Sherpa

THE OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES

An evolving legal status

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This study is the result of a survey which is obviously incomplete, but we trust that it is nonetheless representative of this shift favouring the repositioning of the public interest at the heart of international law.

The conclusions of this study have been presented as part of the work of OECD Watch, in particular at the annual meeting in Brussels on June 15 2007. At this event, a process of consultation of all stakeholders has been launched to gather comments from all interested persons.

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ABSTRACT

In the current climate of questioning the notion of Corporate Social Responsibility (CSR) and the achievement of sustainable development, the OECD *Guidelines for Multinational enterprises* (*Guidelines*) directed at multinationals are particularly valuable legal instruments.

Their priority (1976), acceptance by 39 States, for whom some 90% of direct foreign investment is via multinational enterprises, their substance, adjusted over time to relate to changes in the notion of CSR, and their application procedures involving national structures (NCPs) and a central body (Investment Committee) are all characteristics which make the *Guidelines* a strategic link in the search for effective solutions to make the notion of CSR tangible.

Can they be considered as legally binding? The present study aims to provide an answer to this question, which is hotly debated in many institutions whenever it comes to qualifying the obligations relating to the notion of CSR. It concludes to the entrance of CSR and the *Guidelines* in its wake in a binding sphere.

The starting assumption for this study is an overview of the increasing incidence of the sphere of influence of multinational enterprises which can be summed up as follows:

- **home states** on their own have insufficient influence for apprehending bad practices perpetrated by their national companies' subsidiaries abroad – indeed, if most national legislations have enacted criminal liability principles for corporate bodies, the notions of corporate veil and its corollary, the principle of the personality of the offences, and extraterritoriality which characterize multinationals *modus operandi* through sometimes dozens of different legal structures bound by various legal status, generate great difficulties in practice to enforce existing 'hard' legal tools;

- **international community** has no means up to now to apprehend efficiently violations of human rights and environmental damages caused by multinationals. Indeed, not only existing tools (namely OECD Guidelines for multinational enterprises, ILO Tripartite declaration of principles on multinational enterprises, UN Global Compact) are stated as being merely 'voluntary' but they do not provide any efficient judicial structure for ensuring their enforcement;

- **public interest -** Multinationals have been more and more involved in issues of public interest, namely through the development of Public Private Partnerships (PPP). This trend results largely from the development of investment regulations easing Foreign Direct Investment (FDI) and promotion of PPP by international financial institutions. This has led to the development of rights more than obligations for multinationals. Even if we can observe a slight evolution, the past and present investor/state disputes in international arbitration institutions demonstrate that PPP giving rise to public interest issues (facilities projects relating to access to water for instance) are still apprehended by arbitrators through the filter of investors' rights, quasi ignoring public interest issues.

In this context, among other voluntary rules, OECD Guidelines for multinationals present some interesting specific characteristics.

The approach taken by this study consists in situating the OECD *Guidelines* in the complex legal environment surrounding the notion of CSR by proceeding in three phases. The first consists in analysing their legal characteristics on the basis of OECD texts (1), the second examines them in the light of international customary law (2), and the third considers the most typical specific instances and suggests avenues for greater effectiveness of the *Guidelines*.

Usefulness of international customary law

The reasons for using international customary law to frame *Guidelines* legal status are the fruit of two observations:

- firstly, the relative failure of NCPs, which will be illustrated by analysing practice in specific instances;
- secondly, the fact that it is highly unlikely that OECD member States will explicitly ascribe compelling force to the *Guidelines*.

In this context, the present study intends to open up avenues which will enable the influence of the current framework of positive law to be strengthened and consider international customary law that could enable the *Guidelines* to find a place within hard-law institutions.

This is because we consider that judicial and arbitration institutions that state legal positions are the natural fields of application of the *Guidelines*. Such jurisdictions have some freedom in their interpretation of the law, enabling them to place it in a broader context and refer to customary principles.

Furthermore, custom presents the undeniable advantage of respecting State sovereignty in that 1) nothing obliges those in charge of laying down the law to take it into consideration and 2) rules of custom may be used at their discretion, either as a source of interpretation of existing national, regional or international law, or as a source of substantive law.

Even if we consider that the traditional definition of custom is open to debate, in the interests of effective proof, we have opted to analyse the *Guidelines* in the light of the test of custom which has its origins in article 38(1) of the ICJ Statute, according to which "*custom is the result of a combination of an effective practice and the acceptance by States of the legal - and therefore binding - nature of the practices which make up any such practice*".

In order to preserve objectivity in our demonstration of the arrival of the *Guidelines* into the sphere of international customary law, we cannot pass over elements which, in the light of the specific instances examined, reveal gaps in the effectiveness of implementation of the *Guidelines*.

From this perspective, the study draws lessons from the practice of specific instances to present the need to strengthen substantive effectiveness and obtain greater organisational efficiency

Study major conclusions

- **OECD Guidelines/International Customary Law** – *Guidelines* have entered the sphere of application of Customary law;
- **OECD Guidelines/Arbitration courts -** If such evolution has not yet given rise to major concrete effects in practice, we consider however that conditions are gathered for international arbitrators to include OECD *Guidelines* in their scope of apprehension of disputes. Of course this statement is relevant for investors/states cases;
- **OECD Guidelines/National jurisdictions** – acknowledging status of ICL to the *Guidelines* might be of great help for national judicial systems. Indeed, the use by national judges of the *Guidelines* as a tool for interpreting national legal dispositions might help them to apprehend efficiently the notion of "multinational enterprise" and their specific modus operandi. This could have a great positive impact at various steps of a judicial proceedings, particularly for the admissibility of a complaint and qualification of criminal charges;
- **OECD Implementation proceedings** – entrance of Guidelines within ICL should legitimate NCP and Investment Committee role as *Guidelines* implementation institutions. However, in order to efficiently accompany this mutation, their role and mode of operation should be harmonised and the study will propose some tracks to improve their performance.

INTRODUCTION

In the current climate of questioning the notion of Corporate Social Responsibility (CSR) and the achievement of sustainable development, the OECD *Guidelines for Multinational enterprises* (*Guidelines*) directed at multinationals are particularly valuable legal instruments.

Their priority (1976), acceptance by 39 States, for whom some 90% of direct foreign investment is via multinational enterprises, their substance, adjusted over time to relate to changes in the notion of CSR, and their application procedures involving national structures (NCPs) and a central body (Investment Committee) are all characteristics which make the *Guidelines* a strategic link in the search for effective solutions to make the notion of CSR tangible.

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The starting assumption for this study is an overview of the increasing incidence of the sphere of influence of multinational enterprises which can be summed up as follows:

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- **international community** has no means up to now to apprehend efficiently violations of human rights and environmental damages caused by multinationals. Indeed, not only existing tools (namely OECD Guidelines for multinational enterprises, ILO Tripartite declaration of principles on multinational enterprises, UN Global Compact) are stated as being merely 'voluntary' but they do not provide any efficient judicial structure for ensuring their enforcement;

- **public interest -** Multinationals have been more and more involved in public interest's issues, namely through the development of Public Private Partnerships (PPP). This trend results largely from the development of investment regulations easing Foreign Direct Investment (FDI) and promotion of PPP by international financial institutions. This has led to the development of rights more than obligations for multinationals. Even if we can observe a slight evolution, the past and present investor/state disputes in international arbitration institutions demonstrate that PPP giving rise to public interest issues (facilities projects relating to access to water for instance) are still apprehended by arbitrators through the filter of investors' rights, quasi ignoring public interest issues.

In this context, among other voluntary rules, OECD Guidelines for multinationals present some interesting specific characteristics.

The approach taken by this study consists in situating the OECD *Guidelines* in the complex legal environment surrounding the notion of CSR by proceeding in three phases. The first consists in analysing their legal characteristics on the basis of OECD texts (1), the second examines them in the light of international customary law (2), and the third considers the most typical specific instances and suggests avenues for greater effectiveness of the *Guidelines*.

1 THE LEGAL CHARACTERISTICS OF THE GUIDELINES

1.1 The origins of the guidelines

The statutes of the OECD[1] confer competence on its principal bodies to address **recommendations** to its member states. This provides the backdrop to the drafting of the *Guidelines* that were adopted by the OECD Council as part of the 21 June 1976 Declaration

[1] Founding convention constitutive, article 5 [http://www.oecd.org/document/7/0,2340,en_2649_201185_1915847_1_1_1_1,00.html].

on International Investment and Multinational Enterprises.

One of their originalities is that this set of norms applies both to the member states[2] in charge of implementing them and to the multinational enterprises whose activities these *Guidelines* are supposed to govern (whether they operate on the territory of a member country or are based there).

It is worth noting that organisations representing the world of business (BIAC[3]) and the world of labour (TUAC[4]) were involved in and have lent their support to the *Guidelines* ever since they were drawn up in 1976, and this support has not waned whenever they have come up for review.[5] The same is true of non-governmental organisations, especially since the review in 2000.

The *Guidelines* may be split into three separate parts. Firstly the *Guidelines per se* which are for multinational enterprises, then the procedural *Guidance* for member states and OECD bodies in charge of implementing these *Guidelines*, *i.e.* the National Contact Points (NCP) and the Committee for Investment and Multinational Enterprises (Investment Committee), and finally the *Commentaries* relating to the *Guidelines* and their implementation procedures.[6]

We will return later to the distinction between the **internal normative action** of the OECD, as embodied in the procedural *Guidance* defining the powers of the NCPs (and hence the member states) and of the Investment Committee (and hence the OECD) and the ways in which they both function, and the **external normative action** as embodied in the *Guidelines* for multinational enterprises.[7]

Hence the *Guidelines per se* are not for States but for multinational enterprises. The only time States are mentioned in the measures for implementing the *Guidelines* is when the role of the NCPs is referred to in the procedural *Guidance*.[8]

This reminder of the origins and structures of the *Guidelines* is essential, since it reflects the involvement of economic operators at a very early stage in their negotiation process. It follows from this that the *Guidelines* act as the founding pillar for CSR, and they have undergone several modifications following on from reviews (1979, 1982, 1984, 1991), the last of which was ratified at the ministerial meeting of 27 June 2000.[9]

1.2 Substance of the guidelines

1.2.1 Objectives

As stated in the preface to the *Guidelines*: 'The *Guidelines* aim to […] enhance the contribution to sustainable development made by multinational enterprises'[10] – 'The common aim of the governments adhering to the *Guidelines* is to encourage the positive contributions that multinational enterprises can make to economic, environmental and social progress and to minimise the difficulties to which their various operations may give rise.'[11]

More precisely, the terms of Chapter II.1 of the *Guidelines*, which state that enterprises should 'contribute to economic, social and environmental progress with a view to achieving sustainable development' explicitly include the notion of **sustainable development** as one of the *Guidelines*' key objectives. It is worth recalling here that the Brundtland report, submitted by the World Commission on Environment and Development in 1987, defined the concept of sustainable development as: 'development that meets the needs of the present without compromising the ability of future generations to meet their own needs'.[12]

It is also worth emphasising that the *Guidelines* are an integral part of the *OECD Declaration on*

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[2] In addition to which there are 9 non-member states: Argentina, Brazil and Chile, Estonia, Israel, Latvia, Lithuania, Romania and Slovenia.
[3] Business Industry Advisory Committee.
[4] Trade Union Advisory Committee.
[5] *Review of OECD Guidelines for multinational enterprises –Framework for the Review* - §8 [OECD unclassified document drawn up by the OECD Directorate for Financial, Fiscal and Enterprise Affairs - 21 May 1999 - http://www.oecd.org/dataoecd/38/9/2071909.pdf].
[6] The Commentaries are not part of Declaration on international investment and multinational enterprises.
[7] Cf. section 1.4.1.
[8] Cf. section 1.1.3.1.

[9] *'In comparison with the earlier reviews the changes to the text of the Guidelines are far-reaching and reinforce the core elements – economic, social and environmental - of the sustainable development agenda. They have been developed in constructive dialogue with the business community, labour representatives and non-governmental organisations'* - Foreword of the OECD document OECD Declaration and Decisions on International Investment and Multinational Enterprises: Basic texts [DAFFE/IME(2000)20 http://www.olis.oecd.org/olis/2000doc.nsf/4f7adc214b91a685c12569fa005d0ee7/c1256927006 23b74c1256991003b5147/$FILE/00085743.PDF].
[10] Foreword to the *OECD Guidelines for Multinational Enterprises*, Para. 1 [http://www.oecd.org/dataoecd/56/36/1922428.pdf].
[11] Foreword to the *OECD Guidelines for Multinational Enterprises*, Para. 10.
[12] In 1984, the General Assembly of the United Nations mandated Ms Gro Harlem Brundtland, the then-Prime Minister of Norway, to form and preside the World Commission on Environment and Development, which is now widely recognised as having promoted the values and principles of sustainable development Cf. the report entitled *Our Common Future* submitted in 1987.

International Investment and Multinational Enterprises which, in accordance with the fundamental objective of the OECD, seeks to avoid distortions caused by private-sector action.[13] In the words of the Secretary-General of the OECD, the *Guidelines* 'provide a government-backed standard of good corporate conduct that will help to level the playing field between competitors in the international market place'.[14]

In this case, establishing favourable conditions for competition consists in combating those practices of multinationals which could infringe human rights, harm the environment or which do not respect norms relating to labour law, transparency, consumer protection and corruption. For such practices indisputably do distort the conditions of competition, and therefore the proper functioning of the market depends upon respecting the *Guidelines*.

Nevertheless, given these two distinct and complementary objectives, *i.e.* establishing favourable conditions for competition and sustainable development, it is indisputably the latter which constitute the ends sought and the former which are the means.[15] This is confirmed by the terms of the foreword to the *Guidelines* according to which: '*The ability of multinational enterprises to promote sustainable development is greatly enhanced when trade and investment are conducted in a context of open, competitive and appropriately regulated markets'*.[16]

The broad outlines of what States expect of multinationals are therefore based on the notion of **sustainable development** in particular, and it is this which provides the normative content for **social and environmental responsibility**. This notion also governed the most recent changes to the content of the *Guidelines,* the legal characteristics of which will be studied below.[17]

1.2.2 The means – establishing rules of conduct

The *Guidelines* form part of a legal environment combining an *objective*, that of furthering sustainable development, and a *means* to achieve this, implementing the notion of Corporate Social Responsibility (CSR), which since the 1970s has been the object of numerous regulatory initiatives.[18]

This is not the place to go into the contents of the *Guidelines*, and the reader is invited to consult the full text as well as the commentaries.[19] Nevertheless there are three characteristics that is it useful to bear in mind when situating the *Guidelines* within the complex legal environment constituted by the notion of CSR:

1. the terms of the *Guidelines* are rules of conduct that are broadly accepted by States and by enterprises themselves. This is reflected in a certain number of similarities:
   - between the terms of the *Guidelines* and those of the instruments of other intergovernmental institutions seeking to strengthen the international legal and regulatory framework within which enterprises operate (the adoption of the UDHR in 1948[20] and two international pacts on Civil and Political Rights and on Social, Economic and Cultural Rights in 1966, the ILO Declaration on the fundamental principals and rights at work, the Rio Declaration on Environment and Development, and

[13] '*The basic legal framework for the global market was initially established by more or less parallel unilateral national action, increasingly complemented by joint international action at many levels. For its proper operation it is then necessary that government-induced distortions be avoided -- and this is what international action in the form of multilateral agreements concerning liberalisation is seeking to ensure. Distortions caused by private action must also be eliminated, however; it is indeed such distortions that, not only the Guidelines, but also national laws on the protection of competition and the environment and other such issues, are intended to prevent.'* Prof. Arghyrios A. Fatouros *The OECD guidelines in a globalising world* [unclassified document no.DAFFE/IME/RD (99)3 9 September 1999 - Investment Committee Directorate of Financial, Fiscal and Enterprise Affairs, p.11].

[14] Foreword by D. J. Johnston, Secretary-General of the OECD, to the *Guidelines*, Para. 2 - [http://www.oecd.org/dataoecd/56/36/1922428.pdf].

[15] It is worth noting that the guidelines for interpreting a treaty should be the 'object of the objectives' followed by the treaty itself (as it is put in the Vienna Convention on International Treaties - art 31-1). If the Guidelines do not constitute a Treaty, it is nevertheless widely recognised by the international community that this rule of interpretation should apply.

[16] Foreword to the OECD *Guidelines* for multinational entreprises, Para. 5.

[17] '*The Guidelines' aim to ensure that the operations of these enterprises are in harmony with government policies, to strengthen the basis of mutual confidence between enterprises and the societies in which they operate, to help improve the foreign investment climate and to* ***enhance the contribution to sustainable development made by multinational enterprises****.'* [Foreword to the Guidelines § 1 - http://www.oecd.org/dataoecd/56/36/1922428.pdf].

[18] Apart from the *Guidelines*, the following are the most representative: the Draft Code of Conduct for Transnational Corporations produced by the UN in 1974, the 1977 ILO *Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy* revised in 2000, the 1998 ILO *Declaration on Fundamental Principles and Rights at Work*, the UN Global Compact initiative, the adoption on 26 August 2003 of the Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with regard to Human Rights. One can also mention the 2001 European Commission Green Paper which seeks to provide a definition of CSR.

[19] Available at: http://www.oecd.org/dataoecd/56/36/1922428.pdf.

[20] Of which article 30 states: 'Nothing in this Declaration may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms set forth herein.'

Action 21 as well as the Copenhagen Declaration on Social Development);[21]

- with undertakings resulting from the ethical charters of private sector international operators which have evolved over recent years to include environmental considerations and human rights. It is worth noting moreover that the foreword to the Guidelines states that they: '*both complement and reinforce private efforts to define and implement responsible business conduct.*';[22]

2. the *Guidelines* restate or else are the extension of heterogeneous existing fundamental notions of international law, relating to customary law, general legal principles or practice. In this way the notion of good faith in performance of contracts which compels parties to act loyally in their contractual relations, and which acts as one of the principals governing international economic relations, is subjacent to many of the *Guidelines* and the fundamental principal of the proper administration of justice is also present, in particular via the objective of functional equivalence. The notions of constructive knowledge,[23] legitimate expectations,[24] *abus de droit*, equity, and the precautionary principle [25] are subjacent too.
3. In addition to this the *Guidelines* reflect the regional and national legal dispositions of jurisdictional systems which have incorporated the notion of the criminal responsibility of corporate entities within their law.

LESSONS

The *Guidelines* may thus be seen as lying at the **intersection between the aspirations of States and enterprises regarding CSR and existing legal international, regional or national dispositions** designed to apprehend the criminal liability of corporate entities.

As far as their substance is concerned, the *Guidelines'* place in the legal environment of CSR is therefore fairly close to that of the other existing tools mentioned above. But since they were drafted some time ago now they have had to be progressively adapted, and the way in which they have developed in tandem with the concept of CSR has proved how very flexible they are, as shown particularly by the fact that human rights have been explicitly elevated to an obligation to be met as part of CSR.[26]

It is worth noting that having mentioned that implementing sustainable development should be a key obligation incumbent on enterprises, the *Guidelines* state that enterprises should: '*respect the human rights of those affected by their activities consistent with the host government's international obligations and commitments'.*[27] The fact that human rights are accorded a place among the *Guidelines* relating to the responsibility of enterprises clearly echoes article 30 of the UDHR.[28]

[21] Foreword to the OECD *Guidelines* for Multinational Enterprises, Para. 8 [http://www.oecd.org/dataoecd/56/36/1922428.pdf]. Obviously, other tools can be mentioned and among them the Kimberley process for rough diamonds, the Extractive Industries' Tranparency Initiative, the Business Leaders' Initiative on Human Rights, the Global Compact, etc. [see the report of the UN HIgh COmmissioner for Human Rights on the sectoral consultation entitled « Human rights anf the extractive industry » 10-11 Nov 2005 - http://www.globalpolicy.org/reform/business/2005/1219promotion.pdf

[22] '*Many enterprises have responded to these public concerns by developing internal programmes, guidance and management systems that underpin their commitment to good corporate citizenship, good practices and good business and employee conduct. […] The Guidelines clarify the shared expectations for business conduct of the governments adhering to them and provide* ***a point of reference for enterprises****.'* [Foreword to the OECD *Guidelines* for Multinational Enterprises, Paragraph 7 -http://www.oecd.org/dataoecd/56/36/1922428.pdf].

