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# The Role of the European Union and other International Organisations in Promoting Corporate Social Responsibility

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**Esame finale anno _2016_**

To my mother,
*in memoriam*

To my father, my brother
and friends

**CONTENTS**

“When a society is rich, its people don't need to work with their hands; they can devote themselves to activities of the spirit. We have more and more universities and more and more students. If students are going to earn degrees, they've got to come up with dissertation topics. And since dissertations can be written about everything under the sun, the number of topics is infinite. Sheets of paper covered with words pile up in archives sadder than cemeteries, because no one ever visits them, not even on All Souls' Day. Culture is perishing in overproduction, in an avalanche of words, in the madness of quantity. That's why one banned book in your former country means infinitely more than the billions of words spewed out by our universities.”

Milan Kundera: *The Unbearable Lightness of Being*, New York

1991, Harper-Perennial, p. 105.

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*All errors and omissions, however, remain the author's sole responsibility.*

# Note on Citations

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As for official documents of International Organisations, jurisprudence, and legislation, the full reference is used when first cited. Subsequent citations use only the official reference number of the organisation at stake and the pages or paragraphs.

Websites were checked on 15 January 2016.

# Abbreviations

| | |
|---|---|
| AB | Appellate Body (WTO) |
| ACPs | African, Caribbean and Pacific Group of States. |
| *Art.* | Article |
| ATS/ATCA | Alien Tort Statute / Alien Tort Claims Act |
| AU | African Union |
| BIT | Bilateral Investment Treaty |
| CCPs | Central Counterparties (referred to central banks) |
| CELAC | Community of Latin American and Caribbean Countries |
| CFSP | Common Foreign and Security Policy (EU) |
| COHOM | Council Working Group on Human Rights (EU) |
| CPR | Civil and political rights |
| CSO | Civil Society Organisation |
| CSR | Corporate Social Responsibility |
| *Dir.* | Directive |
| DJSI | Dow Jones Sustainability Index |
| DSB | Dispute Settlement Body (WTO) |
| DSU | Dispute Settlement Understanding (WTO) |
| ECB | European Central Bank |
| ECHR | European Convention on Human Rights |
| ECtHR | European Court of Human Rights |
| ECJ | European Court of Justice (alternatively, CJEU, Court of Justice of the European Union) |
| EIB | European Investment Bank |
| EMAS | Eco-Management and Audit Scheme |
| EMSF | European Multi-Stakeholder Forum |
| EP | European Parliament |
| ESCR | Economic, social and cultural rights |
| EU | European Union |
| FAO | Food and Agriculture Organisation of the United Nations |
| FDI | Foreign Direct Investment |

| | |
|---|---|
| GATS | General Agreement on Trade in Services (WTO) |
| GATT | General Agreement on Tariffs and Trade (WTO) |
| GRI | Global Reporting Initiative |
| H.E. | His Excellency |
| HRC | Human Rights Council (UN) |
| IBRD | International Bank for Reconstruction and Development (WB) |
| ICC | International Criminal Court |
| ICCPR | International Covenant on Civil and Political Rights |
| ICESCR | International Covenant on Economic, Social and Cultural Rights |
| ICSID | International Centre for Settlement of Investment Disputes |
| IDA | International Development Association (WB) |
| IFC | International Finance Corporation (WB) |
| IFI | International Financial Institutions |
| IHRL | International Human Rights Law |
| IIA | International Investment Agreement |
| IL | International Law |
| ILC | International Law Commission |
| ILO | International Labour Organisation |
| IMF | International Monetary Fund |
| IOs | International Organisations |
| ISO | International Organisation for Standardisation |
| MDGs | Millennium Development Goals |
| MFN | Most Favoured Nation (WTO) |
| MIGA | Multilateral Investment Guarantee Agency (WB) |
| MNEs | Multinational Enterprises |
| MoU | Memorandum of Understanding |
| NAFTA | North American Free Trade Agreement |
| NAP/s | National Action Plan/s |
| NCP/s | National Contact Point/s (OECD) |
| NGO | Non-governmental Organisation |
| NHRI | National Human Rights Institution |
| NRA | National Regulatory Authority |
| OECD | Organisation of Economic Co-operation and Development |
| OHCHR | Office of the High Commissioner for Human Rights (UN) |

| | |
|---|---|
| OMC | Open Method of Coordination (EU) |
| PPPs | Public Private Partnerships |
| QB | Queen's Bench Division (British judicial system) |
| R&D | Research and Development |
| *Reg.* | Regulation |
| *Res.* | Resolution |
| SDGs | 2030 United Nations Sustainable Development Goals |
| SMEs | Small and Medium Enterprises |
| SPS Agreement | Agreement on the Application of Sanitary and Phitosanitary Measures (WTO) |
| SRI | Socially Responsible Investment |
| TEU | Treaty of the European Union |
| TFEU | Treaty of Functioning of the European Union |
| TNCs | Transnational Corporations |
| TRIPs Agreement | Trade-Related Aspects of Intellectual Property Rights Agreement (WTO) |
| UDHR | Universal Declaration of Human Rights |
| UN | United Nations |
| UNCITRAL | United Nations Commission on International Trade Law |
| UNCTAD | United Nations Conference on Trade and Development |
| UNESCO | United Nations Educational, Scientific and Cultural Organisation |
| UNGPs | United Nations Guiding Principles on Business and Human Rights |
| UNIDROIT | International Institute for the Unification of Private Law |
| UNPRI | 'United Nations' Principles for Responsible Investment |
| WB | World Bank |
| WG | Working Group |
| WHO | World Health Organisation |
| WIPO | World Intellectual Property Organisation |
| WTO | World Trade Organisation |

## INTRODUCTION

### *Subject of research*

The international scenario has suffered many substantive changes in the last twenty-five years. Almost a generation is born since the end of the Cold War. More precisely, the implosion of the Soviet Union in August 1991 has drastically changed our legal, political and economic priorities and aspirations[1]. Despite the relative level of integration of the so-called international society, essentially promoted by intergovernmental international organisations, we might admit that this integration is still initial and partial, with the meaningful exception of the European Union (EU). At the same time, we witness the multiplication of actors of all kinds in the international arena, and their increasing influence due to globalisation: churches, lobbies and all kind of companies with their diverse interests. Globalisation extends beyond the economy and affects labour relations (global competition between workers, their international mobility and delocalisation), communications (the expansion of the World Wide Web and the Internet), health global crisis (due to Ebola, AIDS/HIV, H5N5 virus, to cite only a few recent diseases), and security problems (all forms of transnational terrorism), creating a variety of "borderless threats"[2]. We face a wider range of actors which, sometimes, seem to relegate States, who historically were self-sufficient and *superiorem non recognoscens* in the classic terminology, while the former dominance of "high-politics" and the bipolar geopolitical configuration have lost prominence.

On the other hand, in legal terms and according to that traditional viewpoint, only States and International Organisations can be considered subjects of International Law (IL) without any doubt; however, nowadays' world places us in an interesting crossroad: the presence and strength of some actors, like transnational companies (TNCs), has eroded the pre-eminence of States and Organizations on the international stage. Simultaneously, the international agenda has also significantly changed, with the rise of new concerns: mainly, human rights, sustainable development and the environment, in

[1] It has been a far-reaching change in mentalities, on which an indispensable, in-depth and visionary analysis is the one made by the Spanish master teacher of international law, Prof. Truyol y Serra, who died in 2003. A. TRUYOL SERRA: *La Sociedad Internacional*, Madrid 1993, Alianza Ed., pp. 128-171.

[2] A very recent state of the art: S. HAMEIRI and L. JONES: *Governing Borderless Threats: Non-Traditional Security and the Politics of State Transformation*, Cambridge 2015, Cambridge University Press.

an increasingly multilateral world. Social concerns have necessarily become international: development and human rights have emerged as strong items on the international agenda, solidly intertwined, repeatedly calling upon private actors' complementary role in their advancement, as confirmed by the new UN Sustainable Development Goals for 2030 (SDGs), adopted in September 2015[3].

The development of international human rights law (IHRL) is, without any doubt, one of the very few good things left by the 20th Century. Economic globalisation and the increasing interdependency and integration of the international system give rise to a double challenge: to make globalisation and human rights reconcilable, with a view to minimising the adverse effects of the intense transnational economic and financial flows. This challenge expresses itself through a particular, and usually controversial, interaction between human rights' enjoyment and the daily activities or operations of transnational companies (TNCs). It is in this context that Corporate Social Responsibility (CSR) and related notions have been born: its aim is to solve this problem through a complex set of 'soft law' and 'hard law' instruments, which are inspired on other classic normative components of IL and IHRL.

In this context, the concrete subject of study of this research is an analysis of the contribution made by international organisations in promoting CSR and how their role has changed. This consists of providing an answer to the following problematics, *inter alia*: what organisations have led the way in shaping CSR; how CSR has evolved and what are its characteristics and definition; why the role of international organisations is crucial; what has been the EU's role, how is it different from other IOs (both institutionally and substantively); and if purely economic organisations got something to say (the World Bank Group, the World Trade Organisation). In sum, what are the open possibilities for the promotion of human rights in relation to the activities of TNCs from an institutional perspective? We also question how CSR can be integrated within the general regime of international protection of human rights, which ultimately leads us to wonder if victims of corporate-related human rights' breaches have access to justice and under what circumstances.

[3] The new SDGs, at the end of the day, "seek to realize the human rights of all". In this development agenda, it is acknowledged that the "*[p]*rivate business activity, investment and innovation are major drivers of productivity, inclusive economic growth and job creations" so that the UN "call*[s]* upon all businesses to apply their creativity and innovation to solving sustainable development challenges". UN (General Assembly): *Resolution "Transforming our World: the 2030 Agenda for Sustainable Development"*, 25 September 2015, UN Doc. A/RES/70/1, preamble and para. 67 (citations).

Even at the risk of being a little descriptive at times, there is a lateral and instrumental objective, but not less important: to bring order to the ever-growing documentation and initiatives (issued by a plethora of intergovernmental and non-governmental international organisations), so as to show, with all due caution, their relative coherence, direction and potential. The need to bring some order is even more important in the EU, were we face dispersed and many times apparently disconnected initiatives that start to go beyond mere voluntariness, so usually associated to CSR. To 'bring order' does not consist of repeating and summarising one more time the existing CSR standards[4]; it is rather a research of common points and threads to infer eventual patterns and directions. Of course, this study corresponds to the larger category of what could be called "business and human rights studies", while having a more limited scope.

At the root of our subject-matter, thus outlined, we come across three theoretical problems that will subsequently determine our methodological approach. First of all, we face the above-mentioned interrelation between traditional subjects of International Law and the whole range of transnational "actors". There is nothing to add for the moment apart from recalling that its origin lies in globalisation and that it is not an insuperable challenge for IL –we address it in detail in the first chapter so we avoid developing it here.

Secondly, the sectorialisation of IL does not help us either, since it sometimes seems that commercial or investment matters are separate from the rest of IL regimes. These regimes have an apparently autonomous development, even with their own tribunals, and tend to self-sufficiency, ultimately implying a risk of fragmentation. Businesses would operate in a field while human rights would correspond to a different and detached universe. The International Law Commission has explained that, unlike internal orders, International Law has not clear-cut normative hierarchies but "this has never meant that one could not, in particular cases, decide on an order of precedence

[4] This work has been done by many commentators. We recommend the following states of the art and a very recent dictionary: S.M. IDOWU, N. CAPALDI, M. FIFKA, L. ZU, R. SCHMIDPETER (Eds): *Dictionary of Corporate Social Responsibility. CSR, Sustainability, Ethics and Governance*, Swtizerland 2015, Springer Ed; D. TÜRKER, H. TOKER and C. ALTUNTAS (Eds.): *Contemporary issues in Corporate Social Responsibility*, Plymouth (UK) – New York (USA) 2014, Lexington Books; B. HORRIGAN: *Corporate Social Responsibility in the 21st Century. Debates, Models and Practices Across Government, Law and Business*, United Kingdom 2010, Edward Elgar Publishing Ltd –the latter covers only until 2009 but is useful for some initial comments and to study the first initiatives.

among conflicting rules"[5], which "cannot be determined abstractly" and needs a case-based and "pragmatic" stance[6].

The third problem is 'ideologisation': ideological needs or 'blinkers' only push us to disillusionment and undermines the scientific value of any study. Many human rights activists expressed their shock in delusional and grandiloquent discourses, for example, when the Grand Chamber of the European Court of Human Rights (ECHR) finally approved the presence of crucifixes at public schools in Italy, to the disappointment of many. The Court very rightly explained that, for the time being, there was "no European consensus" [7] in this regard so it could fall under the margin of appreciation of member-States. Activists were presumably delighted, however, when the UN Committee on Civil and Political Rights (CCPR) impeded a French claimant, Mr Wackenheim, who suffers from dwarfism, to *freely* work in circus numbers including "dwarf tossing" (wearing a suitable protective gear), because the local authorities had banned it alleging a breach of human dignity, to the detriment of the primary livelihood of Mr. Wackenheim. He exhausted the French domestic remedies and unsuccessfully claimed to the UN-CCPR[8] that this ban had deprived him of his right to work and that he had *freely* decided to have *that* work and didn't feel his dignity violated –if we are allowed to add it, our televisions continuously show spectacles in which to ridicule (consenting) people is common place and human dignity and non-discrimination are more than discussable. Of course, we only propose these examples in a thought-provoking manner, to warn against 'ideologisation'. Moving from anecdotes to categories, activists and a good part of the public opinion incur in a twofold misunderstanding that leads to delusion: they defend ideological expectations over legal limitations and they expect international tribunals to act as constitutional courts to overcome that problem[9]. This is

[5] INTERNATIONAL LAW COMMISSION (ILC): *Fragmentation of International Law: Difficulties Arising From the Diversification and Expansion of International Law*, Report of the Study Group of the International Law Commission, 13 April 2006, UN Doc. A/CN.4/L.682, para. 325 (at pp. 166-167).

[6] "This reflected the pragmatic sense that some criteria are, in particular contexts, more important than others". *Ibíd*.

[7] "The Court concludes in the present case that the decision whether crucifixes should be present in State-school classrooms is, in principle, a matter falling within the margin of appreciation of the respondent State. Moreover, the fact that there is no European consensus on the question of the presence of religious symbols in State schools speaks in favour of that approach". ECtHR (Grand Chamber): *Lautsi and Other vs. Italy*, Judgement of 18 March 2011, Application No. 30814/06, para. 70.

[8] UN-CCPR: *Manuel Wackenheim vs. France*, Decision of 15 July 2002, Communication No. 854/1999, UN Doc. CCPR/C/75/D/854/1999 (2002).

[9] In this connection, Prof. Pascual Vives concludes that the above-cited case of *Lautsi* should not disappoint international lawyers: "en el caso Lautsi y otros c. Italia, analizada desde el DI Público, no debe concebirse con desazón, como una laguna en la jurisprudencia del TEDH *[…]* Todo lo contrario,

why we have shunned ideological requirements and any kind of activism (corporate neo-liberalism just as much as pro-human rights purism). In relation to ideological stances, we shall add political interferences, on which it must be highlighted that –when dealing with human rights– we always need a certain amount of political will, without which we cannot make them work. But a purist and doctrinal study of human rights can compromise their practical effectiveness and unduly neglect open opportunities for the introduction of human rights' concerns within business activities, as it will be shown.

*Methodology*

The methodology adopted stems from the observation of the above-mentioned problems (international subjectivity, risk of fragmentation of IL and widespread ideologisation). This has forced us to adopt a *consensual* approach to offset the problematic ideologization and to explain the foundation and development of International Law, since CSR is an area under development. We have further adopted an *integrative* stance to overcome undesirable risks of fragmentation of IL, which is the pathology of the unavoidable sectorialisation of IL. And a *human rights-based approach* is finally needed to clarify and correctly focus CSR.

Our *consensual approach* is guided by pragmatism, in the already-cited words of the ILC, when dealing with the risks of fragmentation of IL, so we give a great importance to the gradual construction of agreements in an area, like CSR, that is clearly in its infancy. Even though it shows promising developments, methodologically speaking, we will keep in mind public international law principles and, in particular, how difficult but necessary it is to reach a certain level of *consensus* within the international society (also within the EU)[10]. Of course, the path of *consensus* is not necessarily easy and we do not idealise it. It is advisable to keep being realistic and critic. Power and economic differences between States are obvious in the world, and between States and

constituye un resultado ajustado a la *naturaleza internacional* del Tribunal de Estrasburgo y coherente con el papel que desarrolla la noción de consenso, entendida desde una perspectiva material, en ordenamiento jurídico internacional". (Emphasis added). F. PASCUAL VIVES: "El margen de apreciación nacional en los tribunales regionales de derechos humanos: una aproximación consensualista", in *Anuario Español de Derecho Internacional*, Vol. 29 (2013), pp. 217-262, at p. 257.

[10] See, generally: J. FERRER LLORET: *El consenso en el proceso de formación institucional de normas en el Derecho internacional*, Barcelona 2006, Atelier Ed., *passim*.

Companies, even within the European Union[11]. IHRL tries to prevent actions, which could, not so long ago, be acceptable. The nineteenth century industrialisation would now be disapproved from a human rights point of view, that is, international standards change and evolve. For example, the abolition of slavery is, from a historical perspective, to some extent a recent development –no need to recall the difficulties experienced before an international *consensus* was reached in this regard –the US needed a civil war. So, it will take some time to consolidate the current initiatives given the huge and non-easily reconcilable interests at stake[12]. Here lies the fundamental role of *consensus* in the formation of IL[13].

To work towards reaching a favourable climate of opinion is an indispensable step in the progressive development of IL. This process will determine the future of CSR: the customary path, based on the construction of that *consensus*, means that all States do not need to absolutely and unanimously agree on every single point, but still is there a common sense of agreement to the extent States do not wish either to hinder the development of CSR just by forcing excessively detailed negotiations, which would be inescapable when unanimity is required or a vote is asked[14].

Still on methodology, we adopt an *integrative position* for two reasons. First of all, our integrative perspective is aimed at resituating CSR within the framework of IHRL, which is its natural field according to our research. At the same time, an integrative

[11] To give a recent example, Swedish Social Democrats had promoted –when in opposition– a parliamentarian initiative to recognise Western Sahara independence. Morocco then blocked the opening of the first IKEA store (in Casablanca) scheduled for October 2015. Once in office, Social Democrats have finally changed their mind abandoning their initiative, as reported by the press. See: A. TAYLOR: Ikea may have stumbled into one of North Africa's most intractable land disputes", in *Washington Post*, 29 September 2015, available at https://www.washingtonpost.com/news/worldviews/wp/2015/09/29/ikea-may-have-stumbled-into-one-of-north-africas-most-intractable-land-disputes/ (last accessed date: 24 October 2015). Also refer to the recent decision adopted by Sweden at the Spanish journal *El País* as reported by Reuters: "Suecia renuncia a reconocer al Sáhara tras el bloqueo marroquí a Ikea", *El País*, 18 January 2016, available at: http://internacional.elpais.com/internacional/2016/01/18/actualidad/1453119823_900989.html -last accessed date 19 January 2016).

[12] As it is eloquently said in a theatrical work by Jacinto Benavente (1866-1954), a Spanish writer very critical of the bourgeoisie –his own social class: "we've created many bonds of interest, and it's in everyone interest to rescue us". To put it crudely, it can be said that it is in the interest of capitalism to find out how business and human rights can be compatible and to develop an international agreement in that direction. A bilingual (English-Spanish) edition of this theatrical work: J. BENAVENTE: *The Bonds of Interest – Los intereses creados* (Edited and translated by Stanley Appelbaum), New York 2004, Dover Publications, p. 75 (quote).

[13] C. JIMENEZ PIERNAS : "El derecho internacional contemporáneo: una aproximación consensualista", *XXXVII Curso de Derecho Internacional*, Washington 2011, Organización de Estados Americanos, 64 pp., at pp. 27-31.

[14] A. CASSESE: "Consensus and some of its pitfalls", in *Rivista Italiana di Diritto Internazionale*, No. 58 (1975), pp. 754-761, at p. 755.

stance is needed to recall that international economic law, IHRL, and any other sector, all are within general international law and do not function in a vacuum. Just as we resituate CSR within human rights law, we resituate international economic law within general international law.

This *integrative perspective* therefore insists on the risks of fragmentation of IL, on which we now shall add a few words. For instance, we have already stated, against fragmentation, that there are not watertight law-fields excluding each other. Sectorialisation is the necessary result of the specialisation of diverse legal fields due to the complexity of international activities, in line with globalisation trends, being also a result of regionalisation[15]. Fragmentation is the undesirable consequence of sectorialisation. According to the ILC, it is difficult and problematic to establish an aprioristic and abstract hierarchy within IL, but as said before, this does not mean it is a *totum revolutum*. Nor does it mean that there are absolutely self-contained regimes. IL has a "relational character": "*[i]*f lawyers feel unable to deal with this complexity, this is not a reflection of problems in their 'tool-box' but in their imagination about how to use it"[16]. More concretely, the fact of being a *lex specialis* is not a *passe-partout* to disregard other specific regimes (human rights) or general international law, provided the specific case requires it and that it is done accordingly with the general principles of IL (for example, in good faith). Imagination is needed besides reasonable and technically-feasible goals, therefore rejecting maximalist stances and wishful thinking that, in fact, reflect ideological exigencies.

Of course there are superior interests of the 'international society', sometimes recognised through treaties and, in general, as a decanting process based on an international *consensus* that has to be the result of combining a extensive and consistent *praxis* with an *opinio iuris* –which in turn can be global or only regional. However, it seems to us too optimistic to say that *all* human rights have reached the status of *erga omnes* obligations; perhaps a limited range of its core elements have (like slavery or, less probably, torture), but insufficient to address the problematic interaction between

[15] S. SALINAS ALCEGA and C. TIRADO ROBLES: *Adaptabilidad y fragmentación del derecho internacional: la crisis de la sectorialización*, Zaragoza 1999, Real Instituto Elcano Ed., pp. 215-228.
[16] ILC: *Fragmentation of International Law…, op. cit.*, UN Doc. A/CN.4/L.682, para. 222 (at pp. 114-115).

business and human rights, which is much wider in its casuistry[17]. Again, pragmatism is advisable to overcome the fact that "idealist hopes are as exaggerated as the fears of realists"[18].

We therefore stick to the *relational character* of international norms and to the widespread idea that fragmentation and strict 'self-contained regimes' are not in line with IL principles[19]. This explains the reasoning in two steps that gives substance to many of our conclusions when studying the dialectic between business and human rights: we first investigate what role might general international law play and, at a second stage, what role human rights can reasonably play. This is particularly important in the area of international trade and investments.

Leaving aside our *consensual* and *integrative* methodological approach, in more general terms, we must be aware of the gap between norms and reality, which is not only an IL problem since it happens at an internal level as well. In this sense, a mere formal analysis of the existing norms, with their different value, would constitute a deductive exercise of idealism, which seems to be out of touch with the material dimensions of a frequently problematic reality. A formal vision tends to forget the interests at stake, both social and political, which have also an influence on the gradual creation of any normative framework (like CSR).

This is why, in summary, we also propose an interdisciplinary approach, a method able to cover, as Weber says, what it "ought to be" and "what it is", to the degree legal processes are also socio-historical *phenomena*[20]. This research has an underlying Weberian foundation; even in what Weber himself was reluctant to explicitly accept

[17] For some authors, it is not unreasonable to place human rights obligations somewhere hierarchically superior in the international legal order. In our view, this rather reflects wishful thinking than a reality *rebus sic stantibus*. See, generally: E. De WET and J. VIDMAR (Eds.): *Hierarchy in International Law: the Place of Human Rights*, Oxford 2012, Oxford University Press.

[18] C.J. TAMS: *Enforcing Obligations Erga Omnes in International Law*, Cambridge 2007, Cambridge University Press, p. 309.

[19] For a good state of the art and the basic bibliography therein, see: M.A. YOUNG: *Regime Interaction in International Law. Facing Fragmentation*, Cambridge 2012, Cambridge University Press.

[20] An example of this idea is provided by Prof. Skouteris, from the American University in Cairo: "In trying to assess legal relationships the jurist cannot avoid the methodological conundrums of contemporary history. The fact that the object of study is 'law' does not mean that legal technique alone can provide an answer. […] Knowledge of state intent is intertwined with various other parameters, such as security and power, that cannot be dissected from the question of intent". T. SKOUTERIS: "Engaging History in International Law", in J.M. BENEYTO, D. KENNEDY (Eds.) and J. CORTI VARELA, J. HASKELL (Assistant Eds.): *New Approaches to International Law. The European and the American Experiences*, The Hague 2012, Springer Ed., pp. 99-121, at pp. 114-115.

such as the relationship between politics and science, which we tangentially address when dealing with technical requirements and the 'expertisation' of policies (in areas like new technologies, food security, pharmaceutical regulation, etc.). According to the sensible comments of Raymond Aron, the more Max Weber insisted on the incompatibility between politics and science, the more he made clear his awareness of the tight links between both areas[21]. The same thing happens in the link between law and politics, given the strength of the concept of legitimacy in this thinker. We fully share the idea that legitimations, whatever they may be, are the glue that makes States work and self-sustain in time, based on a legal power characterised by its ordinary and impersonal character[22].

The interdisciplinarity of this research forces us to make various references to transversal problems like development or governance (weak regimes, poverty, etc.), together with occasional incursions into other fields of knowledge (from the philosophy of language to company law or criminal and civil law[23]). This interdisciplinary perspective arises from the belief that there is a need to connect and relate problems rather than isolate questions, in order to link ideas and include social as well as political, legal and economic aspects when facing a problem. This reveals to be indispensable as far as the most striking global troubles are a result of an increasingly complex mixture of factors and causes.

The international system is more and more complex and 'complete' in its daily attributes and manifestations; the international system itself is in search of legitimations to sustain the power relations upon which it is built. In this vein, if future developments confirm that –as it seems so far– the legal formation of CSR is based on an ever-growing *consensus*, this fact will provide it with a source of legitimacy in the future accordingly to a sociological approach to IL. As Norberto Bobbio remarked in his comments on Weber, a "pattern of legality" is not "self-sufficient" and needs an

[21] "Repitió continuamente que las virtudes del político son incompatibles con las del hombre de ciencia; pero su preocupación por separar ambas actividades no era más aguda que su conciencia del vínculo que entre ellas existe". Introduction of Raymond Aron to the Spanish edition of M. WEBER: *El político y el científico*, Madrid 1967, Alianza Ed., p. 10.

[22] This construction led to the famous definition of the "legitimate monopoly over the use of violence within a recognized and bounded territory". M. WEBER: *Economy and Society*, Vol. 2 (Edited by Guenther Roth and Claus Wittich), Berkeley 1978, University of California Press, pp. 904-905.

[23] In those cases we usually make reference to a problematic that opens the door to a different law-field, but we refrain from adopting a stance or providing any answer. Nevertheless, we have considered it interesting to leave some open questions in neighbouring law-fields.

"ulterior criterion", for example, *consensus*, which is a potent source of legitimacy (among other possibilities)[24].

Norms sometimes derive from international practice, following an empirical and inductive path according to the sociological grounds of law; but in other occasions, it is also possible that some established practices are the product of and obey some previous normative ideals, in a deductive way. All in all, the vertical axis operates in both directions in the international order, combining empirical-inductive and logical-deductive processes[25]. This applies to CSR: in certain occasions, it will respond to pre-existing ideal requirements and, most of the time, it will be a reaction to the continued experience in the field and 'societal expectations'. Law is frequently one step behind social developments and we are therefore closer to a sociological formation of International Law. This research is peppered with cases involving TNCs and human rights violations, whose objective is precisely to keep in touch with reality, the material dimension of law, which alternatively challenges or confirms norms.

There are always logical imperfections in any legal order we examine; also internal legal orders are far from perfect in terms of compliance and enforcement. Imperfections are everywhere and the international society does not escape criticism (or even attracts it more than States). Internationally speaking, we live in a *societas* full of contrasting interests, perhaps with some traits of a very imperfect *communitas*. It is first of all for practical reasons that we use the term "international society", which is in our view the most appropriate description of the current status of world politics[26]. In the view of Vitoria (1483-1546) a community should have a vocation to perfection and be teleological and morally based, but as pointed out in the following century by Suárez (1548-1617), this is –in modern words– similar to a mathematical function or curve that tends toward a point without never fully reaching it; not even States themselves really achieve a perfect level of integration based on the common good[27]. Without entering

[24] "Weber muestra claramente que no considera autosuficiente la pauta de la legalidad y, por tanto, estima necesario recurrir a un criterio ulterior, el cual puede ser el acuerdo entre intereses (el criterio del consenso *[…]*", N. BOBBIO: *Teoría general de la política*, Madrid 2003, Ed. Trotta (Edition by Michelangelo Bovero; translation by A. de Cabo and G. Pisarello), p. 171.

[25] C. JIMENEZ PIERNAS: *Introducción al derecho internacional público. Práctica de España y de la Unión Europea*, Madrid 2011, Tecnos Ed., pp. 50 and 65-66.

[26] It is an international society, "in its way" to become a community, in the words of Prof. del Arenal: C. del ARENAL: *Introducción a las Relaciones Internacionales*, Madrid 2007, Tecnos Ed., p. 414.

[27] "Lo que califica, pues, a una sociedad política como completa o perfecta es su "*sibi sufficientia*", esto es contar con los medios materiales, institucionales y organizativos precisos para lograr el conjunto de

into the full debate on to what extent there are shared values and its degree of integration, we rather think that we are still far away from living in an 'international community' in terms of shared objectives and ethics[28].

This is a merely practical decision as far as we understand that, in terms of the international normative structure, most of our work will remain in the field of international organisations at an institutional level, also when dealing with States' practice. This thesis has a primarily *institutional perspective* because we put the institutional dimension of norms and practice first, sometimes before analysing its substantive aspects, since this is the most adequate way to proceed in the field of international organisations and when analysing their normative production[29]. International organisations (IOs) have mainly institutionalised international cooperation, which is a non-negligible role, while being an important channel through which IL has undergone substantive changes[30]. CSR is just another example that shows an open path, in which we further analyse the dialectic between treaty law and customary law in the development of IL.

*Sources*

In line with the previous methodological considerations, the main sources are logically the practice of the different international organisations at a global level, with a strong emphasis on the European Union at a regional level, without isolating them from each other so as to allow a rigorous and complete investigation. As said before, this comprises the practice of some EU member-States that have put in place proper CSR policies and, *au-fur-et-à-mesure*, we include lateral comments on the most prominent

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condiciones sociales que permitan y favorezcan al pleno desarrollo de las personas, en que consiste el bien común. Ahora bien, como observa clarividentemente Suárez, tal auto-suficiencia nunca fue absoluta, ni siquiera en su época, en el momento de eclosión del Estado moderno *[…]*". F. SÁNCHEZ-APELLANIZ VALDERRAMA: "Naturaleza y caracteres de la soberanía permanente sobre los recursos naturales", in VVAA: *Liber Amicorum. Colección de estudios jurídicos en homenaje al Prof. Dr. D. José Pérez Montero*, Vol. III, Oviedo 1988, Universidad de Oviedo, pp. 1305-1328, at p. 1320.

[28] In line with our arguments, the following pages summarise this debate: E. BARBÉ: *Relaciones Internacionales*, Madrid 2011, Tecnos Ed., pp. 131-135.

[29] "En este ámbito del Derecho Internacional prima la dimensión institucional de las normas y de la práctica antes que la sustantiva", O. CASANOVAS and A.J. RODRIGO: *Compendio de Derecho Internacional Público*, Madrid 2015, Tecnos Ed., p. 170.

[30] J.A. PASTOR RIDRUEJO: *Curso de Derecho Internacional Público y Organizaciones Internacionales*, Madrid 2011, Tecnos Ed., p. 659.

private-led initiatives born under the auspices of IOs (the Equator Principles, the Global Compact, the Global Reporting Initiatives, the Dow Jones Sustainability Index, ISO 26000, etc.).

This international and institutional focus does not mean that States' practice is less important. On the contrary, States' practice is a crucial source of International Law, but our institutional perspective is precisely justified to the extent international institutions are functioning as chemical accelerators of States' initiatives. Nevertheless, in the particular context of the European Union, we will also analyse the most prominent national action plans together with some cutting-edge legislative changes in order to further comment on the importance of their mere existence with regard to the customary path –even regardless of the effectiveness of their contents.

Besides the multiplication of institutional initiatives, literature on CSR is vast and disparate. We lack of systematic studies that clarify the current *statu quo* and the future possibilities from a scientific and neutral perspective. Most of the initial information at an academic level is found in specialised reviews rather than monographies, excluding some prominent examples, due to the fact that we focus on quite recent developments. For good or bad, a 2013-monography can be obsolete by 2015. For this reason, and due to the ever-growing number of commentators, codes, leaflets, essays, press news, etc., we have had to be mercilessly selective with the bibliography and include only the most representative authors and schools of thought.

We intersperse the practice of IOs and States (official documents, legislation and soft instruments) with the incipient jurisprudence in this area, particularly advanced in the US, the UK and Netherlands. Selected cases of national and international courts have a double value: its typical interest as an application of IL, but also a potential recognition of incipient customary practices. It goes without saying that doctrine will serve to compare CSR to other law-fields and to contextualise it within general international law and within EU Law. Some studies *de lege ferenda* will also be useful, but more rarely used since we wish, above all, to conduct a realistic research. Everything together can help us see the wood, not just the trees. We are not the ones to predict the future of CSR, yet everything suggests that it came to stay.

*Plan of work*

The key actors in the origin and development of CSR are international organisations (IOs): mainly, the United Nations (UN), the Organisation for Economic Co-operation and Development (OECD), the International Labour Organisation (ILO). At a regional level, the European Union quickly took over and is now leading the way. Therefore, our first chapter is focused on the UN initiatives, aimed at systematising them rather than repeating their contents. Some core CSR debates are addressed *en passant*: the differential characteristics of CSR, its related concepts (due diligence, legal personality, grievance mechanisms), its legal composition (hard and soft law), the legal options to operationalise it (a new treaty, the customary path or what we call the Europeans' third way), and the policy options to support it (national actions plans alongside the institutional context).

At the end of the first chapter, we propose a definition of Corporate Social Responsibility based on the international practice surveyed. The definition proposed is supported throughout our research in view of IOs and States' practice. On this basis, Chapter II is consecrated to the assessment of the existing possibilities to mainstream human rights into trade and investment issues, while arguing that IOs start to go all in the same direction, in line with an increasing institutional coordination that already delivers some substantive results.

The second part of this research focuses on the European contribution to global CSR. Chapter III is aimed at bringing order into widely dispersed initiatives within the EU; this reveals to be absolutely necessary because the available scientific literature usually forgets to look at the same time at various law-fields (public procurement, corporate governance, the environment, etc.). In this sense, one of the difficulties of CSR in the EU is that, more than a separate policy, it has a strong crosscutting character. On the whole, it shows the "predilection of the European Union to receive international norms with open arms", introduce substantive improvements and then "*upload* EU law and legal policy preferences into the international legal development process"[31]. This will help us analyse in the last chapter the potential contribution of the EU to global CSR.

[31] N. SINGH GHALEIGH: "Iterative Engagements. The European Union and International Normativity", in *Proceedings of the Annual Meeting, American Society of International Law*, Vol. 104 (March 24-27 2010), pp. 572-576, at p. 575.

# CHAPTER I

## Corporate Social Responsibility at a global level

### 1.1 Globalisation and Human Rights

'Business and human rights' studies owe their growth to a double development, accentuated in the second half of the 20th Century: the parallel expansion of globalisation and human rights.

Without a doubt, International Human Rights Law (IHRL) is one of the best legacies of the last century. This even more so, since it has not been a particularly enthusing or inspiring period. Moreover, human rights have managed to evolve and overcome their inherent original sin, according to Hannah Arendt's critique: its paradoxical origin linked to nationalisms in the end of the 18th Century and the 19th Century, when the recognition of such rights was based on the exclusion of non-citizens[32]. Political rights and human rights were firmly united until the latter emancipated themselves. Interestingly, only later, the socially marginalised and politically excluded became the priority of human rights, their *raison d'être*.

This positive evolution has continued with the proliferation of multilateral human rights treaties, ranging from general issues (civil and political rights, economic and social ones, both of 1966), to very specific subjects such as racial discrimination (1966), the rights of the child (1989) or Apartheid in sports (1985), under the auspices of the United Nations (UN). The most recent multilateral human rights treaty dates 2006 on the rights of persons with disabilities. There has been a similar progress at a regional level, with instruments like the Inter-American Convention on Human Rights (1969), the African Charter on Human and Peoples' Rights (1981) and the European Convention for the Protection of Human Rights and Fundamental Freedoms (1950).

The human rights language has clearly penetrated the social tissue and media, sometimes giving rise to misperceptions under which it seems that there are more and

[32] "The whole question of human rights, therefore, was quickly and inextricably blended with the question of national emancipation". H. ARENDT: *The Origins of Totalitarianism (Part II: Imperialism)*, New York 1968 (Vol. II), Harcourt Ed., p. 171.

more rights. In our view, the multiplication of international instruments should not be read in terms of *more rights*, but as a progressive specification of these. The basic misunderstanding lies in the fact that procedural aspects are mistaken for the rights at stake: for example, the protection of cultural heritage, which has an increasing number of specific treaties under the umbrella of the UN Educational, Scientific and Cultural Organisation (UNESCO), has not leaded to new rights; it has detailed the contents of the right to culture and the means to achieve it under an already existing human right – article 15 of the International Covenant on Economic, Social and Cultural Rights (ICESCR). The separation between *cultural heritage* and cultural rights under the ICESCR is simply incorrect: its specificity might justify the existence of particular treaties, the UN agency and specialised monitoring bodies, keeping however in mind that cultural heritage is only a tool. Cultural heritage could be defined as "cultural resources"[33] without which we would deprive "the right to take part in cultural life" of content. Similarly, the so-called 'gay rights' do not exist: they are only a desirable aspect to be added to the general prohibition of discrimination. We could think of many other examples. It seems to us to be legal common sense not to deprive the ICESCR of content just because of the new challenges caused by globalisation and multinational enterprises (MNEs). If we accept artificial separations between different human rights sectors, we would just contribute to slide down the slippery slope to a fragmentation of IL, against which we warned in the introduction[34].

In other words, we face the increasing complexity of different human rights' *dimensions*, not new rights disconnected from the general regime set out in IHRL, which has to provide us with the contextualisation of any problematic, in our case, the interaction between transnational companies (TNCs) and human rights. It is therefore important to note that we do not defend the existence of new rights and responsibilities, and we even see it risky to adopt such stance; we rather defend the full implementation of already existing instruments and, if necessary, procedural advances and a progressive but realistic interpretation to facilitate their effectiveness. This is connected to the on-

[33] M. BIDAULT: *La protection internationale des droits culturels*, Louvain 2009, Université Catholique de Louvain - Ed. Bruylant, pp. 431-435. Also F. Francioni, from the Florence European University Institute, has supported interpretations in the light of general principles of international law when he considered the UNESCO Convention for the safeguarding of the intangible cultural heritage, in relation to other human rights instruments: F. FRANCIONI: "La protección del patrimonio cultural a la luz de los principios de derecho internacional público", in VA: *La protección jurídico internacional del Patrimonio Cultural, Especial referencia a España*, Madrid 2009, Colex Ed., p. 32.

[34] On the risks of fragmentation against the so-called 'self-contained regimes' in International Law, also refer to: C. JIMENEZ PIERNAS: *op. cit.*, pp. 56-58.

going debate on the need for adopting a new international instrument on business and human rights, which we will study in our assessment of soft international law and the effectiveness and usefulness of the current human rights' regime dependent on international treaties[35]. Corporate Social Responsibility (hereinafter CSR) was born out of this intersection between business and human rights.

Of course, many voices still critically rise that we are dealing with the eternal problem of legal moralism, within the framework of H.L.A. Hart's polemic triangle constituted by law, liberty and morality: delegalize morals or demoralize law?[36] Transposing this analysis to the international arena, social morality takes the form of an international *ordre public*, in which we place human rights principles. In any case, moral responsibilities and political responsibilities are more and more "inextricable" in a global age[37]. Notwithstanding the fact that human rights clearly entail some sort of ethics (and it would be cynical not to admit it[38]), some critiques also seem exaggerated as far as there is a margin of appreciation to comply with the treaties so as to adapt their requirements to a variety of cultural, economic and political particularities, not to mention the concept of 'progressive realization' studied in the following section on ESCR.

To continue with our previous examples: article 15 ICESCR on the right to culture does not imply at all that access to culture shall be *free*, but available and accessible; it happens the same with article 12 ICESCR on the right to health –these services do not necessarily need to be delivered by the State through public institutions without any cost, even though it should be available and accessible regardless of its ownership and management[39]; nor the principle of non-discrimination obliges any State to adopt legislation allowing "gay marriage" –provided there is no unlawful discrimination with respect to LGTB people.

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[35] See below Chapter II, Section 3.

[36] M. A. RAMIRO: "A vueltas con el moralismo legal" (Prologue) in H.L.A. HART: *Derecho, libertad y moralidad* (translation of M. A. RAMIRO), Madrid 2006, Dykinson Ed., pp. 9-88, *passim*.

[37] "[D]ebates in international relations between those advocating for international morality and those denying it have become theoretically sterile", R. BEARDSWORTH: "From Moral to Political Responsibility in a Globalised Age", in *Ethics and International Affairs*, Vol. 29 No. 1, 2015, pp. 71-92, at p. 74.

[38] As Amartya Sen pronounced: "human rights are quintessentially ethical articulations", primarily an "ethical demand" that, later on, can have algo secondary legal articulations. A. SEN: "Elements of a Theory of Human Rights", in *Philosophy and Public Affairs*, Vol. 32 No. 4, 2004, pp. 315-356, at p. 321.

[39] OHCHR: *Frequently Asked Questions on Economic, Social and Cultural Rights*, Fact Sheet No. 33, Geneva 2008, United Nations, p. 20.

Behind the critics' reasoning we find the usual allegations of Western paternalism and imperialism through human rights. If we accept the thesis of continuity according to which there were no significant changes despite the fall of the Berlin Wall, we might be tempted to maintain a bipolar discourse, converted into a North-South dialectic that many authors support since the 1990s to keep up a "tale of two worlds: core and periphery"[40] –in economic terms. Nothing substantial would have changed and human rights would have become a new 'soft power' strategy to keep on subjugating less developed countries, following Nye's terminology. Of course, the North-South narrative might be partly true; also, some current international conflicts can perfectly be studied under the continuity thesis (the recent crisis in Ukraine or US-Russia opposing views on Siria's war). However, the maintenance –with its adaptations– of a binary discourse seems to oversimplify some important changes and many other factors that have to be added since the end of the Cold War in a rather multipolar scenario, far from the 'end of history' in the famous Fukuyama's expression. This discussion only reflects our difficulty to "introduce discontinuities into history" in increasingly complex scenarios with a good amount of "chaos"[41].

Accusations of imperialism against human rights also seem exaggerated taking into account, for example, the widely disseminated Millennium Development Goals[42], an agenda aimed at increasing human rights respect and economic development, with eight objectives that should have been accomplished before 2015: eradicate extreme poverty and hunger, achieve universal primary education, promote gender equality and empower women, reduce child mortality, improve maternal health, combat HIV/AIDS malaria and other diseases, ensure environmental sustainability and promote global partnerships

[40] Immediately after the collapse of the Soviet Block, a part of the academia supported the maintenance of a bipolar discourse, changed into a North-South dichotomy, allowed a partial salvation of political realism within less developed countries: "We thus tell the tale of two worlds of international politics in the post-cold war era. In the core, economic interdependence, political democracy *[…]* In the periphery, however, *[…]* interdependence between peripheral States is subordinate to dependence on core States. *[…]* structural realism is inadequate to explain the behaviour of states in the core but is relevant for understanding regional security systems in the periphery". J. M. GOLDGEIER and M. McFAUL: "A Tale of Two Worlds: Core and Periphery in the Post-Cold War Era", in *International Organization*, Vol. 46 No. 2, Spring 1992, pp. 467-491, at pp. 469-470.

[41] J. L. GADDIS: "International Relations Theory and the End of the Cold War", in *International Security*, Vol. 17 No. 3 (Winter 1992-1993), pp. 5-58, at p. 52. Also see: J.E. CRONIN: *The World the Cold War Made: Order, Chaos and the Return of History*, New York 1996, Routledge Ed., *passim*. (xii+332pp)

[42] Following to two Resolutions of the General Assembly in 2000: UNITED NATIONS: *United Nations Millennium Declaration*, Resolution adopted on 8th September 2000 (8th plenary meeting), New-York, 18th September 2000, UN Doc. A/RES/55/2, and the *Follow-up to the outcome of the Millennium Summit*, UN Doc. A/RES/55/162.

for development. These objectives, which don't seem particularly imperialistic, have been partially achieved, apparently with good "reason[s] to celebrate"[43], since extreme poverty and the proportion of under-nourished people have both been reduced by half, net enrolment rates in primary education have significantly increased in developing countries and gaps between women and men steadily narrow, among other encouraging signs. In this sense, we shall note that the mixture between human rights and economic development generated the concept of *sustainable human development* upon which is built the UN strategy. It must be underlined to what extent the new millennium has inaugurated an utterly useful and unprecedented approach: that link between human rights and economic development, very distant from previous morally-idealistic western defences of human rights –which where precisely an easy target for criticism.

In sum, we dare say that most societies embrace human rights as a natural and desirable development, despite the eventual critiques and political nuances. The adoption of the human rights' language includes almost all transnational actors; for example, the Catholic Church, with 1200 million believers, has revived its "social doctrine" at the end of the 20th Century –born at the end of the 19th Cent. with the Encyclical Letter *Rerum Novarum* (Pope Leo XIII). Even H.H. Pope John Paul II expressed that a "type of development which did not respect and promote human rights –personal and social, economic and political, including the rights of nations and of peoples –would not be really worthy of man"[44]. H. H. Pope Francis now includes explicit human rights' concerns in very modern terms, as recently expressed with regard to the environment and the "right to water"[45] or, in more general terms, when it is acknowledged that "[i]n the present condition of global society, where injustices abound and growing numbers of people are deprived of basic human rights and considered expendable, the principle of the common good immediately becomes, logically and inevitably, a summons to solidarity and a preferential option for the poorest of our brothers and sisters"[46]. In any case, one cannot but acknowledge that States' obligations are gradually tougher in this regard, with mixed results, and that societies have generally accepted this as a positive evolution.

[43] UNITED NATIONS: *The Millennium Development Goals Report 2015*, New York 2015, p. 4.
[44] Encyclical Letter, *Sollicitudo Rei Socialis* (30 December 1987), 33: *AAS* 80 (1988), 557.
[45] "Yet access to safe drinkable water is a basic and universal human right, since it is essential to human survival and, as such, is a condition for the exercise of other human rights", advancing in their interdependence. Encyclical Letter, *Laudato si –On Care of our Common Home* (14 May 2015), para. 30 (p.23).
[46] *Ibíd.*, para. 158 (p. 117).

In 2000, when the UN launched the 2015' development agenda, it already recognised the importance of partnerships to foster human rights and involve all actors of society by giving "greater opportunities to the private sector, non-governmental organisations and civil society, in general, to contribute to the realization of the Organization's goals and programmes"[47]. This is the international reflection of a wider process: State-centric approaches are less self-sufficient than expected in a theoretically Westphalian system, and it is more and more necessary to see the links between the State and society, which could be regarded as two systems within a "metasystem"[48], still relatively autonomous but more and more intertwined, also at an international level. It should be noted by the way that threats to the above-mentioned State-centric Westphalian system are numerous and do not only derive from TNCs' activities and globalisation: also international human rights law has meant nothing more and nothing less than the gradual recognition of a partial legal subjectivity of individuals in the international scenario. International human rights law has also contributed to limit States' sovereignty: internal violations of human rights can no longer be considered as merely internal affairs within the domestic jurisdiction[49].

Parallel to the development of human rights, globalisation[50] has rapidly consolidated to further weaken the traditional concept of States' sovereignty. This was already a central problem of scientific literature in 1949[51]:

> *"This 'global' era has made every region sensitive to the developments of far-distant lands; moreover its 'popular' base has changed the decisive forces in*

[47] UN Doc. A/RES/55/2, para. 30.

[48] "En realidad, se trata de un nuevo planteamiento del problema clásico de las relaciones entre el Estado y la sociedad que, en términos de abstracción sistémica, podría expresarse de la siguiente manera: el sistema estatal y el sistema social, sin perjuicio de su respectiva autonomía, son partes de un metasistema, es decir, hay que considerarlos desde la perspectiva de un sistema más amplio en el que cada uno de los términos sirve a finalidades complementarias y posee cualidades y principios estructurales igualmente complementarios". M. GARCÍA-PELAYO: *Las transformaciones del Estado contemporáneo*, Madrid 1995, Alianza Ed., p. 25.

[49] In this case, we rather refer to an evolving practice within the international society, under which internal violations of human rights meet with the increasing disapproval at an international level. Naturally, this is a controversial issue, because article 2.7 of the UN Charter consecrates the principle of non-interference in domestic affairs, even though that practice has progressively developed the Charter in this particular aspect. J. SALMON (Dir.) : « Ingérence» and « Devoir d'ingérence », in *Dictionnaire de Droit International Public*, Bruxelles 2001, Bruylant Ed., pp. 579-580.

[50] We are not interested in the conceptual and historical debate; we shall only note that Nye and Keohane focus on the interdependency between States and societies, as said before, while Hirschmann calls it a 'vulnerable dependency'. A general reference at: J.C. PEREIRA (Coord.): *Diccionario de Relaciones Internacionales y Política Exterior*, Barcelona 2008, Ariel Ed., pp. 431-435. We want to thank Prof. Pereira for his academic orientation and support.

[51] S. NEUMANN: "The International Civil War", in *World Politics*, Vol. 1 No. 3 (April 1949), pp. 333-350, at p. 335.

> *the conduct of international affairs. The time-honored concept, since Ranke's day, of the 'primacy of foreign affairs' defining the internal natural and needs of the nations, has been increasingly replaced […] The frontiers between internal affairs and world politics –despite neat differentiations by the academicians– are irreparably blurred. This change calls for a new 'international relations', the outer contours of which are only dimly recognised. All fundamental concepts such as nationalism, sovereignty, intervention must be redefined".*

In the dawn of the new millennium, the UN General Assembly explicitly considered the interdependence between human rights, development and globalisation. International Organisations and its Member States had to be more proactive leaving room to the "private sector, non-governmental organizations and civil society in general *[…]* to offset the negative economic and social consequences of globalisation"[52]. This statement marks the official recognition that global capitalism is not an ever-progressing and zero-sum phenomenon: there are advantages and opportunities alongside shortfalls and negative side-effects that need to be addressed[53]. This process has deepened the imbalances and tensions between States' power, markets' influence and societal expectations, while increasing their interdependency and the unavoidability of multilateral approaches to tackle the adverse impacts of globalisation. CSR can contribute to alleviate these tensions as a complementary tool; the following diagram shows, by the way, that societal expectations do not only create tensions in relation to the markets, but also in relation to States' power[54], forming an isosceles triangle.

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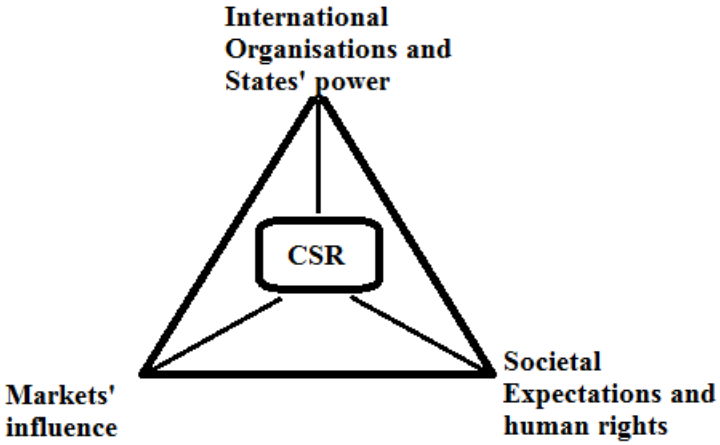
[52] UNITED NATIONS (General Assembly): *Role of the United Nations in promoting development in the context of globalisation and interdependence*, Resolution of 20 December 2001, New-York 22 February 2001, UN Doc. A/RES/55/212, para. 9.

[53] J. MARCHÁN: "La responsabilidad de los Estados en la protección de los derechos económicos, sociales y culturales ante la globalización", in J. SOROETA LICERAS (Dir.): *Los derechos económicos, sociales y culturales en tiempos de crisis –Cursos de Derechos Humanos de Donostia-San Sebastián Volumen XII*, Pamplona 2012, Aranzadi Ed. (Thompson Reuters), pp. 79-106.

[54] IHRL is, in origin, a way to alleviate the tension between societal expectations and States' power, limiting the latter to a precise framework. It was traditionally assumed that States were the major –and, at a time, almost the only- human rights' violators so the historically most important tension was between States and Societal Expectations. Globalisation has added new tensions creating the above triangle. In the words of Prof. Carrillo Salcedo, the government's treatment of its own nationals is no longer an "internal matter", but has become a concern under contemporary international law: "si el trato que un Estado diera a sus nacionales era en el derecho internacional tradicional un cuestión de jurisdicción interna (ya que el Derecho internacional no regía esta cuestión y se limitaba a regular la posición jurídica de los extranjeros), en el Derecho Internacional contemporáneo ocurre lo contrario como consecuencia de *[…]* los derechos humanos". J.A. CARRILLO SALCEDO: *Soberanía de los Estados y Derechos Humanos en Derecho Internacional Contemporáneo*, Madrid 1995, Tecnos Ed., p. 19.

**Diagram No. 1:** *The place of CSR in relation to the tensions of globalisation*




A few figures can illustrate the current situation. The four major Chinese banks top the famous *Forbes 2000* list, but they are under public control. As a properly private company, the biggest one in the world is an investment services enterprise founded in 1955 under the control of CEO Warren Buffet: Berkshire Hathaway, with $ 19'9 billion in profits, exceeding the GDP of 85 countries in the world (individually taken, not aggregated)[55]. We find it more enlightening to look at profits, instead of assets (sometimes difficult to liquid), sales (before costs, taxes, etc.) or market value (generally variable), in order to get a better idea of the power and influence of TNCs. To take another source, *Fortune* also publishes the *Global 500* list, according to which Apple is the biggest company in terms of profits, amounting to $ 39'51 billion in 2014[56], over the GDP of 103 countries the same year. Walmart is also an off-cited example: it has 2,200,000 employees, only a little less than the population of the metropolitan area of Las Vegas (2,293,610 inhabitants), and more than the population of the metropolitan areas of European capitals like Prague (1,910,396) or Stockholm (2.018208)[57].

TNCs' impact on society is undiscussable, sometimes dramatically as we periodically witness corporate scandals: the environmental and human disaster in Bhopal by Union Carbide (1984), the ecological tragedy of Exxon Valdez in Alaska (1989), the labour

[55] We are using the latest list published by Forbes (http://www.forbes.com/global2000/list) and data from the World Bank for the World's GDP in 2014 (World Development Indicators Database, World Bank, 18 September 2015, available at: http://data.worldbank.org/data-catalog/world-development-indicators http://data.worldbank.org/data-catalog/world-development-indicators).

[56] See: http://fortune.com/fortune500.

[57] For the most recent data on the population of these cities see the OECD Statistics at: http://stats.oecd.org/Index.aspx?Datasetcode=CITIES# and EUROSTAT Regional Yearbook (2015, Chapter 15 on European Cities), available at: http://ec.europa.eu/eurostat/web/cities/publications.

scandal in Nike's subcontractors in Vietnam and Indonesia –including child labour– since it was revealed in 1996-97; the French biggest oil company corruption case (Elf Aquitaine, 1994); the financial frauds of Enron (2001), WorldCom (2002), Lehman Brothers (2008); Tyco in 2002-2003 when a former CEO had stolen more than $100 million leading to a class action of defrauded shareholders; the $14 billion black-hole in the Italian milk-processing company Parmalat, discovered in 2003 (the so-called "Europe's Enron"); also in 2003, the Dutch retailer company Ahold –number three in the world– admitted to have inflated the benefits; Pfizer's allegedly illegal drug trials in Nigeria (1996) that led to John Le Carré's novel (and subsequent film) *The Constant Gardener*; and BP's oil spill in the gulf of Mexico back in 2010, to quote only a few examples with great media impact. The latest scandal occurs as we write these words: the alleged fraud in diesel motors' emissions within the German Volkswagen Group (2015).

In spite of all, globalisation should not be the scapegoat for all the international deficits in the area of human rights and development. The opportunities that TNCs can create in developing countries are equally undeniable, in particular, when the exploitation of resources depends on the availability of heavy investments. Of course, the *pros* and *cons* of TNCs and global capitalism seem to generate an unstable or precarious equilibrium. The UN ESCR Committee has pointed out that, even though recent developments are not necessarily a threat to the provisions of the Covenant, it is equally true that, taken together and without the complement of appropriate policies, globalisation carries risks that need to be tackled in order to maintain the prevalence of human rights and avoid a regression in their indivisibility and interdependency[58].

By their nature, markets are simply amoral. Again, the Cold War created a sort of competitive dynamic between the two blocks; Western countries came up with the brilliant idea of the 'social market economy'. We can speculate as to what extent the presence of the soviet system served to maintain a healthy tension within capitalist countries to continually demonstrate that they were better than communists, something that became unnecessary after the fall of the Berlin Wall. Capitalism had no competition anymore. Corporate practices and standards slackened. In our view, this constitutes a

[58] ESCR Committee: *Statement on Globalisation and Economic, Social and Cultural Rights*, May 1998, UN-Doc. E/1999/22-E/C.12/1998/26, para. 3. For a further development in the area of ESCR, please refer to the following section of this chapter.

crucial factor to explain the current problems –of course, together with other concurring causes. Even George Soros (not at all a dangerous communist) warns on the amorality of markets while societies cannot work "without some distinctions between right and wrong"[59]. Nobel Prize Joseph Stiglitz also thinks that it is possible to "make globalization work": even though there are no 'one-size fits-all solutions', a teleological interpretation of the current regulatory scenario might help. Particularly shocking is the abuse of "limited responsibility" when it comes to make TNCs accountable: this figure was actually created to allow and promote investments, without which "modern capitalism" wouldn't have grown as we know it, so that its purpose was not to release director and managers from any liability for business operations[60]. But Stiglitz finally states that "[o]ne thing that makes [him] hopeful is the corporate social responsibility movement"[61]. This influence of TNCs is strong, being more an economic reality than a clear-cut legal entity[62], and a new balance needs to be found within the international society.

In sum, the problematic is clear: to make globalisation and human rights compatible and the contribution of CSR in this dialectic. Our first conclusion (and premise) is that we do not believe there is any *ontological incompatibility* between globalisation and human rights. In fact, implicit and dogmatic *ontological incompatibilities* are, in our view, behind many conflictual misunderstandings in international relations: suffice the Arab Spring to demonstrate that Islam and democracy are not necessarily antagonistic

[59] G. SOROS: *Globalizzazione*, Milano 2002, Ponte Alle Grazie Ed., p. 19 ("La società non può funzionare senza qualche distinzione fra giusto e sbagliato"). The original English edition is: G. SOROS: *On Globalization*, London-New York 2002, Public Affairs Ed., 208 pp.

[60] "Making matters worse is limited liability, which essentially defines corporations. Limited liability is an important legal innovation, and without it modern capitalism surely could not have developed. Investors in corporations with limited liability are at risk for only the amount of money they invested in the company, and no more. [p. 193]*[…]* Limited liability has a major advantage: it allows huge amounts of capital to be raised, since each investor knows that the most he can lose is his investment. But limited liability can have large costs for society [p. 194] *[…]* Limited liability was intended to limitd the liability of investors, not to absolve employees, however senior, of responsibility. But, as we have seen, sometimes that *is* the result [p. 203] *[…]* Limited liability has underpinned the growth of modern capitalism; but with globalisation the abuses of limited liability have become global in scale; without the reforms suggested here, they could become far worse" (p. 210). J.E. STIGLITZ: *Making Globalization Work*, New York – London 2006, WW Norton Ed., pp. 193-194, 203 and 210 (extracted quotes above).

[61] *Ibíd.*, p. 210.

[61] *Ibíd.*, p. 210.

[62] "Se le impresse multinazionali sono riuscite a orientare le scelte politice ed economiche degli Stati, diventa ora necessario trovare all'interno della Comunità Internazionale un accordo che permetta di tenere a freno le leve della globalizzazione economica, con un sistema di valori autenticamente condiviso e un più rigido controllo. In ogni caso, è necessario sottolineare sin d'ora che l'espressione società o impressa multinaionale o anche gruppo multinazionale identifica una realtà economica molto più che una entità giuridica". F. BORGIA: *La responsabilità sociale delle impresse multinazionali*, Napoli 2007, Ed. Scientifica, pp. 20-21.

concepts. A dogmatic and monocultural understanding of democracy is, of course, incompatible with a dogmatic and monocultural understanding of Islam, as it would probably happen with any pair of abstract notions. A concept is a unity of knowledge useful to describe complex ideas and, if possible, improve the world around us. A too stringent, unidirectional and short-sighted interpretation of terms like democracy, human rights, development, or globalisation can give the erroneous perception that they are incompatible with each other. In this vein, to make compatible globalisation and human rights means to "narrow and ultimately bridge the *[governance]* gaps *[…]* created by globalisation"[63], following the wording of the Special Representative of the Secretary-General (SRSG) John Ruggie.

## 1.2 The particular problematic of Economic, Social and Cultural Rights

### *1.2.1. Context and legal evolution*

Transnational companies' activities mostly affect Economic, social and cultural rights (ESCR) rather than civil and political ones (CPR), with the exception of the problems derived from private security, freedom of expression and, very importantly, access to justice[64]. But civil and political rights' violations in cases involving TNCs are almost always related to concomitant economic and social rights. ESCR have faced a number of challenges that have marked their legal evolution up to date, when they have managed to be consolidated in the *corpus* of international human rights law. This process deserves to be evaluated to the extent it illustrates the frame difficulties of ESCR and shall be kept in mind when we deal afterwards with more specific business-related issues. Suffice the following considerations to point out that, in our view, the main responsibilities remain with States, either to promote the effectiveness of human rights treaties, either to prosecute third party violations.

[63] HUMAN RIGHTS COUNCIL (UN): *Protect, Respect and Remedy: a Framework for Business and Human Rights, Report of the SRSG on the issue of human rights and transnational corporations and other business enterprises John Ruggie*, UN Doc. A/HRC/8/5, 7 April 2008, para. 3.
[64] Access to justice is studied in the second part of this work. See Chapter IV, Section 2.

The human rights division in three generations, a very extended and divulgated idea, was proposed by the French lawyer Karel Vasak in 1977[65]. This division helped those interested in marginalising ESCR to "decaffeinate" them, in which cultural rights were clearly the Cinderella of the party[66]. Such a generational division is controversial and very problematic as it suggests a hierarchy or, at least, an underlying order of precedence[67]. The alleged second generation, ESCR, was largely considered as a group of rights manly conducive to positive obligations even though, later, it has been verified that both civil and political rights and ESCR entail positive and negative obligations for States. The conflict between the Western bloc and the Soviet system during the Cold War led, in sum, to the redaction in 1966 of two different and separated International Covenants, what generated some confusion tending to forget that this distinction had its origin in the political equilibria of that time without legal basis to be maintained later on, as it has been reflected in a good part of the academia since the 1990's[68]. The most important juridical consequence was the discrimination between civil and political rights and ESCR in their respective legal protection, both internally and internationally: while CPR had a protection mechanism including individual complaints (first Optional Protocol of the 1966 CPR Covenant), the same mechanism hasn't been achieved for ESCR until 2013.

This line of argument was confirmed in 1993 on the occasion of the World Conference on Human Rights celebrated in Vienna, where was established the "universality, indivisibility, interdependence and interrelation" of all human rights[69]. The indivisibility and interdependence became fundamental principles of international human rights law, added to older ones such as the inherent dignity of human being, participation and equality, and non-discrimination.

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[65] K. VASAK: "A Thirty Year Struggle: The Sustained Efforts to give Force of Law to the UDHR" en *UNESCO Courier*, Nov. 1977, p. 29.

[66] "Cultural Rights are the failed Cinderella of the international human rights lexicon –pretty to picture but they don't quite make it to the ball": D. McGOLDRICK: "Culture, Cultures and Cultural Rights", in M. A. BADERIN and R. McCORQUODALE (Dirs.): *Economic, Social and Cultural Rights in Action*, Oxford 2007, Oxford University Press, p. 447.

[67] C. FLINTERMAN: "Three Generation of Human Rights", in J. BERTING *et al.* (Eds.): *Human Rights in a Pluralist World: Individuals and Collectivities*, London 1990, pp. 75-77.

[68] Western opposition to ESCR during the Cold War is, in any case, discussable and probably there are not definitive answers. A good summary of this debate in: A. KIRKUP and T. EVANS: "The Myth of Western Opposition to Economic, Social and Cultural Rights? A reply to Whelan and Donnelly", in *Human Rights Quarterly*, Vol. XXXI (2009), John Hopkins University Press, pp. 221-238.

[69] *Vienna Declaration and Program of Action*, Part I, parr. 5, adopted by the (second) World Conference on human rights, Vienna, June 25th 1993, UN-Doc. A/CONF.157/24 (Part I, Chap. III).

It should be recalled that the consolidation in Vienna of the doctrine of the indivisibility and interdependence of human rights was not a spontaneous occurrence, but the synthesis of several antecedents, in particular two previous texts. First of all, the Tehran Declaration (1968), following to the first World Conference on Human Rights, already expressed in quite modern words: "Since human rights and fundamental freedoms are indivisible, the full realization of civil and political rights without the enjoyment of economic, social and cultural rights is impossible" [70].

Secondly, a decade after, the same idea was reinforced with a General Assembly resolution: "a) All human rights and fundamental freedoms are indivisible and interdependent; equal attention and urgent consideration should be given to the implementation, promotion and protection of both civil and political, and economic, social and cultural rights; b)the full realization of civil and political rights without the enjoyment of economic, social and cultural rights is impossible; the achievement of lasting progress in the implementation of human rights is dependent upon sound and effective national and international policies of economic and social development" [71].

In the eighties, the Declaration on the Right to Development (1986) continued in the same direction and, finally, the already cited Vienna Conference in 1993 definitively consolidated the indivisibility and interdependency of human rights, only when the dissolution of the Soviet bloc had finished.

When the former Human Rights Commission was replaced by the Human Rights Council, in place since March 2006, the United Nations insisted again in the universality of all human rights, including the right to development and confirming a wider level of *consensus generali* in this regard[72].

This said, the international society, and especially developed States, continue to give a preferential treatment to CPR despite the fact that the right to life has little sense if it is not through, among other rights, the right to health, to adequate food or to adequate housing.

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[70] *Tehran Declaration*, Final Document of the World Conference on human rights, Tehran, May 13th 1968, UN-Doc. A/CONF.32/41, para. 13.
[71] Resolution of the General Assembly 32/130, of 16 December 1977, on the "Alternative approaches and ways and mean within the United Nations system for improving the effective enjoyment of human rights and fundamental freedoms", para. 1, *a)* and *b)*.
[72] UN-Doc. A/RES/60/251, April 3rd 2006, preamble, para. 3.

The core challenge is to convince developed States that both CPR and ESCR and the right to development imply negative and positive obligations so that there aren't cheaper or more expensive rights and, in particular, that ESCR aren't always more expensive than CPR.

In the post-cold war era, globalisation, the growth of a deregulating capitalism, together with privatisation enthusiasms, are the current challenges for ESCR, which continue to lack of sufficient support, as it is the case of the United States Senate whose ratification of the ESCR Covenant is still pending. The proliferation of non-State international actors, such as transnational companies, that usually have a bigger factual power than many States, is a proof of the new challenges for ESCR as stated in the previous section.

In effect, though the progression has been notable, ESCR still suffer some historical delay derived from their initial marginalisation within the family of human rights.

It is plausible to consider that the second major milestone since the Vienna Conference came twenty years later when, the 5th of February 2013, Uruguay became the tenth country to ratify the Optional Protocol of the ESCR Covenant, following the example of Argentina, Bolivia, Bosnia and Herzegovina, Ecuador, El Salvador, Mongolia, Portugal, Slovakia and Spain[73]. The entrance into force of the Optional Protocol, beyond its symbolic importance, opens the possibility to advance in the justiciability of economic, social and cultural rights as it allows individual complaints and *ex officio* investigations by the ESCR Committee.

Another factor that has influenced the delay of ESCR is vagueness and the voluntarism or programmatic character of many texts dealing with this category of rights, in which we often find a mixture of references to socio-economic development and to its progressive nature. A standard critique is that we move, in this sense, somewhere between rights and politics.

Within the framework of the 1997 discussions on the reform of the United Nations, the second Interagency Workshop was convoked for 2003. With the title: "Statement on a Common Understanding of a Human Rights-Based Approach to Development

[73] OHCHR News Press, February 7th 2013, available at: http://acnudh.org/2013/02/pillay-celebra-avance-que-permitira-la-presentacion-de-quejas-individuales-en-relacion-con-los-derechos-economicos-sociales-y-culturales/

Cooperation", the so-called Stamford Principles[74] were born, intending to react to old critiques by ESCR sceptics and simplify its framework. It was decided that some principles had to be clear and two wordings had an instant success: the *human rights-based approach* and *human rights mainstreaming*, which are both extremely useful to study the role of international organisations to promote human rights amongst private companies.

Those principles included the synthesis of half a century of work and, again, insisted on the progress made in Vienna: universality, inalienability, indivisibility, interdependency and interrelation between all human rights; together with the principles of non-discrimination and equality, participation and inclusion, and the accountability in the context of the rule of law.

This evolution of ESCR has founded the approach to development programs and good practices among public and private entities, also in relation to the Millennium Development Goals. It consists of a linguistic and conceptual shift[75] in the initiatives undertaken, above all aimed at implementing effectively the Vienna Conference, promoting the coherence of the huge variety of specialised organisms within the UN decentralised system, and inspiring other international organisations. For instance, there are improvements to be noted in the development of ESCR, persisting some delay in their justiciability, yet many States still consider there is more room for their margin of appreciation with ESCR than with CPR[76], what can hold back the States demands to transnational companies.

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[74] The common understanding reached three principles: "1. All programmes of development cooperation, policies and technical assistance should further the realization of human rights as laid down in the Universal Declaration of Human Rights and other international human rights instruments. 2. Human rights standards contained in, and principles derived from, the Universal Declaration of Human Rights and other international human rights instruments guide all development cooperation and programming in all sectors and in all phases of the programming process. 3. Development cooperation contributes to the development of the capacities of "duty-bearers" to meet their obligations and of "right-holders" to claim their rights." OHCHR: *Frequently-asked questions on a human rights-based approach to development cooperation*, New York and Geneva 2006, Annex II (Stamford Principles), p. 42. Available at: http://www.ohchr.org/documents/publications/faqen.pdf

[75] *"The debate regarding human rights based development has necessitated both a conceptual and language shift. This debate has benefited from advances made in asserting the legitimacy of socio-economic rights but has suffered also from some of the skepticism and resistance that has impeded the realization of socio-economic rights and been a feature, for example, of the debate on an Optional Protocol to the ICESCR"*. P. TWOMEY: "Human Rights-Based Approaches to Development: Towards Accountability", in M. A. BADERIN y R. McCORQUODALE (Dirs.): *op. cit.*, p. 69.

[76] J.A. PASTOR RIDRUEJO: "Sobre la universalidad del derecho internacional de los derechos humanos", en *Anuario de Derechos Humanos. Nueva Época*, Vol. XII (2011), Universidad Complutense de Madrid, pp. 267-286. In English: T.A. O'DONNELL: "The Margin of Appreciation Doctrine:

### *1.2.2. Levels of States' obligations*

In line with article 103 of the United Nations Charter, we consider the pre-eminence of this organisation at an international level is clear, reason why we give this relative importance to the UN practice in terms of human rights. In parallel with their legal evolution and recognition, ESCR have generated levels of State obligation that we take as a benchmark.

In view of the historical delay in the field of ESCR, it is only since the eighties of the last century that a significant clarification of State obligations starts. All scientific literature agrees with the importance of three crucial moments: Limburg Principles of 1986, the General Comment No. 3 of the ESCR Committee on the nature of State parties obligations (1990) and the Maastricht Guidelines (1997).

The experts meeting in the University of Limburg in 1986 insisted again on the benefits of the indivisibility doctrine at a moment when the international system was still divided into two blocs, so that they took the precaution to explain that "[t]here is no single road to their full realization. Successes and failures have been registered in both market and non-market economies, in both centralised and decentralised political structures".[77]

The most important conclusion is the proposal of an interpretation of articles 2 to 5 and 8 of the ESCR Covenant, aimed at clarifying their programmatic and progressive character without giving *carte blanche* to exempt States from their obligations. It was recalled that, in any case, the Vienna Convention on the Law of Treaties (1969) establishes that provisions contained in a treaty have to be interpreted in good faith in line with the object and purpose of the treaty (checking, if necessary, the preparatory work of the treaty).[78]

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Standards in the Jurisprudence of the European Court of Human Rights", *Human Rights Quarterly*, Vol. IV (1982), John Hopkins University Press, pp. 474-496. A more recent revision after the end of the Cold War: J.A. SWEENEY: Margins of Appreciation: "Cultural Relativity and the European Court of Human Rights in the Post-Cold War Era", *The International and Comparative Law Quarterly*, Vol LIV No. 2 (2005), pp. 459-474.

[77] OHCHR: *Economic, Social and Cultural Rights, handbook for National Human Rights Institutions*, United Nations, New York and Geneva 2005, Annex 6 (Limburg Principles), pp. 125-135, para. 6 (of the Limburg Principles).

[78] It is the principle "*pacta sunt servanda*" in arts. 26 and 31 of the Vienna Convention on the Law of Treaties, 1969.

Part of the wording of the ESCR Covenant can be problematic or vague. The merit of the Limburg Principles was to finally adjust its interpretation to real basic objectives: [79]

- - Progressive realization could not justify inaction or disengagement from the State to postpone *sine die* the satisfaction of a right included in the Covenant;

- - The efforts to the "maximum extent of available resources" should be understood as including international cooperation, justifying assignments of resources in the most efficient way to comply with "minimum obligations" and provide with "essential services";

- - "non discrimination" should be effective in order to avoid any case of indirect discrimination; the adoption of measures "by all appropriate means" is understood for this group of experts in a broader sense going beyond legislative initiatives.

The Limburg principles were extremely useful for the ESCR Committee during the preparation of the General Comment No. 3 to delimitate State obligations, that is, the problem of art. 2.1 of the Covenant, that didn't give any tip on how the Committee should decide whether if a State had allocated or not enough resources to ESCR, that is to say, if ESCR budget was efficient and sufficient. This delicate work crystallised in 1990 with the adoption of General Comment No. 3, reflecting four years later the experts' conclusions in Limburg.

The obligation to adopt measures by all appropriate means includes any kind of initiative, not only legislative. According to the terminology of the International Law Commission, it implies obligations of result and obligations of conduct or behaviour. Among the legislative measures, a classical example is the free choice of the State to decide if the Covenant is transposed in the internal legal order or if it is not following a monist perspective, regardless of the fact that specific regulations can be adopted for particular rights. Nothing forces the States to prefer a way or another in the application of Covenant and both options can lead to the satisfaction or to the violation of the treaty[80]. Whether the Covenant is transposed or not, it does not determine the likelihood of compliance, as it happens with almost any other measures at non-legislative levels.

[79] *Limburg Principles*, para. 16 to 41.

[80] ESCR Committee: *General Comment No. 9*, UN-Doc. E/C.12/1998/, para. 8. However, the ESCR Committe had already expressed a preference and recommended States to transpose the Covenant and adopt specific internal legislation (*General Comment No. 3*, para. 3). A transposition of the Covenant and the adoption of internal legislation would facilitate access to justice and remedies at a domestic level.

All measures under art. 2.1 are subject to a certain margin of appreciation of States, as admitted by the Committee[81], to determine the most adequate measures to face its specific circumstances.

This being so, the real obligation is to prove an active commitment in every field (legislative, budgetary and political) in a way that leads to effective measures, in a reasonability framework, to generate the expected and desirable results according to the object and purpose of the Covenant. Guidelines on social corporate responsibility are part of the policy makers' effort to comply with the State obligation to promote the full realisation of human rights; the Committee recurrently emphasizes in a number of Country reports that the adoption of legislation at an internal level isn't either sufficient for the full realisation of ESCR.

To evaluate the design and adoption of such measures we encounter two problematic concepts, as we have said above: the progressive realisation and the maximum available resources. The gradual achievement of ESCR shows, in summary, the wish of the State to comply with its obligation of results.

The ESCR Committee has recognised that the progressive approach reflects the acknowledgement of a diverse material reality and of important inequalities in practice within the international society. This shouldn't be interpreted in the wrong direction; its only purpose is to have a necessary flexibility device available for the variety of difficulties that a State can experience to ensure the full effectivity of ESCR[82].

To disentangle if progressivity is correctly applied in a concrete case according to the terms of the Covenant we have two limits: on one side, inaction or disengagement of the State, which does not need any further explanation and cannot be justified under progressivity criteria. On the other side, eventual regressive measures aren't either acceptable. In fact, the ESCR Committee has very clearly established that regressive measures constitute *prima facie* a violation of the Covenant and only have a justification if a close and sound analysis of all best alternatives has been undertaken.[83]

[81] ESCR Committee: *General Comment No. 14*, UN-Doc. E/C.12/2000/4 (on the right to health), para. 53.
[82] ESCR Committee: *General Comment No. 3*, para. 9.
[83] *Ibíd.*, even though the Committee expressed more strongly the same idea in the *General Comment No. 13* (UN-Doc. E/C.12/1999/10, on the right to education, para. 45): "If any deliberately retrogressive measures are taken, the State party has the burden of proving that they have been introduced after the most careful consideration of all alternatives and that they are fully justified by reference to the totality of

The evaluation of the alternatives brings us back to the problem of "all available resources". The Committee has avoided complex economic and financial debates. To avoid the fact that budgetary restrictions became a licence to violate the Covenant (by an act or omission –with regressive measures, for example), the ESCR Committee stipulated that the maximum available resources had to be read in a broader sense including the potential benefits of international cooperation[84].

