in which the workers would have a stake, to enable them to achieve enforcement of their violated legal rights. It would be a more rational and tranquil route to law enforcement, than the current alternative where workers see no alternative but to take to the streets, to their effort to have employers live up to legal responsibility. A quasi governmental or even private system outside the government, based in a university or NGO setting, or perhaps even administered through the facilities of the Permanent Court of Arbitration could structure a neutral system with prospects of widespread acceptability. Such a free standing institution endorsed and perhaps jointly developed by government, management, party and ACFTU could recruit, and train a body of mediators and arbitrators, attracting leading citizens, professors of law, economics and social affairs, and perhaps legal practitioners to undergo training in labor statutes and the processes of mediation, arbitration and hearing conduct, and then provide the dis-

putant workers and factories with panels of three or five potential neutrals from which those disputants would be able to select their mutual choice of decision maker.

The institution could also provide training in the law and arbitration process to representatives of management and of the ACFTU. Hearings would follow an effort at mediation, and be less formal than at courts, could be held at the workplace or other nearby facilities, could be arranged expeditiously within days of a complaint and the decision rendered by the arbitrator at the end of the hearing or within days thereof would be final, binding and enforceable in court. This would preclude lengthy and costly judicial appeals and would permit any worker to have the ACFTU or lawyer go to court to enforce such judgments. Such a program of ACFTU encouraged and managed complaint handling would do much to enhance the role of the union among workers in the growing private sector, would help to quell the unrest and rash of strikes focusing on failure to implement statutory protections, would encourage private sector employers to deal constructively with the ACFTU, and would open the door to future enhanced negotiating relationships on issues beyond statutory enforcement.

These three proposals would constitute a big undertaking by the ILO, making it a much more active program provider in the world of work than it has been in the past. But the need is there. Other international organizations are beginning to adopt ILO standards in their provision of economic aid, and it would be exciting to see the originator of those standards gain some of the credit for its raising and leveling the workplace playing field by more robust involvement. Even if such proposals are beyond present reach, the ILO through its Institute should encourage research in the extent to which mediation and arbitration are currently being used in member countries to help resolve disputes over workplace fairness, research into the provision of complaint procedures within Corporate Codes of Conduct, research into which such Codes provide access to mutually selected neutrals to resolve such disputes, and research into how societies, corporations, and governments could benefit from the availability of rosters of trained and qualified mutually approved neutrals to help resolve workplace conflict over compliance with ILO conventions.

These are merely examples of areas where the ILO, the Institute and related institutions could do research in helping develop systems bring greater adherence to ILO conventions and as a result, thereby help reduce

workplace disputes by affording workers the protections anticipated through implementation of such conventions. At the same time the proposals would also rely on and strengthen the credibility of existing facilities for enforcing those rights and thereby contribute to strengthening the rule of law.