[23] According to this principle: 'if one by exercise of reasonable care would have known a fact, he is deemed to have had constructive knowledge of such fact' [Yann Queinnec, *Propositions pour un arbitrage international*, a paper given at the 1st International forum for the right to water, Marseille, 25 November 2006, p.9]. In fact, according to this principle and considering that the companies are supposed not to be unaware of the law, like any other subject of right, they cannot be unaware of that any violation of the *Guidelines* can expose them to a proportioned constraint.

[24] '*The notion of the investor's 'legitimate expectation' has become standard in analysing 'fair and equitable treatment'. It is considered defensible that an investor is not entitled to have expectations which run contrary to customary international law and a fortiori contrary to fundamental rights.'* [Yann Queinnec, *Propositions pour un arbitrage international*, a paper given at the 1st International forum for the right to water, Marseille, 25 November 2006, p.8]. We can so consider that the *Guidelines* expressing standards (abstraction made moreover by their binding character or not), a company which does not respect them cannot have legitimate expectations identical to those of whom she could take advantage if she had respected them.

[25] It is worth noting that the WTO has recognised the precautionary principle regarding the protection of biodiversity and has affirmed that 'in a situation where there is no scientific certainty, States have the right to take the appropriate precautionary measures'. The non-subordination of this precautionary principle implies that, for a trade conflict brought before the WTO, it will not be brought into question, ignored or waived.

[26] In the most recent review in 2000 this flexibility meant they now place a greater emphasis on respecting the environment and the role of NGOs as stakeholders in the international community. Multinational enterprises are thus now encouraged to improve their conduct by such measures as better internal environmental management, stricter rules concerning the publication of environmental information and more effective systems concerning their environmental impact.

[27] General Principles II.2.

[28] Article 30 states: 'Nothing in this Declaration may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms set forth herein.'

This reference to the obligation multinationals have to respect human rights, even if it also refers to the 'host government's international obligations and commitments', nevertheless reinforces the idea that multinationals are fully-fledged corporate entities wholly subject to international law[29] just as States are, and are therefore required to contribute to the public interest in accordance with their sphere of influence, which has now become ubiquitous.[30]

1.3 Rules for implementing the guidelines

In addition to their substance, the review of the *Guidelines* in 2000 was a further step in the legal recognition of CSR since it created the procedure of *Specific instances* which are dealt with by the National Contact Points. This procedure enables parties concerned by an investment to lodge a complaint relating to the implementation of the *Guidelines*. The fact that this procedure has been set up reinforces the singular status of the *Guidelines* in the legal environment of CSR.

From the outset, the *Guidelines* were not just a text proposed to multinationals and governments to which they could choose their way to conform. They came with an institutional mechanism and a set of procedures to monitor their implementation and improvement.[31]

However imperfect it may be, this two-tier institutional mechanism – with the National Contact Points (NCP) at the national level and the Investment Committee at the central level – was progress, and showed the determination of member states to provide forums to settle disputes and thus give the notion of CSR tangible form.

The aim of what follows is to draw out the principal legal characteristics of the bodies in charge of implementing the *Guidelines*. At this stage of the study a purely textual analysis has been chosen, so as to draw the key theoretical lessons from the role played by NCPs and the Investment Committee. A third part of this study, which seeks ways to increase the effectiveness of the *Guidelines*, will analyse the practices the NCPs and Investment Committee have developed.

1.3.1 National Contact Points

Each country that subscribes to the *Guidelines* has to set up national contact points (NCP) 'for undertaking promotional activities, handling inquiries and for discussions with the parties[32] concerned on all matters covered by the *Guidelines* so that they can contribute to the solution of problems which may arise in this connection'.[33] The NCP thus have a threefold function:

- promoting the *Guidelines*;
- informing about the *Guidelines*;
- allowing parties to set up discussions to solve problems linked to 'specific instances'. This is the only one of their functions which will be discussed in this study.

In order to fulfil their mission of helping to find solutions to problems arising from 'specific instances', NCPs have to take into account the procedural *Guidance* established by the OECD council. The objective of the procedural *Guidance* is to tend towards the objective of

[29] See observations in section 2.1.3 on this point.

[30] Commentary: '*while promoting and upholding human rights is primarily the responsibility of governments, where corporate conduct and human rights intersect enterprises do play a role, and thus MNEs are encouraged to respect human rights, not only in their dealings with employees, but also with respect to others affected by their activities, in a manner that is consistent with host governments' international obligations and commitments. The Universal Declaration of Human Rights and other human rights obligations of the government concerned are of particular relevance in this regard.'* [Commentary no.4 of the OECD *Guidelines* for Multinational Enterprises, Paragraph 5]. Moreover, it is interesting to note the importance accorded to the positioning of the notions of sustainable development and human rights, as mentioned in the 2000 review: '*Another example in this regard is human rights. The question raised by these two issues is as follows: if it is decided that this is a concept that should be referred to in the Guidelines, should it be addressed in chapter one or two?* ***How this is resolved depends to some degree on how much responsibility for these issues may be said to lie within the domain of governments, and how much lies with enterprises****. If sustainable development or human rights should be seen to be a priority that is part of the overall "framework" in which enterprises operate, then it could be argued that a reference should be incorporated in the Introduction (chapter one) of the Guidelines.* ***If, however, they are seen to be important business responsibilities, then they could be noted in chapter two on general policies****'* in *Review of the OECD Guidelines for Multinational Enterprises – Framework for the Review* - §27 [OECD unclassified document OECD produced by the OECD Directorate for Financial, Fiscal and Enterprise Affairs - 21 may 1999 - http://www.oecd.org/dataoecd/38/9/2071909.pdf]. **As things turn out the two principles both appear in chapter 2 of the Guidelines, which proves that responsibility would tend to fall on enterprises**.

[31] Prof. Arghyrios A. Fatouros *The OECD guidelines in a globalising world* [unclassified document no.DAFFE/IME/RD (99)3 9 September 1999 - Investment Committee Directorate of Financial, Fiscal and Enterprise Affairs, p.12].

[32] It would seem clear that the term 'parties' designates multinationals which, even though they are not parties in the sense of being signatories to the convention, were nevertheless consulted during the negotiation process and above all are entities that the *Guidelines* endow with rights and obligations.

[33] The OECD Council Decision, June 2000, section I.1.

functional equivalence[34] with the key criteria of visibility, accessibility, transparency and responsibility.[35]

The role of the NCPs as it transpires in the procedures for specific instances may be considered to show the importance accorded by institutions to the *Guidelines* in the current development of CSR towards something more binding.

Moreover, during the review in 2000 of the Guidelines, the OECD Directorate for Financial, Fiscal and Enterprise Affairs indicated à propos the establishment of a procedure for specific instances: '*procedures attached to the text of the Guidelines have a strong potential to enhance these norms. They can provide an "arms-length", independent means of encouraging and verifying that the Guidelines are promoted and implemented, and as such can address some of the perceived limitations of self-regulated and self-monitored codes of conduct.*'[36] What follows seeks to draw out those elements in the way the NCPs are organised and operate which consolidate this trend.

1.3.1.1 Organisation

The procedural *Guidance* states that 'adhering countries have flexibility in organising their NCPs',[37] provided that they seek the active support of social partners (business community and employee organisations) and other interested parties (Non-Governmental Organisations). Representatives from the business community, employee organisations and NGOs may (but are not obliged to) take part in this body. This flexibility is however curtailed by the condition that the NCP be a senior government official, a government office headed by a senior official, or else a co-operative body including various government agencies.

Studying the list and composition[38] of various NCPs shows that States have, for the most part, preferred NCPs made up of government officials. Out of 39 NCPs (one per country adhering to the *Guidelines*) 28 are composed exclusively of government officials (21 are composed exclusively of officials drawn from a single Ministry and 7 from several agencies) and only 11 include representatives from the business world, employee organisations or NGOs (Only 2 NCPs include representatives from NGOs, those of Chile and Finland).

1.3.1.2 Action – specific instances

The NCPs are required to follow a three-stage procedure. The first concerns the admissibility of the specific instances raised by one of the parties. Then, if the NCP considers that the specific instances merit further examination, it offers its 'good offices'. Finally, if the parties do not reach an agreement, the NCP issues a statement and, where appropriate, recommendations on the implementation of the *Guidelines*.

1.3.1.2.1 The admissibility of the specific instances

Assessment of admissibility

The NCP has to 'make an initial assessment of whether the issues raised merit further examination'.[39] To this end the NCP has to check whether the issue raised is *bona fide* and relevant to the *Guidelines*, and has to take into account the following:[40]

- the identity of the party concerned (the requesting party and the defendant) and assure itself of the interest of the requesting party;
- whether the issue is material and substantiated;
- the relevance of applicable law and procedures;
- how similar issues have or are being treated in other domestic or international proceedings, *i.e.* the NCP has to take into

[34] Different countries have different structures fulfilling similar functions. Thus functional equivalence is based on the idea that trying to obtain structural equivalence is a waste of time, and that it is sufficient for these structures to offer functional equivalence.
[35] For definitions of these four notions and the one of "functional equivalence", cf. Commentaries on the Procedural Guidance, § 8 available at: http://www.oecd.org/dataoecd/56/36/1922428.pdf
[36] *Review of the OECD Guidelines for multinational enterprises – Framework for the Review* [OECD unclassified document produced by the OECD Directorate for Financial, Fiscal and Enterprise Affairs - 21 may 1999], §10.
[37] The OECD *Guidelines* for Multinational Enterprises, *Procedural Guidance*, Part A first paragraph.
[38] OECD Guidelines for Multinational Enterprises: 2006 Annual Meeting of the National Contact Points, available at http://www.oecd.org/dataoecd/23/33/37439881.pdf.
[39] The OECD *Guidelines* for Multinational Enterprises, Procedural *Guidance*, Part C point 1.
[40] Commentary no.14 of the Procedural *Guidance*.

account existing jurisprudence, including previous decisions made by NCPs and other jurisdictions;[41]

- whether the consideration of the specific issue would contribute to the purposes and effectiveness of the *Guidelines*.[42]

LESSONS

The admissibility test used by NCPs in accordance with the procedural *Guidelines* conforms to the fundamental rules all so-called hard-law bodies follow when an action is brought before them.

In this respect the terminology used in the procedural *Guidance* when evoking '**issues** that arise relating to implementation of the Guidelines in specific instances', cannot conceal the inherent notion of 'dispute' or 'conflict' that the NCPs offer to resolve thanks to their good offices, which are to '*facilitate access to consensual and non-adversarial means, such as conciliation or mediation, to assist in dealing with the issues.*'[43]

It is worth pointing out straight away that studying the jurisprudence of NCPs shows that the requesting parties generally have a certain interest in acting. If the act of identifying the parties does not pose any problems, it sometimes happens that the defendant is not considered to be a multinational enterprise, or that its influence, as the company heading a group or business partner, over another company whose activity is covered by a specific instances procedure is not deemed sufficient. This reason for turning down a request poses the wider problem of how to define the notion of a multinational enterprise, which will be discussed in the third part on the practical lessons to be drawn from the practice of specific instances.

1.3.1.2.2 The good offices of NCPs

NCPs offer, and, with the agreement of the parties involved, facilitate access to consensual and non-adversarial means, such as conciliation or mediation, to assist in dealing with the issues.[44] This is how the role of the NCPs before whom a specific instance is brought is described by the *Procedural Guidance*.

PRINCIPLES RELATING TO GOOD OFFICES

Before examining the function of 'good offices' it is worth recalling that several criteria are considered essential to promoting functional equivalence: visibility, accessibility, transparency and responsibility.[45]

NCPs therefore have to respect these criteria. But while respecting criteria is necessary, it is not in itself sufficient. The commentary on the Procedural *Guidance* indicates that NCPs should deal with the issues brought before them in a timely and efficient manner and in accordance with applicable laws.[46] **Such law needs to be understood as encompassing international, regional and national law**.

Here, the NCPs which were studied above (section 1.3.1.1) emanate from government agencies and as such are obliged to respect the general principles of law, including that of good administration.

This principle is recognised both by the European Union (in article 41 of the Charter of Fundamental Rights of the European Union) and by the Council of Europe which is working on the drafting of a 'European consolidated model code of good administration'.[47] This general legal principle is a 'matrix principle' insofar as many other fundamental legal principles and notions are grounded in it. Among the essential principles of administrative law that are grounded in it are the following:

- **The principle of the independence of government officials** according to which government officials 'should carry out their work in a conscientious way and in accordance with the public interest and not their political or other affinities';
- **Impartiality** according to which government officials impartially carry out

[41] Commentary no.14 of the Procedural *Guidance*.
[42] Let it be observed here that according to the present author NCPs should stop focussing on ironing out competitive inequalities. *A fortiori* if it is a multinational in a quasi-monopolistic position.
[43] Procedural *Guidance*, Part C point 2d.
[44] Chapter I-C-2-d of the Procedural *Guidance*.
[45] Commentaries of the Procedural *Guidance*, § 8.
[46] Commentaries of the Procedural *Guidance*, § 8.
[47] See in particular *Note d'information sur le principe de bonne administration dans les Etats membres du conseil de l'Europe* [http://www.coe.int/T/F/affaires_juridiques/coop%E9ration_juridique/Droit_et_justice_administratifs/Textes_&_documents/CJ-DA-GT(2004)5%20F%20Principe%20de%20bonne%20administration.pdf].

their functions without taking the particularities of citizens into account;

- **The principle of legitimate confidence** which obliges government agencies to fulfil legitimate expectations which the interested party can reasonably expect to be satisfied. In order to comply with this principle NCPs are thus obliged not to deform the *Guidelines.* Further, they are obliged to be predictable in their 'jurisprudence';
- **The principles of equality and equity** – Equality imposes the obligation to treat all citizens equally, whilst equity complements this and imposes the obligation to treat similar cases similarly and cases which are objectively different, differently. Thus NCPs have to treat multinational enterprises and requesting parties in the same way and adopt similar procedures and solutions for specific analogous instances;
- **The reasons for administrative decisions**, so that it may be understood how a decision was reached. Thus vague and general reasons are to be deemed insufficient;
- **The primacy of law** which obliges government officials to act in accordance with the rule of law be it the constitution, laws, international conventions, decrees or codes of good conduct and procedures;[48]
- **Effectiveness** – this is the corollary of all of the above-mentioned principles, and implies that the results obtained by the administration conform to the objectives pursued and the public interest.

It follows from the last two principles that NCPs are obliged to respect the *Procedural Guidance,* and to do so in such a way that its decisions tend towards rendering the objectives laid out in the *Guidelines* effective.

RULES FOR IMPLEMENTING GOOD OFFICES

There are several tools at the disposal of NCPs to ensure that their examination of specific instances tend to ensure that multinational enterprises apply the *Guidelines* in the best possible way. In particular they may call on experts, lawyers and even magistrates to enquire into the state of law on any given issue.[49] They may also request the Investment Committee to clarify how principles should be interpreted. Equally importantly, should they deem it appropriate, they have the possibility of carrying out field investigations so as to fully apprehend the cases brought before them, and complete should need be the information supplied by the parties, so as to maximise the likelihood that the procedure be successful.

1.3.1.3 Results of good offices

Seeing the parties come to an agreement on the issue they have raised, and thus helping to solve a dispute, is what constitutes success for an NCP before which a specific instance is brought. **Settlement** may take a variety of forms and any practical way of proceeding may be chosen. It is, for instance, conceivable that a monitoring procedure be set up for a project involving an NCP with on-site visits to endure that the *Guidelines* are properly respected.

On the other hand, if the parties do not come to an agreement on the issue raised, the NCPs are obliged to issue a **statement** and make **recommendations** if appropriate on the implementation of the guidelines.[50]

In concrete terms, it is by issuing such statements or recommendations that the NCPs fulfil their role as creators of jurisprudence. Even after the failure of good offices and confronted with an ongoing dispute, it is by issuing recommendations that NCPs are able to influence the outcome of the dispute.

Finally, the **annual report** submitted by NCPs to the Investment Committee provides information on the nature and outcome of courses of action put in place in specific instances. The aim of this report is to create a coherent jurisprudence applying across NCPs.

QUALIFYING THE ROLE OF NCPS IN THE PROCEDURES FOR SPECIFIC INSTANCES

There is some uncertainty as to exactly how to qualify the ways in which NCPs intervene, insofar as the Guidelines mention alternately the notions of discussion forums,[51] assistance in dealing with issues in an efficient and timely manner, mediation, and conciliation for all issues relating to the *Guidelines*.[52]

[48] It follows from this principle that members of NCPs are obliged to respect the *Procedural Guidance* and to ensure, within the limits of their authority, that the *Guidelines* are applied. See the observations on the admissibility test section 1.3.1.2.1.

[49] As they are obliged to do in accordance with the Procedural Guidance [Commentary no.14 of the Procedural *Guidance*].
[50] Procedural *Guidance*, Part C point 3.
[51] Chapter I point 10 of the *Guidelines*.
[52] Procedural *Guidance*, Part C.

Despite this semantic fudge, the following principal characteristics may be identified to qualify the way NCPs intervene via the mechanism of specific instances:

- **subject**: contribution of NCPs to resolving issues raised by the implementation of the *Guidelines*;[53]
- **means**: the NCPs offer, with the agreement of the parties involved, to facilitate access to consensual and non-adversarial means, such as conciliation and mediation;[54]
- **ways of proceeding**: 1) referral by one of the parties without the other being informed, as in standard judicial procedure and unlike arbitration procedure,[55] 2) power devolved to the NCP to investigate and 3) role as creator of jurisprudence via the issuing of statements and recommendations;
- **organisational arrangements**: it is worth recalling that since NCPs are institutions invested with certain powers devolved by the State, they are subject to the principle of good administration which obliges them to make best use of all the means at their disposal to avoid any denial of justice.

These characteristics and especially their accountability and power to issue recommendations would tend to emphasise the notion of conciliation rather than that of mediation in describing the specific instance procedure.[56]

LESSONS

It follows from this study of NCPs that their organisational arrangements, the responsibilities incumbent on them and the powers devolved to them mean that they are undeniably tools for settling disputes and for 'stating the law'. Hence the specific instance procedures that States, representatives of the business community, employee organisations and NGOs may avail themselves of belong without a shadow of a doubt to the category of tools called 'alternative dispute resolution'.