The Committee believes that States cannot allege in any case lack of resources to undermine two kinds of inevitable commitments: 1) basic minimum obligations or "minimum essential levels of each right enshrined in the Covenant" [85]; and "immediate obligations", among which non-discrimination, the adoption of measures (regardless of their nature), and refrain from interfering or impeding the enjoyment of these rights[86].

If we recapitulate the practice of the ESCR Committee, the evaluation of adequate measures remains in a triangle whose apexes are: a) all available resources including international cooperation; b) basic minimum obligations; and c) immediate obligations. This did not discourage the Committee, on very few occasions, to comparing allocated resources within a budget, regretting the usual disproportion between the financial resources of military expenses and health or education[87].

Politically speaking, the bad use or abuse of resources may seem evident; however, to demonstrate this fact is an extremely difficult and delicate task from a legal point of view. The Committee adopts in this regard all possible precautions as far as it is the primarily entrusted body with the task of clarifying the provisions of the Covenant. Corruption and hypertrophic military budgets are common, especially in countries where transnational companies face most of their problems. Some help is provided in the 2007 Declaration on the assessment of available resources when the Committee for example did not include generalised corruption cases despite the opportunity to do so[88].

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the rights provided for in the Covenant and in the context of the full use of the State party's maximum available resources".

[84] ESCR Committee: *General Comment No. 3*, para. 13.

[85] *Ibíd.*, para. 10.

[86] *Ibíd.*, para. 1 and 2.

[87] M. SSENYONJO: *op. cit.*, p. 64.

[88] The statement entitled "An evaluation of the obligations to take steps to the "maximum available resources" under an optional protocol to the Covenant", presents some criteria applicable if the State alleges lack of resources: "a) the country's level of development; b) the severity of the alleged breach, in particular whether the situation concerned the enjoyment of the minimum core content of the Covenant; c)the country's current economic situation, in particular whether the country was undergoing a period of

The control of ESCR has also been improved through indicators, an effort undertaken in conjunction with different organisations: the Office of the High Commissioner for Human Rights (OHCHR) and other decentralised organisms of the UN system: UNAIDS, UNICEF, UNESCO, etc., indicators than can give an effective idea of the situation in a country.

In 1991 the Special Rapporteur Danilo Türk for the realisation of economic social and cultural rights, appointed by the former Sub-Commission on Prevention of Discrimination and Protection of Minorities, presented eight principles derived from the Limburg ones and inspired in the General Comment No. 3. Danilo Türk's report[89] encouraged to pay close attention to the use of all available resources to attain the full realisation of human rights. He equally stated that States have the obligation to guarantee the respect of minimum core obligations, irrespective of any budgetary constraint. As for our debate on business and human rights, it is interesting from his report that the State's commitment should not stagnate at an international level, but permeate into society, through public institutions from top to bottom including national and local entities and private organisms.

A new improvement towards the clarification of State's obligations came in 1997 with a second experts meeting in Maastricht, which culminated in the Guidelines on Violations of Economic, Social and Cultural Rights, where we already find mentions to the new challenges in the post-Cold War era. Obligations of result and conduct were included, as well as violations through acts and omissions, the margin of appreciation, the minimum core obligations and non-discrimination. The ESCR has so far written General Comments to clarify immediate effects and core obligations with respect to every right of the Covenant.

After Maastricht's experts meeting, we have to highlight the tripartite organisation of States' obligations, as if they were three components that help us measure the level of compliance of the Covenant. The final terms of this tripartite division of State duties followed Eide's proposal, who used the verbs "to respect, protect and fulfil" (or satisfy).

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economic recession; d) the existence of other serious claims on the State party's limited resources; for example, resulting from a recent natural disaster or from recent internal or international armed conflict; e) whether the State party had sought to identify low-cost options and, f) whether the State party had sought cooperation and assistance or rejected offers of resources from the international community for the purposes of implementing the provisions of the Covenant without sufficient reason". UN-Doc. E/C.12/2007/1, May 10th 2007, para. 10.

[89] UN-Doc. E/CN.4/Sub.2/1991/17, para. 52.

a) The *respect* means a distant attitude from the State, refraining from obstructing or interfering in the enjoyment of the rights, narrowly linked to the freedom of action and the immediate obligations analysed above (such as non-discrimination).

b) The obligation *to protect* attaches a more active role to the State to guarantee the enjoyment of the rights, in front of eventual acts or activities that might threaten them, accomplished by individuals, non-State actors like companies or agents under the public authority. This protection operates through the implementation of policies, legislation, regulatory frameworks and effective legal protection with inspections and all pertinent implementation mechanisms. If a States fails *to protect* human rights in front of transnational companies operations in its territory, from contracts and investments up to the concrete activities in the field, it might also constitute a violation of the Covenant according to this evolution of UN practice.

c) The third level usually eclipses the previous ones: "to fulfil" consists of adopting all necessary measures for the full realisation of ESCR and, in particular, for those persons who are not able to achieve it by their own means. This *fulfilment* has, in turn, another three phases: to facilitate, to promote and to provide, even though it has been wrongly interpreted in a maximalist conception. Far from obliging States to provide all goods and services free of charge, in reality, it rather implies that obligation only when individual lack of resources or during a crisis, as in general terms in would only oblige to comply with minimum core obligations, to make them accessible and affordable towards their progressive realisation.

Finally, the three general level of State obligations (*to respect, protect and fulfil*), as well as the minimum core obligations and the immediate effects of the Covenant are all dependent upon fundamental and transversal characteristics that help us finish this general picture on the levels of State obligation. As we observe the evolving practice of UN human rights bodies we have assisted to the authorised explanation of the Committee, who has drawn an analytical framework for each right. The Committee started with the right to housing, as for which some assessment factor were established such as habitability, bearable costs, legal certainty and an adequate place[90].

In 1999 this process was accelerated thanks to the important work of the Special Procedures of the Human Rights Council, more politically flexible compared to the treaty bodies (the Committees) or to the secretariat itself (the OHCHR). The Special

[90] ESCR Committee: *General Comment No. 4* (on the right to adequate housing), UN-Doc. E/1992/23, para. 8.

Rapporteur on the right to education at that time, Katarina Tomasevski, particularly helped in the generalisation of these factors, which gained accuracy calling them "fundamental characteristics" [91].

This work went on in the same direction with the right to food, adding some specificities of that mandate as adequacy, for example, intended to include its nutritional richness, and the concept of sustainability was added[92].

Back to the ESCR Committee, in 1999 these fundamental interrelated characteristics were defined and, as we have said for the work of the Special Procedures, it was also working on the right to education that the terminology was cleaned up and the interrelated and essential features[93] were extended to any right covered by the Covenant.

As for accessibility, two different aspects were separated: its physical dimension and the economic one (called "affordability"). The essential contribution was that the interrelated essential characteristics of all rights of the Covenant illustrated the minimum core obligations of each right, the adoption of measures, the levels of respect, protection and fulfilment.

The "4-A scheme" suffered some slight variations depending on the subject, but could be summarised as follows:

-cultural *acceptability*, for example, drinking water might be healthy but has to be culturally acceptable (colour or smell);

-*adequacy*, referring to its quality according to the needs of society;

-*accessibility* is, therefore, physical (available without discrimination); and economical (affordability, as the Covenant does not oblige to provide rights free of charge). Accessibility also means access to information[94], to the decision making process and access to justice and remedies, what is particularly important in cases involving transnational companies.

-*adaptability and sustainability*, to make compatible economic development and social rights.

On a global scale, the work of the UN human rights system has, in the last twenty years, clarified the different levels of state obligations in terms of ESCR, in general and

[91] Originally known as the "4 A Scheme", initially integrated by availability, accessibility, acceptability and adaptability. UN-Doc. E/CN.4/1999/49, para. 50.
[92] ESCR Committee: *General Comment No. 12* (on the right to adequate food), UN-Doc. E/C.12/1999/5, para. 7 and 8.
[93] ESCR Committee: *General Comment No. 13* (on the right to education, cited above), para. 6, 7 and 50.
[94] The first time accessibility included information was for the right to health. See *General Comment No. 14*, para. 12 and 35.

specifically for each right. In the light of the practice of the United Nations, we have analysed a terminology that has finally been accepted[95] as authorised criteria to establish State obligations in ESCR. The general levels of State obligations have to illustrate and intersperse our study of the interaction between human rights and transnational companies.

### 1.3 The United Nations: shaping CSR

Corporate Social Responsibility is an interdisciplinary area under development and the current research will be far from constituting the last word. Our study is not aimed either at repeating and summarising the diverse instruments issued by international organisations[96]; instead, we would like to bring some order into a widely dispersed documentation, starting with the UN framework and principles, the definition of CSR and the systematisation of its contents. Some historical studies show that, under diverse labels, CSR has somehow existed for a longer time than expected: precedents can be traced back to the early 20th Century[97]. Politically speaking, the debate is evident as to the role of social concerns within the diverse understandings of a 'free market economy'. From a legal perspective, the debate is further complicated by some blocking dichotomies, mainly: *hard law vs. soft law* (and in connection to this, mandatory or voluntary schemes), *rights vs. duties*, and the issue of *objects vs. subjects* of International Law. Depending on the approach to these opposing terms, the word 'responsibility' will acquire a different meaning.

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[95] ESCR Committe: *General Comment No. 15* (on the right to water and sanitation), UN-Doc. E/C.12/2001/11, parr. 53. Even other UN Treaty Bodies have included it; as a mere example: Committee on the right of the Child, *General Comment No. 4*, 2004, parr. 40 and 41, where the ESCR Committee is explicitly cited, or within the Special Procedures, *the Guiding Principles on extreme poverty and human rights*, by the Special Rapporteur on extreme poverty, UN-Doc A/HRC/21/39, "4-A scheme" cited referring to education (parr. 88.c).

[96] Chronological and detailed summaries and analyses have been done by most of the authors cited in this section. We therefore omit detailed summaries of the documentation as it would add nothing new. The most authoritative texts are those of Jennifer Zerk, Bryan Horrigan, Surya Deva, David Bilchitz, Radu Mares, Doug Cassel and John Knox, together with John Ruggie's diverse publications (footnotes below) and OHCHR's reports.

[97] In her PhD thesis, still one of the most comprehensive (and cited) studies on international CSR, Jennifer Zerk notes some precedents: in 1914, Henry Ford adopted an eight-hour working day when the usual one was nine hours; and in 1935 Johnson and Johnson published what could be considered the first 'internal code' to define the companies' relations with a variety of social groups. See J.A. ZERK: *Multinationals and Corporate Social Responsibility. Limitations and Opportunities in International Law*, Cambridge 2006, Cambridge University Press, pp. 15-16.

It comes as no surprise that the definition itself is controversial and there are a lot of expressions that approximately refer to the same concept: corporate social performance, social value creation or shared social value, corporate philanthropy, business ethics, corporate citizenship, corporate sustainability, best practices, responsible business conduct, etc. Definitions have been proposed by both public and privates actors. In 2001 the European Commission (EC) considered it was the "concept whereby companies integrate social and environmental concerns in their business operations and in their interaction with their stakeholders on a voluntary basis"[98]; ten years later, the EC proclaimed it had simply become the "responsibility of enterprises for their impacts on society"[99], which seems stricter than the precedent definition. The OECD speaks of the "private efforts to define and implement responsible business conduct"[100]; for the OECD, *responsible business conduct* "entails above all complying with laws, such as those on human rights, environmental protection, labour relations and financial accountability, even where these are poorly enforced *[…] [and]* responding to societal expectations communicated by channels other than the law, e.g. inter-governmental organisations, within the workplace, by local communities and trade unions, or via the press"[101]. The OECD further clarifies that "*[p]*rivate voluntary initiatives addressing this latter aspect of R*[esponsible]* B*[usiness]* C*[onduct]* are often referred to as corporate social responsibility"[102]. For the UN CSR is just defined as "the corporate responsibility to respect human rights"[103]. The diversity of definitions is clearly the first difficulty for one who approaches CSR without previous information.

There are also a number of business initiatives with their own definitions. At an early stage, a group of leading TNCs created the Business Leaders Initiative on Human Rights[104], which functioned between 2003 and 2009 and already incorporated a human

[98] COM (2001) 366 Final, 18 July 2001, *Green Paper promoting a European framework for Corporate Social Responsibility*, para. 20 (at p. 6).
[99] COM (2011) 671 Final, 25 October 2011: *A Renewed EU Strategy 2011-14 for Corporate Social Responsibility*, p. 6 (para. 3.1). The documentation of the European Union (EU) is studied in detail in chapters III and IV.
[100] OECD: *Guidelines for Multinational Enterprises*, Paris 2011, OECD Publishing, p. 15 (para. 7 of the Preface).
[101] OECD: *Policy Framework for Investment User's Toolkit*, Paris 2011, OECD Publishing, Chapter VII, p. 2. The most recent edition dates 2015 but omits this clarification of "responsible business conduct" (2015 edition available at http://www.oecd.org/investment/toolkit/)
[102] *Ibíd.*
[103] UN Doc. A/HRC/8/5, para. 9.
[104] This group ceased activities in 2009 when it considered that practical ways to introduce human rights respect into business practice were already clear and work had to move from definition to practice.

rights' perspective that, as we will argue, came to stay. But, at the beginning, most private initiatives tended to avoid a strong human rights' language. For example, the private-led World Business Council for Sustainable Development defines CSR as "the continuing commitment *[…]* to behave ethically and contribute to economic development while improving the quality of life of the workforce and their families as well as of the local community and society at large"[105]. The Global Reporting Initiative (GRI), also private[106], tends to focus on sustainability and economic development.

Non-profit and non-Governmental Organizations (NGOs), like Amnesty International and Human Rights Watch, early emphasised the need to analyse "corporate behaviour through human rights lens"[107], correctly putting the accent on the human rights dimension of CSR. For Transparency International, there is a "missing link" with anti-corruption and it should include, beyond "the management of economic, social and environmental impacts", also the "relationships within the workplace and marketplace, along the supply chain, in communities and among policymakers"[108]. But for different reasons, none of these definitions seems completely satisfactory, as it will be explained below. The proliferation of definitions and the constellation of lateral circumlocutions, alongside the mixture of private and public initiatives, greatly contribute to confusion, sometimes intently[109].

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Member companies included, inter alia, ABB, AREVA, Barclays, Coca-Cola, Ericsson, General Electric, Gap, HP, National Grid, Novartis Foundation for Sustainable Development.

[105] Lord R. RICHARD HOLME and P. WATTS: "Corporate Social Responsibility: Making Good Business Sense, in *World Business Council for Sustainable Development* No. 10, available at www.wbcsd.ch.

[106] Founded in Boston in 1997, GRI is one of the earliest purely private initiative, initially centred on environmental business sustainability, comprising periodic reports, and later expanded to more general 'human rights and corruption' objectives. It has issued up to four updates of their own guidelines. See: www.globalreporting.org.

[107] HUMAN RIGHTS WATCH: *Corporate Accountability: a Human Rights Watch Position Paper. Recommendations to the Special Representative to the U.N. Secretary General on Business and Human Rights*, 8 September 2005. Available at: https://www.hrw.org/news/2005/09/08/corporate-accountability-human-rights-watch-position-paper.

[108] TRANSPARENCY INTERNATIONAL: *Corporate Responsibility and Anti-Corruption: the Missing Link?, Working Paper No. 1* (2010), p. 2. Available at: www.transparency.org.

[109] Definitions of CSR usually hide an "agenda". As noted by the philosopher Ludwig Wittgenstein, in the proposition *4.002* of his famous *Tractatus Logico-philosophicus*: "Language disguises the thought; so that from the external form of the clothes one cannot infer the form of the thought they clothe, because the external form of the clothes is constructed with quite another object than to let the form of the body be recognised". L. WITTGENSTEIN: *Tractatus Logico-Philosophicus* (Introduction by Bertrand Russel; Translation by CK OGDEN revised by the author), New York 1999, Dover Edition, p. 45.

Having said this, the most famous initiative so far is the UN Global Compact[110]: a private led institution but with mixed public-private participants, which also includes soft monitoring (annual reports called "Communications on Progress"). The UN Global Compact incorporates 8,041 business participants (among which the 25% of Fortune Global 500 Companies) and 4,449 non-business participants[111], together with local networks and the UN sponsorship. The Global Compact importantly combines sustainability with explicit human rights criteria (principles 1 and 2 of the Compact), revealing the UN input or influence when it was launched (it was Kofi Annan who came up with the idea in 1999[112]) and the UN continuous support ever since. Despite its private foundation and financing, the Global Compact has received the official recognition of the UN General Assembly[113] for its work and for the coordination opportunities it creates between the public and private sectors in the area of business and human rights[114].

In this context, the G7 leaders gathered in Germany (June 2015) "strongly support*[ed]* the UN Guiding Principles on Business and Human Rights and welcome*[d]* the efforts

[110] Defined as a "voluntary initiative based on CEO commitments to implement universal sustainability principles and to take steps to support UN goals", www.unglobalcompact.org.

[111] UN GLOBAL COMPACT: *Impact. Transforming Business, Changing the World (Report 2015)*, 205 pp., at pp. 48-49, online publication (*ibid.*)

[112] In line with the increasing awareness on the need of private-public partnerships (see section 1 of this chapter), the Global Compact was the personal initiative of former UN Secretary-General Kofi Annan to gather UN agencies, Governments, Companies (who also keep financially alive the Compact), NGOs and CSOs around ten basic principles on business and human rights. In his own words at Davos (1999), the UNSG "propose[d] [… to] initiate a global compact of shared values and principles, which will give a human face to the global market". It was formally constituted a year later (2000) at the UN Headquarters in New York, despite being a mixed public-private institution. See the Foundation website with a list of the companies' financial contribution by years: www.globalcompactfoundation.org.

[113] See for instance GENERAL ASSEMBLY (UN): *Resolution "Towards global partnerships: a principle-based approach to enhanced cooperation between the United Nations and all Relevant Stakeholders"*, 7 February 2014, UN Doc. A/RES/68/234, para. 7, 9 and 11 (specifically acknowledging the UN Global Compact and looking forward to increasing the cooperation).

[114] The UN Global Compact is still one of the most representative private institutions. Any company can adhere by sending a formal letter to the UN S-G, committing to summit a communication on progress two years later and to engage in active dialogue within three months if a complaint is received. The likelihood to participate in the Compact depends on the presence and relations between the UN and the home country of the company, markets' influence, the strength of local CSOs and NGOs (social pressure), the pressure of local and international politics plus the eventual costs of being excluded (mainly at a reputational level). See in this regard: P. BERNHAGEN and N.J. MITCHELL: "The Private Provision of Public Goods: Corporate Commitments and the United Nations Global Compact", in *International Studies Quarterly*, No. 54 No. 4 (2010), pp. 1175-1187, at pp. 1178-1179. The problem of incorporating the word "UN" within its own name, despite being a mainly private-multi-stakeholder forum, has raised concerns of "blue-washing". The UN repeatedly clarifies that the logo is different and that exclusions from the Compact and a list of "inactive companies" would avoid this risk of using the UN's image to the benefit of non-compliant enterprises. A good state of play at: C. VOEGTLIN and N.M. PLESS: "Global Governance: CSR and the Role of the UN Global Compact", in *Journal of Business Ethics*, Vol. 122 No. 2 (2014), pp. 179-191, *passim*.

to set up substantive National Action Plans" and "urge*[d]* the private sector implementation of human rights due diligence"[115]. On companies' side, we cannot turn a blind eye to the multiplication of private initiatives; suffice it to add two last examples: the creation of the Dow Jones Sustainability Index (DJSI) in 1999, and the Equator Principles, launched in 2003, to assess environmental and social risks among financial institutions (mainly private, but also public ones). How did we get to this expansion and status of CSR? Undoubtedly, it has emerged as a permanent item on the international agenda, to a large extent determined by the UN commitment in the area of 'business and human rights'.

This section will first assess the role of the UN in reviving and setting the global CSR agenda, the UN initial leadership, to discuss afterwards the surrounding controversies. We end up proposing a definition of CSR.

### *1.3.1 CSR and the United Nations: a new momentum*

If we leave aside the initial OECD approach (the 1970s first version of the Guidelines on Multinational Enterprises), the UN has played a prominent role in *reviving*, *consolidating* and *clarifying* CSR.

The well-known human rights' primacy in the UN Charter (article 1, purpose No. 3 of the Organisation) has recently been blended with the pursuit of "higher standards of living, full employment, and conditions of economic and social progress and development", in the exact wording of article 55 of the same Charter. The UN contribution can be divided into two periods; *before* and *after* 2005/2006. There are both institutional and substantive reasons to make such a separation that year. In 2006, the Human Rights Council (HRC) is constituted by the General Assembly[116] to replace the former Commission on Human Rights. Furthermore, it coincides with the then Commission's request to appoint a Special Representative of the Secretary-General (SRSG) on the issue of human rights and transnational corporations and other business

[115] G7: *Leaders' Declaration*, G7 Summit, Germany, 7-8 June 2015, p. 6.
[116] GENERAL ASSEMBLY (UN): *Resolution adopted on the Human Rights Council*, 15 March 2006, UN Doc. A/RES/60/251, 3 April 2006.

enterprises for "an initial period of two years"[117]. The then Secretary-General Kofi Annan finally appointed John Ruggie[118] (28 July 2005), a Harvard Professor that had already served him as Assistant and Senior Adviser for strategic planning between 1997 and 2001. He had also participated in the creation of the above-mentioned UN Global Compact and in the elaboration of the MDGs. We therefore distinguish two periods in this section, *before* and *after* 2005/2006.

It must be said that related issues had already been addressed by different organs of the UN since the late 1990s, very prominently by the Security Council. For example, with regard to Irak in 2003, it affected some TNCs to ensure humanitarian relief through the prioritisation of basic goods and the renegotiation of some contracts[119]. In the case of Sierra Leone (and later, other countries), the Security Council dealt with illegal trade in diamonds[120] and, finally, even "welcomed" and "strongly support[ed]" the *Kimberley Process Certification Scheme*[121], by which the relevant companies and governments adopted a mixed self- and co-regulatory scheme to avoid fuelling armed conflicts and connected human rights' violations. The *Kimberley Process* is an exceptional milestone to the extent the Security Council explicitly considered and upheld a "voluntary system of industry self-regulation"[122].

Back in 1998, the then Sub-Commission on the Promotion and Protection of Human Rights established a Working Group (WG) on TNCs[123], whose mandate was extended until 2004. This first WG was asked to study the activities of TNCs and the way IHRL could address that problematic. It was clear that the previous initiatives of the 1970s, the OECD Guidelines on MNEs and the ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy (first edited in 1977), both had

[117] COMMISSION ON HUMAN RIGHTS (UN): *Resolution on Human rights and transnational corporations and other business enterprises*, 20 April 2005, UN Doc. E/CN.4/RES/2005/69, para 1.
[118] UN Doc. SG/A/943. See press release at: http://www.un.org/press/en/2005/sga934.doc.htm
[119] SECURITY COUNCIL (UN): *Resolution (on Irak)*, 28 March 2003, UN Doc. S/RES/1472 (2003), para. 4 (-empowering the S-G to adopt the necessary measures to conduct such negotiations).
[120] SECURITY COUNCIL (UN): *Resolution (on Sierra Leone)*, 4 December 2002, UN Doc. S/RES/1446 (2002).
[121] SECURITY COUNCIL (UN): *Resolution "on the illicit trade in rough diamonds"*, 28 January 2003, UN Doc. S/RES/1459 (2003), para. 1.
[122] *Ibíd.*, para. 2.
[123] The Sub-Commission's Resolution 1998/8 of 20 august 1998, established a mandate extended in Res. 2001/3 of 15 august 2001 for three additional years.

obvious deficits, since they lacked of enforcement tools and had "toothless dispute resolution procedures"[124].

Against this background, the then Sub-Commission wanted to go a step further towards a systematic approach instead of contingent, soft and case-by-case actions[125]. The work of the WG materialised in the famous Draft UN Norms[126], which aroused the enthusiasm of NGOs and activists whereas Member States and TNCs remained very critic. The areas covered were non-discrimination, the right to security of persons, workers' rights and the environment, while institutionalising 'stakeholders' participation. The phrasing recurred to many undetermined legal concepts, which contrasted with the eventually hard implementation measures[127].

Indeed, the Norms *directly* addressed TNCs and placed on them *direct* obligations, so that it could be interpreted as a quite revolutionary "restatement of human rights law"[128], since IHRL is founded on States' direct responsibility –at least *in vigilando* when it comes to violations caused by third-parties / private actors, who might only be bound *indirectly, via* domestic law. Ten years later, the feeling is still widespread that the Norms "were ahead of their time"[129]. Despite the lively debate (diplomat-speak for 'lack of consensus'), the Sub-Commission considered the draft Norms to "reflect most of the current trends in the field of International Law, and particularly international human rights law", and approved them in the form of a draft resolution[130]. At the upper level of the Commission, however, the text was thrown back and blocked. The

[124] D. CASSEL: "Does the World Need a Treaty on Business and Human Rights? Weighing the Pros and Cons", Conference held at the Notre Dame University London Centre, May 14 (2014) –not published. We take this opportunity to thank Professor Cassel for his academic advice and friendly help since our first meeting within the framework of the LL.M on IHRL in the University of Alcalá (Madrid).

[125] The Sub-Commission issued various reports in which it summarised its progressive interpretation of IHRL and the results of diverse consultation processes (see UN Doc. E/CN.4/2005/91 of 15 February 2005), and also on specific issues such as extractive industries (see UN Doc. E/CN.4/2006/92 of 19 December 2005), including the identification –treaty by treaty- of private duties in IHRL and its stand for clear extraterritorial measures.

[126] UN Doc. RES E/CN.4/SUB.2/2003/12/REV.1

[127] SUB-COMMISSION ON HUMAN RIGHTS (UN): *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*, UN Doc. E/CN.4/Sub.2/2003/12/Rev.2, para. (draft articles) 15 to 19 (on implementation).

[128] J.H. KNOX: "The Ruggie Rules: Applying Human Rights Law to Corporations", in R. MARES (Ed.): *The UN Guiding Principles on Business and Human Rights. Foundations and Implementation*, Leiden-Boston 2012, Martinus Nijhoff Publ., pp. 51-83, at p. 53 (and ff.).

[129] B. HORRIGAN: *Corporate Social Responsibility in the 21st Century. Debates, Models and Practices Across Government, Law and Business*, United Kingdom 2010, Edward Elgar Pub. Ltd., p. 318.

[130] SUB-COMMISSION ON HUMAN RIGHTS (UN): *Draft Resolution on Responsibilities of Transnational corporations and other business enterprises with regard to human rights*, 7 August 2003, UN Doc. E/CN.4/Sub.2/2003/L.8, p. 2 (citation).

Commission on Human Rights strongly rejected the Norms and felt compelled to clarify that the draft had "not been requested by the Commission" and had "no legal standing"[131]. In fact, John Ruggie's first *interim report* in 2006 stated that the draft Norms were "engulfed by its own doctrinal excesses" and included "exaggerated legal claims and conceptual ambiguities"[132], in a "deliberately undiplomatic language"[133] as Ruggie himself recognised in a book of reflections after his mandate. Later on, the very first sentence of one of the most important reports submitted in 2008 by John Ruggie more softly rebuked the former Sub-Commission insisting on the fact that the "international community is *still in the early stages* of adapting the human rights regime to provide more effective protection *[…]* against corporate-related human rights harm"[134].

As mentioned earlier, a new momentum for CSR arrived with the appointment of John Ruggie and his significant contribution between 2005 and 2011[135], when his mandate expired. The appointment of Prof. Ruggie might be related to the agitation in the after-match of the Draft UN Norms, which ignited dormant controversies. We may argue the draft Norms were even counter-productive as a maximalist wish list that rearmed CSR detractors. Ruggie's appointment somehow responded to the need to unblock the situation[136] and reinstall a consensus-oriented negotiation. Within the UN human rights system, the mandate as *SRSG on the issue of human rights and transnational corporations and other business enterprises* corresponds to the Special Procedures Branch (SPB) of the HRC, being in this case a thematic mandate[137]. In comparison to

[131] COMMISSION ON HUMAN RIGHTS (UN): *Resolution 2004/116 on the Responsibilities of transnational corporations and related business enterprises with regard to human rights*, 20 April 2004, UN Doc E/CN.4/2004/L.11/Add.7 p. 81 ff.

[132] COMMISSION ON HUMAN RIGHTS (UN): *Interim Report of the SRSG on the issue of human rights and transnational corporations and other business enterprises*, 22 February 2006, UN Doc. E.CN.4/2006/97, at para. 59.

[133] J.G. RUGGIE: *Just Business. Multinational Corporations and Human Rights*, New York 2013, WW Norton & Comp. p. 54.

[134] HUMAN RIGHTS COUNCIL (UN): *"Protect, Respect and Remedy: a Framework for Business and Human Rights", Report of the SRSG on the issue of human rights and transnational corporations and other business enterprises John Ruggie*, 7 April 2008, UN Doc. A/HRC/8/5, para. 1 (emphasis added).

[135] His mandate was further extended in 2008 for an additional period of three years. HUMAN RIGHTS COUNCIL (UN): *Resolution on the mandate of the SRSG on the issue of human rights and transnational corporations and other business enterprises*, 18 June 2008, UN Doc A/HRC/8/7, para. 4.

[136] B. HORRIGAN: *op. cit.*, p. 320.

[137] It is assumed the reader is familiar with the United Nations system in relation to human rights protection. For a detailed study on the Special Procedures, we recommend the diverse publications of Prof. Elvira Dominguez (Middlesex-University, London), whom we sincerely thank for her longstanding friendship and willingness to help: E. DOMINGUEZ: "Public Special Procedures under Damocles Sword", in *Human Rights Law Journal*, Vol. 29 No. 1 (2008), pp. 32-40, and E. DOMINGUEZ: "Rethinking the Legal Foundations of Control in International Human Rights Law: the Case of Special

Treaty Bodies and other UN mechanisms, the SPB constitute a more flexible and political tool, less legally straitjacketed and thus more adapted to the multifaceted challenges of CSR.

The main outcome of Ruggie's first mandate is the three-level framework "Protect, respect and remedy"[138], by which States have the primary and more active duty to ensure human rights' *protection*, to comply with their international obligations and make them permeate into their internal legal orders. In this sense, States' duty shall be understood as a holistic commitment to re-examine existing and future legislation, international agreements and policy actions from a human rights perspective. It further encourages specific legislative and political initiatives to improve human rights respect among companies. Unlike the Draft UN Norms, Ruggie's framework consequently restores the "bedrock role of States"[139]. Secondly, companies are expected *to respect* human rights, a "baseline responsibility"[140], linked to the compliance of existing legislation and, if possible, moving beyond and adhering to international standards and codes of conduct. In our view, the emphasis lies on prevention, "independently of States' duties"[141] so that the enterprises operating in conflictive areas (because of armed conflicts or fragile and failed States) would show the same commitment regardless of weak governments or weak enforcement mechanisms. Finally, both States and Companies must cooperate to provide access to remedies (third level of the framework), without excluding –or even fostering– non-judicial and non-state-based grievance mechanisms –provided these comply with certain minimum criteria; in any case, we are rather unconvinced of the effectiveness of such mechanisms if state-based and purely judicial ones are not strengthened, available and reliable[142].

The complementarity of the three levels would help reduce the governance gaps generated by globalisation in the protection of human rights. Ruggie's framework

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Procedures", in *Netherlands Quarterly of Human Rights*, Vol. 29 No. 3 (2011), pp. 261 ff. For a comprehensive overview on the protection of human rights in the United Nations see: C. VILLÁN DURÁN and C. FALEH PÉREZ: *Manual de Derecho Internacional de los Derechos Humanos*, Madrid 2012, Universidad de Alcalá.

[138] UN Doc A/HRC/8/5.

[139] *Ibíd.*, para. 50.

[140] *Ibíd.*, para. 54.

[141] *Ibíd.*, para 55.

[142] Ruggie identifies six criteria that would make non-judicial and non-state based grievance mechanisms acceptable: they ought to be "legitimate, accessible, predictable, equitable, rights-compatible and transparent". *Ibíd.*, para. 92.

summarised extensive consultations made between 2005 and 2008[143] and complemented his preliminary report. The SRSG produced an utterly useful *state of the art*, especially interesting in relation to access to justice and the current possibilities to facilitate effective remedies for corporate-related human rights victims, but shows some weaknesses. In terms of access to justice, we have already noted that it wide opened the door to non-judicial and non-state grievance tools, someway oddly put on equal foot with traditional access to courts. It would have been more adequate to further develop the current –though scarce– possibilities for human rights victims to fil suits[144]. As for the second level on corporate *respect*, it seems to be built upon a profusion of undetermined legal concepts ("due diligence"[145], "complicity" and "spheres of influence"). These notions do not provide a sufficiently solid ground to assign a responsibility *in practice*. John Ruggie tried to explain these concepts in separate reports[146], in the form of goodist exercises *lege ferenda* without much success.

At this stage, Ruggie's success was fairly political and lied on his capacity to set himself up as an authoritative voice in this subject, acceptable for all relevant actors and subjects, in order to take away the bitter taste of the precedent UN attempt (the draft Norms) and renew the Organization's efforts towards a "more systemic response with cumulative effects"[147]. As cited above, the HRC "welcomed" this three-level framework in Resolution 8/7 and extended until 2011 the SRSG's mandate.

The United Nations Guiding Principles (UNGPs) were the final result of Ruggie's mandate. Above and beyond criticisms and debates, it is important to support the change of mind-set confirmed with the UNGPs and already present in the three-level framework: the definitive priority was to detect practical "implications of existing standards"[148] in lieu of creating new instruments or new obligations under IHRL. We

[143] HUMAN RIGHTS COUNCIL (UN): *Report of the SRSG on the issue of human rights and transnational corporations and other business enterprises, Addendum on Corporate responsibility under international law and issues in extraterritorial regulation: summary of legal workshops*, 15 February 2007, UN Doc. A/HRC/4/35/Add.2.

[144] Given its complexity, this problematic is further studied in a separate section (Chapter IV, Section 2).

[145] On this concept we recommend referring to the PhD thesis of Prof. Lozano Contreras: F. LOZANO CONTRERAS: *La noción de diligencia debida en derecho internacional público*, Barcelona 2007, Atelier Ed., 340 pp.

[146] HUMAN RIGHTS COUNCIL (UN) : *Clarfying the Concepts of Sphere of Influence and Complicity, Report of the SRSG on the issue of human rights and transnational corporations and other business enterprises John Ruggie*, 15 May 2008, UN Doc. A/HRC/8/16.

[147] UN Doc. A/HRC/8/5, *op. cit.*, para. 106.

[148] "The Guiding Principles' normative contribution lies not in the creation of new international law obligations but in elaborating the implications of existing standards and practices for States and

fully support this aspect of Ruggie's approach in the present research: there are possibilities, already in place, to improve the dialectic between business and human rights (this idea is partly explored in the following chapter, when we track some of those current possibilities). It is also important to point out that, while recognising that CSR "morphed out of corporate philanthropy"[149], Ruggie finally suggests that they are separate concepts by now: "Business enterprises may undertake *other commitments or activities […] [b]*ut this does not offset a failure to respect human rights *throughout their operations [emphasis added]"*[150], introducing this way some kind of necessary connection with the impacts caused by the concrete activity of the enterprise at stake. This will be very important in the definition we propose later.

At the same time, John Ruggie was also right to stress the vital role of States, which need to be more proactive in translating their international obligations into their domestic legal systems. Otherwise, without an active engagement at the State level, the UNGPs are not likely to have a positive impact in practice[151], despite being in themselves a significant and substantive twist of IHRL in its interaction with global business. At the State level, Ruggie builds on the crucial difference between legislative initiatives and 'policies'[152], and the importance of ensuring the human rights compatibility of any *existing/future* and *legal/policy* action throughout all governmental departments[153], including apparently unrelated fields such as company law, investment agreements and trade policies within international institutions[154].

Besides these essential aspects of the UNGPs, on which we absolutely agree with the SRSG, we shall recall that their basic goal was to 'operationalise' the three-level framework. There are, of course, some procedural good ideas, such as the general emphasis on prevention, the so-called 'human rights impact assessments', the importance of broad consultations alongside stakeholders, human rights experts and

businesses", HUMAN RIGHTS COUNCIL (UN): *Report of the SRS on the issue of human rights and transnational corporations and other business enterprises John Ruggie, "Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework"*, 21 March 2011, UN Doc. A/HRC/17/31, para. 14. Hereinafter, we will refer to the Guiding Principles with the corresponding number (Guiding Principle 1, 2, etc.), as annexed to this report.

[149] J.G. RUGGIE: *Just Business…*, *op. cit.*, p. 68.

[150] Guiding Principle 11 (commentary).

[151] S.A. AARONSON and I. HIGHAM: "Re-righting Business: John Ruggie and the Struggle to Develop International Human Rights Standards for Transnational Firms", in *Human Rights Quarterly*, Vol. 35 No. 2 (2013), pp. 333-364, at p. 337.

[152] Guiding Principle 3.

[153] Guiding Principles 8 and 9.

[154] Guiding Principle 11.

'auditors', the usefulness of follow-up resorts, and internal capacity-building initiatives[155].

However, in the overall, the UNGPs don't succeed in "clearly articulating this crucial distinction between decisions *[policies]* and processes of companies"[156]. In this connection, they constitute a failed opportunity to really clarify corporate "due diligence" and related concepts, as said before. Due diligence is a double-edged sword and can also benefit non-compliant companies to be easily discharged or absolved "if it can demonstrate and document a certain standard of precaution taken"[157], no matter how limited it may be. The risk is there that companies end up "perceiving human rights as risks and due diligence as a 'defence' to ward off suits"[158], and not as a minimum "precondition" for any business. We can give yet another turn of the screw to this problem, revealing the absolute "need of clarification": on one hand, we have noted that due diligence can limit the risk of complicity liability but, on the other hand, it will not fully exempt companies from incurring in such liability so that, in some cases, companies may be tempted to avoid any policy of due diligence if this means to "acquire knowledge which could be held against it in the context of a complicity charge"[159].

In more general terms, continuing with the second level of Ruggie's framework and guidelines, it can be asked if "can implies ought". Ruggie's book of reflections, published in 2013, contains a contradiction: it first states that "can implies ought", but only partially because companies' influence must be strong enough to imply some kind of duty: "it is one thing to ask companies to support human rights voluntarily where they have influence, as the Global Compact does; but attributing legal obligations to them on that basis for meeting the full range of human rights duties is quite another"[160].

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[155] Guiding Principles 18 to 21.

[156] S. DEVA: *Regulating Corporate Human Rights Violations. Humanising Business*, London-New York 2012, Routledge Ed., p. 208.

[157] B. FASTERLING and G. DEMUIJNCK: "Human Rights in the Void? Due Diligence in the UN Guiding Principles on Business and Human Rights", in *Journal of Business Ethics*, Vol. 116 No. 4 (2013), pp. 799-814, at p. 807.

[158] As stated by Surya Deva, "they have a responsibility to respect human rights as a precondition to doing business and irrespective of whether human rights pose risks or opportunities for them". S. DEVA: "Guiding Principles on Business and Human Rights: Implications for Companies", in *European Company Law*, Vol. 9 No. 2, April 2012, pp. 101-109, at p. 107.

[159] S. MICHALOWSKI: "Due Diligence and Complicity: a relationship in need of clarification", in S. DEVA and D. BILCHITZ (Eds.): *Human Rights Obligations of Business. Beyond the Corporate Responsibility to Respect?*, Cambridge 2013, Cambridge University Press, pp. 218-242, at p. 240.

[160] J.G. RUGGIE: *Just Business…, op. cit.*, p. 50.

Interestingly, later in his book, he explains that "a social norm expresses a collective sense of 'oughtness' with regard to the expected conduct"[161] of companies. This is probably an inadequate and confusing normative foundation to operationalise the second level of the UN guidelines, essentially for the reason that social expectations are the less important –eventual– source of normativity (if they might even have that status), the forgotten source is simply IHRL and its permeation into the internal legal order, by which it should affect the behaviour of non-State actors[162].

Also related to the second level (on companies' respect), "spheres of influence" –connected to due diligence– are an even fuzzier notion, a "metaphor" by which the SRSG refers to suppliers and 'related companies' (subsidiaries, branches, etc.), up to almost any stakeholder. It would have been interesting to have a closer look at company law and taxation law. Within complex transnational corporate groups, international company law and taxation law can provide inspiration on how to determine more accurately the actual corporate relationships (hence responsibilities), starting with the assessment of 'corporate veils' and 'frauds', and related issues that might legitimately be extrapolated to human rights cases[163], provided some obvious differences.

Many other problems already signalled before remain equally unsolved. In an interview after the end of his mandate, the former SRSG tried to hide behind the then on-going *Kiobel* judgement (US Supreme Court) to keep on justifying his approach concerning access to justice. *Kiobel* was surely problematic for human rights activists and lawyers, but it is also probably exaggerated to conclude, as John Ruggie quickly did, that "we are not even sure anymore whether it is possible to hold companies *[… accountable for]* crimes against humanity under the US Alien Tort Statute"[164]. It can perfectly be argued

[161] *Ibíd.*, pp. 91-92.

[162] Bilchitz also note that many acts are perfectly legal and legitimate even if, sometimes, they may contradict 'social norms' (let's think of gender or racial discrimination). D. BILCHITZ: "A Chasm between 'is' and 'ought'? A critique of the normative foundations of the SRSG's Framework and the Guiding Principles", in S. DEVA and D. BILCHITZ: *op. cit.*, pp. 107-137, *passim*.

[163] In general terms, the debate is about the value we give to merely formal distinctions in comparison to actual behaviours and control within corporate groups. It can be argued that, in taxation law, the debate is expressed in terms of *intentio iuris vs. intentio facti*; the latter is the one that counts when it comes to assess the alleged illegality of tax evasion through any artificial montage. We further refer to taxation law below, at pp. 234-236. For instance, see: T. ROSEMBUJ: *Minimización del impuesto y responsabilidad social corporativa*, Barcelona 2009, Ed. El Fisco, pp. 365-366. We thank Dr. Enrique Sánchez de Castro Martín-Luengo for this reference.

[164] INTERNATIONAL REVIEW OF THE RED CROSS: "Interview with John G. Ruggie", in *International Review of the Red Cross*, Vol. 94 No. 887 (Autumn 2012), pp. 891-902, at pp. 898-899.

that the Supreme Court left the "door open"[165]. Notwithstanding the in-depth development of this issue later in this research, we have for instance the impression that the SRSG somehow disregarded or underestimated some current and actual possibilities to access courts, albeit imperfect and limited ones.

Further questions include, for example, the problem of companies "owned or controlled by the State, or that receive substantial support and services from State agencies"[166], which would have an additional burden with regard to human rights. The phrasing allows important loopholes: would it be enough a minority shareholding by the State to create additional CSR duties in the company? The mere participation by the State is enough or does it mean that, under the UNGPs, States are compelled to foster a company's CSR only if they have more than 50% of shares? What is meant by "control" and "substantive support"?

We shall finish wondering whether a voluntary code of conduct might have any contractual value once adopted by a TNC, given that it should be "approved at most senior level", affect all operations and be public and available. There are other pending questions, minor ambiguities and imprecisions, which perhaps explain why the UNGPs reached an unprecedented *consensus* in this subject. Surya Deva speaks of "consensus rhetoric" only because of the obsession to get the guidelines adopted without a vote, by *consensus* in the HRC: this author considers that John Ruggie "lightly" played with human rights terminology ("violation becomes impact"[167]) and that the UNGPs generate confusion on eventual corporate obligations under International Law[168]. This is perhaps too harsh despite the legitimate criticism on the shortfalls of the UNGPs. Is it necessary to recall that human rights language was *simply and completely absent* in the corporate world not so long ago? In fact, we feel more comfortable expressing that, though clearly improvable, the UN initiatives made an important contribution *reviving*, *consolidating* and *exploring* (if not, limitedly clarifying) CSR. As Surya Deva himself says, "existing

[165] D. CASSEL: "Suing Americans for Human Rights Tort Overseas: the Supreme Court Leaves the Door Open", in *Notre Dame Law Review*, Vol. 89 No. 4 (2014), pp. 1773-1812.
[166] Guiding Principle 4.
[167] S. DEVA: "Treating Human Rights Lightly: a critique of the consensus rhetoric and the language employed by the Guiding Principles", in S. DEVA and D. BILCHITZ (Eds.): *op. cit.*, pp. 78-106, at p. 96.
[168] Interestingly, during *Kiobel* judgement, Royal Dutch Petroleum used the 2007 report of John Ruggie to allege that, under international law, there cannot be 'direct' obligations for corporations; whereas it is generally known that international criminal law specifies direct obligations at least against gross violations, as Ruggie himself fell compelled to clarify in an *amicus* brief before the US Supreme Court.

(primarily) state-focal international institutions should be utilized for what they could possibly deliver"[169], even more so since it is an on-going process.

On balance, we consider it important to underline the positive factors of the three-level framework and the UNGPs, above any logical criticism. The UNGPs may inspire more questions than answers, but they provide a few fundamental answers, which have characterised CSR thereafter: *1)* the human rights based approach to CSR; *2)* the general emphasis on prevention; *3)* the crucial role of States and international institutions (they cannot elude responsibility just because it is 'corporate-related''); *4)* the holistic vocation (comprising any legal and policy aspects or field), and *5)* the non-negligible effort to put some order in the debate. From there on, it is impossible to convince everyone on every aspect. As Prof. Ruggie recognised, the expiration of his mandate was only "the end of the beginning"[170].

After the UNGPs, most disapproval came from NGOs[171]: they considered that it confirmed the current *statu quo* and the definitive abandonment of the project of a binding instrument, since it is said that the WG that succeeded the SRSG after 2011[172] does not have enough powers to go any step further[173]. Indeed, apart from focusing on national action plans[174] alongside its new capacity to conduct country visits[175] and

[169] S. DEVA: *Regulating…, op. cit.*, p. 218.
[170] J.G. RUGGIE: *Just Business…, op. cit.*, p. 126. Also see: J.M. AMERSON: "The end of the Beginning? A comprehensive look at the UN's Business and Human Rights Agenda from a Bystander Pespective", in *Fordham Journal of Corporate and Financial Law*, Vol.17 No. 4 (2012), pp. 871-941.
[171] However, this is no obstacle to widely using the UNGPs when it comes to allege violations by TNCs, and therefore showing some success of Ruggie's work, even among NGOs.
[172] The HRC established in 2011 a WG consisting of five independent experts from diverse regional backgrounds to follow-up on the UNGPs, their dissemination, implementation, further recommendations and capacity-building initiatives. As said above, the possibility of country visits is a novelty. See: HUMAN RIGHTS COUNCIL (UN): *Resolution on Human Rights and transnational corporations and other business enterprises*, 6 July 2011, UN Doc. A/HRC/RES/17/4, para. 6 and 7 (establishment of the WG and competencies). The WG's mandate was extended for an additional period of three years by the HRC in July 2014: HUMAN RIGHTS COUNCIL (UN): Resolution on human rights and transnational corporations and other business enterprises, 15 July 2014, UN Doc. A/HRC/RES/26/22, para. 10.
[173] R.C. BLITT: "Beyond Ruggie's Guiding Principles on Business and Human Rights: Charting an Embracive Approach to Corporate Human Rights Compliance", in *Texas International Law Journal*, Vol. 48 No. 1 (February 2012), pp. 33-62, at p. 53.
[174] National implementation is one of the new priorities, compared to Ruggie's phase, of the WG, as stated in the WG's report to the General Assembly: GENERAL ASSEMBLY (UN): *Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises*, 5 August 2014, UN Doc. A/69/263.
[175] The WG has visited Mongolia (A/HRC/23/32/Add.1), Ghana (A/HRC/26/25/Add.5), the Republic of Azerbaijan (A/HRC/29/28/Add.1) and the USA. For example, the WG visited the USA in June 2014 (Report UN Doc. A/HRC/26/25/Add.4) and in October the same year President Obama announced that a national action plan on business and human rights would be elaborated. We take this opportunity to warmly thank *Mme.* Carmen Rosa Rueda, Human Rights Officer in the UN-OHCHR for her friendship

convoke the annual forum in Geneva headquarters, it seems that there isn't much advancement in this field or, at least, not anymore at the same speed as between 2005 and 2011.

In the meanwhile, the Government of Ecuador and its Permanent Representation in Geneva were particularly active in promoting binding formulas, ideally a proper treaty on business and human rights. This brings us back to the debate between mandatory or voluntary schemes, discussed in the following section. We note for instance that, by virtue of Resolution 26/9 of the HRC, an open-ended intergovernmental working group was established to work on an eventual treaty[176]. This intergovernmental initiative overlaps with the independent experts of the other WG on the same issue, which might generate tensions *au-fur-et-à-mesure* they start submitting parallel reports to the HRC and the General Assembly. For the moment, the first session of the intergovernmental working group was held in July 2015 and its potential effects are still unforeseeable. In sum, during the first decade of the 21st Century, the UN has certainly played a central role in *reviving*, *consolidating* and *clarifying* CSR, even though its leadership seems to have recently decayed.

### *1.3.2 The controversial definition of CSR*

Before we conclude with a definition of CSR, it is necessary to assess a few surrounding controversies, some of which have already been mentioned, reactivated by the UN framework and guidelines. We take as a starting point the invitation to abandon "unduly dichotomous ways of thinking"[177], together with the obvious need to resituate CSR in the broader context of human rights. For us, the fact that this field primarily addresses "corporate activity" and not only States, is not enough to say that CSR and human rights are *absolutely* "distinct concepts"[178]: almost any 'specialised' human

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and help during our internship in 2013, and for keeping us updated with press releases and news on the different sessions of the HRC.

[176] HUMAN RIGHTS COUNCIL (UN): *Resolution on the elaboration of an international legally binding instrument on transnational corporations and other business enterprises with respect to human rights*, 14 July 2014, UN Doc. A/HRC/RES/26/9, para. 1.

[177] C. SCOTT: "Translating torture into transnational tort: conceptual divides and the debate on corporate accountability for human rights harms" in C. SCOTT (Ed.): *Torture as Tort*, Oxford 2001, Hart Publ., pp. 45-64, at p. 45.

[178] Of course, CSR and human rights, *taken separately and isolate*, are different concepts, but the first should be resituated within the broader context of the latter, being therefore *not so different* in this regard,

rights treaty[179] addresses indirectly (but quite substantively) third party activities (other than States) and relationships between private parties, regardless of a monist or a dualist implementation. Similarly to our approach on general human rights issues, we consider that too clear-cut distinctions between different human rights contribute to an undesirable legal fragmentation undermining the universality, indivisibility and interdependency of all human rights. We therefore consider CSR an additional aspect under the human rights umbrella. It becomes clear from this research that the separation between CSR and the debate on "business and human rights" is precisely a biased viewpoint[180]: they are not separate things and we fully support an integrated approach. And last but not least, the oppositions between –mainly– mandatory or voluntary initiatives, and subjects *vs.* objects of IL, are not insuperable.

But the very first debate is neither a legal nor an economic issue: it is political. Liberal schools of thought are generally contrary to CSR or any related concept. Its most relevant spokesman was Milton Friedman and his famous New York Times' article back in 1970. His hard-hitting remarks defined CSR as a "suicidal impulse" of some businessmen, an improper and informal (thus unlawful) social tax. Liberal detractors have more modern expressions[181]; in essence, they put forward black and white arguments, according to which shareholders' interests, owner's value and profit maximisation are the only legitimate goals of a company. Any problem would have its origin in the fact that we are not in a perfectly free market economy.

At the source of this reasoning there are a few misunderstandings[182]: first of all, CSR would have no sense in a socialist system; it has precisely consolidated in a post-cold-war and capitalist context, giving less credibility to excessive fears in this regard.

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which is a nuance forgotten by Jennifer Zerk when she seems to draw a clear-cut distinction between them. *Cfr*. J. ZERK: *op. cit.*, pp. 43-44.

[179] By "specialised human rights treaty" we exclude the ICCPR and the ICESCR, and we refer to all the treaties coming afterwards to tackle particular problems: racial discrimination, rights of the child, persons with disabilities, women, etc.

[180] The "rather peculiar disconnect" and separation between CSR and human rights would constitute an unfocused approach to this subject, as it is apparent from previous section and will be further clarified in this section. It responds perhaps to the intention to avoid human rights based approach to corporate-related problems. For instance, refer to F. WETTSTEIN: "CSR and the Debate on Business and Human Rights: Bridging the Great Divide", in *Business Ethics Quarterly*, Vol. 22 No. 4, October 2012, pp. 739-770.

[181] Of course, Friedman's discourse has to be contextualised within the framework of the Cold War. For an update of his position, see generally: E. STERNBERG: *Just Business. Business Ethics in Action*, Oxford 2000, Oxford University Press.

[182] A detailed critique and point by point discussion of Friedman's arguments can be found at: S. DEVA: *Regulating Corporate…*, *op. cit.*, pp. 120-139.

Moreover, it would not exist if companies always behaved perfectly and ethically and, in some way, it benefits the market as a whole against the rapid exhaustion of resources and in favour of the sustainability of capitalism itself –thinking of the problem in entirely selfish terms. On another hand, the definite opposition between shareholders and stakeholders is also quite mystifying: unless they have a bipolar syndrome or a multiple personality disorder, the most probable scenario is where *shareholders are also stakeholders*: shareholders can be persons of different religions, with disabilities, women, members of a variety of NGOs and CSOs, etc. Besides, this "stockholders first" discourse struggles with the multiplication of corporate scandals, frauds and the increasingly problematic separation between owners and managers in modern TNCs. Nor is there any absolute separation between private and public spheres nowadays[183]: as it has been argued in the first section of this chapter, even International Organizations (members-driven institutions *par excellence*) have accepted the necessary cooperation between public and private actors to accomplish common objectives in relation to human rights and development.

Finally, Friedman claims that CSR is seriously undemocratic and has to be seen as an illegitimate and illegal shortcut to face social problems: "to attain by undemocratic procedures what they cannot attain by democratic procedures" because "problems are too urgent to wait on the slow course of political processes, *[so]* that the exercise of social responsibility by businessmen is a quicker and surer way to solve pressing current problems"[184]. This view is deeply American and finds its roots in the revolutionary slogan 'no taxation without representation', which links the foundation of democracy to taxes and the decisions on their allocation. This political argument is one of the trickiest and most thought-provoking ones, because it alleges to be based on democratic values that almost anyone would support.

Companies would act as unelected decision makers with regard to the allocation of resources for social purposes. Does it mean that Friedman and his school of thought would support a significant increase of proper taxes? We do not think so. Then, in our view, CSR seems to be something different from mere charity: it starts to be clear that it must have a connection with the actual activities and operations of the company. The

[183] It seems naïve to deny that TNCs are, *de facto*, both economic and political actors.
[184] M. FRIEDMAN: "The Social Responsibility of Business is to Increase Its Profits", in *The New York Times Magazine*, September 13, 1970.

word "responsibility" is, primarily, a concrete exercise *related to* those activities and their impact; it is not an arbitrary social investment, unrelated to the activities of the company (only in that case it could be said that the company is undemocratically deciding on the prioritisation of some social purposes at the expense of other goals).

If we go one step further, philosophically speaking, we face the dialectic between liberty and responsibility. Liberals treat these concepts, of Hayekian roots, radically and purely. A radical, individualistic and pure understanding of "freedom" and "responsibility" would allow wrongdoers and disregard *prevention* (conflicting with liberty), with the only purpose to reinforce *the ideal* of "responsibility" (read: punishment): "the freedom of action that is the condition of moral merit includes the freedom to act wrongly: we praise or blame only when a person has the opportunity to choose *[…]*"[185]. This does not seem acceptable to us: eventual victims would prefer a less strong *ideal* of freedom and responsibility if their harm is more likely to be avoided or prevented. In other words, this reasoning ignores the real-life tolls we have to pay when a moral concept becomes a legal articulation, though being a difficult equilibrium.

Friedman's only concession to regulation was his recognition of "the rules of the game": time goes by and these rules have changed[186]. Interestingly enough, leaving aside liberal schools of thought, black and white arguments can be found *against* CSR by authors who would only trust strict State regulation[187], according to whom CSR would mean to leave the vessel adrift, by divinising self-regulation. As it will be argued throughout this research, CSR cannot be reduced to self-regulation, which is only a restricted aspect of it.

An attempt to overcome the political controversy is the so-called "business case" theory, which insists on the profitability of CSR for enterprises, economically speaking. This strategy tries to convince managers and owners of adopting a CSR policy because it is said to have a positive impact on benefits. Initially, it was a good point since it

[185] F.A. HAYEK: *The Constitution of Liberty*, Chicago 1978, University of Chicago Press, p. 79. From Hayek thinking, we only retain, in part, the diagnostic: responsibility should ideally be a concrete and feasible aspect, somehow connected to the particular business at stake. Excessively large aspirations might distract from the real possible actions (*ibid.*, pp. 83-84).

[186] J. NOLAN: "Refining the Rules of the Game. The Corporate Responsibility to Respect Human Rights", in *Utrecht Journal of International and European Law*, Vol. 30 No. 78 (2014), pp. 7-23.

[187] Bakan eloquently alleges that: "No one would seriously suggest that individuals should regulate themselves, that laws against murder, assault, and theft are unnecessary because people are socially responsible. Yet oddly, we are asked to believe that corporate persons should be left free to govern themselves". J. BAKAN: *The Corporation*, London 2004, Constable Ed., pp. 109-110.

began to question previous assumptions and prejudices in this respect, such as the "symbiotic relationship between repressive governance and foreign capital"[188]. It is evident that companies do not necessarily and always feel at home in authoritarian or repressive States, but "rhetoric ha*[d]* exceeded empirical research"[189]. Many authors enthusiastically started to conduct quantitative research and generate mathematical models to investigate eventual CSR returns on benefits[190]. In the banking sector, CSR is widely seen as a "strategic value for its ability to optimize the bank quality loan portfolio through pricing policies"[191], the origin of "ethic ratings" –increasingly applied by Ernst & Young or Standard & Poors and many other rating agencies and consultancy firms in their daily advisory tasks and business. For better or worse, business finds its way through.

Among other results, theories of "shared value"[192] emerged to point out that CSR could create value for both companies and stakeholders, being measurable in terms of 'social performance'. This leads to a merely instrumentalist or utilitarian perspective under which it can contribute to reduce 'business risks' and, even, increase benefits by creating value for both the enterprise and society. From that point of view, CSR and human rights respect become a simple management issue of "goodwill-nomics"[193]: violations would be read as risks but, sometimes, this approach can treat violations as unavoidable costs of production, while the word 'stakeholders' would hide victims. This cost-effective way of thinking has an additional problem as far as it would "allow corporations to prioritise some human rights"[194] (those more costly). All these quantitative manias may reflect a certain "dissemination of the corporate form of

[188] S.L. BLANTON and R.G. BLANTON: "What attracts foreign investors? An Examination of Human Rights and Foreign Direct Investment", in *The Journal of Politics*, Vol. 69 No. 1 (February 2007), pp. 143-155, at p. 145.
[189] Concerning, foreign investment, Blanton's research would show that mathematical models refute the "dominant traditional perspective [assuming] FDI and human rights to be inherently incongruous". *Ibíd.*, p. 152.
[190] M.F. IZZO: "Bringing theory to practice: how to extract value from corporate social responsibility", in *Journal of Global Responsibility*, Vol. 5 No. 1 (2014), pp. 22-44.
[191] G. BIRINDELLI, P. FERRETTI, M. INTONTI and A. IANNUZZI: "On the drivers of Corporate Social Responsibility in banks: evidence for an ethical rating model", in *Journal of Management and Governance*, Vol. 19 No. 2, pp. 303-340, at p. 307.
[192] M. E. PORTER and M.R. KRAMER: "Creating Shared Value: How to Reinvent Capitalism –and Unleash a Wave of Innovation and Growth", in *Harvard Business Review*, Special Issue January-February 2011, pp. 63-70.
[193] S. DEVA: *Regulating Corporate…, op. cit.*, p. 139 (and ff.)
[194] R. McCORQUODALE: "Pluralism, Global Law and Human Rights: Strengthening Corporate Accountability for Human Rights Violations" in *Global Constitutionalism*, Vol. 2 No. 2 (2013), pp. 287-315, at p. 307.

thinking"[195]. CSR is only partially quantifiable, in part not to end up pricing human rights, in so far it erroneously "mimics the logic of market transactions"[196]. CSR will not always be fully profitable, nor fully damaging in economic terms. We therefore don't think the 'business case' to be the solution to the political debate; nor is it useful to clarify the concept of CSR, its contents and essential characteristics.

In any case, as a matter of fact, the expansion of CSR seems to generate an increasingly wide social applause and political agreement, which looks largely irreversible. CSR has consolidated its position in the international agenda and overcome these ideological disputes, while some legal questions arise.

*Objects and subjects in International Law*

Once the UN revived CSR, a parallel debate opposing subjects and objects in IL has emerged, or perhaps re-emerged, causing rivers of ink. Is it possible for individuals and corporations to have any kind of international legal personality? In this subject, individuals and corporations constitute the two sides of the same coin. This is not a neutral academic debate: its hidden purpose is to determine whether TNCs are bearers of rights and duties under IL and to what extent.

It must be said, for instance, that IHRL would be seriously undermined if it is said to affect exclusively the activities *directly* carried out by States, since they would be the only subjects of IL. Dualist or monist, an international treaty implies the permeation of its provisions into the internal order of the Contracting Parties and, in this sense, it indirectly impacts third parties and private actors' rights and duties. The dichotomy *objects vs. subjects* would block the advancement of CSR, but is relatively out of date and overtaken by reality.

[195] S.E. MERRY: "Measuring the World: Indicators, Human Rights and Global Governance: with CA Comment by John M. Conley", in *Current Anthropology*, Vol. 52 No. S-3 (Supplement to April 2011: *Corporate Lives: New Perspectives on the Social Life of the Corporate Form*, edited by D.J. PARTRIDGE, M. WELKER and R. HARDIN), pp. S-83-S-95, at p. S-83.

[196] "If the corporate business case for human rights is thought to rest on maximising shareholder 'value' (read: profit), the monetary compensation of 'stakeholders' (read: victims) appears an appropriate remedy". D. AUGENSTEIN: "The Crisis of International Human Rights Law in the Global Market Economy", in M.K. BULTERMAN and W.J.M van GENUGTEN (Eds.): *Netherlands Yearbook of International Law*, No. 44 (2013), Netherlands 2014, Asser Press, pp. 41-64, at p. 53.

More specifically, individuals have become *partial* legal subjects of contemporary IL, most decisively thanks to the development of IHRL[197]. This is particularly evident in some regional sub-systems where individuals can fil suits in international human rights courts after exhausting domestic remedies. As a matter of fact, this is not only the case with IHRL; consular law also "creates individual rights which […] may be invoked in this Court by the national State of the detained person", as settled by the International Court of Justice in *LaGrand*[198], where it was proved that the United States of America "breached its obligations to the Federal Republic of Germany and to the LaGrand brothers" –a violation not only towards Germany, as a State, but also towards two German detainees who were not timely informed of their right to consular protection[199]. Individuals further have legal personality in international criminal law, starting with the use of Chapter VII of the UN Charter for the establishment of the International Criminal Tribunal for the Former Yugoslavia (and Rwanda), later consolidated under the Rome Statute for the International Criminal Court. *Tadic* was a paradigmatic case because it definitely safeguarded the legal foundations and guarantees of such tribunals as well as their legitimacy *ratione personae* and *ratione materiae*. An especially inspiring sentence in *Tadic* states that "[i]t would be a travesty of law and betrayal of the universal need for justice, should the concept of State sovereignty be allowed to be raised successfully against human rights"[200]. In sum, individuals have rights and duties recognised under IL, most of the time *indirectly* through the duties imposed on States (and exceptionally, *directly*, as in international criminal law).

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[197] As a curiosity, the Italian doctrine has addressed the role of individuals in international law since 1950: G. SPERDUTI: *L'individuo nel diritto internazionale: Contributo all'interpretazione del diritto internazionale secondo il principio dell'effettività*, Milan 1950, Giuffrè Ed. The best representative of the modern Italian doctrine would be Antonio Cassese, according to whom "it would be not only consistent from the viewpoint of legal logic but also in keeping with new trends emerging in the world community to argue that the international rights in respect of those obligations accrues to all individuals". A. CASSESE: *International Law*, Oxford 2005, Oxford University Press, p. 145. Also in support of this thesis: F. MASTROMARTINO: "La soggetività degli individui nel diritto internazionale", in *Diritto e questioni pubbliche*, No. 10 (2010), pp. 415-437, Palermo 2011.

[198] INTERNATIONAL COURT OF JUSTICE (ICJ): *LaGrand (Germany v. United States of America)*, Judgment of 27 June 2001, I.C.J. Reports 2001, p. 466 ff., para. 77 (at p. 494) –emphasis added.

[199] *Ibíd*., para. 128.3 (at p. 515). Moreover, the ICJ established for the first time that her previous order of 1999 including provisional measures suspending LaGrand's sentence to death pending the final decision of the ICJ "was not a mere exhortation" but "was consequently binding in character and created a legal obligation for the United States" (para 110). However, the USA executed both brothers disregarding the order alleging that "there is substantial disagreement among jurists as to whether an ICJ order indicating provisional measures is binding" (para. 112). After *LaGrand*, it is considered settled case law that orders including provisional measures issued by the ICJ are binding ever since.

[200] Prof. Cassese (cited *supra*, footnote 197) was the Presiding Judge in this seminal case. INTERNATIONAL CRIMINAL TRIBUNAL FOR FORMER YUGOSLAVIA: *Prosecutor v. Dusco Tadic a/k/a "Dule"*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, of 2 October 1995, para. 58.

Concerning corporations, the ICJ early warned that the "corporate personality represents a development brought about by new expanding requirements in the economic field" in such a way that "[t]hese entities have rights and obligations peculiar to themselves"[201]. In *Diallo*, the ICJ conferred independent legal personality to a corporation only if the legal system of the State of nationality (or incorporation) does so and, in that case, this amounts to "granting it rights over its own property, right which it alone is capable of protecting", and even "diplomatic protection" by the State of nationality against any wrongful act of a third State[202]. States usually take up a corporate interest and defend it before the WTO Appellate Body; it is far from unusual to see corporate lawyers or representatives among the members of a State delegation in such cases[203]. In a more direct way, corporations also acquire rights and duties under Treaties of Friendship, Commerce and Navigation, Bilateral Investment Treaties and other International Investment Agreements or international contracts between States and private actors, legal forms that generally include dispute resolution mechanisms under the 1965 Washington Convention on the Settlement of Investment Disputes between States and Nationals of Other States (hereinafter, ICSID Convention)[204]. At the same time, enterprises have started to make their own some "human rights", initially within the Council of Europe in the particular fields applicable to them, such as procedural aspects (mainly, the right to a fair trial[205]), right to property[206], freedom of expression[207] and

[201] ICJ: *Barcelona Traction, Light and Power Company, Limited*, Judgement, I.C.J. Reports 1970, para. 39. In other words, the ICJ recognises that "international law has had to recognise corporate entity as an institution created by States in a domain essentially within their domestic jurisdiction" (para. 38).

[202] "What matters, from the point of view of international law, is to determine whether or not these have a legal personality independent of their members. Conferring independent corporate personality on a company implies granting it rights over its property, rights which it alone is capable of protecting. As a result, only the State of nationality may exercise diplomatic protection on behalf of the company when its rights are injured by a wrongful act of another State. In determining whether a company possesses independent and distinct legal personality, international law looks to the rules of the relevant domestic law". ICJ: *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, Preliminary Objections, Judgment of 24 May 2007, I.C.J. Reports 2007, p. 582 ff., para. 61 (at p. 605).

[203] On the indirect means by which TNCs participate in the WTO dispute settlement mechanism, see generally: C. MANRIQUE CARPIO: "Las empresas transnacionales en la Organización Mundial del Comercio", in V. ABELLÁN HONRUBIA and J. BONET PÉREZ (Dirs.): *La incidencia de la mundialización en la formación del Derecho internacional público: los actores no estatales. Ponencias y Estudios*, pp. 177-218, at pp. 201-204.

[204] P. MUCHLINSKI: "Corporations in International Law", in *Max Planck Encyclopedia of Public International Law*, June 2014, para. 21 and 26-29. An auxiliary issue is the determination of the corporate nationality, on which there is no customary practice yet a no agreement between the ICJ and ICSID, since there are conflicting national systems based on corporate domicile, corporate nationality, and other factors; however, these details do not challenge the fact that corporations are recognised as partial legal subjects at the international level.

[205] Cases of the European Court of Human Rights declaring a procedural human rights violation in favour of a legal entity, *e.g.*: *Sud Fondi Srl and Others v. Italy*, 20 January 2009 (violation, *inter alia*, of article 7 of the ECHR –no punishment without law), *Sacilor-Lormines v. France*, 9 November 2011 (violation of

even the right to respect for private and family life[208]. The most recent and, probably, famous case was won by the oil company *Yukos* against Russia, an important judgement also because of the great deal of money involved[209]. The European Court of Human Rights condemned Russia for a violation of the right to property and the right to a fair trial[210]. For the moment, at a regional level (Council of Europe), it is not unreasonable to conclude that the European Court of Human Rights has recognised an incipient corporate *locus standi* on the international plane, as it undoubtedly happens with arbitral tribunals[211]. It can therefore be stated that, similarly to individuals, different fields of IL recognise, at least, a *partial* legal subjectivity of corporations and, again, most of the time *indirectly* –because of the States' willingness to accept it.

It goes without saying the remaining prominence of States, which are still "autonomous subjects" while individuals could be described as "passive subjects"[212], a category that

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article 6.1 –right to a fair trial), *Agrokompleks v. Ukraine*, 6 October 2011 (same violation), *Capital Bank AD v. Bulgaria*, 24 November 2005 (same violation of art. 6, *inter alia*), *Regent Company v. Ukraine*, 3 April 2008 (also art. 6 *inter alia*), *Västberga Taxi Aktiebolag and Vulic v. Sweden*, 23 July 2002 (in this case related to taxes concerning a taxi company),

[206] In *Sud Fondi Srl v. Italy*, cited above, the European Court of Human Rights also declared the violation of the right to property (article 1 of Protocol 1); other examples of violations of the right to property in favour of corporate entities at: *Centro Europa Srl and Di Stefano v. Italy* (7 June 2012), again *Agrokompleks v. Ukraine* (6 October 2011), *Capital Bank AD v. Bulgaria* (24 November 2005), *Regent Company v. Ukraine* (3 April 2008), *Aon Conseil et Courtage S.A. and Christian de Clarens S.A. v. France* (25 January 2007), *S.A. Dangeville v. France* (16 April 2002, in this case related to taxation law), *Buffalo Srl in liquidation v. Italy* (03 July 2004), *Eko-Elda Avee v. Greece* (9 March 2006, again with regard to taxes), *Stran Greek Refineries and Stratis Andreadis v. Greece* (9 December 1994, in this case concerning an expropriation).

[207] This problem under article 10 of the ECHR usually concerns newspapers, telecom companies and media. In the following cases the company at stake wins the case because of a violation of freedom of expression: *Verlagsgruppe News GmbH v. Austria* (No. 1 and 2), of 14 December 2006; *Axel Springer AG v. Germany*, of 7 February 2012; *Financial Times Ltd. And Others v. the United Kingdom*, of 15 December 2009; *Sanoma Uitgevers B.V. v. The Netherlands*, of 14 September 2010; *MGN Limited v. the United Kingdom*, of 18 January 2011 (involving the famous model Naomi Campbell); and *Glas Nadezhda EOOD and Anatoliy Elenkov v. Bulgaria*, of 11 October 2007 (concerning a denied broadcast licence).

[208] In *André and Another v. France*, of 24 July 2008, a lawyer and a law firm won a case in which a tax inspection was considered by the Court as disproportionate, in violation of art. 8 (respect for private and family life) jointly with the violation of article 6.1 (right of access to court).

[209] The Court reserved the decision on just satisfaction, which was delayed two years and finally condemned Russia to pay up to one billion, eight hundred sixty six million, hundred and four thousand six hundred thirty six euros to the company. ECtHR: *Case of OAO Neftyanaya Kompaniya Yukos v. Russia*, Judgement on Just Satisfaction of 31 July 2014, Application No. 14902/04.

[210] ECtHR: Case of OAO *Neftyanaya Kompaniya Yukos v. Russia* –Judgement on merits of 20 September 2011, Application No. 14902/04.

[211] Article 25.2 of the ICSID Convention confers the *locus standi* to any natural or juridical person which had the nationality of a Contracting State other than the State party to the dispute, accepting in exceptional cases the same nationality if, *de facto*, foreign control of the company is proved.

[212] K. PARLETT: *The individual in the International Legal System. Continuity and Change in International Law*, Cambridge 2010, Cambridge University Press, p. 357.

might be extrapolated to the legal standing of TNCs[213]. These categories (autonomous and passive subjects) could be criticised as the "reappearance of the dichotomy in different clothes"[214]. Anyhow, it does not change the reality behind theorisations: States are still the enablers of the partial legal personality of both individuals (natural persons) and TNCs (legal persons) in the international system. At the end, indeed, this partial (or passive) subjectivity still depends on the States' willingness to bind themselves through treaties and recognise it. No matter how "passive" they are, individuals are not only right bearers, they have certain obligations as well (as seen in international criminal law).

Of course, this evolution has its origin in the Nuremberg trials; Clapham suggests that the development of IL will require, sooner or later, additional international duties of individuals, in particular, civil duties "if we do not want the development of International Law to stagnate"[215]. This links the problems objects *vs.* subjects with a subsidiary dichotomy, *i.e.*, rights *vs.* duties. At first sight, we would disagree; however, the evolution described above in relation to international personality shows that the price individuals have had to pay (international criminal liability for gross violations) is rather cheap and exceptional compared to the benefits obtained (human rights). The apparently slower (though steady) development of the international personality of corporations might respond to the fact that they have a lot more to lose in comparison to individuals, or at least many TNCs think so. In order to offset corporate fears of advancing their partial legal personality, it must be recalled that, besides investment's protection, we have signalled that corporations already enjoy human rights protection in the limited fields applicable to them –although this field is in its infancy, its greater development may promote a better balance between TNCs rights and duties.

Rosalyn Higgins, former President of the ICJ between 2006 and 2009 (and first female judge in that institution), proposed an alternative nomenclature: the term "participants" would include "transnational corporations and natural persons –who engage in

[213] "It would be difficult to understand why individuals may acquire rights and obligations under international law while the same could not occur with any international organisation, provided that it is an entity which is distinct from its members", as it happens with TNCs. A. CLAPHAM: "The Role of the Individual in International Law", in *European Journal of International Law*, Vol. 21 No. 1 (2010), pp. 25-30, at p. 30.

[214] As a commentator says in a book review of the citation above: A.T. MÜLLER: "Book Review: K. Parlett, The individual in the International Legal System…", in *European Journal of International Law*, 23 (2012), pp. 294-299, at p. 297.

[215] A. CLAPHAM*: op. cit., ibid.*

international activity"[216]. Higgins term was quite successful in the literature and it has been considered a "valuable" framework to explain the increasingly prominent role of TNCs as "instigators" and highly "influential actors", with limited rights and, why not, duties[217]. It is therefore unrealistic to state that individuals and TNCs are mere 'objects' of International Law and thus bypass the debate on their *responsibilities*. It is our understanding that the partial legal personality of both individuals and TNCs should be enough to facilitate and enable the "subjection of MNCs *de facto* sovereignty to global regulation with regard to human rights"[218]. This is certainly an on-going development but "the obstacles created by public international law are not insuperable"[219].

*A new treaty? Rights, duties and the current regime*

As we can see, the controversies revived by the UN initial leadership have turned around a few blocking dichotomies (objects *vs.* subjects, rights and duties of non-State actors, direct or indirect obligations, mandatory or voluntary schemes[220], etc.). It can all be condensed into a simpler question: is the treaty route worthy? The question is pending since 2003, after the failure of the UN Draft Norms, the first binding project to place direct duties on TNCs, to provide a closed list of rights and to include enforcement. Would it be better to reactivate that effort and work on a future treaty on business and human rights? After all, Resolution 26/9 of the HRC created an intergovernmental working group to start working on an eventual binding instrument. Is the customary way not ambitious enough? To what extent the progressive interpretation of existing instruments can be useful to improve corporate human rights respect?

Even here, Res. 26/9 is keen to "stress that the obligations and primary responsibility to promote and protect human rights and fundamental freedoms lie with the State, and that

[216] R. HIGGINS: *Problems and Process: International Law and How we Use It*, Oxford 1994, Oxford University Press, p. 49 (and, generally, chapter III).
[217] R. McCORQUODALE: "Pluralism, Global Law and Human Rights: Strengthening Corporate Accountability for Human Rights Violations", in *Global Constitutionalism*, Vol. 2 No. 2 (2013), pp. 287-315, at pp. 291-294.
[218] E.F. BYRNE: "In lieu of a Sovereignty Shield, Multinational Corporations should be Responsible for the Harm they Cause", in *Journal of Business Ethics*, Vol. 124 (2014), pp. 609-621, at p. 619.
[219] P. MUCHLINSKI: "Implementing the New UN Corporate Human Rights Framework: Implications for Corporate Law, Governance and Regulation", in *Business Ethics Quarterly*, Vol. 22 No. 1 (January 2012), pp. 145-177, at p. 154.
[220] For a closer look at the problem of *soft law vs. hard law*, please, refer to section 3 of chapter II and section 1 of chapter IV (in relation to the EU).

States must protect against human rights abuse within their territory and/or jurisdiction by third parties, including transnational corporations"[221]. Then, what's new compared to the current and incipient development of indirect horizontal duties? Is it a good idea to promote a proper treaty just to be able to allocate *direct* duties instead of further developing and detailing horizontal duties indirectly, through States obligations?