This is moreover confirmed by Donald Johnson, former Secretary-General of the OCDE, when he states that: '*Under this procedure (specific instances), NCPs act as referees in multi-stakeholder discussions of specific company behaviour in specific business situations.*'[57]

The action of NCPS via specific instances, though it is undeniably heterogeneous as shall be seen in the third part of this study, contributes to the progressive recognition of an *opinio juris* regarding CSR and hence participates in the increasing role played by the *Guidelines* in the sphere of international customary law.[58]

1.3.2 The Investment Committee

The principle of effectiveness to which the NCPs must conform obviously falls foul of the perimeters of their area of competence. Here Paragraph I-c-2-c of the *Procedural Guidelines* obliges the NCPs to seek the opinion of the Investment Committee 'if it has doubt about the interpretation of the *Guidelines*'.

The Investment Committee is the OECD body responsible for overseeing the functioning of the *Guidelines*.[59]

Unlike the NCPs, the Investment Committee is a freestanding body within the OECD which does not depend on national government agencies. Its role is to **clarify** the meaning of the *Guidelines* at the multilateral level to ensure that the meaning of the *Guidelines* does not vary from country to country.[60]

To do this it can intervene at three levels within the framework of a specific instance procedure. It can:

[53] Procedural *Guidance*, Part C.
[54] Procedural *Guidance*, Part C point 2.d.
[55] It is worth noting that Chapter I point 9 of the *Guidelines* encourages recourse to international appropriate dispute settlement mechanisms including arbitration so as to the settle legal disputes that are likely to occur between enterprises and host governments. This seeks to distinguish a specific instance mechanism from an arbitration procedure. The difference arises mostly from the fact that a recommendation issued by an NCP is non-enforceable.
[56] Mme Michèle Guillaume-Hofnung, *La médiation* [Que sais-je ? PUF 2005, 3rd edition and the report of the Conseil d'Etat, *Régler autrement les conflits* [La Documentation française, 1993].
[57] Donald Johnson *Promoting Corporate Responsibility: The OECD Guidelines for Multinational Enterprises*, p.6, 19 May 2005 [http://www.oecd.org/dataoecd/54/16/34896738.pdf].
[58] The *opinio juris* constitutes the necessary subjective element in recognising a rule of customary law, with practice constituting the objective element. The reader is invited to refer to the observations in section 2.2 on this point.
[59] Commentary no.4 on the implementation procedures of the OECD *Guidelines* for multinational entreprises.
[60] Commentary no.27 on the implementation procedures of the OECD *Guidelines* for multinational entreprises.

- firstly, help an NCP faced with a doubt about the interpretation of the *Guidelines* with regard to a specific instance case;[61]
- secondly, intervene as a control body to ensure the proper execution of an NCP's obligations, at the request of a country or advisory body calling into doubt the way in which an NCP is handling a case of specific instance; [62]
- finally, if requested by a country or advisory body, issue a clarification should there be a doubt as to whether an NCP has correctly interpreted the *Guidelines* in a specific instance procedure.[63]

The Investment Committee is also free to call on expert advice for all issues covered by the *Guidelines*. The commentaries on the procedures used show that experts from the OECD, other international organisations, consultative bodies, NGOs and academia in particular may be called upon to fulfil this function.[64]

The Investment Committee reacts to these requests via declarations which play a crucial role in ensuring the effectiveness of the *Guidelines*. It can also, on its own initiative, act as a higher body for interpreting texts thanks to its ability to issue recommendations and commentaries on the *Guidelines*.[65]

This means of intervention by the Investment Committee is clearly important, since it influences the **sphere of applicability** of the *Guidelines* relating to specific instances. This point will be discussed in the third part when considering the lessons which may be drawn from observing the practice relating to specific instances.[66]

QUALIFYING THE ROLE OF THE INVESTMENT COMMITTEE IN SPECIFIC INSTANCES

The commentaries on the procedural *Guidance* are in various respects illuminating for qualifying the role of the Investment Committee:

- on the one hand, reference is made to the fact that 'The non-binding nature of the *Guidelines* precludes the Committee from acting as a judicial or quasi-judicial body',[67] which, *a contrario*, means that it is conceivable that if the *Guidelines* end up becoming part of the binding sphere of international customary law, then the activity of the Investment Committee would resemble that of a judicial body;
- on the other hand, the commentaries also specify that: *'Nor should the findings and statements made by the NCP (other than interpretations of the Guidelines) be questioned by a referral to Investment Committee'*. This assertion is interesting for this study for various reasons:
  - it seeks to specify that the Investment Committee is not a second degree of jurisdiction with respect to the positions adopted by NCPs in specific instance procedures, which would tend to confirm the argument put forward here that sees NCPs as quasi-jurisdictional bodies tasked with stating the law;
  - this commentary, however, by excluding the *interpretations of the Guidelines* which remain the exclusive domain of the Investment Committee, insists on the centralising role of ensuring the coherent application of the Guidelines from country to country. This role is wholly similar to that of supreme jurisdictions such as the French Court of Cassation which judges only on the basis of the law (the interpretation of a text) and not on the basis of the facts (a role which is here reserved for the NCPs, and the jurisdictions of first instance and of appeal in French law).

LESSONS

This presentation of the role of the Investment Committee shows that whilst the notion of clarification is ambiguous, covering the interpretation, application and revision of the texts, it endows it with the means to fulfil its role as a harmonising body for NCP jurisprudence.

[61] Chapter II-2 of the Procedural *Guidance*.
[62] Chapter II-3-b of the Procedural *Guidance*.
[63] Chapter II-3-c of the Procedural *Guidance*.
[64] Commentary no.28 on the implementation procedures of the OECD *Guidelines* for multinational enterprises.
[65] Chapter II-3-d of the Procedural *Guidance*.
[66] Section 3.1.1.3.2.
[67] Commentary no.23 on the implementation procedures of the OECD *Guidelines* for multinational enterprises.

There are also several elements which show that the Investment Committee is open to the idea that instances procedures need to be incorporated into the larger sphere of hard-law decisions. This, for example, is the case for considerations that NCPs may take into account relating to specific instances that are the object of other, parallel procedures. These observations mean that it is conceivable that in future links could be created between NCPs, jurisdictions, and arbitration bodies.[68]

1.4 Diagnosis of the legal status of the guidelines

1.4.1 Doctrinal controversy concerning their exact legal nature

It is worth recalling that the *Guidelines* result from the 1976 Declaration on International Investment and Multinational Enterprises and its Procedural Decisions have been strengthened in various ways over the past twenty years.[69]

The *Guidelines* are thus part of the OECD's[70] normative action as expressed by means of **recommendations**[71] or **decisions**[72]. They are therefore **normative resolutions** issued by an international body and the following distinction may be made here:

- between on the one hand, **internal normative action** that created the tools for implementing the *Guidelines*, that is to say the NCPs and the Investment Committee, and that invested them with the powers described above. The *Procedural Guidance* was adopted by a **binding Decision of the OECD Council**. This internal normative action is directed at States and, as seen above, has important consequences for ensuring that NCPs carry out their role effectively;
- and on the other hand, **external normative action** directed at multinational enterprises (which are corporate entities), with the *Guidelines* aiming to regulate their activity so as to ensure that they contribute to sustainable development. They were adopted by the **Declaration** on international investment and multinational enterprises which is **only recommendatory**;

Above and beyond this distinction between the internal or external nature of the norms implemented by the *Guidelines*, their legal nature is generally held to be that of a pre-normative instrument, somewhere between a political and a legal act and of uncertain binding value.[73]

It is nevertheless necessary to distinguish between the obligatory nature of the *Guidance* obliging States to set up NCPs, and the non-binding nature of the *Guidelines* which is clearly and consistently stated.[74] It is nevertheless indisputable that the Guidelines are **recommendatory resolutions**, just like the ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy (1977) or the Universal Declaration of Human Rights.[75]

However, there is great doctrinal controversy surrounding the question of the value to should be accorded to normative resolutions. This debate reflects the difficulties in interpreting and systematising practice, and swings between denying them all obligatory value and recognising that they have such value.[76] It is not worth going into these debates here and the reader is invited to consult the numerous doctrinal works on this issue listed in the bibliography.

Given the lack of any doctrinal consensus as to the legal nature of recommendatory resolutions,

[68] Cf *OECD Guidelines for Multinational Enterprises: 2006 Annual Meeting of the National Contact Points – Report by the Chair* [Meeting held on 20-21 June 2006, Annex 5 - http://www.oecd.org/dataoecd/23/33/37439881.pdf].
[69] Foreword to the OECD document OECD Declaration and Decisions on International Investment and Multinational Enterprises: Basic texts [DAFFE/IME(2000)20http://www.olis.oecd.org/olis/2000doc.nsf/4f7adc214b91a685c12569fa005d0ee7/c125692700623b74c1256991003b5147/$FILE/00085743.PDF].
[70] This by virtue of article 5 of the founding Convention of the OECD [quoted in Jurisclasseur Droit international, Volume 14 §40].
[71] Article 5 b) ot the OECD statutes [http://www.oecd.org/document/7/0,2340,en_2649_201185_1915847_1_1_1_1,00.html].
[72] Article 5 a) ot the OECD statutes [http://www.oecd.org/document/7/0,2340,en_2649_201185_1915847_1_1_1_1,00.html].
[73] « *Il est deux façons d'entendre l'adjectif 'pré-normatif'. Celui-ci peut désigner des actes dits 'mous » du point de vue formel (soft law), situés entre l'acte politique et l'acte juridique. Il peut aussi désigner des actes préparatoires à l'adoption d'un acte juridique.* » (The adjective 'pre-normative' may be understood in two ways. It can designated formally 'soft' acts (soft law), falling somewhere between a political and a legal act. It can also designate those acts which precede the adoption of a legal act' [Jurisclasseur Droit international, Vol. 14 §39].
[74] During the review in 2000, the OECD Directorate for Financial, Fiscal and Enterprise Affairs stated à propos the creation of the specific instance procedure: '*This is not to say that the procedures change the character of the Guidelines; rather that they lend credibility to international standards which governments support and businesses endorse.*' - in *Review of OECD Guidelines for multinational enterprises – Framework for the Review* - [OECD unclassified document drawn up by the OECD Directorate for Financial, Fiscal and Enterprise Affairs - 21 May 1999 - §10 [http://www.oecd.org/dataoecd/38/9/2071909.pdf].
[75] Jurisclasseur Droit international, Vol. 14 §41.
[76] Jurisclasseur Droit international, Vol. 14 §43 et s.

it is worth enquiring into the position adopted by those bodies whose role it is to state the law. Some have had the opportunity to pronounce on the legal force of such resolutions and have given rise to decisions which are most informative when it comes to determining the legal status of the *Guidelines.*

1.4.2 The recognition of obligatory force by jurisprudence

A norm's binding force may be judged from the way it is used by the relevant legal stakeholders, be they involved in applying it (as seen above, the foremost subjects of law targeted by the *Guidelines* are enterprises, but NGOs and employee organisations are also concerned) or ensuring it is applied (arbitrators, magistrates).

It is usage which reveals the legal value of a resolution/recommendation, and several examples prove that institutions whose role it is to state the law are evolving in a favourable way. Whilst they do not expressly concern the *Guidelines,* which are simply one set of resolutions/recommendations among others, they are nevertheless germane to the analysis being conducted here.[77]

The position of **international judge**, for instance, has changed with respect to United Nations resolutions: in its judgement of 18 July 1966 the International Court of Justice initially took up a position that was clearly unfavourable to their binding value, declaring that the General Assembly of the United Nations: '*may be very influential but … into the political and not the legal realm; that does not render these resolutions binding*.[78]

Yet in its opinion of 8 July 1996 it stated: **'**The Court notes that General Assembly resolutions, even if they are not binding, may sometimes have normative value. **They can, in certain circumstances, provide evidence important for establishing the existence of a rule or the emergence of an *opinio juris*.'**[79]

The criteria applied are thus the **content** and the **conditions in which the resolution was adopted**.

Regarding the **content**, the *Guidelines*:

- are not mere declarations of existing legal principles, and seek to specify the nature of such principles.

  - Numerous notions in the *Guidelines* are, for multinational enterprises, the tangible statement of the international obligations they have to fulfil via articles 30 of the UDHR and 5§1 of the ICCPR and the ICESC. This is the case for chapters II point 2 (respecting the human rights of those affected by their activities), point 9 (refraining from discriminatory measures against employees reporting contraventions of the law), all of chapter IV (employment and industrial relations), and chapter V points 2, 3, 4 and 5 (relating to employee health).

  - The *Guidelines* also refer to notions belonging both to customary law and to general legal principles and practice. Thus the notion of good faith in performance of contracts is subjacent to many of the Guidelines, and the objective of functional equivalence discussed above also relates to the fundamental principle of proper administration of justice. The notions of constructive knowledge, abuse of legal process, equity, and the precautionary principle are also subjacent.

  This reminder of the existing principles shows the indirect binding force of the *Guidelines*;

- yet equally reflects the emergence of the notion of sustainable development (particularly since the 2000 review) regarding which there is a general consensus among the members of the

[77] "*Intergovernmental organisations (IGOs) generated Codes of Conduct identify concretely generally accepted uniform rules in the international arena to which any business should adapt. For the same reason, it can even be argued that if during transnational litigation a TNC proves that a certain action has been taken in conformity with a given IGO's code of conduct, it may be presumed that such act is lawful; a result which runs in parallel with the one reached when evaluating States acts in conformity with a recommendation by an IGO.*"[Fabrizio Marrella *Human Rights, Arbitration, and Corporate Social Responsibility in the Law of International Trade*, p.18-19].

[78] *South West Africa cases* [*Rec CIJ 1966, p.51* – cited in Jurisclasseur Droit international, Volume 14, §45].

[79] *Legality of the Threat or Use of Nuclear Weapons* [Rec. CIJ 1996, p. 254 - cited in Jurisclasseur Droit international, Volume 14 §45]. **We here touch upon the central subject of this present study which seeks to show that the *Guidelines* are becoming part of international customary law. The *opinio juris* is a component of custom, and essential insofar as it illustrates that the subjects of law concerned accept the binding nature of a given practice** (cf section 2.2).

international community, and its corollary, the notion of corporate social responsibility.[80]

Regarding the **conditions in which the *Guidelines* were adopted**, it is worth recalling that all the parties involved in negotiating the *Guidelines* were involved.

But the OECD *Guidelines* for multinational enterprises go further than other equivalent instruments insofar as they are come with a quasi-jurisdictional organisation that helps ensure they are respected by multinationals (which are subjects of law).

This evolution in the jurisprudence of the International Court of Justice relating to the resolutions of the United Nations General Assembly, which recognises their role in shaping and changing international law, means that this same conclusion may also be extended to the *Guidelines*.

At the scale of **national jurisdictions**, the resolutions are naturally evoked a little more frequently in those countries whose law is derived from the common law system, and particularly in the United States.[81]

French judges for their part are comparatively hostile to invoking the resolutions of international organisations but jurisdictions may refer expressly to these resolutions on condition that they have been approved by a French law and are thus one of the reasons for the adoption of this law.[82]

Synopsis 1

This analysis shows that the *Guidelines* have the following fundamental legal characteristics:

1. **multinationals are expressly targeted as the principal recipients of the *Guidelines* and are thereby recognised as fully-fledged subjects of international law;**
2. **the terms of the *Guidelines* are rules of conduct that are broadly accepted by States and enterprises themselves, with the aim of attaining sustainable development;**
3. **the *Guidelines* extend various notions of international law belonging both to customary law and to general legal principles and practice;**
4. **one of the responsibilities of NCPS and the Investment Committee is to state what the law should be via their actions and their organisational arrangements.[83]**

2 ELEMENTS FAVOURABLE TO INCORPORATION OF THE GUIDELINES INTO INTERNATIONAL CUSTOMARY LAW

Before attempting to show how the *Guidelines* enter international customary law, it is worth detailing the reasons for such an initiative. The latter is the fruit of two observations:

- firstly, the relative failure of NCPs, which will be illustrated by analysing practice in specific instances in the third part;
- secondly, the fact that it is highly unlikely that OECD member States will explicitly ascribe compelling force to the *Guidelines*.

In this context, the present study intends to open up avenues which will enable the influence of the current framework of positive law to be strengthened and consider international customary law that could enable the *Guidelines* to find a place within hard-law institutions.

This is because we consider that judicial and arbitration institutions that state legal positions are the natural fields of application of the *Guidelines*. Such jurisdictions have some freedom in their interpretation of the law, enabling them to place it in a broader context and refer to customary principles.[84]

[80] As far as States are concerned, there are innumerable treaties which have been adopted and works in progress on this issue (for example the Kyoto protocol.) and associated interrogations relating to the notion of corporate social responsibility. As far as international institutions are concerned, their energies are directed towards the millennium development goals (WN, IMF, etc.). As for private-sector operators, there are very few multinationals without a sustainable development sector and an ethical charter.
[81] Ch. Schrewer, *The Relevance of UN Decision in Domestic Litigations* : ICLQ 1978, p.1 [cited in Jurisclasseur Droit international, Volume 14 §46].
[82] Jurisclasseur Droit international, Book 14 §46.
[83] "Anthea Elizabeth Roberts *Traditional and modern approaches to customary international law: a reconciliation* [The American Journal of International Law, Vol. 95-757].
[84] Jurisclasseur Droit international, Vol. 13, Book 2, no.126. One noteworthy example is the position of the French "Cour de Cassation"

Furthermore, custom presents the undeniable advantage of respecting State sovereignty in that 1) nothing obliges those in charge of laying down the law to take it into consideration[85] and 2) rules of custom may be used at their discretion, either as a **source of interpretation** of existing national, regional or international law, or as a **source of substantive law**.

A few examples may illustrate why judges and arbitrators may find it worthwhile using the *Guidelines* as customary principles:

1. use as **source of interpretation** – Let us take the practical scenario of a magistrate or arbitrator confronted with the case of a Private-Public Partnership (PPP) terminated by a state following public order disturbances[86] which are so severe that the termination must be implemented at the earliest opportunity. In such circumstances, the private investor is entitled to make a compensation claim with respect to the prejudice suffered; in this case, eviction from infrastructures which they will usually have helped to finance. Current damages assessment practice enables investors to claim an amount equivalent to the profits that would have been generated if the contract had been implemented for its full duration.[87] From our perspective, looking at the situation in terms of customary law enables the arbitrator to assess compensation due to the operator using criteria other than simply the loss of future profits. For instance, reduction in compensation would appear to be legitimate if it is established that the investor did not abide by their good-faith commitment to completion. The arbitrator or magistrate would thus be in a position to judge whether the initially agreed contract could be characterised as a **sustainable contract** etc., notions that feature in the *Guidelines* (via the notion of **sustainable development** which is a central plank in the *Guidelines*), enabling arbitrators and national judges to broaden the spectrum of interpretation in the pursuit of fairness; [88]

2. the use of custom as a **source of substantive law** can also be envisaged. Thus, a definition of the notion of "multinational" drawing on the *Guidelines*, comments and clarifications by the Investment Committee and NCP legal precedence could provide a resource for magistrates when examining charges of **complicity** of a parent company where violations are committed by subsidies or other entities under its influence. With a view to proper administration of justice and especially to avoid a denial of justice, magistrates could consent to open an investigation even where this is not required by a code of criminal practice[89], if it can be established that, in the light of the notion of influence set out in the *Guidelines*, an NCP would agree to take into account a *specific instance* in the same matter. Here, the notion of the sphere of influence of

which, despite a written legal tradition, refers positively to custom. In addition to setting a significant legal precedent in terms of maritime law, this was also the basis on which the Cour de Cassation overturned a decision by the Court of Appeal which had failed to recognise the immunity of jurisdiction by referring specifically to the "rules of public international law governing relations between States" [Cass. Civ. I, A Feb. 1986, *General Maritime Transport Company vs. Marseille Fret* : Clunet 1987, p. 112, note Jacquet, and Chr. Lachaume: AFDI 1987, p. 916 and 917 – quoted in Jurisclasseur Droit international, Vol. 13, Book 2, no.135].

[85] This assertion may appear rather unpromising for our study, which is concerned with the binding nature of *Guidelines* via custom. However, it does not authorise a national agency in charge of stating the legal position to ignore, much less violate, a customary principle. On this point, the Jurisclasseur summary dedicated to custom as a source of international law is enlightening: "Each state must determine, both in principle and in practice, to what extent and under what procedures international norms apply to its domestic legal structure. This is an ordinary consequence of its sovereignty, so this observation is not so much a limit as a consequence of the rules of custom that enshrine and protect this sovereignty. States that carry out such determination on their own, based first and foremost on their constitution, must respect the integrity of international law. Domestic rulings may not be binding and the State's international liability may even be called into play if the conditions that they lay down do not abide by their international obligations. Respecting this integrity therefore leads to the relative precedence of international law." [Juris Classeur Vol. 13, Book 2, no.123, p.19].

[86] Cf Homayoon Arfazadeh's work in particular on the notion of international public order in *Ordre public et arbitrage international à l'épreuve de la mondialisation* [LGDJ, 2005].

[87] *« Under the principles of customary international law, a claimant whose property has been expropriated by a foreign state is entitled to full – i.e. to prompt, adequate and effective – compensation. This generally means that such a claimant is to receive the fair market or actual value of the property at the time of the expropriation (...) »* [*Biloune and Marine Drive Complex Ltd v Ghana Investments Centre* (Award on Jurisdiction and Liability, 27 October 1989 ; Award on Damages and Costs, 30 June 1990) (1994) 95 *International Law Reports* 184, at 210-211]. When the investment is a « going concern » with reasonable prospects of future returns, it is widely accepted under international law that the « fair market value » of the investment must take into account its future prospects as noted by the tribunal in *CMS Gas Transmission Company v The Argentine Republic* : *« The price, expressed in terms of cash equivalents, at which property would change hands between a hypotetical willing and able seller, acting at arm's lenght in an open and unrestricted market, when neither is under compulsion to buy or sell and when both have reasonable knowledge of the relevant facts »* (ICSID Case n°ARB/01/8) (Award dated 12 may 2005) at para 402. See also *Azurix Corp v The Argentine Republic* (ICSID Case n° ARB/01/12) (Award dated 14 July 2006), at para. 424, adhering to the same definition.

[88] See the developments of Howard Mann in *Implications of International Trade and Investment Agreements for Water and Water services : Some Response from Other Sources of International Law* [International Sustainable Development Law, Mai 2006, www.idrc.ca/uploads/user-S/11564348251Implication_of_International_Trade_on_Water.DOC].

[89] For example, for investigation of complicity committed in France for an offence committed abroad, article 133-5 of the French Penal Code requires the principal party to have been the subject of a ruling by a court of last resort - a particularly difficult condition to fulfil for victims in places where the rule of law is uncertain.

> multinationals is of particular importance, and setting up standards to which the *Guidelines* can contribute could play a constructive role by providing national magistrates with greater freedom of action, particularly at the decisive stage of determining whether there are grounds for a claim and the related decisions to open an investigation and to qualify the legal charges in a transnational context. [90]

Incorporated into international customary law, the *Guidelines* could thus contribute considerably to decision-making by judges and arbitrators by providing them with standards which are accepted by all interested parties and appropriate to the sphere of influence of multinationals.

However, the perspective for use of the *Guidelines* by hard-law institutions as components of customary law clearly depends on the various power plays at work, and these are not currently favourable in this respect. Nonetheless, given the final objective pursued by the Guidelines - sustainable development - a cause which is so much in the public interest might strongly encourage judges and administrators to take the *Guidelines* into account, if they can provide assistance in coming to a decision. Moreover, the use of custom as a source of interpretation is important in the first instance, since it is likely to be that most rapidly accepted and practiced by national magistrates and international arbitrators. Survival of the planet for future generations can and should constitute the interpretative framework for international law today. We consider that the current changes described in the developments hereafter demonstrate this significant trend.

After presenting shifts in international law towards the notion of CSR (2.1), we will demonstrate and analyse the points of convergence between the Guidelines and international customary law (2.2).

[90] As illustration, let us quote the example of a case concerning TOTAL company introduced by the association Sherpa in 2002. The plaintiff, represented by William Bourdon suggested defining the detention, in the sense of the French penal code, by integrating the international definition of forced labour, which notably results from works of the ILO [William Boudon, *Entreprises multinationales, lois extraterritoriales et droit international des droits de l'homme*, in *Les figures de l'internationalisation pénales en droit des affaires*, RSC, 2005, 4, p.747-751 – cité in Mireille Delmas Marty *Le Pluralisme ordonné*, février 2006, Seuil].

2.1 Changes in international law

2.1.1 Trends in the sources of international law

Let us review one of the reference texts which determine the sources of international law. Article 38(1) of the Statute of the International Court of Justice (ICJ), 1945, reads:

> "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 recognized by the contesting states; b) **international custom, as evidence of a general practice accepted as law**; c) the general principles of law recognized by civilized nations; d) subject to the provisions of Article 5, 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."

It is our opinion that this definition, which limits the sources of international law to justiciable rules (already disputed at the time), is no longer compatible either with the aims or the genuine changes in international law, of which the sources and dispute settlement institutions have expanded considerably since 1945.[91]

Nonetheless, the question here is not to dispute what should or should not constitute a norm in international law but to make sure that rules that do not meet the criteria of justiciability are not neglected as a result when they can enable the dispute to be settled. If they must fulfil notions of custom, general principle of law or *usage*, this is not a major obstacle if the norms concerned are fundamentally aimed at maintaining fairness. This is the case of the *Guidelines*, which aim to plug the gaps in law and jurisdictional mechanisms which are ill-equipped to apprehend bad practice on the part of multinationals and – let us remember - ensure their participation in sustainable development and thus the public interest.

The following developments thus form part of the debate on the evolution of the process by

[91] For instance, it is undeniable that *Lex Mercatoria* is binding in nature given the use which is made of it in arbitration institutions that rule on matters of investment law (cf. our development below in section 2.2.2.1).

which custom is formed.[92] Unless we proceed in this manner, we will inevitably fall foul of article 1 of chapter I of the *Guidelines*, which, it should be remembered, states that "(...) *Observance of the Guidelines by enterprises is* ***voluntary and not legally enforceable***",[93] and conclude thereby that they are not binding in nature and so finish the study then and there, with a mixed or even negative assessment, since the aim of the OECD agreement to see competitive distortions disappear and achieve sustainable development is far from having been achieved.

The present study therefore takes a position in which we attempt to get to grips with the de facto observation of the universal sphere of influence of multinationals and the indispensable changes this implies in the sources of international law. Taking this position particularly influences the fundamental notion of what constitutes a subject of international law.

2.1.2 The influence of the notion of "sphere of influence" of multinational enterprises on the notion of the subjects of international law

At this point, it is worth taking a brief look at changes in international law taking place today with respect to certain members of the international community - the multinationals. Firstly, this change is undeniable, and work done and underway in several institutions to attempt to regulate the activities of multinational companies is a clear sign of this.[94] This illustrates the upheaval generated by the growing sphere of influence of these private investors in the international community, which in many cases exceeds that of nation states.

The issue of the sphere of influence has long been identified.[95] The subject was already being debated in the 1970s at the UN and the OECD. A document from the Investment Committee Directorate of Financial, Fiscal and Enterprise Affairs dated September 1999 provides ample illustration of this new awareness,[96] whilst specifying, in relation to the *Guidelines*: "*While these prospective codes of conduct (negotiated at the United Nations) rested chiefly on the concept of an unequal conflict between all-powerful corporations and governments lacking in resources, and thus sought to see that host countries could exercise full control of the activities of MNEs* (Multinational Enterprises) *to ensure national policy was upheld,* ***the OECD Guidelines have stayed faithful to the traditional view according to which state authorities should be more powerful than MNEs in terms of both form and reality***".

This position has entailed the relative failure of the institutional tools which are supposed to apply the guidelines (NCPs and the Investment

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[92] We will not go into detail here about the debates relating to the formation of rules of custom, even if we are of the opinion that custom is the result of a more complex process in which a number of different factors interact. "*Outstanding uncertainties about the formation of custom relate largely to the mental process by which the human mind associates normativeness (the idea of obligation) to a certain social legitimacies. The a posteriori link which is established here cannot be clarified in general terms. On this point, it is the notion of order which guides legal thinking, which in turn proceeds from a representation of values and certain moral and social imperatives which, in international relations, are anything but immutable. Neither the data used de facto (number, specificity, etc) nor the path by which this data is joined together to eventually take shape and turn into the "precedents" which make up custom can be subject to generalisations in any theory of custom.*"[Ch. De Visscher *Théories et réalités en droit international public*, 2nd edn., Paris, Pedone 1955, p.190 – in Robert Kolb *selected problems in the theory of customary international law* - Netherland International Law Review, L:119-150, 2003 – p.121] and "*Custom is a legal and intellectual construct, developed through a complex process of analogical reasoning reducing to an 'artificial' unity a series of unconnected fact and facts. It is only this analogical reasoning which allows the establishment of a common 'rate of exchange', i.e., a bridge connecting the 'is' to an 'ought', a fact to a regularity, and finally to declare the existence of a rule.* " - [Robert Kolb – *selected problems in the theory of customary international law* [Netherland International Law Review, L:119-150, 2003 – p.131]

[93] Article I.1 states in extenso that "*The Guidelines are recommendations addressed by governments to multinational enterprises. They provide voluntary principles and standards for responsible business conduct consistent with applicable laws. Observance of the Guidelines by enterprises is voluntary and not legally enforceable.*".

[94] Aside from work within inter-state institutions, there is for instance the work done by the FAFO [www.fafo.no] and the IISD which is suggesting a standard new-generation Bilateral Investment Treaty taking into account the increased sphere of influence of private investors (International Institute for Sustainable Development (iisd) Model International Agreement on Investment for Sustainable Development - Negotiator's Handbook [April 2006 - http://www.iisd.org/pdf/2005/investment_model_int_handbook.pdf], and the work of the International Commission of Jurists. It should also be specified that all this work is being monitored by Prof. John Ruggie.

[95] For instance, this excerpt from a 1986 article by Professor Jean Paillusseau: "To protect and safeguard their interests, enterprises tend to react by following guidelines opposed to those of society or some of the latter's constituent groups. (...) The action of enterprises in these various fields, and thence its opposition to society or some of its constituent groups, is in relation to the former's power. While action by a small or medium enterprise is completely negligible on a macroeconomic scale, that of an international or multinational company may be significant, particularly in a small nation. This is why multinational corporations excite such passions and breed so much controversy." [*Qu'est-ce-que l'entreprise ?* Les Petites Affiches no.43, 9 April 1986, p.32, no.172]

[96] Prof. Arghyrios A. Fatouros *Les principes directeurs de l'OCDE dans un monde en voie de mondialisation* - "*the adoption of standards of conduct applicable to MNEs not only recognises that the activities of these enterprises have significant effects on national economies, but also recognises that this influence differs - certainly in its causes and perhaps in its effects - from that of other powerful economic stakeholders. The increased power and resources of MNEs are not related solely to the size of these resources and the breadth of activities in which they are involved, but also - and this is perhaps the key element - to their transnational links. Their structure and organisation - the fact that they operate in several countries and under a large number of jurisdictional and administrative systems and that they can draw on resources and activities located in a large number of countries between which they are able to transfer resources and information - provide them with more power and much more freedom of action compared to enterprises operating in a single country*" Investment Committee Directorate of Financial, Fiscal and Enterprise Affairs document, not filed, dated September 9 1999, no.DAFFE/IME/RD(99)3, p.6 and s.].

Committee) - this will be analysed in part III. The situation has clearly changed; today, there is universal recognition and reflexion concerning the most efficient means of getting apprehending the bad practices of certain multinational enterprises.

The notion of "sphere of influence" is thus crucial to both the theoretical debate and to practice[97] in terms of apprehending the bad practices developed by some enterprises via their foreign subsidies or entities, over which they exercise significant influence. It should be noted that this features in article 1 of the standards adopted on August 13 2003 by the Social and Economic Council of the UN,[98] as well as in the mandate of Professor John Ruggie, who was designated in 2005 as the UN special representative for human rights and business - transnationals and other enterprises.[99]

The present study does not however intend to supply a definition for this notion, indeed we consider that such a task is destined to failure since there are so many widely diverse criteria which could be taken into account. As a minimum, it can be said that this notion should constitute a means of appraising CSR that could in turn help to define other, much more legal concepts, such as "complicity". This short introduction to the subject aims above all to establish this de facto situation as a postulate justifying the legitimacy of qualifying enterprises as being subjects of international law and the interest of the appeal to custom.
The traditional school of international law recognises only States as being subject to such law. This element is crucial, because it partially explains the "voluntary" nature of the *Guidelines*. The reason these Guidelines are not formally binding on the States which have adopted them is not only the fact that they were not adopted in any legally binding form, with the notable exception of the *Procedural Guidance*, but also because they are intended for enterprises and not for States.[100]

We believe that this explanation of the origins of the non-binding nature of the *Guidelines* illustrates the fundamental importance of taking into account changes in international law in the light of the recognition of the sphere of influence of multinational enterprises if a relevant analysis of the Guidelines' legal status is to be undertaken. These changes tend to demonstrate that today, other stakeholders besides States have become subjects of international law. This is certainly true for physical individuals and multinational enterprises. Even if this position is still disputed by those who cling to the fiction that only States may create international legal norms, considerations of efficiency dictate that it be taken as the logical, consistent starting point for any analysis of the legal status of the *Guidelines*.

In the light of this recognition of the sphere of influence of multinational enterprises, following the traditional school that recognises States as the sole subjects that qualify as subjects of international law is a position which is no longer in touch with reality. In particular, this definition does not address the role of international arbitration courts where the most important commercial disputes between private operators and between private operators and States are settled. Moreover, it is in such forums that international investment law has developed the most, and where the sphere of influence of multinationals is most effectively expressed via *Lex mercatoria* and the application of the around 1,700 Bilateral Investment Treaties.[101]

This traditional position is disputed today to the extent that objecting to the fact that this study considers multinationals as well as individual citizens to be genuine subjects of international law can no longer be deemed a valid objection. In this respect, it should be remembered that since 2000, NGOs representing citizens' interests have been able to bring disputes before the NCPs.

We therefore consider that multinationals are subjects of international law and that as such, they must answer for actions on their part which violate fundamental

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[97] As we saw in the introduction to this second part, this is particularly the case at the moment of decision as to whether to open an investigation into complicity of a parent company called to account for the actions of one of its subsidies or other entity under its influence carrying out business in another country.

[98] http://www.unhchr.ch/huridocda/huridoca.nsf/(Symbol)/E.CN.4.Sub.2.2003.12.Rev.2.En.

[99] Point (c) of Resolution 2005/69: "*To research and clarify the implications for transnational corporations and other business enterprises of concepts such as 'complicity' and 'sphere of influence'*" [http://daccessdds.un.org/doc/UNDOC/GEN/G06/110/28/PDF/G0611028.pdf?OpenElement].

[100] "*it can be supposed that (their non-binding nature) is a consequence of their international origin, on the hypothesis that the norms of international law are not normally binding in nature for individuals or corporate entities. However, the validity of this hypothesis can of course be questioned, probably more easily today than in 1976.*, " [Prof. Arghyrios A. Fatouros *"Les principes directeur de l'OCDE dans un monde en voie de mondialisation* - Investment Committee Directorate of Financial, Fiscal and Enterprise Affairs unclassified document no.DAFFE/IME/RD(99)3 dated 9 September 1999, p.8].

[101] Cf Fabrizio Marella *Choice of Law in Third-Millenium Arbitrations: The relevance of the UNIDROIT Principles of International Commercial Contracts* [Vanderbilt Journal of Transnational Law, Vol. 36].

principles when the latter have their origin within their sphere of influence.

2.2 The *Guidelines* and international customary law

Even if we consider that the traditional definition of custom is open to debate, in the interests of effective proof, we have opted to analyse the *Guidelines* in the light of the test of custom which has its origins in article 38(1) of the ICJ Statute, according to which "*custom is the result of a combination of an effective practice and the acceptance by States of the legal - and therefore binding - nature of the practices which make up any such practice*".[102]

It should also be specified that in terms of acknowledging the existence of a rule of custom, the combination of general practice and acceptance of this practice as a legal obligation (opinio juris) is a necessary condition; it is also a sufficient condition.[103]

It is also worth stating clearly that while the *Guidelines* constitute an attempt by the 39 signatory states to identify practices which are the subject of consensus, they also form part of the broader normative development of the notion of Corporate Social Responsibility (CSR). In this respect, incorporation of the Guidelines into international customary law is consistent with the direction of CSR.

After having analysed the objective/material component of practices, which assume the existence of a repeated, generalised practice (2.2.1), we will also identify the subjective/psychological component of opinio juris, which assumes that subjects of law are convinced that this practice represents an obligatory rule of law (2.2.2).

2.2.1 Existence of general practice in terms of CSR

2.2.1.1 The generally recognised recognition of criminal liability of corporate entities

Over and above the multiplication of corporate governance legislation imposing obligations of social and environmental information on enterprises,[104] many States have adopted legislation recognising the criminal liability of corporate entities and/or the one of their executives.

For instance, in the case of **French criminal law**, the latter has recognised general criminal responsibility of corporate entities since 1994 (including, for instance, crimes against humanity, injury to life or individual physical or moral integrity, money-laundering, damage to the environment, receiving, etc.).[105] It is interesting to note that the offences listed cover practically the whole field of commitments originating in the notion of CSR and which are taken up in the *Guidelines*.[106]

It should be added that French criminal law (like almost all other criminal law) recognises the principle of individual liability. In absolutum, application of this principle combined with the notion of the legal autonomy of corporate bodies enables parent companies to escape liability arising from offences committed by one of their subsidiaries. However, there are three avenues which can circumvent this state of affairs: complicity, receiving, and failure to assist persons in danger.

Complicity[107]

Complicity is an accessory offence which requires a principal punishable offence. However, by definition, the act of complicity is not committed by the principal perpetrator. This therefore provides a way out of personal liability. Unfortunately, when (as is often the case with a multinational enterprise) the principal offence was committed in another

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[102] Robert Kolb – *selected problems in the theory of customary international law* [Netherland International Law Review, L:119-150, 2003 - footnote no.2].

[103] Juris Classeur Vol. 13, Book 1, no.61, p.21. It should also be noted that the following developments take into account the position adopted in 2004 by the United States Supreme Court, which ruled that to be admissible, a norm of international customary law had to be "specific", "obligatory", and "universal". [*Sosa v. Alvarez-Machain*, 542 US 692, 732 (2004) - http://a257.g.akamaitech.net/7/257/2422/29june20041115/www.supremecourtus.gov/opinions/03pdf/03-339.pdf].

[104] e.g. in France, article 116 of the New Economic Regulations law dated 15 Mai 2001 (C. com., art. L. 225-102-1) and its decree of application dated February 20 2002; in Italy, the *Codice di Autodisciplina* (July 2003) for the financial market; in Germany, the *Regierungskommission Deutscher Corporate Governance Kodex*, Derlin 21 mai 2003; in the United States, the *Sarbanes Oxley Act* of 2002.