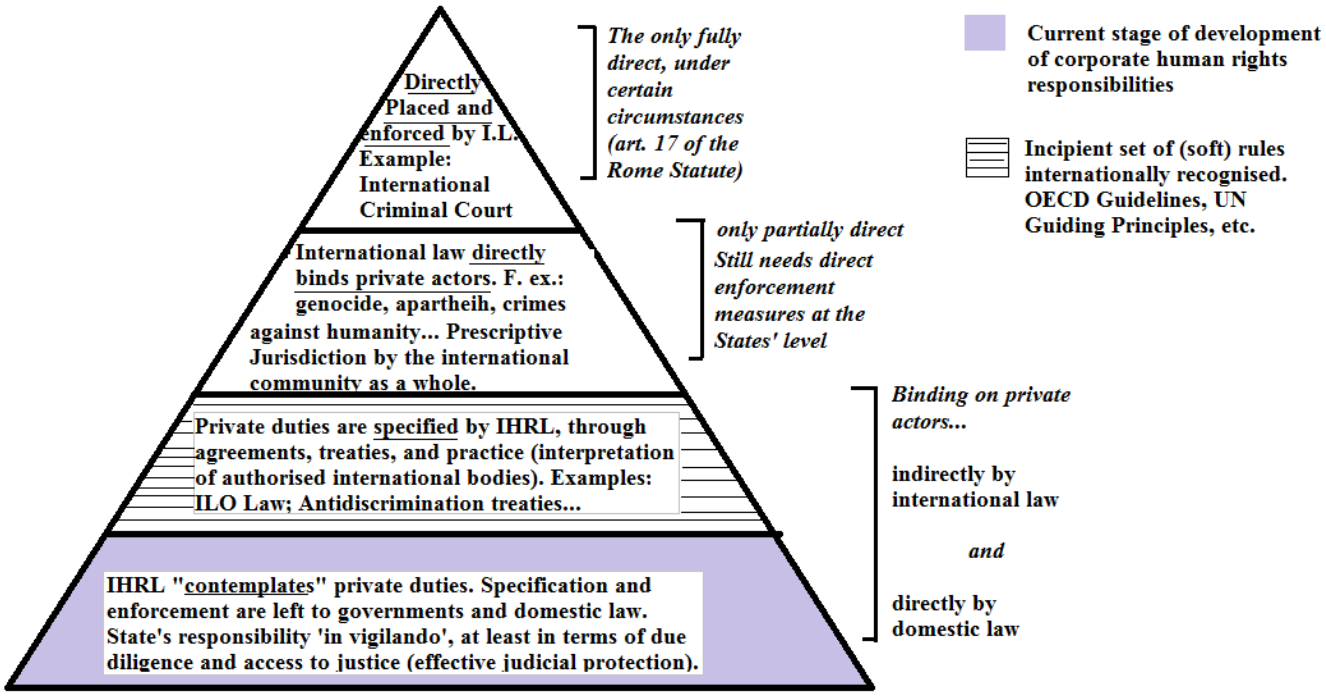
In this vein, a particularly enlightening article by John Knox systematises this universe of dichotomies. Eventual duties of private actors can be "converse duties" ("owed to the State", mainly obey the law, pay taxes and comply with the civil or military service) or "correlative duties", which are those between private actors derived from the respect of other's rights. Business and human rights issues correspond to "correlative duties", which most of the time *indirectly* emanate from IL and are *directly* provided by national law[222]. Through a meticulous examination of the drafting process of the main human rights treaties, John Knox shows that the drafters debated on the appropriateness of listing duties, as opposed to human rights, but concluded that risks outweigh the benefits in regard to the spirit of human rights law, to the extent States could use such duties to limit their own commitment, but "[t]his approach did not result from the belief that international law could place duties only on States". On the contrary, IHRL already comprises correlative private duties, but most of the time indirectly, through national legislation (implementing International Law). Knox draws a pyramid of correlative private duties to summarise this issue, which we represent below. In many ways, the treaty route (or similar instruments) is interested in moving private duties from the second to the third level of the pyramid below by creating *direct* duties; the current system implies a gradual evolution from the first to the second level of this pyramid. According to Knox, and we fully agree, the treaty route diverts attention from the fundamental problem in this field: the effective implementation of human rights law, which is not solved by just creating direct obligations. In this sense, "*[p]*roposals to move such duties directly to the third level are distractions from the real need, which is to give the *[private correlative]* duties greater specificity so that they might be more

[221] UN Doc. A/HRC/RES/26/9, recital 7 (at p. 2).

[222] John Knox further proposes a test for the suitability of -eventual- private correlative duties: they must do "no harm" (be only correlative without opening the door for converse ones, allowing the State to limit human rights arbitrarily), and "do some good" (by clarifying existing indirect duties and reinforce the current human rights regime). J.H. KNOX: "Horizontal Human Rights Law", in *The American Journal of International Law*, Vol. 102 No. 1 (January 2008), pp. 1-47, at p. 2. For this author, the UN Draft Norms precisely failed at the second level: they abandon indirect correlative duties and take the 'direct duties' route, therefore alleviating current States' duties –thus not improving the current system (*Ibíd.*, pp. 37-40).

effectively implemented domestically"[223]. This is, in fact, the task of the UN Working Group of five independent experts, whose current priority is to expand national action plans in this field while consolidating a wider practice and *consensus* on indirect correlative duties upon TNCs.

**Diagram No. 2:** *Pyramid of correlative private duties under IHRL**




* Own elaboration based on J.H. KNOX: "Horizontal Human Rights Law", *The American Journal of International Law*, Vol. 102 No. 1 (January 2008), pp. 1-47, *passim*.

In summary, International Law can allocate rights and duties to non-State actors, such as individuals and corporations, but most of the time *indirectly*, mediating the imposition of obligations to States and their permeation into the internal legal orders. We have cited examples in treaties and jurisprudence that show this partial legal subjectivity and a limited *locus standi* of non-State actors at the international level, in a variety of fields (IHRL, investment's protection, diplomatic and consular law, international criminal law). Monist or dualist, the true problem is the specification and effectiveness of IHRL in domestic systems.

At a political level, we also agree with John Knox on several points. The negotiation of a treaty is long, painful and uncertain. It should not be idealised. States can take advantage of it and block some current developments of existing instruments with the

[223] *Ibíd*., p. 45.

diplomatic excuse that they do not want to interfere with the content and orientation of an open negotiation. We would equally have to wait for the ratification by a number of States for its eventual entry into force; let's recall that the HRC's resolution creating the open-ended intergovernmental working group on this issue was not adopted by consensus: a narrow vote of 20 to 14 with 13 abstentions. Furthermore, Japan, the USA and many European countries (Austria, Czech Republic, Estonia, France, Germany, Ireland, Italy and the UK) voted against, being the home-States of most TNCs.

The proposal of *direct obligations* upon non-State actors is very problematic; we risk seeing States wash their hands in some cases alleging that it is TNCs' responsibility, not admitting any public responsibility, not even *in vigilando*. Ruggie already warned about this risk[224]. Such a treaty could seriously slow down the current human rights regime and, in the long term, be less beneficial than desired or needed. We have further explained that most specialised human rights treaties (on racial discrimination, on women, on persons with disabilities, on the rights of the child, on apartheid in sports, etc.) already have, *indirectly*, quite significant repercussions *inter privatos*, in the form of *horizontal obligations* through the national implementation of IL, if correctly applied. In the field of anti-discrimination, it early became clear its horizontal vocation (besides the obvious vertical consequences for States and public administrations), and somehow constitutes the historic origins of indirect horizontal obligations under IHRL.

Lest we forget, important *indirect horizontal effects* on non-State actors are also traceable in other fields, to name a few relevant examples: the 1992 Brussels Convention on Civil Liability for Oil Pollution Damage[225]; the 1997 OECD Convention on Combatting Bribery of Foreign Public Officials in International Business Transactions[226]; the same year Kyoto Protocol to the UN Framework Convention on

[224] "A government can deliberately fail to perform its duties […] in the hope that the company will yield to social pressures to promote or fulfil certain rights", J.G. RUGGIE: *Just Business…, op. cit.*, pp. 50-51.
[225] Article III states that "the owner of a ship at the time of an incident, or where the incident consists of a series of occurrences, at the time of the first such occurrence, shall be liable for any pollution damage caused by the ship as a result of the incident". The International Convention on Civil Liability for Oil Pollution Damage, adopted 29 November 1969 (entry into force: 19 June 1975), was replaced by this 1992 Protocol, adopted on 27 November 1992 (entry into force: 30 May 1996).
[226] Interestingly, article 2 sets the "liability of legal persons for the bribery". Though affecting for the moment foreign public officials, its article 1.1 establishes it is an offence "for any person intentionally to offer, promise or give any undue pecuniary or other advantage, whether directly or through intermediaries […] for that official or for a third party, in order that the official act or refrain from acting in relation to the performance of official duties, in order to obtain or retain business or other improper advantage in the conduct of international business". The OECD *Convention on Combatting Bribery* was adopted on 21

Climate Change[227]; 1999 Protocol to the Basel Convention on Liability and Compensation for Damage Resulting from Transboundary Movements of Waste and Their Disposal (not yet into force[228]); the 2003 UN Convention on Corruption[229]; and, at the Council of Europe, we could cite the European Convention on the Protection of the Environment Through Criminal Law (1998, not yet into force[230]).

Against the problematic proposal of direct obligations, the instruments cited above rather show the potential of indirect horizontal effects through the national implementation of IL. We shall stress that, whilst improving and deepening indirect horizontal obligations, some of the latter conventions have not entered into force yet revealing the remaining difficulties to convince States. A proper treaty on business and human rights would have to face two additional problems: whether to list rights or duties, and upon what terms, a process that might derive into a lowest common denominator agreement, who knows if slowing down the development of the current human rights regime. A decision would have to be made as to whether accompany the treaty with an additional or optional protocol to ensure the existence of an internationally binding mechanism to supervise its compliance. Otherwise, no matter how "hard law" it will be, at the end its practical impact could be questioned. To end this recap, we need not forget the sluggish speed of signatures and ratifications and the uncertainty of eventual reservations, as with any treaty.

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November 1997 and entered into force on 15 February 1999. It has now 41 signatories among which all OECD Member States plus 7 non-OECD States.

[227] Articles 10 and 12, *inter alia*, include explicit mentions to the "private sector". The Kyoto Protocol was adopted on 11 December 1997 and entered into force on 16 February 2005.

[228] With 13 signatories and 11 States Parties, this Protocol has not entered into force yet. For example, article 4 on strict liability states: "The person who notifies […] shall be liable for the damage until the disposer has taken possession of the hazardous wastes and other wastes. Thereafter, the disposer shall be liable for damage. If the State of export is the notifier or if no notification has taken place, the exporter shall be liable for damage until the disposer has taken possession of the hazardous wastes and other wastes. […] Thereafter, the disposer shall be liable for damage". For the status of ratifications, see www.basel.int (last accessed date: 9 December 2015).

[229] This represents a very prominent step forward since it includes both private-to-public and private-to-private corruption situations. Finally, article 12 contemplates "proportionate and dissuasive civil, administrative or criminal penalties". UN Doc. A/58/422, it entered into force on 14 December 2005. It currently has 178 parties and 140 signatories. Status of ratifications at http://treaties.un.org (last accessed date 1 December 2015).

[230] Article 9 provides the "corporate liability", which "shall not exclude criminal proceedings against a natural person", for any of the actions covered by articles 2 (intentional offences) and 3 (negligent offences". The latter articles further establish that such offences will be translated as "criminal offences" under domestic law. This treaty has been signed by thirteen countries; only one State has ratified it (Estonia) for the time being; it has not entered into force as far as it needs at least three ratifications. See: www.coe.int (last accessed date 1 December 2015).

We face a fluid and changing scenario. A good example is the recent Statement of H.E. Archbishop Silvano M. Tomasi, Permanent Observer of the Holy See to the United Nations and Specialized Agencies in Geneva, on the occasion of the 26th Session of the HRC, when the Resolution creating the intergovernmental WG on a binding instrument was finally adopted by a narrow vote. In this statement, he acknowledged that it is necessary a "smart mix of regulatory and policy approaches and incentives", to conclude however that "only a binding instrument will be more effective in advancing this objective"[231]. As the saying goes, 'the road to hell is paved with good intentions': of course, a binding instrument seems *prima facie* the ideal solution, but only if, in the first place, we are aware of all the traps, risks and problems behind and, at a second stage, if we succeed in annulling those adverse side-effects.

In the face of the difficulties of the treaty route, we consider it is preferable –for the time being– to go on developing and improving the two current open paths: the customary practice, with gradual efforts aimed at building a solid *consensus* in the long run[232]; and the progressive interpretation of the *existing* instruments, as well as their effective implementation to ensure their indirect horizontal implications upon non-State actors (possibilities on which we further elaborate in the following chapter). Whatever the case may be in the future, it is evident that the "debate has now moved on –from 'why?' be socially responsible to 'how?' " [233].

*Characteristics and definition of CSR*

At this point, it is important to turn back to our understanding of the word 'responsibility' so as to construct the differential characteristics of CSR. It does not consist of a chivalrous exercise of generosity. Far away from generosity, the term 'responsibility' is closer to some kind of 'duty', in terms of due diligence –though undetermined, still a legal concept. Furthermore, we defend that the word "social",

[231] As cited and commented by: V. CAMARERO SUÁREZ and F.J. ZAMORA CABOT: "Apuntes sobre la Santa Sede y el tratado de empresas y derechos humanos", in *GLOSSAE European Journal of Legal History*, No. 12 (2015), pp. 183-205, at pp. 197-200. The text of the Declaration is available at: http://www.vatican.va/roman_curia/secretariat_state/2014/documents/rc-seg-st-20140611_tomasi-diritti-umani_en.html. We wish to warmly thank Prof. Zamora Cabot for this interesting reference.

[232] In fact, the task of the current WG of five independent experts under the HRC's mandate to foster national action plan is a crucial mission in widening the international practice and eventual customary practice in the future.

[233] J. ZERK: *op. cit.*, p. 25.

while having an origin centred on the environment and labour law, now entails in popular usage a variety of other concerns that turns it into a general human rights appeal. In this sense, even assuming the strict views of Friedman and Sternberg, we dare say that charity and corporate philanthropy are actually much more illegitimate (if not unlawful) than CSR, since they really constitute 'arbitrary generous decisions' disconnected from the type of business, its actual operations and its inherent 'responsibilities'.

Let us provide some examples from different economic sectors. When a hotel decides to donate a certain amount of money for the protection of cultural heritage in its own city, this action is certainly praiseworthy and can also be in the hotel's business interest. A second option would be to use more environmentally-friendly cleaning materials and to donate money for research and development (R&D) in this field. In our view, the latter option constitutes a "human rights based approach" with a clear connection with the type of business and its inherent operations and responsibilities: proper CSR. However, the first option (a donation for cultural heritage) would rather constitute an exercise of corporate philanthropy or, put otherwise, a "charitable approach" to CSR (for us, improper and unfocused). An educational institution (a university) may organise awards and prizes to recognise the work of local NGOs for their social action and, at the same time, offer free public lectures of Nobel prizes (to whom the University pays). Again, a different possibility would consist of an integral recycling plan (office equipment in educational institutions is one of the highest items), combined with its own programme of scholarships for students from disadvantaged backgrounds. The difference is interesting: in the first case, it is a relatively charitable approach, which also benefits the public image of the university but has a rather loose connection with *the impact of its proper operations*; in the second case, in our view, it is a proper CSR initiative because the connection with the operations at stake is stronger and it also has a more solid human rights fundament. A third example could be a law firm (or any office): a charitable approach may provide free legal assistance to the victims of a recent natural disaster or fraud with great media impact, whereas a human rights approach would inspire putting in place more comprehensive work-family reconciliation measures for employees, especially women of childbearing age and to ensure the application of the principle 'equal pay for equal work', or even installing presence detectors to avoid excessive consumption of electricity (meeting rooms, corridors, etc.) and an automatic

mechanism to ensure that all computers are turned off at the end of the working day. Our fourth example is a big construction company: a philanthropic initiative would be to donate 0'5% of incomes to a local NGO to combat hunger; a proper CSR policy would ensure that all workers benefit from social security, to improve these social benefits together with the occupational risk prevention plan. Within the textile industry, major designers can organise after the terrorist attacks in Paris (November 2015) a charitable fashion show or parade; but a proper CSR policy would address the usual problems of pollution caused by industrial inks in developing countries (down the supply chain) or workers' rights. There are endless possibilities and examples; we shall finish mentioning the food industry. Following the charitable approach to CSR would lead to contribute to a local food bank. Contrariwise, a human rights and correct approach to CSR would prioritise other actions strictly connected to the actual impact of the company's operations: for example, to refine the sell-by dates in order to avoid undue food wasting in large supermarkets, or to invest in R&D to improve the health standards of food products (and go beyond the minimum legal requirements).

**Table No. 1:** *Characterising CSR: charity or human rights*

| **Examples of businesses** | **Charitable Approach** ***(corporate philanthropy)*** | **Human Rights Approach** ***(proper CSR)*** |
|---|---|---|
| Hotel (Tourist industry) | Donation for the protection of cultural heritage | Environmentally-friendly cleaning materials |
| Educational Institutions (a University) | Awards and Prizes. Free conferences. | Recycling office equipment Scholarships |
| Law firm (or any office) | Free legal assistance to the victims of a disaster | Family-work conciliation measures. Electricity consumption |
| Construction company | Periodic donations to a local NGO | Improve social security of workers and the occupational risk prevention plan |
| Textile industry | Charitable fashion show | Supply chain policies to tackle pollution and workers' rights |
| Food industry | Contribution to a local food bank | Address the problem of sell-by dates and health standards |
| Agricultural sector | Donate excesses of production | Use of better sanitary and phytosanitary products (with higher environmental and health standards) |

Both options (charitable and human rights approaches to CSR) can have a positive impact on public image and, perhaps, economic returns for the company, but in the case of proper CSR initiatives the difference is that it will *not always* and *necessarily* imply an economic saving or benefit[234]. Both can be praiseworthy. The objective is not to denigrate philanthropy; this is only aimed at clarifying concepts and initiatives. Each company has its own characteristics and our reaction to different corporate policies will vary depending on them; furthermore, the concrete activities and operations of the company will also be essential to determine our reaction and the way we assess the adequacy of a particular CSR initiative: "For example, should Levi Strauss fund a campaign to end racism? Should Ford contribute to finding a cure for AIDS?"[235] Of course there might be counter-examples and cases in which the distinctions are not clear (no disappointment: it is a typical problem in social sciences).

We propose that there are three *characteristic elements* of CSR, taken as categories that represent ideal types: *1)* the close connection with the type of business and its inherent operations; *2)* a sustainability criteria, *i.e.*, to prioritise long-term effects in social or environmental issues leaving aside circumstantial and contingent approaches; *3)* a solid vocation to respect human rights. The concurrence of all three characteristics will mark the likelihood of being closer to a truly CSR initiative, a human-rights-based one, annulling by the way the usual critique according to which it is only about marketing strategies and public image smokescreens. Unlike classical monetary approaches to CSR, which focus on profit maximisation, our approach is centred on "social preferences", under which there are "mixed effects on profits" and, even sometimes, an eventual short-term reduction, within the context of stakeholders-shareholders overlaps and interactions[236].

Bearing in mind the preceding analysis, the current situation can be summarised in the following premises:

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[234] "All CSR activities are not profit maximizing, *[only]* some may be". M.L. BARNETT: "Stakeholder Influence Capacity and the Variability of Financial Returns to Corporate Social Responsibility", in *The Academy of Management Review*, Vol. 32 No. 3 (July 2007), pp. 794-816, at p. 813.

[235] As persuasively notes Barnett: "Consider your reaction were Union Carbide to announce a $10 million donation to community hospitals in Bhopal, India, or were Exxon to announce a $10 million donation to improve wild-life habitats along the Alaskan coast. Now consider you reaction were Ben & Jerries to do either of the above." *Ibíd.*, p. 794 and 808 (citations).

[236] M. KITZMUELLER and J. SHIMSHACK: "Economic Perspectives on Corporate Social Responsibility", in *Journal of Economic Literature*, Vol. 50 No. 1 (March 2012), pp. 51-84, at p. 59.

a) International Human Rights Law (IHRL) has generally focused –and almost exclusively relied– on international treaties and traditional international mechanisms that imply vertical effects and States' responsibilities. The progressive and positive evolution of IHRL must be acknowledged as a gradual and on-going development (as seen in the case of ESCR).

b) Moreover, IHRL mostly consists of *ex-post* strategies aimed at remediation with recurrent difficulties in preventing eventual violations. Even when violations have already occurred, restrictions and problems arise when breaches involve non-State transnational actors while we face fragmented jurisdictions;

c) The complexity of TNCs' operations and the dynamics derived from globalisation have led to an increasing interdependency between subjects of IL and all kind of transnational actors in the international system, so that the Westphalian self-sufficiency of States is being questioned to protect human rights in their especially complex interaction with TNCs;

d) When TNCs (co-)participate in human rights breaches, classic doctrines emerge to point out that, strictly speaking, only States and International Organisations are proper subjects of the international system, added to limited liability veils. Contrariwise, TNCs are clearly recognised as 'right-bearers' when it comes to investments protection and in other cases, suggesting at least some kind of international personality. In parallel, IHRL has introduced a partial legal subjectivity of individuals, now even in the area of ESCR with the entry into force of the Optional Protocol to the ICESCR.

In view of these premises, we propose the following definition of corporate social responsibility: *a complementary strategy to increase the horizontal effects of internationally recognised human rights, mixing hard and soft law instruments, in their particular interaction with the activities of all kind of business enterprises, with a predominantly preventive vocation.*

The definition we propose condenses important nuances, starting with the necessary centrality of human rights within CSR, frequently forgotten or unfocused. Then, CSR's *predominantly preventive vocation* does not prevent it from including remediation (ex post) procedures, but we understand that it is not its most developed facet for the time

being and, more significantly, it might also constitute one of its most interesting contributions to the current human rights regime since traditional instruments already focus on remediation and not so much on prevention. In other words, a predominantly preventive approach could complete some *lacunae* in the field of prevention in IHRL[237], in order to increase *ex-ante* the actual effectiveness of human rights, provided that pre-existing hard law mechanisms continue to develop. The objective is to improve the actual efficacy of *existing instruments*, rather than looking for new binding tools. In this connection, CSR constitutes a *complementary* way to reinforce the international protection of human rights, which should neither replace nor overrule treaty-based bodies and obligations. The mixture and interaction between hard and soft law instruments has already been seen in the context of the UN and will further be shown with regard to other international organisations and the EU.

In conclusion, as it will also be argued in chapter II, the increasing practice of International Organisations in this subject suggests a growing *consensus* that might be a source of new customary obligations in the long term. It is in fact the practice of States and International Organisations (IOs) that would be the source of that eventual new international custom (the practice of private actors cannot be regarded as a source of any customary obligation: the expansion of CSR in the private sector is the echo of the growing concern at the level of States and IOs). This also justifies our primary institutional approach focused on IOs. To sum up, instead of new instruments, this research is based on the possibilities of: *1)* building a wider international practice and *consensus* to push CSR potential effects among States and IOs; *2)* in its interaction with treaty law, the effective implementation and, sometimes, the progressive interpretation[238] and reinforcement[239] of *existing* instruments.

[237] Prevention is certainly a pending task of IHRL. However, 'preventive principles' might be deduced from the current obligations under many instruments and, up to a certain point, constitute a part of States' duties. See, generally: B. G. RAMCHARAN: *Preventive Human Rights Strategies*, London – New York 2010, Routledge Ed., *passim*.

[238] Progressive interpretation seems to be, *prima facie*, absent of the Vienna Convention on the Law of Treaties, which includes the textual, contextual and teleological interpretation. However, it can be argued that the progressive interpretation falls within the latter (teleological), and a good amount of jurisprudence, both at a global and at a regional level, supports this idea, even more so if quasi jurisdictional bodies or dispute settlement organs are established by the treaty. F. PASCUAL VIVES: "Consenso e interpretación evolutiva de los tratados regionales de derechos humanos", in *Revista Española de Derecho Internacional*, Vol. LVI No. 2 (July – December 2014), pp. 114-153, at pp. 122-126.

[239] For example, instead of creating new institutions and new instruments, a good and necessary option is the reinforcement of UN Treaty Bodies, as signalled by Prof. Cardona, Member of the Committee of the

# CHAPTER II

## The role of international organisations: open windows

### 2.1 Bringing orderliness in the work of international organisations

At the G-7 meeting in Germany (June 2015), the world leaders' declaration explicitly recognised the UN leadership and the UNGPs as the most authoritative framework to guide any effort in our subject, putting the emphasis on the expansion of national action plans (NAPs). Mention of NAPs and this political encouragement should not go unnoticed: in the end, it will be the greater or lesser extension of CSR at a national level the one able to build an international practice, apart from the primary inspiration or guidance that IOs can provide. In the second place, the G-7 also committed to foster the implementation of the OECD Guidelines and their correspondent National Contact Points (NCPs); the leaders "will ensure that our own NCPs are effective and lead by example"[240]. From this statement, of political value, we infer the increasing importance of this subject and how it has managed to emerge as a permanent item on the agenda, as said elsewhere in this work. We also deduce the unforgettable importance of States' practice as a source of international norms and, apart from the UN, other international organisations have participated in the common effort to convince States to act in this subject matter.

#### *2.1.1. Common aspects and institutional coordination of international standards*

The prominence of the UN is, in reality, relatively recent taking into account that both the OECD and the ILO have CSR-related initiatives in the 1970s. The UN has certainly leaded the way, very significantly since the beginning of the 21st Century, but other international organisations have made non-negligible efforts to promote CSR. The

Rights of the Child: J. CARDONA: "Los mecanismos institucionales para la protección de los derechos humanos como interés público global: el fortalecimiento del sistema de órganos de tratados de Naciones Unidas", in N. BOUZA, C. GARCÍA and A.J. RODRIGO (Dirs.): *La gobernanza del interés público global, XXV Jornadas de la Asociación Española de Profesores de Derecho Internacional y Relaciones Internacionales* (Barcelona, 19-20 September 2013), Madrid 2015, Tecnos Ed., pp. 429-466, *passim*.

[240] G7: *Leaders' Declaration*, G7 Summit, Germany, 7-8 June 2015, p. 7.

proliferation of instruments from different sources might have both positive and negative effects. The outcome will depend on the degree of *coordination* and *consistency*: the latter being a substantive issue impossible to achieve without the first, we address first the institutional coordination. Coordination and consistency would generate together a desirable *convergence*, in the words of John Ruggie:

> *"Convergence is desirable for two reasons. First, reducing the number of competing standards provides greater clarity and predictability for businesses and other stakeholders alike. Thus, it produces larger scale change and change that is more cumulative in its effects over time. Second, other major standard-setting bodies active in this domain have implementation capacities the UN lacks".*[241]

The variety of proposals coming from different IOs certainly poses problems of coherence. For example, we still find a number of global initiatives insisting on the so-called 'business case', according to which CSR is expected to generate economic returns. The OECD seems reluctant to definitely abandon the 'business case' approach (CSR is seen as "both a business responsibility and a business opportunity"[242]), yet we have explained that CSR will not always have a positive impact on benefits. Where the 'business case' is more visible is in the International Organisation for Standardisation (ISO), a non-governmental institution composed of private national standard-setting associations. Among other motivations to buy the social responsibility standard of the ISO (*ISO 26000*, at the price of 198 Swiss francs for a 106-pages' document), we find the possibility of gaining "competitive advantage, reputation, the ability to attract and retain workers or members, customers, clients and users, the maintenance of employee morale, commitment and productivity, *[and]* the perception of investors"[243]. In this line, ISO 26000 leaves room for managerial discretion in relation to 'due diligence', which is built on the basis of societal expectations and avoiding legal constructions, somehow more linked to sustainable development rather than to proper human rights concerns[244].

Of course, the 'business case' component, residually present in the OECD Guidelines and strongly embedded in ISO 26000, is far away from our approach to CSR. However, the OECD has recently aligned itself with the UN. Prof. Ruggie himself was invited to participate in the meetings previous to 2011' update of the Guidelines, with a view to

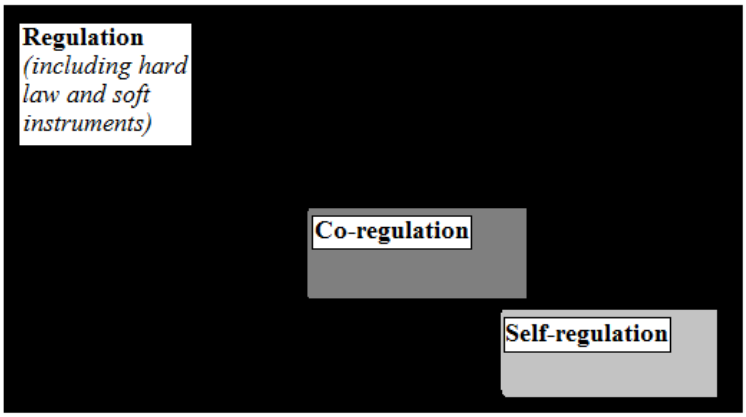
[241] J. RUGGIE: *Just Business…*, *op. cit.*, pp. 159-160.
[242] OECD: *Guidelines for Multinational Enterprises*, Paris 2011, OECD Publishing, p. 44.
[243] ISO: *Discovering ISO 26000*, 2014, available at www.iso.org.
[244] A. JOHNSTON: "ISO 26000: Guiding Companies to Sustainability through Social Responsibility?", in *European Company Law*, Vol. 9 No. 2 (2012), pp. 110-117, at pp. 114-116.

coordinating discourses. In the current stage, coherence and consistency of global initiatives start to be indispensable for the future success of CSR.

To start with, we wish to underline that, despite dispersion, the work of IOs –other than the UN– actually confirms the definition of CSR that we propose. Even ISO 26000, with all its limitations, has a strong point: its focus on prevention, which is essential in our understanding of CSR. And both the OECD Guidelines and ISO 26000, though very different, incorporate the necessary centrality of human rights as we propose. More in detail, the latest version of the OECD Guidelines for Multinational Enterprises (2011) includes a new chapter (No. IV), only on human rights, absent in the previous versions, which strictly follows the language and contents of the UNGPs: it highlights that the primary responsibility lies on States, that companies have to respect that framework, prevent and avoid adverse human rights impacts and "provide for or co-operate through legitimate processes in the*[ir]* remediation"[245], thus implicitly including judicial and non-judicial grievance mechanisms.

As far back as 2008 –before Ruggie's work–, an unofficial ILO publication already stressed that CSR "should not be defined as only 'beyond the Law'", because it also includes "minimum regulatory standards" with a human rights approach[246]. Compliance with the existing legislation is seen as a baseline; only a portion of CSR consists of going "beyond the law". Again, our definition also states that CSR mixes both hard and soft law, mandatory and voluntary components, as summarised in the following diagram:

**Diagram No. 3:** *Legal composition of CSR*




[245] OECD *Guidelines… (2011)*, p. 31.
[246] INTERNATIONAL INSTITUTE FOR LABOUR STUDIES / ILO: "Governance, International Law and Corporate Social Responsibility", *Research Series* No. 116 (2008), pp. 107-113.

Finally, the OECD, the ILO and the ISO texts put the accent on risk assessments of adverse human rights impacts, confirming again what we defined as a "predominantly preventive vocation" of CSR. Unfortunately, none of the initiatives of IOs at a global level –not even the UN's– can be said to be complete and fully satisfactory. Each definition incorporates some good points and presents some loopholes, a phenomenon that is perfectly understandable given the dispersion and disconnection of the diverse instruments at their source. Nevertheless, the fact of having found in the work of these organisations the diverse elements of our definition of CSR gives cause for some optimism (the human rights centrality, the predominantly preventive vocation and the mixture of hard and soft law). This indicates that the work of IOs at a global level seems to follow a similar direction. Undoubtedly, there is still pending work to systematise the overlapping initiatives from different international organisations, for which the institutional coordination is a prerequisite to deal with the almost infinite spheres of interaction between business and human rights.

Also in this regard, we start to detect some progress in the form of policy transfers between IOs. In our view, both revisions of the OECD Guidelines are partly a response to the UN's impulse of the global CSR agenda: the OECD Council revised the Guidelines in 2000 and created the National Contact Points (NCPs), with non-judicial grievance competencies, precisely when the Draft UN Norms had caused a vivid debate and revitalised CSR. And the following update of the Guidelines (2011) incorporated the above-cited new chapter on human rights. The establishment of the NCPs is obligatory for those countries adhered to the Guidelines (45 States at the time of writing[247]); the weak point is that most of them are established within a department of the Ministries of the Economy and their independence and usefulness is constantly under question, problems which are behind the amending purpose expressed by the G-7[248]. It goes without saying that the OECD Guidelines constitute a soft-law instrument, a set of recommendations *by* governments *to* companies, the effectiveness of which can generate an endless debate. In the overall, we totally agree with Johnston's assessment:

> "*Initially skeptic about the effectiveness of soft law, I quickly became an advocate after my arrival as Secretary General of the OECD. When an attempt to adopt a multilateral agreement on investment (MAI) foundered in 1998 […],*

[247] The official website is https://mneguidelines.oecd.org/ncps/ (last accessed date: 10 December 2015).
[248] Further reference to the NCPs is made, in the context of the EU, at pp. 194-195. We propose there that the NCPs could be more wisely placed within the correspondent national human rights institution.

> *it became clear that proposed conventions and treaties are not only targets for dissident groups, they also take years to negotiate and implement […]. At the same time, it would be naïve to think that a meaningful system of global norms could exist without binding regulation and formal deterrence. […] Future international regulation in some areas could emerge from gradual convergence and coordination of national practices. […] I would caution, however, against exaggerating the degree to which formal law enforcement can or should solve all the world's problems. Soft law, as through the Guidelines, has an increasingly important role to play".*[249]

By the same token, one should ask 'treaty advocates' if the current 189 ILO Conventions have proved to be the best way to promote labour rights. Of course, this was somehow an expectable development given that labour relations have a stronger historical inclination to hard norms (at least outside the US). This historical inclination of labour relations to hard law has also a sound reason behind: the balancing of employer's power with the generally less power of workers, giving rise to principles such as "*in dubio pro operario*" (similarly to the adagio '*in dubio pro reo*' of criminal law).

Notwithstanding this, the ILO is no stranger to soft law and CSR. The ILO has produced two basic texts: the *Tripartite Declaration on MNEs and Social Policy* (1977) and the *Declaration on Fundamental Principles and Rights at Work* (1998). As we have said, CSR is a mix of hard and soft law (the ILO early pointed in that direction), so these guidelines and recommendations need to be read jointly with the eight 'core' ILO Conventions[250]. In fact, both declarations have the underlying objective of coordinating diverse ILO conventions to foster their joint CSR-effect through soft-law guidance.

Besides, the International Labour Conference also approved the Annex of 1998' Declaration on Fundamental Principles and Rights at Work, which establishes a unique follow-up mechanism in a soft norm. The follow-up looks forward to promoting the ratification of the eight fundamental Conventions, *via* State-by-State annual reports and a global report, both reviewed by the Governing Body, so as to facilitate technical cooperation and the gradual achievement of concrete goals. On their side, the successive

[249] D. J. JOHNSTON: "Promoting Corporate Responsibility: the OECD Guidelines for Multinational Enterprises", in R. MULLERAT: *Corporate social responsibility: the Corporate Governance of the 21st Century*, The Netherlands 2011, Wolters-Kluwer, pp. 275-284, at pp. 278-279.

[250] In chronological order: the Forced Labour Convention (No. 29 -1930), the Freedom of Association and Protection of the Rights to Organise Convention (No. 87 -1948), the Right to Organise and Collective Bargaining Convention (No. 98 -1949), the Equal Remuneration Convention (No. 100 -1951), the Abolition of Forced Labour Convention (No. 105 -1957), the Discrimination (Employment and Occupation) Convention (No. 111 -1958), the Minimum Age Convention (No. 138 -1973) and the Worst Forms of Child Labour Convention (No. 182 -1999).

revisions of the *Tripartite Declaration on MNEs and Social Policy* have included mentions to the UN Global Compact and the MDGs and confirm that, from the point of view of the ILO, recommendations are addressed also to "governments", alongside companies, workers and employers, unlike the OECD Guidelines, which are recommendations to companies by member-States. In this line, the ILO states that these objectives "will be furthered by appropriate laws and policies"[251], anchored in "basic human rights"[252], therefore combining mandatory and voluntary schemes together with legalist and political strategies. The Declaration on MNEs was completed in 1986 with a dispute resolution mechanism on its interpretation[253], which can be activated by any of the three constituents – the intrinsic originality of the ILO in the international system.

Policy transfers may seem relatively evident between the UN and the ILO (an UN Agency) and the OECD, cross-citing each other standards. A similar cross-fertilisation can be studied in the particular case of the ISO 26000. We mentioned earlier that this (private) standard had a more developmental and business-friendly approach, rather than a proper human rights one. Though being business-oriented, ISO 26000 has a positive aspect: unlike other famous ISO standards, it is not *certifiable* and thus reduces the risks of creating a new "certification circus" related to CSR; in other words, it remarkably reflected the "lack of desire to create another product for the auditing/certification industry"[254]. ISO 26000 developmental approach can also be seen as a positive aspect, in terms of an "inter-marriage" between CSR and the MDGs[255], in line with the UN strategy, which actually links human rights to development. In fact, this tendency to unite human rights and development has been confirmed by the new Sustainable Development Goals or 2030-agenda[256], which continues to include many ESCR such as health, education, the environment, food and adequate housing.

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[251] ILO: *Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy*, revised version adopted by the Governing Body of the International Labour Office at its 295th Session, March 2006, art. 3. A fourth edition (not revised) was issued 29 August 2014 without changes by the Governing Body.
[252] *Ibíd.*, art. 1.
[253] This is a task for the ILO Committee on Multinational Enterprises. It excludes overlapping with other ILO procedures of review of national law and practice, other Conventions and Recommendations or matters under the freedom of association procedure
[254] The standard cited as by A. JOHNSTON: *op. cit.*, at p. 112.
[255] D. KATAMBA, C.M. NKIKO, C. TUSHABOMWE KAZOOBA, I. KEMEZA, S. BABIIHA MPISI: "Community Involvement and development: An inter-marriage of ISO 26000 and millennium development goals", in *International Journal of Social Economics*, Vol. 41 No. 9, pp. 837-861.
[256] UN Doc. A/RES/70/1, adopted 21 October 2015.

Finally, although we see a *de facto* institutional coordination through policy transfers, many of which start to be openly deliberate, we find sometimes more formal cooperation agreements between organisations. Suffice it to cite the interesting *Memorandum of Understanding between the OECD and ISO in the area of social responsibility*, signed in 2008 to ensure that "ISO International Standard […] and ISO activities relating thereto are *consistent with* and *complement* the OECD Guidelines"[257], through a mutual and timely communication, consultations, assistance and co-operation. Consistency and complementarity are difficult to balance; but anyone would agree that the express intention to do so is *a must* irrespective of the final result. We are already used to inter-agency initiatives on particular matters and to see officers attending meetings at the headquarters of other organisations depending on the subject, but this MoU consists of going a step further: an institutionalisation of coordination that may hopefully inspire similar institutional agreements in the future, perhaps in order to include all relevant IOs in the area of CSR.

### *2.1.2. The challenge of substantive coordination*

We have shown in the previous section that our definition of CSR finds support in the work of IOs at a global level. We have also highlighted the common aspects of diverse standards as a result of policy transfers between IOs and an increasing, though still imperfect, institutional coordination. The next step should consist of promoting a joint-reading of all these standards given the fact that there are overlapping initiatives addressing the same issues from different perspectives.

Indeed, more and more IOs incorporate human rights concerns or related issues into their daily activities, regardless of their founding priorities. Our objective now is to show some sector-specific opportunities for coordination with substantive outcomes. The following examples, in a non-exhaustive way, would merit a longer, in-depth and distinct research; but our goal is just to suggest there are also substantive interactions and opportunities for convergence of social responsibility standards and related instruments.

[257] Emphasis added. OECD – ISO: *Memorandum of Understanding between the OECD and ISO in the Area of Social Responsibility*, 5 May 2008, article 1.1.

Within IHRL, environmental protection has always been the spearhead of a regulatory evolution that has brought about improvements that start to be extended to other areas. For example, environmental footprints are widely used by the industry and the fact of being a quite easily quantifiable factor (including a strong 'business case') has decisively helped environmental standards on their path to a prompt success. International Environmental Law is a quite recent evolution within the history of IL, an area in which we also find a good amount of soft norms[258] but more and more binding treaties, whose effectiveness in turn is discussable. We have already cited the 1992 Brussels Convention on Civil Liability for Oil Pollution Damage, the Kyoto Protocol to the UN Framework Convention on Climate Change[259]. The level of specificity of these treaties is also remarkable: suffice the additional examples of the International Convention for the Conservation of Atlantic Tuna or the Convention for the Conservation of Antarctic Seals, for the concreteness of their subject-matter and their repercussion on private actors, and the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, for its procedural importance –an extraordinary formalisation of 'procedural human rights'. Two international environmental treaties await a sufficient number of ratifications to enter into force: the 1999 Protocol to the Basel Convention on Liability and Compensation for Damage Resulting from Transboundary Movements of Waste and Their Disposal as well as the European Convention on the Protection of the Environment through Criminal Law (1998). Moving to policies, environmental objectives mainstream all UN agencies, as confirmed by the new Sustainable Development agenda for 2030; even WIPO has jumped on the environmental wagon and has developed an internet-based marketplace to facilitate intellectual property services and databases for green technologies, which is by the way a good example of PPPs.

For instance, the situation can be interpreted in terms of a progressive hardening of previous environmental expectations, a process accelerated since the late 1980s. Because of its early development, environmental protection has blazed a trail and has

[258] A recent state of the art with examples and case studies at: J. FRIEDRICH: *International Environmental 'Soft Law'. The functions and Limits of Nonbinding Instruments in International Environmental Governance and Law*, Max Planck Institute 2013, Springer Ed., *passim*.

[259] On 12 December 2015, the 21st yearly session of the Conference of the Parties to the UNFCCC, and 11th session of the Meeting of the Parties to the Kyoto Protocol, adopted by consensus the Paris Agreement, updating the goals for the reduction of greenhouse gas emissions and limit the global warming to 2 Celsius degrees between 2030 and 2050 (compared to preindustrial values).

always been one step ahead developing and intermixing hard and soft law instruments. This evolution of environmental regulation has contributed to three achievements: *1)* the gradual inclusion of procedural aspects to operationalise simultaneous goals; *2)* the progressive hardening of previous soft-law aspects; *3)* the coordination efforts by a variety of IOs (both institutionally and substantially).

We observe similar improvements in the area of the right to food and agricultural production. A highly topical human rights problem is food security while speculation in the stock markets is said to be related to several food crises in Africa, in particular due to the spectacular escalation of the price of corn after 2008' crisis. The area of the right to food and agriculture is also in advance in terms of international coordination, including CSR instruments to tackle the current defies. Already in 2004, FAO issued the *Voluntary Guidelines to support the progressive realization of the right to adequate food*[260], which take a transversal human rights-based approach, from good governance to specific ESCR, like water and sanitation, food security and labour rights.

This path finally led to an unprecedented institutional and substantive co-operation: the *principles framework for responsible agricultural investments*, adopted in 2009 by an interagency working-group composed of FAO, IFAD, UNCTAD and WB, a strong call for a global consensus. According to these principles, investments should not "jeopardize food security" (principle 2) but respect the environment (principle 7) and "existing rights to land" (principle 1)[261]. FAO has produced two additional guidelines: in 2012, the *Voluntary Guidelines on the responsible governance of tenure of land, fisheries and forests*[262] and, in 2014, the *Principles for Responsible Investment in Agriculture and Food Systems*[263]. We could also add FAO's *Code of Conduct for Responsible Fisheries* and the *International Code of Conduct on the Distribution and Use of Pesticides*, more clearly calling upon companies, apart from the usual regulatory responsibility of States. In summary, the current polemic turns around large scale land acquisitions ("land grabbing") and the respect of the environment to ensure a sustainable agriculture.

[260] Adopted by the 127th Session of FAO Council, November 2004.
[261] FAO – IFAD – UNCTAD – WB: *Principles for Responsible Agricultural Investment that Respects Rights, Livelihoods and Resources* (Extended version), 25 January 2010.
[262] Adopted by the Committee on World Food Security (FAO), 38th Special Session, 11 May 2012.
[263] Adopted by the Committee on World Food Security (FAO), 41st Session, 15 October 2014.

In today's economy, the ever-growing complexity of supply chains is not limited to the industrial sector and widely affects food products, which has marked a new priority in this subject. The OECD and FAO are currently working on a joint voluntary *Guidance for Responsible Agricultural Supply Chains*[264], therefore continuing their coordination, at an institutional level but also on the substance. The most recent example is the joint FAO-UNIDROIT *Legal Guide on Contract Farming*, where specific human rights concerns are straightforwardly addressed: it directly cites the UNGPs as a source of inspiration[265] and recognises the intertwining of technical standards with several human rights, on which it assumes their interdependency[266]. This Legal Guide even states that Companies should respect human rights regardless of the local enforcement deficits at the government level, including procedural aspects like "participation, accountability, empowerment, non-discrimination, transparency, human dignity and the rule of law"[267]. In this context of guidelines and codes, public goods and concerns are more likely to be introduced into private (contractual) relationships through certificates and standards that promote it[268].

All these instruments urgently need a joint reading, to be added to the numerous reports of the UN Special Rapporteur on the Right to Food and the UNGPs, to cite the framework within which it should be interpreted; only such an approach will help moving from institutional coordination to substantive results. In this regard, it must be ensured that the development of guidelines and soft norms allows a sector-by-sector substantive operationalisation of CSR –as seen in the case of agriculture and food. However, at the same time, the multiplication of standards should not undermine the need for harmonisation (what we termed "coordination and consistency"). In any case, even though so many people die of hunger every day, the right to food and agribusiness

[264] The draft text and the agenda for negotiations are available at: http://www.oecd.org/daf/inv/investment-policy/rbc-agriculture-supply-chains.htm (last accessed date: 29 December 2015).
[265] UNIDROIT – FAO – IFAD: *Legal Guide on Contract Farming*, Rome 2015, para. 34 (at p. 12).
[266] "Emcompassing civil and political rights, as well as economic, social and cultural rights (such as the right to food, the right to health, the right to social security and the right to work)". *Ibíd.*, para. 41 (at p. 31).
[267] *Ibíd.*, para. 58 (at pp. 36-27).
[268] F. CAFAGGI and P. IAMICELI: "Supply chains, contractual governance and certification regimes", in *European Journal of Law and Economics*, Vol. 37 No. 1 (February 2014), pp. 131-173, at p. 170.

are a good example to demonstrate that "convergence among CSR standards and guidelines is in progress"[269].

Finally, in a totally different area that allows us to introduce the following section on trade and investments, besides the specialised work of the WB and the ICSID, or the WTO, we should have a look at other instruments and proposals from other organisations. In a particularly interesting and recent report, Mr. Alfred de Zayas, UN Independent Expert on the promotion of a democratic and equitable international order, has proposed to the General Assembly to request an Advisory Opinion from the ICJ on the priority of the Charter of the United Nations and the United Nations human rights conventions over other treaties –in particular, investment and trade arrangements[270]. In this research, we basically follow the same approach as his report, based on article 103 of the UN Charter, article 38 of the Statute of the ICJ and the Vienna Convention on the Law of Treaties, in order to conclude on the duty to make compatible human rights and UN obligations with other concurring international obligations[271].

However, the Independent Expert adopts a far more radical stance, compared to ours, inasmuch he even promotes a categorical abolition of investor-State dispute settlements. In our case, as it will be further developed in the following section, we adopt a more nuanced and pragmatic approach to show that there is room for improvement and that there are open windows to gradually mainstream human rights respect in trade and investment disputes. Regardless of our differences of opinion with the Independent Expert, we certainly support the idea that an emerging international practice reveals an increasing *consensus* on the fact that human rights entail some *transversal* principles that can also affect international economic law.

The practice surveyed so far indicates that IOs and many States seem to go in that direction (mainstreaming human rights into any area), but it would be more delicate to precisely select what human rights and principles have really evolved, or can finally

[269] K. POETZ, R. HAAS and M. BALZAROVA: "CSR schemes in agribusiness: opening the black box", in *British Food Journal*, Vol. 115 No. 1 (2013), pp. 47-74, at p. 58.
[270] UN (General Assembly): *Report of the Independent Expert on the promotion of a democratic and equitable international order*, 5 August 2015, UN Doc. A/70/285. We wish to thank the Independent Expert for his kind invitation to various events during our internship in the UN (2013).
[271] This means a joint reading of international obligations acknowledging the relational character of international law. We should not risk proposing a clear hierarchy, as explained elsewhere in this work (see the precedent section).

crystallise, into customary obligations[272]. Such obligations would have to be based on a consistent and generalised *opinio iuris* and *praxis* at the end of the journey. However, we rather think that, if such a customary rule of respect for human rights has emerged, it is more likely to affect only some selected principles on which we have scarce certainty, and probably not *all* human rights –therefore not being very useful in the far richer area of 'business and human rights'. We essentially argue that, at this stage, it is rather inadvisable to request an opinion from the ICJ –we further risk an ambiguous and unhelpful answer, which is capable of blocking or slowing down the customary path already initiated.

### 2.2 CSR and international trade and investments

As we have seen so far, when dealing with transnational companies' respect for human rights we need an interdisciplinary perspective –procedural law, commercial and labour law, civil law, public and private international law…- to cover legal relations that go beyond a single legal order or jurisdictional system. We are, therefore, projected to almost any kind of legal relationship.

This is also why we need to analyse all actors, from States to private companies and international organisations, trade unions and consumers and almost any civil society organisation. We know globalisation mainly affects international trade and investments but, in the last decades, international transactions and external investments have significantly increased and, among other reasons, we might underline two:

1) Both the WTO and the World Bank (WB[273]), together with financial institutions at a regional level and the private banking sector, finance a great part of these investments;

[272] In a different report, the above-cited Independent Expert even says it would extend to all human rights, including ILO and WHO Conventions. For this report see: HUMAN RIGHTS COUNCIL (UN): *Report of the Independent Expert on the promotion of a democratic and equitable international order Alfred-Maurice de Zayas*, 14 July 2015, UN Doc. A/HRC/30/44.

[273] Please, note that the expression World Bank comprises the International Bank for Reconstruction and Development (IBRD) and the International Development Association (IDA). The expression "World Bank Group" refers to three additional institutions, besides the IBRD and IDA: the International Finance Corporation (hereinafter IFC), the Multilateral Investment Guarantee Agency (MIGA) and the International Centre for Settlement of Investment Disputes (ICSID). All are technically considered UN institutions. They were the result of the Bretton Woods negotiations (1945), when the IMF was also

2) States protect foreign investors through three types of legal forms: bilateral treaties (BITs), multilateral investment agreements (MIAs) and, more simply, through international contracts between the State and concessionary companies. In this way, governments protect those who directly or indirectly finance projects, facilitating access to means of dispute settlement outside the State's jurisdiction.

As repeated elsewhere in this research, it is our understanding that, if there is any part of the legal order that could be made relevant for all sectors and branches of law, this is the case of international human rights law and its principles or, at least, *core* human rights' principles that have penetrated into customary international law. In this vein, we should emphasise again that we are mainly speaking of States' obligations and their responsibility of surveillance, also when it comes to private activities at the international level. Even if States weren't to have ratified specific human rights instruments, such as the ICESCR, we need to recall some general obligations with regard to article 1 of the UN Charter and the Vienna Convention on the Law of Treaties, which foresees the resolution of international controversies "by peaceful means and in conformity with the principles of justice and international law" (preamble) and "in good faith" (art. 31), in conformity with "human rights and fundamental freedoms for all" (preamble). We can obviously discuss the different degrees of compliance and standards, but it is recognised a high degree of consensus on the essential or core human rights principles, which can therefore be considered customary obligations regardless of the ratification of a specific treaty[274].

A widespread practice indicates that there are not watertight compartments in International Law. To quote just one example, the ICJ settled in a very simple way that "*[a]*n international instrument has to be interpreted and applied within the framework of the entire legal system prevailing at the time of the interpretation"[275]. It is precisely for this reason that we find "general exception clauses", "public interest clauses" in the WTO agreements as well as recurrent references to general international law in some

created, in this case as a fully separate organisation, focused on monetary cooperation, development and balance of payments difficulties.

[274] But only very few human rights would have reached that status, being useless taking into account the casuistry of 'business and human rights' issues. Of course, in some cases we may face *erga omnes* obligations: for example, if contemporary forms of slavery are detected, or racial segregation, States could adopt any measure against the transnational corporation eventually involved (from breaking contracts to any other enforcement mechanism).

[275] ICJ: *Advisory Opinion on Namibia*, ICJ Reports 1971, para. 53 (at p. 31).

interesting arbitral decisions. Ernst-Ulrich Petersmann, one of the most authoritative scholars in this field, has repeatedly warned of the dangers of so-called 'self-contained regimes' such as investment law in relation to public international law. We need coordination and an integrated approach to diverse international legal fields in order to tackle legal fragmentation, which is the reason "why international economic law fail*[s]* to protect global public goods", not being irreconcilable with the due "respect for the legitimate diversity *[and specificity]* of international legal regimes"[276] –we fully support Petersmann's diagnostic[277].

We suggest below that there are practical examples, in which human rights have found their way into trade and investments issues, although timidly. Nothing impedes this practice from being extended and developed in the future; for instance, it is only a question of progressive development of the current instruments, bearing in mind the usefulness of referring to general international law as the only legal and legitimate method to make compatible the increasing transnational economic activities with human rights obligations. IOs role in regulating trade and investments shows a wider acknowledgement of the 'relational character' of IL and the transversal effects of human rights.

### *2.2.1 International investments and human rights*

First of all, we propose that international organisations that finance foreign investments have, at least, an institutional and procedural role to play to protect human rights, even if their first legitimate objective might be the protection of their natural founding priority.

The right to life and the right to health are prominent obligations of States under the rule of law and this necessarily implies the right to drinking water. According to our analysis

[276] E.U. PETERSMANN: "Why Does International Economic Law Fail to Protect 'Global Public Goods'", in A. LIGUSTRO and G. SACERDOTI (a cura di): *Problemi e tendenze del diritto internazionale dell'economia, Liber Amicorun in onore di Paolo Picone*, Napoli 2011, Ed. Scientifica, pp. 111-125, at p. 115. This thesis is further developed in E.U. PETERSMANN: *International Economic Law in the 21st Century*, Oxford 2011, Oxford University Press.

[277] However, we disagree with the solution: Petersmann proposes a multilevel constitutional approach to international law; such a constitutionalist attitude towards IL forgets, in essence, that internal legal orders based on a variety of constitutional theories, are unfortunately quite far from being efficient providers of "global public goods". In many occasions, pressure for improvement precisely comes from International Law itself.

of the ICESCR (1966), no provision establishes that it has to be a free and public service, but drinking water needs to be made accessible and fully available regardless of its private or public management[278]. But economic and social rights usually require big initial investments, where the conflicting interests can be large and complex.

Many investment contracts actually deal with basic public services (water, power, oil and gas, telecommunications, transport and waste disposal), which are narrowly linked to the enjoyment of economic, social and cultural rights. In many occasions, an international investment contract constitutes the first step before the enjoyment of any economic and social right in a developing country. Very frequent problems come up also with private security services and its related aspects, touching on civil and political rights. Sometimes tragically, we witness regular violations of the right to life and public security or freedom of expression. The rights of indigenous peoples are, finally, another recurrent problem in the operations of transnational companies, because of the remote location of many natural resources.

Prevention measures could be put in place to avoid or reduce the potential negative effects on the host community, most of the times involving the following problems: the right to health, labour rights, forced evictions, the protection of cultural heritage and the environment, each of them including important procedural dimensions (information, consultation and public participation, access to justice plus effective and timely legal protection[279]).

In a famous example, a gas pipeline through Chad and Cameroon led to a threat to human rights in both Central African countries[280]. Amnesty International warned that this threat was more likely to materialise if the investment agreement forgets, omits or clearly hampers State's international obligations in terms of human rights and the management responsibility of concessionary companies. A consortium of companies was extracting gas of the fields of Doba (southern Chad) to cross Cameroon with a thousand kilometres pipeline to the Atlantic. It consisted of the biggest private

[278] OHCHR: *Frequently Asked Questions on Economic, Social and Cultural Rights*, Fact Sheet No. 33, Geneva 2008, United Nations, p. 20.

[279] Called "procedural human rights", which started their consolidation in cases touching on the environment, a recurrent problem for TNC's.

[280] A good analysis of the case: A. Al FARUQUE: "Relationship between investment contracts and human rights: a developing countries' perspective", in Ph. SANDS, S. BHUIYAN and N. SCHRIJVER (Eds): *International Law and Developing Countries. Essays in honour of Kamal Hossain*, Leiden-Boston 2014, Brill-Nijhof, pp. 240-243.

investment in Africa at that time and the consortium was composed of Exxon Movil and Chevron, both American companies, and Petronas, the gas State company of Malaysia.

As it is often the case, this project was promoted by a number of investors, accepted by the concerned governments, supported with World Bank loans, private export credit companies and banks, some of which had already and voluntarily adopted social and environmental standards. The project was deeply criticised as an invitation for Chad and Cameroon to ignore their international obligations in terms of human rights. Particular clauses allegedly prevented these countries from adopting measures that might disturb the future of the project, even when such measures were meant to address a human rights' demand[281]. This possibility should be excluded of any agreement: as said before, no international contract has its own life in a vacuum; it only exists in an international legal context.

As for this particular case, in 2001 the President of Chad ordered that the head of opposition be arrested and tortured because he was against the creation of the gas pipeline. Even though it was one of the biggest investments foreseen in Africa, the project linked a consortium of big oil companies and was financed by the World Bank. The opposition to this project claimed that the rights of the citizens were not respected and further raised the fact that landowners were harassed and threatened with death to abandon their properties in order to place a pipeline instead of conducting a correct expropriation process with due legal guarantees.

That's when an NGO addressed the President of the World Bank asking for his help to liberate the opposition leader. In this case, in spite of the general scepticism about the effectiveness of using his "good offices", and doubting that this case fell into his competencies, Mr. Wolfensohn finally phoned the President of Chad and the head of opposition was immediately liberated. This obviously opened a vivid debate and raised several questions: to what extent the World Bank is responsible for investment projects that end up in human rights violations (the WB, in itself, is not violating at any time those rights); whether formal and informal 'good offices' are sufficient and adequate to tackle these situations; and if there could be an better system to address human rights' related issues.

[281] E. MUJIH: "The regulation of Multinational Companies Operating in Developing Contries: A Case Study of the Chad-Cameroon Pipeline Project", *African Journal of International and Comparative Law*, No. 16 (2008), pp. 83-99.

In many cases that concern developing countries, projects are wrongly interpreted as allowing companies' operations without being held accountable in front of local legislation in cases of alleged human rights violations. Amnesty International promptly raised the question and the inherent contradiction with general international law, in the sense victims would be deprived of any access to remedies creating inadmissible obstacles for the realisation of human rights. In many countries the exploitation of natural resources has contributed to worsening corruption, deteriorating social unrest, conflicts and abuses. It is important to note that, as in the case of Chad and Cameroon and most of the African countries, we face a situation of state fragility –if not failure[282]– what makes the population particularly vulnerable, where the judicial system is ineffective and, all in all, where it is more likely that the Governments succumb to the companies' pressure and interests. It consists of a delicate and precarious equilibrium between economic development thanks to big investment projects, and the adverse effects it might cause. Other NGO's claim that some African governments carry out prosecutions, tortures and massive murder to keep some oil reserves without population.

A number of cases were deemed crucial to convince international financial institutions (IFI) to take some steps. Of course, there are precedents well before the Chadian case exposed. Since the 1960's, when the WB did not stop lending South Africa and Portugal despite their apartheid and colonial policies respectively[283], the CESCR has issued a good amount of Concluding Observations[284] detailing the negative impact of IMF-WB actions on ESCR. It was argued that these IFI, being within the UN building, should –in accordance with article 103 of the UN Charter– make their policies consistent with wider UN priorities in terms of human rights[285]; nevertheless, this alleged *organic* link with the UN, in itself, is unlikely to force substantive changes in view of the *functional* independence of World Bank.

The problem starts with the "apolitical" character of IFI, whose operations must only be guided by economic considerations. In particular, as it is well-known, article IV –

[282] S.D. KAPLAN, *Fixing fragile States. A New Paradigm for Development*, Wesport (Connecticut), 2008. (See the summary: "Fixing Fragile States", in *Policy Review* nº152 (December 4, 2008), in http://www.hoover.org/publications/policy-review.
[283] Ignoring General Assembly Resolutions 2107(XX) and 2054(XX).
[284] M. SSENYONJO: *Economic, Social and Cultural Rights in International Law*, Oxford-Portland 2009, Hart Publishing, pp. 128-129.
[285] *Ibíd.*, p. 134.

Section 10 of the IBRD Agreement explicitly prohibits "political activity"[286]. The legal framework of the WB has evolved or, rather, its interpretation, especially since the Presidency of Wolfensohn. As shown by Roberto Dañino, former Senior Vice President and General Counsel of the WB, the "concept of political interference in the context of human rights has also evolved"[287]: the WB's poverty alleviation and development objectives can be legally articulated in terms of human rights, in line with the MDGs, and consistently with art. 31 of the Vienna Convention on the Law of Treaties. Besides, a country's poor human rights record might also be read as a "financial risk", according to which the WB has to decide its loans. This work concluded that a distinction still had to be made between economic and social rights and civil and political rights, considering the latter outside the competencies of the World Bank.

It can be argued that there was a historic over-dependence on the President's personal capacity to conciliate conflicting interests[288]: in 1958, when holders of bonds issued by Tokyo and the city agreed to request the President a plan; a year later in relation to some goods confiscated by the British forces after their intervention in Egypt in 1956. This was also true in controversies dealing with nationalisations: the power sector in Egypt (1965) or some mining facilities nationalised in 1968 by the then Zaire (today DR Congo). The good offices of the President were not limited to private-public controversies; he also mediated in inter-State conflicts such as that between India and Pakistan leading to 1960 treaty on the Indus River and its exploitation.

But it was urgent to find solutions less dependent on the "good offices" of the President of the WB. The final trigger for the evolution of WB policies was Sardar Sarovar Project in India (Narmada Project), a dam including water supply and drainage facilities that could, on the one hand, significantly improve the population's access to water and

[286] "The Bank and its officers shall not interfere in the political affairs of any member; nor shall they be influenced in their decisions by the political character of the member or members concerned. Only economic considerations shall be relevant to their decisions, and these considerations shall be weighed impartially in order to achieve the purposes stated in Article I".

[287] Internal human rights violations are no longer legitimate expressions of sovereignty out of international scrutiny: "sovereignty is no longer an absolute shield against scrutiny of States". R. DAÑINO: "The Legal Aspects of the World Bank's Work on Human Rights: Some Preliminary Thoughts", in P. ALSTON and M. ROBINSON (Eds.): *Human Rights and Development: Towards a Mutual Reinforcement*, Oxford 2004, Oxford University Press, pp. 509-524, at pp. 519-520.

[288] The following precedents are explained by Dr. Andrés Rigo Sureda, former Deputy General Legal Counsel of the World Bank at: A. RIGO SUREDA: "El Banco Mundial y los Bancos Regionales de Desarrollo", in *Curso de Derecho Internacional XXVII*, Inter-American Juridical Committee of the Organization of American States, 2001, pp. 595-655, p. 634. We wish to express our gratitude to Mr. Rigo Sureda for his kind help and support.

sanitation and the right to food (enabling better irrigation systems) in line with article 11 of the ICESCR; but on the other hand, it raised serious allegations of human rights violations, in particular, damages to the environment and forced evictions. It was the first time that the WB fell compelled to create an *ad hoc* group of experts (the *Morse Commission*) to address this problematic situation; this case therefore constitutes the direct precedent of the WB Inspection Panel, finally created in 1993[289].

The progressive understanding of the WB's Articles of Agreement has opened the door to non-investment issues to support economic development, in particular through informal interpretations that maintain a certain level of flexibility[290]. The practical materialisation of this evolution came, as said before, with the Inspection Panel, operative since 1994. With its quasi-judicial or arbitral function, the Panel allows individuals (at least two, or more, comprising their representatives or NGOs) to seek remedies if they consider that their interests or they themselves have been or could be adversely impacted, direct or indirectly, because of a project (partly) financed by the World Bank (IBRD and IDA)[291]. The procedure starts only if the Panel considers that the request is not manifestly unfounded. In reasonable, the President of the Panel informs the President of the WB and the Administration has 21 days to explain if the loan has followed the Operating Procedures and if problems have already been addressed. If this answer is considered unsatisfactory by the Panel, it can formally request the Board of Directors the opening of a proper inquiry. Once authorised, the President of the Inspection Panel appoints the inquirer/s (an "Investigation Team") to undertake such review, interviewing staff members and even conducting country visits (which need to be authorised by the host State). Finally, the panel adopts an investigation report with its recommendations. This report is sent to the Board and to the concerned management departments, which have six additional weeks to exercise their right of reply (the so-called "Management Report and Recommendation in Response to the Inspection Panel Investigation Report"). Afterwards, the Board of Directors and the President of the WB re-examine the whole question and adopt a final

[289] *Ibíd.*, pp. 641-642. Also see: D. FREESTONE (Ed.): *The World Bank and sustainable development. Legal Essays*, Leiden-Boston 2013, Brill-Nijhoff, pp.16-20.

[290] A. RIGO SUREDA: "Arbitraje de inversión y desarrollo económico. La relación con el Banco Mundial", in *Arbitraje. Revista de Arbitraje comercial y de inversiones*, Vol. III No. 2 (2010), pp. 357-375, at pp. 371-374.

[291] Though rare, an Executive Director, or the Board acting as such, can also initiate an inspection procedure. The Inspection Panel is constituted by three individuals from different nationalities for a non-renewable five years term.

decision on the merits and the recommendations.[292] Requesters are informed within two weeks after the Board's meeting, including the public disclosure of the main documents.

In all phases, the borrowing or guaranteeing country is informed and updated, while the Board can promptly adopt decisions on the subject matter without waiting to the end of the Panel's investigation or reports, allowing a greater flexibility in terms of rapid response and effectiveness to ensure compliance with the Bank's Operating Procedures[293]. It can obviously be criticised that, from the very beginning, the Panel needs the authorisation of the Board of Directors to effectively initiate an investigation, and that the Board will also have the last word as to the eventual measures to be taken. Moreover, since it is not a proper jurisdictional organ, the legal value of the decisions is in doubt, the operations are not suspended just because an investigation is under examination and requests are rejected if more than 95% of the loan has already been disbursed.

Against this background, we shall recall however its originality and autonomy: for the first time, an international financial institution creates an *ad hoc* but permanent subsidiary organ at the highest level of the organisation, reporting directly to the Board, with a strong institutional margin of manoeuvre to engage with all parties concerned, thus bypassing technical barriers in terms of extraterritoriality and legal personality of such parties (individuals, NGOs, TNCs in cases of guaranteeing countries or States themselves as direct Borrowers and local companies). On the substance, the practice of the Panel shows a progressive openness to general principles of IL, especially in the interaction between international economic law and environmental protection, human rights (indigenous peoples, minority rights, health, and labour law), poverty and sustainable development, generating a sort of "osmosis"[294] between the law applicable by the Panel and those other fields. The institutionalisation of the Inspection Panel has undoubtedly marked the evolution of the WB lending policies since 1994, moving from literal – historicist to more finalistic – systematic interpretations of the founding

[292] For a clear summary of these three phases, see: A. VITERBO: "Fondo Monetario Internazionale e Banca Mondiale", in A. COMBA (a cura di): *Neoliberismo Internazionale e Global Economic Governance. Sviluppi Istituzionali e nuovi strumenti*, Torino 2008, G. Giappichelli Ed., pp. 189-244, at pp. 234-236.

[293] The latest revision of the Inspection Panel's Operating Procedures date April 2014 and are available at: www.inspectionpanel.org.

[294] F. SEATZU: *Il Panel di Ispezione della Banca Mondiale. Contributo allo Studio della Funzione di Controllo nelle Banche Internazionali di Sviluppo*, Torino 2008, G. Giappichelli Ed., pp. 316-317.

agreements[295]. At the same time, this has inspired other IFI: in 2001 the IMF instituted the Independent Evaluation Office. At a regional level, only the Inter-American Development Bank and the Asian Development Bank have similar accountability mechanisms for the moment, which constitutes a minority of IFI.

The private arm of the WB, the IFC and MIGA established in 1999 the Office of the Compliance Advisor/Ombudsman (CAO), whose 2007' operational guidelines recognise as authoritative legal sources the environmental and social requirements "including international legal obligations" within the audit criteria[296], perhaps implicitly including soft law instruments since it ambiguously distinguishes between "legal and regulatory requirements". In the current CAO's Operational Guidelines (2013) those 'audit criteria' have mutated into "compliance investigation criteria"[297], a little harsher, while an express mention of 'business and human rights'[298] issues is added. The IFC Policy on Environmental and Social Sustainability establishes a set of eight performance standards, which directly refer to diverse ESCR[299], inasmuch the "IFC recognises the responsibility of business to respect human rights independently of States duties"[300], thus confirming correlative private duties as we exposed in the first chapter. Naturally, at the end it is "the responsibility of the client", but the IFC commits to do everything in its power to foster due diligence, in line with its own standards but interestingly including "other internationally recognized sources"[301]. One cannot deny the potential influence of the IFC over the international financial sector.

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[295] *Ibíd.*, pp. 312-313.

[296] "Audit criteria may have their origin, or arise from the environmental and social assessments or plans, host country legal and regulatory requirements (including international legal obligations), and the environmental, social, health or safety provisions of the World Bank Group, IFC/MIGA, or other conditions for IFC/MIGA involvement". IFC/MIGA: *CAO Operational Guidelines*, Washington 2007, para 3.2 (at p. 21), available at www.cao-ombudsman.org.

[297] IFC/MIGA: *CAO Operational Guidelines*, Washington 2013, para. 4.3 (at p. 23).

[298] "This includes impacts related to business and human rights in the context of IFC Policy and Performance Standards on Environmental and Social Accountability", *ibid.*, para. 1.1 (at p. 4).

[299] IFC performance standards are: 1) Assessment and Management of Environmental and Social Risks and Impacts; 2) Labor and Working Conditions; 3) Resource efficiency and pollution prevention; 4) Community Health, safety and security; 5) Land acquisition and involuntary resettlement; 6) Biodiversity conservation and sustainable management of living natural resources; 7) Indigenous peoples; 8) Cultural Heritage. IFC: *Policy on Environmental and Social Sustainability*, Washington January 2012, para. 5 (at pp. 1-2).

[300] This includes the International Bill of Human Rights and the eight core ILO Conventions. *Ibíd.*, para. 12 ( at p. 3).

[301] According to the IFC, environmental and social due diligence typically includes the following key components: i) reviewing all available information, records and documentation related to the environmental and social risks and impacts of the business activity; ii) concluding site inspections and interviews of client personnel and relevant stakeholders, where appropriate; iii)analysing the business activity's environmental and social performance in relation to the requirements of the Performance

It is evident that the World Bank Group has ended up assuming that, institutionally, it can play a positive role to pressure both governments and transnational companies to pressurise them to respect environmental and social rights, particularly dealing with their preventive – procedural dimension within investment operations (mainly, access to information and consultation, more importantly in cases of needed resettlements of populations or if indigenous peoples are involved). The WB Inspection Panel has received 104 cases until 2015, only 34 of these were admitted to the next stage (actual investigation) by the Board of Directors; in five cases, the Panel recommended to undertake the investigation but the Board of Directors did not authorise it. Most complaints come from Africa (31%) followed by the LAC Region (26%) and South Asia (22%)[302].

In summary, the institutional strategy of the WB was translated into two secondary objectives: in the first place, it was important to clarify and 'grease' the relationship between general international law and investment law, before analysing the place of internationally recognised human rights and the eventual responsibility of the WB or IFI in particular projects. This was done thanks to a progressive interpretation of the articles of agreement. The WB leads the way[303] but the numbers show there is still a long way to walk. Lest we forget the vital role of States in their governing capacity of IOs. The attention paid to the direct responsibility of the WB as a lending institution is, very probably, "disproportionate" [304]: legally speaking, the direct responsibility is more likely to fall on recipient States; substantively speaking, problems touch the WB only indirectly and institutionally. Financial institutions can play a role but, as member-driven organisations, it is equally important to raise Member-States awareness of these problems. In other words, the WB *institutional responsibility* has evolved in the

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standards and provisions of the World Bank Group Environmental Health and Safety Guidelines or other internationally recognized sources, as appropriate; and iv) identifying any gaps therewith, and corresponding additional measures and actions beyond those identified by the client's in-place management practices". *Ibíd.*, para. 28 (at p. 6).

[302] Statistical data available at www.inspectionpanel.org.

[303] The World Bank has currently undertaken a revision and update of its Environmental and Social Framework. The Second Draft for consultation, issued on 1st July 2015, is now under discussion and incorporate a strong emphasis on sustainable development. Available at http://consultations.worldbank.org/consultation/review-and-update-world-bank-safeguard-policies

[304] Says Pasquale De Sena: "Senza escludere la poblematica della risponsabilità diretta di tali organizzazioni, [...] l'attenzione usualmente dedicata ad essa è, con ogni probabilità, sproporzionata". This author further explains: "l'ipotesi della responsabilità degli Stati membri [...] possiede, perlomeno in astratto, una consistenza giuridica maggiore, rispetto a quella della loro diretta resposabilità *[delle organizzazioni internazzionali]*" P. DE SENA: "Fondo Monetario Internazionale, Banca Mondiale e Rispetto dei Diritti Dell'Uomo", in A. LIGUSTRO and G. SACERDOTI: *op. cit.*, pp. 829-858, at pp. 831 and 845.

direction of forcing or increasing Member States *substantive responsibility*, especially recipient States (as direct Borrowers or as Guaranteeing countries). Ultimately, the Panel can be described as an instrument to put pressure on recipient States, rather than on the Bank's administration[305], to comply with certain non-investment-related minimum standards. In any case, this evolution has clearly moved from mere "good offices" (a phone call in the Chadian case) to more predictable and better guarantees (the Inspection Panel).

*BITs, investment contracts, the ICSID and the place of human rights*

Having said this, the World Bank or regional banks are not the only financial investors for States. In reality, nearly 75% of world investments are actually financed by private institutions: banks and credit agencies to exports and investments. Business-lead initiatives have followed a very different approach and, as mentioned elsewhere in this work, companies were more concerned with corruption, the environment and social abuses in response to new societal expectations they were starting the detect in the markets. In this line, the Equator Principles, launched in 2003 under the auspices of the WB-IFC jointly with private banking houses, constitute the key code for the banking sector. Entities and institutions that voluntarily declare their adherence to this soft law instrument assume thereby their commitment to fostering sustainable investments and to take into account social risks when financing a project. The Equator Principles were followed by the UN Principles for Responsible Investment, another private-led code established in 2006 further to the initiative of the UN Global Compact and the UNEP Finance Initiative. Both the Equator Principles and the UNPRI constitute private-led initiatives to foster soft instruments that reassemble public and private financial institutions around some ethical standards and goals before green-lighting projects. The Equator Principles have been adopted by 81 financial institutions from 36 countries covering "over 70% of international Project Finance debt in emerging markets"[306]. In theory, projects without an adequate social and environmental impact assessment would be deprived of their financial support. The UNPRI defends six environmental and social

[305] "El Grupo puede aparecer en tales condiciones como un vehículo de presión –y hasta de presión política- sobre los países prestatarios, más que sobre la administración del Banco." A. RIGO SUREDA: *op. cit.*, p. 644.
[306] See www.equator-principles.com

principles, plus 35 proposed actions in connection to these, voluntarily accepted by 1380 signatories (asset owners, investment managers and service providers), which control $59 trillion in assets[307].

These key steps were applauded by the private sector although the real problem is to put flesh on the bones of notions such as "social impact", while controlling the effective implementation of these objectives. During the 2005 revision of the Equator Principles, the mention to social impact was legally reoriented to the respect of international treaties and covenants adopted by States. We are therefore lucky if the State has ratified the main international human rights treaties (not always the case). Despite obvious critics concerning their legal value and actual effectiveness, there are two positive aspects: it introduces "process standards" within corporate behaviour and it increasingly considers its consistency and cross-fertilisation with internationally recognised human rights law. In other words, their contribution is mainly "cultural", "normalising the consideration of social and environmental factors in corporate decision-making in the investment sector and, in this sense, it is contributing to the development of international CSR norms for financiers and investors"[308].

Leaving aside the private sector initiatives, globalisation has led to a second problem: when States make bilateral treaties or conclude contracts, they place themselves under the obligation to protect foreign investors in front of non-economic risks, and do not usually include responsibilities for investors as a counter-balance, for example, in terms of human rights. Bilateralism still dominates the regulation of international investments at a global level and international organisations might claim more room to make recommendations[309]. When an investor, for example, acts against an individual or collective right within the territory where the investment takes place, the bilateral agreement does not foresee any kind of sanction to the investor or the possibility of compensating the victim for the alleged damage. And if the State's legislation does

[307] See www.unpri.org

[308] K. MILES: "Soft law instruments in environmental law: models for international investment law?", in A.K. BJORKLUND and A. REINISCH: *International Investment Law and Soft Law*, Cheltenham 2012, Edward Elgar Publishing Ltd., pp. 82-108, at pp. 103-105 (on the UNPRI and Equator Principles), and p. 104 (citation).

[309] I. GARCÍA RODRÍGUEZ (†): *La protección de las inversiones exteriores: los acuerdos de promoción y protección recíproca de inversiones celebrados por España*, Valencia 2005, Tirant Ed., pp. 423-424.

envisage the situation or simply does not apply the legislation and turns a blind eye to problems, investor's impunity can be almost absolute.

In contrast, such bilateral texts allow the investor to solve potential controversies with the State directly through an international commercial arbitration, without exhausting internal remedies and excluding diplomatic protection. The investment protection system therefore creates an autonomous regime of States' responsibility, tendentiously escaping or outgoing the general norms of international law[310]. This way, Sates find themselves involved in important controversies showing the tension between the necessary protection of investments with its particular regime and the respect for human rights. This tension usually emerges when dealing with privatisations of basic services such as drinkable water in developing countries, power supply, and highways construction, to cite only some of them.

When a bilateral investments' treaty is applicable, we expect States' due diligence to ensure the protection of such foreign investments. Sometimes, it seems difficult to explain some States initiatives against concrete investors (mainly, nationalisations), except in clear cases of "general interest" or what is called the "parameters inherent in a democratic State".

The problem is that, when determining the applicable law to dispute settlements between States and investors, the parties do not usually consider the application of international human rights law, not even States themselves when making investment contracts. Nor is it done in bilateral treaties when, in the absence of choice by the parties, the applicable law in a dispute based on a bilateral investment treaty is the law of the receiving State as well as principles and norms of International Law. Only this reference to IL, frequently vague and minimal[311], could be linked to international human rights law or, for instance, clarify the obligations of the receiving State.

This is the reason why the *first question* is the place of general international law within investment law, *before* wondering whether there is room for human rights or not. Some

[310] J.A. VIVES CHILLIDA*: El Centro Internacional de Arreglo de Diferencias Relativas a Inversiones (ICSID)*, Madrid 1998, McGraw Hill, pp. 1-12. In the Spanish legal doctrine see, in general: A.L. CALVO CARAVACA and L.F. De la GÁNDARA: *El arbitraje comercial internacional*, Madrid 1989, Tecnos Ed.
[311] I. GARCÍA RODRÍGUEZ: *op. cit.*, pp. 405-408.

arbitration awards show open possibilities to introduce public international law principles in investment disputes and, indirectly, core human rights principles.

In principle, general international law is never excluded in dispute settlements. The problem starts with the interpretation of article 42(1) of the ICSID Convention, the first sentence of which states that "the tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties", while the second sentence adds that "in the absence of such agreement, the Tribunal shall apply the law of the Contracting State party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable". Does this mean that general international law is *only* applicable in the absence of such a choice of law by the Parties? Or only in cases of *lacunae* or contradictions with domestic legislation? Is it then necessary to demonstrate that the parties have failed to choose the applicable law in order to obtain recourse to International Law? And in case of choice of law, is it then absolutely necessary to shame domestic systems and show inconsistencies and lacunae in order to open the way for public international law? Public international law hasn't any role outside these strict requirements? The only possibility to use public international law is the second sentence of art. 42(1)? Is it otherwise *excluded*?

When there is a choice of applicable law, the Tribunal has sometimes decided that there is no reason to 'go further' and that a very restricted role of IL may be enough, only for corrective or supplementary purposes. This is the stance in *AUCOVEN vs. Venezuela*, when the contract at stake was easily isolated upholding 'self-contained regimes' theories[312]. It is clear that the tribunal did not feel obliged by the previous and more liberal award, *Wena vs. Egypt*, where the *ad hoc* committee accepted that both domestic law and international law could be simultaneously applied: "The law of host State can indeed be applied in conjunction with international law if this is justified. So too international law can be applied by itself if the appropriate rule is found in this other

[312] "The role of international law in the ICSID practice is not entirely clear. It is certainly well settled that international law may fill lacunae when national law lacks of rules on certain issues (so called complementary function). It is also established that it may correct the result of the application of national law when the latter violates international law (corrective function). *[…]* Does the role of international law extend beyond these functions? The recent decision of the ICSID *Ad hoc* Committee in Wena Hotelts Ltd. Vs. Arab Republic of Egypt accepts the possibility of a broad approach to the role of international law, and that the arbitral tribunal has a "certain margin and power of interpretation"*[…]* Whatever the extent of international law plays under article 42(2) (second sentence), this Tribunal believes that there is no reason in this case, considering especially that it is a contract and not a treaty arbitration, to go beyond the corrective and supplemental functions of international law", at ICSID: *AUCOVEN vs. Bolivarian Republic of Venezuela*, Award of 23 September 2003, Case No. ARB/00/5, para. 102.

ambit"[313]. But in *Wena*, the tribunal had already stated that the parties hadn't made a "choice of law under the first sentence of Article 42(1)"[314], and this circumstance facilitated that broad margin of interpretation to include IL.

It seems difficult to understand why the first sentence of article 42(1) would exclude general international law, when appropriate. It looks like legal juggling the requirement to place ourselves in the context of the second sentence –art. 42(1), before allowing the use of international law: nor the first nor the second sentence should, in principle, exclude international law. In support of this reasoning, the tribunal has clarified that both international law and domestic law are applicable jointly: "international law is fully applicable and to classify its role as 'only' 'supplemental and corrective' seems a distinction without a difference"[315], therefore rejecting a simplistic and reductionist approach to international law.

Interestingly, in *AAPL vs. Sri Lanka*, the tribunal made an unprecedented effort of systematisation of the ICSID case-law: a unique proposal of rules of interpretation, according to which **"***[i]*n addition to the 'integral context' *[of the treaty or contract]*, 'object and intent', 'spirit', 'objectives', 'comprehensive construction of the treaty as a whole', recourse to the rules and principles of IL has to be considered a necessary factor providing guidance within the process of treaty interpretation", and "establishing the practice followed through comparative law survey of all relevant precedents becomes an extremely useful tool to provide an authoritative interpretation"[316].

In light of this, there are no contracts without law, nor contracts overruling legal systems: in *AAPL*, the company maintained that Sri Lanka had failed to protect the investment since "the Parties *[to the BIT]* substituted the 'due diligence' standard of general international law by a new obligation creating an obligation to achieve a result ('obligation de résultat'), providing the foreign investor a sort of 'insurance' against the risk of having his investment destroyed under whatever circumstances"[317]. But the

[313] ICSID: *Wena Hotels Ltd. vs. Arab Republic of Egypt*, Annulment Proceeding, Decision of 5 February 2002, Case No. ARB/98/4, para. 40.
[314] *Ibíd.*, para. 36.
[315] ICSID: *Amco vs. Indonesia*, Resubmitted Case, Award of 5 June 1990, Case No. ARB/81/1, para. 40.
[316] ICSID: *AAPL vs. Republic of Sri Lanka*, Final Award of 27 June 1990, Case No. ARB/87/3, para. 40 (« rules D and E »).
[317] *Ibíd.*, para. 45.

tribunal finds that applicable law is a "false problem"[318] and that a BITs interpretation that implies a higher exigency of due diligence against Sri Lanka is inconsistent with general international law, since it disregarded the fact that "rules of international law have to be taken into consideration by necessary implication, and not be deemed totally excluded as alleged by the Claimant"[319] –here is also the limit of the prevalence of any *lex specialis*. So it seems that general international law is not excluded in none of the two sentences of article 42(1) of the ICSID Convention, provided the situation sufficiently justifies it.

*SPP vs. Egypt* constitutes a milestone in the ICSID jurisprudence. First of all, it confirmed the above considerations on a broader role for International Law, well above the traditional supplemental and corrective functions. It was ruled that the arbitral committee can make a reference to International Law and thus change the effects of the Parties' choice of law, if necessary. This is the case even when such a choice of law is clear, in order to avoid a violation of IL by the "exclusive application of municipal law"[320]. In effect, nobody can ignore that the autonomous and isolated recourse to the law designated by the parties as applicable, at end of the day, can be in conflict with International Law, and not necessarily because internal legislation is 'incomplete' or 'incorrect', but simply because an isolated application –by itself– can produce unlawful results.

*SPP vs. Egypt* is also important because it allows us to address our second question, the place of human rights. This case concerns the annulment and expropriation of a tourism investment project following to the discovery of archaeologic remains –it was baptized "the pyramids case". The company, Southern Pacific Properties, led a joint venture, which had already initiated the works by July 1977. After the discovery at the end of that year, public opposition increased against the project and pushed for a legislative change to protect cultural rights (art. 15 ICESCR) and, specifically, cultural heritage in line with the UNESCO Convention for the Protection of the World Cultural and Natural Heritage, which entered into force in Egypt in December 1975. In 1979, at the initiative

[318] *Ibíd.*, para. 24.
[319] *Ibíd.*, para. 52.
[320] That situation would betray the spirit of the Washington Convention: "When municipal law contains a lacunae, or international law is violated by the exclusive application of municipal law, the Tribunal is bound in accordance with Article 42 of the Washington Convention to apply directly the relevant principles and rules of international law. As explained by one of the author of the Washington Convention *[…]*". ICSID: *SPP vs. Arab Republic of Egypt*, Award on the merits, Case No. ARB/84/3, para. 84.

of Egypt, the UNESCO Committee was requested to inscribe the Pyramids plateau as World Heritage Site, implying the maximum protection. According to the arbitral tribunal, the obligation to compensate an expropriation remains: the expropriation is considered legal under International Law and "an unquestionable attribute of sovereignty"[321]. The obligation to pay an adequate "compensation for a lawful expropriation" is not the same as a "reparation for an injury caused by an illegal act such as a breach of contract"[322]. Of course, the lawfulness of Egypt's action does not diminish the expropriatory nature of the measure imposed, and to expect anything else is just unrealistic. But the role of the UNESCO Convention is also important when calculating the adequate compensation: first of all, it is precisely limited to a "compensation" and does not include any "reparation" since it was a lawful expropriation; and secondly, given that no reparation is foreseen, the arbitral tribunal decides that the investors are not entitled to any *lucrum cessans* after the date of the entry into force of the UNESCO Convention (1979)[323] –a by no means negligible economic saving for the State[324].

We must be cautious and realistic: in *CDSE vs. Costa Rica*, the principle by which any expropriation is subject to *compensation* was confirmed, "no matter how laudable and beneficial to society as a whole *[…]* even for environmental purposes"[325] –in that case, to protect biodiversity. Only in case of unlawfulness of the measure, the investor would further be entitled to *reparations* and *lucrum cessans*. The "international source of the obligation to protect the environment"[326] (we might add, human rights in general) does not always make a difference: it is also a problem of legal certainty with regard to guarantee private property and protect foreign investors, so as to promote States' awareness of their own responsibilities and commitments before concluding contracts and accepting investments.

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[321] In other words, a "lawful exercise of the right of eminent domain", *ibíd.*, para. 158.
[322] *Ibíd.*, para. 183.
[323] The tribunal "could only award *lucrum cessans* until 1979, when the obligations resulting from the UNESCO Convention with respect to the Pyramids Plateau became binding on the Respondent. From that date forward, the Claimant's activities would have been in conflict with the Convention and therefore in violation of international law, and any profits that might have resulted from such activities are consequently non-compensable". *Ibíd.*, para. 191.
[324] For a detailed and systematic study, perhaps more optimistic than us, on the place of cultural heritage in international investment law see: V. VADI: *Cultural Heritage in International Investment Law*, Cambridge 2014, Cambridge University Press, *passim*.
[325] ICSID: *CDSE vs. The Republic of Costa Rica*, Final Award of 17 February 2000, Case No. ARB/96/1, para. 72.
[326] *Ibíd.*, para. 71.

Regarding contracts and investments, States must conduct their own studies before committing themselves to new obligations. In *Metalclad vs. Mexico,* also touching on environmental issues but under NAFTA, a company incorporated in the USA had obtained a Mexican federal authorisation to build an hazardous waste transfer station and landfill in the valley of La Pedrera (Guadalcazar –Mexico), but the local authorities refused to issue the final building authorisation for environmental reasons. The arbitral tribunal logically considers that Metalclad "was led to believe, and did believe, that the federal and state permits allowed for the construction and operation of the landfill"[327] and the company "was merely acting prudently and in the full expectation that the permit would be granted"[328]. Again, human rights are not a trumpery excuse for States' internal administrative chaos and lack of legal certainty.

In sum, our discussion on the place of public international law and, subsidiarily, of human rights law, in relation to investment law, is not intended to demonstrate that IHRL and investment protection are "interdependent" –the ICSID already ruled they are not[329], but to show that international investments have to be *contextualised* and *integrated* into general international law as a whole, which is a less audacious approach with a sounder legal footing.

Indeed, the political discourse under which human rights obligations need to be prioritised over investment protection constitutes a dialectic trap without fundament in many cases, used by some States as a shortcut to wash their image and bypass internal inconsistencies. In our view, this kind of reasoning will probably be unacceptable for an arbitral tribunal in almost *any* situation, not even in the case of a developing country. For example, in *Klöckner vs. Cameroon I*, the award established that the company had failed to duly inform the State of the changing economic scenario in 1973, which would render the industrial investment unprofitable. The corporation therefore breached its obligation of full disclosure between partners, so the compensation would be limited to

[327] ICSID : *METALCLAD CORPORATION vs The United Mexican States*, Award of 30 August 2000, Case No. ARB(AF)/97/1, para. 85.
[328] *Ibíd.*, para. 89.
[329] In *Borders Timbers Limited et al. vs. The Republic of Zimbabwe*, the tribunal was reluctant to the claimants assertion that IHRL has a central role in arbitration proceedings, and the tribunal argumentation proves it is very difficult to provide "evidence" to "support *[…]* that international investment law and international human rights law are interdependent such that any decision of these Arbitral Tribunals which did not consider the content of international human rights norms would be legally incomplete". ICSID: *Borders Timbers Limited et al. vs. The Republic of Zimbabwe*, Procedural Order No. 2 of 26 June 2012, Case No. ARB/10/25, para. 58.

the facilities already built and in use. However, as a commentator points out, the tribunal took care not to leave the door opened to the 'right to development'[330]: obviously, one can ask if Cameroon wasn't also able to learn on its own the worsening of the economic scenario by 1973, if it is enough to be a developing country to allege that the States' capacities are reduced (in terms of access to financial advice and information). However, the award took a rather classic stand: the contractual relationship between Klöckner and Cameroon apparently implied that the company was responsible for *all* the phases of the project, from information and financial perspectives, to proper works. The failure to disclose all available information to a partner, including a *damnun emergens*, was sufficient to demonstrate a lack of "good faith" on the company's side, avoiding the debate on Cameroon's ability to detect on his own the economic crisis of 1973.

Our "integrationist perspective"[331] of investment law within general international law shouldn't be understood as challenging the specificity of arbitral rulings, whose centre will remain commercial matters. Human rights can play a role in investment arbitration, but States' powers to protect alleged public interests are not a *passe-partout*: IL does not allow States to disregard *any* of its international obligation; they are "subject to both international obligations, *i.e.* human rights and treaty obligations, and must respect both of them equally"[332]. With regard to water and sanitation, an ICSID tribunal has clarified this problem:

> *« En réalité, les droits de l'homme en général, et le droit à l'eau en particulier, constituent l'une des diverses sources que le Tribunal devra prendre en compte pour résoudre le différend car ces droits sont élevés au sein du système juridique argentin au rang de droits constitutionnels, et, de plus, ils font partie des principes généraux du droit international. […] Mais ces prérogatives sont compatibles avec les droits des investisseurs à recevoir la protection offerte par l'APRI. […] Mais l'exercice de ces pouvoirs ne se fait pas de façon absolue et doit, au contraire, être conjugué avec le respect des droits et des garanties octroyés à l'investisseur étranger en vertu de l'APRI […]*

[330] E. GAILLARD : *La jurisprudence du CIRDI*, Paris 2004, Ed. A Pedone, pp. 133-134.
[331] R.A. LORZ: "Fragmentation, consolidation and the future relationship between international investment law and general international law", in F. BAETENS (Ed.): *Investment Law within International Law. Integrationist Perspectives*, Cambridge 2013, Cambridge University Press, pp. 482-493.
[332] ICSID: *Suez, Sociedad General de Aguas de Barcelona SA and Vivendi Universal SA vs. The Argentine Republic*, Decision on liability of 30 July 2010, Case No. ARB/03/19, para. 262.

*Contrebalancer ces deux principes sera la tâche que le Tribunal devra effectuer lors de son analyse des prétentions substantives […] ».*[333]

In the context of the serious Argentinian debt crisis in 2001 and 2002, which led to a '*corralito*' (bank freeze), it has been argued that the 'state of necessity' (a situation of economic emergency) justified the State's failure to satisfy the rights of international holders of sovereign bonds. This led to a variety of arbitral awards with mixed results depending on the BIT applicable; in *Impregilo*, many authors regret that the arbitrators considered that Argentina itself had contributed to the financial crisis and that there was no justification to recur to 'state of necessity' allegations, on which it is said that too strict criteria were established[334]. But one may ask if we really think that Argentina did not contribute to the worsening of the financial situation –if not to its origin, starting with inadequate currency policies, like the creation of a new currency (the *austral*) in 1983, which required new loans and inflated public debt, alarmingly increasing inflation rates, not to mention widespread corruption. The major lesson learnt from that crisis is that exception clauses, comprising non-precluded measures (for economic or whatsoever reasons), could be added to BITs so as to face economic emergencies while overcoming the unfortunate lack of a treaty or articles adopted on States' responsibility, which would have probably clarified the notion of 'state of necessity' as in the project of the ILC.

In any case, it has been said that such exception clauses can be interpreted as a *lex specialis* that somehow annuls the stricter requirements of customary international law to effectively put forward a state of necessity[335]; however, we think this consists of playing the game of those interested in the fragmentation of IL. The real *lex specialis* is the bilateral treaty and not a clause within it. It would be wiser to argue that such an exception clause is, as its very name indicates, an exception to the BIT, which is the real *lex specialis*. In this way, the proper *lex specialis* –the BIT, incorporates an exception clause aimed at reintroducing general international law into the BIT (like the state of necessity). If human rights clauses or general exception clauses are added to new

[333] ICSID: *SAUR International S.A. vs. Argentine Republic*, Decision on Jurisdiction and Liability of 6 June 2012, Case No. ARB/04/4, para. 330-332 (original versions only in French and Spanish).

[334] See, for example: I. IRURETAGOIENA AGIRREZABALAGA: "Protección de inversor extranjero *versus* salvaguardia de intereses esenciales del estado en contextos de crisis económica, financiera y social", in F.J. QUEL LÓPEZ and M.D. BOLLO AROCENA: *Intereses públicos, intereses privados, su defensa y colisión en el Derecho Internacional*, pp. 63-97, at pp. 94-95. Also refer to the bibliography therein.

[335] This would only be so if the clause specifies those (looser) requirements of the state of necessity, which is unlikely to happen given the usually vague language of BITs. *Ibíd.*, p. 93.

generation BITs, it is not to play the game of fragmentation and allege their character of *lex specialis* to ensure their primacy; on the contrary, it is to reflect the relational character of IL and that investment treaties operate within a wider legal context that may include human rights or the state of necessity. Legal doctrine has to adequately interpret those clauses as an open window for general international law and a way to effectively consider the relational character between competing regimes under IL (like investment protection and human rights). Such clauses should not be read in terms of a *lex specialis* within the *lex specialis*. Such clauses can precise and clarify some customary practices in the subject of 'state of necessity' –given that there is room for clarification since the General Assembly did not adopt the ILC draft articles on the responsibility of States. In this sense, States further have the opportunity, through those clauses, to specify and detail –to their liking– a *consuetudine*, without further contributing to the so-called 'self-contained regimes'. In this sense, a spread practice that includes those clauses on human rights and state of necessity can be beneficial in the long term, provided we understand them in line with the relational character of IL.

In any of the previous situations, the compatibility between IHRL and investment protection will naturally depend on the availability of an "alternative that is *[…]* least inconsistent"[336] with the BIT, MIA or Contract at stake. A different approach to the dialectic between investments and human rights will be likely to fail, as well as the misuse of human rights to hide legal uncertainty or to withdraw *ex post* risky investments not duly evaluated in advance. These considerations are essential to assess if "measures are proportional to the public interest presumably protected thereby and to the protection legally granted to investments" [337], as noted in an interesting case where the arbitral tribunal directly cites the ECHR to build this concept of proportionality.

[336] In a case brought to UNCITRAL arbitration under NAFTA, the Committee reached that conclusion when considering the compatibility between the Basel Convention and NAFTA: "Even if the Basel Convention were to have been ratified by the NAFTA Parties, it should not be presumed that Canada would have been able to use it to justify the breach of a specific NAFTA provision because… *where a party has a choice among equally effective and reasonably available alternatives for complying… with a Basel Convention obligations, it is obliged to choose the alternative that is… least inconsistent… with the NAFTA*. If one such alternative were to involve no inconsistency with the Basel Convention, clealy this should be followed" (emphasis in the original). UNCITRAL: *S.D. MYERS Inc. vs. Government of Canada*, Partial Award of 13 November 2000, para. 215.

[337] Again under the NAFTA: ICSID: *Técnicas Medioambientales Tecmed SA vs. Mexico*, Award of 29 May 2003, Case No. ARB(AF)/00/2, para. 122. (Original in Spanish, available at www.icsid.worldbank.org).

Yet States do not always win these cases –sometimes because the arbitral tribunal finds their human rights allegations abusive or elusive of other international obligations, the open possibilities shouldn't be neglected. All these cases constitute an important improvement in the overall because the evolution shows an increasing openness. States will have to make a genuine effort to duly prove their human rights allegations, the proportionality of the measures adopted, the compatibility with investment protection, as required by the above cited jurisprudence. Certainly, it is still not clear to what extent an arbitral tribunal –such as the ICSID– might put into practice this linkage: at first sight, investment headquarters don't seem the place to protect human rights. It doesn't look as if it was a competency of those tribunals. Furthermore, arbitrators are commonly selected amongst lawyers and litigators with sufficient practice in international commercial law, and logically not in public international law. The growing number of ICJ judges that also act as arbitrators (not being incompatible), may change the historical lack of public international law perspectives within investment disputes. However, it is interesting to note that there is nothing stopping one of the parties from proposing a human rights expert as an arbitrator, at least in some cases, obviously jointly with commercial lawyers in the arbitral tribunal. Nevertheless, the language of investment contracts usually lacks of this level of concreteness and specificity.

From a pragmatic approach, a high specialisation in international commercial law is perfectly understandable; the easiest desirable solution could be double: a) to provide arbitrators with a human rights perspective that might complete their assessment of the facts; b) to make sure that the contract includes at least one general reference to "general international law and other international obligations of the State" in line with the usually vague language of these contracts. Historically speaking, international investment law was born to protect investors, who traditionally were the main beneficiaries of arbitration; this has changed and States' legitimate interests are now "protected" in more and more cases[338] and some general interests have found a place, even anti-corruption[339].

[338] « Plus généralement, on a pu assister, au cours des dernières années, à une évolution sensible des rôles, les États n'étant plus systématiquement défendeurs, si ce n'est défaillants, et les principes tel que le respect des conventions ou l'exécution de bonne foi des conventions n'étant plus systématiquement invoqués par les seuls investisseurs. » E. GAILLARD : *op. cit.*, p. 213.

[339] In *Wena vs. Egypt*, the arbitral tribunal accepted that corruption could justify the annulment of a contract: "The first concerns the validity of the leases in connection with an alleged incident of corruption or conflict of interest *[…]* While such improper influence can invalidate the lease agreements under Egyptian law, or for the matter of corruption also under international law, such unlawful act has to be

We don't forget either that arbitrations are conducted in closed sessions, making it difficult to know the comparative importance given to human rights or non-investment issues, and their final weight, except when the arbitral award is explicit and public. It is true that an increasing number of decisions are made public and transparency is wider, since *Metalclad vs. Mexico* (cited above), the first time an *amicus curiae* submission was accepted, which is a consolidated practice by now[340]. Acting more boldly, but less realistically, we could also think of including specific human rights clauses in bilateral investment treaties or some kind of reference to the protection of human rights and its levels of obligations, both for States and investors.

Investment contracts could eventually be revised in order to include a clause by virtue of which the investors accept the obligation to respect international human rights law. However, as we have said above, this is an unlikely event: companies pressure States affirming that specific human rights legislation could decrease the economic growth and the benefits expected from the project. If a State assumes this reasoning, it should be considered to constitute a breach of its responsibility with regards to human rights. To sum up, under the light of public international law, an investment contract should be interpreted in a way that a State action to protect human rights cannot be considered contrary to any investment contract, or impeding its development, and of course would not constitute a reason for the termination of the contract. This does not mean that investors will be left unprotected: we have seen that the open windows for human rights protection do not challenge the essential principles of investment law. Depending on the strength of the public goals pursued by the State, the amount of eventual compensations might vary; and reparations might be excluded, only if States act more responsibly when juggling with their diverse international obligations and their internal problems.

*Conclusion*

There are signs of hope but the work is still incomplete to ensure respect for human rights with reference to international investments. Transparency on the content and scope of the projects being financed is absolutely crucial, as well as the content of

proved". ICSID: *Wena Hotels Ltd. vs. Arab Republic of Egypt*, Annulment Proceeding, Decision of 5 February 2002, Case No. ARB/98/4, para. 47.

[340] E. GAILLARD: *op. cit.*, pp. 618-619.

investment contracts and international agreements –of course, without disseminating confidential issues that can be important for private companies in front of their competitors.

All in all, human rights mainstreaming is an idealistic strategy to include HR within the contractual framework and, even before, during its negotiation. The solution can be both pragmatic and holistic:

-reinforce multilateralism and the role of IOs to offset the negative effects of a mainly bilateral or simply contractual system of regulating international investments[341]. Multilateral *fora* are more likely to promote consistency at an international level, by avoiding undue legal fragmentation, fostering policy transfers and proposing model BITs and MIA together with additional interpretative instruments able to consolidate an *opinio iuris* in favour of consolidating the human rights' transversality.

-means of dispute settlement can be provided with a human rights-based approach when necessary, which is not a threat to the central place of international commercial law, but taking into account that States have concurring international obligations;

-general exceptions clauses could be put in place in model BITs, MIAs or contracts. Bearing in mind the tendency to vagueness or ambiguity in these instruments, a general mention to 'international law principles and other international obligations' could be enough to open some windows, read in conjunction with the Vienna Convention on the Law of Treaties. More specific formulas directly mentioning human rights might be studied (human rights clauses). The spread inclusion of such clauses can have customary effects in the long run and solve the problem of allegedly self-contained regimes.

-in connection to this, further clarification could be made as for the role of general international law, which has been used so far to solve contradictions between IL and domestic law, or to complete the latter when necessary. The use of general international law could be extended to include core internationally recognised human rights principles if necessary. The practice in this regard shows some open windows to be further developed.

[341] Meg Kinnear, Secretary-General of the ICSID, already detects that "*[p]*erhaps the most significant recent trend is the shift from negotiating bilateral treaties to negotiating treaties on a regional basis". M. KINNEAR: "Navigating International Dispute Resolution: Innovation in Investor-State Arbitration", in *Hugo Grotius Conferences –Universidad San Pablo CEU*, Madrid 2013, Ed. Fundación Universidad San Pablo CEU, 33 pp., at pp. 17-18.

-it could finally be envisaged to require that potential concessionary companies (or consortium of companies) have CSR measures and codes of conduct, extended to subcontractors. In parallel, it has to be studied to what extent the existence of codes of conduct, made public and approved at the senior level of TNCs, can have a "contractual value" in the context of a dispute. At least, such a development may not be discarded *ad futuram*, if the international practice continues in the same direction[342].

Many States are developing Corporate Social Responsibility Guidelines and NAPs, conscious that a soft law instrument can contribute to the improvement of their respect for human rights, in the understanding that human rights are a transversal interest within the international society and, if a hard law perspective is finally needed, it should be made available and mainstreamed within the means of dispute settlement without challenging the specificities and central place of commercial matters. More importantly, a current trend shows that more and more States include general non-investment clauses in BITs and MIA: an early precedent is the Netherlands-Costa Rica BIT (1999) expressly "including its laws and regulation on labour and environment", or even in the multilateral Common Market for Eastern and Southern Africa, investments might be subject to environmental and social impact assessments[343]. The spread of these "new generation BITs"[344] would support the consolidation of an international practice in this regard and building a wider *consensus* in the long run. Individuals have the rights to claim against the investing company and access to justice has to be guaranteed, up to the exhaustion of domestic remedies (with the well-known exceptions of unreasonable delays, ineffective or unavailable appeals). Otherwise the equality before the law is seriously undermined and non-discrimination is a general principle that, whether or not

[342] On the eventual contractual relevance of codes of conduct see: C. CRONSTEDT: "Some Legal Dimensions of Corporate Codes of Conduct", in R. MULLERAT: *op. cit.*, pp. 443-460, at pp. 452-455. Being a problem of civil law, it falls beyond the scope of this research.

[343] A comment of both precedents at: C. TIETJE and E. SIPIORSKI: "The evolution of investment protection based on public international law treaties: lessons to be learned", in A.K. BJORKLUND and A. REINISCH (Eds.): *op. cit.*, pp. 192-237, at pp. 233-235.

[344] However, these precedents are still far from widespread. Prof. Attila Tanzi provides some additional examples and precedents in the above-cited case-book, such as the Hungary-Russian Federation BIT (1996, art. 2 referred to "protection of the environment, morality and public health"), US-Uruguay BIT (2006, in which the Preamble states that it must be read "consistent[ly] with the protection of health, safety, and the environment and the promotion of consumer protection and internationally recognised labour rights", as well as art. 12 specifically on the environment), the US Model BIT (Preamble and article 12), article 1114 of NAFTA on the environment, the Japan-Philippines Economic Partnership Agreement Helsinki (2008, in which art. 99 protect "human, animal or plant life or health" –very similarly to WTO exception clauses in GATT agreement, see following section). A. TANZI and F. CRISTANI (Eds.): *International Investment Law and Arbitration. An Introductory Casebook*, Milano 2013, CEDAM Ed., pp. 319-321.

a State has ratified a particular treaty, is considered customary international law. No investment contract may operate outside this frame even though the success or failure of developing these niches of opportunity (for human rights within investment law) will depend on the States' good faith when it comes to put it into practice.

### *2.2.2 Screening the WTO: open windows*

The approach to this subject is recurrently passionate: if it is true that trade is about business and business is about competition and private benefits, we need to acknowledge that it makes sense to promote a trade culture that respects consumers' rights to the extent trade doesn't happen without consumers. As investment contracts are not, by themselves, ontologically opposed to human rights, multilateral trade agreements aren't necessarily a threat to consumers' rights. We face, of course, a number of conflicting interests: States, TNCs, lobbies, media, NGO's and CSO's, individuals and international organisations. There are, also, shared responsibilities. This said, we would falsify the debate if we shift responsibility only towards consumers: it would be impossible for every single consumer to ethically evaluate every product he or she buys before purchasing it. Responsibility is also sitting on the rest of actors.

#### *WTO's institutional role in context*

Trade has suffered substantial changes in the second half of the twentieth century, starting with the rising exchange of intermediate goods instead of final products. Commercial services grow faster and are the biggest part of international trade in a context of constant decline of communication and transportation costs. A more recent change is the growing importance of services –the enablers of global value chains. Comparative advantages are in intermediate goods and not anymore in final products so that countries can specialise in tasks within the framework of a more and more knowledge-based economy[345]. In fact, the so-called global value chains are not chains

[345] The following pages of this manual will provide a good explanation of the types of intra-industrial and inter-industrial specialisation, changing current comparative advantages in relation to global value chains, at: M. CARRERA TROYANO, D. de DIEGO ÁLVAREZ and R. HERNÁNDEZ MARTÍN: "Lección 8. Comercio internacional" in J.A. ALONSO (Dir.): *Lecciones sobre Economía Mundial. Introducción al*

anymore, but networks, generally dominated by three regions (North America, Asia and Europe).

A good example is the study made by Rivoli[346], who has tracked the supply chain of a simple t-shirt, from the cotton grown in Texas, to its manufacture in Shangai, its printing back to the US (logos), and finally placed in the international markets, even sent to Tanzania shredded as furniture padding. We are witness to a highly fragmented production system where supply chains are obscure for most of the consumers; there is almost no person who knows all steps of a product. Decisions are, in turn, distributed in this global network. Another challenge in the internet era is data protection and the acceleration of exchanges, where legislation is still slow to meet consumers' problems. On the other side, we find difficulties for small and medium producers/traders to reach international routes. We also find a number of legal gaps despite the intense international transactions. A recurrent cause of disagreement we should keep in mind is the continued subsidies in OECD countries, especially in the agricultural sector. And finally, we tend to obviate that trade is an easy victim of other political tensions, which are immediately reflected in multilateral fora[347].

Beyond the directly related human rights issues of international trade[348], we can also ask ourselves a more general question: is there a clear link between globalisation and income inequality? Do we find a substantial relationship of cause and effect between trade liberalisation and unemployment, especially during the current economic crisis? Of course, we cannot give a definitive and rigorous response as far as the economists don't agree in this respect. Up to a certain point, economic openness promoted by the WTO can increase income inequality to the extent networks and conditions need to be developed to participate in and benefit from global markets. On-going adjustments are more or less painful, even in the OECD countries, depending on their level of previous preparation to markets instability through consistent and proficient public policies.

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*Desarrollo y a las relaciones económicas internacionales*, Madrid 2013, Ed. Civitas, pp. 239-270, at pp. 252-260.

[346] P. RIVOLI: *The Traves of a T-Shirt in the Global Economy. An Economist Examines the Markets, Power and Politics of World Trade*, Hoboken-New Jersey 2009, John Wiley & Sons Inc., *passim*.

[347] An insight on the current challenges of trade: P. LOVE and R. LATTIMORE: *International Trade: Free, Fair and Open?*, Paris 2009, OECD Insights.

[348] A comprehensive summary: OHCHR: *Les droits de l'homme et les accords commerciaux internationaux. Utilisation des clauses d'exception générale pour la protection des droits de l'homme*, New-York-Geneva 2005, Nations Unies.

It goes without saying that trade liberalisation has a potential for growth and development but is insufficient to make widely available the benefits from global value chains: "*[n]*ot all countries, firms and workers are equally prepared for the adjustments associated with more integrated markets"[349]. There are always particularities that make different the situation from a country to another; nevertheless, it is strongly advisable to maintain a sustained investment in education, skills and training, combined with social protection systems (regardless of the chosen formula) and comprehensive labour policies. These policies soften the adjustments to markets volatility and make it easier to prepare the country's workforce to changing supply-demand dynamics.

A nuanced discussion would recognize the possibilities of trade to generate growth and development, but would point out that the benefits of increasing trade are unequally distributed so that complementary policies are needed to accompany trade liberalisation towards a more equitable international order. Sustainable development means, primarily, a sustainable and respectful use of resources, not an idealistic renunciation to use them. Consumers' education and awareness has to be fostered, together with capacity building initiatives in the developing countries to tackle corrupted regimes and expand democracy and the rule of law. We lack of a holistic approach in which trade facilitation of goods and services is oriented to make benefits accessible to the poorest regions and people[350].

When international organisations are accused of ineffectiveness and helplessness, then again it reflects the situation of the member States as member-driven organisations. First of all, State representatives usually have a very slight margin of negotiation when plenary debates take place (red lines are tight). Secondly, the home countries' situation holds back many possible improvements, because of the multiple political and legal systems and, in many occasions, due to lacks of good governance. Finally, even in the best case scenario, we come across uncertain domestic determinants (from elections to a wide range of political imponderables). In sum, a basic mismatch persists: trade is not sufficiently mainstreamed in development strategies and, at the same time, human rights

[349] OECD, WTO and WORLD BANK GROUP: *Global Value Chains: Challenges, Opportunities and Implications for Policy, Report prepared for submission to the G-20 Trade Ministers Meeting*, Sydney-Australia (19th July 2014), p. 9.
[350] K. J. GUEST: "Exploitation Under Erasure: Economic, Social and Cultural Rights Engage Economic Globalisation, in *Adelaide Law Review*, 19 (1997), pp. 73-93, at pp. 79-84.

aren't adequately mainstreamed in trade policies. Simultaneously, the work of different international organisations still lacks of coordination.

From an institutional perspective[351], the WTO replaces GATT 1947, as the result of the Uruguay Round (1986), culminating in the Marrakesh Agreement (1994), which entered into force in 1995. Biannual ministerial conferences or *rounds* mark the agenda and conclude binding subsequent agreements[352], added to the diverse treaties on specific trade issues. The main purpose of the organisation remains trade liberalisation through the elimination of trade barriers, *i.e.*, against trade tariffs and all forms of protectionism and discrimination of products. With over 162 member-States (Afghanistan will be the 163rd member by June 2016), and 34 members considered Least Developed Countries (LDCs), the WTO is no longer a club of developed and like-minded States, but has evolved into a strongly multilateral forum. Perhaps the other side of the coin is the lengthier process of negotiations and less outcomes from trade talks and rounds.

With its pros and cons, the institutional role has to be analysed in light of a prominent particularity of the WTO compared to other international economic organisations: the WTO is the only international economic organisation that follows the system one member – one vote, more typical of IOs of political character. For instance, we shall further note that WTO membership necessarily implies accepting its jurisdictional organs and their decisions, with a unique force among international organisations (the Dispute Settlement Body –DSB). No member of the WTO can opt-out of this settlement mechanism. In more general terms, and despite its relatively reduced administrative structure in Geneva (Switzerland), we can distinguish four functions of the WTO, all of them highlighting the solidity of its institutional role[353]: an executive function (the application of the Marrakesh Agreement and subsequent trade agreements), a jurisdictional function (the administration of the DSB), a legislative function (creates

[351] A concise appraisal on the most significant traits of the WTO at: L. GRADONI: "L'organizzazione mondiale del Commercio", in L.S. ROSSI (a cura di): *Le Organizzazioni Internazionali come Strumenti di Governo Multilaterale*, Milano 2006, Giuffrè Ed., pp. 313-362.

[352] Article IV of the Marrakesh Agreement Establishing the WTO states: "There shall be a Ministerial Conference composed of representatives of all the Members, which shall meet at least once every two years. The Ministerial Conference shall carry out the functions of the WTO and take actions necessary to this effect. The Ministerial Conference shall have the authority to take decisions on all matters under any of the Multilateral Trade Agreements, if so requested by a Member, in accordance with the specific requirements for decision-making in this Agreement and in the relevant Multilateral Trade Agreement".

[353] These four functions and their institutional importance could be explained in terms of implicit powers, as noted by: E. LÓPEZ BARRERO: *Regulación del comercio internacional: la OMC*, Valencia 2010, Tirant lo Blanch Ed., pp. 194-195.

the institutional framework and become the forum for consecutive binding agreements and decisions through Ministerial Rounds or the General Council's regular meetings), and finally, a function of participation in international relations (coordinating itself with the IMF, WB, WHO, ILO, when appropriate, in economic and developmental issues).

Strength and flexibility equally characterise the WTO's institutional building, the first because of its capacity to produce major legislative changes on global trade rules, and the second because, at the same time, it shows an undeniable capacity to adapt itself to changing scenarios, starting with its re-founding in 1994. The increase of *amicus curiae* submissions to Panels and the AB is another example of flexibility or, if we insist in talking in negative terms, maybe an "acrobatic"[354], but useful interpretation of the Dispute Settlement Understanding (art. 13). In the pursuit of transparency and public participation, an annual forum is organised in Geneva's headquarters, where a good amount of NGOs' and CSOs' representatives can raise their voice, though with mixed results. In the course of 2014 Annual Forum[355], a disenchanted Argentinian trade-unionist ironically described the "cathartic effect" of a 10 hours flight to Switzerland to raise his voice in front of "circumspect" WTO officers that will gently listen to his complaints and regrets, on the lack of further agreements after Doha and on the continuation of more SME-inclusive initiatives. A better trade system may be imagined, but the fact is also that CSOs' and NGOs' representatives continue to attend those meetings, which originally constituted an institutional improvement.

An additional example of evolution and institutional flexibility is the way development has reached an unexpected place in international trade rules and debates. The relationship between development and human rights, and their compatibility with the WTO founding purposes, has caused an endless debate with a good amount of wishful thinking, especially after the Doha Round introduced the so-called 'development mandate' into the WTO[356]. The importance of Doha's Ministerial Declaration lies in the explicit pro-developing countries language, emphasizing that "no country should be

[354] F. WEISS: "Good Governance in the Procedural Practice of the WTO", in A. LIGUSTRO and G. SACERDOTI (a cura di): *op. cit.*, pp. 479-493, at p. 491.
[355] We wish to thank Mr. Josep Bosh, WTO officer, for his kind invitation and logistic help to attend 2014 Annual Forum.
[356] Among the over-abundant literature on the Doha Round and its *allegedly* profound change of WTO, we shall propose a recent state of the art and the bibliography therein: D.A. GANTZ: *Liberalizing International Trade after Doha. Multilateral, Plurilateral, Regional and Unilateral Initiatives*, Cambridge 2013, Cambridge University Press, *passim*.

prevented from taking measures for the protection of human, animal or plant life or health, or the environment at the levels it considers appropriate"[357], provided they are made consistently with WTO agreements and they do not disguise protectionist measures. This stronger developmental approach was later confirmed in Hong Kong (2005) and, ever since, the organisation's work entails a more sensitive approach to non-trade-related issues, expressly encouraging coordination with other international organisations to undertake capacity-building and technical assistance in development issues. In short, the WTO's developmental vocation at an institutional level was not born at Doha, despite the profuse literature in this line; it could be said that it was reinforced in 2001, but one should recall –under GATT 1947– the Enabling Clause of 1979, according to which preferential treatment could be granted to developing countries, temporarily annulling MFN obligations, in so far as they are generalised, non-reciprocal and non-discriminatory[358]. Development was, therefore, latent in the WTO's institutional practice well before Doha, without denying the moderate importance of 2001 Round.

Major changes have been adopted at the latest Ministerial Conference in Nairobi (15-19 December 2015), including quite significant progresses in the elimination of agricultural subsidies. As of January 2016, developed countries immediately commit to end subsidies on farm products; developing countries[359] will do so by 2018 with a flexibility calendar until 2023 to cover transport costs and marketing difficulties; and least developed countries, until 2030. The financial crisis since 2008 has generated instability in the stock markets, affecting commodities and primary products –a tragic example is the rise of the price of corn. At the same time and paradoxically, depending on the markets fluctuations, imports of primary products (or even food aid) from developed and developing countries into LDCs notably increases the supply in LDCs, imbalances their internal market and dramatically reduces the prices for local producers, creating at the end similar problems. With food security under threat, many LDCs and some

[357] It must be noted that the language follows very closely that of article XX GATT ("the protection of human, animal or plant life or health"), WTO (Doha Ministerial Conference): *Ministerial Declaration*, Adopted on 14 November 2001, WTO Doc. WT/MIN(01)/DEC/1, para. 6. Please, note that all official WTO documents, dispute cases and treaties cited in this section are available at www.wto.org.

[358] This led to the spread of "Generalised Systems of Preferences" (GSPs). GATT: *Decision on Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries*, 28 November 1979, GATT Document L/4903, mainly par. 3 *c)*, 4, 5 and 8.

[359] For economy of language in this section, we only refer to 'developing countries', which are also members of the WTO, as with 'LDCs' or 'developed countries'.

developing countries put in place public stockholding programmes (for cases of sudden rise in prices) and tariffs (for eventual rapid import surges) to address both problematics. Already established in Doha Round and confirmed in 2005 in Hong Kong, a Special Safeguard Mechanism was a tool to face suddenly increasing imports, to provide "the flexibility to self-designate an appropriate number of tariff lines as Special Products guided by indicators based on the criteria of food security, livelihood security and rural development", and "based on import quantity and price triggers"[360].

For the moment, Nairobi's package does not provide a definitive solution in this regard, but provisionally allows Public Stockholding for Food Security Purposes, as well as the extension of the Special Safeguard Mechanism while negotiations continue, that means at least until the next negotiation round in 2017. Finally, there are very concrete successes for LDCs, mainly sub-Saharan African countries: the ministerial conference approved preferential rules of origin to determine when a product is 'made in an LDC' – products can use foreign materials provided they constitute less than 75% of the final value of the product; also from 1 January 2016, cotton from LDCs will have quota-free and duty-free access to the markets of developed countries and those of developing countries willing to do so, while it foresees the immediate prohibition of cotton subsidies in developed countries and the progressive prohibition in developing ones. A different Ministerial Decisions extended the waiver on MFN obligations under the GATS to allow preferential treatment to LDC services and service suppliers for an additional period of 15 years (until 2030), with a view to address the historic delay of these countries in trade in services.

It is early to know if Nairobi is a turning point, or even the "death of Doha"[361] and a shift towards a more pragmatic, consensus-based and item-by-item approach so as to ensure delivering results. The link between trade and development might receive a new long-term impulse because of 2008 crisis[362]. There was an undeniable need to unblock the remaining issues of Doha's Work Program and to reinforce or revitalise the global

[360] WTO (Hong Kong Ministerial Conference): *Ministerial Declaration, Doha Work Programme*, Adopted on 18 December 2005, Hong Kong, WTO Doc. WT/MIN(05)/DEC, para. 7.
[361] S. DONNAN: "Trade talks lead to 'death of Doha and birth of new WTO", in *Financial Times*, 20 December 2015, accessed online at: http://www.ft.com/cms/s/0/97e8525e-a740-11e5-9700-2b669a5aeb83.html#axzz3vdqE8qHB.
[362] R. BERMEJO GARCÍA and R. GARCIANDÍA GARMENDIA: "La crisis financiera internacional y sus consecuencias sobre el sistema comercial multilateral de la Organización Mundial del Comercio", in D.J. LIÑÁN NOGUERAS (Dir.) and A. SEGURA SERRANO (Coord.): *Las crisis políticas y económicas: nuevos escenarios internacionales*, Madrid 2014, Tecnos Ed., pp. 105-128, at pp. 123-127.

institutional role of the WTO, moreover taking into consideration the spread of regional trade arrangements outside the WTO and, very prominently, the US initiatives with the Trans-Pacific Partnership and the parallel Trans-Atlantic Trade and Investment Partnership with the EU (still in negotiation). Regardless of future changes, it can be concluded that this institutional profile facilitates the WTO substantive contribution, though some natural limitations remain.

*WTO's substantive contribution*

On the substance, there are numerous human rights' aspects of international trade and there are open possibilities to introduce non-trade-related issues into the WTO practice. Similarly to what has been argued with regard to development and its origins well before the Doha Round, the "GATT-WTO legal regime already harbors a number of putatively human rights-based principles"[363], as noted by Prof. David Kinley referring to non-discrimination between trading nations, the inclusion of intellectual property rights after TRIPS Agreement, and the significant precedent of article XX of GATT 1947 as an exception clause.

Precisely article XX of GATT has inspired the rest of general exception clauses in the following multilateral trade agreements, in order to allow measures "necessary to protect public morals", "necessary to protect human, animal or plant life or health", "relating to the products of prison labour", or "imposed for the protection of national treasures of artistic, historic or archaeological value". Article XIV of GATS foresees, *mutatis mutandis*, the same exceptions, to which it adds "the privacy of individuals" and "safety". Article XXIII of the Public Procurement Agreement includes in its first paragraph an exception for national security reasons and, in the second comma, the general exception clause according to which "nothing in this Agreement shall be construed to prevent any Party from imposing or enforcing measures: necessary to protect public morals, order or safety, human, animal or plan life or health or intellectual property, or relating to the products or services of handicapped persons, of philanthropic institutions o of prison labour". Article 27(2) of TRIPS assumes that, if "necessary to protect *ordre public* or morality, including to protect human, animal or

[363] D. KINLEY: "Corporate Social Responsibility and International Human Rights Law", in R. MULLERAT (Ed.): *op. cit.*, pp. 231-241, at p. 235.

plan life or health or to avoid serious prejudice to the environment", inventions may be excluded from patentability. TRIPS Agreement also establishes that intellectual protection "may be waived by a Member in the case of a national emergency or other circumstances of extreme urgency or in cases of public non-commercial use" even though in these situations "the right holder shall […] be notified as soon as reasonably practicable". Article 2(2) of the TBT Agreement further recognises "legitimate objectives" in a broad manner since it makes a non-exhaustive list: "Such legitimate objectives are, *inter alia*: national security requirements; the prevention of deceptive practices; protection of human health or safety, animal or plant life or health, or the environment". Finally, article 2(2) of the SPS Agreement limits sanitary and phytosanitary measures to "the extent necessary to protect human, animal or plant life or health" and "based on scientific principles, and is not maintained without sufficient scientific evidence", obviously complicating our debate.

Compared to investment treaties and contracts, the language of WTO Agreements suggests, at first sight, a more embracive relationship between trade regulation and non-economic concerns, but this optimism has to be balanced with the organisation's practice in the field. Continuing similarly to investment cases, we shall first assess the linkage to general international law and, in a second stage, examine those "open windows" for human rights. Besides these latent human rights aspects in the exception clauses cited above, it is the Dispute Settlement Body (DSB) who has opened those windows, sometimes in the form of a panel's report and, in other occasions, the Appellate Body (AB), which is the last instance in the dispute settlement procedure as foreseen by the Dispute Settlement Understanding (DSU).

For instance, many disputes support our integrationist approach, against the fragmentation of International Law through allegedly autonomous self-contained regimes, so we may only mention a few famous cases chosen for their expressiveness. The Appellate Body (AB) promptly clarified that the General Agreement "is not to be read in clinical isolation from public international law" and directly cited the Vienna Convention on the Law of Treaties[364], when interpreting the scope of article XX GATT (commas *b)* and *g)*). From the perspective on general international law, the AB has further expressed that its work has to be "faithful to the 'customary rules of

[364] WTO (AB): *United States – Standards for Reformulated and Conventional Gasoline*, Report of the Appellate Body, 29 April 1996, WTO Doc. WT/DS2/AB/R, p. 17.

interpretation of public international law'", and very eloquently added: "WTO rules are not so rigid or so inflexible as not to leave room for reasoned judgements in confronting the endless and ever-changing ebb and flow of real facts in real cases in the real world"[365], thus sustaining an evolving and progressive development of International Law, closer to the material reality[366]. In the same vein, the AB has aligned itself with the "contemporary concerns of the community of nations about the protection and conservation of the environment", implicitly recognising that there are common interests of the international society, such as "sustainable development", as included in the preamble of GATT 1994. Moreover, it has adopted a progressive approach to evaluate the meaning of 'natural resources' in art. XX(g) GATT, a term that "is not 'static' in its content or reference but is rather 'by definition, evolutionary'"[367]. WTO Agreement should not be interpreted literally, but finalistically in accordance with the preamble of WTO Agreement, which "gives colour, texture and shading to the rights and obligations"[368].

Bearing in mind this framework, recourse to exception clauses and public international law is obviously not unconditional. The first paragraph of article XX GATT details the *chapeau* under which it can be used. In sum, the reasoning has two steps: the measures at the origin of the dispute must fall within the scope of the exception clauses; and secondly, it must also be demonstrated that they are consistent with the *chapeau* to avoid a misuse or abuse of article XX GATT.

It is worth citing two precedents under GATT 1947. In *Thailand-Cigarettes* the Panel used this test on equivalent domestic measures to prove that Thailand's prohibition of American cigarettes disguised a protectionist initiative to benefit local production. The test must assess that measures are "necessary" to protect a public interest enshrined in art. XX GATT, i.e., "only if there were no alternative measure consistent with the General Agreement, or less inconsistent with it", and "provided they do not thereby accord treatment to imported products less favourable than that accorded to 'like'

[365] WTO (AB): *Japan – Taxes on Alcoholic Beverages*, Report of the Appellate Body, 4 October 1996, WTO Doc. WT/DS11/AB/R, p. 31.
[366] This coincides entirely with our methodological approach, as explained in the introduction.
[367] WTO (AB): *United States – Import Prohibition of certain Shrimps and Shrimp Products*, Report of the Appellate Body, 12 October 1998, WTO Doc. WT/DS58/AB/R, para. 129 and 130 (quotes).
[368] *Ibíd.*, para. 155.

products of national origin"[369]. *Thailand-Cigarettes* case was also a landmark because of the important submission by the WHO, an example of coordination between international organisations. Also under GATT 1947, in a case between the US and Canada on the protection of tuna in line with the International Convention on the Conservation of Atlantic Tuna, the Panel decided to adopt, without consequences, its report despite the previous amicable conciliation between the parties outside the DSB[370]. The Panel observed that trade exceptions based on environmental concerns are not allegeable to hide other interests –in that case, the US non-recognition of Canadian sovereignty over tuna in its Atlantic coastal waters, initiating the WTO dispute when Canada seized US-flagged fishing vessels[371].

After 1995, the WTO has continued this practice while further detailing the exact conditions laid down by the *chapeau* of art. XX GATT. In *US-Gasoline*, the AB stated that the import restrictions had no equivalent internal measures in the US; therefore, though clean air may fall within the scope of art. XX, the US failed to demonstrate that the measure adopted was consistent with equivalent measures at a domestic level, and the AB concluded that the US put forward biased environmental purposes to actually grant privileges to internal producers of gasoline[372]. When dealing with Japan's higher taxes for foreign alcoholic beverages, alleging public health concerns, the AB similarly ruled that, though possibly falling under the scope of art. XX GATT, the measure unfairly discriminated foreign like-products, in comparison to local alcoholic beverages[373]. In relation to the protection of sea turtles threatened by shrimp fishing methods, the AB finally decided that import restrictions of shrimps put in place by the

[369] GATT (Panel): *Thailand – Restrictions on Importation of And Internal Taxes on Cigarettes*, Report of the Panel, 7 November 1990, Doc. DS10/R – 37S/200, para. 75.

[370] In 1994, a different case (*Dolphin*) on same ground (tuna fishing and the protection of dolphins), but between the US and Mexico was also conciliated and the GATT Panel decided not to adopt the Report DS29/R of 16 June 1994.

[371] Besides, the US had not adopted similar measures in its internal market. "The Panel could therefore not accept it to be justified that the United States prohibition of imports of all tuna and tuna products from Canada […] had been made effective in conjunction with restrictions on United States domestic production or consumption", and that "prohibition of imports *[…]* had been imposed in response to Canadian arrest of United States vessels fishing *[…]*". GATT (Panel): *Conciliation. United States – Prohibition of imports of tuna and tuna products from Canada*, Report of the Panel, 22 February 1982, Doc. L/5198 – 29S/91, para. 4.12 and 4.13. Again, trade is an easy victim for political conflicts.

[372] "The chapeau by its express terms addresses, not so much the questioned measure or its specific contents as such, but rather the manner in which that measure is applied. It is, accordingly, important to underscore that the purpose and object of the introductory clauses of article XX is generally the prevention of 'abuse of the exceptions' […]". WTO (AB): *US – Gasoline…*, p. 22 (*supra*, footnote 364).

[373] "Shochu and vodka are like products and *[…]* Japan, by taxing imported products in excess of like domestic products, is in violation of its obligations under Article III *[GATT]*", WTO (AB): *Japan – Alcoholic Beverages…*, p. 32 (*supra*, footnote 365).

US fell within the scope of art. XX *(g)*, were consistent with equivalent internal measures, but were too "rigid" and, at the end, extraterritorially imposed an excessively concrete fishing method and a particular certification scheme, which went beyond a reasonable, environmentally finalistic requirement to allow third States' imports of shrimps or shrimp products[374].

In all these cases, States are unsuccessful in alleging an exception under article XX. But in the practice of the DSB it starts to become clear that there is no fear to use general international law, through the Vienna Convention on the Law of Treaties, and even including soft law instruments from other organisations to clarify, in a particular situation, the link to other International Law regimes and principles[375]. It has been said that a weakness of the WTO system is this process that imposes on States a sort of "*probatio diabolica*"[376] to justify human rights exceptions. But we do not think it is a problem of the WTO dispute settlement mechanism. For example, the assessment of "necessity" is more flexible that what it seems. According the DSB, the necessity to protect public goods "is not limited to what is indispensable", given that it constitutes a "continuum"[377] with different degrees of necessity, depending on the proportionality between the measures imposed and the ends pursued. In reality, it looks more like a triangle according to which the DSB carries a process of "weighing and balancing"[378] of three factors: the measures adopted, the ends pursued, and their degree of WTO-Law consistency. When a more WTO-consistent measure is reasonably available, it is the one that States should put in place. As noted with investment disputes, human rights are not a shortcut for avoiding other international obligations without the due justification. If States don't satisfy this test, it is because most of the times we find hidden purposes

[374] "The United States did not permit imports of shrimp harvested by commercial shrimp trawl vessels using TEDs *[methods]* comparable in effectiveness *[in protecting sea turtles]* to those required in the United States". WTO (AB): *US – Shrimps…*, para. 165.
[375] "En conjunto, la práctica examinada evidencia que […] han tenido en cuenta muy diversas normas internacionales en la interpretación de los acuerdos abarcados […] la inclusión de instrumentos de soft-law que ha efectuado el Órgano de Apelación, particularmente en el asunto Estados Unidos – Camarones, debe ser ponderada como una operación conjunta para determinar, esencialmente, el contenido del Derecho Internacional general en la materia, sin tomar de forma aislada las concretas referencias a uno u otro instrumento". X. FERNÁNDEZ PONS: *La OMC y el Derecho Internacional. Un estudio sobre el sistema de solución de diferencias de la OMC y las normas secundarias del Derecho internacional general*, Madrid – Barcelona 2006, Marcial Pons Ed., pp. 244-245.
[376] A. ODENINO: "Soluzione delle controversie nell'OMC e valori non commerciali", in A. COMBA (a cura di): *op. cit.*, pp. 153-187, at p. 179.
[377] WTO (AB): *Korea – Measures affecting imports of fresh, chilled and frozen beef*, Report of the Appellate Body, 11 December 2000, WTO Doc. WT/DS169/AB/R, para. 161 (at p. 49).
[378] *Ibíd.*, para. 164.

to influence international trade or other non-trade related political and economic issues, which do not respond to genuine human rights' concerns.

A paradigmatic (and unique) case is precisely *EC-Asbestos*, where the then European Communities are able to show that asbestos prohibition is fully justified *step by step*: first, it falls within the scope of article XX GATT (in three areas: health, labour law and the environment); secondly, it complies with the conditions of the *chapeau* in the sense that measures adopted are proportional enough (to the ends pursued), necessary (a sufficient level of risk is shown) and non-discriminatory (they are applicable to the same product wherever it may come from, including domestic equivalent measures).

Given that this test usually requires a variable level of scientific evidence, we cannot but praise the Panel's acknowledgement that "it is not its function to settle a scientific debate" –that would amount to put an excessive burden of proof on defendants, but to "determine whether there is sufficient scientific evidence to conclude that there exists a risk for human life or health"[379]. The Panel's decision was upheld by the Appellate Body in 2003 modifying some aspects of the reasoning but without touching on its essential structure. The evidence before the Panel "tend*[ed]* to show" that asbestos was "a risk to health rather than the opposite" and "*[a]*ccordingly, a decision-maker responsible for taking public health measures might reasonably conclude that the presence of chrysotile-cement products posed a risk"[380]. Interestingly, the Panel adopts this decision taking into consideration ILO Convention 162 on asbestos and the WHO list of carcinogenic products, being the first a hard law instrument and the latter a soft law guidance. Besides, we consider that "risks" are quite pragmatically interpreted by the Panel: there is no need to wait "until scientific certainty, which is often difficult to achieve, had been established over the whole of a particular field before public health measures could be implemented"[381]. This confirmed by the way the rather preventive approach of the EC-EU and its member States[382]. We infer that exceptions are perfectly defensible under the GATT's notion of "risk", if WTO-members succeed in passing the test.

[379] WTO (Panel): *European Communities – Measures affecting asbestos and asbestos-containing products*, Report of the Panel, 18 September 2000, WTO Doc. WT/DS135/R, para. 8.181 and 8.182.
[380] *Ibíd.*, para. 8.193.
[381] *Ibíd.*, para. 8.221.
[382] We further discuss this problematic on the EU's preventive approach and the legitimation of scientific expertise in Chapter IV, at pp. 257-259.

This powerful and sound interpretative methodology to approach the GATT has been extended to other WTO Agreements by the DSB, progressively detailing the components of the *chapeau*, which is said to be just "but one expression of the principle of good faith *[…]*, the application widely known as the doctrine of *abus de droit*, prohibit*[ing]* the abusive exercise of state's rights"[383]. Of course, in the area of preventive human rights, grey zones are frequent and make it more necessary than ever to build solid defence strategies based on the WTO's own practice.

With regard to other multilateral trade agreements, the practice under GATT and the general logic explained so far, have been confirmed and extrapolated, *mutatis mutandis*. Under the SPS Agreement, the AB clarified that, in connection to risk assessments and sanitary measures, preventive measures or, in general, a "precautionary principle" is not part of customary international law yet (there is no *consensus* in that regard). Hence, prevention cannot "override", by itself, other provisions of international trade agreements[384]. This is why a test is also needed to further analyse if preventive measures are justified under the exception clauses –the door is moderately opened.

The SPS Agreement is, moreover, a good example of how the WTO promotes coordination between international organisations, recognising their work on standards, guidelines and recommendations, in relation to which States have room to establish higher levels of sanitary measures (art. 3.3). Articles 3.1 and 3.2 of the SPS Agreement establish a presumption of consistency with WTO-Law for measures taken in line with international soft law instruments (guidelines and standards). In principle, the logic rule goes: if A then B, no-A means no-B; but in social sciences and legal studies this is not necessarily the case. Indeed, the AB has ruled that the presumption of consistency for measures following international standards does *not* mean that measures taken *outside* those standards are *presumed to be inconsistent*. Otherwise, the legal value of these soft law guidelines would be excessive and defendants would have an unfair burden of proof. There may be sanitary measures, not already standardised at an international level, which are perfectly consistent with the SPS Agreement or, perhaps, be justifiable under an exception clause. That's why claimants still have the duty to construct a sufficiently solid *prima facie* case, even when SPS measures are outside international

[383] WTO (AB): *US – Shrimps…*, para. 158.
[384] WTO (AB): *EC – Measures concerning meat and meat products (Hormones)*, Report of the Appellate Body, 16 January 1998, WTO Doc. WT/DS48/AB/R, para. 121-125.

standards; only afterwards, it is the defendants' turn to argue their case[385]. In other words, as in *EC-Hormones*, the fact that the EC measures did not follow a specific international standard did not "absolve" the US and Canada from showing there is a *prima facie* case of violation of the SPS Agreement.

Unfortunately, the problem for the EC came later, to demonstrate a sufficient risk assessment: in that case, we rather argue that the EC's priority should have been to put political pressure on other international organisations (mainly the ISO and WHO) in order to create guidelines on hormones and, in that process, influence its outcome so as to satisfy the EC's sanitary concerns (indirectly affecting SPS trade rules). Put in other words, the SPS Agreement is probably the best example of "soft law instruments hardening up"[386] through WTO's practice, and this indirect way to influence SPS trade rules shouldn't be undervalued. Concerning articles 2.4 and 2.5 of the TBT Agreement, also on international standards, in *Tuna Dolphin II* the AB has ruled that standards sourced from other organisations still have to be legitimate and, at times, a private standard might be "more legitimate" than a public one, or vice versa depending on the case, on its procedural foundations and technical aspects: CSR can play a prominent role in the harmonization of private and public, hard and soft instruments, even within trade disputes[387].

In sum, to simultaneously influence other standard-setting international organisations, private and public, can deem to be a wiser complementary strategy, like in a more recent WTO-complaint by the US on an EU ban of poultry meat treated with certain chemicals to reduce microbes –still pending[388]. It will also be interesting to see the evolution of case *DS-495*, where a Panel established in September 2015 will have to analyse the lawfulness of Korean extra-requirements on Japanese food products

[385] In this important aspect, the AB reversed the Panel's previous conclusions: "Only after such a prima facie determination had been made by the Panel may the onus be shifted to the European Communities to bring forward evidence and arguments to disprove the complaining party's claim". *Ibíd.*, para. 101-109 (quotes at para. 108 and 109).

[386] M. GEBOYE DESTA: "GATT/WTO Law and international standard: an example of soft law instruments hardening up?", in A.K. BJORKLUND and A. REINISCH (Eds.): *op. cit.*, pp. 148-191, at pp. 160-166 (these pages also discuss *EC-Hormones* case).

[387] C. GLINSKI: "Competing Transnational Regimes under WTO Law", in *Utrecht Journal of International and European Law* (Special Issue: *Legal Aspects of Corporate Social Responsibility*), Vol. 30 No. 78 (2014), pp. 44-66, at p. 63.

[388] Dispute No. DS389. The consultation phase has ended and third countries have reserved their right for third-party submissions. For information purposes see the US Trade Representative website: https://ustr.gov/issue-areas/enforcement/dispute-settlement-proceedings/european-communities-%E2%80%93-certain-measures-affe and the WTO website https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds389_e.htm

regarding the presence of radionuclides after the nuclear accident at Fukushima back in 2011. We will finally have to follow up the EU's complaint on Russian import restrictions of live pigs and pork products, alleging concerns on African swine fever (dispute No. *DS- 475*), though one would hypothesize that the Ukrainian crisis had an influence –it chronologically coincided, in parallel to similar problems with European fruit products usually exported to the Russian Federation.

In relation to the GATS Agreement, art. XIV *a)* was specifically addressed in *US-Gambling*: when there are concurring international obligations, States' good faith is demonstrated when they opt for the "least inconsistent" and "reasonably available" measure in terms of WTO law –just as with investment protection[389]. In that case, the US restrictions of internet-based gambling services, on the ground of public order, fell within the scope of the exception clause, but were found to be partially discriminatory because, in the particular area of horse racing, only domestic suppliers were exempted from the restrictions enacted, unlike foreign betting companies[390].

A different significant example is when former PM of Brazil Lula da Silva used the expression "a national interest" to define the fight against HIV/AIDS and, accordingly, find inapplicable patent legislation under the flexibility of article 31 of TRIPS agreement[391], in coordination with the World Intellectual Property Organisation, the World Health Organisation and the United Nations High Commissioner for Human Rights. This is an interesting case where we detect the important role of and interaction between international organisations and the possibilities they might offer. For good or for bad, one year after having filed a WTO complaint against Brazil, the US dropped it, so no Panel could finally discuss the question[392]. There is a very well-known debate between the access to medicines and the respect of intellectual property rights, which

[389] WTO (AB): *United States – Measures affecting the cross-border supply of gambling and betting services*, Report of the Appellate Body, 7 April 2005, WTO Doc. WT/DS285/AB/R, para. 307.
[390] The discrimination lied in the fact that "only domestic suppliers of remote betting services for horse racing *[were exempted]* from the prohibitions in the Wire Act, the Travel Act and the IGBA". *Ibíd.*, para. 369.
[391] S. WALKER: *The TRIPS Agreement, Sustainable Development and the Public Interest: Discussion Paper*, Cambridge-Gland 2001, IUCN, xiv + 60 pp, *passim*.
[392] WTO Reporter: "United States Drops WTO Case Against Brazil Over HIV/AIDS Patent Law", 26 Junes 2001. A summary of Brazil's arguments and the wider problematic, for purely informative purposes, see the submission of the Permanent Mission of Brazil to the WTO on behalf of Bolivia, Brazil, Cuba, China, Dominican Republic, Ecuador, India, Indonesia, Pakistan, Peru and Sri Lanka, Thailand and Venezuela: WTO (Council for TRIPS): Paragraph 6 of the Ministerial Declaration on the TRIPS Agreement and Public Health, 24 June 2002, WTO Doc. IP/C/W/355. Also see: https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds199_e.htm

have both a human rights' dimension[393]: to balance the moral and economic rights of creators and inventors, on one hand, and the access to the benefits of science for the effective realisation of social rights, on the other hand. After the Doha Declaration on the TRIPS Agreement and Public Health, the General Council adopted a waiver of art. 31 for "eligible member States"[394], mainly LDCs, who had poor pharmaceutical capacities, allowing them to issue "compulsory licences" to ensure access to certain medicines under clear conditions and supervision of the Council for TRIPS. In the meantime, Nairobi's Ministerial Conference has agreed to extend the freezing of non-violation and situation complaints dealing with TRIPS Agreement, at least until 2017 when the ministerial conference will re-examine this issue.

Of course, these actions do not solve the causes of pharmaceutical shortages for developing and least developed countries, but awareness is increasingly widespread[395]. Apart from compulsory licences, a different way to obtains medicines at better prices for developing countries and LDCs is "parallel imports": once the patent owner consents to introduce a product in a particular market, it is understood that he loses control over its commercialisation and it can be resold to a third country wishing to benefit from a lower price, instead of buying it in the international markets. Parallel imports are not contemplated by TRIPS and simply constitute a tricky (though legitimate) circumvention of the treaty, whereas compulsory licences are limitedly justified under art. 31. These two flexibility strategies under TRIPS (compulsory licences and parallel imports) are, however, unlikely to bring about long-term solutions, unless we really solve the twofold root of the problem[396]: transfer of technology and capacity building together with further investigation on 'neglected diseases'.

A very frequent problem of TRIPS is the production of generic medicines and the patent's owners enjoyment of their rights, while "both society and the scientist have a

[393] A human rights approach to intellectual property by A. R. CHAPMAN: "Core obligations related to ICESCR Article 15 (1)(c)", in and A. R. CHAPMAN and S. RUSSEL*: Core obligations: Building a Framework for Economic, Social and Cultural Rights*, Belgium 2002, Intersentia Ed., pp. 305-331, at pp. 315 ff.

[394] WTO (General Council): *Implementation of Paragraph 6 of the Doha Declaration on the TRIPS Agreement and Public Health*, Decision of 2 September 2003, WTO Doc. WT/L/540.

[395] D. ZAPICO ALONSO: "La regulación de los derechos de propiedad intelectual y el acceso a medicamentos esenciales", in A. EMBID IRUJO (Dir.): *Comercio internacional y derechos humanos*, Pamplona 2007, Aranzadi Ed., pp. 175-216, at pp. 197-200.

[396] M. ORTEGA GÓMEZ: *Patentes farmacéuticas y Países en Desarrollo*, Madrid 2011, Difusión Jurídica Ed., pp. 85-87.

legitimate interest"[397] in using discoveries before the expiration of the 20-year patent term. In 1997 the European Communities filled a complaint against two aspects of a Canadian patent regulation, mainly affecting pharmaceutical products. In the first place, Canada had allowed eventual competitors of a patent owner to initiate the process of obtaining the relevant governmental permits before the patent term had expired, so that competitors could sell their products immediately after the end of the patent. The EC alleged that governmental regulations of pharmaceutical products actually reduce that 20-year exclusivity, as a matter of fact *circa* 40/60% shorter, so that the marketing approval process for competitors shouldn't be initiated before the exact end of the patent term, alleging it would be inconsistent with article 27 TRIPS. However, the Panel rejected this reasoning alluding to the above-cited "legitimate interests", understood as a broader notion than mere 'legal interests'[398].

As for the delays generated by public marketing licences, the Panel reframes or refocuses it on whether it is discriminatory or not. According to the Panel, all producers are subject to such reduction of the "effective period of market exclusivity", so it is not discriminatory –implicitly confirming that the fact of alleging an exception clause does not liberate us from showing it is not used in a discriminatory manner. Many States, acting as third parties, were in favour of "granting compensatory patent term extensions" due to the regulatory delay that reduces *de facto* the effective period of patent exclusivity. However, the Panel interestingly noted there was still no international *consensus* with regard to such a compensatory extension of the patent term[399], partially benefiting the prompter placing in the market of generic medicines

[397] WTO (Panel): *Canada – Patent Protection of Pharmaceutical Products*, Report of the Panel, 17 March 2000, WTO Doc. WT/DS114/R, para 7.69.

[398] "In sum, after consideration of the ordinary meaning of the term "legitimate interests" as it is used in Article 30, the Panel was unable to accept the EC's interpretation of that term as referring to legal interests pursuant to article 28.1. Accordingly, the Panel was unable to accept the primary EC argument with regard to the third condition of Article 30. It found that the EC argument based solely on the patent owner's legal rights pursuant to Article 28.1, without reference to any more particular normative claims of interest, did not raise a relevant claim of non-compliance with the third condition of Article 30". *Ibíd.*, para 7.73

[399] "On balance, the Panel concluded that the interest claimed on behalf of patent owners whose effective period of market exclusivity had been reduced by delays in marketing approval was neither so compelling nor so widely recognised that it could be regarded as a "legitimate interest" within the meaning of Article 30 of the TRIPS Agreement. Notwithstanding the number of governments that had responded positively to that claimed interest by granting compensatory patent term extensions, the issue itself was of relatively recent standing, and the community of governments was obviously still divided over the merits of such claims. *[…]* The Panel believed that Article 30's "legitimate interests" concept should not be used to decide, through adjudication, a normative policy issue that is still obviously a matter of unresolved political debate". *Ibíd.*, para. 7.82.

once expired the patent at stake. Nonetheless, the Panel concluded against the second question of the dispute inasmuch as it considered inconsistent with art. 28.1 and 30 the Canadian regulatory exception that allowed manufacturing and stockpiling patented products, regardless of the fact that they would not be sold before the expiry of the patent –the Panel applied here the principle of effectivity and understood that such exception substantially contravenes the patent's owner exclusionary rights[400]. But initiating the administrative procedure to obtain the regulatory permits for a generic medicine, before the end of a patent, is then compatible with TRIPS Agreement. In sum, the third flexibility strategy under TRIPS (the so-called 'Bolar exception' or 'regulatory exception'), as seen in the Canadian case, was the result of WTO's jurisprudence. This 'regulatory exception' passed the test of the Panel and the time lag caused by governmental permits can be circumvented: potential competitors can accelerate the merely bureaucratic procedures *even before* the patent expires, so that generic medicines can be placed in the market immediately after the expiration of the patent.

TRIPS Agreement is certainly a curious example of how essentially private interests (patents and patent owners' rights) are protected by States in an international dispute resolution mechanism against other States' regulations, other than traditional diplomatic protection, as a parallel road to the Paris Convention for the Protection of Industrial Property and the Berne Convention for the Protection of Literary and Artistic Works, and accepting rather loose connections[401] between the origin of corporations involved and the country that decides to take over and bring the issue to the attention of the DSB.

In conclusion, the reasoning started with article XX GATT and has progressively been detailed through the DSB's practice, now extended to other agreements (GATS, TRIPS, SPS…) and their respective exception clauses. The use of an exception clause has to be justified and is not unconditional. The WTO-consistency test has three basic elements: measures shall be necessary, proportional and non-discriminatory, which are not new or surprising concepts in international tribunals or arbitrage seats against the abuse or misuse of States' prerogatives. We have also noted that the DSB has a perfectly sharable approach to different situations and cases: realistic –close to the concrete

[400] "*[T]*he rights of the patent owner are generally viewed as a right to prevent competitive commercial activity by others, and manufacturing for commercial sale is a quintessential competitive commercial activity, whose character is not altered by a mere delay in the commercial reward". *Ibíd.*, para. 7.35.

[401] C. WADLOW: "The Beneficiaries of TRIPs: Some Questions of Rights, Ressortissants and International *Locus Standi*", in *The European Journal of International Law*, Vol. 25 No. 1 (2014), pp. 59-82, at p. 74.

factual evidence; explicitly integrative –no fear to public international law; and open to progressive interpretations of treaties and agreements –in the light of preambles, the *travaux préparatoires*, customary international law in other fields like the environment or health, and the practice of other international organisations (even soft law instruments). It starts to be clear that it doesn't seem difficult to show that a particular measure falls within the scope of exception clauses; problems rather arise when it comes to demonstrate that measures are sufficiently justified. It does not seem to us an insuperable burden of proof, provided States duly manage their overlapping and concurring international obligations in good faith. It is now the responsibility of member-States to *effectively* and *reasonably* use these open windows: it will depend on how they use the inherent *multilateral*, *consensual* and *evolutionist*[402] genetics of WTO Law.

## 2.3 Soft law and the potential of international organisations

### *2.3.1 Soft law and corporate human rights respect*

Notwithstanding the fact that we discuss in detail the value of soft law through the European Union's practice in Chapter IV, we shall make some initial remarks to serve as a starting point. The debate on soft law hides the last dichotomy we did not address in the first chapter, *i.e.*, the one opposing mandatory and voluntary schemes. In the first chapter, we addressed the problems of the 'treaty route', both in theory and practice, but that problematic is the consequence of a previous choice: hard law *vs.* soft law, which implies more theoretical (if not ideological) questions. Of course, hard law enthusiasts will immediately identify themselves with the defence of a new international treaty on business and human rights. And soft law supporters will say that everything has to be

[402] "*[T]*he possibilities of collectively adopting subsequent interpretations, setting up new standardising bodies, and adapting the interpretation of WTO Law in response to the practice of members and the evolution of international law, allow the development of WTO Law at the margins, by a majority of members and with considerably low formal requirements. As a result, the mechanisms of multilateral law-making allow members to produce incremental adjustments to WTO Law while preserving its coherence as a legal system". G. VIDIGAL: "From Bilateral to Multilateral Law-making: Legislation, Practice, Evolution and the Future of Inter Se Agreements in the WTO", in *The European Journal of International Law*, Vol. 24 No. 4 (2013), pp. 1027-1053, at p. 1053.

left to companies' discretion because mandatory schemes would place an "unwarranted burden on business"[403].

It is often heard that corporate social responsibility is only about soft law; that it responds to a negative feudalisation caused by global capitalism: our "age of neo-medievalism" would have diversified the sources of power, legitimacies and norms, thus creating *soft* instruments aimed at clarifying some private (corporate) duties –always *softly*[404]. In practice, we have found both voluntary and mandatory aspects and, contrary to a widespread belief, minimum legal requirements are also part of CSR, ideally to go beyond them so as to achieve "best practices" –but always within the framework of legal compliance. In sum, in view of the current international practice, what we actually infer from our analysis is an interaction between both *hard* and *soft law* instruments in the area of corporate human rights respect.

This mixture responds to the fact that mere self-regulation is not sufficient after having detected many traps and contradictions. For example, in the occasion of the 2014 Winter Olympic Games in Sochi (Russian Federation), many companies could not do anything to avoid sponsoring the games –contrariwise, it was part of their 'CSR', despite the increasing unease in relation to widespread discrimination in Russia on the grounds of sexual orientation, affecting also some athletes[405]. We have mentioned other risks of CSR, like 'blue washing' –when the UN logo is unduly used in the Global Compact by poor performing companies, or 'green washing' when only a small percentage of 'green providers' hides essentially the same bad performance in supply chains, phenomena that have been investigated in many areas[406]. The many examples available have led to some authors to think that CSR is just about voluntary and

[403] H. CHOUDHARY: "Mandatory Corporate Social Responsibility: An Unwarranted Burden on Business", in *European Company Law*, Vol. 10 No. 4/5 (2013), pp. 156-160, *passim*.
[404] C. M. BAILLET: "What is to become of the human rights international order in an age of neo-medievalism?", in C.M. BAILLET (Ed.): *Non-State Actors, Soft Law and Protection Regimes. From the Margins*, Cambridge 2012, Cambridge University Press, pp. 95-124, at pp. 119-123.
[405] J. van DETTA: "Sexual Orientation, Human Rights and Corporate Sponsorship of the Sochi Olympic Games: Rethinking the Voluntary Approach to Corporate Social Responsibility", in *Utrecht Journal of International and European Law*, Vol. 30 No. 78 (2014), pp. 99-124.
[406] Suffice the example of many tobacco produces apparently recurring to green supply chains to actually hide the fact that most of purchases still come from previous circuits involved in child labour and tobacco-related deforestation: M. OTAÑEZ and S.A. GLANTZ: "Social Responsibility in Tobacco Production? Tobacco Companies' use of green supply chains to obscure the real costs of tobacco farming", in *Tobacco Control*, Vol. 20 No. 6 (November 2011), pp. 403-411.