[105] Article 121-2 of the Penal Code states "*Corporate entities, excluding the State, are criminally liable (...) for offences committed on their own behalf and/or by their organs or representatives*".

[106] "*However, globalisation was initially associated with deregulation and self-regulatory mechanisms ('soft law' and codes of conduct). Nonetheless, henceforth it is also characterised by increased criminalisation: for the game to be equally matched, the playing field has to be levelled, and criminal sanctions are more effective in this respect than administrative or civil sanctions. Given this, it is hardly surprising that liberalism implies a return to criminal law (...).*" - Mireille Delmas Marty, *Le Pluralisme ordonné*, Seuil, February 2006, p. 177ff.

[107] Article 121-7 of the French Penal Code provides : "*The accomplice to a felony or a misdemeanour is the person who knowingly, by aiding and abetting, facilitates its preparation or commission. Any person who, by means of a gift, promise, threat, order, or an abuse of authority or powers, provokes the commission of an offence or gives instructions to commit it, is also an accomplice.*"

country, the liability of the accomplice can be sought only where there is an existing ruling by a foreign court recognising that the offence has been committed. The fact is that many host countries are in a disadvantaged position compared with a multinational enterprise and cannot (or will not) nurture a criminal ruling against the company responsible for the offences. Use of complicity does not therefore enable all these difficulties to be circumvented.

Receiving[108]

Receiving (*recel*) also assumes an original offence qualified as a crime or misdemeanour under French criminal law. French law has adopted an extensive concept of receiving. This includes receiving for profit: Any person who has benefited from the results of a crime or misdemeanour and who is aware of the origin of what they have benefited from may be prosecuted.

Receiving thus overcomes the problem of liability for the initial action and does not raise the issue of recognition of the offence committed by a foreign jurisdiction.

Non-assistance to persons in danger[109]

Non-assistance to persons in danger is a fully autonomous offence. It does not require an original offence (as is the case with receiving) or a principal offence (as is the case with complicity). If a person is in danger (or runs the risk of an offence against their physical integrity being committed) and another person can help the former without placing themselves in danger and refuses to do so, an offence has been committed.

This offence therefore overcomes all difficulties; unfortunately, however, its field of application is much more restricted than for receiving and complicity; the danger must be serious or the offence must be related to physical integrity.

Involuntary offences

Since the law of July 10 2000, the provisions of the French Criminal Code relating to involuntary offences also constitute a useful tool to render the notion of corporate social responsibility more tangible.

Article 121-3 of the Penal Code states the following:
"(...) *where provided for by law, a misdemeanour is committed in the event of deliberate imperilling of another person. A misdemeanour is also committed where provided for by law, in the event of carelessness, negligence, or failure to carry out obligations of precaution or security provided for by law or regulations if it can be established that the perpetrator did not carry out all normal due diligence, given the nature of their missions, position, competencies (as applicable) and the authority and resources which were available to them.*"[110]

These avenues opened up by French law have equivalents in many other jurisdictions, as is attested by the extensive work carried out particularly by the International Commission of Jurists and the FAFO.[111] It can be considered that the definition by national law of civil and criminal liability of corporate entities constitutes the positive legal framework for corporate social responsibility and demonstrates the existence of a positive binding law, creating significant jurisprudence which we will deal with in section 2.2.2.5.

2.2.1.2 The development of ethical charters

The development of ethical charters constitutes habitual practice which is disparate but which nonetheless constitutes a consensus on the notion of CSR. The complementary nature of the charters was clearly evident when the Guidelines were revised in 2000.

[108] Article 321-1 of the French Penal Code provides : " *Receiving is the concealment, retention or transfer a thing, or acting as an intermediary in its transfer, knowing that that thing was obtained by a felony or misdemeanour. Receiving is also the act of knowingly benefiting in any manner from the product of a felony or misdemeanour.*"

[109] Article 223-6 of the French Penal Code provides : " *Anyone who, being able to prevent by immediate action a felony or a misdemeanour against the bodily integrity of a person, without risk to himself or to third parties, wilfully abstains from doing so, is punished by five years' imprisonment and a fine of €75,000. The same penalties apply to anyone who wilfully fails to offer assistance to a person in danger which he could himself provide without risk to himself or to third parties, or by initiating rescue operations.*"

[110] For information on the possible procedures for using these provisions, see *Rapport d'enquête sur la situation des travailleurs de la COMUF, filiale gabonaise du groupe AREVA-COGEMA*, April 4 2007, pp. 29ff. [http://asso-sherpa.org/CP_areva07/RAPPORT%20AREVA%20MOUNANA%20040407.pdf].

[111] See the recent study coordinated for FAFO by Mark B. Taylor, Anita Ramasastry and Robert C. Thompson *Commerce, Crime and Conflict. Legal Remedies for Private Sector Liability for Grave Breaches of International Law. A survey of Sixteen Countries*, Sept. 2006 [FAFO www.fafo.no and ICJ www.icj.org- See also interim report by Professor John Ruggie noting this phenomenon, § 63 [http://daccessdds.un.org/doc/UNDOC/GEN/G06/110/28/PDF/G0611028.pdf?OpenElement].

Development of this practice on the part of multinational enterprises as the subjects of international law is undeniable,[112] and the issue of the legal status of these ethical charters is especially relevant here to the extent that despite their voluntary nature, they refer to the status of *Lex Mercatoria* whose binding nature is not in dispute – this will be developed in section 2.2.2.2

2.2.2 Developing opinio juris for CSR

This touches on the high point of the constitution of custom - its subjective element which consists in acceptance, by the subjects of law in question, of the **obligatory** nature of a rule of custom. This merits spending some time considering the notion of **constraint** and what it covers today.

As has already been mentioned, the *Guidelines* are representative of a general tendency to recognise the incidence of multinationals' activity on considerations relating to the public interest. This recognition has given rise to the notion of Corporate Social Responsibility, for which the *Guidelines* are just one of several means of apprehension. It is undeniable that observation of management of social and environmental hazards by enterprises helps to increase the legal weight given to CSR. This risk management by companies is undeniably linked to the notion of constraint. The latter is implemented practically in a variety of ways. For instance:

- the role of ranking agencies and investment funds, which exercise considerable influence on the good standing of stock market values, and which are increasingly attentive to the social and environmental balance sheets published by companies, either voluntarily or under the terms of domestic legal provisions;
- media pressure and its effect on a company's image is also a form of constraint. For example, the signature on February 13th 2007 of an agreement between the Ivorian government and Trafigura for payment of compensation for the environmental and health damage relating to the dumping of toxic waste in several areas of Abidjan constitutes an admission of liability. Behind a settlement presented as an initiative on the part of the company lies constraint, i.e. fear of an image deficit and the threat of legal proceedings against the company. Moreover, it should be noted that since the signing of this agreement was not binding on the direct victims, the latter are still free to take legal action. A similar instance concerns the attitude taken by Areva; when the company was confronted with the reports from two enquiries into the impacts on health and the environment of their subsidiaries' uranium mining activities in Gabon and Niger, it decided to set up observatories on each of its mining sites.[113]

This constraint, which could be termed "soft constraint", linked to the threat of "marketing" and stock-market sanctions, is undeniable and goes a long way to explaining the multiplication of multinationals' internal departments in charge of corporate social responsibility and/or sustainable development.

In addition, when it comes to the regularly cited opposition between the voluntary nature of the *guidelines* and the notion of constraint, it is interesting to quote the former Secretary General of the OECD:[114]

> "*Moreover, initiatives are not always as voluntary as they might seem. The dictionary defines the adjective "voluntary" as "acting freely without an external constraint". On the basis of this definition, many private initiatives are not really "voluntary"; they are private reactions (anchored in management systems and other business practices) which are motivated by powerful financial, legal or regulatory pressures created by the societies within which companies carry out their business.*"

Some multinational enterprises[115] now publicly affirm their need of legal security, and those who take part in theoretical work underway in the field of CSR are willing to accept proposals

[112] For more information, see the OCDE study *Responsabilité des entreprises, initiatives privées et objectifs publics* 2001 [http://www.oecd.org/dataoecd/58/12/35316082.pdf]. See also the interim report by Professor John Ruggie noting this phenomenon, § 33-37 [http://daccessdds.un.org/doc/UNDOC/GEN/G06/110/28/PDF/G0611028.pdf?OpenElement].

[113] For more details, see: http://asso-sherpa.org/conf.presse_areva2007.html.

[114] Donald Johnson *Promoting corporate responsibility: OECD Guidelines intended for multinational enterprises*, p.5, May 19 2005 [http://www.oecd.org/dataoecd/54/17/34896809.pdf].

[115] For instance, this is the case for ABB, BP, Coca Cola and Grind who, through their representatives at a conference organised in October 2006 by the International Commission of Jurists on the subject of investment in conflict zones, expressed this need of legal security and their readiness to examine any proposals containing elements of constraint in the event of failure on their part to abide by their commitments

which do not rule out the aspect of constraint in the measures proposed, provided these gain them enhanced legal security (a measure of constraint is acceptable if it is framed so as to be predictable for all parties concerned).

It should also be noted that multinationals are increasingly vigilant when there are proceedings relating to special circumstances. At the stage of good offices, it is not rare to see legal counsel sitting alongside representatives from the communications department of the multinational in question.

The existence of such an opinio juris with respect to CSR and more specifically in relation to the *Guidelines* is still further established by observation of

- the way *Lex mercatoria* has developed
- incidence of CSR in international arbitration
- incidence of CSR in regional institutions
- incidence of CSR in national institutions

2.2.2.1 Lex Mercatoria

Lex mercatoria (*Lex mercatoria*) represents "a set of rules which are specific to international economic relations of which a state is not the origin or source... enabling the beneficiaries to escape from the reach of international legal order".[116]

A parallel between *Guidelines* and *Lex mercatoria* is not devoid of interest here. This is because in terms of its formation, *Lex Mercatoria* does not of course pass the test of custom for international law, despite having progressively asserted itself as a legal tool, universally and at international level, with no distinction of jurisdiction, alongside the development of international trade and its main stakeholders - multinational enterprises. The binding nature of this category of norms, adopted within the sphere of influence of multinational enterprises, is beyond doubt, as all disputes relating to international trade demonstrate.[117]

It is worth referring to habitual practice under *Lex mercatoria* for the purposes of our study, given the spectacular proliferation of corporate ethical charters that some authors claim are now entering *Lex mercatoria*.[118]

There are thus several arguments allowing us to conclude that ethical charters **between operators** are binding in nature based on the fundamentals of contract law. For instance, the Code of Labour Practices for the Apparel Industry states the following: "*Where there is repeated failure to observe or to ensure observance of the code by a particular contractor, subcontractor, supplier or licensee, the agreement should be terminated*".[119] It is also conceivable that in application of the UNIDROIT rules and more specifically, based on the notion of "legitimate expectations",[120] the party to a contract could terminate it on the grounds that the unilateral commitments made in the ethical charter of the co-contractor had not been adhered to.

Clearly, incorporation of ethical charters into *lex mercatoria* does not have a direct impact on the victims of human rights or environmental violations who are not parties to the contract. However, this arrival of ethical charters in the body of rules applicable when a dispute opposes two private operators opens promising perspectives, particularly for arbitration.

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[116] Jacques Beguin "does the development of Law Merchant threaten international order?"[1984-85, 30 McGill L.J. 478] – in Serge Parisien "Un essai sur le mode de formation des normes dans le commerce électronique", p.2 – http://www.lex-electronica.org/articles/v2-1/parisien.html#fnb18.

[117] "*The theory of lex mercatoria has incorporated contractual practice as one of its sources. Professors Lalive summarise this phenomenon by observing that "scientific and technical developments, ease of communications and the need for rapid decision-making have required (and continue to require) practice to devise new formulae which, through experience, become standard professional practice, norms, pro forma contracts or standard forms, and customs for one branch of business, prior to being codified by some form of association or federation. The presence of contractual normalisation of trade relations is admitted even by those who doubt the reality of the phenomenon of lex mercatoria".* Eric Loquin et Laurence Ravillon, *La volonté des opérateurs vecteur d'un droit mondialisé* in *La mondialisation du droit*, Research Centre for Market Law and International Investment, Volume 19, Litec 2000, p.91ff. Fabrizio Marella *Choice of Law in Third-Millenium Arbitrations: The relevance of the UNIDROIT Principles of International Commercial Contracts* [Vanderbilt Journal of Transnational Law, Vol. 36].

[118] Fabrizio Marrella - *Human Rights, Arbitration, and Corporate Social Responsibility in the Law of International Trade* – pp.25-26; Farjat – *Nouvelles Réflexions sur les codes de conduite privés*, in Fouchard, P. Lyon-Caen, A. and Kahn, P. (eds.) *Les transformations de la régulation juridique* (Paris: LGDJ, 1998), pp. 151-178.

[119] Clean Clothes Campaign, Code of Labour Practices for the Apparel Industry including Sportswear, February 1998 [reproduced in R. Mares, *Business and human rights: A compilation of documents* (Boston: Martinus Nijhoff, 2004 – quoted in in Fabrizio Marrella - *Human Rights, Arbitration, and Corporate Social Responsibility in the Law of International Trade* – p.25]

[120] In the terms of the UNIDROIT Principles, art. 1.8 states "*A party may not act contrary to an expectation which they may have generated in the other party if the latter had reasonably believed in this expectation and acted in consequence and do their disadvantage*" [UNIDROIT Principles relative to contracts for international trade 2004 - http://www.unidroit.org/french/principles/contracts/principles2004/blackletter2004.pdf].

2.2.2.2 Incidence of CSR in international arbitration

Arbitration institutions are a privileged forum for the settlement of international trading disputes, so it is worth paying close attention to the emergence - admittedly marginal but nonetheless real - of the tendency to recognise the incidence of the activity of multinationals on considerations relating to the public interest.

For instance, the taking into account of the specific issues relating to water in the CIRDI dispute *Aguas Argentinas v Argentina*. On February 12 2007, the arbitrators agreed to accept an *amicus curiae* submission by five NGOs on the grounds that they would have to settle "complex public and international law questions, including human rights considerations".[121] The symbolic subject of the right to water constitutes a particularly important vector of evolution of CSR by which it is advisable to follow attentively the progress.[122]

Moreover, as regards disputes between investors, the existence of two arbitration procedures before the International Chamber of Commerce following termination of contract due to a breach by one of the contracting parties of their ethical charter[123] can be noted.

Of course, this openness of arbitrators to considerations relating to the public interest has not yet produced tangible results for the direct victims of abuses, since at present arbitrators are content simply to admit *amicus curiae* submissions relating to investor obligations under human rights law, without any significant ensuing consequences. However, this tendency to incorporate CSR considerations in the proceedings via *amicus curiae* submissions and the incorporation of ethical charters in contractual obligations of co-contractors is undeniable, and likely to strengthen legal precedent and help define the contours of the obligations of multinational enterprises. In addition, it is interesting to note that recourse to arbitration is explicitly recognised by the European Court of Human Rights as an extension of property law, the subject of article 1 of Protocol no. 1 of the European Convention on Human Rights; enterprises are thus protected against breaches of this law.[124]

Finally, it should be recalled that the *Guidelines* encourage recourse to appropriate international dispute settlement mechanisms, including arbitration, and that by so doing, they are making an indirect entry into these institutions.[125]

2.2.2.3 Incidences of CSR in regional jurisdictions

Extensive discussion of this topic is beyond the scope of the present study an we send back the reader diverse works on this issue.[126] However, we can note in passing that at the level of the European Union, the means of apprehension of CSR exist. In terms of civil liability, Regulation (CE) no. 44/2001 of the Council dated December 22 2000 relating to legal competency, recognition and implementation of decisions in civil and commercial matters give jurisdiction to the courts of the States of the EU to know of any civil complaint against persons, including moral persons, domiciled in the EU.

This regulation thus allows every victim of violation of human rights or environmental damages caused by the activity of a multinational company registered in the EU, to ask for damages in front of the courts of the member state where the aforementioned company is registered.

The application of this convention in particular made it possible to force the British magistrates in the the case *Lubbe v. Cape plc* to consider acts perpetrated in South Africa (cf following section).

2.2.2.4 Incidences of CSR in national jurisdictions

The generalisation of recognition of criminal liability of corporate entities mentioned in

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[121] CIRDI – n°ARB/03/19, Order in response to a petition by five non-governmental organizations for permission to make an amicus curiae submission, February 12, 2007, para.18.
[122] Yann Queinnec, *Propositions pour un arbitrage international*, intervention à l'occasion des 1ères Rencontres internationales pour le droit d'accès à l'eau, Marseille, 25 novembre 2006.
[123] ICC award n°5617 (1989), *Journal de droit international*, 994 at 1041 (contract of sales of human glands obtained from cadavers for production of drugs); ICC award n°3493 (1983) in 23 ILM 1048 (1984) ("Pyramids arbitration": international construction contract in the area of Egyptian pyramids) [quoted in Fabrizio Marrella - *Human Rights, Arbitration, and Corporate Social Responsibility in the Law of International Trade* – p.26]
[124] *Stant Greek Refineries et al. V. Greece*, Dec. 9, 1994, A 301-B, 19, Eur. Comm. HR, Dec. & Rep. 293 [in Fabrizio Marrella - *Human Rights, Arbitration, and Corporate Social Responsibility in the Law of International Trade* – p.7].
[125] *Guidelines*, I. concepts and Guidelines no. 9.
[126] Namely, De Schutter *Towards Corporate Accountability for Human and environment rights abuses*, section III [2007); Andrew Clapham *Human Rights Obligations of Non-State Actors* [Oxford 2006]; Nicola Jägers *Corporate Human Rights Obligations: in search of Accountability* [School of Human Rights Research, Intersentia, 2002]; Mireille Delmas-Marty *Le relatif et l'universel* [Seuil, Oct. 2004]; Mireille Delmas-Marty *Le pluralisme ordonné* [Seuil, Feb. 2006].

section 2.2.1.1 has resulted in legal proceedings against economic operators using all texts which enable breaches of social liability by enterprises to be apprehended.

This raises a crucial point relating to the question of the effectiveness of law. This is because there is a patent disparity between the existence of these so-called "hard-law" norms and their effective application to multinational enterprises. This can be explained to a large extent by the inherently extra-territorial nature of the activity of multinational enterprises. It is indeed particularly difficult for plaintiffs to call the parent company to account for actions carried out by one of its subsidiaries located in another jurisdiction.

This is due to a variety of reasons. The conditions required by various Codes of Criminal Procedure for offences committed abroad are one specific example. Nonetheless, examples of legal action against multinational enterprises for breach of principles relating to their CSR indicate the emergence of an *opinio juris*.

Extensive coverage of this point is outside the scope of the present study, but we note some significant examples below.[127]

In the United States, the example of the application of the Alien Tort Claims Act (ACTA)[128] in the legal precedent created by *Doe I v. Unocal* is significant. In this case, the liability of Unocal for complicity in forced labour imposed by the Burmese junta on workers at a gas pipeline site was recognised.[129]

In the United Kingdom, on the basis of employers' "duty of care", Cape was the subject of legal action due to it not having obtained a safe and healthy working environment for employees in its South African subsidiaries. In spite of Cape's appeal to the theory of *forum non conveniens* in an attempt to demonstrate the lack of competency of British judges in favour of South African jurisdictions, the House of Lords ruled in 2000 that British jurisdictions were the best place to rule on such matters. This case led to a transactional settlement in 2001 with the 7500 plaintiffs.[130]

In France, following a suit filed by Sherpa in August 2002 against TOTAL relating to the same charges as those made against UNOCAL in the United States, an investigation was opened and has led to several hearings. Although these proceedings concluded with a transactional settlement on November 29 2005, they nonetheless constituted an encouraging precedent in terms of the judges' appraisal of the notion of complicity.[131]

It should be noted that the references to the Guidelines in these proceedings are still marginal or non-existent. However, several criminal prosecutions currently being prepared refer to the OCDE *Guidelines* in support of the charges made. Close attention should be paid to the outcome of these proceedings.