"ceremonial commitments" seasoned with an institutionally "organised hypocrisy"[407], maintaining the imbalances between developed countries and the rest of the world. But the CSR movement has surely served to reveal these contradictions to a wide public and, from a social perspective, more and more people think that "benefits that come from human rights violations are illegitimate, if not directly illegal"[408] –extrapolating the so-called doctrine of the fruit of the poisoned tree. Shall we recall *SPP vs. Egypt* recognising *lucrum cessans* only until the entry into force of the UNESCO Convention on Wold Heritage, after which any benefit would have been internationally illegal; as in other investment and trade situations analysed in the precedent section in terms of 'open windows'. For us, the obvious deficits and traps of CSR are not enough to totally reject it; given that we have defined it as a human rights strategy mixing hard and soft law instruments, our conclusion is on its relative usefulness and certain potential; nevertheless, it is clear that a merely voluntary approach does not seem sufficient.

More generally, the expansion of soft international law is frequently criticised in terms of a feudalisation of global regulation, to primarily serve private interests, a sort of post-modern *lex mercatoria*[409]. But this argument simply forgets that CSR and soft international norms are nothing new under the sun. Besides, they are not necessarily negative: the so-called "Incoterms" is a set of international trade terminology created in 1936 by the International Chamber of Commerce, also responsible for the "Uniform Customs and Practices for Documentary Credits", operative in 175 countries. Continuing with the banking sector, we shall also cite the "Basel III Guidelines" on risk management formulated by the Committee of the Bank for International Settlements (a mix private-public institution whose members are central banks, but not exactly an intergovernmental one); the International Financial Reporting Standards are the product of another private institution (the International Accounting Standards Board). There are examples in other areas: the World Wide Web Consortium, responsible for the World

[407] A. LIM and K. TSUTSUI: "Globalization and Commitment in Corporate Social Responsibility: Cross-national Analyses of Institutional and Political-Economy Effects", in *American Sociological Review*, Vol. 77 No. 1 (February 2012), pp. 69-98, at p. 88.

[408] Shall we recall *SPP vs. Egypt* recognising *lucrum cessans* only until the entry into force of the UNESCO Convention on World Heritage, after what any benefits would have been internationally illegal; as in other investment and trade situations analyse in the precedent section. S. DEVA: *Regulating Corporate Human Rights Violations. Humanising Business*, London-New York 2012, Routledge Ed., p. 139.

[409] "The use of private-sector standards, codes, and best practices –a kind of contemporary version of the medieval *lex mercatoria*– is a major and increasing factor in international business", says L.L. HERMAN: "The New Multilateralism: The Shift to Private Global Regulation", *Institute C.D. Howe Commentary*, No. 360, Canada (August 2012), 17 pp., at p. 15.

Wide Web rules "totally outside of international treaty"; and the work of the International Organisation for Standardisation (ISO), a non-governmental organisation whose numerous standards are just unavoidable in international business[410].

Precisely in the area of global financial regulation is where soft law is stronger or, at least, a subject that more evidently shows that "soft law can have its own hard edges"[411], with its positive and negative effects. Of course, the abundance of soft norms in international finances can be partially linked to 2008 global economic crisis: besides a good number of market causes, it is true that there have been failures in the successive Basel Accords and Principles, in international accounting standards and credit-rating agencies –in sum, in the "global systemic risk regulation" [412]. The crisis might have marked a turning point towards a bigger public input and stricter regulation of derivatives, hedge funds and rating agencies[413], a trend that still has to be confirmed in the future.

In this context, the critique can be easily summarised in Marxist terms: for the capital, it was not enough to control the means of production; it now wants to control the *means of production of norms*, by fostering soft law in a frame of global benefits but fragmented jurisdictions. Against this background, it must first be said that sources of legitimacy and norms have historically been diverse: even in Roman law we might find 'soft law' examples, starting with the difference between *potestas* and *auctoritas*, the latter being the simple capacity to persuade but deprived of the formal competency to command[414].

Those who point out soft law's positive effects frequently refer to a wider flexibility to adapt to changing scenarios and more easy corrections or changes when needed, while the negative side would be an alleged lack of democratic legitimacy in the rule-making process. Equally positive would be its capacity to set itself up as an interpretation of hard law instruments, which at times would otherwise be difficult to operationalise, but

[410] *Ibíd.*, pp. 6-8 (for all the examples cited in this paragraph).
[411] C. BRUMMER: *Soft Law and the Global Financial System. Rule Making in the 21st Century*, Cambridge 2012, Cambridge University Press, p. 174.
[412] *Ibíd.*, pp. 213-229.
[413] S. PAGLIARI: "Who Governs Finance? The Shifting Public-Private Divide in the Regulation of Derivatives, Rating Agencies and Hedge Funds", in *European Law Journal*, Vol. 18 No. 1 (January 2012), pp. 44-61.
[414] On the *auctoritas*: "Questo concetto prettamente romano, quistessenza dell'aristocratica società tardo republicana, esprime bene l'idea della normatività debole, non implicando la competenza di comandare, ma la semplice capacità di persuadere". T. GIARO: "Dal Soft Law moderno al Soft Law Antico", in A. SOMMA (a cura di): *Soft Law e Hard Law nelle società postmoderne*, Torino 2009, G. Giappichelli Ed., pp. 83-99, at p. 93.

the other side of the coin is its obscure judicial review. Again as a starting point and before this research focuses on the EU's contribution, the most authoritative and cited reference on soft law is Abbott and Snidal's research, according to which it is a "continuum" far away from Kelsen's positivist tradition[415], to rather show the "deep connection of law and politics"[416]. We already warned on the tight link between law and politics in the introduction, in line with Max Weber's thinking. Indeed, the influence of the political debate is unavoidable and it would be naïve not to recognise that companies are "already engaged in these governance processes"[417]. At least the largest corporations are *de facto* both economic and political actors, so that some kind of political ingredients need to be included in the CSR discourse and development, like democratic legitimacy and human rights, opened to all kind of stakeholders[418] from a pragmatic standpoint.

In IHRL, the so-called 'name and shame' strategies have generally failed to improve States' human rights performance or, at least, to generate long-term and structural improvements. In our view, name and shame strategies are *more likely* to work in the case of TNCs, unlike States, since the market's reward or punishment directly threatens their obvious *raison d'être*: reputational risks may have a translation into their economic performance, provided there exists a certain level of consumer's awareness. This is a kind of "social sanction"[419], which has never ceased to exist whether or not the positivists like it[420], coherently with our sociological approach to the formation of

[415] As expected in legal studies, the positivist tradition is strong and considers, all in all, that soft law is just a "trap" and a "legal metaphor": L. BLUTMAN: "In the Trap of a Legal Metaphor: International Soft Law", in *International and Comparative Law Quarterly*, Vol. 59 No. 3 (July 2010), pp. 605-624.

[416] In sum, soft law is sometime a "way station to harder legalisation", with advantages and disadvantages shared with hard regulation, and some exclusive benefits and costs. K.W. ABBOTT and D. SNIDAL: "Hard and Soft Law in International Governance", in *International Organization*, Vol. 54 No. 3 (Summer 2000), pp. 421-456, at pp. 423-424 and 455 (quotes).

[417] A.G. SHERER and G. PALAZZO: "Towards a Political Conception of Corporate Responsibility: Business and Society Seen from a Habermasian Perspective", in *The Academy of Management Review*, Vol. 32 No. 4 (October 2007), pp. 1096-1120, at p. 1098.

[418] The so-called "stakeholderism" is one of the most important innovations brought by the CSR movement: B. DUBBACH and M.T. MACHADO: "The importance of stakeholder engagement in the corporate responsibility to respect human rights", in *International Review of the Red Cross*, Vol. 94 No. 887 (Autumn 2012), pp. 1047-1068, at pp. 1053-1058.

[419] On this concept in international law, see: A. TANZI: *Introduzione al diritto internazionale contemporaneo*, Milano 2013, CEDAM Ed., pp. 51-53.

[420] Amusingly, Prof. Tanzi further says: "Il convincimento più diffuso che si incontra negli student dopo il primo anno di studio in una facoltà di giurisprudenza –e che li fa apparire come dei fedeli epigoni, ora del positivismo giuridico, ora della kelseniana "dottrina pura del diritto", e, nonostantante ciò (o proprio per questo), comunque scettici nei riguardi del diritto internazionale – è quello della natura coercitiva dell'ordinamento giuridico. *[...]* Tuttavia, sarebbe errato sostenere che la regola giuridica operi

International Law. And quite more importantly, soft law instruments can contribute to extend an international practice and generate, in the long term, a *consuetudine* that can be said to follow an *opinio iuris* if sufficiently consistent and expanded[421].

In this line, soft norms can also contribute to effectively 'open' the windows of opportunity we have detected concerning international trade and investments, as long as we renounce to maximalist demands and wish lists. However, the list of *pros* and *cons* is endless and it is not our objective to settle the debate on whether soft law advantages compensate the eventual shortfalls and gaps: we only suggest the answer is probably a matter of degree, that is, the quantity of soft instruments and how they are used.

As said before, we are no longer in the initial choice between hard law and soft law. As a matter of fact, CSR is not anymore an exclusively soft law area. At the end of the day, the question is wrong: it is "not an either/or proposition: both are necessary"[422]. We have rather observed an interaction and intermix of hard and soft norms. For the time being, we may conclude that soft law is *helping* or *completing* IHRL, or has shown its potential to do so, in two essential aspects: *prevention* and *horizontalisation* with regard to TNCs, while bypassing some crucial legal problems that could block for a long time any hard law initiative (for example, international subjectivity).

As said before, we referred to this in further detail when we criticised the 'treaty route'. Ultimately, only States have to respect their international obligations and, even though many academics put forward the need of designing a specific legal personality for transnational companies and individuals, we don't think this is a really effective shortcut to improve respect for human rights when international businesses are involved, as we have also justified that the proliferation of biding international treaties isn't either always the best way to materially foster human rights and, hence, part of the

efficacemente venendo rispettata esclusivamente in ragione dell'esistenza e del funzionamento di meccanismi sanzionatori". *Ibíd.*, p. 50.

[421] Soft law would have a "function of crystallisation" [funzione di cristallizzazione]. *Ibíd.*, p. 153. It has further been studied that soft instruments have widely been used when international tribunals had to decide whether a certain practice already constitutes a *consuetudine* or not, and also in the course of treaties' negotiations within the *travaux préparatoires*. *Ibíd.*, pp. 151-165.

[422] H.S. DASHWOOD: "Corporate Social Responsibility and the Evolution of International Norms", in J.J. KIRTON and M.J. TREBILCOCK (Eds.): *Hard Choices, Soft Law. Voluntary Standards in Global Trade, Environment and Social Governance*, Hants (England) 2004, Ashgate Publishing Company, pp. 189-202, at p. 199.

usefulness of *complementary* soft law instruments[423]. In order for human rights *treaties* to have –in and of themselves– tangible effects in the field, we usually need to be in democratic countries with relatively strong CSO's and NGOs, preferably with solid international connections; otherwise, the real impact of international human rights treaties has proved a very limited one[424]. More regulation does not automatically and necessarily lead to better compliance, neither in internal legal orders nor at an international level. We therefore have to abandon ideological misunderstandings on what regulation is and its real effectiveness and demystify hard law –while avoiding the other extreme of uncritically praising soft law. In our subject, the effectiveness of IHRL is not obvious in view of the regularity of violations. As pointed out by Prof. Douglass Cassel, the real impact of a human rights treaty will largely depend on the institutional environment and its valuable effects have to be "understood as part of a broader set of interrelated, mutually reinforcing processes and institutions –interwoven strands in a rope– that together pull human rights forward, and to which international law makes distinctive contributions"[425].

Consistently with our analysis in Chapter I, we therefore propose overcoming certain blocking dichotomies and this includes the apparently irreconcilable opposition between mandatory and voluntary schemes. International practice shows an interaction and combination of both policy options. We can also anticipate that the EU, at a regional level, has followed a sort of third way consisting of a *voluntary within mandatory* approach, as it will be developed in the second part of this work. In this line, we take as a premise that hard and soft law are "complements, not alternatives"[426].

[423] O. MARTÍN-ORTEAGA: "La diligencia debida de las empresas en material de Derechos Humanos. Un Nuevo estándar para una nueva responsabilidad", in F.J. ZAMORA, J. GARCÍA CIVICO, L. SALES PALLARÉS (Eds.): *La responsabilidad de las multinacionales por violaciones de los derechos humanos*, Madrid 2013, Universidad de Alcalá - Defensor del Pueblo, pp. 167-192.
[424] E. NEUMAYER: "Do International Human Rights Treaties Improve Respect for Human Rights?", in *The Journal of Conflict Resolution*, Vol. 49 No. 6 (2005), pp. 925-953.
[425] D. CASSEL: "Does Human Rights law make a difference?", in *Chicago Journal of International Law*, Vol. 2 No. 1 (Spring 2001), pp. 121-135, at p. 135.
[426] N. BAYNE: "Hard and Soft Law in International Institutions: Complements, not alternatives", in J.J. KIRTON and M.J. TREBILCOCK (Eds.): *op. cit.*, pp. 347-351.

### *2.3.2 The role of international organisations*

The media and popular imaginary expect any 'expert' worthy of that name to mercilessly criticise international institutions. It is commonplace to blame international organisations under any pretext and an interestingly similar discourse demonises TNCs. Black and white analyses seem to us oversimplifying and useless; we will now make some institutional remarks.

In a gradually liberalised world economy where international contracts and investments are widespread, States and International Organisations have a crucial role to play. The trade of diamonds and the Kimberly Process Certification Scheme provides again an enlightening example of the radical importance of the institutional environment to foster CSR, including "carrots and sticks"[427] in a mixed legislative-voluntary scheme and tripartite negotiations involving States, NGOs, CSOs and the industry, all of which should ideally have a proved legitimacy: States to be preferably democratic and institutionally solid; NGOs and CSOs have legitimate interests and be representative; and the industry should be consolidated and agree on the starting point (the need to tackle the adverse impacts of their business activity). In our view, we fully agree with the idea that institutionalisation is the key to "translate CSR rhetoric into concrete actions"[428] and, in this respect, international organisations have played a prominent role, though improvable or unfinished.

In our view, international institutions can decisively contribute to the development of a human rights-friendly business milieu. Similarly to human rights treaties, corporate social responsibility –understood as a mixture of hard and soft law instruments mainly centred on 'business and human rights' issues– is more likely to have an effect the stronger is civil society and the "institutional terrain within corporations operate"[429], to name just a few aspects: public pressure, trade unions, NGOs, monitoring and inspection bodies, proper legislation encouraging and framing CSR, a competitive and healthy economy and, of course, a democratic regime.

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[427] F. BIERI and J. BOLI: "Trading Diamonds Responsibility: Institutional Explanations for Corporate Social Responsibility", in *Sociological Forum*, Vol. 26 No. 3 (September 2011), pp. 501-526, at p. 507.
[428] *Ibíd.*, p. 502.
[429] J.L. CAMPBELL: "Why would Corporations Behave in Socially Responsible Ways? An Institutional Theory of Corporate Social Responsibility", in *The Academy of Management Review*, Vol. 32 No. 3 (July 2007), pp. 946-967, at p. 962.

Both national and international institutions have a critical role to define the framework within which they discipline the diverse initiatives, facilitate and promote corporate human rights respect. The institutional environment is the reason why, for example, this research is peppered with tangential references to other problems, being a prominent example the issue of fragile and failed states, but also other factors like aid and development[430] or political and legitimacy questions

In developing and least developed countries, public debt imbalances, economic weaknesses and needs are priorities that tend to shadow their human rights obligations. On the companies' side, we have already stated that it is Manichean and inaccurate to only blame companies, alleging that they specifically look for weak State regimes. However, generally speaking, the business tendency will be more likely to adapt to –let's say– *undesirable situations* in third countries rather than put at risk investments or benefits. We can now add another reason why only soft self-regulation is insufficient: once again, the institutional environment of developing and least developed countries. Strategies based solely on the self-interest of companies (the 'business case') clearly fall short; public inputs and frames are needed, on which international organisations can provide significant guidance to overcome and address, in parallel, weak governance and poverty in those countries.

Concerning the politics of democracy and legitimacy issues, the critiques against soft law are ultimately rooted in alleged problems of democracy and legitimacy within international institutions, the ones who create those soft instruments. We must note, even at the risk of being repetitive, that IOs are created *by* and *for* States, so the latter are the key-players. As rightly indicated by Norberto Bobbio, the international community will be democratic only when all States are themselves democratic and, vice versa, a State's democracy will be imperfect and experience problems in the international community if there are still non-democratic regimes in the world[431]. This situation has its reflection within international institutions in terms of transparency, accessibility, public participation and human rights performance. In this vein, we should stop using the 19th century-logics on nation-state democracies to design the multilevel

[430] Blowfield argues that CSR has reinvented the meaning of development; only time will tell if positive changes will come but, for the moment, it has been useful to uncover hidden issues in terms of supply chains and raise social awareness. M. BLOWFIELD: "Corporate Social Responsibility: Reinventing the Meaning of Development?", in *International Affairs* (Royal Institute of International Affairs), Vol. 81 No. 3 (May 2005), Monographic issue: *Critical Perspectives on Corporate Social Responsibility*, pp. 515-524.
[431] N. BOBBIO: *op. cit.*, pp. 416-417 and pp. 444-445.

international governance and rather start thinking of IOs differently. Perhaps novel forms of international democratic accountability appear someday. For their success, they will have to overcome the three main problems of multilevel governance: the "weak visibility" of its inherent networks, "their selective composition and the prevalence of peer over public forms of accountability"[432].

In this regard, functionalism still dominates the theory of international organisations, with the immunity doctrine and the 'members-driven' *leitmotiv* at its heart. In practice, the predominant functionalist theory of IOs fails to assess the real role of politics within IOs and the complexity of overlapping functions and powers, interface subjects and accountability problems[433]. In the first section of this chapter we have mentioned a number of overlapping CSR initiatives undertaken by different IOs. And we witness timid improvements that occur in the normal way many things happen in the international sphere –through simple *faits accomplis*. In effect, nowadays IOs start to coordinate each other policies and engage in unprecedented manners with actors other than member-States, which shows a growing openness; at the same time, the doctrine of human rights mainstreaming is more widely accepted to introduce human rights concerns into the practice of specialised institutions, of course without turning around their founding goals. In the second part of this research, we will see that the EU, as an "extreme"[434] international organisation, accordingly carries substantive CSR to the extreme, compared to the global instruments. This change or evolution of IOs is in its infancy and silently challenges the above-mentioned limits of the functionalist theory of IOs. Furthermore, the daily practice and work of IOs could be explained in terms of 'implicit powers' and escapes traditional moulds[435]. There are organisations more geared to services (the UN) and others tend to serve as *fora* (the WTO)[436], but this classification does not provide us with clear-cut distinctions either.

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[432] Y. PAPADOPOULOS: "Problems of Democratic Accountability in Network and Multilevel Governance", in *European Law Journal*, Vol. 13 No. 4 (July 2007), pp. 469-486, at pp. 473-478 and 480-483.

[433] On the limits of the "scope of functionalism" see: J. KLABBERS: "The Transformation of International Organizations Law", in *The European Journal of International Law*, Vol. 26 No. 1, pp. 9-82, at pp. 30-33.

[434] *Ibíd.*, at p. 33.

[435] J. KLABBERS: *An Introduction to International Institutional Law*, Cambridge 2009, Cambridge University Press, pp. 53-73.

[436] R.W. COX and H.K. JACOBSON: *The Anatomy of Influence. Decision-making in International Organisations*, New Haven – London 1972, Yale University Press, pp. 5-6.

That said, it is difficult to evaluate to what extent an IO, created by States as "an institution with a life of its own", can become a threat to States themselves and, at times, eventually act against their interests, which is very much the case in many delicate human rights situations. Perhaps the remaining insistence on functionalism and the recurrent limitations of IOs are, in fact, the States "response to the Frankenstein problem"[437] –thus preventing IOs from becoming a 'monster out of their control'. Apart from theorisations, the fact is that IOs legitimacy will largely depend on two factors: *1)* the number of democratic States within the international community; and *2)* the formation of a specific sociological legitimacy for IOs, precisely built through their compliance of International Law and, very prominently, of human rights law[438].

Finally, by way of conclusion, the following points indicate some of the most prominent contributions that could be made by international organisations at a global scale:

1) To build an atmosphere of trust and dialogue, indispensable basis on which the international society can conduct negotiations and reach agreements;

2) Mainstream human rights into their founding objectives, whatever these are;

3) Give priority to capacity-building in developing and least developed countries. Capacity-building should include all actors: States, institutions, policy makers, investors, traders and producers, companies, lobbies, judges and arbitrators, workers and consumers, NGO's and CSO's;

4) Prioritise good governance. Essential components are democracy, rule of law, predictability, political stability, transparency and access to justice;

5) Link the agendas of the different international organisations;

6) Promote cross-cutting public agencies, both national and international, to help address transversal human rights issues, capable to put in place tailored measures and initiatives adapted to each economic sector;

[437] A. GUZMAN: "International Organizations and the Frankenstein Problem", in *The European Journal of International Law*, Vol. 24 No. 4 (2013), pp. 999-1025, at p. 1018.
[438] This would lead to a "reputation" that would serve as the basis for legitimacy. K. DAUGIRDAS: "Reputation and the Responsibility of International Organizations", in *The European Journal of International Law*, Vol. 25 No. 4 (2015), pp. 991-1018, at pp. 1007-1010.

7) Support negotiations as usual, but also at a domestic level providing with the organisation's expertise;

8) To work on international standards is critical in order to extrapolate good governance to the international sphere and, through harmonisation, attain a predictable international order. Proposals ought to be clear, concise, pragmatic and understandable, built on a long-term and technical vision;

9) For the success of this work on international standards, organisations could create reliable information systems, including human rights indicators, as objectively as possible;

10) Bring all stakeholders to the table and make sure their voice is heard, extending the external participation channels in the decision-making process, even though the final decisions fall on member-States;

11) To structure and spread public-private dialogue and PPPs, at an internal level and internationally. International organisations could without fear engage in more and more direct dialogue with the private sector –there is no reason why this dialogue might go against their intergovernmental nature and scope.

12) Lastly, the possibility of promoting private sector partnerships could be explored by governments and international organisations to expand good practices and encourage social responsibility guidelines and codes of conduct.

13) Promotion of "human rights impact assessments"[439], inspired in the environmental ones.

The successful interplay of the foregoing bullet-points will mark the final contribution of IOs in two crucial aspects: the progressive development of International Law in relation to business and human rights, and the promotion of an extended and consistent States' practice in the same direction.

[439] There is a lot of pending research on 'human rights impact assessments' applied to areas such as investments and trade, which would foster the preventive aspects of IHRL. A practical and interesting proposal to assess trade agreements at: S. WALKER: *The Future of Human Rights Impact Assessments of Trade Agreements*, Antwerp-Oxford-Portland 2009, Intersentia Ed., xiv + 252 pp. *passim*.

# CHAPTER III

## Corporate Social Responsibility in the European Union

CSR is somehow linked to many different policies of the European Union, even before being labelled and receiving that name. One of its related issues is sustainable development: fight against poverty is essentially articulated through development policies which are, since 2000, tightly related to the MDG's of the United Nations. However, this commitment to human rights and engagement towards developing countries goes beyond mere development policies and, more and more, affects other European actions such as commercial and neighbourhood policies. In this sense, we need to analyse to what extent CSR and fight against poverty have started to overlap and to create synergies with other EU policies, advancing in the achievement of the MDG's and the post-2015 agenda.

The EU has developed CSR on three different levels:

1) Within the international framework in this subject, that is, in accordance with codes and norms of other international organisations and some particular initiatives of member States.
2) Secondly, a specific frame was born after the *Green Paper on Corporate Social Responsibility* (2001) together with an important Communication of the Commission on CSR (2002), which constitute the initial benchmark, followed by a rich documentation functioning as a general guidance.
3) Lastly, the EU has introduced CSR in almost any of its policies, which now include CSR objectives. Among these policies, the most important fields are the cooperation and development, environment, employment, consumers' protection among others.

### 3.1. The emergence of CSR in the EU

#### *3.1.1. From a limited concern* ad intra *to a wider development goal*

CSR could initially be understood as another complementary way to promote a fully integrated interior market and to facilitate the enlargement eastwards, making it

compatible with the European values. Its link with more general human rights and development goals has been understood more recently, in particular for those countries with which the EU has commercial, financial or political-strategic relations.

The obvious problem at the beginning is that the EU's CSR objectives were far from reflecting the real problems and needs of developing or under-developed countries, as summarized in the UN goals. The level of development of member States might explain why European companies usually didn't include among their CSR objectives the most prominent human rights issues, such as the reduction of extreme poverty or child labour, which are not urgent problems inside the EU but core goals of the 2015 world agenda and the new SDGs for 2030. Nevertheless, European companies have the engagement of promoting the respect of the same norms and codes of conduct in all countries in which they operate, regardless of the usual breach of fundamental rights in some of these places.

Delors declaration in 1993 against social exclusion is the most repeated key date when studying the origin of CSR, inaugurating the European Union after Maastricht with a clear social agenda: "[t]he social dimension is the Achilles heel of a Community that is misunderstood, that lacks grassroots support"[440]. It could have been a perfectly forgettable political statement; its importance *a posteriori* lies in the impact it had in the private sector, leading to the creation of European networks of companies, and because it helped to launch a new conception of a social Europe, linking it both to economic prosperity and to its external action: "without economic muscle the Community will be in no position to demonstrate solidarity with countries suffering from internal divisions and underdevelopment, or to exert any influence on world affairs"[441]. The inclusion of new social concerns is logically related to the introduction in Maastricht of the European citizenship.

Delors' triangle linking the social agenda, the economic integration and prosperity together with the EU international role, constituted the first step towards the development of new non-economic concerns of the European Union, both internally and externally. Not surprisingly, it is also in 1993 when the European Council at

[440] Address by Jacques Delors, President of the Commission, to the European Parliament on the occasion of the investiture debate of the new Commission, Strasbourg 10 February 1993, *Official Journal of the European Communities*, Supplement 1/93, p. 9.
[441] *Ibíd.*, p.11.

Copenhaguen established a set of four criteria for eventual enlargements (completed with a fifth requirement in 1995 in Madrid) including clear human rights and democratic references[442]. The political environment induced the European Union to become more aware of its international role beyond mere economic factors.

In 1999, the EU Parliament approved a Resolution on the *EU standards for European Enterprises operating in developing countries: towards a European Code of Conduct.* This document called on the Commission and the Council to keep working on corporate responsibility in line with the work of other international organisations, particularly the OECD and the ILO. Besides some classic initiatives from a European approach, such as the creation of a "social label"[443], this Resolution insisted on the need of monitoring mechanisms, in order to ensure that Companies operating on behalf of the EU in third Countries respect EU standards, at the risk of losing the adjudication of projects through the European Development Fund or the Commission's budget[444]. An explicit reference is also made to future EU agreements with third countries, which should not forget social and human rights issues, including investment agreements[445]. The Parliament finally foresaw a European code of conduct to facilitate the standardisation of voluntary good practices, with the help of an observatory on CSR eventually comprising of complaints and coercive measures.

This control is very problematic when dealing with the international activity of European transnational companies. A supplier of several European transnational companies could be subject to different codes of conduct imposed by its clients, in such a way that part of its commercial relations would be seen as "socially responsible" but some others not, even in the case of the same product and the same production criteria. This is why, even though many companies were already writing their own CSR reports, generally centred on the environment, health or safety at work, only very few included respect for human rights in general terms or child labour. The diversity of the data in these reports showed the need of a wider *consensus* at an international level on the contents of CSR, its structure and reliability. Furthermore, the complexity of corporate

[442] A. BIONDI, P. EECKHOUT and S. RIPLEY (Eds.): *EU Law after Lisbon*, Oxford 2012, Oxford Univ. Press, p. 131.
[443] EUROPEAN PARLIAMENT: "Resolution on EU standards for European enterprises operating in developing Countries: towards a European Code of Conduct", [A4-508/98], *Official Journal of the Europen Communities*, C 104, Part II, 14 April 1999, pp. 180-184, para. 13
[444] *Ibíd.*, para. 23.
[445] *Ibíd.*, para. 25-27 and 30.

structures, that is, the fluidity and confusion between EU-based parent companies and their international operations in third countries, make this problem even more difficult.

On the other hand, all the documents on CSR emanating from EU institutions acknowledge and assume the previous work of other international organisations, so that there is no doubt on where the EU has found its inspiration. The most usual explicit references are the United Nations Charter, the Universal Declaration of Human Rights, the most prominent international human rights law, the 1977 ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy, the 1976 OECD "Guidelines for Multinational Enterprises", the 1998 ILO Declaration on Fundamental Principles and Rights at Work, specific recommendations of FAO, WHO, World Bank and other specialised agencies. After 2000/2001, further references will be made to more recent guidelines and documents, in particular to the work of the SRSG John Ruggie in the area of business and human rights.

In March 2000 we find the first explicit and important reference to CSR: the European Council at Lisbon made "a special appeal to *companies' corporate sense of social responsibility* regarding best practices on lifelong learning, work organisation, equal opportunities, social inclusion and sustainable development"[446]. In this way, the Council highlighted the will to develop CSR by establishing good practices in areas such as education, continuous training and social affairs, consistently with the notion of sustainable human development, *i.e.*, the fusion of sustainable growth and human rights. This objective represented an important advancement and a challenge to the extent it was aimed at facing future changes derived from globalisation and a knowledge-based economy, all in line with European values and social conceptions. In this direction, it was necessary to increase the investment in human capital and to combat social exclusion in order to proceed to a real modernisation of the European social model. In the same direction, it was acknowledged that human capital was the main asset of the EU and this idea had to inspire any European policy including CSR aspects (at least, indirectly). More concretely, it was proposed to significantly increase *per capita* investment in human capital; to reduce by half before 2010 the number of citizens between 18 and 24 years old with secondary education who do not receive any further preparation; and to define new basic skills for continuous training, as well as the

[446] We find up to eight references to private companies: Presidency Conclusions, Lisbon European Council, 23 and 24 March 2000, para. 39 (citation –emphasis added).

promotion of private-public partnerships in the field of education[447]. In this sense, even though the EU would act as a catalyst, the fundamental actions had to be undertaken by the private sector (companies).

In the Commission's *Social Policy Agenda* 2000[448] a special mention was made to the requirement of incorporating social responsibility as an active strategy to remediate the negative consequences of globalisation and economic integration in the employment market. For that purpose, the impulse of a coordinated CSR strategy in Europe had to go through multi-stakeholder partnerships (NGO's, CSO's, companies, social public authorities, etc.). The so-called "social partners" had a crucial role in the view of both the Commission and the Council; it is our understanding that the level of institutional engagement was still low, limited to the general promotion of these initiatives without really launching concrete actions, even though it is necessary to point out that the social aspects of the "European Union external relations" were reaffirmed, not only in anticipation of enlargements but also in general terms with regard to third countries[449].

During the Stockholm European Council, in March 2001, whose main target was full employment, a variety of CSR related issues were considered, although indirectly. The pre-crisis politics were centred on building a sustainable growth, wondering on which way the European social model had to be updated so as to include new educational and training skills, adapted to the information society and knowledge-based economy. In this strategy, well-designed systems of social protection deserved being studied as important productive factors: *more* but also *better* work, as already stated in the Lisbon Council (2000), to improve working conditions, foster equal opportunities (gender policies and persons with disabilities), facilitate continuous training, ensure safety at work and reach a better balance between family life and career.

A specific heading on Corporate Social Responsibility was included, welcoming business-lead initiatives and the already existing project of a Green Paper in this area[450]. What is important to note is that, little by little, an external dimension was progressively

[447] *Ibíd.*, para. 26.
[448] COM (2000) 379 final.
[449] Presidency Conclusions, Nice European Council, 7-10 December 2010, Annex 1 (Social Agenda), title VI.
[450] Presidency Conclusions, Stockholm European Council, 23-24 March 2001, para. 31

added to CSR issues, consistent with more general development goals at an international level.[451]

The European engagement to renovate economic and social policies received a powerful impetus at the Gothenburg European Council (June 2001), when a general new strategy for sustainable development was approved adding a new environmental approach to some of the previous agreements, particularly relevant to complete the Lisbon strategy for CSR. We still don't always find explicit references to CSR but the bases were settled to build its further development. It was recognised that all economic, social and environmental policies had to be implemented taking into account their social effects and interactions, in order to design a comprehensive and holistic approach to coordinate institutional initiatives towards sustainable development. Since Gothenburg, considerations on the "social impacts" had to be introduced into the Common Agricultural Policy, the Fisheries Policy, the Integrated Product Policy ("in cooperation with business", especially to improve waste management)[452], what established a precedent to potentially mainstream CSR issues into any European policy.

On a more general note, the Council also made some significant political statements, saying for example that "*[s]*ustainable development –to meet the needs of the present generation without compromising those of future generations- is a fundamental objective under the Treaties"[453], providing us with a definition at the same time it informs us on which direction is evolving the approach to social responsibility linked to more global and general goals. To confirm it, the Council expressed its engagement towards reaching an agreement at the then forthcoming Doha Round, which indeed ended up inserting into the WTO practices a more friendly attitude towards development, taking into account the ever since undeniable importance of the social dimensions of globalisation[454]. However, Doha would block the WTO for a decade.

At this point, we start to realise that the emergence of CSR in the EU has two main characteristics: it initially follows the initiatives taken by other international organisations, assuming this global work without additions. CSR receives of course

[451] O. AMAO: *Corporate Social Responsibility, Human Rights and the Law. Multinational corporations in developing countries*, New York 2011, Routledge Ed., pp. 207-215.
[452] Presidency Conclusions, Gothenburg European Council, 15-16 June 2001, para. 31.
[453] Even though the Council didn't specify on which articles of the Treaties this statement could find support. *Ibíd.*, para. 19.
[454] *Ibíd.*, para. 26 and 45.

some institutional support through the documentation cited above, but its content heavily relies on private and voluntary initiatives, who may take over. As it has happened in many fields of the European integration, the society takes the baton and runs with it in parallel to slower and highly bureaucratised EU institutions. Later, back to the institutional level, whilst CSR is gradually consolidated, the EU has made an interesting contribution that we start to witness since year 2000: to strengthen the global dimension of CSR, its potential in terms of sustainable human development through cooperation and development policies, and even through trade or investment contracts (in the case of the Parliament resolutions, usually more audacious than the Council or the Commission).

This very important international or external dimension of CSR is again confirmed at the Gothenburg Council. Part of the agreement stated that sustainable development had to be included in cooperation programs, aimed at extending this practice to other international organisations. The European Union was assuming this way its international role, perhaps even a desire for leadership, to promote an adequate protection of the environment and a consistent commercial policy. There were four concrete areas on which the Council put emphasis: climate change, natural resources, transport and public health.

At this first stage of CSR in the EU (before 2009), apart from the practice of the Parliament and the Council, the Commission was also working in this field and made two main contributions: the *Green Paper promoting a European framework for CSR* (2001)[455] as well as the famous 2002' Communication[456], when CSR received proper consideration by itself as a new crosscutting strategy in the EU.

The *Green Paper* was aimed at creating a general frame for companies and all eventual stakeholders, in line with the sustainable development agenda settled at Gothenburg and with a view to avoiding the potential adverse effects of European integration and globalisation trends in the economy and labour markets. The Commission insisted on the fact that corporate contribution must be understood as going beyond the existing legal obligations, so that CSR is not a substitute for legal constraints, but a complement

[455] COM (2001) 366 Final, 18 July 2001, *Green Paper promoting a European framework for Corporate Social Responsibility*.
[456] COM (2002) 347 Final, of 2 July 2002, *Corporate Social Responsibility: a business contribution to sustainable development*.

to boost development consistently with both general human rights compliance and the European social agenda. According to the Commission, it was crucial to work on a double direction: to involve all stakeholders and as many CSO's / NGO's as possible, and secondly to extend these initiatives also to SME's, which actually constitute the majority of the productive and business sector.

In a more concrete manner, the *Green Paper* includes different engagements from an intra-European point of view:

a) Concerning the management of human resources, the objective is to foster and maintain qualified workers thanks to continuous education and training, equal remuneration programs and better information on the companies themselves. Non-discrimination responsible practices were encouraged so as to facilitate labour opportunities to less qualified work force, less educated or elderly people, sustained on training policies in close cooperation with local public authorities in charge of education and professional programs.
b) As for public health and safety at work, this is to a great extent a pending subject in the EU due to the expansion of subcontracting and outsourcing practices making it difficult to apply CSR principles (or even prevent directly illegal practices). We cannot forget that most of the historic improvements in labour and social security law have been achieved through legal constraints. To stimulate good practices in this area, we might propose quantifying its benefits in the companies' management and within marketing policies.
c) In regard to the environment, the main goals are the reduction of use of resources, pollution and waste management. This field has experienced a significant and prompt improvement because companies were primarily interested in reducing the associated costs (power and raw materials), compensated with efficient waste management and recycling processes, which are in addition easily measurable in traditional accounting systems and Boards of Directors' reports.

From an institutional and international perspective, more relevant to us, the Commission wants European enterprises to integrate CSR within their commercial and development policies, extending its use to other international scenarios and contexts. Already recognised obligations under international human rights law are not under discussion

because of CSR recent developments. Companies have to be aware of this fact whether they operate in Europe or in third countries even where human rights violations or corruption might be usual. Although the EU had already given importance to the OECD and ILO principles and norms, with the *Green Paper* a new commitment was expressed trying to push forward standards and regain some leadership in its interaction with other international organisations. As for CSR's external dimension, networking plans were fostered towards the creation of private partnerships in line with common guidelines, for example, when looking for suppliers (supply chains easily become CSR "black holes" as they become more and more complex and global). It is in the relationship with customers where CSR has quite quickly developed (so-called "eco-friendly" products and services); not that much when dealing with suppliers. The reason is that consumers' awareness is higher and demand such responsibility while, at the same time, benefits for companies and calculations are easily integrated in marketing plans[457]. In summary, the remaining problems (up to now) are the same: credibility, standardisation, measurement and information systems, monitoring and impact assessments (to detect the benefits for both companies and society).

In this sense, the institutional role of the EU is potentially positive, if institutions dare developing these ideas. As preconized by the EU Parliament report on the *Green Paper,* it seems easy to call on the Council and the Commission to go one step further, starting with the liability of EU parent companies operating abroad also within EU Courts[458] (see *Chapter IV*, heading 2), or making CSR mainstream to any business and not only a voluntary "extra add-on" taking into account the actual influence of many EU-based transnational companies. The voluntary component of CSR would be the choice of the concrete way to implement and select the particular focus of the company, but not the fact of having a CSR policy. The most audacious institutional player in the emergence of CSR in the EU has been the Parliament, but we need to balance all positions without forgetting the importance of the external dimension of CSR. The need to improve human rights respect in economically developing countries where EU-based companies operate is crucial. At the same time, the internal dimension of CSR shouldn't be

[457] C. VALOR and I. HURTADO (Coords.): *Las empresas españolas y la Responsabilidad Social Corporativa. La contribución a los Objetivos de Desarrollo del Milenio*, Madrid 2009, Ed. Catarata, pp. 38-45.

[458] The EU Parliament Report on the *Green Paper* took form of a *Resolution on the Commission Green Paper on Promoting a European framework for Corporate Social Responsibility* (COM(2001) 366 –c5-0161/2002-2002/2069(COS)), para. 50 (for the interpretation of the Brussels Convention and the extraterritorial liability of EU companies, analysed below –Chapter IV, Section 2).

neglected in order to maintain and preserve human rights standards in economically developed countries. The number of pending cases in ECHR suggests that Europe is not necessarily a paradise; it could be said that the EU Parliament excessively focuses on the external dimension[459], even if we also need to put the above-cited Parliaments' Report on the *Green Paper* in the context of pre-crisis politics and keep in mind that it constitutes a perfectly legitimate and well-founded political *desideratum*. In any event, the global approach of the Green Paper and the international concerns of the Parliament don't seem problematic, but useful to foster CSR through an early global approach[460].

Finally, the Communication of the Commission issued in 2002[461] importantly clarified the European frame on CSR. The new strategy was designed specifically thinking of private actors, in such a way that public authorities would only encourage it as a *complementary* way to contribute to sustainable development (together with other classic developmental policies). In summary, the proposal envisaged the following developments:

a) The positive impact of CSR had to be disseminated, both inside and outside Europe, to the extent most of the companies are still not able to quantify its potential effect on productivity and neither consumers know to what extent it can benefit them. To that end, the exchange of information and experiences would be promoted between companies and Member States, especially within the same economic sector, to reach a common understanding on core CSR notions and to help the establishment of agreements that might reduce the initial cost of introducing CSR codes. This is based on the recognition of a long-term interest of companies, once the Commission realises that the Parliament was right when saying that CSR was no longer an "add-on" but had become a commonplace among corporations, despite the fact that its completely voluntary adoption is still defended by the Commission.
b) A multilateral forum was proposed at a regional level to evaluate transparency and convergence of CSR tools and practices.
c) Precisely for that reason, the Commission realised that an important work was needed towards convergence and transparency in order to build a reliable and

[459] J. LUX, S. SKADEGAARD THORSEN and A. MEISLING: "The European Initiatives", in R. MULLERAT: *op. cit.*, pp. 325-348, at p. 332.
[460] F. BORGIA: *op. cit.*, pp. 150-151.
[461] COM (2002) 347 Final, 2 July 2002, on *Corporate Social Responsibility: A Business contribution to Sustainable Development.*

credible system to really reflect –internally and externally- the benefits of CSR. The EU could serve as intermediator and coordinator of these information systems, moderating the debates to make the advancements effective.

d) CSR had to be integrated in all EU policies. This is an absolute novelty; it is true that the Gothenburg European Council already provided the insertion of social and environmental concerns in any European action, but the Commission took a substantial step forward mentioning expressly CSR as such in any EU policy, included the external action.

As can be seen so far, after the first impulse of the different European Councils cited above, the inter-institutional dialogue has mainly taken place between the Commission and the Parliament. The *Green Paper* and 2002' Communication undoubtedly constituted steps forward, but the Parliament issued a new report making some remarks to the Commission. The debate on voluntariness was closed and the Parliament admitted that CSR is necessarily voluntary, but the Parliament did not shy away from "emphasis*[ing]* that companies should be required to contribute to a cleaner environment by law rather than solely on a voluntary basis" [462], thus a bit frustrated with an essential aspect of the definition of CSR. We have noted in the general part of this work that CSR has evolved into a mix of hard and soft law, well beyond mere voluntariness, but by 2003 the EU was still in its way to reach that conclusion. In any case, the Parliament seemed to be satisfied in the overall with the Commissions' approach, calling for an effective and quick implementation of the proposed measures, in particular the eco and social labels, the launching of the multi-stakeholder forum, and some new ideas such as a register of blacklisted companies[463], sadly forgotten afterwards. The Parliament's report annexes the opinion of different Committees, of which we might highlight the Industry, External Trade, Research and Energy which demands a greater engagement within the WTO negotiations as well as launching a Global Convention on Corporate Accountability[464].

Before the entry into force of the Treaty of Lisbon in December 2009, we might say that CSR emerged and started to consolidate at a European level. The following initiatives didn't add much to the previous *corpus*. Between 2005 and 2006, the Commission made

[462] EUROPEAN PARLIAMENT: *Report on the Communication from the Commission concerning Corporate Social Responsibility: A business contribution to Sustainable Development* (COM(2002) 347 - 2002/2261 INI), Final A5-0133/2003, 28 April 2003, para. 3.
[463] *Ibíd.*, p. 10, para. 29.
[464] *Ibíd.*, p.16, para. 9 and 12.

some efforts to recover the spirit of the European Council at Lisbon. For example, a new Communication in 2006 renewed the commitment with CSR, essentially repeating the wording and priorities, but advancing in the international or external dimension of CSR[465], also tightly related to UN MDG's and the work of the SGSR John Ruggie, newly appointed in 2005[466]. Again, the Parliament's response is centred on the complementarity of compulsory and voluntary measures. The EP realises that the proliferation of codes of conduct without clear guidelines and common criteria can cause confusion, and that the European debate was stagnating and needed a "shift from 'processes' to 'outcomes"[467], without giving away any of the previous considerations on the extraterritorial liability of EU-based companies as a complement to make CSR more effective.

For those particularly sceptic on the potential of this work, even at this first stage before the decisive impulse after 2009, all this soft law permeated for example, timidly but clearly, in two Directives regarding the annual reporting of certain companies and financial institutions, which included unprecedented references to social aspects. It is said that "where appropriate, this should lead to an analysis of environmental and social aspects necessary for an understanding of the company's development, performance or position"[468] consistently with Recommendation 2001/453/EC. In 2006 a Directive of the Commission reiterated this approach on "environmental and social aspects" and further required (amending Directive 78/660/EEC) that Companies may provide in their annual report with a corporate governance statement, disclosing the corporate

[465] "The Commission recognises the linkages between the uptake of CSR in the EU and internationally, and believes that European companies should behave responsibly wherever they operate, in accordance with European values and internationally agreed norms and standards", Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee: *Implementing the Partnership for Growth and Jobs: making Europe a Pole of Excellence on Corporate Social Responsibility*, COM (2006) 136 final, 22 March 2006, p. 5.

[466] The appointment of John Ruggie took place in 2005 and is likely to be another reason why the Commission re-examines CSR trying to revitalise the efforts without much success between 2006 and 2009.

[467] EUROPEAN PARLIAMENT: *Report on corporate social responsibility: a new partnership* (2006/2133 INI), Final A6-0471/2006, 22 December 2006, para 4. The main ideas of this Report were included in the Resolution of 13 March 2007 on corporate social responsibility, a new partnership (A6-0471/2006 / P6_TA-PROV(2007)0062).

[468] Directive 2003/51/EC, 18 June 2003, *on the annual and consolidated accounts of certain types of companies, banks, and other financial institutions and insurance undertakings*, recital 9. This recital is consistent, within the same Directive, with article 1, item 14 (amending previous Directive 78/669/EEC) which states that "to the extent necessary for an understanding of the company's development, performance or position, the analysis shall include both financial and, where appropriate, non-financial key performance indicators relevant to the particular business, including information relating to environmental and employee matters" (emphasis added).

governance code to which they are subject, or the one to which they have voluntarily adhered, as well as the "corporate governance practices applied beyond the requirements under national law", or in absence of all these, when "the company has decided not to apply any provisions of a corporate governance code […], it shall *explain* its reasons for doing so" (emphasis added)[469]. Despite the obvious interest of this early permeation into hard law instruments, we share only to a limited extent the view of many academics that are only interested in CSR in the EU because of its possible compulsory character *ad futuram*[470]*;* even its voluntary elements can contribute to *complement* legal obligations (provided these exist). We move somewhere between "complying" and "explaining" requirements. Perhaps there is a lack of clarity in the European corporate governance codes, and this initial regulation might be less demanding than in the US[471], but we should keep in mind it is a highly complex on-going process in which the Commission understandably leaves more room for the margin of appreciation of Member States.

From this documentation we infer that the inter-institutional feedbacks have vivified the development of CSR in the EU. The terms of the debate between the Parliament and the Commission confirms the early global vocation of CSR in the EU at the same time it continued to be internally consolidated. In any case, social concerns and the potential of corporate responsible practices had a rapid reflection in civil society organisations and companies. The awareness on social and environmental impacts of the market economy quickly spread and, after this first institutional push, we might hypothesize that –again in the European history, private actors and civil society took over and has, for a long time, been ahead of the institutional initiatives. A good part of the progress made recently is thanks to the private initiative, particularly in social issues, environmental protection and respect for human rights, trying to contribute to sustainable development as indicated after Gothenburg, not only in Europe, but also in third countries in which companies operate (mainly least developed countries).

[469] This affects companies whose securities are admitted to trading on a regulated market and which have their registered office in the Community. Directive 2006/46/EC, 14 June 2006, *on the anual accounts of certain types of companies*, recital 10 and article 1, item 7.
[470] B. HORRIGAN : *Corporate Social Responsibility in the 21st Century. Debates, Models and Practices among Government, Law and Business*, United Kingdom 2010, Edward Elgar Pub. Ltd., pp. 187-188.
[471] B. SOLTANI and C. MAUPETIT : "Importance of core values of ethics, integrity and accountability in the European corporate governance codes", in *Journal of Management and Governance*(Springer Ed.), May 2015, Vol. 19, Issue 2, , pp. 259-284, at pp. 273-280.

In this first phase of emergence of CSR at a regional level, and despite the usual inter-institutional battles and the lack of originality, the first European contribution is to have strengthened its link with general human rights issues and global development goals, while internally clarifying and progressively specifying its content. To sum up, the first phase of emergence and definition of CSR in the EU did not incorporated new components but interestingly evolved from a limited concern *ad intra* to a wider development goal.

### *3.1.2. A new impulse after 2009*

With the entry into force of the Treaty of Lisbon in December 2009 the debate on CSR slightly changes. For instance, article 2 of the TEU clearly settles the "values" of the EU in terms of democracy, rule of law, respect for human rights and justice. The global dimension of CSR finds support in articles 21 and 205 of TFEU extending these *values* to the Union's external action. Particularly interesting is the accuracy and level of detail of item 1 of art. 21 TFEU referred to the "universality and indivisibility of human rights and fundamental freedoms", assuming by the way, at a Treaty level, the evolution and consolidated practice of international human rights law as we have studied previously. After 2009 the Treaties' provisions are therefore consistent with CSR conception under which internal improvements have little sense if they are not accompanied by an international dimension, according to the Union's external commitment to "consolidate and support democracy, the rule of law, human rights and the principles of international law" (art. 21.2 TFEU). The mention to general international law is an open window, as argued with regard to trade and investment agreements[472], to introduce human rights as a common interest of the international society. Besides, but not surprisingly, the general provision on the EU external action (item 2 art. 21 TFEU) provides us with a list in which we find both human rights and the promotion of economic development, if we read these articles together with art. 3 TEU enshrining the European social vocation and article 11 TFEU on the environment and sustainable development.

As explained, after a few years of relative stagnation (2006-2009) or without significant news in this regard, one of the most interesting initiatives came in 2009 when the

[472] See Chapter II, Section 2.

European Commission launched a *call for tenders* to study 'the legal framework with respect to human rights and the environment applicable to European companies operating outside the EU', in order to know on what basis the work had to be done to join Ruggie's efforts and effectively advance in that direction.[473] The result was the *Study of the Legal Framework on Human Rights and the Environment Applicable to European Enterprises Operating outside the European Union*, made by the University of Edinburgh in 2010.[474]

It is also important to cite a second comprehensive study, entitled *Responsible Supply Chain Management Potential Success Factors and Challenges for Addressing Prevailing Human Rights and Other CSR Issues in Supply Chains of EU-Based Companies* (2011)[475], carried out under the EU Programme for Employment and Social Solidarity (PROGRESS, 2007-2013). One of the differences after 2009 is that research funds are allocated to CSR issues, perhaps nurturing endless theoretical discussions without focusing enough on concrete outcomes, but also informing the institutions. Both studies have a very technical and legal approach, devoting much space and interest to binding aspects, but showing as well to a certain extent the interaction between *soft* and *hard law* and the way they complement each other[476].

Concreteness is precisely the spirit of the EU Parliament's Report *on corporate social responsibility in international trade agreements*, together with the Committee on International Trade, issued in 2010[477], where we find the proposal to incorporate CSR into the generalised system of preferences, CSR clauses in all EU trade agreements (as in the South Korean precedent), and make EU-based companies accountable for eventual breaches of human rights or environmental hazards when they operate abroad escaping European standards (again, according to a progressive interpretation of the Brussels Convention). The appointment of John Ruggie and his main contribution, the

[473] DO 2009/S 131, 11/07/2009. Call for Tenders ENTR/09/045 –Study of the legal framework on human rights and the environment applicable to European enterprises operating outside the EU.
[474] Available at : http://ec.europa.eu/enterprise/policies/sustainable-business/files/business-human-rights/101025_ec_study_final_report_en.pdf
[475] This was a very comprehensive research including up to 12 case-studies. http//ec.europa.eu/enterprise/policies/sustainable-business/files/business-human-rights/final_rscm_report-11-04-12_en.pdf
[476] The potential of soft law in the EU is studied below (see Chapter IV, Section 1).
[477] EUROPEAN PARLIAMENT: *Report on corporate social responsibility in international trade agreements* (2009/2201(INI)), EP reference A7-0317/2010, 11 November 2010.

*UN Guiding Principles on Business and Human Rights* (studied in the first part of this work), also renewed the interest in this subject at a European level.

However, if the Parliament is always complaining and pushing for further advancements, it sometimes sins of impatience, as shows the example of Regulation (EC) 1221/2009 of 25 November 2009 on the voluntary participation by organisations in a Community eco-management and audit scheme (EMAS). EMAS was an important new tool in the area of environmental impacts, which constitutes a kind of voluntary collective self-control system with an institutional supervision including, basically, the obligation to provide sound information. By way of little criticism, we shall recall that the environmental protection in the EU and in International Law is in advance, so that such a mechanism –being a sign of hope– is still not likely to exist in other sectors.

2009 is also a turning point as the 2007/2008 financial crisis, converted into a public debt crisis and finally a full economic crisis for more than five years, also raised the awareness on the human rights and social risks of globalisation following to the de-regulatory enthusiasms since 1991. *Europe 2020 Strategy* reflects this situation, being EU institutions seriously concerned by the speed with which the recent economic growth was being reversed, the rising unemployment (becoming structural) and the lack of demographic relieve and the impotence of the financial sector. In essence, it seemed clear that recovery had two pillars: growth, certainly, but also social relieve (even though the structural reforms promoted by the *Troika* were initially centred on the alleviation of the debt crisis leaving aside many social concerns). Anyway, the fact is that the *EU 2020 Strategy* is peppered with social issues and the Commission declares its commitment towards a new updated approach to CSR, considered a "key element" to ensure a durable recovery, in addition to go on extending CSR codes and practices among businesses[478].

This statement of intent is singularly translated into the *Renewed EU Strategy 2011-14 for CSR.* First of all, the three-fold analysis proposed by Ruggie has been accepted in the EU, that is, the UN three level framework (to "protect, respect and remedy") is read as "identifying, preventing and mitigating" in this new approach to CSR: obvious is the State duty to protect, as the corporate duty to respect, and the need of effective

[478] COM (2010) 2020, 3 March 2010, *Europe 2020. A strategy for smart, sustainable and inclusive growth*, pp. 15-16.

remediation mechanisms (judicial or non-judicial). CSR is founded on this basic understanding, but is no limited to that as it goes beyond.

The *Renewed EU Strategy for 2011-14* gives us a new definition of CSR: it is no longer the voluntary incorporation of social concerns in the business activity, but directly the "responsibility of enterprises for their impacts on society"[479], underpinning all Europe 2020 objectives, always respecting the international frame where the Commission adds references to the latest instruments (the UN Guiding Principles and the Global Compact). Moreover and not less important, there is a shift in the wording: it is no longer a 'framework', but a 'strategy', including self and co-regulation procedures, consultation to all businesses (extended to SME's), shareholders, stakeholders (mainly CSO's and NGO's) aimed at launching a specific agenda for action. Finally, it is our understanding that the Commission was not wrong when giving such a crucial role to information on CSR and reporting measures to serve as solid foundations to continue working.

### 3.2. CSR: mainstreaming EU Policies

The Commission released in March 2014 an implementation table[480] that needs to be clarified and updated, partly thanks to a more recent Staff Working Document[481]. The table identifies up to eight areas in which the CSR agenda is being implemented: enhancing visibility and disseminating good practices; improving and tracking trust in business; improving self and co-regulation processes; enhancing market reward (through public procurement reforms, consumption patterns and investments); disclosure of social and environmental information; CSR in training and education; national and sub-national CSR policies; and a better aligning of EU and global approaches (principles, guidelines, other international organisations and third countries).

[479] COM (2011) 671 Final, 25 October 2011: *A Renewed EU Strategy 2011-14 for Corporate Social Responsibility*, p. 6 (para. 3.1). Available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:20110681:FIN:EN:PDF

[480] Not an official document. Accessible at http://ec.europa.eu/growth/industry/corporate-social-responsibility/index_en.htm (PDF link "detailed table showing progress in the implementation of this agenda").

[481] SWD (2015) 144 Final, 14 July 2015, on *Implementing the UN Guiding Principles on Business and Human Rights –State of Play*.

Instead of using the categories chosen by the Commission to present the different initiatives undertaken so far, we rather propose a functional criterion to divide them into three different items: *a)* information on CSR and its promotion; *b)* institutional and international initiatives; and *c)* actions with an eventual or already effective impact on EU Law. Without obviously undervaluing the first two areas of action, we will pay a greater attention to the latter, as it will indicate the extent to which CSR should be taken seriously, even by sceptics. We will first analyse the informative and promotion actions, followed by the institutional and international approaches, before considering the legal spill-overs, in order to put some order into widely dispersed initiatives.

Is CSR a new policy in the EU? The following analysis shows, on the one hand, that CSR has emerged as a strong crosscutting concern and, in this sense it would deserve to be considered as a new policy in its own right, especially after 2009. On the other hand, more than a policy as such, the wide dispersion and sometimes disconnection between the different actions suggest that it has become a new governance tool that has emerged, meant to mainstream almost any EU policy, hailing from development and cooperation programmes to commercial policies, public procurement regulation, company law or trade and investments.

The CSR precedents might confirm this definition as a mainstreaming governance tool rather than a policy *per se*, since CSR issues can be traced back even before it received that name and was properly labelled, starting with three basic origins: the environment and work and consumers' policies. EU institutions have "long been renowned for their "implicit CSR" much before the concept of CSR was even discussed in an explicit manner"[482]. There is no difficulty in making emerge CSR when it comes to consumer's protection: suffice it to say that, as early as 1984 a Council Directive addressed misleading advertising,[483] which later has become a typical CSR related issue, combining hard regulations and the industry self-control under the name of unfair commercial practices[484]. An unlabelled and implicit CSR can easily be traced in a number of early directives concerning the environment and related issues, even public contracts, comprising reporting requirements, public disclosure and access to

[482] M. A. CAMILLERI: "Environmental, social and governance disclosures in Europe", in *Sustainability Accounting, Management and Policy Journal*, Vol. 6 (2015) No. 2, pp. 224-242, at p. 226.
[483] COUNCIL Directive 84/450/EEC, of 10 September 1984, *relating to the approximation of the laws, regulations and administrative provisions of the Member States concerning misleading advertising*.
[484] COM (2013) 138 Final, 14 March 2013, *on the application of the Unfair Commercial Practices Directive. Achieving a high level of consumer protection. Building Trust in the Internal Market.*

information, due diligence measures and previous impact assessments[485]. More recently, the common agricultural policy, the fisheries policy and transport policy have also implicitly incorporated this approach in their actions and objectives. As an example we could cite the increasing importance given to the safety of food and to protection of the environment in the CAP and its slow but constant liberalisation. In addition, we will have to pay special attention to the environmental policy, the development cooperation policy, the commercial policy and the neighbourhood policy. In summary, the wide dispersion of the initiatives on CSR and, ultimately, the relative "confusion is perhaps due to the fact that the EU did not wait for the advent of CSR to deal with diligence obligations of organisations or companies with regard to their environmental, social or societal responsibility"[486].

Whether a new policy or a transversal governance tool, the fact is that the Commission has turned CSR into a new instrument to go on fostering the integration of the internal market, convergence and transparency, mainstreaming many policies in line with sustainable development and human rights goals as a general interest of the international society (and, as explained elsewhere in this work, a priority confirmed with the Treaty of Lisbon).

### *3.2.1. Implementation of the CSR agenda: information and promotion*

After 2009, the EU rightly realised that any effort to foster CSR had an inescapable starting point: information and promotion. Sound information, dissemination of good practices and exchange of experiences are the three pillars of an active publicity, which sometimes includes reporting mechanisms. Obtaining and disseminating information

[485] For example, in Directive 92/43/EEC on the conservation of natural habitats and of wild fauna and flora, Directive 94/62/EC on packaging and packaging waste, Directive 2001/42/EC of the European Parliament and the Council on the assessment of the effect of certain plans and programmes on the environment, Directive 2003/87/EC of the European Parliament and of the Council establishing a scheme for greenhouse gas emissions allowance trading within the Community and amending Council Directive 96/61/EC, Directive 2004/35/EC of the European Parliament and of the Council on environmental liability with regard to the prevention and remedying of environmental damage, and Directive 2008/98/EC on waste or Directive 2011/92/EU on the assessment of the effects of certain public and private projects on the environment. The European Parliament has already shown the CSR-related aspects of the aforementioned directives as a precedent: EUROPEAN PARLIAMENT –Directorate General for Internal Policies: *Corporate Social Responsibility. Identifying what initiatives and instruments at EU level could enhance legal certainty in the field of corporate social responsibility*, PE462.464, 2012, pp.43-52.

[486] *Ibíd.*, p. 43.

(through reports, working papers, surveys and studies) is an essential step to promote CSR.

The Commission has focused on obtaining the best available information on CSR in order to disseminate and promote good practices. The informative and institutional efforts of the Commission are then tightly related to the promotion of CSR. The philosophy could be simply summarised in a sentence: before assessing the state of play we need to know the playing field.

A comprehensive Eurobarometer survey on CSR, undertaken in 2013[487], showed that local businesses and SME's apparently do a better job than large companies. Moreover, in the context of the crisis, 39 % of the 32,000 respondents consider that companies do not take seriously their impact on society whereas almost exactly the same proportion of respondents (40%) thinks the opposite. Citizen's view on CSR is positive in the overall, as it is said to contribute to get out of the crisis, even though the crisis would erode it and discrimination in employment remains a concern in public opinion[488].

More interestingly, the extent to which the work of the EU and other international organisations has permeated business practice seems still low. A study on 200 randomly selected large companies reveals openly improvable results[489]. Even if 68% of companies refer to CSR (or similar definitions) and 40% cite at least one internationally recognised CSR instrument, the sample indicates two major limitations: first of all, a very shy third of the sampled companies comply with the Commission's request to refer to at least one of the main instruments (the UN *Global Compact*, OECD *Guidelines for Multinational Enterprises* or ISO *26000*); but secondly, only five companies (2'5 % of the sample) do cite the UN *Guiding Principles on Business and Human Rights*, very illustrative percentage that shows the lack of a consolidated human rights approach to CSR, to overcome the strong inertia to consider it a mere marketing strategy.

Besides, in contradiction with citizens' perception shown by the above-cited Eurobarometer (more doubtful about the engagement of larger companies), according to

[487] EUROPEAN COMMISSION: *Flash Eurobarometer 363. How Companies Influence our Society: Citizen's View, Report*, Brussels (April 2013), 134 pp., *passim*. Available at: http://tinyurl.com/q4a2mt7
[488] EUROPEAN COMMISSION: *Flash Eurobarometer 393. Discrimination in the EU in 2012, Report*. Brussels (November 2012), 238 pp. Available at: http://tinyurl.com/bv2zpqc
[489] EUROPEAN COMMISSION: *An Analysis of Policy References made by large EU Companies to Internationally Recognised CSR Guidelines and Principles*, Brussels (March 2013), 19 pp., at pp. 6-7 (for the data discussed).

this study on 200 enterprises it seems that those over 10,000 employees would paradoxically be three times more likely to refer to different international standards, in comparison with smaller companies (between 1,000 and 10,000 employees). The Commission interpreted that smaller companies needed a particular guidance and has issued a number of documents addressed at SME's in 2013, that range from the handbook *"My Business and Human Rights"* (very correctly emphasizing the centrality of human rights in CSR[490]), to the publication of a six pages study of five SME's –of questionable usefulness- entitled *"De-mystify Human Rights for Small and Medium-sized Enterprises"*.

Without contesting the importance of fostering CSR amongst SME's, which constitute the majority of EU's business fabric[491], we do not consider it a problem of "mystification". The Commission's focus on SME's is right, but the statistics showing their apparently lower level of engagement might have in fact a different origin, especially if citizen's perception is the opposite. A simpler explanation should take into consideration the logically lower accounting requirements for SME's and their reduced communication strategies, what does not necessarily mean that SME's are actually less committed or socially responsible at a local or community level[492]; bigger companies are usually keener and much more interested in communicating their CSR thanks to structured media and information departments. In 2014 the EC finally noticed this "fallacy"[493].

The informative and promotion strategy in the form of studies and reports is, in many cases, the output of networking events organised by the Commission, who has the capacity-building know-how and the institutional structure to make them possible. For

[490] EUROPEAN COMMISSION: *My Business and Human Rights. A guide to human rights for small and medium-sized enterprises*, Brussels (March 2013), 28 pp.

[491] According to the latest available data of 2013/2014, 99'8% of all companies in the EU are SME's, responsible for the 66'9% of employment, while large companies constitute 0'2% and employ 33'1 % of the active population. In terms of total value added at factor costs in the EU, SME's are 16'2 percentage points above large companies. EUROPEAN COMMISSION: *A partial and fragile recovery. Annual report on European SME's 2013/2014*, Brussels (July 2014), p. 15.

[492] C.D. DITLEV-SIMONSEN, H. von WELTZIEN HOIVIK and O. IHLEN: "The historical development of Corporate Social Responsibility in Norway", in S.O. IDOWWU, R. SCHMIDETER and M.S. FIFKA (Eds.): *Corporate Social Responsibility in Europe. United in Sustainable Diversity*, Switzerland 2015, Springer Ed., pp. 177-196, at pp. 190-191.

[493] "At the same time it must be noted that it is a fallacy to assume that SME's and micro-companies necessarily have a lower awareness of CSR issues. With their close ties to their local communities such small businesses often have a heightened awareness of their social responsibility in the local context, whether or not any initiatives taken are officially labelled as CSR or not". EUROPEAN COMMISSION: *Corporate Social Responsibility. National Public Policies in the European Union, Compendium 2014*, Brussels 2014, p. 14.

example, still on the subject of SME's, a handbook for advisers was published in 2013 after a meeting held 11-12 June 2012 attended by 100 advisers[494].

We can observe that meetings with stakeholders, CSO's and experts usually lead to the publication of studies. A good example is the report "*Helping consumers make informed green choices and ensuring a level playing field for business*", which was the result of a multi-stakeholder dialogue presented at the European Consumer Summit in March 2013. It gave us some clues on the evolving Commission's opinion on unfair commercial practices in relation to environmental standards: the so-called "green-washing", misleading advertising, the reliability of eco-labels and the self- and co-regulation problems. Also under the initiative of the DG SANCO (Health and Consumers), there is work in process to extend the range of products covered by these studies, such as non-food products, second hand cars, electricity or children and the internet, always through several multi-stakeholders dialogues on environmental claims that may delay their publication.

In a different area, meetings have also been very frequent with "CSR Europe", one of the most prominent business-lead organisation in the EU with 70 corporate members and 41 national CSR organisations[495], leader of the private programme Enterprise 2020 aimed at completing the Europe 2020 Strategy with the point of view of entrepreneurs after two meetings with Commission's representatives in September and November 2012, to be added to its participation in the numerous multi-stakeholders dialogues organised in Brussels. Also important, but for the moment less active in the EU, is UNPRI[496], an investors' initiative on Socially Responsible Investments (SRI's) in partnership with the UNEP Financial Initiative and the UN Global Compact, who is more and more involved in negotiations and dialogues with the Commission.

Networking events have covered a variety of matters, like the CSR dimension of youth and employment[497] or active ageing and mental health at workplace. In cooperation with

[494] EUROPEAN COMMISSION: *Tips and Tricks for Advisors. Corporate Social Responsibility for Small and Medium-Sized Enterprises*, Brussels 2013, 31 pp.
[495] European Business Network for Corporate Social Responsibility: see www.csreurope.org Even though it is a frequent interlocutor of the Commission, shall we recall that its 70 corporate member represent a very small proportion of all EU companies according (see footnote 97).
[496] This private initiative has, at the date of closing this thesis, 286 asset owners, 911 investment managers and 193 professional service partners among its signatories. However, we shall bear in mind that this still constitutes a small proportion of all EU Companies. See www.unpri.org
[497] Seminar on Youth, Entrepreneurship, volunteering and CSR, organised in September 2012. Other examples related to youth is the Partnership 2020 within the "Youth in Action Programme", which also

"CSR Europe", the Healthy Aging Conference led to a 20 pages study completed in May 2013 and co-funded by the Commission, and –interestingly enough– it warns that the environmental concerns need to be completed with labour issues in CSR policies[498]. We have already noted that the environmental protection has traditionally been ahead with respect to general human rights and CSR; nevertheless, we have to keep in mind the risk that the environment monopolise CSR, which is evidently a quite wider field.

Apart from statistics, surveys and short studies following to these networking events or experts' meetings, the Commission further allocates funds for research to obtain more rigorous information upon which it can build a more credible promotion of CSR. We have already cited, because of their prominence, the *Study of the Legal Framework on Human Rights and the Environment Applicable to European Enterprises Operating outside the European Union*, made by the University of Edinburgh in 2010[499] and the study on *Responsible Supply Chain Management Potential Success Factors and Challenges for Addressing Prevailing Human Rights and Other CSR Issues in Supply Chains of EU-Based Companies* (2011)[500], carried out under the EU Programme for Employment and Social Solidarity (PROGRESS, 2007-2013).

Other co-funded research projects have a more practical vocation, such as the European Apparel and Textile Confederation and Industry-All (a European Trade Union) tool to assist SME's and, in general, the textile industry when operating abroad: it consists of country-by-country assessments, including mathematic and qualitative factors inspired on the ISO 26000, to inform on the main human rights risks for the textile industry, particularly chemicals and pollution. After a period of refinement, it is aimed to be made available as an online tool at the end of 2016[501]. Also very pragmatic was the

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includes the project "CSR in Europe: Prince, Merchant and Citizen as one". The latter consisted of a 17 months project to disseminate CSR among youngsters: it finalised in 2013, was adjudicated to several organisations and CSO's with experience in youth issues, comprising workshops, seminars, courses that took place in Italy, Poland, Turkey and Portugal, all financed by the Commission.

[498] We refer to the SWOT Analysis Report "Joint Action on Mental Health and Well-Being. Mental Health at the Workplace", 20 pp, at p. 16. Available at: www.mentalhealthandwellbeing.eu

[499] Available at : http://ec.europa.eu/enterprise/policies/sustainable-business/files/business-human-rights/101025_ec_study_final_report_en.pdf

[500] This was a very comprehensive research including up to 12 case-studies. http//ec.europa.eu/enterprise/policies/sustainable-business/files/business-human-rights/final_rscm_report-11-04-12_en.pdf

[501] SWD (2015) 144 Final, 14 July 2015, on *Implementing the UN Guiding Principles on Business and Human Rights –State of Play*, p. 12.

approach of a more general project, financed under the Seventh Framework Programme, to assess the impact of CSR, in quantitative and qualitative terms[502].

Further resources have been allocated to the European Multistakeholder Platforms on Corporate Social Responsibility in relevant business sectors, which have been adjudicated for instance in the fruit juice, machine tools and social housing sectors, besides a specific DG Connect platform called "ICT4Society" to coordinate CSR issues in the ICT.

Other sectors have also been covered: to foster the so-called "socially responsible investments" (SRI's) the Commission co-funded with the UN Global Compact and UNEP, a capacity building project on the integration of non-financial information into investment decisions, lastly published in February 2013 by UNPRI –a private investors initiative on SRI's[503].

Finally, the Commission commissioned the publication of three sector-specific guidelines: on employment and recruitment agencies, information and communication technology and oil/gas companies, to better inform on the implementation of the UN Guiding Principles adapted to the particularities of these types of companies, always after large consultations[504]. Even if there is no innovative approach and the EU keeps on recognising the leadership of the UN principles and guidelines, the contribution again is its unwavering human rights approach and its dissemination and promotion efforts.

Networking meetings and conferences, co-funding research projects and their output in the form of reports, in sum, reliable information, is the very cornerstone of the EU's promotion strategy of CSR. As we have seen, the Commission has played a leading role, culminated with the organisation of the first "CSR Awards" in 2013, to round off this informative and promotion work, while raising its visibility.

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[502] See www.csr-impact.eu. Unfortunately, apart from general information, the website has been emptied once finalised the project so that there is no public access to documents and conclusions.

[503] Principles for Responsible Investment Initiative –ESG Integration Working Group: *Integrated Analysis. How investors are addressing environmental, social and governance factors in fundamental equity valuation*, 27 pp. Available at: http://tinyurl.com/pgqbdds

[504] Shift and the Institute for Human Rights and Business were commissioned to write all three guidelines cited: EUROPEAN COMMISSION: *Oil and Gas Sector Guide on Implementing the UN Guiding Principles on Business and Human Rights*, Brussels (June 2013), 91 pp.; *Id.*: Employment and Recruitment Agencies. Sector Guide on Implementing the UN Guiding Principles on Business and Human Rights, Brussels (June 2013), 96 pp.; and *Id.*: ICT Sector Guide on Implementing the UN Guiding Principles on Business and Human Rights, Brussels (June 2013), 98 pp. All three are available for free at http://bookshop.europa.eu.

### *3.2.2. Implementation of the CSR agenda: international and institutional aspects*

The information and promotion initiatives are further articulated by an institutional commitment outside the EU, confirming the global and developmental dimension of CSR after 2009. No need to repeat the institutional willingness *ad intra*, behind all consultations and initiatives studied in the previous section (informative and promotion strategies), to which we shall only add, because of its institutional importance *ad extra*, the creation of the Council Working Group on Human Rights (COHOM) to monitor the Action Plan on Human Rights and Democracy (2012-2014), principally addressed to the EU institutions themselves and Member States, annexed to the more general EU Strategic Framework on Human Rights and Democracy adopted in June 2012. The main task of COHOM is to coordinate and ensure the consistency between the external and internal actions of the EU, carrying out an important bilateral and multilateral work but also, inside the EU, encouraging Member States to adopt national action plans. Everything suggests that human rights will continue to mainstream, more or less effectively, the institutional work of the EU and, obviously, with regard to business and human rights in its external relations[505].

From a formal and political perspective, business and human rights have been fully incorporated into the agenda of the EU Special Representative for Human Rights in bilateral meetings, particularly with Latin America (Mexico, Brazil, Peru, Colombia and Ecuador), Asia (China and Indonesia) and Africa (especially South Africa). In the EU relations with third countries, it is worth citing the EU-US Human Rights Dialogue in 2012, which considered the implementation of the UNGP's. The EU has similarly addressed CSR in the first meeting of the EU-Korea Committee on Trade and Sustainable Development, or on the occasion of other bilateral meetings, such as the EC-Turkey sub-committee on Industry and Trade and the EU-Chile Association Committee meetings.

It is worth stopping a moment at the EU-Chile Association Agreement, which states that "The Parties remind their multinational enterprises of their recommendation to observe

[505] JOIN (2015) 16 Final.

the OECD Guidelines for Multinational Enterprises"[506]. Despite its inclusion as a political declaration of difficult enforcement[507], annexed to the Agreement itself, its significance is undeniable in the consolidation of a *corpus* of soft international norms. In any case, most of the literature passes over the fact that the Agreement itself includes a clear reference to CSR, even if it does not use this term, but a circumlocution when art. 18 *c)* mentions "transparency, good regulatory practices and the promotion of quality standards for products and business practices", apart from more typical explicit human rights references in articles 1, 12, 16 and 44. Article 44 is particularly noteworthy, since it covers social cooperation with elements that are now considered part of the definition of CSR[508].

Bilaterally speaking, trade and development are now intertwined in the EU negotiations. The trade and development policies, highly bureaucratised, have suffered some changes in the same direction, *i.e.*, including unprecedented dialogues and strategies with third countries, with which CSR is being consolidated as a recurrent item on the agenda. The European Instrument for Democracy and Human Rights included in its 2012 and 2013 Action Plans the promotion of trade unions and social dialogues in third countries. It is since 2012 that the Commission issued a Communication in which it started to take into account CSR and private actors in the development and trade policies to stimulate responsible business practices[509]. The Council's reaction to the Commission's Communication was very prompt agreeing with the "crucial role of the private sector" and the importance of "partnerships between the private and public sectors" and "dialogue with civil society", therefore supporting the inclusion of innovative green and

[506] EUROPEAN COMMUNITY: "Agreement Establishing and Association between the European Community and its Member States, of the one part, and the Republic of Chile, of the other part. Final Act. Joint Declaration concerning Guidelines to Investors", *Official Journal of the European Communities*, L. 352, 30 December 2002, p. 3.

[507] A. BONFANTI*: Impresse Multinazionali, diritti umani e ambiente: profili di diritto internazionale pubblico e privato*, Milano 2012, Giuffrè Ed., pp. 108-109.

[508] Art. 44 of the Agreement prioritises "vulnerable and marginalised social sectors", "women", "working conditions, social welfare and employment security", SME's, "social and environmental vulnerability[ies]", "social dialogue" and "human rights". Article 45 specifically addresses gender equality.

[509] "Corporate social responsibility also plays an increasing role at the international level as companies can contribute to inclusive and sustainable growth by taking more account of the human rights, social and environmental impact of their activities. We encourage companies to sign up to the internationally recognised guidelines and principles in this area […]. We also include provisions in our agreements to promote responsible business conduct by investors". COM (2012) 22 Final, 27 January 2012, *Trade, Growth and Development. Tailoring trade and investment policy for those countries most in need*, p. 14.

social criteria in trade and development policies as part of the EU's external action[510]. The Council reiterated the same idea just a few months later and, if there was any doubt, it explicitly mentioned the promotion of CSR[511].

In this context, the Commission's new *modus operandi* in development policies has definitely incorporated CSR amongst the conditions to be taken into account when negotiating an agreement, thus institutionally fostering CSR expansion beyond the EU[512]. In the EU relations with third States, we note the increasing importance of ratifying international human rights instruments, labour and environmental standards, fight against corruption, besides the promotion of CSR programmes in these partner countries, "encouraging public-private policy dialogues […] to try to increase willingness among governments and local authorities to engage in open discussions with private sector representatives"[513], with a particular focus on disadvantaged groups. A practical and relatively successful example is the SWITCH-Asia Programme towards sustainable production and consumption patterns, especially addressed at SME's to extend good practices and codes of conduct, besides institutionalising the EU-Asia and intra-Asian cooperation. This model has been copied to other regions without the same success for instance (SWITCH-Africa Green, SWITCH-MED for Mediterranean countries, a middle-east partnership with EAP-Green). Their main contribution is the acknowledgement that changes need to be stimulated also in the demand sector (consumers), to render more attractive the productive efforts to comply with CSR

[510] COUNCIL OF THE EU*: Council conclusions. EU's approach to trade, growth and development in the next decade*, 3154th Foreign Affairs Meeting, Brussels, 16 March 2012, para. 16, 22 and 26. (Citation para. 16)

[511] "The private sector and trade development are important drivers for development. An enabling business environment and more effective ways of leveraging private sector participation and resources in partner countries as well as increased regional integration, aid for trade and research and innovation will be key to the development of a competitive private sector. This has to go along with promoting labour rights, decent work and corporate social responsibility". COUNCIL OF THE EU: *Council Conclusions. Increasing the impact of EU Development Policy: an Agenda for Change*, Brussels, 14 May 2012, Council Doc. 9369/12, para. 9. Similarly, but less explicit: COUNCIL OF THE EU: *Council Conclusions. Social Protection in European Union Development Cooperation*, 3192st Foreign Affairs Meeting, Luxembourg, 15 October 2012, para. 4.

[512] "Adherence to social, environmental and fiscal standards is also considered a precondition for any EU engagement with, or public support to, the private sector". COM (2014) 263, 13 May 2014, *A Stronger Role of the Private Sector in Achieving Inclusive and Sustainable Growth in Developing Countries*, p. 12. In the same page, Action 10 proposed by the Commission specifically refers to CSR: "Promote international CSR guidelines and principles through policy dialogue and development cooperation with partner countries, and enhance market reward for CSR in public procurement and through promotion of sustainable consumption and production".

[513] *Ibíd.*, p. 14.

standards, so promoting market rewards for CSR-friendly companies while consolidating civil society and human rights awareness in developing countries.

In parallel, the European Investment Bank, a major international investor in development, has updated its Environmental and Social Handbook by the end of 2013 to integrate the UNGP's among the standards to be considered when making investment decisions[514].

In addition to the EU relations with third States, there is an utterly important multilateral dimension of this institutional and international work on CSR, remarkably intertwining trade, development and human rights.

At the level of other regional integration organisations, we could start citing the EU-African Union (AU) Human Rights Dialogue held in November 2013, a specific EU-AU Business and Human Rights conference was scheduled for September 2014, taking advantage of the already organised UN Conference on the same issue in Addis Ababa.

As for the European role in Africa we shall highlight the importance of a shift in language to overcome allegations of paternalism, fair or not, and the traditional scheme of conditionalities, which is in part behind the fact that many African countries have turned their attention to China and other new partners. China's investments are not subject to the stricter European standards[515]; we consider that a wider debate and dialogue on "business and human rights", making it clear that they are compatible, can soften these relations and improve and revitalise the European role in the African continent (without rejecting basic conditions and similar formulas for EU aid or investments).

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[514] The Commission holds 30% of EIB shares, which is "the largest supranational borrower and lender in the world with an annual investment volume of ca. €7 billion per year and the biggest international investor in development policy". EUROPEAN COMMISSION: *Implementing the UN Guiding Principles on Business and Human Rights –State of Play,* SWD (2015) 144 Final, 14 July 2015, p. 14. The EIB environmental and social handbook is available at http://www.eib.org/infocentre/publications/all/environmental-and-social-practices-handbook.htm

[515] A good summary of the key-ideas that have governed China's foreign trade and investment policies since the 1990's at: I. TAYLOR: "China's Foreign Policy towards Africa in the 1990s", in *The Journal of Modern African Studies*, Vol. 36 No. 3, September 1998, pp. 443-460. On a general note, the following study is also very informative: G. SEGAL: "China and Africa", in *Annals of the American Academy of Political and Social Science*, January 1992, Vol. 519 No 1 (January 1992), pp. 115-126. There are, besides, many case-studies that confirm this ambiguous role in relation to human rights in Sudan. For information purposes, refer to: D. LARGE: "China and the Contradictions of 'Non-Interference' in Sudan" in *Review of African Political Economy*, Vol. 35 No. 115, pp. 93-106; also *víd*. S. SRINIVASAN: "A Marriage Less Convenient: China, Sudan and Darfur", in K. AMPIAH and S. NAIDU (Eds.): *Crouching Tiger, Hidden Dragon? Africa and China*, Scottsville 2008, University of KwaZulu-Natal Press, pp. 55-85.

A different problem arises when we face many States' fragility, or even failure, which is also a predominantly African problem[516] on which the EU could further *warn* and *assist* TCN's. The Commission is aware that "specific approaches are required particularly for fragile and conflict-affected countries that are urgently in need of jobs and economic opportunities to restore social cohesion, peace and political stability"[517], even though more technical and detailed initiatives in this respect are pending to move beyond institutional good intentions. In 2010 the Cotonou Agreement introduced a new article 11.4 to address States' fragility, with a general call for multilateral cooperation to "agree on the best way to strengthen capabilities of States to fulfil their core functions", but without really concrete ideas. EU Delegations in third countries are supposed to advice EU-based companies in this regard as well as help them face the potential human rights' risks following to the Delegation's field experience. The EIDHR is deploying a network of focal points in EU Delegations, similarly to the OECD "national contact points". Coordinated multilateral actions are essential to get closer to any solution. The international agenda has started with the AU, introducing business and human rights issues, but needs to be translated into concrete actions in the future.

Indeed, as for the African, Caribbean and Pacific Group of States, the several revisions of the Cotonou Agreement make it a promising text. The latest revision in 2010 has added sustainable development goals and further human rights provisions, recognising both civil and political and economic and social rights with a very positive level of detail[518]. Notwithstanding these improvements and new references to the role of private actors, the link between business and human rights is still under-developed.

Moving to another regional integration organisation, there are on-going negotiations with the Community of Latin American and Caribbean States (CELAC). There have been two EU-CELAC Summits (in Santiago –Chile January 2013 and in June 2015 in

[516] The most comprehensive study on the phenomenon of fragile and failed States at: C. JIMENEZ PIERNAS: "Estados débiles y fracasados", in *Revista Española de Derecho Internacional*, Vol. LXV No. 2 (2013), pp. 11-49.

[517] COM (2014) 263, 13 May 2014, *A Stronger Role of the Private Sector in Achieving Inclusive and Sustainable Growth in Developing Countries*, p. 4.

[518] Article 9 is one the most comprehensive examples of human rights provisions within a trade, investment and development international agreement, already in its 2005 version. During its 2010 revision, article 1 was amended to cite the Millennium Development Goals and climate change, non-state actors in article 4. EU-ACP Group of States: Agreement amending for the second time the Partnership Agreement between the members of the African Caribbean and Pacific Group of States, of the one part, and the European Community and its Member States, of the other part, signed in Cotonou on 23 June 2000, as first amended in Luxembourg on 25 June 2005, *Official Journal of the European Union* L 287, 4 November 2010, pp. 3 ff.

Brussels). The first Summit ended up with a Declaration that formally acknowledged the importance of coordinating CSR strategies in the two regions. In Latin America CSR was interestingly linked to the fight against corruption (and the further ratification of the UN Convention against Corruption)[519], in addition to more classical issues as the support of the Rio +20 agenda, the collaboration to build up a renovated post-2015 engagement[520], and to promote socially and environmentally responsible investments between the two regions[521]. In fact, two senior official seminars were organised to follow up in October 2013 and September 2014 with a view to extending the development of national action plans in both regions, as explicitly reaffirmed in June 2015 within the *Brussels Declaration* following to the II EU-CELAC Summit[522].

The institutional cooperation, initiated with the AU, ACP States and CELAC, is likely to be extended, if possible in similar terms, to the Association of Southeast Asian Nations (ASEAN)[523] and maybe other international organisations at a regional level.

In any case, multilateral initiatives are numerous: an example with major media repercussions on an international scale was the tragedy in Rana Plaza (Bangladesh), after which this country launched the "Sustainability Compact for Continuous Improvements in Labour Rights and Factory Safety in the Ready-Made Garment and Knitwear Industry", with the support of the EU, the ILO and the US.

Also from this multilateral point of view, a comparable project takes place in Myanmar/Burma to "Promote Fundamental Labour Rights and Practices", under the leadership of the EU and the ILO together with the participation of the US, Japan and Denmark. Myanmar's trade and development story brings us the opportunity to raise a captivating case: being a frequent human rights violator, the Commonwealth of Massachusetts (USA) adopted on the 25 June 1996 restrictive public procurement legislation against Burma-Myanmar, which indirectly affected any EU-based company

[519] EU-CELAC: *Santiago Declaration*, Santiago de Chile, 27 January 2013, [Council of the EU Doc. 5747/13], para. 37. It is well-known that corruption implies both public and private connivance.
[520] *Ibíd.*, para. 41.
[521] *Ibíd.*, para. 45.
[522] « We commit to increase our joint efforts on corporate social responsibility, and in this context encourage the implementation of policies, National Action Plans and other initiatives aiming at promoting and strengthening the compliance with corporate social responsibility dispositions, principles and processes within the framework of the relevant international fora ». EU-CELAC: *Brussels Declaration*, Brussels, 11 June 2015, para. 50. (Council of the EU Doc. 9839/15).
[523] EUROPEAN COMMISSION: *Implementing the UN Guiding Principles on Business and Human Rights –State of Play,* SWD (2015) 144 Final, 14 July 2015, p. 20.

linked to that country (mainly due to trade relations or subsidiary structures). A year later, the EC brought a formal complaint before the WTO –probably under the pressure of companies– alleging a violation of articles VIII (B), X and XII of the Agreement on Government Procurement[524]. Opportunely enough, the Federal District Court in Boston annulled Massachusetts' selective purchase Act so that the EC finally suspended the proceedings against the USA in Geneva, revealing Europe's certain degree of cynicism and "inconsistency"[525]: at the same time of starting the dispute settlement within the WTO, the EU had renewed its sanctions against Burma and withdrew it from the General System of Preferences (GSP).

This case leads us onto the subject of the EU's international commitment beyond spontaneous multilateral projects after a disaster or the inter-regional level. It is crucial to analyse the voice of the EU in global multilateral *fora* like the WTO. Fortunately, Myanmar's case is relatively out-of-date: the EU has realised that GSP can contribute to extend CSR globally. Beginning with a focus on labour law, the European GSP human rights requirements are wider and wider reform after reform. The European special incentive arrangements, including labour and environmental standards, have legal bases under the GATT Agreement (1994): despite the general Most Favoured Nation rule of Article I, the so-called Enabling Clause allows tariff preferences towards developing countries to help them meet their specific "development, financial and trade needs"[526] – it is worth highlighting that it is not restricted to trade and financial problems, but it is extended to more general development goals.

A very important precedent-setting case brought by India against the EC provided the opportunity to clarify under which conditions European tariff preferences for developing countries comply with WTO Law (GATT Agreement in this case). The WTO Dispute Settlement Body ruled in 2005 that some anti-drugs provisions of the contested GSP (Reg. 2501/2001) were discriminatory and arbitrary: the Chapeau of art.

[524] According the norms of procedure of the WTO Dispute Settlement Body, the EC first issued a *Request for Consultations*, 20 June 1997 (WTO Doc. WT/DS88/1), and after an initial negotiation the EC directly filed the *Request for Establishment of a Panel* (8 September 1998, WT/D88/3).

[525] A. GATTO: "Corporate Social Responsibility in the External Relations of the EU", in *Yearbook of European Law*, Vol. 24 (2005) No. 1, pp. 423-462, at p. 449.

[526] Decision on Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries, 28 November 1979, GATT Document L/4903, mainly par. 3 *c)*, 4, 5 and 8. This "Enabling Clause" is considered part of the GATT Agreement in line with paragraph 1 (b) iv) of Annex 1A incorporating GATT 1994 into the WTO Agreement, including "other decisions of the Contracting Parties to GATT 1947".

XX *b)* of GATT was not sufficient to justify a closed list of 12 beneficiaries in the Drugs Arrangement, apparently excluding other developing countries. In doing so, the Appellate Body (AB) upheld the Panel's previous assessment[527], but importantly nuanced the reasoning and reversed some of the Panel's conclusions: the discriminatory nature of the Drugs Arrangement did not emanate from the fact that it was not granted to *all* developing countries without distinctions, in a restrictive interpretation of the term "discrimination". Although agreements under the Enabling Clause do not annul the necessary respect of non-discrimination between developing countries[528], the Enabling Clause itself also considers the possibility of distinguishing amongst developing countries under certain circumstances[529]. According to the WTO AB, paragraph 3 of the Enabling Clause envisages specific conditions to grant preferential treatment: the existence of objective criteria to justify different treatment, due to "development, financial and trade needs", which "must be assessed according to an objective standard". Such criteria can respond to the "*[b]*road-based recognition of a particular need, set out in the WTO Agreement *or in multilateral instruments adopted by international organisations, [which]* could serve as such a standard"[530]. The EC Drugs Arrangement provided a list of 12 beneficiaries without prerequisites, but it did not detail any positive and objective criteria by which a developing country may qualify for preferences, so that the EC failed to demonstrate the non-discriminatory nature of the regulation (the absence of criteria makes it impossible to show it is not discriminatory). Therefore, WTO law allows distinctions between developing countries: the EC Drugs

[527] The final decision was taken in 2004 by the Appellate Body. WTO: *European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries*. Report of the Appellate Body, 7 April 2004, Doc. WT/DS246/AB/R.

[528] One of the Indian arguments held that, in supporting the Enabling Clause, "developing countries did not agree to relinquish their MFN rights as between themselves" (*Ibíd.*, para. 47, pp. 18-19). This is only partially confirmed by the AB: differentiating between developing countries do not automatically constitute discrimination, even though the Enabling Clause does not become a general exception of MFN rule as certain conditions must be satisfied: "India submits that developing countries should not be presumed to have waived their MFN rights under Article I:1 of the GATT 1994 vis-à-vis other developing countries, and we make no such presumption. […]With this in mind, and given that paragraph 3(c) of the Enabling Clause contemplates, in certain circumstances, differentiation among GSP beneficiaries, we cannot agree with India that the right to MFN treatment can be invoked by a GSP beneficiary vis-à-vis other GSP beneficiaries in the context of GSP schemes that meet the conditions set out in the Enabling Clause". *Ibíd.*, para. 166 (p. 67).

[529] The AB understands that "certain development needs may be common to only a certain number of developing countries". *Supra*, note 135, WT/DS246/AB/R, para. 160 (p. 65). Furthermore, the AB states that "In sum, we read paragraph 3(c) [of the Enabling Clause] as authorizing preference-granting countries to 'respond positively' to 'needs' that are *not* necessarily common or shared by all developing countries. Responding to the 'needs of developing countries' may thus entail treating different developing-country beneficiaries differently". *Ibíd.*, para. 163 (p. 67).

[530] *Ibíd.*, para. 163 (p. 66).

Arrangement was not discriminatory because of that, but because it did not include 'objective criteria' on 'development, trade and financial needs'. The most crucial progress is the mention of other international organisations to justify the objective criteria behind preferential treatment systems in terms of "development, financial and trade needs".

Anyway, this precedent is essential to lawfully unite development, human rights and trade in EU Law. Although the EC lost this case, the European GSP schemes were paradoxically reinforced in terms of international trade law in order to legitimately and legally cover development concerns, clarifying under which conditions. GSP schemes can include CSR clauses and requisites, according to internationally recognised standards, to help raise human rights in developing countries[531]. More recently, the EU has actually included sustainable development and (explicitly) corporate social responsibility in the EU-South Korea Free Trade Agreement (2009) and with Colombia and Peru in March 2010, so we can truly speak of a "merger of Corporate Social Responsibility into the EU Common Commercial Policy"[532]. The WTO Agreements have several open windows to which we already referred in the general part of this work (in this case, the Enabling Clause and art. XX of GATT). The EU can put them into practice, actually opening those windows, provided that certain legal conditions are met –which don't seem colossal or unmanageable.

The EU international commitment to foster CSR and business and human rights principles can have two major consequences: first, to increase the level of *consensus* in this regard within the international society; secondly, to effectively impact the interpretation of the already available International Law to make changes possible, without necessarily have recourse to new instruments.

Finally, the UN *fora* are also a good scenario for more political than technical statements, also useful if they contribute to advance the state of opinion of the international society. The EU has always participated with high level representatives to

[531] A similar conclusion on the human rights' potential of the *India vs. EC* case but by different means: A. GATTO: *Multinational Enterprises and Human Rights. Obligations under EU Law and International Law*, United Kingdom-USA 2011, Edward Elgar Publishing Ltd., pp. 246-252.

[532] O. QUIRICO: "The Merger of Corporate Social Responsibility into the EU Common Commercial Policy", in *European Company Law*, Vol. 9 (2012) No. 2, pp. 93-100, at pp. 94-95. According to the author, Parliament's Resolutions 2009/2201 and 2010/2103 advocate to incorporate, respectively, CSR and climate change into the CCP. However, even if they point in the same direction, we would be cautious as to what extent the Commission will effectively put them in practice.

support the implementation of the UNGP's, particularly in all annual Forums on Business and Human Rights in Geneva (Switzerland). Within the framework of the UN OHCHR, the EU is collaborating with the project "Accountability and Remedy" to increase the available information and advice for States on access to justice in cases of human rights violations involving TNC's[533]. Still pending is the cooperation or adherence to the UN Principles for Responsible Management Education. Despite its originality as an international organisation, the EU has also acted as such when it supported the *"Montreux Document on pertinent legal obligations and good practices for States related to operations of private military and security companies during armed conflict"*, which is an highly topical problem, encouraging this way up to 23 EU Member States to adhere to that document. Moreover, the EU as such has become member of the Working Group on the International Code of Conduct Association, born in 2013 in Geneva.

At a totally political level, in June 2015 and during the preparatory meetings of the G7 under the German Presidency, the EU apparently advocated for the inclusion of CSR issues in the final Declaration[534]. It is important to note the explicit support of the UNGP's and the agreement to "urge private sector implementation of human rights due diligence"[535], placing strong emphasis on supply chains and labour standards (a specific fund is foreseen in cooperation with the ILO, maybe extended to the G-20 participation).

Sustainable development, the MDG's, the post-2015 agenda, and human rights are, in conclusion, the rails of the EU's institutional actions both inside and outside the EU, but especially when engaging with third countries and other international organisations or *fora*. All in all, there has been an international and institutional implementation of CSR with an important role played by the Commission, albeit the challenge remains to make a real impact in the field avoiding leftovers or loose ends.

[533] For an analysis of this issue, see Chapter IV, Section 2.
[534] EUROPEAN COMMISSION: *Implementing the UN Guiding Principles on Business and Human Rights –State of Play,* SWD (2015) 144 Final, 14 July 2015, p. 8.
[535] G-7: *Leaders' Declaration "Think Ahead. Act Together"*, 7-8 June 2015, Schloss Elmau (Germany), p. 6.

### *3.2.3. Implementation of the CSR agenda: impact on EU Law*

On top of the information/promotion initiatives and the international commitment at an institutional level, we also find a good amount of actions with a clear impact on EU Law, sometimes already in place and, in some other cases, with a remarkable potential *ad futuram*. In other words, the implementation of the CSR agenda is having important legal spill-overs in different law-fields.

A number of scandals (WorldCom, Tyco, Enron, Parmalat, Lehman Brothers, and very recently Volkswagen) together with the financial (and then economic) crisis since 2007/2008, have both favoured a relative reversal of some of the previous neo-liberal trends. This context explains why corporate governance has been one of the first areas in which transparency and CSR have emerged. By way of introduction, we find an unprecedented value judgement in recital 62 of Directive 2013/36/EU of the Parliament and the Council: "Remuneration policies which encourage excessive risk-taking behaviour can undermine sound and effective risk management of credit institutions and investment firms"[536]. The debate is assured.

A characteristic corporate governance debate lies behind this problematic: modern capitalist societies have witnessed an increasing separation between owners and managers, at least in large companies. The power balance between them is a central issue of corporate governance[537], particularly centred on the protection of shareholders. We can basically study corporate governance from three perspectives: company law, capital market law and labour law. The evolution apparently shows a monopolisation by capital market law, a "marketization" of corporate governance whose main criticism may be the relegation of workers' rights to vaguer social issues, with blatant examples in the occasion of takeovers[538]. From this rather critical view, in interpreting corporate law "the ECJ has legally reinforced the four freedoms, bypassing a political debate on

[536] Directive 2013/36/EU of the European Parliament and the Council, 26 June 2013, on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms, amending Directive 2002/87/EC and repealing Directives 2006/48/EC and 2006/49/EC, *Official Journal of the European Union* L-176, pp. 338-436, 27 June 2013, at recital 62 (p. 345).

[537] The off-cited classic text, from 1932, already pointed to the increasing dispersion of ownership in larger companies creating control problems with the appearance of a more and more autonomous management cast: A.A. BERLE (Jr.) and G.C. MEANS: *The Modern Corporation and Private Property*, New York 1932, Macmillan, xiii + 396 pp, *passim*.

[538] L. HORN: "Corporate Governance in Crisis? The Politics of EU Corporate Governance Regulation", in *European Law Journal*, Vol. 18 No. 1 (January 2012), pp. 83-107, at pp. 94-95.

the subordination of social policies and rights to capitalist freedoms"[539], "within the broader context of deepening financial market integration in the EU and the dominance of financial market imperatives"[540].

Being partly correct, it seems to us a rather exaggerated conclusion, in light of recent EU Directives that head to compulsory transparency measures with a wider range of addressees: "Mandatory reporting in that area can therefore be seen as an important element of the corporate responsibility of institutions towards stakeholders and society" (not only shareholders)[541]. The EU has perfectly taken note of the traps behind voluntary codes when analysing the misconduct of the financial sector before the crisis[542], and even encourages Member States to go beyond the European incipient regulations[543]. In the area of corporate governance, the so-called Accounting Directives have suffered similar changes[544]: Directive 2013/34/EU marks a turning point as it establishes that undertakings considered of "public-interest", *i.e.*, admitted to stock markets in the EU, have the obligation to elaborate corporate governance statements. This information should include the applicable corporate code of conduct, any code voluntarily adopted and practices "over and above the requirements of national law"[545], confirming that CSR already has a place under the sun and consists of going beyond legal obligations. It also covers control and risk management systems and details on the management and supervisory bodies.

In addition to this, we also find in Directive 2013/34/EU[546] a very innovative measure that obliges the extractive industry (minerals, oil, natural gas, deposits and other

[539] *Ibíd.*, p. 98.
[540] *Ibíd.*, p. 101.
[541] Directive 2013/36/EU, *op. cit.*, recital 52 (p. 343).
[542] "The very general provisions on governance of institutions and the non-binding nature of a substantial part of the corporate governance framework, based essentially on voluntary codes of conduct, did not sufficiently facilitate the effective implementation of sound corporate governance practices by institutions. […] The unclear role of the competent authorities in overseeing corporate governance systems in institutions did not allow for sufficient supervision of the effectiveness of the internal governance processes". *Ibíd.*, recital 53 (pp. 343-344).
[543] "Member States should be able to impose corporate governance principles and standards additional to those required by this Directive", *Ibíd.*, recital 54 (p. 344).
[544] We already referred to some disclosure and accounting requirements when we analysed the initial steps of CSR in the EU, before 2009. See *supra*, heading 3.1, item 1, at pp. 40-41. We now study its reform within more recent Accounting Directives that have strengthened the CSR requirements.
[545] Directive 2013/34/EU of the European Parliament and the Council, 26 June 2013, on the annual financial statements, consolidated financial statements and related reports of certain types of undertakings, amending Directive 2006/43/EC of the European Parliament and of the Council and repealing Council Directives 78/660/EEC and 83/349/EEC, *Official Journal of the European Union*, 29 June 2013, L 182 pp. 19 ff., article 20 (at pp. 38-39).
[546] For national practice and deadlines for transposition, please, refer to the following section.

materials as well as active in the logging of primary forests) to report on payments to governments over €100,000 within a financial year, in money or in kind including tax exemptions, royalties and dividends, licence fees or payments for infrastructure improvements[547]. The negotiation of this aspect has been tough and long, for evident reasons: the Commissions' proposal was dated October 2011 and the aforementioned Directive wasn't adopted until mid-2013, undergoing in this regard some important modifications. In particular, it should be noted that the legislative proposal made by the Commission[548] was even more restrictive and did not include any payment out of control (the €100,000 limit).

Here the US's influence is clear: precisely in January 2010 and with bipartisan support, the US adopted in a joint session of the Congress and the Senate the Dodd-Frank Wall Street Reform and Consumer Protection Act, to enhance transparency and financial stability. Under its section 1504, an *addendum* (letter *Q*) is made to Section 13 of the Securities Exchange Act (1934), to oblige the extractive industry to report on payments to governments, in very comparable terms to those used –later– in the EU. The US Act commissioned the SEC to detail in a further regulation the quantities, types of payments or projects and other operative provisions[549]. In August 2012 the SEC issued the final rule limiting it to payments over $100,000 (aggregate or individually), exactly the same symbolic amount established in Directive 2013/34/EU in June 2013. However, following to a suit filed by a coalition of industry groups (leaded by Exxon Mobil, Chevron, Royal Dutch Shell and BP), the SEC rule was annulled in July 2013 by the US District Court in Washington DC and will have to be reviewed. In September 2014, after the 270 days deadline, Oxfam America filed a new suit to put pressure on the SEC to approve a final ruling, which is not likely to be ready before spring 2016.

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[547] *Ibíd.*, Chapter 10, articles 41-46 (at pp. 52-53).

[548] COM (2011) 684 Final, of 25 October 2011, *Proposal for a Directive of the European Parliament and the Council on the annual financial statements, consolidated financial statements and related reports of certain types of undertakings*, pp. 61-62.

[549] "Not later than 270 days after the date of enactment of the Dodd-Frank Wall Street Reform and Consumer Protection Act, the Commission shall issue final rules that require each resource extraction issuer to include in an annual report of the resource extraction issuer information relating to any payment made by the resource extraction issuer, a subsidiary of the resource extraction issuer, or an entity under the control of the resource extraction issuer to a foreign government or the Federal Government for the purpose of commercial development of oil, natural gas or minerals, including: i) the type and total amount of such payments made for each project of the resource extraction issuer relating to the commercial development of oil, natural gas or minerals; and ii) the type and total amount of such payments made to each government". CONGRESS OF THE USA (111th): *Dodd-Frank Wall Street Reform and Consumer Protection Act*, 5 January 2010, Section 1504, H.R. 4173 pp. 845-847, at pp. 845-846, article Q, 2 (A). Emphasis added.

In any case, the European Directive was passed in the meanwhile (2013), with a clear American influence, despite the current problems and delays to be finally implemented in the US. The Directive's level of transposition into national law by Member States is very low despite the relative margin of appreciation, and the scarce national implementing measures generally do not include this requirement for the extractive industry[550]. In spite of all, it constitutes a benchmark as it openly recognises the importance of non-financial information from a social and environmental approach[551], particularly addressed at the extractive industry, which is frequently the target of human rights defenders.

Directive 2013/34/EU, in turn, has been significantly amended by Directive 2014/95/EU in order to further reinforce CSR requirements, extending non-financial reporting to large companies (more than 500 employees), whether they operate or not in the stock markets. Directive 2014/95/EU also changes the content of corporate governance reports and stipulates that they will comprise "as a minimum, environmental, social and employee matters, respect for human rights, anti-corruption and bribery matters"[552]. This amendment maintains the provision on reports of payments to governments by the extractive industry, but constitutes a crucial improvement of Directive 2013/34/EU. It recognises, in a legally binding text, the centrality of human rights in CSR. Guidelines on non-financial reporting are expected by December 2016, the same deadline for transposition, so that the first reports shall be issued for the financial year 2017.

Through this initial legal work, the EU further assumes the "multidimensional nature of corporate social responsibility"[553], indirectly recognising the usefulness of social

[550] At the moment of closing this research, only five Member States have partially implemented the Directive. See National Implementing Measures of the Directive at: http://eur-lex.europa.eu/legal-content/EN/NIM/?uri=celex:32013L0034

[551] "The information should not be restricted to the financial aspects of the undertaking's business, and there should be an analysis of environmental and social aspects of the business necessary for an understanding of the undertaking's development, performance or position", Directive 2013/34/EU, op. cit., at recital 26 (p. 22 of the *OJEU*).

[552] Emphasis added. This remains applicable, now with the amendment including *inter alia* human rights, for undertakings trading in the stock markets, correcting so Directive 2013/34/EU with two new articles, 19 *a)* and 29 *a)*: Directive 2014/95/EU of the European Parliament and of the Council, 22 October 2014, amending Directive 2013/34/EU as regards disclosure of non-financial and diversity information by certain large undertakings and groups, *Official Journal of the European Union*, 15 November 2014, L 330 pp. 1 ff., at article 1, pp. 4-6.

[553] *Ibíd.*, recital 3 (at p. 1 of the *OJEU*).

coercion implied by soft law approaches[554], which has begun with disclosure requirements. Indeed, "non-financial transparency is therefore a key element of any CSR policy"[555]; the EU works on transparency issues since the last decade but, combined with CSR within the framework of corporate governance, it can improve both the internal market and respect for human rights[556].

Perhaps less ambitious at first sight than the above-cited Directives, the protection of retail investors has received particular attention in terms of transparency and social responsibility, what is by the way very important taking into account the large number of individuals and families who had purchased toxic assets before the financial crisis, including complex financial products that embedded derivatives, without due information. In this respect, a recent Regulation[557] has laid down new simplified disclosure obligations and standardised leaflets to duly inform eventual retail investors; from now on, they can apply for compensation if they succeed to demonstrate that losses result from the reliance on that "key information document". In view of the complexity of many financial products from the perspective of retail investors, the Commission had proposed the reversal of the burden of the proof[558]. But the Council finally rejected it and further stated that the manufacturers of such products "shall not incur civil liability solely on the bases of the key information document" (article 11 of the Regulation), unless the documents are clearly misleading or inaccurate. To some extent, the reversal of the burden of the proof has become a fashionable legal tool, also in human rights law, but its abuse isn't either advisable and does not necessarily bring the solutions to the problems. In this sense, we think that this Regulation is a new element towards integrating CSR in corporate governance, in the belief that "*[i]*ncreasingly, retail investors pursue, along with the financial returns on their

[554] "This would inform the market of corporate governance practices and thus put indirect pressures on undertakings", *Ibíd.*, recital 18 (at p. 3). The Commission by the way continues to encourage Member States to go further: "This should not prevent Member States from requiring disclosure of non-financial information from undertakings and groups other than undertakings which are subject to this Directive" (recital 14).

[555] COM (2013) 207 Final, 16 March 2013, *Proposal for a Directive of the European Parliament of the Council amending Council Directives 78/660/EEC and 83/349/EEC as regards disclosure of non-financial and diversity information by certain large companies and groups*, p.2.

[556] M. SONMEZ: "The Role of Transparency in Corporate Governance and Its Regulation in the EU", in *European Company Law*, Vol. 10 No. 4/5 (2013), pp. 139-146, at pp. 144-145.

[557] Regulation (EU) No. 1286/2014 of the European Parliament and of the Council, 26 November 2014, on key information documents for packaged retail and insurance-based investment products (PRIIPs), *Official Journal of the European Union*, L 352, pp. 1 ff., at article 11 (p. 14).

[558] COM(2012) 352 Final, 3rd July 2012, *Proposal for a Regulation of the European Parliament and of the Council on key information documents for investment products*, article 11, pp. 24-25.

investment, additional purposes such as social or environmental goals"[559]. Accepting that there are no "one-size fits all" solutions, the CSR legal spill-overs are taking the form of "comply or explain mandates" to start enhancing disclosure of non-financial information, also in the area of energy and pollution[560].

Notwithstanding these improvements in the area of corporate governance, when the Commission has tried to move forward with more precise actions beyond disclosure requirements, it has encountered some barriers. This is what happens to the project to regulate "supply chain due diligence self-certification of responsible importers of tin, tantalum and tungsten, their ores, and gold originating in conflict-affected and high-risk areas". In 2010 the EP asked the Commission to imitate (again) the US –the above-cited Dodd-Frank Wall Street Reform and Consumer Protection Act (in this case, Section 1502)[561], built upon the OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas. The Commission's proposal consists of a hard norm, which would serve as a framework for self-regulation (certifications and good practices) to foster responsible supply chains in this highly sensitive trade of minerals. The public competent authorities would help to implement self-certifications and provide with the structures for review, reporting and claiming, being thus a more daring initiative. The Commission advocates for a mixed *hard* and *soft* approach, in which companies partly manage a self-certificate as "responsible importers" but, once in, they must fully comply with the OECD guidelines and accept supervision and reporting. Another option would be to make it compulsory to join the system, so that the number of Companies would be higher, but the requirements would eventually persuade them to leave certain risk areas looking for an alternative sourcing, to make it easier to comply with the standards. This would probably generate serious market distortions when abandoning already weak countries, in which companies would not source anymore. What is more, by leaving these conflict-affected or high-risk areas, at the end, nothing would point to improvements on the ground. Since 2010, after the approval of Dodd-Frank Act, it has been assessed a drastic reduction of exports and increase of informal trade networks in DRC and neighbouring countries of the Great

[559] Regulation (EU) No. 1286/2014, *op. cit.*, recital 19 (at p. 4 of the *OJEU*).
[560] M. A. CAMILLERI: "Environmental, social and governance disclosures in Europe", *op. cit.*, at pp. 238-239.
[561] COM(2014) 111 Final, 5 March 2014, *Proposal for a Regulation of the European Parliament and of the Council setting up a Union system for supply chain due diligence self-regulation of responsible importers of tin, tantalum and tungsten, their ores, and gold originating in conflict-affected and high risk areas*, recital 7, p. 3.

Lakes Region where, again, we face the problem of failed States (DRC). This negative impact[562], according to the Commission, could be minimised if the Regulation maintains the half-voluntary character of this self-certification system, so as to avoid worsening the problems at source by simply abandoning these areas.

The fact is that the EP called on the Commission to regulate this matter in 2010, again inspired by the USA's Dodd-Frank Act (here Section 1502), but the proposal was not drafted and published until 2014. The outcome is still unclear. Politically speaking, the Commission united to the High Representative of the European Union for Foreign Affairs and Security Policy to put pressure on the Council and the Parliament, stressing the development and human rights coherence of adopting such a regulation, in the exposed terms, consistently with the values that should inform EU's external action[563]. For instance, the Parliament's reaction has been a profusion of amendments adopted on 20 May 2015, even asking for a tougher regulation and accentuating the human rights aspects[564]. Although the negotiations seem to be delayed *sine die*, sooner or later it will certainly impact EU Law, probably in a positive manner if it succeeds in balancing, to the extent possible, the necessary requirement of responsible imports with the development needs of those areas.

Finally, a complementary way to promote CSR through legally-binding instruments is the recent and innovative public procurement reform, which facilitates at the same time market reward to socially responsible companies. The EU has enforced new provisions that establish, as a general rule, that Member States' public contracts shall comply with the "applicable obligations in the fields of environmental, social and labour law established by Union law, national law, and collective agreements or by the international environmental, social and labour law provisions listed in Annex X"[565]. For

[562] The Commission's policy assessment can be found at the Staff Working Document: SWD(2014) 52 Final, *Executive Summary of the Impact Assessment Accompanying the document "Proposal for a Regulation of the European Parliament and of the Council setting up a Union system for supply chain due diligence self-certification of responsible importers of tin, tantalum and tungsten, their ores, and gold originating in conflict-affected and high-risk areas*".

[563] JOIN(2014) 8 Final, 5 March 2014, *Joint Communication to the European Parliament and the Council. Responsible sourcing of minerals originating in conflict-affected and high-risk areas. Towards an integrated EU approach*, 13 pp.

[564] EUROPEAN PARLIAMENT: *Amendments adopted on the proposal for a regulation of the European Parliament and of the Council setting up a Union system for supply chain due diligence self-certification of responsible importer of tin, tantalum and tungsten, their ores, and gold originating in conflict-affected and high-risk areas*, 20 May 2015, P8_TA-PROV(2015)0204.

[565] Directive 2014/24/EU of the European Parliament and of the Council, 26 February 2014, on public procurement and repealing Directive 2004/18/EC, *Official Journal of the European Union*, 28 March

that purpose, labels can be used to evaluate candidates so that more economically advantageous tenderers might be rejected for those reasons [566].

We find equivalent measures in Directive 2014/25/EU, specifically addressing public procurement in the water, energy, transport and postal services sectors[567]: article 36.2 lays down the same labour, social and environmental principles, also evaluable through the appropriate labels (art. 61) and provides with a list of international agreements in Annex XIV. However, Annex X of Directive 2014/24/EU and Annex XIV of Directive 2014/25 /EU completely forget two basic international human rights instruments: neither the International Covenant on Civil and Political Rights nor the International Covenant on Economic, Social and Cultural Rights are apparently part of the EU "environmental, social and labour" standards dealing with public procurement, according to these Annexes, despite correctly citing many ILO and other environmental conventions. The Commission could easily correct it, for example, adding the above-mentioned Conventions to Annex XIV of Directive 2014/25/EU, as a delegated act expressly foreseen by art. 76.8 of this Directive, given that all Member States have ratified both the ICCPR and the ICESCR[568]. In sum, despite improvable details, the public procurement reform has introduced new CSR criteria to award public contracts.

To recapitulate, CSR has firstly been introduced in corporate governance, initiating an unprecedented role in legally binding texts. Its incipient impact on the financial sector led to the control of credit and investment institutions, including risk-linked remuneration policies within management boards and gender balance (Directive 2013/36/EU). This was followed up with the protection of retail investors against misleading and aggressive practices, including new social and environmental considerations (Regulation (EU) No. 1286/2014). CSR has been extended also to non-

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2014, L 94, pp. 65 ff., art. 18.2 (at p. 106). Similar provisions but in more general terms are found at Directive 2014/23/EU.

[566] Directive 2014/24/EU, articles 56.1 and 57.4 *a)* read together with art. 18.2. *Ibíd.*, at p. 122 of the *OJEU*. However, it must be noted that, according to art. 9, these rules apply only internally so that contracts pursuant international rules are excluded, a loop-hole in the EU's consistency *ad extra*.

[567] Directive 2014/25/EU of the European Parliament and of the Council, 26 February 2014, on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC, *Official Journal of the European Union*, 28 March 2014, L 94, p. 243 ff.

[568] All 28 Member States have ratified the ICCPR and the ICESCR of 1966 (to check the status of signatures and ratifications see https://treaties.un.org/). However, it must be highlighted that, as for their respective Optional Protocols –allowing individual complaints and the competences of the UN Committees on CPR or ESCR– all Member States except the UK have ratified the Optional Protocol of the ICCPR and only seven Member States have ratified the OP to the ICESCR (Spain, Slovakia, Portugal, Luxembourg, France, Belgium and Italy). The Netherlands have signed the OP to the ICESCR but has not ratified the text yet.

financial disclosure requirements from a human rights approach (Directive 2013/34/EU and its partial amendment in Dir. 2014/95/EU), what applies to large companies in general terms (a potential of ca. 6000 EU Companies). Also Directive 2013/34/EU sets innovative reporting obligations for the extractive industry on payments to governments above €100000, what is likely to become an utterly interesting instrument to increase control on this industry as well as in the fight against corruption in developing countries. As can be seen, CSR has firstly penetrated the European Corporate Governance Regulation, which has become an "extremely versatile, comparative and transnational legal field"; in the overall, we detect positive aspects to the extent "both hard and soft norms governing particular elements of corporate governance, accentuates the degree to which European Corporate Governance Regulation has come under pressure to facilitate quasi-neutral, 'best' practices in 'good' corporate governance"[569].

In the end, we have seen that a comprehensive public procurement reform has added new CSR contracting requirements to be further regulated by Member States (Directives 2014/24/EU and 2014/25/EU). Then, the pending regulation on responsible supply chains of minerals appears a promising initiative, once more combining hard and soft norms, while the Commission seems to bear in mind the need to address human rights problems at source. We therefore note that the implementation of the CSR agenda has incipient legal spill-overs, which are far from negligible; it does not seem unreasonable to predict that this tendency will continue.

### 3.3. National initiatives in the EU

#### *3.3.1. Member States' role: challenges and opportunities*

The importance of Member States in ensuring the implementation of any EU policy or piece of legislation is beyond any doubt and the diverse levels of compliance have for long received the attention of the literature. It is too soon to make any study on the transposition of the CSR-aspects of the Directives analysed above; once possible, *i.e.*, after the expiration of the deadlines for transposition or even slightly later, such a research might be of interest to confront it to the state of the art. For instance, the

[569] P. ZUMBANSEN: "New Governance in European Corporate Law Regulation as Transnational Legal Pluralism", in *European Law Journal*, Vol. 15 No. 2 (March 2009), pp. 246-276, at pp. 247 and 251 (citations).

deadline for transposition of Directive 2013/34/EU expired 20 July 2015 and no Member State has yet transposed into national law the aspects related to the disclosure of payments to governments by the extractive industry (arts. 41-46 of the Directive, which were not modified by Dir. 2014/95/EU so that the transposition deadline was not postponed in this regard). The transposition deadline for Directive 2014/95/EU, strengthening the CSR reporting requirements for large companies, expires 6 December 2016. It happens the same with the public procurement reform (2014/24/EU and 2014/25/EU, deadline 18 April 2016) so that they might be applied for the financial year 2017, even though States like France, the Netherlands or Finland include similar provisions in their public procurements well before the appearance of these Directives, as we will illustrate below. Again, it is too soon to draw any conclusion on national implementing measures. Likewise, it would be premature to fully evaluate to what extent the EU succeeds in effectively mobilising Member States; only some preliminary comments might be done with the limited value of an early assessment.

The limits of Member States' discretion is a more than usual EU Law issue: if Directives impose obligations of results without predetermining the means, one can imagine to what extent soft law and CSR leave an ample room for manoeuvre. Harmonisation seems easier with soft law under the OMC (despite its imperfections, as discussed elsewhere in this work[570]) and it can be sometimes even more suitable, for example, to leave space for experimentation when national business systems and other national constraints widely differ. At the national level, the UN Guiding Principle 3-*b)* invites States to "provide effective guidance to business enterprises on how to respect human rights throughout their operations", at the same time they ensure the human rights-consistency of their legislation (UNGP 3-*a)*). This is the basis of Member States' role.

The EU has taken over the responsibility to promote compliance with the UNGPs among Member States. The famous *Renewed EU Strategy 2011-2014 for CSR* already asked Member States "to develop or update by mid-2012 their own plans or national lists of priority actions to promote CSR" [571], within the broader context of several peer reviews to exchange information and experiences. The Commission has undertaken seven of such peer reviews in 2013 to study the best policy options at a national level.

[570] See below Chapter IV, section 1.
[571] COM (2011) 681 Final, *op. cit.*, para. 4.7, pp. 12-13.

In June 2012, the Action Plan on Human Rights and Democracy for 2012-2014, issued at the same time of the EU Strategic Framework on the same subject, foresees to "develop National Action Plans for EU Member States on implementation of the UNGPs", ideally by 2013[572]. The Action Plan on Human Rights and Democracy has been updated for the period 2015-2019 but the need to "develop and implement National Action Plans (NAPs) on the implementation of the UN Guiding Principles" [573] is repeated. The current Action Plan then reiterates the necessary commitment at the national level and extends the deadline to 2017.

Indeed, at the time of writing, only five Member States have developed such NAPs on "business and human rights", thus implementing the UNGPs: Finland, the United Kingdom, The Netherlands, Denmark and Italy (a preliminary version considered valid). The COHOM is supposed to stimulate their adoption and monitor the state of implementation, apparently without much success in view of the modest number of NAPs on business and human rights.

Nevertheless, up to eighteen Member States have specific NAPs on CSR (nineteen if we add the United Kingdom, with a longer tradition in this regard). Perhaps CSR has become a more attractive denomination (19 NAPs) compared to the "business and human rights" label (5 NAPs), despite their obvious closeness and the insistence of the EU to endorse the UN approach. Member States might be reluctant to intensify the human rights language within CSR, forgetting that the most effective way to approach the latter is through the UNGPs.

Concerning NAPs on CSR, there are also a number of ways to adopt them: according to the latest available information[574], only Cyprus and Bulgaria detailed the approval by the Council of Ministers, which seems the most authoritative option given the complex interaction between legal force and political power in our topic[575]. But the most usual

[572] COUNCIL OF THE EU: *EU Strategic Framework and Action Plan on Human Rights and Democracy*, Luxembourg, 25 June 2012, Council Doc. 11855/12, Annex, Action 25 *c),* p. 20.
[573] EUROPEAN COMMISSION and HIGH REPRESENTATIVE FOR FOREIGN AFFAIRS AND SECURITY POLICY: *Joint Communication to the European Parliament and to the Council. Action Plan on Human Rights and Democracy (2015-2019). "Keeping Human Rights at the heart of the EU Agenda"*. Brussels, 28 April 2015, JOIN (2015) 16 Final, Action 17 *b),* p. 14.
[574] EUROPEAN COMMISSION: *Corporate Social Responsibility. National Public Policies in the European Union (Compendium 2014),* Brussels, June 2014, pp.14-15 and Annex (pp. 60-100).
[575] Information provided to this author by participants in the Spanish working group indicates that the Spanish NAP, under development, would also be submitted for deliberation and approval by the Council of Ministers.

procedure consists of more or less informal governmental publications (a *memorandum* in Latvia, preparatory documents in France, non-binding policy papers issued by commissions or committees such as the Danish Council for CSR or the Interdepartmental Commission on Sustainable Development in Belgium –governmental bodies without real legislative powers). Screening all EU Member States, we further note that the Czech Republic has decided to add the UNGP's within the already done CSR plan, and Malta is considering the same possibility for their NAP on CSR under development. That raises the question as to what extent two separate action plans are really necessary (one on CSR and a second one on business and human rights).

For the time being, NAPs on CSR rarely lead to legislative actions; on the contrary, most of the time policies propose awareness raising and promotional activities, the softest options. To cite only a few examples: the usual eco-labels in Nordic countries; the Dutch online-tool to provide Companies with country assessments of human rights' risks in third countries; a Polish CSR capacity-building program for SMEs; the Austrian toolkit for gender equality; the Estonian CSR label; the Irish "Business Working Responsibility Mark" to certify responsible and sustainable businesses; a CSR dictionary in Croatia; the Danish Partnership for Public Green Procurement; the Finish website "CSR Compass" to guide on CSR within public procurement; etc.

Harder or softer, consolidated or recent, the fact is that 19 Member States have NAPs on CSR while only five on the UNGP's. As stated, this is of course an additional aspect to complete a wider picture of the national initiatives in the EU. There are other differences among Member States caused by simpler factors: political tradition, the maturity of the civil society and quality of democracy, plus the diverse understandings of market coordinated economies. In this sense, the enlargement eastwards has incorporated countries with a less enthusiastic attitude towards any eventual hardening of CSR, since the attraction of FDIs constitutes there a priority and there is some historical fear to reintroduce politics in the economy.

Economically speaking, the key factors that explain national differences in the EU are the greater or lesser exposure to international trade and supply chains, the importance of exports and the balance of payments, the relative weight of SMEs in the GDP, the major sectors of the economy, the number of MNC's headquarters, and the macro- and micro-economic situation in the overall.

As for the economic situation, many European NAPs on CSR include measures that actually respond to the crisis since 2007/2008, to tackle structural unemployment, youngsters and elderly people, and other internal problems (mainly in social affairs). Suffice the example of the Spanish label to acknowledge companies that take part in the "Strategy for Entrepreneurship and Youth Employment". The crisis has generated a series of human rights challenges in some EU Member States: of course, one of the objectives of CSR is to enhance preventive measures to promote human rights' horizontal effects, while actively involving private actors, with two dimensions, external and internal. But an excessive focus on the internal aspects may distort the sense of CSR. The obligation to respect core human rights treaties already existed for EU Member States, so that the predominance of internal social affairs is somehow unfocused, despite being a perfectly understandable priority. In this regard, it is basic to keep a distance and remain critical: we do not think that the contingent character of this crisis-motivated and internally-oriented approach to CSR is likely to bring about durable and positive changes, neither for society nor for companies themselves.

In sum, national initiatives need to be contextualised within a broader analytical framework. On the ground, 39.83% of companies included in the Dow Jones Sustainability Index are located in EU Member States. We can list the EU countries in order: United Kingdom (second position; 12.57% of companies incorporated to the DJSI are British), Germany (4$^{th}$ position; 8.14%), France (5$^{th}$; 6.75%), Spain (8$^{th}$; 3'65%), Netherlands (10$^{th}$; 3.10%), Italy (12$^{th}$; 2.79%), Denmark (13$^{th}$; 1.42%), Sweden (15$^{th}$; 1.02%), Finland (20$^{th}$; 0.20%), Portugal (23$^{rd}$; 0.15%) and Belgium (25$^{th}$; 0.04%)[576]. It must be noted that Netherlands, Finland, Denmark, the United Kingdom and Italy, all having both NAPs (on CSR and on the UNGPs) do not necessarily have a higher number of companies within the DJSI compared to countries that only have NAPs on CSR (Sweden, France, Germany and Belgium), or compared to those with none of the two NAPs yet (Spain and Portugal, under development though). Moreover, these results need to be interpreted in the light of offshoring processes by which the dirtiest industries or production phases have been moved from advanced economies to

[576] Dow Jones Sustainability World Index. Data calculated in USD as of end of July 2015. Available at http://djindexes.com/sustainability/?go=literature.

other parts of the world[577], improving OECD countries' performance in environmental and social matters.

This reminds us the OECD Guidelines for Multinational Enterprises: twenty-four EU Member States have adhered[578], obliging themselves to establish National Contact Points with three main functions: CSR promotion, enquiries and research tasks, and the establishment of non-judicial dispute mediation mechanisms in some cases of alleged non-compliance with the Guidelines. Luxembourg or Austria have no NAPs yet, but they have adhered to the OECD Guidelines, and both established in 2000 their respective National Contact Points within the Ministry of Economy.

In view of all that has been set out above, the presence of NAPs on CSR or specifically on business and human rights, or both of them, is not necessarily correlated to a better CSR performance. It will only be a sign, an indicative element that needs to be assessed through political, legal and economic filters.

Denmark and France are good examples to complete this picture and reveal some grey zones: the Commission has not always been the torchbearer. Denmark has published its NAP on CSR in 2008 and on the UNGPs in 2014, but as early as 2008 an amendment to the Danish law on Financial Statements added new CSR requirements well-above the Directive applicable at that time and even more stringent than the current ones, with effects on companies above 250 employees (while the EU stated 500 employees). This constitutes an innovative and visionary introduction of CSR in Danish Company Law, with a clear human rights language; while specific CSR actions are up to the companies, the obligation is clear on the reporting side, marking a "gradual jurification of societal expectations of companies"[579], extrapolating international standards and leading the way in the EU.

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[577] "*[A]*dvanced economies have often moved their more dirty industries to other parts of the world where there are less stringent environmental and social standards. As a result, other countries may be polluting on their behalf and the indexes do not factor those in". R. MULLERAT: "Corporate Social Responsibility: A European Perspective", in *Jean Monnet/Robert Schuman Paper Series* (University of Miami), Vol. 13 No. 6 (June 2013), 22 pp. at p. 4.

[578] 45 States in total have adhered, so EU countries represent more than a half of the global support of the OECD Guidelines. EU Member States that adhered to the Guidelines are: Austria, Belgium, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden and the United Kingdom. As usual, a different problem is the extent to which the general public has this information. See https://mneguidelines.oecd.org/ncps/

[579] K. BUHMAN: "The Danish CSR Reporting Requirement: Migration of CSR-Related International Norms into Companies' Self Regulation through Company Law?", in *European Company Law*, Vol. 8

France has been far in front of other countries in continental Europe too: well-before the publication of the preparatory document for the French NAP on CSR (January 2013), and well in advance of Directives 2013/34/EU and 2014/95/EU, the French *Grenelle* Law of 2001, reformed in 2010 precisely to reinforce its CSR aspects, already established quite stringent non-financial disclosure requirements for companies. That is, three years before any EU directive was contemplated. The so-called *Grenelle II* Law (2010) did not just affect corporations operating in the stock markets, but also large companies in general terms as well as investment companies[580]. Investment funds and asset management companies have, since 2010, to prepare annual reports on the criteria concerning *«le respect d'objectifs sociaux, environnementaux et de qualité de gouvernance»*. Furthermore, article 225 of the *Grenelle II* Law importantly clarifies their content: *«Il comprend également des informations sur la manière dont la société prend en compte les conséquences sociales et environnementales de son activité ainsi que sur ses engagements sociétaux en faveur du développement durable […] sur la société elle-même ainsi que sur l'ensemble de ses filiales […] ou les sociétés qu'elle contrôle […]»*[581]. This French Law has another cutting-edge aspect: the creation of an independent monitoring body, tasked to verify the soundness of corporate reports and, as of the year 2016, empowered to issue an opinion (*«un avis motivé»*) on the sincerity of the content (*«la sincérité des informations»*)[582] –a bit ingenuous in Foucauldian terms[583].

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No. 2/3 (2011), pp. 65-73, p. 73. Only unofficial English translations are available of the cited Danish law; the reference of the law is "Act No. 1403 (27 December 2008) amending the Act on Financial Statements (*Lov om aendring af arsregnskabsloven*)".

[580] There is an abundant French literature on the issue. A short but good in English: V. MAGNIER: "New Trends in French Corporate Governance: Towards a Stakeholder oriented Approach?" in *European Company Law*, Vol. 9 No. 5 (2012), pp. 245-249, *passim*.

[581] Law No. 2010-788 of 12 July 2010 ("portant engagement national pour l'environnement"), *Journal Officiel de la République Française*, No. 0160 du 13 Juillet 2010, page 12905, art. 224 and 225.

[582] One year and a half after the adoption of Grenelle II Law, the Conseil d'Etat issued the application Decree No. 2012-557 of 24 April 2012 to finally regulate some operative aspects, establishing a progressive entry into force, in such a way that the first year (2011) only companies in the stock markets and those with more than 5000 employees would be affected, extending it in 2012 to companies with more than 2000 employees and finally, in 2013, to any company with more than 500 employees (or equivalent revenue criteria according to the French legislation). The application decree also regulates the independent monitoring body to which we refer in the text above. Décret nº 2012-557 du 24 avril 212 relatif aux obligations de transparence des entreprises en matière sociale et environnementale, *Journal Officiel de la République Française* No. 0099 du 26 avril 2012, page 7439, art. 1. French legislation is available at : www.legifrance.gouv.fr

[583] « Il n'y a pas d'exercice du pouvoir sans une certaine économie des discours de vérité fonctionnant dans, à partir de et à travers ce pouvoir. Nous sommes soumis par le pouvoir à la production de la vérité et nous ne pouvons exercer le pouvoir que par la production de la vérité. C'est vrai de toute société, mais je crois que dans la nôtre ce rapport entre pouvoir, droit et vérité s'organise d'une façon très

Naturally, the Commission's compendium on national public policies recognises the uniqueness of the early French initiatives in this regard[584]. Interestingly enough, it must be recalled that the Commission did not always praise France for this pioneering social and environmental progresses: at the request of tenderers in 1998, the Commission brought an action before the ECJ to declare the French failure to fulfil its obligations under Community Law because it had included social clauses (a campaign against unemployment) among the criteria to award public works contracts[585]. The Directives governing public procurement at the moment were almost exclusively centred on economic criteria, and the Commission initially played an unclear role in the potential extension to social and environmental issues. The ECJ followed a quite progressive interpretation to support some EU Member States that were already including social and environmental clauses in public contracts; not only in the above-cited case of the *Commission vs. France*, but also in three important preliminary rulings regarding the Netherlands[586], Finland[587] and Austria[588]. We have come a long way since that action against France; now the Commission actively supports further explicit CSR clauses in

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particulière… ». M. FOUCAULT : « *Il faut défendre la société ». Cours au Collège de France (1975-1976)*, Paris 1997, Éd. Gallimard Le Seuil, pp. 22.

584 "France has implemented a unique worldwide legislative requirement [...]", EUROPEAN COMMISSION: *Corporate Social Responsibility. National Public Policies in the European Union (Compendium 2014)*, Brussels, June 2014, pp. 49 and 39.

585 The Court concluded that the Directive then in force "does not preclude all possibility for the contracting authorities to use as a criterion a condition linked to the campaign against unemployment provided that that condition is consistent with all the fundamental principles of Community Law, in particular the principle of non-discrimination flowing from the provisions of the Treaty on the right of establishment and the freedom to provide services", Case C-225/98, *Commission v. France*, Judgement of 26 September 2000, para. 50.

586 "The condition relating to the employment of long-term unemployed persons is compatible with the Directive if it has no direct or indirect discriminatory effect on tenderers from other Member States of the Community. An additional specific condition of this kind must be mentioned in the contract notice", Case 31/87, *Gebroeders Beentjes BV*, Judgement of 20 September 1988, para. 37 *iii)*.

587 In this case, on the environmental requirements for a city-bus service contract in Helsinki, the ECJ decided to recur to the Treaties stating, more innovatively, that environmental concerns had to underpin all EU Policies (of course, it is a judgement of 2002): "Article 130r(2) of the EC Treaty, transferred by the Treaty of Amsterdam in slightly amended form to Article 6 EC, which lays down that environmental protection requirements must be integrated into the definition and implementation of Community Policies and activities, it must be concluded that Article 36(1)a of Directive 92/50 does not exclude the possibility for the contracting authority of using criteria relating to the preservation of the environment when assessing the economically most advantageous tender". Case 513/99, *Concordia Bus Finland*, Judgement of 17 September 2002, para. 57.

588 In this case, a public contract to supply electricity that included a number of requirements on renewable energy sources. "The Court therefore accepted that where the contracting authority decides to award a contract to the tenderer who submits the most economically advantageous tender it may take into consideration ecological criteria, provided that they are linked to the subject-matter of the contract, do not confer an unrestricted freedom of choice on the authority, are expressly mentioned in the contract documents or the tender notice, and comply with all the fundamental principles of Community Law, in particular the principle of non-discrimination". Case C-448/01, *EVN AG, Wienstrom GmbH*, Judgement of 4 December 2003, para 33.

public procurement[589] but it should be born in mind the role of some EU Member States that took a step forward and how the ECJ found the legal way to support it.

As is apparent, the promotion of CSR at a national level in the EU has several facets; NAPs are insufficient to evaluate the real role of EU Member States. In some cases, Member States have been more advanced than the Commission. NAPs (on CSR or, at best, on business and human rights) are only another element, to be added to the endorsement of the OECD Guidelines, the prompt and complete implementation of the CSR-aspects of recent EU Directives, other purely legislative measures, even the daily administration, to mention just a few. Many studies excessively focus on NAPs: we must see the wood, not just the trees.

Leaving aside concrete examples of what is happening at the national level, it is now relevant to make some theoretical comments. To explain the diversity of national responses to the CSR agenda, from our institutional perspective that studies both political and legal factors, we need to take into account the national business systems and different varieties of capitalism. The concept of "implicit" and "explicit" CSR, first proposed by Matten and Moon in 2008, deems to be very useful to shed light on the current European initiatives and explain the spread of NAPs on CSR among EU Member States, as well as a previous "hidden CSR" at a national level. To some extent, it could be guessed when we explained the more or less remote origin of CSR in the EU, even before being labelled as such. The concepts of implicit and explicit CSR are worth a longer citation:[590]

> *"[C]orporations practicing implicit CSR might conduct practices similar to those of corporations practicing explicit CSR. Implicit CSR, however, is not conceived of as a voluntary and deliberate corporate decision but, rather, as a reaction to, or reflection of, a corporation's institutional environment, whereas explicit CSR is the result of a deliberate, voluntary, and often strategic decision of a corporation. Many of the elements of implicit CSR occur in the form of codified norms, rules and laws but are not conventionally described explicitly as CSR. It is the societal norms, networks, organizations, and rules that are explicit, rather than their implications for the social responsibilities of business. It is in this sense that CSR in these systems is implicit. Where corporations comply with the law and customary ethics but do not claim distinctive authorship of these practices, they are nonetheless acting responsibly […]".*

[589] See this chapter, Section 2.3 for the analysis of the current public procurement directives and the supportive role of the Commission.

[590] D. MATTEN and J. MOON: "Implicit" and "Explicit" CSR: A Conceptual Framework for a Comparative Understanding of Corporate Social Responsibility", in *Academy of Management Review*, Vol. 33 No. 2 (April 2008), pp. 404-424, at p. 410.

According to Matten and Moon, some differences between the US and the EU can help explain the evolution of the several policy options of EU Member States. For instance, the power of the State is lower in the US and there is a greater corporate discretion in this matter (CSR), on which the US government has been less active. The enhanced role of private actors in the US is also visible in more evident differences concerning the education, labour and cultural systems, added to a lower public confidence in, and credibility of, the government compared to Europe. In finances, the US has rather focused on shareholders whereas there have always been wider concerns in the EU, where public authorities have historically been friendlier to the concept of 'stakeholders'. This has marked two different paths towards CSR: in Europe, through a consolidated institutional concern on public participation and stakeholders, and in the US *via* a higher exposure to stock markets and dispersed ownership that would have obliged to put in place earlier transparency measures to attract investors and consumers. Moreover, in Europe corporations tend to be controlled by a smaller number of large investors, among which banks and financial institutions predominate, apart from depending more on the State as an economic actor.

Matten and Moon's analysis concludes that the US, being a more liberal market economy, has traditionally been closer to explicit CSR: companies freely choose how to proceed and explicitly express their own original CSR, in a flexible and voluntary manner, sensitive to a variety of corporate needs and interests before deciding how to interact with more general societal expectations regarding business responsibility. However, in the EU, a less liberal economy, Member States traditionally have an "implicit CSR" on a number of issues, a *CSR before CSR*, which in our view continues to condition Member States initiatives and, sometimes, their scepticism since implicit CSR schemes look nearer to hard law approaches. In one way or another, explicit or implicit, it is all about corporate responsibility. The concept can also be extended to the EU: as we have seen, an implicit CSR has existed in many policies before the explicit one emerged.

Famous corporate scandals (Parmalat in Italy, Elf Aquitaine in France, Ahold in the Netherlands, etc.), alongside the increasing privatisation of public goods and services in the EU, plus the impact of the financial crisis and general globalisation trends, have all together risen social awareness of private actors and might jointly explain the recent spread of a more explicit CSR among EU Member States. The public opinion is

suddenly to many unexpected limits of Nation-States to face these problems: the European implicit CSR, despite its traditional emphasis on hard regulations, deemed to be insufficient after these recent developments, thus "encouraging a more explicit CSR"[591]. The deficiencies of traditional regulations in the EU have been noted during the crisis, when we discovered the link between remuneration systems and excessive financial risks. The historical trend persists to some extent: for example, the general lack of workers matters in the European CSR is the result of a long historical labour law tradition that takes for granted an "implicit CSR" on the subject, relying on already existing norms. In our opinion, this trend might change following to the labour system reforms undertaken, in the heat of the crisis, by some liberal and conservative governments in the EU, in order to "flexibilize" –as they claim– the labour market, what could in the future make necessary a stronger explicit CSR also in this area (if the former implicit one is really weakened and impossible to be restored). However, workers matters are at the core of CSR in US companies.

Whatever the case, if the implementation of the CSR agenda has (promising) legal spill-overs in the EU, it is because of a typically European historical and constitutional preference for hard law, which is likely to become one of the main European contributions to global CSR (with the exception of the United Kingdom as a common law system with a longer and more liberal understanding of CSR).

EU Member States have a crucial role to build a wider *consensus*, which is needed both inside and outside the EU to effectively boost CSR. We notice a great number of risks and problems when we come down to the State level, more accentuated in highly decentralised countries. In summary, the main problematics we have detected concern the different speeds and understandings with respect to CSR, which is shaped by structural political and economic factors. In general terms, Member States simply follow the EU institutions. Of course, no anti-CSR attitude is detected, but there are no big enthusiasms or particularly original initiatives either, even in those countries that show a stronger commitment.

A possible way to face many of the aforementioned challenges is to task the already existing National Human Rights Institutions with the coordination, on-going evolution

[591] According to Matten and Moon, the US reaction has been the opposite: a growth of the implicit CSR with two unexpected legislative initiatives, the Dodd-Frank Act and the Sarbanes-Oxley Act, both cited elsewhere in this research. *Ibíd.*, p. 415.

and implementation of the CSR agenda. The potential role of NHRIs has been somehow underestimated or simply forgotten when dealing with business and human rights[592].

We can further elaborate on the advantages of NHRIs in this respect. For instance, it is a public authority, functionally independent from the government (sometimes even handling individual complaints), with the know-how and experience in the field to adapt better to the EU national diversity, including legal aspects. Secondly, this would allow a proper recognition that human rights are an essential ingredient of the definition of CSR, as the latter would be incorporated into the areas of action of a proper human rights institution, thus consolidating the human rights language within CSR. By the way, the creation of new institutions (in the form of committees, interdepartmental bodies, etc.) is not a very pragmatic solution either, provided that NHRI's capacity to act in their former competencies is not weakened by adding this new responsibility. Thirdly, it can solve the usual mistrust that looms any negotiation to establish monitoring bodies: despite being public, its functional independence according to the Paris Principles would never be to the governments' total satisfaction, since NHRIs could also control public authorities and state-owned companies, or participated by the State or providing public services. Of course, in this new capacity, NHRIs would not be the ideal option for many companies either, as many are still advocating for the predominance of self-regulation, without realising that the current tendency seems hardly reversible and tends to combine self-regulation with both co-regulation and, also, proper regulations –at least to frame the first two ones. A larger degree of regulatory coordination between Member States is needed to make CSR work, perfectly compatible with its voluntary nature[593].

[592] We mean it has been underestimated by governments –not by scientific literature. States, in their NAPs and CSR policies, don't contemplate any special role for NHRIs in a field, business and human rights, on which these institutions could be very useful. Surya Deva promotes this idea since 2011: S. DEVA: "Corporate Human Rights Abuses: What Role for the National Human Rights Institutions?", in H. NASU and B. SAUL (Eds.): *Human Rights in the Asia Pacific Region: Towards Institution Building*, London 2011, Routledge Ed., pp. 234-248. In the same sense, also see: M. BRODIE: "Pushing the Boundaries: The Role of National Human Rights Institutions in Operationalising the 'Protect, Respect and Remedy' Framework", in R. MARES (Ed.): *op. cit.*, pp. 245-272. Also generally: V. HAÁSZ: "The Role of National Human Rights Institutions un the Implementation of the UN Guiding Principles", in *Human Rights Review*, Vol. 14 No. 3 (September 2013), pp. 165-187, *passim.*

[593] A sort of 'voluntary within mandatory' scheme: "There is a need, clearly identifiable, for a regulatory framework to be established, if CSR is to work. This is not in contradiction with the voluntary character of CSR. On the contrary, it attaches its meaning to voluntary commitments". O. De SCHUTTER: "Corporate Social Responsibility European Style", in *European Law Journal*, Vol. 14 No. 2 (March 2008), pp. 203-236, at p. 219.

Lobbying activities comprise by the way private self-certification systems –the proliferation and marketization of certificates is a not very desirable development, but a real possibility within the consultancy sector. The problem of CSR standardisation and certification systems at a national level has materialised in the Netherlands following to the ISO 26000. Since the ISO did not support any kind of certification, the Dutch private-led "CSR Performance Ladder" identified a market need to adapt and change the ISO 26000 into a certifiable system, arguing that both customers and businesses need publicly recognisable standards which imply reputational consequences to facilitate market rewards for responsible companies[594]. In our view, private and for-profit CSR rating agencies remind us –setting aside obvious differences– the recent role of private rating agencies during the debt markets crisis. In relation to this, NHRI's new competencies on Business and Human Rights could include the management (definition and award) of CSR labels and certificates, on a non-profit basis to avoid their privatisation and multiplication (likely to generate confusion), thus contributing to their credibility. However, to finish with standards and certification systems, we wonder if it would be preferable to have European labels rather than national ones, such as the EU eco-Flower, managed by the Commission, as they would be more attractive than national labels for different reasons: mainly, the dimensions of the common market and the capacity of the EU to create widely recognised and credible logos that would increase their reliability.

At the national level, NHRIs can, in sum, actively contribute to the implementation and supervision of the international framework, within which a high degree of voluntary actions would be maintained. NHRI's have the potential to address many of the practical challenges in Member States to overcome the predominance of information and promotion strategies, pushing for more concrete developments. Therefore, the role of Member States is essential. With a few exceptions, it can be said that EU States tend to work *reactively* rather than *proactively* –most of the power of initiative still stays with the EU (particularly, the Commission). In some aspects such as public procurement Member States, however, were initially more audacious than the Commission. The current spread of NAPs on CSR, in five cases specifically on the UNGPs, only constitute the first step towards building a stronger international

[594] L. MORATIS and A. TATANG WIDJAJA: "Determinants of CSR standards adoption: exploring the case of ISO 26000 and the CSR performance ladder in the Netherlands", in *Social Responsibility Journal*, Vol. 10 No. 3 (2014), pp. 516-536, at pp. 518-519 and 525-526.

*consensus,* development for which Member States deem to be of an utmost importance, even over the EU institutional role. Finally, Member States can build on their previous experience, their implicit CSR, to intensify without fear the human rights language in CSR as well as caring of its external/international dimension in relation to development policies (as it now happens at the EU level). The implementation of the CSR agenda is therefore conditioned by a number of problematic factors that influence the outputs at a national level, even though there are identifiable opportunity niches.

### *3.3.2. National guidelines and main initiatives*[595]

NAPs on business and human rights are being elaborated at a very lower speed than NAPs on CSR, but they seem a more comprehensive option or, at least, a better decision since it emphasises the centrality of human rights in this topic. For the time being, only the United Kingdom, the Netherlands, Denmark, Finland and Italy have published their NAPs on business and human rights. Acknowledged the fact that Member States' CSR performance depends on many other factors, and that the need of two separate NAPs is discussable in view of the debate above, the fact of being the first five countries with NAPs on the UNGPs can be a pretext for studying more in detail their policies.

This five NAPs strictly follow the three-level structure of John Ruggies' Framework (protect, respect and remedy). The contents, however, are more OECD-informed while the WTO and ILO have a very limited presence. They can be defined as policy papers, the result of ministerial working groups. The main institutions involved at a national level are:

- In Finland, the strategy is governed by the Ministry of Employment and the Economy. Within this Ministry, the Committee on Corporate Social Responsibility is an independent advisory body composed of government authorities and CSOs' representatives; its tasks comprise the evaluation and development of CSR policies. The same Committee functions as the Finnish NCP of the OECD Guidelines[596]. The NAP, published in October 2014, is

[595] This section is built upon the information of the five NAPs on the UNGPs, all available at: http://ec.europa.eu/growth/industry/corporate-social-responsibility/in-practice/index_en.htm

[596] The Committee was created in 2008 following to the Finnish *Government Decree on the Committee on Corporate Social Responsibility*, Helsinki, 4 December 2008, Section 1 (position and duties) and Section

the result of a Government Resolution published in November 2012, in which the involvement of other Ministries is foreseen, in particular, Finances, the Environment, Social Affairs and Foreign Affairs.

- In Denmark, the Danish Council for CSR[597] leads the way. Its President is elected by the Minister for Business and Growth while the rest of its members are independent representatives of CSOs such as trade unions, industrials, Amnesty International or the national Red Cross. Apart from the Ministry for Business and Growth, the Ministry for Trade and Development is also involved. However, the Danish NCP for the OECD Guidelines is a separate secretariat, the "Mediation and Complaints-Handling Institution for Responsible Business Conduct", also under the same Ministry for Business and Growth, but within the Danish Business Authority. The strong point of the Danish NCP is to be the only established by law[598] and with *ex officio* powers of investigation, although this capacity has not been used so far. The Danish institutional building is the strongest point of their CSR, despite the fact that the NCP could be part of the CSR Council (like in Finland). In any case, Denmark is probably the Scandinavian country where the Government's role has been larger in promoting CSR, to discipline businesses "without forcing the issue" and a powerful agenda-setting power as well as influence on societal expectations[599]. Maintaining the voluntary character of CSR regarding its contents, Denmark seems to support a government-driven framework, unlike Finland or Sweden –less enthusiastically active– and more similarly to Norway, where "the government does not seem inclined to accept the 'retreat of the state' thesis"[600].

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2 (composition). Available at: https://www.tem.fi/en/enterprises/corporate_social_responsibility_(csr)/committee_on_corporate_social_responsibility

[597] See http://csrcouncil.dk/

[598] Act No. 546 adopted by the Danish Parliament 18 Junes 2012. See: http://businessconduct.dk

[599] The Danish policy might have just a few direct effects and be centre on "indirect (agenda-setting) effects", it cannot be denied to be one of the most advanced countries in the promotion of CSR. S. VALLENTIN: "Governmentalities of CSR: Danish Government Policy as a Reflection of Political Difference", in *Journal of Business Ethics*, Vol. 127 No. 1 (March 2015), pp. 33-47, at pp. 36 and 45 (citations).

[600] A. WELLE-STRAND and M. VLAICU: Business and State Balancing International Development Agendas –The Case of Norwegian CSR", in *Journal of Politics and Law*, Vol. 6 No. 3 (2013), pp. 103-116, at p. 109.

- In the UK, the Ministry for Foreign and Commonwealth Affairs was responsible for the Plan and the Minister presented it to the Parliament in September 2013[601]. The technical direction is provided by the Department for Business, Innovation and Skills, within which we find the British NCP to monitor the implementation of the OECD Guidelines. However, in contrast to Denmark, the British NCP is made up of civil servants supervised by the Steering Board. Despite this, the British approach seems a good combination between the internal and external dimension of CSR.

- In the Netherlands we also find a similar emphasis on the international vocation of the NAP, precisely published by the Ministry of Foreign Affairs, which also houses the Dutch NCP (created in 2007 and extended in 2011). The Government clearly rejects the idea of the NCP having *ex officio* powers[602]; however, according to a case study published by OECD Watch, a recent complaint involving Royal Dutch Shell would have raised important doubts about the NCP's guarantees in terms of transparency and predictability[603]. In June 2014 a new government decree only strengthened the NCP competence to conduct wide researches and regular consultations sector by sector, apparently without news about the complaint mechanism[604].

- The Italian "*Foundations of the Italian Action Plan on the UNGPs*" are, as its name indicates, a preliminary policy paper that should not be judged according to the same criteria. Otherwise, it would be difficult to justify its length (80 pages) and rhetoric style. In any case, it constitutes a prime example of a problem against which we warned in the previous section: excessively crisis-motivated and internally-oriented NAPs that ultimately

[601] GOVERNMENT OF THE UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND: *Good Business. Implementing the UN Guiding Principles on Business and Human Rights*, Presented to the Parliament by the Secretary of State for Foreign and Commonwealth Affairs by Command of Her Majesty, September 2013, Cm 8695.

[602] "The government is not in favour of the Dutch NCP having similar, unconditional powers to carry out investigations": MINISTRY OF FOREIGN AFFAIRS (Netherlands): *National Action Plan on Business and Human Rights*, April 2014, p. 35.

[603] Two NGOs (Amnesty International and Fiends of the Earth Netherlands) filed a complaint to the Dutch NCP on an alleged violation of the OECD Guidelines following the diverse oil-spills in the Niger Delta. Shell headquarters firstly derived responsibility to the subsidiaries until the NCP obliged them to provide information since the Guidelines include subsidiary structures. However, the dialogue and mediation did not have any positive output and the environmental threats remain unaddressed. See: http://oecdwatch.org/cases/Case_197

[604] Unfortunately, this decree is only available in Dutch. See: http://www.oecdguidelines.nl/ncp

> distort CSR, including details around completely off-topic issues such as religious minorities, railway system, poverty, fight against drug addiction, etc. (as if it was a general report for a UN monitoring body). As explained, CSR is not about complying with already existing human rights treaties ratified by EU Member States; it is rather about preventive and horizontal strategies to foster human rights in their particularly complex interaction with business activities. This unfocused approach is confirmed by the presence of the Italian NCP within the Ministry of Economic Development, who governs the incipient CSR policy in Italy.

Problems of understanding, however, are not exclusively Italian. The British NAP is proud to enumerate the different international human rights conventions ratified by the UK, but it forgets that it has not ratified any of the Optional Protocols of the Civil and Political Rights and Economic, Social and Cultural Rights Covenants[605], which are essential to ensure the vertical effects of human rights, in other words, States' accountability *vis-à-vis* the respective UN Committees. Denmark, to give another example, has ratified the Optional Protocol of the ICCPR, but not that of the ICESCR, obviously relevant in terms of business and human rights. It is curious to read in the Danish NAP a reference to how they "actively tak*[e]* part in the Universal Periodic Review process of the United Nations"[606], which is largely identified as the weakest human rights monitoring mechanism since it is an *inter pares* procedure[607] with a more than doubtful significance in terms of business and human rights. The only link with the UNGPs is that, even at the first level of Ruggie's Framework (on States' duties), basic failures –or omissions– are still visible, undesirably within the EU.

The common objective of all NAPs is to present some actions undertaken, without many details on legal issues, and the future developments foreseen. The participation in incident-based programs, with the recurrent examples of Bangladesh and Myanmar, are a commonplace that does not, in substance, add anything new. The lack of technical and

[605] For the state of signatures and ratifications see: https://treaties.un.org.
[606] DANISH GOVERNMENT: *Danish National Action Plan. Implementing the UN Guiding Principles on Business and Human Rights*, March 2014, p. 11.
[607] Indeed, the Universal Periodic Review is least advanced international human rights mechanism: more than a monitoring body, it might be defined as a body aimed at the promotion of human rights *inter pares* (States). It has, therefore, a political-diplomatic character and more general goals. C. VILLÁN DURÁN and C. FALEH PÉREZ: *Manual de Derecho Internacional de los Derechos Humanos*, Madrid 2012, Universidad de Alcalá, pp. 132-135.

legal details makes us think of general policy papers or political statements rather than true 'action plans' with objectives and deadlines, whereas the different strategies designed by the Commission were far more concrete.