However, whether or not the *Guidelines* are actually mentioned in proceedings under way in national institutions is not really the issue. What this section seeks to demonstrate is the emergence at an international level of jurisprudence invoking the civil liability of enterprises via civil or criminal claims for which the *Guidelines* are likely to provide a useful contribution in terms of custom.

Synopsis 2

This analysis shows that the *Guidelines* have become part of international custom through a combination of practice and an opinio juris based on the notion of CSR:

1. **PRACTICE - the substance of the *Guidelines* is in harmony with:**
   - **the attitude of international institutions that are demonstrating their interest in the question of CSR in many attempts to regulate this field;**
   - **the many state-level manifestations of regulation of CSR (via the adoption of international texts and domestic law relating to civil and**

[127] For a presentation of the most significant decisions, cf. for example Sonia Gabriele *Vers une émergence de la responsabilité des multinationales en matière de violations des droits de l'homme ?* [Université Paris I, Panthéon-Sorbonne – Research Masters in international law and international organisations, supervised by Professeur Brigitte Stern, 2005-2006].
[128] The ACTA offers reparation to victims who do not have American nationality and who can file a civil suit before American federal tribunals for breaches of international law committed on foreign territory by foreign nationals.
[129] *Doe I v. Unocal Corp., 963 F. Supp. 880*, (C.D. Cal. 97), March 25 1997.
[130] http://www.business-humanrights.org/Categories/Lawlawsuits/Lawsuitsregulatoryaction/LawsuitsSelectedcases/CapeGencorlawsuitsreSoAfrica.
[131] For more information on this case, see: www.asso-sherpa.org.

criminal liability of corporate entities);

- **habitual practice by the principal subjects of law for which the *Guidelines* are intended, i.e. multinational enterprises, which are adopting ethical charters and equipping themselves with departments devoted to sustainable development;**
- **the emergence of citizens who are exercising their fundamental legal rights via NGOs and by other means.**

2. **OPINIO JURIS - the constraint relating to failure to abide by the *Guidelines* which, in practical terms, leads to:**
   1. **"soft" but nonetheless effective constraint represented by the risk of image deficit;**
   2. **the attitude of international arbitration institutions;**
   3. **the attitude of regional jurisdictions;**
   4. **the attitude of national jurisdictions, which are increasingly open to procedures which take into account fundamental characteristics of offences committed by multinationals (principally, legal autonomy of entities constituting groups and extra-territoriality).**

Of course, it must be borne in mind that the field of application of the preceding development is not limited solely to the *Guidelines*, which are one of a number of tools designed to apprehend the concept of CSR. It is rather CSR which has drawn the *Guidelines* with it into the sphere of influence of international customary law.

The significant fact remains that unlike other existing instruments, the *Guidelines*, via proceedings relating to *special circumstances*, enable the emergence of legal precedent relating to CSR, which is vital to ensure the legal security of all interested parties. Nonetheless, analysis of the practice of the completely different instrument of alternative dispute resolution, which is the subject of the third part of this study, shows that it also acts as a brake, given the operational shortcomings of the organisations in charge of applying them.

3 LESSONS FROM PRACTICES AND AVENUES FOR IMPROVED EFFECTIVENESS

In order to preserve objectivity in our demonstration of the arrival of the *Guidelines* into the sphere of international customary law, we cannot pass over elements which, in the light of the specific instances examined, reveal gaps in the effectiveness of implementation of the *Guidelines*.

The obligation on States to ensure the proper administration of justice and its natural corollary, effectiveness, should be remembered.

From this perspective, the following developments draw lessons from the practice of specific instances to present the need to strengthen substantive effectiveness (3.1) and obtain greater organisational efficiency (3.2).

3.1 Substantive effectiveness - strengthening consistency

Observation of the practices of NCPs and the Investment Committee relating to specific instance procedures demonstrates that several of them generate malfunctions which are detrimental to the influence of the *Guidelines* and go a long way towards explaining their relative lack of effectiveness to date.

Among these inconsistencies, differences in interpretation of key notions or interpretations in which the NCP does not express a search for effectiveness as part of its good offices must cease. The following developments examine specific instance cases available on the OECD Watch data base and which illustrate these notable weaknesses, apparent at several stages of proceedings.

3.1.1 Preliminary phase of the test of admissibility.

3.1.1.1 Practice of the test of admissibility

Examining specific instances found in the OECD Watch NGO database[132] (58 specific instance cases are listed out of 130 specific instance

[132] Password-protected database accessible at: http://www.oecdwatch.org/

cases submitted to the NCPs[133]) reveals that 13 specific instance cases were not investigated further by the NCPs (i.e. just over 22% of cases).

Before examining these rejections, it should be noted that several NCPs, (particularly Belgian and German NCPs) did not inform the requesting parties of the decision not to investigate their examination request further. This is an established breach of the principle of transparency, which is deemed an essential criterion for attaining "functional equivalence". Furthermore, paragraph 15 of the comments on the procedural *Guidance* states that "*if the NCP decides that the question is not worth examining in more depth, the grounds for this decision must be supplied*"; how can parties judge the validity of the grounds for a decision if they are not informed of it?

Out of the 13 rejections, 6 were due to the absence of an investment nexus. This is despite the fact that the fundamentals of this notion are poorly defined and that in addition, NCPs' application of this notion is particularly restrictive.

THE ANZ SPECIFIC INSTANCE

Two rejections were based on the supposed lack of influence of the defendants over the enterprises which directly committed the breaches. Only one of the rejection decisions is available on the OECD Watch database. This ruling was made by the Australian NCP (ANCP) in the specific instance case concerning the ANZ bank, for its financing of a forestry company (RH) in Papua New Guinea.[134]

COMMENTS

In this case, there is no direct investment link of the kind that characterises relations between a parent company and one of its subsidiaries; the ANCP therefore had recourse to the notion of "investment nexus" created by the Investment Committee in 2003 and the related notions of influence and supply chain.[135]

1° Investment nexus: for the ANCP, an investment nexus involved acceptance of a share of the risk, and in the eyes of the ANCP, a bank offering to underwrite the operations of a customer is not accepting a specific risk. The ANCP goes on to say that ANZ provided financial services in exchange for payment, which implies that a risk existed but that it was covered by the payment, which contradicts its previous declaration.[136]

This definition of an investment nexus is open to criticism since the ANCP is basing its ruling on the fact that there was no investment (for which one of the elements is acceptance of a share of the risk) while the Investment Committee refers to the notion of an "investment-like relationship". Thus, when evaluating an investment nexus, the Investment Committee itself does not require the existence of an actual investment but simply the existence of a relationship that looks like an investment. We consider this interpretation by the ANCP to be restrictive if not contradictory to the recommendations of the Investment Committee.

Once drawn aside the existence of a investment nexus, which would have obliged it to agree to open a specific circumstance, the ANCP will check if the bank has a capacity of influence on RH.

2° Influence: The NCP did no more than carry out a formal examination of the capacity of the bank to influence its customer, by noting that the bank was not part of any RH entity. This interpretation of the notion of influence is restrictive if not contradictory to the Investment Committee's letter of comment on the *Guidelines*. Following its 2003 annual meeting, the Investment Committee stated that it was necessary to take into account the *practical* capacity to influence of partners.[137] 'Practical influence' means that the NCP should not have confined its examination to a formal examination of influence; it should have examined the respective positions of the partners and their market shares or any other

[133] *OECD Guidelines for Multinational Enterprises: 2006 Annual Meeting of the National Contact Points Report by the Chair* p12. available at: http://www.oecd.org/dataoecd/23/33/37439881.pdf
[134] This rejection was also based on the lack of investment nexus between the bank and its client.
[135] Chapter II paragraph 10 of the *Guidelines*

[136] It can also be noted that the ANCP did not respond to the NGO's argument that ANZ had undertaken "to make good liabilities that may incurred by RH under the term of its lease...". This implies that the co-contractors of RH could make a claim against ANZ in the event of RH failing to meet its obligations and that ANZ was therefore agreeing to bear part of the risk. [p.2 note 3 of the ANCP declaration].
[137] Quoted in the minutes of the *Annual meeting of National Contact Points Chairman's report - Meeting of June 23-24*, p14 [http://www.oecd.org/dataoecd/3/49/15952890.pdf] – see also comment no. 10 on Guideline II.10 [http://www.oecd.org/dataoecd/56/39/1922470.pdf].

components which were specific to the matter in hand, in more detail.

3° Supply chain Chapter 2 paragraph 10 of the "*Guidelines*" mentions that multinational enterprises must attempt to influence their "commercial partners, including their suppliers and sub-contractors". This phrase means that all commercial partners should be encouraged, not just sub-contractors and suppliers. In English, the notion of commercial partners is to be found in the expression "supply chain"

"Supply chain" means: "the global network enabling products and services to be supplied from raw materials to final customers via a rationalised flow of information, physical distribution, and finance".[138] Others define a "supply chain" as "a set of three or more entities (organizations or individuals) directly involved in the upstream and downstream flows of products, services, finances, and/or information from a source to a customer. "[139] In spite of these definitions including the supply of financial services as a component of the supply chain, the ANCP expressly excluded financial services from the notion by "inventing" an extremely restrictive definition.

FINNVERA/BOTNIA SPECIFIC INSTANCE

With respect to the notion of a multinational enterprise, the Finnish NCP[140] threw out the applicability of the *Guidelines* to export credit companies, on the basis of two key arguments:

1) Export credit companies were held to be governed by other texts at both national and OECD level.

2) The Investment Committee report mentioned above did not consider that the *Guidelines* could apply to the finance business of Finnvera.

COMMENTS

We believe that by delivering this ruling, the Finnish NCP[141] violated both the spirit and the letter of the *Guidelines* by indicating that they could not be applied to export credit companies. It is our opinion that the fact that such companies are governed by national texts does not prevent them from also being governed by the *Guidelines* - all the more so because the texts governing such companies (specifically, the "program for export promotion") "calls the attention of guarantee applicants to the *Guidelines* "[142]

Moreover, the Investment Committee *Guidelines* report does not expressly or implicitly exclude export finance activities in the slightest. Indeed, it notes that several governments (including that of Finland) refer to the *Guidelines* in several ways in the context of export credit or investment promotion or guarantee programmes[143].

ANVIL SPECIFIC INSTANCE

A specific instance relating to the Anvil affair was thrown out by the Canadian NCP, which judged that proceeding with investigations into alleged breaches of human rights by Anvil in the Democratic Republic of Congo fell outside its remit[144].

COMMENTS

This refusal is regrettable, because investigations might not have required the NCP to travel to the site. In this case, the information supplied by the requesting parties was complete, did not require any real research by the NCP, and were the result of independent investigations. Their mission of good offices could have been carried out successfully using the available elements. This rejection is all the more regrettable in that the serious nature of the alleged violations (the massacre of at least 100 innocent people by rebels benefiting from the logistical support of equipment made available and belonging to Anvil) merited more careful consideration.

[138] American Production and Inventory Control Society (APICS) Dictionary
[139] JOURNAL OF BUSINESS LOGISTICS, Vol.22, No.2,2001, DEFINING SUPPLY CHAIN MANAGEMENT by John T. Mentzer The University of Tennessee, William DeWitt The University of Maryland, James S. Keebler St. Cloud State University, Soonhong Min Georgia Southern University, Nancy W. Nix Texas Christian University, Carlo D. Smith The University of San Diego and Zach G. Zacharia Texas Christian University.
[140] Botnia case, Finnera specific instance
[141] Botnia case, Finnera specific instance
[142] quoted on p6 of the "OECD Guidelines for M E 2003 Annual meeting of the NCP"
[143] p5 of OECD Guidelines for M E 2003 Annual meeting of the NCP
[144] Only the substance of the answer is available on the OEDC Watch database and not the full text of the answer itself.

BTC SPECIFIC INSTANCE

The United Kingdom NCP agreed to carry out detailed investigation by travelling to the site in question for the specific instances relating to BTC, where the allegations related to less serious facts.

Other refusals were based either on a disputable interpretation of the notion of a multinational enterprise (cf. section 3.1.1.2.1), or on the notion of "parallel proceedings" which will also be examined hereafter (3.1.1.2.3).

3.1.1.2 Lessons from observation of the practice of the test of admissibility

The previous examples illustrate a fundamental problem - that of the **substantive field of application**, not of the *Guidelines* themselves, but of *specific instance* procedures.

3.1.1.2.1 The notion of a *multinational enterprise*

When the *Guidelines* were drafted, the key notion of multinational was left intentionally vague.[145] At the very most, it is stated that "*Generally, this refers to companies or other entities established in several countries and linked in such a way as to be able to coordinate their activities in a number of ways. One or more of these entities may be capable of exercising a major* ***influence*** *on the activities of the others, but their degree of autonomy within the company may vary widely from one multinational to another. Their capital may be private, public, or mixed. The Guidelines are aimed at all entities which make up the multinational enterprise (parent company and/or local entities).*"[146]

Clarification provided by the Investment Committee states that "*These structures may be based on a direct stake in the company capital following the traditional direct international investment model, but the same result may be obtained by other means without necessarily involving the component of a share in the capital.*"[147]

These elements indicate that NCPs have a wide margin of appraisal when specific instance cases are submitted to them and that the **criteria of influence** exercised by one enterprise over another is what counts. This is because it is clearly established that "*holding a majority stake is not the sole form of link between two companies in different countries which enables the one to exert significant influence over the activities of the others.*"[148] This issue brings us back to the notion of *sphere of influence* discussed in section 2.1, the resulting effects of which are so significant, with the contours becoming apparent as jurisprudence progresses.

However, the valid use of such fuzzy notions implies interpretation of these notions by NCPs in compliance with the spirit of the *Guidelines*, their comments and the statements made by the Investment Committee. It so happens that the creation of the notion of an investment nexus by the Investment Committee has resulted in a reduction in the margin of appreciation granted to NCPs.

3.1.1.2.2 The notion of an *investment nexus*

As we have mentioned, the role of the Investment Committee is to interpret the *Guidelines* and not to alter them, remove existing components or add new ones. However, after its meeting in April 2003, the Investment Committee published a statement[149] on the scope of the guidelines, with a completely original definition of the notion of **investment nexus,** despite the complete lack of provision in the texts allowing for the creation of such a notion. *Ex nihilo* creation can hardly be viewed as interpretation.

We will not discuss the examination of this notion of investment nexus which is currently the subject of other work underway elsewhere. However, the effects of the creation of such a condition are to be deplored since they create the risk of inconsistencies of interpretation between different NCPs. Thus, the refusal of the Australian NCP to deal with the ANZ case contradicts the position of the Belgian NCP in a

[145] *Guidelines* Chapter I point 3: "a precise definition of multinational enterprises is not necessary..."
[146] *Guidelines* Chapter I point 3.
[147] Clarification of Chapter I point 3 of the *Guidelines*.
[148] Ibid.
[149] See the text of the statement - http://www.oecd.org/document/3/0,2340,en_2649_37461_37356099_1_1_1_37461,00.html.

specific instance involving several banking institutions, as well as that adopted by the Swedish NCP which admitted a specific instance relating to the NORDEA bank in the context of the BOTNIA case.

We believe that the intrusion of the notion of the investment nexus should not overshadow the essential notion of influence.

3.1.1.2.3 The impact of parallel proceedings

Parallel proceedings may, according to the 2006 report on the annual NCP meeting [150] "fall under the following categories 1) criminal, administrative, or civil 2) other dispute settlement proceedings (arbitration, conciliation or mediation) 3) public consultations or 4) other inquiries (for example, by United Nations agencies).

It should be noted here that NCPs may be required to rule according to standards that do not exist or that are not implemented in some investment host countries (procedural guarantees, impartiality, independence, etc.). It follows from all these considerations that NCPs should not decline to act on the sole grounds that parallel proceedings are being carried out.

The current questioning of parallel proceedings is also an opportunity to clarify the position of specific instance procedure within the legal environment. In the long term, this can only serve to strengthen the role of NCPs as jurisdictional entities and thus incorporate the *Guidelines* into the sphere of hard law. The refusal of many NCPs to "postpone a ruling" heralds the possibility of bridgebuilding between NCPs and the jurisdictions under which proceedings have been brought. These are all opportunities to encourage the entry of the *Guidelines* into the sphere of interpretation of the judge or arbitrator before whom proceedings have been brought.

3.1.2 Good offices phase

3.1.2.1 Observation of the practice of good offices

Among the various motions which have reached the stage of "good offices", this study will concentrate on the specific instances relating to exploitation of resources in the Democratic Republic of Congo, since this is typical of the problems encountered in the implementation of the *Guidelines* by NCPs.

Cases relating to the exploitation of resources in DRC

The facts - During the unrest in the Democratic Republic of Congo (DRC) in the 2000s. Several companies, including ANVIL, AVIENT and ORYX were alleged either to have supplied logistical support to armed forces (ANVIL) or, by virtue of a secret agreement, misappropriated some of the monetary flow generated by mine operation for their gain and that of some elements of armed forces (ORYX), or to have supplied men and equipment to carry out military operations during the conflicts (AVIENT).

Proceedings - A panel of experts from the United Nations[151] recorded these facts. Based on this record, the NGO RAID requested that this specific instance be brought before the United Kingdom NCP.

For Anvil Mining, the allegations were particularly serious in that they involved logistical support to troops from the Democratic Republic of Congo Armed Forces (FARDC) before, during and after the massacre of tens of people at Kilwa (there are estimated to have been about one hundred fatalities). The NCP refused to take on this case on the grounds that carrying out investigations of the facts did not fall within its remit, since its primary role was to mediate or facilitate discussions between parties. However, chapter 1-c-5 of the *Guidance* states that the NCP must "take measures to obtain a fuller understanding of issues raised". This expression may legitimately be understood as permission if not outright encouragement for the NCP to conduct investigations. This is also the thrust of the comments on the *Guidance,* which supply a non-exhaustive list of possible means of investigation.

In this case, the facts had been established by the UN panel's report, inquiries on the spot by the NGO RAID and by the Australian television programme "Four Corners". In this concrete case, the United Kingdom NCP interpreted its role in a particularly restrictive fashion, thus damaging the required efficiency of administrative action and to the principle of the primacy of law. Indeed, nothing in either the

[150] vailable at http://www.oecd.org/dataoecd/6/3/38038002.pdf appendix 5 p84 and appendix 6 p89, particularly the RAID comments on page 94 ff

[151] Available from http://www.rdc-humanitaire.net/pdfresolution/R_exploitation.pdf

Guidelines or the procedural *Guidance* prevented the NCP from carrying out further investigations. Moreover, in a specific instance relating to BTC, the requesting parties asked for on-the-spot investigations by the same NCP, and on that occasion the investigations were accepted. What can be understood from this? That in reality, the principle of equity (similar treatment of similar concrete cases) seems to have been transgressed.