All five countries insist on their active engagement in the negotiations and decision-making processes in the international *fora* and in Brussels, but not always in the same direction: Finland expresses a clear disagreement with the on-going discussion on the need of a new international treaty on business and human rights[608], within the framework of the UN Human Rights Council. The Netherlands stress that "there is too little international support for an international, legally-binding instrument"[609]. Only Denmark seems more supportive of extraterritorial obligations for companies and, interestingly, proposes that the leader of this negotiation should not be the UN or the EU, but the Council of Europe[610]. Both the UK and Netherlands insist on more liberal understandings of CSR, private grievance mechanisms based on mediation and facilitation, encouraging their companies to apply the same domestic standards in third countries, but with no supervision or consequences. At the same time, all countries except Denmark recall the debate on the definition of "due diligence". In our view, when academic discussions make their appearance on the political scene, it is likely to reflect the lack of political will rather than a genuine International Law concern. Of course due diligence is an indeterminate legal concept[611]. The problem of clarifying the concept of 'due diligence' is repeated by the Netherlands, the UK and Finland; we will just leave an open question: in terms of CSR, is it more appropriate to wonder "What is sufficient" rather than "How much can be done?"

[608] "It has been suggested within the UN Human Rights Council that a convention on the human rights liabilities of companies be made between governments, but Finland has not recommended this. In international human rights bodies, Finland has emphasised the development related to due diligence". MINISTRY OF EMPLOYMENT AND THE ECONOMY –Labour and Trade Department (Finland): *National Action Plan for the implementation of the UN Guiding Principles on Business and Human Rights*, October 2014, Publication 46/2014, p. 14.

[609] It further states that "extraterritorial application alone is not enough. A court judgement must also be enforceable, and it is not up to the Netherlands to decide for other countries whether this is possible. The government is therefore not convinced that legislation with extraterritorial impact will contribute to preventing human rights abuses by foreign companies in the countries in which they are active". MINISTRY OF FOREIGN AFFAIRS (Netherlands): *National Action Plan…, op. cit*, p. 39.

[610] "The Danish Government wishes to engage in the discussion on extraterritorial legislation as roclaimed in the UNGPs and as recommended by the Danish Council for CSR. […] The Government has recommended that the Council of Europe should take the lead on the issue of extraterritoriality". DANISH GOVERNMENT: *Danish National Action Plan… op. cit.*, p. 15.

[611] We have signalled some of its problems in the general part of this study, see pp.

The existing NAPs on the UNGPs further show that it is now quite commonplace in the EU to refer to the social responsibility of state-owned companies or controlled by the State. To this day, state-owned companies constitutes a relatively limited concept: it should be considered to extend CSR to 'State-participated' companies, not necessarily with the majority of the shares, and even to companies in charge of public services, which is an increasing reality in the EU (and at a global scale). In this sense, the British NAP on the UNGPs is the most complete when it declares its commitment to "review the degree to which the activities of UK State-owned, controlled or supported enterprises, and of State contracting and purchasing of goods and services, are executed with respect for human rights"[612], what could have an inspiring role.

In spite of all the limitations described so far, we have also found useful initiatives shared by some countries: both the Netherlands and the United Kingdom, with a high exposure to international trade and supply chains, have developed instruments to provide the private sector with country assessments concerning the main human rights risks depending on the regions and sectors. In practice, the Dutch "CSR Risk Check" is an online tool, analytical and visual, to show this risks in function of diverse criteria (child labour; pollution; discrimination and gender issues; etc.). Similarly, the British "Overseas Business Risk (OBR) Service" gives the same type of information on the most usual problems detected in countries where the UK trade and investment has a presence, adding another interesting "Business and Human Rights Toolkit" specifically addressed at officials. The UK has also funded an online hub in six languages to promote the UNGPs. Similar sector risk analysis are planned or under development in Finland and the Netherlands.

Related to this, a Dutch legislative proposal contemplated guarantees on access to information for the general public, making it compulsory for companies to answer any request regarding the origins and production phases of their products or services[613]. Technically feasible, it remains in abeyance as the Dutch government considers it should not be enacted yet: "the government does not feel that this is the right time to enact such legislation", in part due to its high costs. Regardless of the final decision, the

[612] Emphasis added. GOVERNMENT OF THE UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND: *Good Business. Implementing… op. cit.*, p. 11.
[613] The so-called "Production and Supply Chain Information (Public Access) Act (WOK). MINISTRY OF FOREIGN AFFAIRS (Netherlands): *National Action Plan…, op. cit,* p. 31.

proposal has a clear potential to increase transparency and strengthen the interest of companies to implement CSR and avoid serious reputational damages.

Finally, the UK has also passed the *Bribery Act* in virtue of which companies are held responsible for acts of bribery regardless of the country in which they occur, showing the important links between business activities, corruption and human rights[614]. Transparency, access to information and accountability are key drivers of the fight against corruption, which is recognised to be linked with human rights abuses in developing countries and, therefore, should not be neglected in the intertwined design of public/private and internal/external strategies of CSR.

In conclusion, alongside the delays, challenges and divergent opinions among Member States, we have detected interesting policy options too. Sometimes, Member States have been more audacious than the Commission, which has taken over after 2011 with its *Renewed Strategy*. The following table summarises the most progressive initiatives detected at a national level.

**Table No. 2:** *National Policies in the EU: screening the best initiatives*

| MAIN ISSUES OF NATIONAL POLICIES | BEST POLICIES IDENTIFIED |
|---|---|
| **Definition of CSR** | All endorse the Commission's definition and the UN and OECD texts. Only **the UK** explicitly clarifies that *"it is not the same as philanthropy or social investment"*. (All lack of ILO and WTO related aspects). The UK and Netherlands more heavily rely on private-led initiatives. |
| **Guidance for Companies** | **Netherlands**: *"CSR Risk Check"*, tool including comprehensive country assessments on human rights' risks in third countries, sector by sector.<br><br>**UK:** Similarly the *"Overseas Business Risk Services"*; the *"Business and Human Rights Toolkit"* (for officials); funding online hub in 6 languages (share companies experiences and inform on the UNGPs). |

[614] OHCHR: *Good Governance Practices for the Protection of Human Rights*, New York – Geneva 2007, United Nations Publications (HR/PUB/07/4), pp. 59-79.

| | |
|---|---|
| **Grievance mechanisms and NCPs** | **Denmark**: NCP established by law and with ex officio investigation powers. President appointed by Minister for Business and Growth, but the rest of members are independent experts from NGOs and CSOs. The Danish "Mediation and Complaints-Handling Institution for Responsible Business Conduct" is a non-judicial but state-based institution governed by law.<br><br>**Finland**: the fact that the same Committee on CSR constitutes the Finnish NCP, avoiding the multiplication of institutions. |
| **Extraterritorial obligations** | **Only Denmark** supports the negotiations and shows an opened attitude, advocating for the leadership of the Council of Europe. |
| **Public Companies** | **Only the UK** goes beyond the restrictive concept of State-owned companies and plans to introduce CSR into *"controlled or supported enterprises, and of State contracting and purchasing of goods and services"*. |
| **Implementing EU initiatives on CSR**<br><br>**(early assessment)** | - **Non-financial reporting requirements: France** initiatives following to the "Grenelle II Law" (2010). Transposition deadline of Dir. 2014/95/EU expires 6 December 2016.<br><br>- **UK Bribery Act**: British companies are liable for acts of bribery committed anywhere in the world<br><br>- **All EU Member States have transposed Directive 2013/36/EU** on remunerations and gender balance in financial institutions.<br><br>- **19 EU Member States have NAPs on CSR; only 5 specifically on the UNGPs**. Almost all EU Member States have several information and promotion initiatives (partnering, forums, etc.)<br><br>- **24 Member States have adhered to the OECD Guidelines on MNEs**.<br><br>- **None of the EU Member States** have transposed arts. 41-46 of Dir. 2013/34/EU obliging **the extractive industry to report on payments to governments**.<br><br>- **Public Procurement Reform pending**: deadline 18 April 2016 (Dirs. 2014/24/EU and 2014/25/EU). |

# CHAPTER IV

## The potential of the EU's contribution to global CSR

### 4.1 The potential of soft law in the EU

#### *4.1.1. The initial guidance of the ECJ: introducing the debate*

In assessing the potential of the EU initiatives on Corporate Social Responsibility, it is fundamental to undertake an analysis of soft law instruments in the EU. There is a broad range of such instruments: from Recommendations and Opinions, more widely used, up to a plethora of Declarations, Resolutions, Action Programmes and Plans, Guidelines, Communications of the Commission, Conclusions of the Council, and inter-institutional arrangements, as we have seen in chapter III related to the emergence of CSR in the EU. It is well known that soft law is not limited to CSR but has spread to all EU law fields. Recommendations and Opinions are the only soft instruments provided for by article 288 TFEU, adding that they "shall have no binding force", what reveals to be a rather insufficient description given that there is a good number of other unmentioned acts (like guidelines) that would also fall within the scope of that article.

As it happens with CSR, we lack of systematic and general studies on soft law in the EU. The available literature agrees in maintaining Snyder's early definition (1993) so far as it conforms to the initial guidance of the ECJ: "rules of conduct which in principle have no legally binding force but which nevertheless may have practical effects"[615], to what we can add that, obviously, it goes further than mere 'rules of conduct', comprising political aspirations, interpretations of hard law provisions and a wide range of other situations that we classify below. Snyder already noticed the "hardening" of soft law once it passes through the filter of the ECJ, when the Commission takes it back to apply it.

[615] F. SNYDER: "The Effectiveness of European Community Law: Institutions, Processes, Tools and Techniques", in *The Modern Law Review*, Vol. 56 No. 1 (January 1993), pp. 19-54, at p. 32.

The starting point of this debate has some unavoidable benchmarks very recurrent in the available literature on the subject, generally obsessed with measuring the legal force from positivist paradigms rather than gauging its value from a pragmatic and realistic approach, closer to what happens in the field. This is why we introduce the debate on the potential of soft law taking the initial guidance of the European Court of Justice as our starting-point. There is no doubt on the importance of *Grimaldi*, where the ECJ accepted that soft law had to be taken into consideration to inform national Courts decisions. Without giving further details on how this can be done, the Court distinguished at first sight two functions of soft law, to complete and to interpret:

> *"The national Courts are bound to take recommendations into consideration in order to decide disputes submitted to them, in particular where they cast light on the interpretation of national measures adopted in order to implement them or where they are designed to supplement binding Community provisions".*[616]

Another off-cited example is *Polska Telefonia Cyfrowa* (*PTC*), a polish phone company that challenged the imposition of new regulatory obligations following to 2002 Guidelines concerning electronic communications networks and services. The question of this preliminary ruling was if such guidelines could be relied upon against individuals, even if they hadn't been translated into polish. In our view, the reasoning of the Court has three steps. Quite surprisingly, the ECJ basically explains that there is no "general principle of EU Law under which anything that might affect the interests of an EU citizen must be drawn up in his language in all circumstances" [617], so we understand the lack of translation is not allegeable to preclude the application of soft law instruments (which most of the times are not available in all EU languages). The ECJ secondly states that the guidelines under discussion are not reliable upon against individuals because their intended recipients are national regulatory authorities (NRA). However, at the end the Court concludes that nothing prevents the polish regulatory authority referring to those guidelines in a decision "by which that NRA imposes certain regulatory obligations on an operator"[618]. This solution was reached only after a textual analysis that in no case precluded the possibility that Guidelines have legal effects.

[616] Emphasis added. Case C-322/88, *Grimaldi v. Fonds des maladies professionnelles,* Judgement of 13 December 1989, para. 18.
[617] Case C-410/09 *Polska Telefonia Cifrowa*, Judgement of 12 May 2011, para. 38.
[618] *Ibíd.*, para. 39.

In other words, the Court implicitly acknowledges that soft law might have legal effects in some cases. These instruments might be unlikely to generate direct obligations allegeable against natural or legal persons, but they can indirectly and lawfully affect their rights and obligations (for example, through national enacting institutions), regardless of available translations and publication. In *PTC*, the Court did not shed much more light but therefore clarified a key difference between 'legally binding force' and 'legal effects', the latter including in practice "legally binding effects"[619]. The practical translation, again, is that the legal situation of natural and legal persons can be affected in terms of their rights and obligations, but mostly through indirect mechanisms.

*Dansk Rörindustri et al.* against the Commission is another seminal and recurrent case in the literature on this subject. We face nine companies operating in the district heating sector that produce or market pre-insulated pipes for that sector, who challenge a fine for anti-competitive conducts imposed by the Commission according to the 'Guidelines on the method of setting fines imposed pursuant to Article 15(2) of Regulation 17 and Article 65 of the ECSC Treaty'. The Grand Chamber reaffirms, one by one, in an exhaustive and exceptionally long judgement, the arguments held by the Court of First Instance. Relevant to us is the criteria followed to determine the legality of those 'Guidelines': "in setting out in the Guidelines the method which it proposed to apply when calculating fines imposed under Article 15(2) of Regulation No. 17, the Commission remained within the legal framework laid down by that provision and did not exceed the discretion conferred on it by the legislature"[620], what leads to the rejection of all pleas in law: against the legality itself of the Guidelines (lack of competence of the Commission), and against the pleas alleging a breach of the principles of legitimate expectations and non-retroactivity. However, these problems related to legal certainty persist and are not negligible, especially when soft law has an interpretative character of the current legislation, as well as the problem of available

[619] O. STEFAN: "European Union Soft Law: New Developments Concerning the Divide between Legally Binding Force and Legal Effects", in *The Modern Law Review*, Vol. 75 (2012) No. 5, pp. 879-893, at pp. 885-887.
[620] Joined Cases C- 189-02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P, *Dansk Rorindustri et al. v. Commission*, Judgement of 28 June 2005 (Grand Chamber), para. 252.

translations[621] and the due publicity of norms. Despite these pertinent doubts, the Grand Chamber absolutely defends such soft instruments provided some conditions:

> *"In adopting such rules of conduct and announcing by publishing them that they will henceforth apply to the cases to which they relate, the institution in question imposes a limit on the exercise of its discretion […] It cannot therefore be precluded that, on certain conditions and depending on their context, such rules of conduct, which are of general application, may produce legal effects".*[622]

A close analysis of ECJ's settled case-law is Stefan's comprehensive thesis in the area of competition law and State aids, where soft law is widespread, in which the author shows that EU Courts use both hard and soft norms, very particularly to clarify the interpretation of hard law[623]. The scholarship's interest has mainly targeted this phenomenon: how Courts confirm the interpretative character of soft instruments. Another way to express the same difference between legal force and legal effects would be to use the expressions 'rules of law' and 'rules of practice', reminding Snyder's reference to 'practical effects'. After Stefan's quantitative and qualitative scrutiny of soft law in the field of competition law and State aids, it appears that there is some judicial recognition of the role of soft law in its interaction with classic norms, detecting feedbacks between them that better approximate the complexity and heterogeneity of any regulation in order to abandon monolithic visions of law. We have seen that the ECJ essentially checks if "soft law instruments remain in the boundaries fixed by hard law"[624], and at the same time, it can be beneficial to the extent soft law can detail previous regulations and thus reduce the Commission's margin of discretion[625], as we have also noted in *Danks Rorindustri et al.*.

More recently, and moving to a different law-field, the General Court has confirmed this approach: while ruling the annulment of an aspect of the Eurosystem Oversight Policy Framework published by the ECB. Once again, it was acknowledged that soft instruments emanating from EU institutions can perfectly have legal effects and

[621] The problem of available translations, an obligation rejected by the Court as we have seen since the *PTC* judgement for soft instruments, could be argued from article 4 item 2 of TEU (equality of Member States) together with the principles of democracy and legal certainty.
[622] *Ibíd.*, para. 211.
[623] O. STEFAN: *Soft Law in Court. Competition Law, State Aid and the Court of Justice of the European Union*, The Netherlands 2013, Wolters-Kluwer Law International, 367 pp., *passim*. However, the limitation of Stefan's work is that it mainly focuses on soft law when it has an interpretative function of hard norms, leaving aside many other manifestations of soft instruments.
[624] *Ibíd.*, p. 142.
[625] *Ibíd.*, p. 179.

subsequently be under the Court's scrutiny: "*[A]*n action for annulment is available in the case of all measures adopted by the institutions, *whatever their nature or form*, which are intended to have legal effects"[626]. A meticulous textual analysis was undertaken to assess the context, the level of specificity, the wording, ultimately, the content and scope of the policy framework to finally conclude its originality with regard to the regulation it was supposed to clarify and, above all, the unlawful addition of a requirement absent in the parent-regulation (to be located in a Member State party to the Eurosystem for central counterparties involved in the clearing of securities). This additional requirement surpassed the boundaries of hard law, then suggesting some kind of hierarchy in their interaction. The Court is consistent with its previous case-law even if it seems an innovative approach to the extent it expressly "take[s] into account the perception of the Policy Framework"[627]. This rather psychological or anthropological way of thinking of the Court is perfectly legitimate and understandable to overcome the white and black logic of legal positivism, despite the eventual unease of lawyers, in view of the increasing complexity of EU integration. Soft law, if reasonable and within the hard law limits, may have unquestionable effects, even if indirectly. Whenever it deems to be necessary, the ECJ has pronounced itself on soft law. The ECJ therefore supports our pragmatic view under which substantive criteria have to be considered beyond purely formal ones when assessing the potential of these new instruments, reducing the prominence of rather classic *nomen iuris* discussions[628]. It seems logical that material reality prevails over formalities: any legal order takes place in a social setting in which coercions can be institutional, but also practical, if we assume the contribution of legal anthropology: social and market coercions are not to be neglected[629].

[626] Emphasis added. Case T-496/11, *United Kingdom of Great Britain and Northern Ireland v. European Central Bank*, Judgement of 4 March 2015, para. 30.
[627] *Ibíd.*, para. 42.
[628] Settled case law to reaffirm the ECJ judicial review of any act with "legal effects" regardless of its formal denomination has its origin in case 68/86, *United Kingdom of Great Britain and Northern Ireland v. the Council*, Judgement of 23 February 1988, as commented by U. DRAETTA: *Elementi di diritto dell'Unione Europea. Parte Istituzionale, ordinamento e struttura dell'Unione Europea*, Milano 2009, Giuffrè Ed., pp. 278-279. Also see: G. STROZZI and R. MASTROIANNI: *Diritto dell'Unione Europea. Parte Istituzionale*, Torino 2011, G. Giappicheli Ed., pp. 296-300.
[629] F.M. ZERILLI: "The Rule of Soft Law, an Introduction", in *FOCAAL –Journal of Global and Historical Anthropology*, Vol. 56 (2010) No. , pp. 3-18, at p. 11. The "Bologna process" to restructure higher education in the EU and adapt it to the "3+2 system", is a very clear example given by the author to show how coercion exists beyond hard norms: the text signed in Bologna was a simple declaration that usually never leads to hard obligations. *Ibíd.*, p. 5.

To relatively reassure lawyers and concerned civil society, some conclusions can be drawn out of this initial guidance of the ECJ. First, the Court seems to distinguish quite clearly between hard and soft law, putting them in context when required. Secondly, it seems that there is the possibility of judicial scrutiny of these soft law instruments if necessary (admissibility criteria are to be understood under this flexible substantive approach on *legal effects* without fearing formal considerations, so that soft law will not escape the control of the ECJ).

Finally, while the "legal effects" of soft law are recognised, abuses have generally been annulled so we infer that soft instruments must operate within the framework of the existing legislation, refraining from going further. It is finally true that its effects can indirectly touch the rights and obligations of legal and natural persons, but rarely in a direct way. Notwithstanding the importance of the ECJ initial guidance, we need to be aware of its limits as it focuses on a very particular expression of the soft law phenomenon, its interpretative function which, albeit a significant part, it actually constitutes only one of its many manifestations.

#### *4.1.2. Consolidation and taxonomy of soft law in the EU*

To de-dramatize and expand the picture of this debate it is worth looking back at the origin and consolidation of soft law in the EU. As it has been stated in the general part of this research, soft law is nothing new neither to the EU nor to any international organisation. The EU law-making processes have considerably evolved, overcoming the Community method. The legislative procedures were already altered with the new cooperation procedures in virtue of the Single European Act in 1987, then with the introduction of the Co-decision (I) following to the Treaty of Maastricht (1992), completely rearranged with the Treaty of Amsterdam in 1997 (so-called Co-decision II). The legislative role of EU institutions correspondingly changed, while the EP was gaining power.

The definitive boost of soft law in the EU comes in the 2000's after the aforementioned Lisbon Council: the Open Method of Coordination marks a before and an after, formalising soft law procedures through flexible strategies and programmes, implementation timetables, developing both qualitative and quantitative indicators, and

completing the overall with periodic peer reviews as a sort of monitoring mechanism *via* reporting commitments[630]. The OMC institutionalises what we would call 'soft procedures': Member States and EU institutions have to work together to identify common objectives and evaluate them through statistics, guidelines and indicators, and the Commission has a general supervision over the coordination to ensure the exchange of information and best practices, affecting mainly to education, employment and social policies in general, but later on extended to other policy making. It normally agreed that the output will rarely be a binding act (directives, regulations or decisions).

Particularly thought for social issues and later extended to other policies, the OMC allowed maintaining an intense inter-governmental dialogue, while reaching some basic common understandings and apparently fluidizing the EU multilevel governance. Through the OMC, like a kid with a new toy, the EU definitely embraced soft law as new predominant tool for governance[631]. The White Paper on European Governance reinforced this mentality in the sense that the EU "must renew the Community method by following a less top-down approach and complementing its policy tools more effectively with non-legislative instruments". It further explains that "legislation is often only a part of a broader solution combining formal rules with other non-binding tools such as recommendation, guidelines, or even self-regulation within a commonly agreed framework" [632].

An Action Plan dated June 2002[633] continued this trend, responding to a context in which the enlargement, the difficulty to manage the *acquis* and the profusion of EU Law, together with legitimacy concerns, were pointing to the need of improvements of the legislative procedures, reducing the quantity and raising the quality[634]. We leave aside the ideological debate around this "do less, do better" spirit and whether it is a reflection of a deregulatory neo-liberal choice or, simply, a recognition of the complexity of EU Law and the desire of making it more manageable.

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[630] Presidency Conclusions, Lisbon European Council, 23 and 24 March 2000, para 37.
[631] E. O'HAGAN: "Too soft to handle? A Reflection on Soft Law in Europe and Accession States", in *Journal of European Integration*, Vol. 26 (2004) No. 4, pp. 379-403, at pp. 382-4 and p. 397.
[632] COM (2001) 428, 25 July 2001, *European Governance. A white paper*, pp. 4 and 20.
[633] COM (2002) 278 FINAL, 5 June 2002, *Action Plan: Simplifying and improving the regulatory environment*, p. 7.
[634] It is the spirit of a "new legislative culture" and "new governance modes", L. SENDEN: "Soft Law, Self-Regulation and Co-Regulation in European Law: Where Do They Meet?", in *Electronic Journal of Comparative Law*, Vol. 9.1 (January 2005), www.ejcl.org, 26 pp., at pp. 5-11.

We have to wait until 2003 to read the basic text, the *Interinstitutional Agreement on better law-making*, where self-regulation and co-regulation are finally defined: both involve private and public actors and the difference is to what extent. In the case of self-regulation, the public role is smaller serving as a political inspiration without compromising the future stance of institutions, only at a very general level supervising its compliance with the Treaties or other general guidance and information of best practices[635]. On the other side, in the case of co-regulation public authorities provide with the legal framework –leaving room for concrete implementation but clearly within the margins of legislation, by way of complement. This agreement constitutes an utterly important step in the recognition of "alternative methods of regulation" and their usefulness, provided of course their consistency with EU Law. However, we shall highlight that "[t]hese mechanisms will not be applicable where fundamental rights or important political options are at stake or in situations where the rules must be applied in a uniform fashion in all Member States" [636].

The political background of the aforementioned documents is the EU looking forward to regaining social acceptance and legitimacy, as the key words of these documents are *simplification*, *coordination*, raising *quality* or reducing the *volume of legislation*, *better implementation and transpositions*, *transparency* and *accessibility*, etc. In any case, the boom of soft law precisely came since the 2000's. A very common concern of EU institutions has been to enhance public participation in the decision-making processes, regarding both policy-making and law-making; the path is full of traps, of course, as we might realise that the most powerful and economically interested will be more likely to raise their voice. However, thanks to the new possibilities of the digital era, socio-economic gaps can be less disabling in terms of access to information, public participation and formation of civil society organisations for particular purposes.

In view of the success and extension of soft law instruments since the 2000's, another problem is to determine its outcome, also in order to evaluate its potential. In some cases it is a *pre-legislative soft law*, such as the numerous Communications of the Commission or the *Green Paper*, where the institutional impulse is likely to introduce

[635] "Self-regulation is defined as the possibility for economic operators, the social partners, non-governmental organisations or associations to adopt amongst themselves and for themselves common guidelines at European level (particularly codes of practice or sectoral agreements)". European Parliament, Council and Commission: *Interinstitutional Agreement on better law-making*, OJ 2003, C 321/01, para 22.
[636] *Ibíd.*, para. 17.

the subjects into the political agenda[637]. On the other hand we find *para-legislative* initiatives aimed at supporting the pre-legislative agenda via the creation of a favourable environment based on the corporate awareness and extension of voluntary good practices. Part of this institutional work is likely to become, sooner or later, binding instruments as grows the international *consensus* in this respect (or at least, at a regional level).

More systematically, we might divide soft law into three main categories following the early but absolutely accurate terminology of Prof. Daniel Thürer[638]. First of all, *pre-law*, as said before, is the most likely to crystallise into a legal act, but alongside its eventual preparatory character, it also has an informative function (such as many communications). We then find interpretative and decisional soft law, intended to give further details on the exact application of previous EU law, in this sense a sort of *post-law*, with which the Court has dealt confirming it despite the risk of adding provisions absent of the parent-legislation, as we have seen above; c) thirdly we find *para-law*, always according to Thürer's terminology, which expresses some kind of political will tending to create an agenda, a favourable climate of opinion, sometimes formally (recommendations, explicitly covered by art. 288 TFEU) and many times informally (declarations, conclusions, codes of conduct).

The taxonomic efforts include a different perspective that well deserves some comments as it completes this functional perspective. Besides the 'pre/post/para –law' functions, we have three other variables to be taken into account: the type of norm, the type of obligation and the type of enforcement, in a way that any of them can be hard or soft, understanding law as a *continuum.* This enables us to discover some captivating categories. We find hard norms apparently including hard obligations that actually

[637] P. DE LUCA: « La responsabilité sociale des entreprises en Europe », in *Comparazione e diritto civile*, Novembre 2012 (ISSN 2037-5662), pp. 9-10. Accesible at: http://www.comparazionedirittocivile.it (Relazione presentata al convegno italo-francese Il nuovo diritto internazionale degli investimenti tenutosi a Napoli il 26 maggio 2008 presso l'Università Federico II).

[638] The first original work in this regard, which has inspired all the subsequent literature was: D. THÜRER: "The role of Soft Law in the Actual Process of European Integration" in O. Jacot-Guillarmod and P. PESCATORE (Eds.): *L'avenir du libre-échange en Europe: vers un Espace économique européen?*, Zürich 1990, Schultess Polygraphischer Verlag, pp. 131-133. Not surprisingly, the same author was tasked to summarise the concept in the prestigious Max Planck Encyclopedia of Public International Law. See D. THÜRER: "Soft Law", in *Max Plank Encyclopedia of Public International* Law, www.mpepil.com, March 2009. This taxonomy, among the many available in the literature, is the most extended and functional. For a good summary of these concepts that emerge from the three main functions of soft law see: L. SENDEN: *Soft Law in European Community Law*, Oxford 2004, Hart Publishing, pp. 119-120.

derive into very soft enforcement mechanisms, such as the Treaty on Stability, Coordination and Governance: in 2002-2003 Germany and France were not sanctioned for violating the debt and public deficit objectives, as the enforcement depended upon the arbitrary willingness of the contracting parties; enforcement mechanisms have only been strengthened after the 2012-13 reforms[639]. We also detect hard norms with no enforcement at all: the Common Foreign and Security Policy (CFSP) is a *corpus* of legally binding acts (arts. 28 and 29 TEU) but compliance of Member States with the CFSP is –in most of its aspects if not entirely– excluded of the ECJ jurisdiction. This is an interesting invitation to demystify hard norms, from a formal point of view, as everything finally depends on the obligations and on the way they are intended to be put in practice. According to this taxonomy we also have soft law leading to hard obligations, for example when this soft law corresponds to a post-law function, i.e., interpretative and decisional.

In summary, if we combine the classification based on the functions of soft law (*pre*/*post* and *para*-) and the analysis centred on the dialectic between types of obligations and enforcements, we observe that soft obligations with hard enforcement generally correspond to post-law functions (its interpretative character). Sometimes, soft law instruments with a post-law character might present hard obligations with hard enforcement mechanisms, but we have seen that these situations are more likely to be seen as an 'abuse of soft law' and to be annulled by the ECJ. In any case, the main issue when dealing with post-legislative soft tools is the way they are administratively hardened and, in this regard, relevant doubts on judicial review and guarantees might arise. We also face soft obligations with soft enforcement (the paradigm of soft law): these are more common in para-legislative situations (mainly for political objectives, as the OMC). In other cases we find supposedly hard obligations with soft enforcement, when a para-legislative function is again predominant to assure flexibility in anticipation of politically or socially fluid circumstances. Finally, when a preparatory character is at stake, the pre-law function is predominantly expressed through two combinations: 'soft obligation / soft enforcement' and hard obligation/ soft

[639] This classification and examples have been taken from F. TERPAN: "Soft Law in the European Union: The Changing Nature of EU Law", in *European Law Journal*, Vol. 21 No. 1 (January 2015), pp. 68-96, at pp. 78-79. The open method of coordination would correspond to soft obligations (almost inexistent or merely declarative) but with soft enforcement through procedures and monitoring means.

enforcement. The table below summarises the predominant functions that correspond to the combination of both taxonomies related to soft law.

**Table No. 3:** *Taxonomy of Soft Law and CSR in the EU*

| Type of Obligation | Type of Enforcement | Predominant Function | CSR Examples[640] (and type of instrument) | Other Examples[641] (and type of instrument) |
|---|---|---|---|---|
| Soft | Soft | Para-law or pre-law | *Green Paper* (2001) (soft instrument)<br><br>*Renewed EU Strategy for CSR 2011-2014* (soft instrument)<br><br>Articles 1, 4 and 9 of the *Cotonou Agreement* 2010 (hard instrument).<br><br>*Brussels Declaration* of the II EU-CELAC Summit June 2015 (soft instrument) | *Open Method of Coordination* (soft instrument of discussable effectiveness). |
| Soft | Hard | Post-law (or proper norms) | *Regulation 1221/2009 on the voluntary participation in the EMAS* (hard instrument).<br><br>Article 41-46 of *Directive 2013/34/EU* (reports on payments to governments by the extractive industries) –hard instrument. | *In the infringement procedure*[642]: the Com. "may bring" the case (art. 258 TFEU, soft obligation). But the Com. has "hard enforcement" mechanisms (preventive measures in the agricultural and fisheries policies) to make States comply with soft instruments (letters of notice). |
| Hard | Hard | Post-law or proper norms<br><br>*(higher risk of 'abuse of soft* | *Regulation 1286/2014 on Key information documents* for small and retail investors. Civil liability if the KID is "clearly misleading or inaccurate" (hard instrument). | Location policy on CCPs included in the Eurosystem Oversight Policy Framework of the ECB. 'Soft instrument' annulled |

[640] These examples are not exhaustive. All have been studied in detail in Chapter III, Section 2.
[641] These examples are not exhaustive either. All have been mentioned in this section.
[642] This is further explained at p. 260 (and footnotes therein).

| | | | | |
|---|---|---|---|---|
| | | *law' if the type of instrument is soft)* | *Directives 2014/24/EU and 204/25/EU* on public procurement: possible exclusion from public contracts (hard instrument). | by the ECJ in case T-496/11 ('abuse of soft law') |
| Hard | Soft | Para-law or Pre-law | *European Investment Bank Environmental and Social Handbook* (para-law – 'internal code of conduct', soft instrument). | Articles 28-29 TEU compliance of Member States with the CFSP but excluded from the ECJ's jurisdiction: hard instrument, hard obligation, but no enforcement. |

In light of these characteristics we understand the success of the so-called theory of hybridity in EU Law, by virtue of which we cope with "hybrid constellations in which both hard and soft processes operate in the same domain and affect the same actors"[643], which is an increasing reality. The presence of hard and soft norms governing the same policies makes us think of two convergent "routes" towards the same objective. This view synthesises rationalism and constructivism: the first because it still gives importance to formal *nomen iuris* distinctions, and the second because it sensibly accepts that both hard and soft instruments can complement each other and diversely contribute to improve compliance with socially responsible standards and, in general terms, with human rights (or with employment objectives or any other EU policy). Soft law, born of new governance modes boosted after the 2000's, has a growing influence on law-making processes and taking into account their legal effects, it does not seem a reversible phenomenon in the EU.

### *4.1.3. Assessment*

Despite these classifications, we walk on an unstable ground difficult to systematise, where generalisations are strongly inadvisable and where experimentation is commonplace. It is delicate to look for "spill-over effects" between sub-categories of soft-law or between sectors in which soft law plays any role. The opportunities are as big as the perils in terms of democracy and legitimacy: soft law can perfectly be used to

[643] D. M. TRUBEK, P. COTTRELL and M. NANCE: "'Soft Law', 'Hard Law' and European Integration", in G. De BURCA and J. SCOTT (Eds.): *Law and New Governance in the EU and the US*, Oxford 2006, Hart Publishing, pp. 65-94, at p. 67.

circumvent the appropriate legislative procedures[644]. As any tool, the problem at the end is the user.

We firstly would like to suggest that the Commission might be tempted to use soft law as a new arm to increase its own influence in the inter-institutional balance of power. Let's anyway recall that the ECJ is prompt (and keen) to annul any eventual abuse of soft law, as already noted. Extensive debate is written on the inter-institutional battles, in which we do not enter, if not to suggest that the role of soft law has been forgotten. It is generally accepted that the change from co-operation to co-decision procedures increased the power of the EP ever since. The Parliament wanted to go further its agenda-setting power and it focused on the obtention of a full *veto* prerogative (after Maastricht). This traditional strategy of the Parliament to obtain a veto power, somehow underestimated the fact that the capacity of determining or influencing the agenda leads to a far from negligible political power, compared to the institution whose task is facing the proposals (despite its eventual *veto*); nothing new under the sun, it is the classical debate between presidential and parliamentary systems with respect to the legislative agenda. Quantitative studies demonstrate in the overall the greater acceptance of EP's amendments with the co-decision system, in other words, an apparently increasing power of the Parliament. Without denying this fact, we must nevertheless draw attention to critics[645] who have revised the available studies in this regard and, following similar quantitative and qualitative surveys, have also concluded that, at the same time the Commission seems to lose the battle, the EP is also loosing part of its influence on the agenda-setting despite its new 'veto toy'[646].

This is fully consistent with our work on CSR in the EU, as most of the initiatives come from the Commission. A relative loss of influence in the agenda-setting might have been the price paid by the EP to get an unconditional veto power. And to some extent, apart from specific CSR issues, this dynamic could also explain the boost of soft law instruments since the 2000's, as the new strategy of the Commission to exercise its

[644] L. SENDEN: *op. cit.*, pp. 30, 447 and 475 (for the incipient but unclear spill-over effects) and p. 334 (for the Commission escaping legislative procedures and using soft law "as a tool in the institutional balance").
[645] G. TSEBELIS, C.B. JENSEN, A. KALANDRAKIS and A. KREPPEL: "Legislative Procedures in the European Union: An Empirical Analysis", in *British Journal of Political Science*, Vol. 31 No. 4 (Oct. 2001), pp. 573-599, at pp. 576-579 and 596-597.
[646] There are many different positions on the relative "empowerment of the EP" and to what policies may apply that veto: S. HIX and B. HOYLAND: "Empowerment of the European Parliament", in *Annual Review of Political Sciences* (London School of Economics), No. 16 (2013), pp. 171-189.

power and maintain a high level of influence over the two other institutions. The EP logically complained of being left aside in such initiatives, what bitterly shows this loss of influence and the importance it gives to them: the EP "considers the open method of coordination to be legally dubious" and "deplores the use of soft law by the Commission where it is a surrogate for EU legislation that is still necessary *per se*, having due regard to the principles of subsidiarity and proportionality, or were it extrapolates the case-law of the Court of Justice into unchartered territory"[647]. However, the Parliament does not defend an absolute ban of soft law instruments, but asks to be consulted and to establish a proper mechanism of inter-institutional dialogue leading to the adoption of soft law instruments[648], a clear recognition of their potential importance. Is it a pure advocacy of democratic values or a new episode of inter-institutional battles? This is commonplace in European integration and, extrapolating the debate, we could also wonder if the law-making capacity of the ECJ isn't in fact –to some extent– also a backdoor judicial constitutionalisation of the EU.

A nuanced discussion would conclude that, behind the Parliaments' and the Commission's positions we find both sincere concerns in terms of legitimacy and democracy and, also, a part of institutional battles. At the same time, desirable or not, soft law continues to expand and some consider it a form of "delegalisation" of the EU: "t]he use of soft law, together with the application of new forms of governance and the relative decline of the Community method, would bring the EU closer to classical international organisations", a sort of "normalisation" which could be both positive and negative for the future of the EU integration[649].

More broadly, depending on the purpose of soft instruments, they might present different advantages and disadvantages[650]. The reconciliation of a globalised economy and international human rights law needs to go through different paths at the same time and cannot rely anymore exclusively on vertical obligations and States' responsibilities. Not always hard law is the paradigm of neither precision nor the panacea to human rights issues. Hard law's tendency towards the fossilization of legal solutions is far from

[647] EUROPEAN PARLIAMENT: "Resolution on institutional and legal implications of the use of 'soft law' instruments", 2007/2028(INI) P6_TA (2007) 0366, *OJEU* C 187 E/, 24 July 2008, pp. 75-79, para. 4-5.
[648] *Ibíd.*, para. 17.
[649] F. TERPAN: "Soft Law in the European Union: The Changing Nature of EU Law", in *op. cit.*, at p. 95.
[650] A good summary of the pros and cons at: D. CHALMERS, G. DAVIES and G. MONTI: *European Union Law*, Cambridge 2014, Cambridge Univ. Press, pp. 114-116.

the current needs of flexible and practical mechanisms to foster human rights horizontal effects, as we have already said, among legal and natural persons. Substantial changes in circumstances are more and more common, making it necessary to have available –as a complement– more flexible mechanisms of self and co-regulation, which are more easily amendable. It seems important to leave room for experimentation when we are still not sure on what is the best stance to be adopted and, therefore, it seems reasonable to avoid the difficult and slow modification procedures of hard law. In case of error, soft law instruments do not imply the major negative consequences that might derive from classic legislative initiatives. Moreover, effectiveness and coercion are not necessarily correlated; the participation of all relevant stakeholders may help them internalise conducts and practices before these "eventually" become obligatory, apart from taking conscience of their social responsibility. Stakeholders are both internal and external to companies and new technologies and cheaper communication networks can help to materialise more opened participation systems in the decision-making procedures, including the poor and voiceless. Finally, soft law approaches can also be more sensitive to diversity between Member States, especially as the lack of legal personality of transnational companies persists hampering their liability even in cases of human rights violations.

Having said that, we are under no illusions that many legal doubts remain concerning these new governance modes and their impact or effects on EU Law. Most objections point to the fact that soft law can aggravate the EU's democratic deficit because it doesn't follow the normal legislative procedures and, accordingly, lacks of legitimacy to generate any legal effect, even indirectly. Sceptics blame it to be the new strategy of EU institutions to circumvent democratic legislative procedures. The *proceduralization* and *administratization* of European governance tends to forget that the decision-making process is not an end in itself, but a mean to achieve a goal. It is essential to continue to be vigilant in the final output and whether we are contributing to a sort of neo-feudal privatisation of law-making. The notions of 'stakeholders' and 'public participation' is perfumed with inclusiveness and transparency, but it can become a trap behind which European corporatisation hides the project of revitalising a lobbyist market-based European project rather than a rights-based Europe[651]. A calm and reasoned assessment

[651] A. SOMMA: "Some like it soft. Soft Law e Hard Law nella costruzione del diritto private europeo", in A. SOMMA (a cura di): *op. cit.,* pp. 153-171, at pp. 167-171.

might recognise the risks but also acknowledge the opportunity to improve traditional participative democracy, completing it with new tools from the so-called deliberative democracy. However, according to detractors, in addition to these alleged formal illegality and ideological inadequacy, moving to what happens in practice, its voluntary nature and programmatic character are seen as insufficient to give rise to truly positive changes.

Critics further claim that soft law undermines citizens' legal certainty and causes confusion as for their legitimate expectations. Under this point of view the Commission exceeds its competences in a breach of the conferral of powers enshrined in art. 5 TEU. As soft instruments are formally not considered 'legislative acts', the Commission seems to be enabled to escape the provisions laid down in the *Protocol No. 2 on the application of the principles of subsidiarity and proportionality*, such as the obligation to widely consult (art. 2) and inform national Parliaments and the other EU institutions (art. 4). We also noted earlier that soft law is usually not available in all EU languages what may rise problems under article 4 TEU on "the equality of Member States and their national identities', besides the problem of publicising norms to contribute to legal certainty if we accept that soft instruments can perfectly have legal effects –as stated by the ECJ.

No need of ambiguous legal jugglery: it is our understanding that these imperfections can be corrected, for example, amending Protocols No. 1 and 2 in order to include an article referred to 'other initiatives with legal effects' and not only 'legislative acts', what would be perfectly consistent with the initial ECJ case-law. The amendment of Protocols does not seem realistic, but an easier option would be an inter-institutional agreement to ensure information exchanges and consultation between EU institutions and between them and Member States when dealing with soft law, in view of its increasing importance and therefore preserving another core principle, that of sincere cooperation (art. 12 TEU). In doing so, the unsuccessful Open Method of Coordination would be relatively updated and adapted to the actual potential of soft law. In any case, we consider not completely fair the criticism based on democratic values and, more concretely, the supposed incompatibility between soft law and legal certainty or legitimate expectations. Soft law has also proved to have some potential regarding the limitation of the Commission's margin of discretion in its work and, looked at from that

angle, it can contribute to clarify expectations and increase certainty, provided the correction of the above-mentioned imperfections.

*CSR and soft law*

In the case of CSR, we have noted from our previous research that most CSR soft initiatives would have pre-legislative and para-legislative functions and, therefore, are less problematic in view of this *pros* and *cons* discussion –as seen through the ECJ case law, most of the problematics arise with its post-law manifestation. Most of the CSR advancements so far could be classified within these pre- and para-legislative functions, less problematic as they are intended to prepare the field and involve all actors, while promoting concrete results and creating a favourable political and social environment for its further development.

On another front, we understand that soft law has *per se* some potential, regardless of its eventual hardening, even if this should not be discarded. In fact, we are witnessing the gradual introduction and mainstreaming of CSR issues in post-legislative soft instruments of a variety of policies, and even a progressive hardening of CSR, though very incipient. 'Hardening' processes should not come as a surprise to anyone. Before 2009, the Nice Charter has a number of similarities with an inter-institutional agreement[652]: the intervention of all institutions and Member States in the drafting, the importance of the *consensus* between the Council, the Commission and the Parliament and its final *solemn proclamation*, bringing it near to soft international declarations. Not only that, the main obligations fell to EU institutions, who committed to respect the Charter in their work. Despite these obvious limitations, most of the public opinion and politicians were pleased to welcome the Nice Charter and its potential was clear. Of course, as is well-known, its hardening came only after the entry into force of the Lisbon Treaty in December 2009, when the Charter was upgraded to the same legal value as the Treaties; but even before being granted this treaty-level, the ECJ has a

[652] E. MOSTACCI: *La Soft Law nel Sistema delle fonti: uno studio comparato*, Padova 2008, CEDAM, pp. 78-85.

number of references to its provisions "on a quite number of occasions"[653], as we have seen with many other soft instruments we cited.

In chapter III we have already referred to some significant examples that it is worth recalling at this point to interpret them as a kind of CSR 'legal spill-over', the most important of which are the following: 1) Directives 2013/34/EU and 2014/95/EU on non-financial reporting requirements; 2) Directives 2014/24/EU and 2014/25/EU which constituted a wide public procurement reform novelty including CSR conditions; and the current proposal for a Directive –under discussion between EU institutions– on responsible supply chains of minerals from high-risk and conflict-affected areas[654]. We start to observe CSR transfers: to post-law soft instruments but also to hard norms that start to include unprecedented provisions that invites us not to discard any potential *hardening*, even though the main function of CSR up to now has been preparatory and predominantly soft, what is absolutely not a demerit or a sign of uselessness.

On a general note, it is understood that CSR consists of going beyond the already settled legal standards, but the possibility of adding new regulatory options enriches the situation and is likely to facilitate the attainment of corporations' responsibility, involving them in the process, as important economic operators, together with civil society, social partners, non-governmental organisations and associations. Obviously, we do not discuss that without the sword of Damocles of hard law, soft law might lose part of its usefulness. The interest of this process is precisely the mixture of instruments and initiatives that well deserve the effort to put things in order so as to properly gauge the value of the on-going work. In this sense, most of the times we face soft and hard norms when dealing with almost any EU policy, so that their interaction marks the practical outcome, influencing the legal effects (directly for classic legislative initiatives or indirectly applied by Courts when dealing with soft norms). We even have cases, such as nanotechnologies[655], in which the majority of legal instruments available are

[653] G. De BURCA : « After the EU Charter of Fundamental Rights : The Court of Justice as a Human Rights Adjudicator ? », in *Maastricht Journal of European and Comparative Law*, Vol. 20 No. 2, pp. 168-185, at p. 169.
[654] See chapter III, Section 2.3.
[655] E. PARIOTTI and D. RUGGIU: "Governing nanotechnologies in Europe: Human Rights, Soft Law and Corporate Social Responsibility", in H. VAN LENTE, C. COENEN, K. KONRAD, L. KRABBENBORG, C. MILBURN, F. SEIFERT, F. THOREAU and B ZÜLSDORF (Eds.): *Little by Little: Expansions of Nanoscience and Emerging Technologies*, Heidelberg 2012, IOS Press/AKA-Verlag, pp. 157-168.

*soft*, an emblematic field where the potential benefits of soft law are clear in terms of flexibility and adaptability to further developments.

At the end of the day, even though the Rousseaunian myth of the noble savage is over, it would be too pessimistic to say that State's coercion –by itself and taken alone– is the primary purpose or *raison d'être* of any legal system. We rather think that legal orders look forward to reaching *relatively* just and peaceful solutions to social problems or the achievement of certain public goods[656]. The need and usefulness of State's responsibilities in terms of human rights is not discussable at all, ensuring the vertical effect of human rights. However, as explained in the general part of this work, at this stage of globalisation it seems naïve to totally rely on these vertical effects, without stimulating as well forms of human rights respect through their horizontal effects[657], in the relationships among individuals and between individuals and corporations. It is in this field where soft law might make its main contribution, unlike those who say that only hard law can contribute to the achievement of human rights goals. We have already seen that international human rights treaties and other hard mechanisms are not the panacea. The unfortunately marginal role of human rights in CSR issues is due to this school of thought that only accepts the benefits of hard law and is not able to imagine the potential of strongly mainstreaming human rights into soft law so as to foster their horizontal effects. We tend to a teleological approach to the rule of law, why not including soft law instruments if they contribute to get closer to solutions and a better society, as a complement rather than a replacement of hard law. Finally, the interest of soft law is not only due to its eventual *hardening*, it actually has a potential *per se*. Obviously, to adequately use this tool, we should equally raise awareness on the traps behind this process.

[656] We do not share the divinisation of the monopoly of the violence and institutional coercion mechanisms as the most effective ways to achieve any goal, in contrast to classic literature: H. KELSEN: *Pure Theory of Law*, London 2009, The Lawbook Exchange Ltd., 399 pages, *passim*.

[657] As commented in the first part of this work, the idea of horizontal human rights duties is highly controversial. It is also worth reading: E. PARIOTTI: " 'Effetto orizzontale' dei diritti umani e impresse transnazionali nello spazio europeo", *in I. TRUJILLO and F. VIOLA (Eds.): Identità, diritti, raggione pubblica in Europa*, Bologna 2007, Il Mulino, pp. 171-201.

## 4.2. Access to justice: an open question

### *4.2.1. Premises on corporate extraterritorial responsibilities*

Many of the official documents studied indicate that CSR policies and the incipient sets of rules are still under development and could have a stronger impact, especially if they were accompanied with effective mechanisms to investigate, punish and compensate eventual breaches, as recurrently noted by the EU institutions (in particular, by the Parliament). John Ruggie's UNGPs attach great importance to access to justice in their third level, the remediation, in which it is said that effective judicial mechanisms are at the core of ensuring access to remedy as stated in Principle 25. Principle 26 further provides that "States should take appropriate steps to ensure the effectiveness of domestic judicial mechanisms when addressing business-related human rights abuses, including considering ways to reduce legal, practical and other relevant barriers that could lead to a denial of access to remedy", respecting the characteristics of due process in such a way that "States should ensure that they do not erect barriers to prevent legitimate cases from being brought before the courts […]"[658]. In the dialectic between *hard* and *soft* law, the second cannot exist without the first one and access to justice looks simply unavoidable, but the definition on 'legitimate cases' remains unclear.

To ensure a useful and positive implementation of CSR initiatives, access to justice is the necessary threat of hard law, as recognised by the UN, in this mixed CSR scheme. Alleged victims of transnational companies face multiple obstacles among which we highlight the lack of guarantees of many domestic judicial systems (in developing States or in fragile and failed States), general misinformation on access to remedies, difficulties in acceding to legal aid and unknown procedural barriers –mainly *ratione personae* and *ratione loci*. In general terms, we could summarise there is an inequality of arms between alleged victims and authors, in the absence of institutional support for legal disputes that, in fact, should be matters of general interest.

It is utterly important to make some terminological distinctions to properly introduce this debate, starting with the essential difference between the private interest of the litigants and the public interests of the *forum*: there are many factors that need to be

[658] UN Doc. A/HRC/17/31, 21 March 2011, *op. cit.*, Principle 26.

balanced. In talking about remedies, most people immediately think of judicial levers. The UN International Law Commission distinguishes three types of jurisdiction: prescriptive (norms or legislative acts), adjudicative (judicial review) and enforcement (executive)[659]. All three might have extraterritorial expressions, but in CSR the debate is centred on 'extraterritorial adjudicative jurisdiction', as far as the other two possibilities (extraterritorial legislation and enforcement) are *–prima facie–* much more difficult to reconcile with art. 2.7 of the UN Charter. States have the possibility to exert an extraterritorial adjudicative jurisdiction; "*[h]*owever, a State exercises such jurisdiction in the interest of the international community rather than exclusively in its own national interest"[660], indirectly recognising the existence of superior interests of the international society.

Working on John Ruggie's matrix on extraterritoriality, the initiatives to make companies 'accountable' should not be limited to judicial liability: there is a myriad of less problematic and not-less-important measures "with extraterritorial implications"[661], particularly in public procurement, export credit agencies and non-financial reporting requirements: the EU has very opportunely understood this, as we have seen analysing the level of implementation of CSR policies. It is less problematic in terms of International Law because "the State is not exercising extraterritorial jurisdiction, but simply its territorial jurisdiction with extraterritorial implications". Indeed, extraterritoriality is not the "magic potion" to definitively solve human rights abuses by TNCs: corporate responsibilities are not limited to "liability", which is only an aspect of their "accountability" to be added to reputational risks, stock markets effects, public contracts, etc.[662]

This is not to deny the usefulness and importance of effective judicial mechanisms; it is only aimed at underlining that incident-based and judicially-limited strategies by home States of TNCs may eventually lack of long-term effects on the problems at host States: lack of governance, human rights structural weaknesses, and consolidated corruption.

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[659] UNITED NATIONS: *Report of the International Law Commission, Fifty-eighth session*, New York 2006, UN Doc. A/61/10, pp. 516-519 (Annex E on Extraterritorial Jurisdiction, see in particular para. 5).
[660] *Ibíd.*, para 16.
[661] Less problematic because the "State is not exercising extraterritorial jurisdiction, but simply its territorial jurisdiction with extraterritorial implications". N. BERNAZ: "Enhancing Corporate Accountability for Human Rights Violations: Is Extraterritoriality the Magic Potion?", in *Journal of Business Ethics*, Vol. 117 No. 3, pp. 493-511, at p. 496.
[662] *Ibíd.*, on the "wider notion of accountability".

There is a need for a pragmatic and holistic approach to extraterritoriality in order to abandon the idea it constitutes the final panacea.

States have for the moment no obligation to adopt exterritorial human rights measures as far as, strictly speaking, each State is the sole responsible for the respect of human rights within its own jurisdiction. Obviously, the "business and human rights" studies have shown that the overreliance on vertical effects and State responsibilities fail to effectively address many human rights' abuses by TNCs, since globalisation has created a governance gap. Under International Law, it early arose that what is not prohibited might be permitted[663]: the lack of an obligation does not necessarily mean it is unlawful to act, and has not impeded an increasing international *opinio iuris* and practice in this direction, starting with many General Comments and Concluding Observations of UN bodies[664], though insufficient to speak of any customary obligation yet.

Given that this *consensus* is under construction, it is again advisable to remain realistic and pragmatic. A further distinction has to be made between criminal and civil responsibilities, bearing in mind that many legal orders do not contemplate criminal offences for legal persons (companies). There are authoritative voices that advocate for the criminalisation of human rights violations, "including those that take place outside the EU"[665], and there is no doubt that many international instruments in humanitarian law and international criminal law already include partial obligations for non-State actors[666]. Its origin is the Nuremberg trials under the US Military Tribunal and Control

[663] "International law governs relations between independent States. The rules of law binding upon States therefore emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law and established in order to regulate the relations between these co-existing independent communities or with a view to the achievement of common aims. Restrictions upon the independence of States cannot therefore be presumed". PERMANENT COURT OF INTERNATIONAL JUSTICE: *Case of the S.S. "Lotus"*, Judgment No. 9 of 7 September 1927, p. 18 (emphasis added). This was very controversially confirmed when the ICJ had to assess lawfulness of the secession of Kosovo in 2008: ICJ: *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion*, ICJ Reports 2010, 22 July 2010, p. 403.

[664] It should be noted that the legal force of the practice of UN Bodies is relative, even though it has an indicative value of the current international tendencies as reflected by the CESCR and CERD: N. BERNAZ: *op. cit.*, pp. 504-505.

[665] O. De SCHUTTER, R. McCORQUODALE and G. SKINNER: *The Third Pillar: Access to Judicial Remedies for Human Rights Violations by Transnational Businesses*, December 2013 (online publication), ICAR-CORE-ECCJ, p. 88 (recommendation No. 29).

[666] Under international humanitarian law, corporate liability can be argued in relation to article 75 of Rome Statue of the ICC, common art. 5 of the ICCPR and ICESCR, common article 3 of the four Geneva Conventions under certain conditions, art. 3 of the Hague Convention IV, art. 1.2 of the International Convention on the Suppression and Punishment of the Crime of Apartheid, art. 2 of the Basel Convention, and art. 10 of the UN Convention against Organised Transnational Crime. *Víd.*: E. MONGELARD: "Corporate civil liability for violations of international humanitarian law", in

Council Order 10, but "there is a risk of overemphasising the potential of international criminal law to bring about human rights compliance among businesses and to serve as an accountability mechanism for corporate human rights abuses"[667]. For instance, not all human rights violations can be considered 'international crimes'. Secondly, criminal claims rely on the prosecutor's role and, unfortunately, this is not always a good idea as we have checked in two important French cases. In the first one, currently under instruction, the French company then called *Amesys* was said to sell internet spying software to the Libyan regime of Colonel Muammar Gaddafi. According to the information of diverse NGOs and CSOs, this software was behind the arbitrary detention and torture of five pro-democracy activists opposed to the regime. A claim was brought in France but the Paris Prosecutor's Office steadily opposed the claim and, on several occasions, asked for its dismissal delaying the admissibility proceedings until January 2013[668]. Also concerning France, a second case confirms the discussable role of public prosecutors: one of the largest timber traders, the Danish company *DLH*, and particularly its French branch, were said to import through the port of Nantes allegedly illegal timber coming from Liberia and apparently behind the financing of Charles Taylor's faction in the civil war. The public prosecutor of Nantes transferred the case to Montpellier and, after two years without any news, Montpellier's public prosecutor informed the plaintiffs that he would not open any preliminary inquiry[669]. In sum, public prosecutors are generally unexperienced (if not unwilling) to deal with these cases because of their complexity, sometimes their political sensitiveness, and the lack of resources.

In view of the difficulties around criminal proceedings, civil liability should not be neglected; in colloquial terms, there is a Spanish expression that goes "*lo que les duele*

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*International Review of the Red Cross*, Vol. 88 No. 863, September 2006, pp. 665-691, at pp. 670-672 and 682.

[667] J. KYRIAKAKIS: "Developments in international criminal law and the case of business involvement in international crimes", in *International Review of the Red Cross*, Vol. 94 No. 887, Autumn 2012, pp. 981-1005, at pp. 988-989.

[668] FÉDERATION INTERNATIONALE DES LIGUES DE DROITS DE L'HOMME: *L'affaire Amesys*, Paris 2014 (online publication ISSN 2225-1790), p. 7.

[669] The plaintiffs were a group of NGOs and CSOs that, under French law, were recognised as entitled to make judicial claims. The French law establishes a crime of "recel": the intermediate sell of a product which is known to be of illegal origin. Since there was no public inquiry, there are not official documents available. See the NGOs websites at: http://www.asso-sherpa.org/procedures-and-milestones-dlh-liberia#.Vf8O08sVgpY and https://www.globalwitness.org/archive/8572/.

*es el bolsillo*"[670]. Many critics correctly claim that civil trials are not possible under International Law. Indeed, pragmatically speaking there is no need to discuss the criminal liability of TNCs: it is about the civil consequences of human rights breaches. For example, most internal orders have some kind of secondary or subsidiary civil liability when criminal offences run parallel to civil claims, in line with the Roman adage that says "*societas delinquere non potest*". Pragmatism leads us to believe that civil claims are the most interesting option, in so far as it entails tangible remediation measures, without rejecting eventual criminal responsibilities if individuals are identified and the legal order at stake allows it.

In any case, civil actions are not without problems. Several polemic cases brought before UK Courts, finally settled out of court, can give an idea on the *cons* of civil claims. In two cases, South-African individuals claimed damages for mercury poisoning when working at a factory of a wholly-owned subsidiary of an English company (*Thor Chemicals Holdings Ltd).* Both cases of 1997 and 2000[671] were quickly aborted with multi-million dollar settlements and "no admission of liability"[672].

In 2009 nearly 30.000 claimants from Ivory Coast filed a suit against *Trafigura Ltd.* for the alleged dumping of toxic waste, having caused related diseases among the population living by the coast[673]. Once the case was declared admissible and having started the probative phase before the English High Court[674], *Trafigura* decided to pay $1.500 to each alleged victim and no further inquiry was done, since civil proceedings only function upon request by a party. The settlement, however, led to a second lawsuit referred to the costs and delivered in 2011: according to the Judge, costs alleged by the claimants seemed disproportionate even though an item by item assessment had to be done, from witnesses, security, to experts, medical investigations, media and

[670] An English translation would be "where it hurts, in their pockets". I. VIVAS-TESÓN: "La implementación de los Principios Rectores ONU sobre empresas y derechos humanos en España", in *Anais dos III Congresso Iberoamericano de Direito Sanitário / II Congresso Brasileiro de Direitto Sanitário*, Vol. 2 No. 2, July-December 2013, pp. 870-880, at p. 878.
[671] *Sithole v. Thor Chemicals Holding Ltd*, [2000] A2/2000/2894 (AC), and the previous settlement, also for mercury poisoning, in *Ngcobo v Thor Chemicals Holdings Ltd & Desmond Cowley* of 1997.
[672] C. BUGGENHOUDT and S. COLMANT: *Report ASF. Justice in a Globalised Economy: A Challenge for Lawyers. Corporate Responsibility and Accountability in European Courts*, Brussels 2011, Avocats Sans Frontières, pp. 10-12.
[673] For a summary and comment of this case, also see: Y. FARAH: "Toward a Multi-Directional Approach to Corporate Accountability", in S. MICHALOWSKI (Ed.): *Corporate Accountability in the Context of Transitional Justice*, New York 2013, Routledge Ed., pp. 27-51, at pp. 41-42.
[674] The Judge was already delivering opinions on witnesses and experts: ENGLISH HIGH COURT: *Yao Essaie Motto and Ors v Trafigura Ltd.*, [2009] EWHC 1246 (QB).

information, lawyers retribution or even extra-territorial costs (for research in other locations like Malta, Amsterdam, Lagos or Norway). The Judge partially recognised the claimant's bill, while he clarified that "it is not open to me to decide whether those witness statements were i) admissible; and or ii) of any probative value in relation to any of the issues in the case, since there has never been a trial"[675]. Again, "the defendants settled with a denial of liability"[676], but for the judge the settlement itself "effectively prevents any argument that the proceedings should never have been brought because they would be bound to fail"[677], as the defendants argued to disallow the costs of the alleged victims. *Trafigura* almost became a judicial saga because it operated from the port of Amsterdam: a € 1 million fine was imposed to the company in the Netherlands, considering it a "co-perpetrator" indirectly responsible and "knowing that they *[the toxic substances]* are harmful to life or health"[678]. One year later, the Court of Appeal confirmed the fine under the same Dutch Environmental Acts[679].

The third example of settlement involves *Shell* activities in the Niger Delta, a very problematic oil-producing site that has led to numerous lawsuits in different courts of the EU and the US. In this particular case, *Shell* decided to compensate the alleged victims *via* an extrajudicial agreement only after the Judge had delivered a preliminary ruling on eight issues, answering that claimants were entitled to compensation in respect of 2008 oil spills, even though spills caused by sabotage and illegal activities were not imputable to the company[680]. The full trial was planned for 2015 and Shell paid £ 55 million divided as follows: £ 35 million for the individuals (aprox. £ 2,200 each, *circa*.

[675] HIGH COURT OF JUSTICE (Queen's Bench Division, Senior Courts Costs Office): *Yao Essaie MOTTO & ORS v. Trafigura Ltd and Trafigura Beheer BV*, Judgment of 15 February 2011, EWHC 90201, para. 214 ii), *4.2*.
[676] *Ibíd.*, para 67.
[677] *Ibíd.*, para. 206 ii).
[678] RECHTBANK AMSTERDAM (Amsterdam Court): *Trafigura Beheer B.V.*, Case No. 13/846003-06, Judgment of 23/07/2010, para 15. Unofficial translation made with "Google Translator" tool. The judgment is only available in Dutch at: http://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBAMS:2010:BN2149.
[679] GERECHTSHOF AMSTERDAM (Amsterdam Court of Appeal): *Trafigura Beheer B.V –Appeal*, Case No. 23/003334-10, Judgment of 23 December 2011. Available (in Dutch) at: http://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:GHAMS:2011:BU9237.
[680] High Court of Justice (Queen's Bench Division): *The Bodo Community and Others v. The Shell Petroleum Development Company of Nigeria Limited*, Judgment of 20 June 2014, EWHC 1973 (TCC), para 93 (on oil spills due to sabotage and criminal activities) and para. 151-152 and 160 (on the calculation of damages according to Nigeria's standard of living and price of the land).

33 times the monthly minimum wage in Nigeria), and £ 20 million for the Bodo Community[681].

Therefore, the other side of the coin of civil claims is the eventual risk of ending up in out of court settlements that, ultimately, might shed little light on human rights concerns, even including anti-suit clauses and non-liability declarations that the victims have to sign to reach the agreements. At least in the EU, an arbitration agreement is not sufficient to prevent an EU Court from hearing a case, even if the agreement includes an anti-suit clause[682], because one of the parties would be deprived of judicial protection[683]. With its *pros* and *cons*, we still consider that the civil litigation looks more attractive and practical than criminal proceedings, also following to the foregoing general considerations on extraterritoriality and liability.

Having said this, the debate on corporate extraterritorial responsibilities can therefore be reduced to the following question: to what extent an extraterritorial adjudicative jurisdiction can be exercised to judge extra-contractual civil responsibilities in cases of human rights violations by TNCs.

By way of premise, most of the problematic aspects will turn around the admissibility criteria to exert such extraterritorial adjudicative jurisdiction and obstacles *ratione temporis* can also arise because of victims' misinformation on procedural requirements and, even *ratione materiae*, to duly translate human rights issues into internal civil

[681] Also see: http://www.leighday.co.uk/News/2015/January-2015/Shell-agrees-55m-compensation-deal-for-Nigeria-Del

[682] "Accordingly, the use of an anti-suit injunction to prevent a court of a Member State, which normally has jurisdiction to resolve a dispute under Article 5(3) of Regulation No 44/2001, from ruling, in accordance with Article 1(2)(d) of that regulation, on the very applicability of the regulation to the dispute brought before it necessarily amounts to stripping that court of the power to rule on its own jurisdiction under Regulation No 44/2001. *[…]*a party could avoid the proceedings merely by relying on that agreement and the applicant, which considers that the agreement is void, inoperative or incapable of being performed, would thus be barred from access to the court before which it brought proceedings under Article 5(3) of Regulation No 44/2001 and would therefore be deprived of a form of judicial protection to which it is entitled. […] [I]t is incompatible with Regulation No 44/2001 for a court of a Member State to make an order to restrain a person from commencing or continuing proceedings before the courts of another Member State on the ground that such proceedings would be contrary to an arbitration agreement." Case C-185/07, *Allianz SpA and GeneraliAssicurazioni Generali SpA v. West Tankers Inc.*, Judgment of 10 February 2009 (Grand Chamber), para. 28, 31 and 34 (extracted citations).

[683] However, EU Courts have both possibilities: to recognise or not the validity of such anti-suit clauses. "Regulation No 44/2001 must be interpreted as not precluding a court of a Member State from recognising and enforcing, or from refusing to recognise and enforce, an arbitral award prohibiting a party from bringing certain claims before a court of that Member State, since that regulation does not govern the recognition and enforcement, in a Member State, of an arbitral award issued by an arbitral tribunal in another Member State." Case C-536/13, *Gazprom OAO v. Lietuvos Respublika*, Judgment of 13 May 2015 (Grand Chamber), para. 44.

responsibility claims. However, as said before, the hardest nuts to crack will be *ratione loci* and *ratione personae*.

*Ratione loci*

Apart from the debate on extraterritoriality itself, it is not evident to reverse the general rule that offences have to be judged in the place where they occur (*lex loci delicti*). The *forum non conveniens* doctrine insists on the importance of the 'natural forum' because access to evidence and witnesses will be easier, and it will always be difficult for a Court to apply an alien legal order (that of the place where the violation took place), including probably different standards for reparation if the violation is finally proved. This doctrine generally corresponds to common law systems. Many authors defend its usefulness to "level the playing field" and prevent "a plaintiff from compelling litigation in a forum where the defendant will have great difficulty in obtaining evidence vital to the defense"[684]. Moreover, tax payers might be reluctant to welcome the "glut of foreign plaintiffs suing for injuries inflicted abroad"[685]. In our view, this reflects a rather disproportionate concern and care of TNCs' defence: the problems for litigation in terms of access to evidence will be the same for alleged victims and authors if an external forum accepts jurisdiction and, if there is any significant and usual inequality of arms, it will rather undermine the victims. According to the famous and amusing concurring opinion of Judge Jackson in a US case, back in 1942, he put forward the exaggerated "protective doctrines in terms of sheltering defendants against vexatious and harassing suits […] behind a rather fantastic fiction that a widow is harassing the Illinois Central Railroad"[686]. This is the equivalent to say that, in some cases, the public interest would prevail, which is not an uncontroversial conclusion.

A milestone to clarify this doctrine on jurisdiction *ratione loci* is the so-called 'Spiliada test', a twofold scheme foreseen by the House of Lords (UK): firstly, the defendant has to demonstrate that not only the UK is not a suitable forum but that there is another

[684] R. J. WEINTRAUB: "Judicial Guidance of Litigation to an Appropriate Forum", in L. PEREZNIETO CASTRO, T. TREVES and F. SEATZU (Eds.): *Tradition and Innovation of Private International Law at the Beginning of the Third Millenium*, New York 2006, Juris Publishing Inc., pp. 251-260, at p. 260.
[685] *Ibíd.*, p. 258.
[686] US SUPREME COURT: *Miles v. Illinois Central R. Co.*, 315 US 698 (1942), Judgment of 30 March 1942, p. 706. Available at: https://supreme.justia.com/cases/federal/us/315/698/case.html (also cited by WEINTRAUB, *supra*, footnote 684).

natural and clearly more appropriate Court, notwithstanding the fact that, in the second phase of the reasoning, the Court may declare itself competent if, "established objectively by cogent evidence, *[…]* the plaintiff will not obtain justice in the foreign jurisdiction"[687]. This helps to handle the *forum non conveniens* doctrine in favour of human rights litigations if the alleged victims succeed to show that the difficulties in the natural forum "would amount to a denial of justice", as in the off-cited case *Lubbe v. Cape*[688]. This is even compatible with the sceptics view against any 'public interest' of courts: it can be seen as a way to balance the private interests of the litigants so that, in applying the 'Spiliada test', "questions of judicial *amour propre* and political interest or responsibility have no part to play"[689]. The burden of proof is shared: the defendant has to argue the suitability of another forum, but the plaintiff has the obligation to clearly show that "substantial justice cannot be done in the appropriate forum", to convince a UK Court to take over –'substantial justice' meaning that claimants will have to accept normal differences between legal systems, perhaps less "generous" than the British[690]. As we will argue in the following section, the EU has tackled the problem *ratione loci* differently; let's note for instance that exceptions to 'local remedies' are not new in

[687] " […] the burden resting on the defendant is not just to show that England is not the natural or appropriate forum for the trial, but to establish that there is another available forum which is clearly or distinctly more appropriate than the English forum. […] If however the court concludes at that stage that there is some other available forum which prima facie is clearly more appropriate for the trial of the action, it will ordinarily grant a stay unless there are circumstances by reason of which justice requires that a stay should nevertheless not be granted. In this enquiry, the court will consider all the circumstances of the case, including circumstances which go beyond those taken into account when considering connecting factors with other jurisdictions. One such factor can be the fact, if established objectively by cogent evidence, that the plaintiff will not obtain justice in the foreign jurisdiction", HOUSE OF LORDS (UK): *Spiliada Maritime Corporation v. Cansulex Ltd.*, Judgment of 19 November 1986, Paragraphs 6.3 and 6.6.

[688] "If these proceedings were stayed in favour of the more appropriate forum in South Africa the probability is that the plaintiffs would have no means of obtaining the professional representation and the expert evidence which would be essential if these claims were to be justly decided. This would amount to a denial of justice […] at the second stage of the Spiliada test" HOUSE OF LORDS: *Lubbe and Others and Cape Plc. And Related Appeals* [2000] UKHL 41, Judgment of 20 July 2000 (opinions of the Lords of Appeal for Judgment), para. 28.

[689] *Ibíd.*, para. 33.

[690] "he *[the defendant]* has to establish that there is another available forum which is clearly or distinctly more appropriate than the English forum in which jurisdiction has been founded by the plaintiff as of right. […]This is the first stage. However, even if the court concludes at that stage that the other forum is clearly more appropriate for the trial of the action, the court may nevertheless decline to grant a stay if persuaded by the plaintiff, on whom the burden of proof then lies, that justice requires that a stay should not be granted. This is the second stage." HOUSE OF LORDS: *Connelly (A.P.) v. RTZ Corporation Plc and Others*, Judgment of 24 July
1997, available at:
http://www.publications.parliament.uk/pa/ld199798/ldjudgmt/jd970724/con01.htm.

international human rights law: the non-exhaustion of domestic remedies are generally justified if there are unreasonable delays or lack of judicial guarantees[691].

While this may sound strange, *forum shopping* is also possible in human rights cases, and sometimes perfectly legal and legitimate. The *forum non conveniens* doctrine has been refined through the jurisprudence to evaluate and limit the best *fora,* especially in common law systems, but still leaves room for human rights litigation under the conditions explained above. To some extent, *forum shopping* is also a legitimate practice for human rights litigators when, in representation of alleged victims, they have to choose the most advantageous court, provided a choice is possible and under concrete conditions (*lis pendens, ne bis in idem,* and other procedural aspects that each tribunal lays down). Generally speaking, human rights lawyers pay little attention to the election of the correct forum, compared to other fields of law. In the EU, there are two available options: the European Court of Human Rights in Strasbourg (Council of Europe) or the European Court of Justice in Luxembourg (EU), so that human rights lawyers will have a delicate work -and many times neglected- even before starting the proceedings. In Latin America, a case might be more suitable for the UN Committee on Human Rights rather than the Inter-American Court of Human Rights, or even in some cases the Special Procedures branch of the UN Human Rights Council deems to be a more effective and practical shortcut (tough less juridical).

*Ratione personae*

The first problem is that of the legal personality of TNCs and the difficulty to trace a direct or indirect causal link with alleged human rights abuses in third countries, taking into account the complexity of business structures. In Private International Law, "connecting factors that go beyond old-fashioned territorial limits"[692] are more and more usual, at the same time that companies are considered, to some degree, right-holders, for example in the protection of international investments. According to the

[691] To mention just a few examples, see: art. 5.2 *b)* of the *Optional Protocol to the International Covenant on Civil and Political Rights*; exceptions to art. 35 of the *European Convention on Human Rights* through the Strasbourg's case law in terms of availability and effectiveness (see EUROPEAN COURT OF HUMAN RIGHTS: *Practical Guide on Admissibility Criteria*, Strasbourg 2011, p. 18, available at www.echr.coe.int), or art. 46.2 *a), b)* and *c)* on unreasonable delays and due process of the Inter-American Convention on Human Rights.

[692] A. SANGER: "Transnational Human Rights Cases? Not in our Backyard!" in *The Cambridge Law Journal*, Vol. 72 No. 3, November 2013, pp. 487-490, at p. 489.

International Court of Justice, it deems to be sometimes necessary to "prevent the misuse of the privileges of legal personality, as in certain cases of fraud or malfeasance, to protect third persons *[…]* or to prevent the evasion of legal requirements or of obligations"[693]. The lifting of the corporate veil might be justified in certain "special circumstances"[694], why not in the interest of internationally recognised human rights obligations. Despite the fact that only States and International Organisations are the primary subjects of international law, the recognition of TNCs does not mean that they might start appointing ambassadors, but to recognise that, in fact, they should have a "limited personality"[695] within the framework of their rights in order to allow parallel responsibilities.

Perhaps the expression 'lifting the corporate veil' only represents a particular facet of a broader phenomenon in International Law: the gradual piercing of legal personality, to which human rights have greatly contributed while gradually recognising a limited *locus standi* of individuals. We have therefore to "rethink jurisdiction" in the light of recent developments after which the "idea of jurisdiction as purely an expression of the rights and powers of sovereign states requires reconceptualization"[696]. The challenges derived from piracy, terrorism and transnational crime have International Law reeling against the ropes. Globalisation has also led to the multiplication of asymmetric transnational (but non-international) conflicts[697], not to mention the complex human rights issues raised by the activities of TNCs. The concept of sovereignty has always

[693] INTERNATIONAL COURT OF JUSTICE: *Barcelona Traction, Light and Power Company, Limited*, Judgement, I.C.J. Reports 1970, p. 3, para. 56.

[694] In that case, to protect shareholders: "the process of lifting the veil, being an exceptional one admitted by municipal law in respect of an institution of its own making, is equally admissible to play a similar role in international law. It follows that on the international plane also there may in principle be special circumstances which justify the lifting of the veil in the interest of shareholders". *Ibíd*., para. 58.

[695] F.J. ZAMORA CABOT: "Kiobel v. Royal Dutch Corp y los litigios transnacionales sobre derechos humanos", in *Working Papers 'El tiempo de los Derechos'*, No. 4 (2011), ISSN 1989-8797, pp.1-13, p. 7.

[696] "This development suggests the need to rethink the idea of jurisdiction in international law. To the extent that States have agreed to individually enforceable rights for foreign investors which extend to a right of access to civil or administrative remedies […] they have apparently agreed that they owe jurisdictional obligations not only to foreign States but also to individuals. It is true that these rights may be considered as products of State consent through treaties or even (more controversially) customary international law, suggesting that the individual rights thus created can be accommodates within the existing framework of jurisdictional rules. It can nevertheless also be argued that through the recognition of individuals as positive actors and jurisdictional rights-bearers, the idea of jurisdiction as purely an expression of the rights and powers of sovereign States requires reconceptualization". A. MILLS: "Rethinking Jurisdiction in International Law", in *The British Yearbook of International Law*, Vol. 84 No. 1, 2014, pp. 187-239, at pp. 218-219.

[697] See R. CALDUCH CERVERA: "Procesos de cooperación y conflicto en el sistema internacional del siglo XXI", in J.C. PEREIRA (Coord.): *Historia de las Relaciones Internacionales Contemporáneas*, Madrid 2009, Ariel Ed., pp. 701-721, at pp. 709-713.

moved between "autonomy and responsibility"[698], but these developments tend to increase the relative weight of the latter. This has to come with the understanding that there are no self-contained regimes in International Law, as argued in the first part of this work.

Notwithstanding the fact that it is not a consolidated doctrine yet, we rather support a functional definition of companies –consistently with other issues in this research. Otherwise, actions taken by apparently separate entities, distributed across associates, subsidiaries, branches and suppliers, can be legal individually taken, but the sum of them can amount to illegalities. In general terms, the complexity of corporate structures are probably not deliberately designed to violate human rights[699], but they reveal to be very useful to avoid responsibilities once problems arise. In this sense, it is vital to keep close to what happens in the field in order to test merely formal separations based on legal personality.