The AVIENT case was more serious in terms of the principles to be respected. It was claimed that the company had supplied equipment and military personnel, also in DRC. For this specific instance, the UK NCP failed to read (or else misread) the expert panel's report and committed glaring mistakes. These errors are so important as to cast doubts on these civil servants' impartiality, independence, or at the very least their ability to read a report. Their declaration manages to make the UN expert panel's report say the exact opposite of what is actually written, asserting that the report does not supply elements to support the allegations despite them all having a basis in fact, etc...

3.1.2.2 Lessons from observation of the practice of good offices

Not only does this accumulation of errors in the case of exploitation of resources in DRC raise doubts about the impartiality and independence of the civil servants responsible for NCPs, it also damages the principle of legitimate confidence of citizens in their respective administrations.

It should be noted that under French law, breach of these principles by public administrations entitles a claim to be made before the superior of the person responsible for the disputed decision, in this case, the minister for finance, and also to bring the issue before the Mediator of the Republic. This type of recourse, available in many OECD member states, might in the long term enable pressure to be brought to bear on NCPs so that they apply the *Guidelines* more equitably and effectively.

Similarly, the practice of "intermediary statements" during the course of good offices proceedings would provide the parties with the information necessary to be clear on the progress of investigations – a practice which is all too rare given that NCPs are free to use it.

Role of NCPs - Clarification?

We have already touched on the key concepts that fundamentally influence the field of application and thus the effectiveness of the *Guidelines* (multinationals, investment links and parallel proceedings). All these concepts have been dealt with by the Investment Committee in its role as a clarifying body.

We will not return here to the definition of this clarifying role of the Investment Committee, which has already been discussed in section 1.3.2. However, it is interesting to note that the status of "consultative body" which entitles an entity to request clarification from the Investment Committee is reserved today solely for the TUAC and the BIAC and notably excludes NGOs.

This state of affairs no longer corresponds to the professionalisation of the world of NGOs (particularly, the huge increase in *amicus curiae* contributions by NGOs to international arbitration) and should be rectified. In this respect, the Argentine NGO CEDHA recently directly petitioned the Investment Committee for a question relating to the BOTNIA specific instance case: to our knowledge, it has not responded to this request to date. It will be interesting to observe the Investment Committee position on this issue.

3.1.3 Decision-making phase - Recommendations

When an NCP judges that it should issue recommendations, these must be specific enough to enable "effective implementation" of the *Guidelines.* Thus, general recommendations such as "*In future Avient Ltd. should carefully consider the recommendations of the Guidelines particularly, but not exclusively, Chapter 2 before entering into contracts with Governments and businesses in the area*" are of no interest in terms of achieving the goal of effectiveness required of NCPs both in terms of the application of Procedural *Guidance* and in terms of the principle of good administration.

One example of constructive recommendations is available in the statement issued by the Norwegian NCP relating to the Aker Kvaener specific instance. "The Contact Point has noted that the company does not appear to have drawn up ethical guidelines for its activities. The Contact Point strongly encourages the company to draw up such guidelines, and to use them in

all countries where Aker Kværner is active. The Contact Point emphasises that the norms that are quoted in OECD's Guidelines for Multinational Enterprises, Chap.2 point 2 are international, and therefore have equal relevance and weight in all countries".

3.2 Organisational efficiency - harmonisation of the workings of NCPs

The mechanism for specific instances submitted to NCPs is an element which, while imperfect in the light of practice to date, as we have emphasised, is nonetheless crucial for the effectiveness of a legal project such that enshrined in the *Guidelines*. While international law has changed significantly in recent years, it clearly seeks security. This legal security can only be guaranteed by consistent interpretation, which requires NCPs to be structured so as to be attentive to the action of their peers who are responsible for stating the law.

As stakeholders in the international community, multinationals themselves are today openly asking for this legal security.[152] Whether or not power to compel resulted, not only would this replace legal insecurity with constraint, which is already a good measurement of the administration of justice, but such legal constraint would also be more legitimate and thus more respected, if it was expressed in closer proximity to citizens, via structures set up in each country such as the NCPs present in each OECD member state.

Even if the unlikely prospect of NCPs gaining powers to compel in specific instance cases is disregarded, as a minimum, their legitimacy, effectiveness, and observance of the aim of functional equivalence[153] could only be strengthened by:

- systematic incorporation in the college responsible for dealing with cases: of NGOs as consultative bodies with the same status as the BIAC, TUAC, magistrates, and jurists;
- the setting up of a rotating presidency (six-monthly, as for the European Commission);
- greater independence of NCPs with respect to their parent ministries in order to observe the requirement for impartiality;
- interaction with national jurisdictions for international disputes involving multinational enterprises for which they are petitioned.

Synopsis 3

The preceding developments indicate that although obstacles remain for the use of the *Guidelines* as principles of international customary law, these are due less to the *Guidelines* being deemed too general in nature - the regular objection raised by those opposed to this shift[154] - or their territorial field of application,[155] than to malfunctions within the entities in charge of their application.

These malfunctions are the result both of the way NCPs are organised and the positions taken by the Investment Committee via Declarations made in response to requests for clarification. Improving the terms of application of the *Guidelines* based on the procedural *Guidance* would be of great help in disseminating these to other entities responsible for stating the law, thus accelerating the effects of the entry of CSR into international customary law.

[152] This is the case for ABB, BP, Coca Cola and Grind, among others, who in the person of their representatives at a conference of the International Commission of Jurists expressed this need for legal security and a readiness to study all proposals incorporating an element of constraint in the event of failure to keep their commitments.

[153] The aim of functional equivalence should be remembered: in particular, this sets three essential criteria in order to achieve this goal: visibility, accessibility, and transparency. For the definitions of these four notions see *Comments on Guidance* p64 available at: http://www.olis.oecd.org/olis/2000doc.nsf/8d00615172fd2a63c125685d005300b5/d1bada1e70ca5d90c1256af6005ddad5/$FILE/JT00115759.PDF

[154] This is not an insurmountable obstacle to the extent that this is the very nature of rules of custom, as the ICJ stated in the Gulf of Maine case: "international ... customary law in and of its very nature can only supply... some legal principles that lay out guidelines to be followed with an essential aim... each concrete case is... different from every other... and constitutes an *unicum*... the most appropriate criteria... can generally be determined only with respect to the matter in hand and the specific characteristics it exhibits..." [*CIJ, 12 Nov. 1984, aff. Gulf of Maine, ruling: Rec. P. 292, 293* quoted in Jurisclasseur Droit international, vol. 13, Book 2, no85].

[155] The fact that the scope of application of the Guidelines is restricted to OECD member countries is not an insurmountable obstacle. Indeed, the activity of multinationals in countries that are not members of the OECD may be examined by the NCP of their country of origin, furthermore the Guidelines' 39 signatory states are the source of most of direct foreign investment worldwide and most multinationals are headquartered in one of them (out of the UN Conference on Trade and Development's top 100 multinationals, the Guidelines apply directly to 96) - World Investment Report 2006, p. 280ff. [http://www.unctad.org/en/docs//wir2006_en.pdf]. Above all, this purely relative geographical limitation does not call into question the consistency of the Guidelines, which are a more specific extension of the general principles of law or pre-existing customs.

CONCLUSION

The assessment of the effectiveness of the OECD Guidelines on multinationals is highly contrasting. Their clearly stated non-binding nature, the poor harmonisation of the proceedings of NCPs and the Investment Committee and the often over-political nature of the positions adopted are undeniably the major causes for their - albeit relative - failure in terms of fighting against the injustice of the general impunity of multinationals in respect of their bad practices.

In other words, the situation could be summarised thus: States are failing in their obligations as set out in the *Procedural Guidance* and enterprises continue to breach the *Guidelines*.

The obstacles encountered today in terms of ensuring the effectiveness of the *Guidelines* do not detract from the fact that they are a valuable instrument to help fill the current legal vacuum surrounding the legal apprehension of acts by multinational enterprises which are damaging to the public interest.

The progressive development of their nature towards having binding powers via their incorporation into the sphere of influence of national custom, which we have attempted to demonstrate, is due mainly to changes in international law itself with respect to the notion of Corporate Social Responsibility. This phenomenon has given rise to the existence of multiple attempts to regiment the actions of multinational enterprises within the EU and the UN.

The *Guidelines* are also accompanied by an instrument of implementation which is as original as it is remarkable: the *Guidance*. The terms of action of NCPs are shifting so much today, especially since the reform of 2000 and the possibility for NGOs to file specific instances, that it is legitimate to conclude that a process of reform is under way. What direction will this reform, which should enable NCPs to completely fulfil their role as a stakeholder responsible for stating the law, take? This is difficult to predict, even if arbitration in the fullest sense of the term seems, in the long term, to be one of the natural developments in the task entrusted to NCPs.

This context creates unprecedented conditions for change. Even if these were not taken into account in OECD member states, they would nonetheless prosper via other channels and national jurisdictional institutions or international arbitration institutions.

If OECD member states were to fail to take them into account, the proliferation of cases brought before NCPs would inevitably exacerbate the inconsistencies of the way they function at present and lead rapidly to major deadlock situations, which might create the necessary conditions for change.

This is by no means a defiant position[156] but simply an observation of the effects of the growing sphere of influence of multinational enterprises and the emergence of a desire on the part of the international community to see sustainable development combined with a need for legal security which all stakeholders are requesting in the strongest possible terms.

The question of the necessary and possible mutation of the tools of soft law is in the heart of this debate if contemporary which associates States, companies and the NGO. As for Sherpa, there is a will to think, outside quite a priori, about the means to reach a legal security called by their wishes by all the concerned actors. One of the paradoxes of the soft law and the *Guidelines* in particular is that they were imagined to avoid the appeal to the hard law. What the writers had not foreseen it is their development which pulls a progressive release of their initiators's influence thanks to a normative structure complemented by other equivalent tools. Among these tools, the ethical commitments of companies, becoming a substantial parameter of their activity, contribute widely to weight their legal status.

Sherpa finds encouraging that these instruments can show their capacity of dynamic mutation and this study tries to make a contribution to this process.

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[156] It is not new which a standard takes a turning not envisaged by its writers. Let us recall in this respect the at the very least unexpected evolution of the use of chapter 11 of convention UNCITRAL: *"While challenges to government actions are inevitably part of providing legal protestion for foreign investors, the implementation of Chapter 11 to date reflects a disturbing lack of balance between the protection of private interests and the need to promote and protect the public welfare. The nature of the challenges brought so far has even surprised many of the agreement's authors (...) Particularly disturbing is the large proportion of these cases that are brought against environmental laws and regulations"* [*Private Rights, Public Problems – A guide to NAFTA's controversial chapter on investor rights*, iisd, p. vii-viii - http://www.iisd.org/pdf/trade_citizensguide.pdf].

AFTERWORD

This study is the result of a survey which is obviously incomplete, but we trust that it is nonetheless representative of this shift favouring the repositioning of public interest at the heart of international law. This is a work-in progress requesting comments in order to contribute to the debate on the legal status of corporate social accountability.

Mireille Delmas-Marty, professor at the Collège de France and member of Sherpa's Board of Directors, has accepted to make the following first contribution.

Globalisation and Transnational Corporations[a]

Mireille Delmas-Marty
Professor at the Collège de France
February 2008

Multinational, or *trans*national corporations in UN terminology, are not new. The definition (corporations having their headquarters in a given country and operating in one or several other countries through branch offices or subsidiaries that they coordinate) refers implicitly to a "multinational" economy, which began to emerge in the early 1960s and favours "direct foreign investment and mobility of corporate production activities from one territory to another"[157]. Mobility is essential: once liberated from the national legal framework, corporations are free to pursue their own best interests[158].

About thirty years ago, Klaus Tiedemann, our two groups of students and assistants and I analysed how these corporations, which we called "multinational", took advantage of the differences in various countries' criminal law[159]. Our work was presented and discussed at the 1979 United Nations' world congress on "Offenses and Offenders Beyond the Reach of the Law".

Since the end of the Cold War in 1989, however, globalisation has fostered unprecedented expansion: by 1999, the number of persons employed by multinational corporations had increased from 24 to 54 million and annual sales doubled as multinationals became the principal actors of world trade[160]. The *inter*national economy, governed by politics and diplomacy, was replaced by a *multi*national economy in which multinational corporations played a more and more decisive role, tending eventually to supplant states (of the 100 largest economic entities, more than two-thirds are corporations)[161]. This multinational economy is also global, owing to the financial sector's dominance (the term "global" was first used to describe financial operations). It has also progressively imposed itself everywhere, even in countries such as China, which continues to promote "market socialism"[162] and, in the face of growing inequality, is trying to update Sun Yat Sen's slogan "society of small prosperity" (a forum on small prosperity was organized in Beijing in December 2007)[163].

It becomes clear in such a context that many areas beyond financial markets, such as the environment, health, information, employment and even domestic security[164], are progressively escaping national regulation and being integrated into a network of international agreements and regimes. This raises the issue of globalisation's effects: from regulating the flow of intangibles (money or information) to preventing ecological or biotechnological risks or punishing cross-border crime, more and more sectors of activity are moving beyond the control of national institutions[165].

The preponderance of new subjects of international law[166], particularly transnational corporations with global strategies, therefore raises the pressing issue of their global responsibility.

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[a] The author thanks Naomi Norberg for this translation.

[157] Ch. A. Michalet, "Les métamorphoses de la mondialisation, une approche économique", in E. Locquin and C. Kessedjian (eds), *La mondialisation du droit*, Litec, 2000, p. 22.

[158] M. Delmas-Marty and K. Tiedemann, *La criminalité, le droit pénal et les multinationales*, JCP. 1979. I. 12900; *Multinationale Unternehmen und Strafrecht*, Carl Heymanns Verlag KG, 1980.

[159] Cf. *ibid*.

[160] D. Carreau and P. Julliard, *Droit international économique*, Dalloz (2d ed) 2005, n°14, p. 5.

[161] *Ibid.*, p. 26.

[162] M. Delmas-Marty and P.-E. Will (eds), *La Chine et la démocratie*, Fayard 2007.

[163] Th. Pairault, "Les souliers rouges de l'économie chinoise", in *Un monde meilleur pour tous? Projet réaliste ou rêve insensé?* Colloque du Collège de France, Odile Jacob, 2007.

[164] On the international subcontracting of torture and other cruel, inhuman and degrading treatments and the appearance of a "black market in torture", see E. Babissagana, *L'interdit de la torture en procès?* Fac. Univ. Saint-Louis, 2006, pp. 12-13.

[165] M. Delmas-Marty, "Les limites du relativisme juridique ou la force des choses", in *Les forces imaginantes du droit*, vol. I, *Le relatif et l'universel*, Seuil, 2004, p. 220 et seq. On non-state actors (including civic actors such as NGOs and unions, and scientific actors such as experts), see vol. III, *La refondation des pouvoirs*, Seuil, 2007.

[166] G. Cohen Jonathan, "L'individu comme sujet de droit international – droit international des contrats et des droits de l'homme", in *Mélanges Amselek*, Bruylant, 2005.

1. The Preponderance
2. of Transnational Corporations[167]

Transnational corporations have a strong impact in the legal as well as the economic sphere, as they operate at the crossroads of public and private international law. In France, we separate these two branches of law and distinguish between micro- and macroeconomic relations (for example, the law of international sales or international contracts versus WTO or investment law) to emphasize that the legal situations are so different that no synthesis is possible. Legal categories have blurred, however, and economic power is being privatised in both branches.

Blurring of Legal Categories

When a closer look is taken at the temptations and limits of what has been called "economic patriotism", we find that many theoretically private disputes between corporations and individuals actually concern highly antagonistic state interests. Examples such as the *Executive Life* case (though Credit Lyonnais, nationalised at the time, was the primary entity indicted) or the *Lloyd's* case, which resulted from a conflict between provisions in the American Securities Exchange Act and norms regulating the English reinsurance market, make it clear that "the massive introduction of public economic law into the field of conflicts of laws arising from the interconnection of markets is accompanied by a politicisation of disputes"[168]. In the face of this politicization, none of the solutions proposed seems able to resolve conflicts of laws satisfactorily. Better, then, to rearrange relations between the public and private sectors to take account of "the new political economy of private international law arising from the globalisation of markets"[169]. This approach is called for even more, given that, conversely, public international law norms are no longer produced only by states, partly because of lobbying – a well known practice (particularly in Brussels) by which pressure groups claiming to represent particular professions or sectors of activity offer their expertise regarding complex problems[170].

More fundamentally, however, it also seems that the international public law disputes resolved by the Dispute Resolution Body of the WTO, though reputed to be of an interstate nature, "concern to a high degree, even meld with, the interests of private economic actors, such that it is obvious that the state is in fact the spokesperson for these interests"[171]. Despite state reticence, corporations are allowed to submit *amicus curiae* memoranda to this body and are increasingly insisting on having their say. In addition, they are doing so even more directly, on equal footing with the states themselves, in the area of investment law.

Private law that becomes political and public, public law that becomes private: economic and financial globalisation not only disrupts legal categories, it also affects the distribution of power. More precisely, it is accompanied by the privatisation of both micro- and macroeconomic relations as the area of international contracts shows.

Microeconomic Relations: Private International Contracts

Due to its method of development, the *lex mercatoria* is a good example of privatisation. Despite its false Latin name, this Law Merchant cannot be traced to Roman law; it results from the practices and rules of trade (explicitly recognized by the French civil code and at one time called "corporative law")[172]. In other words, it expresses the economic operators' intent and bargaining power. It draws on all sources of law – national, international and transnational – and the parties to the contract select the norms that best suit them, that is, those that are most apt to meet the needs of international trade. This practice gave rise to the expression "legal Darwinism" and the competition that quickly set in among different legal systems as they turned the law of the market into a market of laws. Competition was further stimulated by financial organisations, such as, for example, the World Bank, which encouraged states to "eliminate all obstacles to growth"[173]. These organisations are so strongly influenced by private sector experts that

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[167] This heading is taken from a chapter in *La refondation des pouvoirs*, *supra* n.9, pp. 130-162.
[168] H. Muir Watt, "Globalisation des marchés et économie du droit international privé", in *La mondialisation entre illusion et utopie*, Arch. de philosophie du droit, n° 47, Dalloz, 2003, p. 245.
[169] H. Muir Watt, *Aspects économiques du droit international privé, Réflexions sur l'impact de la globalisation économique sur les fondements des conflits de lois et de juridictions,* The Hague Academy of International Law, 2005, p. 357.
[170] G. Farjat, "Les pouvoirs économiques privés", in *Charles Leben, Eric Loquin, Mahmoud Salem (eds), Souverainete etatique et marches internationaux a la fin du 20ieme siecle, A propos de 30 ans de recherché du Credimi, Melanges en l'honneur de Philippe Kahn, Litec, 2000*, p. 623.
[171] H. Ruiz Fabri, "La juridictionalisation du règlement des litiges économiques entre Etats", *Rev . arbitrage*, 2003, n°3, p. 897. See also R. Chavin, "L'ordre concurrentiel et l'OMC" in *L'ordre concurrentiel, Mélanges Pirovano*, Editions Frison–Roche, 2003, pp. 181-194.
[172] *Le relatif et l'universel*, *supra* n.9, pp. 100-103.
[173] World Bank, *Doing Business in 2005*.

national legislation is the first "obstacle" they have in mind[174].

Though the criticism is first and foremost ideological, because the *lex mercatoria* favours the strong over the weak, it is also theoretical, because this spare, largely inaccessible and uncertain set of rules disorganises the domestic legal order and disturbs the traditional rules regarding conflicts of laws without replacing them with the consistency of a true transnational legal order[175]. The uncertain and blurry outlines of a legal order in gestation are visible, but it resembles general international law more than national law: non-territorial, decentralised and with little coercive force, this "mercatorial" order (*ordre mercatique*[176]) can be compared to the classical international legal order, in which national laws are simply facts. However, the comparison is not very convincing because, unlike the international legal order, which preserves state power, the "mercatorial" order attributes quasi-legislative powers to economic actors.

To limit this transfer of power, some authors suggest that we adopt a *lex economica*, which, contrary to the *lex mercatoria*, would be developed by states on the basis of a "multilateral, public international law agreement"[177]. Rather than being *trans*national (at the intersection of the private interests of economic actors), this agreement would found a new, *supra*national order built on universal principles serving shared interests[178]. Utopian for now, due to the apparent unwillingness of the United States to take such a path, such an evolution will depend in the next decade on the interests of a new economic leader (why not China?)[179]. It will also depend on the practical relationship between competition policy and world trade because the resurgence of state interventionism disarms states but leaves private operators' protectionist measures intact. Mutual interference between competition law and international trade law is therefore increasing[180].

In any case, the relationship between the state – or more precisely, the state or interstate – order and the competitive order is changing. At first glance, these two orders seem to be in opposition, even radically antagonistic: competition on the one side, monopolism on the other. In reality, they are interdependent because states, which organise competition, are themselves now subject to a competitive order that governs at least part of their activities[181]. They have thus accepted both "marketisation" (expansion of the logic of the market) and "merchandisation" (the generalisation of mercantile valuation, even for things that may not be commercialised)[182].

In sum, microeconomic relations contribute to privatising power by leaving corporations the freedom to choose the *lex mercatoria* and by weakening states upon which the law of the market imposes its logic and rules. By means of investment law, which gives corporations access to international public law, privatisation also affects macroeconomic relations.

Macroeconomic Relations: Inter-State Contracts

In the area of investments, multinational corporations are openly becoming equal partners with states. Power is transferred through new types of international agreements favoured by that new legal monster, the "state contract": a contract concluded between a state and a private investor who thus becomes a subject of public international law.

The state contract's major evolutionary phases are the following[183]: first, a failed attempt between 1970 and 1985 to regulate transnational corporations (an offensive on the part of the new world economic order and an

[174] G. Burdeau, "La privatisation des organisations internationals", in H. Gherari and S. Szurek (eds), *L'émergence de la société civile internationale*. *Vers la privatisation du droit international?*, Pedone "Cahiers internationaux", no. 18, pp. 179-197.
[175] Ph. Fouchard, E. Gaillard and B. Goldman, "Appréciation critique de la *Lex mercatoria*", in *Traité de l'arbitrage commercial international*, Litec, 1996, p. 819 et seq. See also P. Lagarde, "Approche critique de la *lex mercatoria"*, in *Le droit des relations internationales, Etudes offertes à Bertold Goldman*, Litec 1982.
[176] A. Pellet, "La *lex mercatoria*, tiers ordre juridique? Remarques ingénues d'un internationaliste de droit public", in *Souveraineté étatique et marchés internationaux*, *supra* n.14, p. 53 et seq.
[177] W. Abdelgawald, "Jalons de l'internationalisation du droit de la concurrence: vers l'éclosion d'un ordre juridique mondial de la *lex economica*", *RIDE*, 2001, p. 161.
[178] J. B. Racine, "La contribution de l'ordre public européen à l'élaboration d'un ordre public transnational en droit de l'arbitrage", *Rev. Aff. Europ.*, 2005-2, pp. 227-239.
[179] G. Farjat, "Observations sur la dynamique du droit de la concurrence", in G. Canivet (ed), *La modernisation du droit de la concurrence*, LGDJ, 2006, pp. 4 -29.
[180] H. Gherari, "L'influence de l'Organisation mondiale du commerce sur le droit de la concurrence (à travers le cas des Etats-Unis et du Mexique", in *La modernisation du droit de la concurrence*, *supra* n.23, pp. 248-282.
[181] J. Chevallier, "Etat et ordre concurrentiel", in *L'ordre concurrentiel*, *supra*, n.15, p. 59.
[182] L. Boy, "L'ordre concurrentiel: essai de définition d'un concept », in *L'ordre concurrentiel supra* n.15, p. 23 et seq.; "L'abus de pouvoir de marché: contrôle de la domination ou protection de la concurrence?", *RIDE*, 2005, p. 27.
[183] Ch. Leben, "Les opérateurs des affaires internationales" in *Le droit international des affaires* (6th ed.), PUF 2003, p. 54 et seq.; "Entreprises multinationales et droit international économique", in "Les figures de l'internationalisation pénale en droit des affaires", *RSC* 2005, pp. 733-798.

attempt to draft an international code of conduct for technology transfers); second, a phase beginning in the late 1980s that saw the development of investment law and the accession of corporations, generally multinationals, to public international law. Privatisation then spread from norm elaboration to norm implementation as the Washington Convention of 1965 created the International Centre for Settlement of Investment Disputes (ICSID) under the auspices of the World Bank. By 2005, the convention had been ratified by 140 states, including China, which had long been hostile to this type of arbitrage.

The jurisdiction of these arbitral tribunals has expanded continuously as the number of treaties protecting investments that refer to the ICSID continues to increase (from a few hundred per year in 1990 to more than 2000 fifteen years later). Most are bilateral treaties, but the multilateral treaty North American Free Trade Agreement (NAFTA) also introduced a mechanism for North America, and the project for the Free Trade Area of the Americas envisages its extension to the entire Western hemisphere.

Corporations now have access to all of investment law because the jurisdiction of these arbitral tribunals (the sentences of which are binding) is no longer limited to state contracts. Once a state concludes a treaty with the host state, any private investor may bring this state before an arbitral tribunal and obtain a judgment against it, even in the absence of a contract. Granting international personality (that is, the status of a subject of international law) to private economic actors is "of an importance comparable to the accession of private persons to the international law of human rights"[184] and further reinforces the preponderance of economic actors. To rebalance power, responsibility must be transferred along with it.

2. Corporate Responsibility

The idea that global power means global responsibility is met with various arguments of unequal weight. The claim that corporations would shun power to avoid responsibility is hardly convincing given the attraction of power. However, assigning blame in an organization as complex as a multinational corporation, where decisions are made at several hierarchical levels, is a problem in civil as well as criminal law if sanctions are to be truly "punitive"[185].

Even if not insurmountable, the problem of assigning blame can partially explain Michel Foucault's observation on the "differential control of illegalisms"[186], that is, the difference in criminal law between the popular classes' illegalism, which relates to goods (traditional criminal law, called "common law", is built around the emblematic crime of theft), and that of the rich, which is an illegalism of rights (white collar crime often goes unpunished). At first glance, globalisation seems to reinforce this observation because the illegalisms seem to be considered professional hazards and are all the better tolerated as the mobility of multinational corporations enables them to take advantage of differences in the laws of various countries (for example, by selling dangerous products where not prohibited).

However, this view shows only part of the reality. World trade now demands greater equality among competitors and thereby seems to reduce contradictions between private and public interests. Yet this is true only in appearance: inequalities within a country have little effect on the world market; among competitors, equality from one country to another is indispensable. In other words, illegalisms may still be treated differently at the national level, but not at the international level. At the latter level, the market is indeed interested in the illegalism of rights and encourages their severe punishment as such cases as *Enron* in the United States and *Parmalat* in Europe attest. For the game to be played fairly, the playing field must be levelled[187], and punitive sanctions are more effective in this regard than are codes of conduct, administrative regulations or even paying indemnities.

It is not surprising, then, that liberalism, after having eliminated barriers to trade and fostered deregulation by dissociating the economic sphere from political territory, is now leading to a stronger focus on ethics and the internationalisation of responsibility.

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[184] *Id*. See also G. Cohen Jonathan, "L'individu comme sujet de droit international", *supra* n.10, pp. 223-260.

[185] M. Frison-Roche, "Introduction: La redécouverte des piliers du droit: le contrat et la responsabilité", in Jean Clam and Gilles Martin (eds), *Les transformations de la régulation juridique*, LGDJ, 1998 p. 279 et seq., esp. p. 289.

[186] M. Foucault, *Surveiller et punir*, Gallimard, 1975, p. 91.

[187] M. Pieth, *Anti money-laundering: Levelling the playing field,* Summary of Study by the Basel Institute on Governance (UK, USA, Switzerland), Dec. 2002. See also Delmas-Marty, *Le relatif et l'universel*, *supra*, n. 9, p. 246 et seq.

Strengthening the Corporate Ethic

A corporate ethic alone cannot rebalance power. If the goal is simply to improve the public (consumer) image of corporations, the ethic's nonbinding mechanisms are indeed simply an alibi by which to avoid true liability. A colloquium organized in France in 2005 by the MEDEF (industrialists' union) and the Ministry of Foreign Affairs entitled "Human rights, performance factor for companies operating internationally" therefore seemed to resemble "return fire aimed at more binding proposals"[188]: in other words, simply a new form of codes of conduct manifesting a self-established, self-directed right[189]. It is precisely because they are self-established that these codes of conduct could incorporate the public interest into the private sphere by referencing human rights although the effectiveness of this approach would vary, depending on whether the codes were drafted under the auspices of the International Chamber of Commerce (ICC) or in partnership with another international institution, such as the OECD, International Labour Organisation (ILO) or UN. For example, in January 1999, the UN Secretary General proposed a Global Compact and encouraged multinational corporations to adhere to it in order to pledge their respect for human rights. Since no review mechanism was implemented, however, the Compact's nine principles (Millenium Forum, Rome 2000) – divided into principles on human rights, labour standards and the environment – seem to be merely for show.

In 2002, however, the Subcommission on Human Rights organized a working group on transnational corporations to evaluate the effects of competition on human rights. Going somewhat further than the Secretary General, but still remaining quite prudent, the group's mission statement encouraged examination of the "possibility" of establishing a "follow-up" mechanism. UN pressure resulted in the adoption of a set of draft norms ("Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights"[190]) in August 2003 that takes a firmer approach than the Global Compact. With the support of the High Commissioner for Human Rights, the group was renewed and an independent expert designated to continue the project for two years (2005-2007).

Even if these principles are not designed to be directly binding, the novelty is that the draft provides not only for evaluations by the corporations themselves, but also for periodic review by means of national and international mechanisms. Even better, it sets out the principle of "prompt, effective, and adequate reparation to those persons, entities, and communities that have been adversely affected by failures to comply with these Norms", which could lead to legal actions: "[i]n connection with determining damages, […] these Norms shall be enforced by national courts and/or international tribunals if appropriate".

Because they lead the way from soft law to hard law, the draft norms were opposed by several states (South Africa, Australia and the United States) and received with hostility by the ICC. To reassure them, the economist formerly in charge of the Global Compact was taken on as special representative and the mission reoriented toward "best practices", with words such as "violations" being replaced with more neutral terms such as "impact". Nevertheless, the draft at least shows how standing firm on ethics can contribute to internationalising responsibility.

Internationalising Responsibility

Only a unified, global business law can bring the economic sphere within normative territory, but creating such a law seems impossible as long as there is no global court with jurisdiction in this area (the jurisdiction of the existing international criminal tribunals and the International Criminal Court is limited to the most serious international crimes, none of which includes economic crimes). Still, by using national and international, civil and criminal sources, the responsibility of economic actors is being internationalised.

First, this process is taking place by the spontaneous extension of domestic law, primarily unilateral initiatives by the United States, where judges can apply civil or criminal penalties to multinational corporations and their directors for acts committed abroad. The two bases of jurisdiction, one criminal and one civil, are the Sarbanes Oxley Act (SOX) of 2002 and the Alien Tort Claims Act (ATCA) of 1789.

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[188] E. Decaux, "La responsabilité des entreprises transnationales en matière de droits de l'homme", in "Les figures de l'internationalisation", *supra* n.27, p. 789.
[189] G. Farjat, "Nouvelles réflexions sur les codes de conduite privés", in *Les transformations de la régulation juridique*, *supra* n.29, p. 151 et seq. See also G. Teubner, *Droit et réflexibilité*, LGDJ 1999.
[190] Voir Decaux, "La responsabilité des entreprises transnationales en matière de droits de l'homme", *supra* n.32.

SOX was adopted to reestablish investor confidence after the Enron scandal, but its extraterritorial application to any company listed on the US stock exchange or otherwise subject to the Securities and Exchange Commission (SEC) regulations has made it an instrument for internationalising stock market regulations. Among other things, SOX increased the obligations of intermediaries and auditors, placed limits on the composition of boards of directors and created two new crimes (destroying or altering records in cases of bankruptcy or federal investigations and destroying the audit trail) subject to heavy penalties (fines and imprisonment of up to twenty years). Subsequently, the oil company Royal Dutch Shell avoided a prison sentence for misrepresenting its oil reserves but paid US-$ 120 million in fines[191]. At the same time, one of its subsidiaries (Royal Dutch Petroleum) was the subject of a lawsuit filed under the ATCA for alleged human rights violations in Nigeria.

The ATCA confers jurisdiction on the federal courts to hear tort cases brought by foreigners who have been victims of violations of the law of nations, which has been interpreted as including certain customary human rights norms, such as the prohibitions against torture, forced disappearance and summary execution. Numerous lawsuits demanding reparation have been brought under this law since 1980, often against multinational corporations, but the quasi-universal jurisdiction exercised by American courts under the ATCA poses both legal and political problems, which may explain the U.S. Supreme Court's prudence in *Sosa v. Alvarez Machain*[192].

This decision, which concerns an arrest made in violation of the extradition treaty between the United States and Mexico, has been interpreted by some authors as a "stunning blow" to the movement in favour of establishing corporate liability for human rights violations under the ATCA[193]. Indeed, the *amicus curiae* briefs submitted by Australia, the United Kingdom and Switzerland, as well as the European Commission, express concern over the possible consequences of extensive case law, particularly for corporations that might be sued[194]. The Supreme Court examined the criteria proposed to limit jurisdiction, such as the gravity of the acts committed or the subsidiarity of the action, and Justice Breyer once again emphasized the importance of international comity as being "*a matter of increasing importance in an ever more interdependent world*"[195].

The foundations are thus being laid for universal civil liability that could be more strongly tied to ethics if the legal regime takes inspiration from the UN norms on the responsibility of transnational corporations. However, in the absence of a law combining international soft law with domestic hard law, American courts have led the way – in a unilateral direction.

This is why the second way of internationalising responsibility – by extending criminal liability – is so important. Guided by international law, such an extension would enable a pluralist, rather than hegemonic, harmonisation of criminal law[196]. Taking this route would ensure greater legitimacy because harmonisation would be based on the multilateral adoption of shared norms, even if only in certain sectors, such as those involving corruption[197].

The preamble to the 2003 UN Convention Against Corruption sets out the goal of protecting both national interests (state resources, political stability and sustainable development) and supposedly universal values (democratic institutions and values, ethical values and justice) from a crime that is now global: "corruption is no longer a local matter, but a transnational phenomenon that affects all societies and economies". In fact, the preamble to the 1997 OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions already stressed that "bribery…undermines good governance and economic development and distorts international competitive conditions".

In other words, in order for trade to be free and flowing, competition must not be distorted but governed by rules that replace power struggles. As Durkheim observed, a contract is not, in itself, enough because it is only possible thanks to rules "of social origin"[198]. These rules do not refer solely, as Durkheim thought then, to

[191] N. Norberg, "Entreprises multinationales et lois extraterritoriales", in "Les figures de l'internationalisation" *supra* n.27, p. 739 et seq.
[192] 542 U.S. 692 (29 June 2004). See N. Norberg, "The US Supreme Court Affirms the Filartiga Paradigm", *JICJ* 4 (2006) 387-400.
[193] On civil universal jurisdiction, see JF Flauss, "Compétence civile universelle et droit international général", in Ch. Tomuschat and J.M. Thouvenin (eds), *The fundamental rules of the International Legal Order*, Martinus Nijhoff, 2006, p. 385 et seq.
[194] See the pending cases cited by N. Norberg, *supra* n.36.
[195] See also the Court's opinion (also in 2004) in *Hoffman La Roche v. Empagran*, 124 542 U.S. 155, concerning vitamin cartel.
[196] See M. Delmas-Marty, M. Pieth and U. Sieber (eds), *Les chemins de l'harmonisation pénale*, forthcoming, SLC 2008.
[197] J. Tricot, "La corruption internationale", in "Les figures de l'internationalisation", *supra* n.27, p. 753 et seq. See also M. Pieth, in *Les chemins de l'harmonisation pénale*, *supra* n.40.
[198] E. Durkheim, *La division du travail social*, reprint, PUF, p. 193.

organic solidarity and the penalty of restitution. Criminal law today is therefore well integrated into the global economic space.

The extension of criminal liability via conventions brings private economic actors into the game, showing once again that one of liberalism's strengths is its ability to adapt and counteract rapidly. This is why a public/private partnership was suggested in the very lucrative arms trade[199]. With the corporate responsibility ethic firming up and criminal liability expanding, economic operators are not challenging the need to unite against bribery. On the contrary, they put forward several arguments in favour of unifying norms: review by national authorities becomes obsolete in the age of globalisation and electronic exchange; and the diversity of national practices and the multiplication of international authorities make it practically impossible for global corporations to take them into account. Indeed, they consider it illusory to think that review, however rigorous, can be effective in the long term if corporations do not accept it and do not cooperate. It has therefore been suggested that economic operators be associated with the legislator, the executive and – why not – the judge.

In the absence of supranational institutions representing the global public will, the suggestion is not absurd, but sharing power in this way – and it must be seen as sharing sovereignty[200] – is likely to instrumentalise corporate responsibility, making it a leveraging point to ensure that the strongest actors dominate the market. This would cause a slide from the preponderance of economic actors to the preponderance of the economic system or even to the "economic totalitarianism" that Farjat has already warned us of, citing the American jurist Posner who, a few years ago, did not hesitate to advise removing restrictions on the costs of adoption in order to avoid the establishment of a black market for adoption[201]. From the black market for adoption to the black market for torture that has grown out of the struggle against terrorism since September 11, 2001, the dangers of a globalisation that tightens the relationship between political and economic powers are apparent.

Yet to hold those who exercise global power (namely transnational corporations) responsible globally, the guarantees of the rule of law must be combined with the flexibility of governance networks. In other words, power must be rebalanced between public and private actors, and the objectivity and foreseeability of norms (legality), as well as the independence and impartiality of the authorities charged with their application (judicial guarantee), must be improved.

As the note underscores, "despite the tendency to render subsidiaries autonomous, holding companies exercise significant influence on operations and reap the benefits"[202]. It is therefore necessary to understand how the "supply chain" works and no doubt distinguish, as international criminal law suggests, the concept of a hierarchical command chain from the horizontal concept, which is also included in the International Criminal Court statute as "joint criminal enterprise".

Viewed in this light, Sherpa's work – whether it involves analyzing the "supply chain", redefining the concept of "corporate body", suggesting criteria to determine civil and criminal responsibility within transnational groups or identifying legal ways to implement them – serves to ensure that globalisation obeys the rule of law.

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[199] *Le relatif et l'universel*, *supra* n.9, p. 258 sq.
[200] Nadja Capus, "Le droit pénal et la souveraineté partagée", *RSC*, 2005, p. 251.
[201] G. Farjat, "L'éthique et le système économique, une analyse juridique", *Mélanges Fouchard*, forthcoming, Dalloz, 2008.

[202] See Sherpa, « Chaine d'approvisionnement et responsabilité », working document, Nov. 2007.

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