We can build on the experience in the area of international taxation law and money laundering, where there are instruments to pierce the corporate veil. There are sound reasons to do so in a variety of international and European standards. There is a solid ECJ's case law that has empowered the Commission, in the area of competition law, to extraterritorially prosecute foreign parent companies, based on "the economic unit doctrine" and the "economic continuity test" (in cases of "succession of enterprises") if there are enough elements "to shift the liability to the controlling entity"[700]. Therefore, in the area of competition law, the EU did not want to be the victim of merely formal separations based on legal personality, when subsidiaries in Europe were carrying out anti-trust activities under the orders of parent companies based outside the EU. In human rights cases the situation is exactly the opposite as the parent company is usually

[698] T. GAMMELTOFT-HANSEN and T. E. AALBERTS: "Sovereignty at Sea: The Law and Politics of saving lives in the Mare Liberum", in *Working Papers of the Danish Institute for International Studies*, No. 18, Copenhagen 2010, 31 pp., at pp. 8-13.

[699] For example, the figure of 'limited liability' was intended to promote private investors' confidence, but not intended to make companies unaccountable, for example, after an environmental disaster, so that… "When called upon by the government to clean up the mess, the MNC announces that it is bankrupt: all of the revenues have already been paid out to shareholders. In these circumstances, MNCs are taking advantage of limited liability", as noted by the Nobel in Economy J. STIGLITZ: "Regulating Multinational Corporations: Towards Principles of Cross-Border Legal Frameworks in a Globalised World Balancing Rights with Responsibilities", in *American University International Law Review*, Vol. 23 No. 3 (2007-2008), pp. 451-558, at p. 474.

[700] A comprehensive study on this case law at: B. CORTESE: "Piercing the Corporate Veil in EU Competition Law: the Parent Subsidiary Relationship and Antitrust Liability", in B. CORTESE (Ed.): *EU Competition Law. Between Public and Private Enforcement*, The Netherlands 2014, Kluwer Law International, pp. 73-93, at p. 83.

registered in the EU, but we do not see why the same reasoning would not be applicable.

The OECD Guidelines on Multinational Enterprises acknowledge that different enterprises operating abroad might be subject to different legislations, but "compliance and control systems should extend where possible to these subsidiaries" and "the board's monitoring of governance includes continuous review of internal structures to ensure clear lines of management accountability throughout the group"[701]. Formally speaking, a subsidiary is controlled by the parent company when the latter owns more than 50% of shares or when it has the right to appoint or remove a majority of directors and managers, in terms of control and not only simple ownership. Control is presumed to be extended to the subsidiaries of subsidiaries: if subsidiary B controls C, but B is controlled by A, then the logical conclusion is that A controls C, and so on, as it happens in complex conglomerates that characterize multinational corporations in a generational structure[702]. EUROSTAT and the Seventh Directive went a step further stating that "if nobody holds the legal power to control B, but A has effective control over B, i.e., there is a presumption of a participating interest of A in B through the ownership by A of 20% or more of the capital of B, and A actually exercises a dominant influence over B, or B is managed on a unified basis by A"[703], which is a functional and more realistic approach to determine the level of power over subsidiaries and, consequently, potential responsibilities. In fact, the main function of 'Holding' corporations is to *control* and *direct* groups of subsidiaries or associates (in the latter, the parent company is supposed to have between 10% and 50% of shares), in a building where branches are also a different form[704]. Besides, article 5 of the OECD Model Tax Convention provides with a very useful definition of 'permanent establishment': "a fixed place of business through which the business of an enterprise is wholly or partly

[701] OECD: *Guidelines of Multinational Enterprises, Text and commentary*, Paris 2011, p. 22.
[702] To find the internationally recognised definitions, please check the OECD Glossary (at https://stats.oecd.org/glossary/) and EUROSTAT's concepts and definitions database: (http://ec.europa.eu/eurostat/ramon/nomenclatures/)
[703] EUROSTAT (supra) and Seventh Council Directive 83/349/EEC of 13 June 1983.
[704] "A branch is a wholly or jointly owned unincorporated enterprise in the host country which is one of the following: (i) a permanent establishment or office of the foreign investor; (ii) an unincorporated partnership or joint venture between the foreign direct investor and one or more third parties; (iii) land, structures (except structures owned by government entities), and /or immovable equipment and objects directly owned by a foreign resident; or (iv) mobile equipment (such as ships, aircraft, gas- or oil‑drilling rights) operating within a country, other than that of the foreign investor, for at least one year." UNCTAD: *World Investment Report. Transnational Corporations, Extractive Industries and Development*, (2007), p. 245

carried on", including "a place of management, a branch, an office, a factory, a workshop and a mine, an oil or gas well, a quarry or any other place of extraction of natural resources"[705], even though subsidiaries and parents may not be considered permanent establishments of each other, as the control is exercised differently.

In conclusion, modern legal definitions of companies focus on *control and power*, and not only on ownership rights. The EU has established that "control also exists when the parent owns half or less of the voting power of an entity", when it is proved to "govern the financial and operating policies of the entity under a statute or an agreement"[706]. In our view, such 'agreement' can also be tacit and demonstrated through the internal communications, for example, if evidence can be collected on instructions and decisions, of operative nature or on human resources, that are effectively taken by the parent company. The EU considers that a 20% of voting power justifies a presumption of "significant influence, unless it can be clearly demonstrated that this is not the case"[707]. In this context, it seems inappropriate to be blocked by old-fashioned and limitative formal definitions –which by the way would be inconsistent within the EU, where a Directive to avoid double taxation and lower the tax burden of companies, considers that a company can declare itself 'parent' of a 'subsidiary' by owning only the 10% of shares of the latter, a requirement progressively reduced (after 2007 it was the 15% and, before, the 20%)[708].

The lifting of the corporate veil in human rights cases can be supported by these international standards that increasingly accept a functional approach to complete the picture on *effective* control and power, to overcome the classic limited perceptions on 'ownership' and 'legal personality'. In other words, a TNC might claim its *organic independence* from its subsidiaries, but it can help the human rights litigator to show the

[705] *OECD Model Convention with respect to taxes on income and on capital*.
[706] COMMISSION Regulation (EC) No. 1126/2008 of 3 November 2008 *adopting certain international accounting standards in accordance with Regulation (EC) No. 1606/2002 of the European Parliament and the Council*, *Official Journal of the European Union* L 320/1 of 29 November 2008, International Accounting Standard No. 27, para. 13.
[707] *Ibíd.*, International Accounting Standard 28, para. 6. Appendix A of this Regulation finally defines "subsidiary" as "an entity, including an unincorporated entity such as a partnership, that is controlled by another entity", a completely functional perspective that goes beyond classic criteria on ownership.
[708] Council Directive 2003/123/EC of 22 December 2003 amending Directive 90/435/EEC *on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States*, *Official Journal of the European Union* L 007, 13 January 2004 p. 0041-0044, art. 3.

*functional dependence* in operative and economic terms[709] with the goal of convincing the courts that, *ratione personae*, the parent company is also liable, similarly to internal orders where a distinction is made between intellectual and material authors of an offence (or at least, in terms of negligence if a lack of due control –or connivance– over the subsidiaries can be shown).

*The United States' influence*

Yet the US jurisprudence is not the subject of this research, the debate on access to justice in the area of business and human rights has for long gravitated around the American Alien Tort Statute, with a notable influence in the European debate. It is also a good way to conclude these premises on corporate extraterritorial responsibilities, before detailing the current developments in the EU. Enacted during the First Congress, in 1789, the Alien Tort Claims Act remained in a lethargic state for two centuries. It re-emerged in 1980 on the occasion of the judgment *Filartiga v. Peña Irala* revealing itself as a useful tool for transnational human rights litigation, allowing the admission of cases on violations of 'the law of nations' brought by aliens against other individuals and, in a second wave, against TNCs. The main advantages of the ATS in conjunction with some characteristics of the US system are these[710]: the 'discovery' facilities by which the claimants can ask for internal documents of the defendants are also available during the admissibility phase in form of a "jurisdictional discovery"; 'class actions' (collective claims) are easier and, sometimes, the absence of such possibility in the 'natural forum' has been sufficient for a US Court to declare itself competent; many lawyers and law-firms accept these cases *pro bono*, without remuneration, sometimes only for the prestige or on "no win – no fee" basis (which in most European countries is even forbidden, except the UK); in many cases, Courts have accepted jurisdiction *ratione personae* over subsidiaries of TNCs, even when the latter had a rather slight

[709] Let's note that an entity *organically dependent* can also be *functionally independent*; this has to be studied on a case by case basis. Obviously, the complexity of TNCs makes it impossible to find standardised relationships between parents and subsidiaries, and CSR does not necessarily leads to a clear-cut centralisation: J. BASTIANUTI: "Les dynamiques organisationnelles liées à la RSE. Le cas de la relation siège-filiale", in *Revue Française de Gestion*, No. 240 (2014), pp. 115-132.

[710] A comprehensive summary of this advantages: M. REQUEJO ISIDRO: "Responsabilidad civil y derechos humanos en EEUU: ¿el fin del ATS?", in *Revista para el Análisis del Derecho*, 3:2011, 38 pp., at pp. 8-12. This work also includes an annex with the most relevant US jurisprudence in chronological order.

connection with the US; and finally, punitive damages are generally generous and alien legislation and compensation schemes can be more easily disallowed.

After a few successes with significant international impact[711], the US Courts have declared themselves competent on the basis of loose 'connecting factors' with the US, following the initial decisions but without examining in depth their fundaments and a bit erratically. The ATS suffered a first limitation in *Sosa v. Alvarez-Machain* (2004): for the first time, the Supreme Court of the United States dismissed a case by laying down three new criteria to accept jurisdiction on an alleged violation of International Law brought by an alien. It had to be "specific, universal and obligatory"[712], which generated unexpected restrictions *ratione materiae*.

Some conservative judges were also increasingly unease with the political dimensions of these cases, mainly due to the respect of foreign sovereignty and, last but not least, expressed concerns on eventual interferences of the judiciary with the Congress in foreign affairs by accepting new causes of action when, in fact, the ATS is only a jurisdictional tool and remains silent of substantive causes of action. Interestingly enough, foreign policy concerns and more serious doubts *ratione loci* only appeared when an Israeli filed a suit against the Libyan Arab Republic for a terrorist attack occurred in Haifa (Israel); the Court's expectable dismissal constituted a premonition of more hostile views on the ATS[713]. The above-mentioned doctrine of *forum non conveniens* gained adepts while it became clear the potential of the ATS to sue TNCs. The controversy developed on the status of customary international law, how it is translated into the internal US legal order (if it becomes 'federal common law' and its

[711] For information purposes, an off-cited case is *Wiwa v Royal Dutch Petroleum:* a single investor's office with only one employee in the US sufficed to declare personal jurisdiction involving the killing in Nigeria of Ogoni activists against the extractive projects (settled out of court after it was declared admissible). Also very famous and cited by all the literature is case *Doe v. UNOCAL* (2001), settled out of court once declared admissible, for allegations of complicity in alleged tortures and killings in a village of Burma (Myanmar), again together with the local security forces.

[712] *Sosa v. Alvarez Machain* concerned a Mexican national who alleged kidnapping and arbitrary detention by another Mexican national, for one day, in the course of an operation –in Mexico– orchestrated by the US Drug Enforcement Administration. S. KATUOKA and M. DAILIDAITÉ: "Responsibility of Transnational Corporations for Human Rights Violations: Deficiencies of International Legal Background and Solutions Offered by National and Regional Legal Tools", in *Jurisprudence (Mikolas Romeris University)*, Vol. 19 No. 4, pp. 1301-1316, at p. 1307.

[713] J. A. KIRSHNER: "Why is the US Abdicating the Policing of Multinational Corporations to Europe? Extraterritoriality, Sovereignty and the Alien Tort Statute", in *Berkeley Journal of International Law*, Vol. 30 No. 2, pp. 259-302, at p. 272.

consequences), alongside the debate between 'originalist' and 'modernist' interpretations of the ATS[714].

As long as almost any TNC has some kind of presence in the US, the new corporate strategy to circumvent the generally liberal 'personal jurisdiction' of US courts, consisted of putting in question the admissibility *ratione materiae* (the subject matter), *i.e.*, making manifest the lack of a sufficiently consolidated international practice to support a liability for damages against TNCs. The result is the famous *Kiobel* judgment (2013), which is the second and major limitation of the ATS. In that case[715], the US Supreme Court decided to further step back and applied stricter admissibility criteria and started to require closer connections to the US. The ATS, according to the Court, was suddenly presumed to be non-extraterritorial, a presumption that has to be rebutted for a case to succeed if it "touche*[s]* and concern*[s]* the territory of the United States *[…]* with sufficient force"[716], not being enough a mere economic presence of TNCs in the US. Many academics have argued that *Kiobel* represents a fatal restriction, though not total, of the ATS possibilities for transnational human rights litigation, while a historicist and limitative reading of the ATS seems to prevail at the moment[717]. It is important to note that, in virtue of the *amicus curiae* accepted in the US, the Commission submitted a brief in *Kiobel*, "acknowledging the possibility of universal

[714] Being drafted back in 1789, the debate has also taken the form of virtuosistic disquisitions of legal archaeology around the original and true purposes of the ATS like if the Law was a static reality. In summary, critics affirm that, unlike the situation in 1789, the current US legal order apparently does not foresee anymore the existence of international norms which are non-federal but still binding, so that jurisdiction *ratione loci* should also be narrowed as done in *Kiobel*: "The debate about the status of international law is more directly implicated by the argument that a cause of action should not be recognised for violations of international law by aliens abroad because recognising such actions would exceed the United States' jurisdiction to prescribe. If customary international law is federal law, then it would directly pre-empt State causes of action that exceed the United States' jurisdiction to prescribe. But if international law were not federal law, States would be free to recognise such causes of action and place the nation in breach of its international obligations", C. M. VÁZQUEZ: "Alien Tort Claims and the Status of Customary International Law", in *The American Journal of International Law*, Vol. 106 No. 3 (July 2012), pp. 531-546, at p. 546.

[715] It involved again Royal Dutch Shell activities in Nigeria and, more concretely, allegations of complicity of the parent company and its Nigerian subsidiary in the violent repression of public demonstrations against the project in the Ogoni area, with the collaboration of the Nigerian police.

[716] A sound state of play of the ATS in the US, including case law and compared to Europe, in: O. De SCHUTTER, R. McCORQUODALE and G. SKINNER: *The Third Pillar. Access to Judicial Remedies for Human Rights Violations by Transnational Businesses*, December 2013, ICAR-CORE-ECCJ, pp. 27-30 and 34-36 (for the situation in the US, citation at p. 27).

[717] "una lectura historicista del ATCA, fosilizándola en el momento en que se promulgó", F.J. ZAMORA CABOT: "*Kiobel* y la cuestión de la Extraterritorialidad", in F.J. ZAMORA, J. GARCÍA CÍVICO and L. SALES PALLARÉS: *La responsabilidad de las multinacionales por violaciones de derechos humanos*, Madrid 2013, Ed. Defensor del Pueblo –Universidad de Alcalá, pp. 135-148, at p. 147. We want to take the occasion to warmly thank the author for his constant support and friendship and the invitation to the book presentation.

civil jurisdiction provided it was restricted along the same lines as universal criminal jurisdiction, including the procedural requirement of 'exhaustion of local and international remedies or, alternatively, the claimants' demonstration that such remedies are unavailable or their pursuit is futile"[718], thus confirming the conclusion we reached before as for the *forum non conveniens* doctrine and its balancing to avoid a denial of justice.

Even after *Kiobel*, the possibility for civil claims connected to human rights violations is still opened in the US, though under more restrictive admissibility criteria. Anyhow, the acceptance of civil jurisdiction under certain conditions (at least *ratione personae*) should not automatically mean that the applicable law changes: we understand that the applicable civil law should remain that of the place where the harm occurred, unless it is clearly incompatible with human rights or other basic standards. Activists usually request the application of the civil law of the new forum, but this is likely to 'kill the goose that lays the golden eggs' and give reasons to critics that wisely raise "unlawful assertions of universal civil jurisdiction"[719]. The increasing reluctance in the US about the ATS was partly caused by the less friendly administration of G.W. Bush[720] and, somehow, by a reborn traditional "US suspicion of international laws" derived from the fact that their independence was built upon a reaffirmation of their sovereignty, while "Europe instead relinquished sovereignty to protect democracy"[721]. The EU is actually taking the baton of these developments and, as we will see in the following section, now is relatively opened to corporate extraterritorial responsibilities.

[718] U. KOHL: "Corporate Human Rights Accountability: the Objections of Western Governments to the Alien Tort Statute", in *International and Comparative Law Quarterly*, Vol. 63 (July 2014), pp. 665-697, at p. 667-668.
[719] P. DAVID MORA: "The Alien Tort Statute After *Kiobel*: the Possibility for Unlawful Assertions of Universal Civil Jurisdiction Still Remains", in *International and Comparative Law Quaterly*, Vol. 63 No. 03, July 2014, pp. 699-719, at pp. 707-713.
[720] For example a Presidential order granted immunity to companies operating in Irak during the occupation by the US-leaded coalition. Bush administration also pushed back the ATS in briefs submitted by the US Government in a variety of cases as *amicus curiae*. It can be defined as "a comprehensive attack against the ATS, reprising arguments against admitting international law into US courts for judicial imposition abroad and raising new challenges to the extraterritorial basis of the statute itself", J. A. KIRSHNER: "Why is the US Abdicating the Policing of Multinational Corporations to Europe? Extraterritoriality, Sovereignty and the Alien Tort Statute", in *op. cit.*, at pp. 276-277.
[721] *Ibíd.*, pp. 292-300. (Citation at pp. 292 and 296).

### *4.2.2. Current developments in the EU*

In the famous *Communication […] A Renewed Strategy 2011-14 for CSR*[722], we find the promise to advance in the area of access to remedies and take into account the conclusions of experts and forums. It is our understanding that allowing access to justice and remedies in European Courts would mark an utterly significant step forward. If there are signs of direct or indirect involvement of an EU company in a violation of human rights in a third country, *reasonable* measures should be taken to facilitate access to justice, to some extent inspired by the American Alien Tort Statute. In terms of new instruments, there are no big innovations within the EU; in practice, however, there are indeed very notable opportunities that it is worth explaining.

In 2006, consistently with the approach outlined in the previous section, a French Court warned that "*l'ordre public international s'oppose à ce qu'un employeur puisse se prévaloir des règles de conflit de juridictions et de lois pour décliner la compétence des juridictions nationales et évincer l'application de la loi française dans un différend qui présente un rattachement avec la France et qui a été élevé par un salarié placé à son service sans manifestation personnelle de sa volonté et employé dans des conditions ayant méconnu sa liberté individuelle*"[723]. The EU has found its own way to balance the notion of '*ordre public international*' with the necessary respect of foreign sovereignty and natural forums, but permitting national Courts of Member States to declare themselves competent in cases of verified risks of denial of justice[724].

At a national level, we have already referred to important decisions in the UK as a platform to transfer the ATS debate into Europe while British Courts nuanced and limited the *forum non conveniens* doctrine. We have cited above the seminal *Lubbe v. Cape*, where the liability of the parent company was established despite that doctrine[725]. The House of Lords acknowledged that, *prima facie*, England was not the natural

[722] COM (2011) 681 Final, of 25 October 2011.
[723] COUR DE CASSATION (Chambre sociale): Case No. 1184, 10 May 2006 : https://www.courdecassation.fr/jurisprudence_2/chambre_sociale_576/arr_ecirc_8861.html Other cases and situations will be studied in the thesis.
[724] A good summary of the current situation in the EU and the way it is taking over the international leadership in this subject at: J.A. KIRSHNER: "A Call for the EU to Assume Jurisdiction over Extraterritorial Corporate Human Rights Abuses", in *Northwestern Journal of International Human Rights*, Vol. 13 No. 1 (2015), 26 pp., *passim*.
[725] Also see: TWANDA MAGAISA, A.: "Suing Multinational Corporate Groups for Torts in the Wake of the Lubbe Case –A comment", in MACMILLAN, F. (Ed.): *International Corporate Law Annual* (Volume II), Oxford 2003, Hart Publishing, pp. 315-322.

forum; nevertheless, at the second stage of the so-called *Spiliada test*, the Court found out that the costs of litigation and other serious difficulties for the applicants in South Africa would lead to an unacceptable denial of justice. If the *Spiliada test* became a useful tool to initially counterbalance the *forum non conveniens* doctrine, at the end the ECJ has declared the incompatibility of this doctrine with the Brussels Convention[726]. On the whole, the European answer has been a partial *forum necessitatis*, on the basic understanding that both article 47 of the European Charter of Fundamental Rights and article 6 of the European Convention on Human rights require access to effective judicial remedies, in principle without excluding third country nationals[727]. It is, similarly to the ATS, a possibility under development with mixed results.

Under the umbrella of art. 82 TFEU, the general applicable regime in the EU is essentially governed by Regulation (EC) No. 44/2001 of December 22nd 2000 (the EU consolidation of 1968 Brussels Convention), concerning jurisdiction and the recognition and enforcement of judgements in civil and commercial maters[728], provided that the claimant is domiciled in a Member State (art. 4). In the Resolution dated 13 March 2007 on "Corporate Social Responsibility: a new partnership", the European Parliament referred to this Regulation and enthusiastically asked the Commission "to implement a mechanism by which victims, including third-country nationals, can seek redress against European companies in the national courts of the Member States" and "organise and promote awareness campaigns and monitor the implementation of the application of foreign direct liability according to the Brussels Convention"[729]. It would appear that, in

[726] "Respect for the principle of legal certainty, which is one of the objectives of the Brussels Convention, would not be fully guaranteed if the court having jurisdiction under the Convention had to be allowed to apply the *forum non conveniens* doctrine. *[…]* the Brussels Convention precludes a court of a Contracting State from declining the jurisdiction conferred on it by Article 2 of that convention on the ground that a court of a non-Contracting State would be a more appropriate forum for the trial of the action even if the jurisdiction of no other Contracting State is in issue or the proceedings have no connecting factors to any other Contracting State", Case C-281/02, *Owusu v. Jackson*, Judgment of 1 March 2005 (Grand Chamber), para. 38 and 46.

[727] S. BARIATTI: "Diritti Fondamentali e Diritto Internazionale Privato dell'Unione Europea", in L.S. ROSSI (a cura di): *La protezione dei diritti fondamentali. Carta dei diritti UE e standards internazionali* (XV Convegno Bologna 10-11 Giugno 2010 Società Italiana di Diritto Internazionale), Napoli 2011, Ed. Scientifica, pp. 397-424, at pp. 414-421.

[728] *Brussels I Regulation* (European Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters of 27 September 1968), consolidated into EU Law through the Council Regulation (EC) No 44/2001 of 22 December 2000 *on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters* (Official Journal L 012 , 16/01/2001 P. 0001 – 0023).

[729] European Parliament: Resolution 2006/2133 (INI) on *Corporate Social Responsibility: a new partnership*, 13 March 2007, pars. 34 and 40. At: http://www.europarl.europa.eu/sides/getDoc.do?type=REPORT&reference=A6-2006-0471&language=EN#title2

the opinion of the Parliament, Regulation (EC) No. 44/2001 would allow corporate accountability in the Courts of Member States; legally speaking, this is a very controversial statement.

On one side, article 60[730] on the domicile of legal persons offers a wide notion (statutory seat, central administration or principle place of business). At first sight, the obvious difficulty is, again, to link parent and subsidiary, so that article 60 does not seem very useful. Indeed, when the legal person is not based in the EU, the link to the parent company is of dubious helpfulness. In *Vava and Others v. Anglo American South Africa Ltd* the decisional influence and direction of Anglo American Group over its South African subsidiary was not seen as a solid connecting factor for the English judge: "The fact that decisions taken and policies and strategies adopted by AA plc in England influence, indeed strongly influence, the decisions taken by AASA in South Africa does not alter the position"[731]. The relationship parent-subsidiary might be insufficient to bring a case to the EU, even in the British jurisdiction[732], if we must rely solely on article 60 of Regulation 44/2001.

It is true that we find hopeful signs too: in *Chandler v. Cape Plc* the judge admits that parent companies have duties of care over subsidiaries, even if not wholly-owned, at least "in relation to what might be called high level advice or strategy"[733] and demonstrated "that in appropriate circumstances the law may impose on a parent

[730] Article 60 goes: "1. For the purposes of this Regulation, a company or other legal person or association of natural or legal persons is domiciled at the place where it has its: (a) statutory seat, or (b) central administration, or (c) principal place of business. *2.* For the purposes of the United Kingdom and Ireland "statutory seat" means the registered office or, where there is no such office anywhere, the place of incorporation or, where there is no such place anywhere, the place under the law of which the formation took place. *3.* In order to determine whether a trust is domiciled in the Member State whose courts are seised of the matter, the court shall apply its rules of private international law." At "Brussels I Regulation" (European Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters of 27 September 1968), consolidated into EU Law through the Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Official Journal L 012 , 16/01/2001 P. 0001 – 0023).

[731] HIGH COURT OF JUSTICE (Queen's Bench Division): *Vava and Others v. Anglo American South Africa Limited –Appeal*, Judgment of 24 July 2013, EWHC 2131(QB), para. 72.

[732] The claimants tried to link parent and subsidiary unsuccessfully: "The article is not simply about where an entity's central administration is; it is about the entity having its central administration in a jurisdiction. Just as the other limbs of article 60(1) are about where the entity has its statutory seat or the entity principally conducts business, article 60(1)(b) is about where it carries out functions, not about where others carry out functions that affect it. […] it is not difficult to envisage circumstances in which an entity's entrepreneurial decisions are determined predominantly by the wishes of a bank or other institution on which it relies for its financial survival, but it could not, I think, really be suggested that it has its central administration where the bank or institution takes decisions.", *Ibíd.*, para. 71.

[733] HIGH COURT OF JUSTICE (Court of Appeal, Queen's Bench Division): *David Brian Chandler v Cape Plc (Appelant)*, Judgment of 25 April 2012, EWCA Civ 525, para. 66.

company responsibility for the health and safety of its subsidiary's employees"[734], including harms occurred abroad as in the case at stake, given that the "evidence shows that the parent company has a practice of intervening in the trading operations of the subsidiary, for example, production and funding issues"[735]. This is by the way perfectly coherent with our functional understanding of transnational business structures.

In Regulation 44/2001, there is no link based on the objet or content of the litigious, regardless of the domicile of the parties and its current interpretation is still unclear. If it is a collective claim or there is a number of defendants, article 6.1 of Reg. 44/2001 foresees that the domicile of one of them would be sufficient to sue in that Member State, when there is a clear link concerning the content of the process in order to "avoid the risk of irreconcilable judgements resulting from separate proceedings".

Critics allege that Brussels Convention is only applicable between Member States, but it has become clear that, as a starting point, the fundamental article 2 was clearly though to regulate "relationships between the courts of a single Contracting State and those of a non-Contracting State, rather than relationships between the courts of a number of Contracting States", as explained by the ECJ in *Owusu v. Jackson*[736]. With this in mind, we understand that the ECJ has justified joint hearings when "there is a connection of such kind that it is expedient to determine those actions together"[737], in line with article 6.1, and there is no need for the claims to have identical legal bases so that national courts will enjoy a interesting room for manoeuvre. The *forum necessitatis* doctrine, useful to avoid both denials of justice or irreconcilable judgments, has been upheld in two occasions by Dutch Courts, who explicitly put forward Member States' margin of appreciation under article 4.1 of Reg. 4/2001: "In part in view of article 4(1) of the Brussels Regulation, this means that the question regarding whether the court has international jurisdiction in respect of SPDC *[the Nigerian subsidiary of Royal Dutch*

[734] *Ibíd.*, para. 88.
[735] *Ibíd*. However, the judge felt very uncomfortable with the idea of piercing the corporate veil, insisted on the fact that the companies are separate entities and that on a case by case basis it should be shown that, specifically dealing with one problem, the parent company had a direct implication or duty: "I would emphatically reject any suggestion that this court is in any way concerned with what is usually referred to as piercing the corporate veil. A subsidiary and its company are separate entities. There is no imposition or assumption of responsibility by reason only that a company is the parent company of another company. The question is simply whether what the parent company did amounted to taking on a direct duty to the subsidiary's employees." *Ibíd.*, para 69 and 70.
[736] Case C-281/02, *Owusu v. Jackson*, Judgment of 1 March 2005 (Grand Chamber), para. 35.
[737] Case C-98/06, *Freeport plc v. Olle Arnoldsson*, Judgment of 11 October 2007, para. 39.

*Shell]* should be answered based on the Dutch Code of Civil Procedure"[738]. In that case, the Court adopted a progressive stance by accepting that "the corporate veil in group relationships may be directly or indirectly pierced, albeit under exceptional circumstances"[739] and finally concluded that the claimants succeeded to prove "a connection to such an extent that reasons of efficiency justify a joint hearing of the claims against RDS and SPDC"[740]. On a later occasion affecting the same company, sued by a different plaintiff, a joint hearing of the parent company and the Nigeria-based subsidiary was granted without any fear of "abuse of process"[741]. It must be noted as well that the same arguments were used to dismiss a third case against *Shell* in the Netherlands, because the District Court of the Hague was not convinced of the allegations of 'negligence' and considered that there was no concurrence of the "exceptional circumstances"[742] necessary, as said before, even citing Lord Goff of Chieveley –the leading judge in the above-cited *Spiliada* case.

This interpretation of articles 2, 4 and 6 of Reg. 44/2001 finds further support in a British case, where the domicile in England of the parent company was sufficient for the judge to issue a worldwide injunction to freeze assets of the parent company as "there was a real risk that Monterrico would not retain assets within the jurisdiction sufficient to meet any claim against it or Rio Blanco"[743], being the latter its subsidiary registered in Peru and thus confirming the subsidiary civil liability of the parent company. Moreover, we shall highlight that the British judge justified its jurisdiction *ratione personae* citing the interpretation of article 2 of Regulation 44/2001 made by the ECJ's in above-mentioned case *Owusu v. Jackson*[744]. In spite of all these promising developments, there are also some setbacks. For example, in a different case the ECJ decided that "Article 6(1) of Regulation No 44/2001 must be interpreted as meaning that it is not intended to apply to defendants who are not domiciled in another Member

[738] RECHTBANK DEN HAAG (Court of The Hague): *Plaintiffs 1 and 2 (Oruma) and Vereniging Milieudefendie v. Royal Dutch Shell and Shell Petroleum Development Company of Nigeria Ltd*, Judgment of 30 December 2009, Case No. 330891/HA ZA 09-579, para. 3.4.
[739] *Ibíd.*, para. 3.3.
[740] *Ibíd.*, para. 3.6.
[741] RECHTBANK DEN HAAG (District Court of the Hague): *Friday Alfred AKPAN (Ikot Ada Udo) and Vereniging Milieudefensie v. Royal Dutch Shell Plc and Shell Petroleum Company of Nigeria Ltd*, Judgment of 30 January 2013, Case No. C/09/337050/HA ZA 09-1580, para. 4.1.
[742] RECHTBANK DEN HAAG (District Court of The Hague): *Fidelis Ayoro OGURU and Alali EFANGA (Oruma) v. Royal Dutch Shell Plc and Shell Petroleum Development Company of Nigeria Ltd*, Judgment of 30 January 2013, Case No. C/09/330891/HA ZA 09-0579, para 4.53.
[743] HIGH COURT OF JUSTICE (Queen's Bench Division): *Guerrero and Others v. Monterrico Metals Plc and Rio Blanco Copper SA*, Judgment of 16 October 2009, EWHC 2475 (QB), para 28.
[744] *Ibíd.*, para. 23.

State, in the case where they are sued in proceedings brought against several defendants, some of whom are also persons domiciles in the European Union"[745], inconsistently the increasing case-law commented above.

In sum, the interpretation of Reg. 44/2001 shows some possibilities for transnational human rights litigation even though its interpretation is unclear at some points. On the other hand, since human rights breaches would basically lead to extra-contractual civil responsibilities, the above-mentioned regulation has to be read together with Reg. 864/2007 (*Rome II*[746]): though being separate and having different purposes, the ECJ has clarified that consistency between both regulations should be ensured[747]. *Rome II* clearly settles that the law applicable is that of the country where the harm occurs (art. 4) as a general rule, but this is not an impediment to accept jurisdiction in case of risks of denial of justice or irreconcilable judgments, if the Court applies the foreign law at stake: as we explained before, the civil corollary of applying the law of the new forum could lead to an "unlawful assertion of universal civil jurisdiction"[748] and might undermine the defendants' fundamental rights. In general terms, we insist that accepting jurisdiction should not lead to a change on the applicable law, unless it is clearly incompatible with human rights or basic judicial guarantees.

In fact, art. 5.3 of Reg. 44/2001 also enshrines the general rule that the law applicable is that of the place where the harmful event occurred. But the ECJ –contributing to the general confusion– has established that article 5.3 of Reg. 44/2001 "must be understood as being intended to cover both the place where the damage occurred and the place of the event giving rise to it, with the result that the defendant may be sued, at the option of the claimant, in the courts of either of those places"[749]. This should be valid also

[745] Case C-645/11, *Land Berlin v. Ellen Mirjam Sapir et al*., Judgment of 11 April 2013, para. 56.
[746] REGULATION (EC) No 864/2007 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL, of 11 July 2007, *on the law applicable to non-contractual obligations* (Rome II), *Official Journal* L-199/40 of 31/07/2007.
[747] Despite being a difficult equilibrium, which becomes manifest in the following writing style: "It must be stated next that, although it is apparent from recital 7 in the preamble to Regulation No. 864/2007 that the European Union legislature sought to ensure consistency between Regulation No. 44/2001, on the one hand, and the substantive scope and the provisions of Regulation No. 864/2007, on the other, that does not mean, however, that the provisions of Regulation No. 44/2001 must for that reason be interpreted in the light of the provisions of Regulation No. 864/2007. The objective of consistency cannot, in any event, lead to the provisions of Regulation No. 44/2001 being interpreted in a manner which is unconnected to the scheme and objectives pursued by that regulation". Case C-45/13, *Andreas Klainz v. Pantherwerke AG*, Judgment of 16 January 2014, para. 20.
[748] See *supra*, footnote 719.
[749] The Court was probably not thinking of transnational human rights litigation. Case C-45/13, *Andreas Klainz v. Pantherwerke AG*, Judgment of 16 January 2014, para. 23.

when one of these places is not a Contracting State, in view of the interpretation of article 2 made at *Owusu v Jackson*. Besides, in cases of environmental damage, even *Rome II* provides that the claimant can "base his or her claim on the law of the country in which the event giving rise to the damage occurred" (art. 7). The exact meaning of 'giving rise' and the situations to which it could be applied remains obscure: could it be extended to the operative decisions taken in the headquarters of TNCs that 'give rise to' eventual human rights violations in the field? Are human rights "overriding mandatory provisions" in accordance to article 16 of Rome II? Or perhaps human rights, as a common interest of the international society, might fit into article 26 referred to the "*ordre public* of the forum"? It is commonplace that the damages usually don't take place in Europe, but the "place of the event giving rise to it" might constitute a possibility to show a link with EU-based parent companies, to be added to other opportunity niches in the current regulations. For example, article 7 of *Rome II* is an open window that many authors wish to see extended to cases beyond 'environmental damages'[750].

To cite a more recent norm, the domicile of the defendant is still a key requirement in Regulation (EU) 1215/2012, in force since 10 January 2015. It could be argued that this territorial link should decline in exceptional circumstances, such as in cases of human rights violations. We might recall that the Commission in 2010 had a more ambitious proposal to improve this regulation[751], even though a general rule on "related actions" to allow extraterritorial accountability of European companies wasn't either considered, not even in exceptional terms in cases of human rights violations. All in all, the recast regulation 1215/2012 maintained the territorial link based on the domicile of the defendant, but in the overall respected and preserved a good amount of flexibility at the level of Member States and their own margin of manoeuvre, which is a strange option to the extent the European integration heads to uniformity and harmonisation. Perhaps the lack of political will and *consensus* is behind these mixed results and the discreet and ambiguous role of the Commission. Whatever the case may be, we have seen that there are interesting examples of this margin of appreciation that show a certain

[750] V. VAN DEN EECKHOUT: "Corporate Human Rights Violations and Private International Law. The Hinge Function and Conductivity of PIL in Implementing Human Rights in Civil Proceedings in Europe: A Facilitating Role for PIL or PIL as a Complicating Factor?", in *Contemporary Readings in Law and Social Justice*, Vol. 4 No. 2 (2012), pp. 178-207, at p. 194.
[751] COM (2010) 748 Final.

potential for transnational human rights litigation, with the leading role of British and Dutch courts.

It is early to know to what extent the margin of member States will be sufficient to cope with the deficiencies of Regulations 44/01 and 1215/2012 with respect to the direct or indirect involvement of EU companies in human rights violations in third countries. A different option would be to increase the relative weight of Reg. 864/2007 to counterbalance some unclear aspects of Reg. 44/2001. A case by case and a State by State scenario is, in our view, unlikely to create solid bases and, sooner or later, a revision will be necessary at the EU level (and well beyond a simple amendment). For different reasons, it doesn't seem realistic to expect a modification in the near future. In addition to the technical difficulties, to accept new jurisdiction criteria (something like a "related action" connection to sue in European Courts) clearly requires a wider political will to support civil suits for human rights violations even when the facts occur in third countries or when there is not a person involved with a clear European connection.

Finally, the obligation to provide with free legal assistance if necessary, as a fundamental tool to ensure an effective access to justice, derives from the European Convention on Human Rights. The Convention does not explicitly envisage it in civil proceedings; but the ECHR has clarified that under article 6.1 of the treaty it can be considered as an element of the right to a fair trial, very particularly when exceptional circumstances arise becoming evident a high risk of inequality of arms between the parties in *inter partes* proceedings. In the case *Steel and Morris v. The United Kingdom*, the European Court Of Human Rights stated that "the denial of legal aid to the applicants deprived them of the opportunity to present their case effectively before the Courts and contributed to an unacceptable inequality of arms" which in turn may lead to the violation of substantial human rights such as, in that case, freedom of expression in terms of proportionality: "If, however, a State decides to provide such a remedy to a corporate body, it is essential in order to safeguard the countervailing interests in free expression and open debate, that a measure of legal aid rendered the defamation proceedings unfair, in breach of art. 6.1. The inequality of arms and the difficulties

under which the applicants laboured are also significant in assessing the proportionality of the interference under Article 10" (and we presume that many other articles). [752]

Also the Charter of Fundamental Rights of the European Union, in its article 47.3 states that "legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice". The question is the practical degree of coverage: the aspects covered and if it is a right of any person trying to file a lawsuit in the territory of the EU regardless of his or her nationality and domicile. Directive 2003/8/EC to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid for such disputes[753] could help us answering these questions. There was no doubt for all Union citizens and third-country nationals who habitually and lawfully reside in a Member State (recital 13 of the Directive) and, to comply with non-discrimination principle, article 4 provides that any member State will offer this legal aid to *any* Union citizen or third-country national with domicile in *another* member State. This condition significantly reduces the possibilities to sue, even more when it is not clear if the requirement is fulfilled once an application of legal residency is filed or only when it is approved. In sum, it is not a useful tool for our purpose as it is aimed at clarifying the right of Union citizen or third-country national legally domiciled to have access to legal aid in any member State different from that of his residence or nationality.

This solves many problems inside Europe, but doesn't give an answer to our question to the extent the situations involving third States as scenario of the dispute or origin of at least one of the parties in the proceeding. The two Hague Conventions, that is, first of all Convention II (March 1954) [754] on civil procedure and Convention XXIX (25 October 1980) on international access to justice basically obliges to provide in this regard the same national treatment to nationals of any of the parties to the Treaty. Convention XXIX of 1980 develops this idea and requires nationals of contracting States and persons habitually resident in a contracting State to be treated, for the purposes of legal aid in court proceedings in each contracting State, as if they were

[752] ECHR: *Steel and Morris v. The United Kingdom*, Case 68416/01, 15 February 2005 (Final 15 May 2005), par. 72 and 95. In the same direction see the Case *Airey v. Ireland* A32/1979 which also started to extend free legal aid to civil cases (in the case of an indigent).

[753] COUNCIL DIRECTIVE 2002/8/EC of 27 January 2003, accessible at http://eur-lex.europa.eu/legal-content/en/ALL/;ELX_SESSIONID=1tnZJRCG7TQTQH98bM0vwbKFny1Tzv2RQjXZYtNvPSN7Q66TjR2w!-1249367065?uri=CELEX:32003L0008 , Recital 13 read together with articles 1 and 4.

[754] Ratified by Austria, Belgium, Denmark, Finland, France, Germany, Italy, Luxemboug, the Netherlands, Portual, Sain and Sweden.

nationals of and resident in that State. The Commission therefore indicated that it was highly desirable to extend the ratification of 1980 Hague Convention[755] in order to advance in the solution of the problem and a proposal for Recommendation was drafted[756]. Well accepted by the European Parliament and by the Economic and Social Committee, it didn't convince the Council of member States: the public debate focused on the extent to which non-European citizens would benefit much more than Union citizens from the treaty. The accession to 1980 Hague Convention on international access to justice might seem a good shortcut but is actually, in the light of our explanation, just a quick political fix without expectations of long-term success because of the technical problems. To sum up[757], the regulation of access to justice by the Directive 2003/8/EC has two remaining loopholes: a) the eligibility criteria *ratione personae* and substantive admissibility, still unclear for third countries (we are far from some kind of "alien tort statute"); b) and secondly, article 3 of this Directive completely forgets legal persons.

The Commission has somehow understood that we may dare expanding the traditional mould of admissibility criteria, among which we should reach a new balance in cases of human rights violations. This way, we would give better protection to the weaker party in these processes, especially when local judicial systems show structural deficiencies and, of course, provided there is a direct or indirect involvement of an EU-based Company. This is a logical a measure in a world of increasingly integrated economies and communications, but requires a clear political will. The EU has the opportunity to show the way and part of the work concerning access to justice (detecting the main issues at stake) is done. For the time being, the European initiatives in this regard have been shy but, as we have seen, the EU has discreetly preserved a sufficient margin of appreciation to allow Member States to go further.

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[755] To see the updated status of signatures and ratifications: http://www.hcch.net/index_en.php?act=conventions.status&cid=91

[756] COM (86) 610 Final, of 13 November 1986.

[757] This paragraph is based on the interesting analysis of shortfalls and possible improvements at: M. REQUEJO ISIDRO: "Access to remedy: abusos contra derechos humanos en terceros Estados, ¿Justicia civil en Europa?", in F.J. ZAMORA, J. GARCÍA CÍVICO and L. SALES PALLARDÉS (Eds.): *op. cit.*, pp. 79-107.

### 4.3. The role of the EU and the post-2015 agenda

Taking into consideration this specific analysis of CSR in the EU, it is clear that its contents are still under development. CSR grows somehow disorderly for different reasons: first, the interaction between EU institutions, since the Parliament, the Council and the Commission have different priorities and working methods; because Member States themselves show diverse understandings and speeds; and because it has spread to different policies and law-fields, apparently without a logical storyline behind –we mean, hardly predictable –with good progresses alongside failures or omissions.

Besides, we face a complex mix of *hard* and *soft law*, the question of access to remedies is still pending as well as its future interaction with classical human rights instruments. Only time will tell how the traditional *ex-post* and vertical human rights mechanisms can be completed by CSR, defined as a mostly *ex-ante* (preventive) and horizontal approach[758]. We started this research raising questions such as: What are the differences and similarities between the EU and other international organisations in promoting CSR? How has operated the interaction between them? To what extent the EU leads the way and in which aspects? What have been its successes and deficiencies, to evaluate its potential leadership in the international scenario? Since when and how is CSR inserted into EU policies? Could we make emerge CSR issues before it was labelled as such? Are there original aspects in the European CSR? What is the legal value of the diverse initiatives? In short, the five W's of CSR, as a journalist would say: *who*, *what*, *where*, *when* and *why*, and of course, *how* –which is a transversal question.

We have answered most of these questions *au fur et à mesure*. Provided certain caution and criticism advisable in any research, we do not find justified the excessive fears with regard to soft methods to *complement* the human rights regime: shall we recall, for example, that in the CFSP *"si può tranquillamente affermare, ad esemplio, che il contributo alla pace dato dalla Comunità europea con i suoi mezi "soft" ed indiretti è stato molto più importante di quello dato sin qui dall'Unione con i suoi strumenti diretti di politica estera e militare"*[759]. The following concluding remarks are aimed at tying up some loose ends on the role of the EU in promoting CSR. We divide it into two

[758] See Chapter I (Section 3) for our discussion on the emergence and definition of CSR.
[759] L.S. ROSSI: "L'Unione Europea", in L.S. ROSSI (a cura di): *Le Organizzazioni Internazionali come Strumenti di Governo Multilaterale*, Milano 2006, Giuffrè Ed., pp. 9-48, at p. 41.

different categories: institutional aspects that mark its development, and substantive contributions that might shed light on its potential.

### *4.3.1. The role of the EU: some institutional remarks*

As for the general principles and broad spectrum initiatives, it is evident that the first achievements fall on international organisations with universal scope (first part of this research). It seems in some measure (and for instance) that the EU has followed the path set out by those other organisations at a universal level and has, later, tried to lead the way with mixed results. The European strategy is explicitly built upon the OECD Guidelines for Multinational Enterprises, the UN Guiding Principles, the eight core ILO conventions, and the ISO 26000, which remain the most important references. The EU readily acknowledges this inspiration but the Commission is keen to clarify that "*[t]*he EU role here does not duplicate the role of the UN Working Group or other existing mechanisms"[760].

Indeed, the EU is a unique organisation in the international scenario so that, intuitively, there must be institutional particularities with an influence on the development of CSR. The high degree of integration, now both economic and political, renders it more and more difficult to reach the *equilibrium* between a market-oriented and a rights-based Europe. CSR is somewhere in between. To the equation we have to add the hackneyed discussion on legitimate, democratic *but efficient* institutions. As we have seen, since 2000 the EU institutions have embraced the so-called new modes of governance, a *soft-law fashion* extended to many other policy areas after the entry into force of the Treaty of Lisbon in 2009. Analytically and institutionally, the discussion hereafter refers to a variety of debates and subjects concerning the EU institutional building: at first sight, some might seem off-topic, but all have an impact on the way in which CSR has been developed, starting with an analysis of governance issues to continue with the complex interaction between the Commission, the Parliament, the Council and the ECJ.

We have already signalled the *pros* and *cons* of soft law, in relation to CSR; soft law, however, has an institutional dimension: the current informal modes of governance. It

[760] SWD (2015) 144 Final, 14 July 2015, on *Implementing the UN Guiding Principles on Business and Human Rights –State of Play*, p. 6.

goes without saying that almost any kind of informal governance has been put in practice during the initial implementation of the CSR agenda, to supposedly increase the efficiency and democratic character of the institutions' work. The alleged greater transparency and inclusiveness of the decision-making process has to be nuanced: nobody would be against hearing a myriad of stakeholders, but criteria on their variable selection are loose and obscure; no one would deny the political helpfulness of more flexible or even amorphous structures for negotiations but, as a consequence, we face more uncertain and unpredictable outcomes. The process can actually become slower, more expensive and even "reduce the quality of the decisions by driving those decisions to those that are the lowest common denominator"[761]. As with soft law, a particular product of informal governance, we already stated that problems are not the tools but the way they are used, the guarantees to ensure that these "devices" are effectively open and inclusive[762].

We might also argue that human rights precisely constitute an area in which the need of uniformity tends to discourage the adoption of informal modes of governance. After all, if we are speaking about democratic institutions and fundamental rights, we would all agree that they should be effective with the existing mechanisms, even in their complicated interaction with business activities. What are then the reasons for the success –or at least, growth– of these new informal governance schemes behind CSR?

Three law-making changes have simultaneously developed in the EU: a horizontal bureaucratisation, a vertical Europeanisation and a lateral privatisation, which all together create a "3D governance space" [763] in such a way that the EU is somewhere in between with the potential of intervening in the three dimensions. This evolution has led to a "complex *[that]* may work more effectively, while still bestowing mediated legitimacy, by casting a hierarchical shadow over more (though never fully) autonomous lawmakers, instead of trying to steer them too heavily or too directly, for

[761] B. GUY PETERS: "Forms of Informal Governance: searching for efficiency and democracy", in T. CHRISTIANSEN and T. LARSON (Eds.): *The Role of Committees in the Policy-Process of the European Union. Legislation, Implementation and Deliberation*, Cheltenham (UK) – Northampton (USA) 2007, Edward Elgar Ed., pp. 39-63, at p. 45.
[762] This confirms the need of looking not only at formal aspects, but also at the material practice: "Hence, again we need to examine the consequences of informality, both empirical and normative, rather carefully". *Ibíd.*, p. 60.
[763] J. CORKIN: "Constitutionalism in 3D: Mapping and Legitimating Our Lawmaking Underworld", in *European Law Journal*, Vol. 19 No. 5 (September 2013), pp. 636-661, *passim.*

which it anyway lacks the capacity"[764]. Being perhaps disappointing, in view of the challenges of globalisation and the factual power of MNCs, it is utterly important to realise this lack of capacity to defend human rights with traditional *hard moulds* in some cases, and rather take a pragmatic approach to work proactively and take the most of the available opportunities to influence on the new global order in defence of human rights. This does not mean to relinquish other mechanisms for the protection of human rights.

The EU seems to have taken up this institutional role, abandoning positivist and theoretic fears on the procedures followed, despite the obvious risks that refer to democracy, legitimacy, inclusiveness and participation.

We are far from reinventing the wheel concerning governance; we will only draw attention to the usual misunderstanding that semantically links it to types of government when, in fact, it has more to do with forms of policy making or exercising power. The study of CSR reveals linkages between *public governance* and *corporate governance*, which according to us have an unavoidable human rights component. In this sense we dare to propose a rather simple but pragmatic definition of governance: 'the behavioural and procedural aspects of the institutional exercise of power, public or private, allegedly based on selected ethical values of the Community at stake'. In this way, we include the public and private dimensions, the human rights core ingredients and motivations, and the fact that CSR predominantly consists of *practices* (behaviours and procedures) to *prevent* human rights abuses.

As it happens with soft law, it is difficult to take a scientific stance on to what extent informal governance exclusively responds to neo-liberal wishes or, to a certain extent, also to other factors like a historical elitist inertia in the European integration project (when doubts appear as to the degree of inclusiveness of decision-making processes). In this respect we warn on the usual confusion between political accountability and legal responsibility, very frequently mixed up for ideological purposes. The Commission herself makes an ambiguous mishmash of *ex-ante* and *ex-post* responsibilities "tend[ing] to blur accountability with issues of representative deliberation"[765]. Paradoxically, it is the success of the EU that has led to its increasing and

[764] *Ibíd.*, p. 658.
[765] M. BOVENS: "Analysing and Assessing Accountability: A Conceptual Framework", in *European Law Review*, Vol. 13 No. 4 (July 2007), pp. 447-468, at p. 453.

unprecedented *administratisation*. This takes us to the borders of the treaties: articles 288 and 290 TFEU establish an apparently clear-cut distinction between legislative and non-legislative acts, their respective legal effects and the delegation of powers to the Commission, but they insufficiently address the operational tasks that need to be accomplished to deal with this increasingly specialised EU administration.

In a very interesting precedent-setting case, precisely related to the cooperation in the social field (employment and working conditions) and migration policies, the ECJ clearly distinguished between competences and powers: while it declared void a Commission initiative to initiate a consultation procedure on migration policies because it lacked competences, it nevertheless dismissed the application of various Member States worried about the leading role and organisational tasks of the Commission in other social issues when it decides to start a consultation process (so usual in CSR). The ECJ strongly emphasised that "where an article of the EEC Treaty –in this case Article 118– confers a specific task on the Commission it must be accepted, if that provision is not to be rendered wholly ineffective, that it confers on the Commission necessarily and *per se* the powers which are indispensable in order to carry out that task"[766]. The understandable fear of Member States as to the level of actual influence of the Commission found no legal support but, as early as 1987, anticipated the problem of the relative power of the Commission only by coordinating consultations, despite the fact that, of course, it could not be proved to what extent the Commission would inform the final outcome, as it happens with soft law, soft governance and CSR. In other words, the informal but real power derived from the institutional role of the Commission, though merely procedural, does not seem a *juridifyable* matter for the Court, naively concluding that "[s]ince the Commission has a power of a purely procedural nature to initiate a consultation procedure it cannot determine the result to be achieved in that consultation"[767].

We insist that this administrative growth is the result of a relative success of the EU, even though it is a 'double-edged sword'. Its combination with new governance modes has generated a plurality of networks and agencies and other bodies in such a way that, in no small measure, it develops into a *soft administratisation*. Informal governance

[766] Joined Cases 281, 283 to 285 and 287/85, *Germany, France, Netherlands, Denmark and United Kingdom v. Commission*, Judgement of 9 July 1987, para 28.
[767] *Ibíd.*, para. 34.

makes it easier to operationalise the increasing administrative needs of the EU, not bearable anymore by the Commission on her own because of their number, specificity and technical character. In sum, informal governance *softens* but *allows* the deepening of market integration up to ever higher levels that need a proper administration.

CSR has to be contextualised in the wider framework of market integration. 'Responsible' market integration has therefore to combine merely economic regulation with CSR-informed governance, in a relatively flexible manner that facilitates getting closer to an "ecosocial market economy", in the words of Mrs. Ferrero-Waldner, European Commissioner for External Relations back in 2007[768]. Truly strict interpretation of the treaties would be likely to impede certain levels of harmonisation of the internal markets, partially achieved through soft law and new governance forms, most prominent among which are also agencies and networks. The enlargement eastwards has also had an influence since the negotiations in Brussels become tougher, making *soft harmonisation* more attractive. The Commission thus circumvents legal limits to its competences, as regards implementation, and has taken the opportunity to go beyond in certain policies –like CSR–, through soft strategies in view of the lack of proper powers under the treaties. Another example are EU networks of regulators with more or less informal characteristics: "lacking the legal instruments to coordinate policies in certain sectors, the Commission would primarily attempt to indirectly expand the range of issues that fall under supranational competences by coordinating networks of regulators"[769]. In the area of CSR, this can explain the emphasis of the Commission in apparently grey 'coordination tasks' that we defined as 'information and promotion strategies'[770]. These information and promotion strategies bring the occasion to gather with and influence public and private regulators: informal peer reviews with Member States or other national authorities, along with private-led organisations with standard-setting vocation and companies themselves.

Certainly, CSR has interwoven a great number of stakeholders and specialists, allocating funds for research and policy papers. We have cited a number of reports and

[768] Cited by: V. BACHMANN and J.D. SIDAWAY: "*Zivilmacht Europa*: A Critical Geopolitics of the European Union as a Global Power", *in Transactions of the Institute of British Geographers, New Series*, Vol. 34 No. 1 (January 2009), pp. 94-109, at p. 103.
[769] Moreover, the Commission profits from the fact that Member States have already delegated powers to their respective national institutions and, later, the Commission informally coordinates them with a clear influence on the outputs. M. ZINZANI: *Market Integration through Network Governance: the Role of the European Agencies and Networks of Regulators*, Cambridge 2012, Intersentia Ed., p. 25.
[770] Refer to Chapter III, Section 2.1.

studies on different aspects of CSR, in which the external influence of 'stakeholders' and 'experts' is sometimes direct, as when the study is produced by external institutions like the University of Edinburgh (the *Study of the Legal Framework on Human Rights and the Environment Applicable to European Enterprises Operating outside the European Union*) or Commission's study on *Responsible Supply Chains*, tasked to a group of research projects under a services contract for the High Level Group on Corporate Social Responsibility. In some other cases, the external influence is indirect and less easy to be traced such as the meetings and networking events that precede, for example, the sectoral CSR handbooks published by the Commission. In sum, we have mentioned reports, strategies, frameworks and guidelines, being the most important the *Renewed EU Strategy for 2011-2014*.

These documents were not without consequences, as we have seen a partial –at times audacious- implementation. We have even shown its permeation into proper EU Law. From the companies' perspective, it starts to be risky to turn a blind eye to this incipient regulatory scenario and the future agenda. In this sense, we have observed that the Commission has moved from a framework phase to a more strategic and active phase after 2009. Precisely at this step it is necessary to wonder on the share of external influences. It appears almost impossible to gauge the real impact of stakeholders, experts and other informal actors about whom doubts persist in terms of legitimacy, conflict of interests, and supervision.

It must be said that this institutional *modus operandi* is not limited to CSR; it reflects by the way a wider political dynamic in the EU. Recourse to experts and the *agencification* of the EU are explained by the above-mentioned specialised administrative tasks that the Commission no longer performs due to its number and technical character. This research is not centred on this particular phenomenon, although it deserves –*en passant*– a short comment since experts and other unknown actors have contributed to shape CSR in the EU. CSR is also, in part, the result of this cumulative technocratic administratisation of the EU, based on the passivity of Member States –rather than an active support: a "permissive consensus" or a "seductive formula of political abdication"[771]. The legal responsibility, in cases of breach of the treaties, is likely to fall

[771] M. EVERSON: "The European System of Financial Supervision: a Technology of Expertise", in M. AMBRUS, K. ARTS, E. HEY and H. RAULUS: *The Role of 'Experts' in International and European*

on the Commission as the most usual formal decision-maker; nevertheless, the political accountability will be vaguer and vaguer. Challenges will be insurmountable for social scientists eager to contextualise their researches in "their socio-economic terrains, [as] we risk not seeing how those who supposedly influence policies (experts) are themselves also influenced by material, ideational and institutional considerations"[772]. The objective is not to discuss the expertise of experts or the representativity of particular stakeholders, but to remain critical in terms of, respectively, their alleged scientific neutrality or full inclusiveness: the EU should establish some kind of "legitimacy test"[773] or double-check procedure or administrative filter, even more important taking into account the international influence of the EU when it officially takes a stand.

If we may be allowed to incur a short philosophical *excursus*, it is our personal opinion that soft governance, manifesting itself in the form of soft norms, with the concrete example of CSR, all shall be the materialisation of changing mentalities, a process that will have to be confirmed in the *longue durée*, in the words of the French historian Braudel. We have already cited another French thinker, Foucault, to warn on the discourses of truth and its political management[774]. The multiplication of experts, the super-specialisation, and their institutional reflection (bodies, agencies, multistakeholder forums, etc.) respond, in our view, to a general crisis of legitimacies. The end of the Cold War and the progressive achievements of welfare states have led to a partial de-politicisation of western societies. Postmodernism is also behind the questioning of almost any source of legitimacy, in particular in the political scene. Even democracy is suffering this crisis of legitimacies in the sense that its operative bases are under discussion: for example, "deliberative" formulas gain adepts in the era of internet. Only the scientific and technical legitimation seems to resist and might explain a *scientificization* or technification of politics (the "political abdication" to which we referred before). This is not to discuss the progress of sciences, today better than yesterday in the way they describe and explain nature; however, it seems a bit

*Decision-Making Processes. Advisors, Decision Makers or Irrelevant Actors?*, Cambridge 2014, Cambridge University Press, pp. 315-340, at p. 334.

[772] This is one of the conclusions of a study on the profiles of the experts who took part in the Larosière Commission for the reform of the European financial system between 2009 and 2010. See K. KNIO: "The Role of Experts and Financial Supervision in the European Union: the De Larosière Commission", in *Ibíd.*, pp. 341-360, at p. 359.

[773] C. DEVAUX: "The Role of Experts in the Elaboration of the Cape Town Convention: Between Authority and Legitimacy", in *European Law Review*, Vol. 19 No. 6 (November 2013), pp. 843-863.

[774] *Supra*, footnote 583.

illusionary to express it in ontological terms, as if we were 'closer to truth' and this being a self-sufficient and definitive authority to shape policy making: we forget that tomorrows' science will also be better than todays' and it is not a linear ontologically-finalistic but an arborescent development that also entails uncertainty[775].

As is apparent, institutional soft governance may entail strong powers, with its lights and shadows. We have seen that a lateral question in this regard is the identification of the actual decision-makers. Networks and agencies share the same institutional problems: legitimacy, transparency, and supervision. These can perfectly be extrapolated to CSR policies, as it might seem that the real decision-makers avoid spotlights, escape accountability. There are reasonable doubts on *who* is really making decisions, on the share of the institutional input in the final guidelines, recommendations, communications and –more importantly- directives. It has been studied that "the activist role of the ECJ"[776] has been fundamental to control the decisions made by agencies and this case-law finally crystallised in the current wording of article 263 TFEU that openly provides the review of "the legality of acts of bodies, offices or agencies of the Union intended to produce legal effects vis-à-vis third parties". Article 263 TFEU repeatedly uses the expression "intended to produce legal effects": this constitutes a further recognition of the ECJ case law in relation to the scrutiny of soft law, as explained elsewhere in this work, confirming that it is impossible to return narrow positivist positions based on formal legal distinctions. We have to adopt a more functional perspective to study the actual effects of institutions' work, in a broad sense –the term 'bodies' invites to a lax interpretation as for the European institutional building. Besides, article 290 TFEU (comma 2 *a)*) includes an extra precaution, the permanent threat of the European Parliament or the Council "to revoke the delegation" of powers to the Commission at any moment. These provisions therefore adapt the treaties to the growing administrative complexity of the EU in the

[775] As Thomas Kuhn stated: "A scientific theory is usually felt to be better than its predecessors not only in the sense that it is a better instrument for discovering and solving puzzles but also because it is somehow a better representation of what nature is really like. One often hears that successive theories grow ever closer to, or approximate more and more closely to, the truth. […] There is, I think, no theory-independent way to reconstruct phrases like 'really there'; the notion of a match between the ontology of a theory and its 'real' counterpart in nature now seems to me illusive in principle. […] I do not doubt, for example, that Newton's mechanics improves on Aristotle's and that Einstein's improve on Newton's as instruments for puzzle-solving. But I can see in their succession no coherent direction of ontological development." T. S. KUHN: *The Structure of Scientific Revolutions*, Chicago 1970 (Second Edition enlarged), University of Chicago Press, Vol II No. 2, p. 206.

[776] E. MADALINA BUSUIOC: "Blurred areas of responsibility: Europen agencies' scientific 'opinions' under scrutiny", in M. AMBRUS, K. ARTS, E. HEY and H. RAULUS: *op. cit.*, pp. 383-402, at p. 387.

understanding that it is no longer a mere question of competences, but a problem of implementation and daily exercise of powers. At the same time, the ECJ seized the political opportunity[777]. The initial development of CSR confirms this role of the ECJ: firstly, to support positive developments made by Member States that included early social and environmental clauses in public procurement (cases against France, the Netherlands, Finland and Austria[778]); and secondly, to allow the judicial review of soft law regardless of formal *nomen iuris* distinctions before this was contemplated in the TFEU[779].

In any case, the ECJ will indirectly scrutinise *soft governance* through the eventual revision of *soft law*, if intended to have legal effects. However, this method focuses on the content, *i.e.*, on the material product of the new modes of governance but not on the validity of the institutional procedures behind and, therefore, constitutes a very indirect and weak control of the institutional working methods. Diffuse and hardly identifiable decision-makers may generate confusion in a system where "not only is the *demos* absent but –like Kafka's Castle perhaps– there is also no one in charge who can ever be *held responsible*"[780].

On another front, with this general institutional problematics in mind, it is well-known that the EU is not institutionally homogeneous: we have studied various documents emanating from the Commission (most of them), and also from the Council and the Parliament. Equally important has been the parallel ECJ case-law to reassure us on the eventual judicial review of soft law and soft governance. The institutional interplay inside the EU also determines its potential role and it is time to make some final remarks in this respect. For instance, the Commission is the protagonist in the development of CSR although we have to recall that this is the result of an evolving opinion influenced, in some particular cases, by the practice of advanced EU Member States or, last but not least, by some US initiatives.

Again, as shown, the Commission has not always been the 'torchbearer'. Nor is the European Parliament free of contradictions. In the overall, the EP looked like the most progressive EU institution in terms of CSR. The cited EP's reports on CSR and its

[777] *Ibíd.*, p. 389.
[778] Please refer Chapter III, Section 3.1.
[779] Please refer Chapter IV, Section 1.
[780] C. SHORE: "European Governance or Governmentality? The European Commission and the Future of Democratic Government", in *European Law Review*, Vol. 17 No. 3 (May 2011), pp. 287-303, at p. 301.

proposals for amendments to the studied directives support a *harder* and justicialist approach, generally contrary to soft governance and technocracy. In the heat of the crisis, while CSR reports include pompous statements on the need to transparently regulate corporate governance, the EP "enthusiastically welcomed the ESFS [European System of Financial Supervision], discarding its long-standing opposition to further consolidation of EU technocratic governance, in particular by means of supranational agencification"[781].

As for CSR, the role of the Council should not be underestimated either. We tend to forget that the EU is, to a lower degree than years ago, but still, an international organisation composed of "High Contracting Parties": "*il metodo intergovernativo tende periodicamente a riapparire nella realtà della vita istituzionale*"[782]. An obvious example of the remaining intergovernmental nature of the EU is the accession procedure settled by article 49 TEU which establishes that "the conditions of eligibility agreed upon by the European Council shall be taken into account", a language that does not accurately show how important the Council is (let's recall the Copenhagen criteria). The infringement procedure is a less obvious but perfect example of the remaining intergovernmental and classical international procedures within the EU: under the European Coal and Steel Convention, the High Authority "was obligated to pursue infringements *[… whereas]* the Commission enjoys full discretion in this respect"[783]. In comparison, the pre-litigation phase has therefore been *softened* and politicised. Article 258 TFEU only states that the Commission "may bring the matter before the Court". This evolution can also be explained in terms of *governance:* 'soft' ways of implementation and management of compliance, even including "means to put pressure on the Member States to comply with non-binding instruments, such as letters of notice" in the context of the "emergence of non-binding auxiliary enforcement procedures", like preventive measures in the agricultural and fisheries policies[784]. The EU institutional architecture is hybrid so that hybrid legal results should come as no surprise as well as the influence of inter-governmental *fora* like the Council.

[781] M. EVERSON: *op. cit.*, pp. 315-340, at p. 320-321.
[782] R. ADAM and A. TIZZANO: *Manuale di Diritto dell'Unione Europea*, Torino 2014, G. Giappichelli Ed., p. 37.
[783] S. ANDERSEN: *The enforcement of EU Law. The role of the European Commission*, Oxford 2012, Oxford University Press, p. 131.
[784] *Ibíd.*, pp. 190 and 202.

We detect abundant references to the Council Conclusions in the CSR initiatives undertaken by the Commission (communications, recitals of the Directives), especially the seminal European Councils at Lisbon (2000), Stockholm and Gothenburg (2001). The EU intergovernmental nature is an undeniable part of its institutional DNA and it should not be forgotten that the recourse to Council Conclusions "*all'interno dell'*iter *legislativo può determinare uno sviamento di procedura*"[785] so that its role shall not be neglected. The Council provided the necessary political impulse to initiate the European CSR agenda when it invited (since it cannot oblige) the Commission to submit reports and communications in the topic at hand. The Commission's *Green Paper* of 2001 and, more recently, its *Renewed Strategy for CSR 2011-2014* are a response to this political will. The Renewed EU Strategy for 2011-2014 recalled that "The Council and the European Parliament have both called on the Commission to further develop its CSR Policy" [786], expressly citing the Environment Council of 5 December 2008, the Environment Council of 20 December 2010, the Foreign Affairs Council of 14 June 2010 and two EP resolutions of 2007 and 2011, the institutional legitimation of the Commission to act despite being soft governance issues.

These initiatives have more institutional weight when they are backed-up by the Council, which is also the main party in the CFSP and, accordingly, an indispensable actor to impulse the external dimension of CSR. Beyond the stereotypes on inter-institutional battles (that –at times– occur), there is a good amount of political compromises and *permissive cooperation*, to take up and adapt the concept of 'permissive consensus' to which we alluded above. And even, "on several occasions, the European Parliament has considered it useful to request, in the course of the EU decision making process, the inclusion of explicit references to European Council Conclusions in EU legislation to be adopted"[787], with a clear intention to increase the political weight of the initiatives at stake and indirectly recognising that many Council Conclusions might be seen as political "mandates"[788]. We have referred to the *EU Strategic Framework and Action Plan on Human Rights and Democracy 2012-2014*, precisely adopted by the Council (Council Doc. 11855/12), even though it has no choice

[785] R. ADAM and A. TIZZANO: *Manuale…*, *op. cit.*, p. 181.
[786] COM (2011) 681 Final, *op. cit.*, p. 4.
[787] F. EGGERMONT: *The Changing Role of the European Council in the Institutional Framework of the European Union: Consequences for the European Integration Process*, Cambridge 2012, Intersentia Ed., p. 354.
[788] *Ibíd.*, p. 360.

but to precise, in a footnote, that "decisions on specific steps to implement this Action Plan will be taken in accordance with the Treaties" and "does not affect the division of competence between the EU and its Member States". The first initiative fell on the Commission's Communication "Human Rights and Democracy at the heart of the EU External Action –towards a more effective approach", dated December 2011, which mutated into the framework and action plan adopted by the Council in June 2012. In the 2015 spring, again the Commission and the High Representative for Foreign Affairs and Security Policy took the initiative and issued a joint communication with the proposal of a renewed Action Plan for the Period 2015-2019, calling on the Council to adopt it. More rapidly that with the first action plan, only two months later, the Foreign Affairs Council adopts it illustrating this inter-institutional permissive cooperation and, to some extent, the bi-directionality of (soft) political mandates between the Commission and the Council.

We shall make a final point on the Council. According to the EU's own documentation, apart from private actors, CSR also concerns public authorities. The success of transparency requirements is one of its key-drivers so that the calls for more transparency have been extended to the EU institutions. The Grand Chamber consolidated the necessary openness and transparency of the Council vis-à-vis EU citizens with respect to decision-making processes, defining it as an "overriding public interest" clarifying the institutional work of the EU, based on the "democratic right of European citizens to scrutinize the information which has formed the basis of a legislative act, as referred to, in particular, in recitals 2 and 6 of the preamble to Regulation No. 1049/2001"[789]. In a second paradigmatic case, the NGO Access Info Europe challenged before the Court the decision of the Council to disclose the minutes of negotiations without detailing Member States' positions. In appeal, the First Chamber upheld the General Court decision and dismissed the Council allegations on the supposed sensitive nature of the documents requested that would justify an exception to disclosure of information in virtue of art. 4(3) of Regulation 1049/2001. By rejecting this argument, the ECJ understands that the exception needs to be assessed on a case-by-case basis and was not sufficiently proved, therefore supporting the idea that the effectiveness of the Council's decision-making process was not under threat because of

[789] Joined Cases C-39/05 P and C-52/05 P, *Kingdom of Sweden and Maurizio Turco v. Council*, Judgement of 1 July 2008, para. 67.

transparency. The ECJ indirectly confirmed, as alleged by Access Info Europe, that "it is precisely at the point when the procedure is initiated that maximum transparency is vital: by the time that discussions have already been held and compromise positions reached, transparency and public debate are no longer of any use at all"[790]. In sum, the Council has not been unaffected to these new governance modes, pushed by a minority of States led by Sweden that profited from the so-called permissive consensus, albeit "the permissive atmosphere from which the pro-transparency coalition long derived its power has declined"[791].

The ECJ seems to have taken on the profile of a face-saving referent in this complex institutional inter-play. It is true that the ECJ is not free from criticism either: once the Charter was upgraded to same level of the Treaties, the Court as a "human rights adjudicator" is limited to the application of EU Law and some argue that it lacks of a solid and opened comparative approach to international human rights law[792].

On the whole, it can be said that disappointments with regard to the Court's role in defending human rights are caused by the fact that public opinion and many academics expect it to act as a constitutional court while it is an international tribunal, with its obvious particularities. The roots of this misunderstanding are created expectations, perhaps a *desideratum*, but not the Court's clearly hybrid nature and characteristics. The ECJ has even empowered National Courts to review the measures of State executives in application of the Treaties: the off-cited *Van Gend en Loos* recognised under certain criteria the eventual direct effect of some provisions of international agreements[793]. This implicitly vested EU National Courts with complementary supervision powers with respect to Member States and, to some extent, also the control of EU institutions

[790] Case C-280/11 P, *Council v. Access Info Europe*, Judgement of 17 October 2013, para. 46.
[791] M. ZBIGNIEW HILLEBRANDT, D. CURTIN and A. MEIJER: "Transparency in the EU Council of Ministers: An Institutionalist Analysis", in *European Law Review*, Vol. 20 No. 1 (January 2014), pp. 1-20, at p. 17. Also interesting, in the preparation of Council of Ministers, the role of the COREPER, where permanent representatives face the difficulty of a "double loyalty": towards their respective Member States and towards the EU because of their obligation to reach pre-agreements: J. LEWIS: "The Janus Face of Brussels: Socialization and Everyday Decision Making in the European Union", in *International Organisation*, Monographic volume *International Institutions and Socialisation in Europe*, Vol. 59 No. 4 (Autumn 2005), pp. 937-971, p. 939.
[792] G. De BÚRCA: "After the EU Charter of Fundamental Rights: The Court of Justice as a Human Rights Adjudicator?", in *Maastricht Journal of European and Comparative Law*, Vol. 20 No. 2 (2013), pp. 168-185, p. 179 and ff.
[793] In the "legal relationship between Member States and their subjects", negative obligations provided in an international agreement produce "direct effects and creat[e] individual rights which national courts must protect". Case 26/62, *Van Gend en Loos v. Nederlandse Administratie der Belastingen*, Judgement of 5 February 1963, p. 13.

themselves: we could say that the same criteria laid down in *Van Gend en Loos* would reasonably lead to the hypothesis that, in 2008, the "implicit threat of intervention"[794] of National Courts encouraged the Grand Chamber's decision in *Kadi*[795], overruling nothing less than a UN Security Council Resolution (despite art. 103 of the UN Charter) and its translation into a Council Regulation.

An institutional lesson can be drawn out for other international organisations on to what extent the interaction between international tribunals and national courts can contribute to control the legitimacy of the international organisation at stake when its international tribunal might be weaker (or less willing) as to the supervision of the international institutional itself. In any case, we have seen the ECJ's transversal role in the area of public procurement, in general terms dealing with soft law, with the indirect (improvable) control of agencies, and with the Council's transparency. This is how EU institutions partially bypass their inherent traps in terms of "overlapping jurisdictions resulting from layers and layers of agreements reached with a heavy emphasis on balancing [… and] pompous and empty rhetoric"[796].

The several peppered interventions of the ECJ encourage to describe it as a transversal curative actor in the institutional building: some deficiencies would otherwise dramatically reduce –if not annul– the institutional credibility of the EU in promoting CSR, human rights and good governance. In the area of CSR, if at any time there are unlawful results, there are good reasons to think that they can be avoided or annulled thanks to the ECJ, even though their institutional origin might remain unaddressed. Besides, the EU institutions may face legal and political responsibilities for contents and decisions taken by multiple actors.

These institutional remarks confirm that the ECJ's role has been positive in the overall. Furthermore, in terms of policy transfers, "the transfer potential of the ECJ is

[794] "There is reason to believe, for example, htat the pivotal *Kadi* judgement in 2008 was prompted by the concern that if the Grand Chamber did not review the EU policy, several N[ational] C[ourt]s would step in and do this". E. BENVENISTI and G.W. DOWNS: "The Premises, Assumptions and Implications of Van Gend en Loos: Viewed from the Perspectives of Democracy and Legitimacy of International Institutions", in *European Journal of International Law*, Vol. 25 No. 1 (2014), pp. 85-102, at p. 101.
[795] Joint Cases C-402/05 P and C-415/05 P, *Yassin Abdullah Kadi and Al Barakaat International Foundation v. Council of the European Union and Commission of the European Communities*, Judgement of 3 September 2008.
[796] A. ALESINA and R. PEROTTI : "The European Union: A Politically Incorrect View", in *The Journal of Economic Perspectives*, Vol. 18 No. 4 (Autumn 2004), pp. 27-48, at p. 47.

consistently [but erroneously] ignored"[797]. Precisely in the area of CSR, inter-institutional policy transfers are particularly important and weave complex relational networks: for example, from the US, the influence of the Dodd-Frank and Sarbanes-Oaxley Acts plus the Alien Tort Statute. In other cases, some early concrete initiatives that come from Member States have anticipated CSR aspects that were later incorporated into the EU institutional agenda –sometimes traumatically, through the ECJ judicial intervention–, resulting in potential policy transfers to other Member States. It goes without saying the crucial transfers from other international organisations: as for the UNGPs, the EU uses an external source and asks Member States to implement it 'in coordination' *via* national action plans in a sort of "facilitated unilateralism"[798], a particular form of policy transfer that allows, in the meanwhile, the influence of EU institutions. Additionally, the interaction between EU institutions themselves: the Parliament, the Council and the Commission have all been supportive of CSR and, setting aside their diversity, they have differently shaped the materialisation of CSR. The EU also has transferred CSR issues to other regional organisations, as seen in chapter III. At the end of the chain, when EU based TNCs adopt Codes of Conduct there is a potential "private transplant of EU Law"[799]: a private bottom-to-bottom policy transfer or "legal transplant" given that private of Codes of Conduct can have an influence to extend EU law beyond the EU.

Lastly, detractors say the EU's institutional role in promoting human rights is built on shifting sand. We might agree on the fact that "Europe is a laboratory of a postmodern multiplicity of human rights protection and their interaction"[800]. CSR confirms it. This has to be seen against the institutional narrative on the EU, particularly insistent in its alleged teleological and ever progressing character. The crisis since 2008 might have broken this *fairy tale* promoted by EU institutions[801], or perhaps its constitutive elements have been exhausted. The EU's global institutional role is also a question of the self-image of authorised story-tellers, to use human rights as the cornerstone of the

[797] S. BULMER and S. PADGETT: "Policy Transfer in the European Union: An Institutionalist Perspective", in *British Journal of Political Science*, Vol. 35 No. 1 (January 2005), pp. 103-126, at p. 104.
[798] *Ibíd.*, pp. 110-111.
[799] T. FERRANDO: "Codes of Conduct as Private Legal Transplant: The Case of European Extractive MNEs", in *European Law Journal*, Vol 19 No. 6 (November 2013), pp. 799-821, at p. 809.
[800] A. PAULUS: "Human Rights Protection in a European Network of Courts", in *American Society of International Law* –Proceedings of the Annual Meeting, Vol. 107(April 2013), pp. 174-182, p. 174.
[801] A. MORENO JUSTE: "El fin del relato europeo. La crisis del proceso de integración y su impacto sobre las narrativas europeas", in *Revista de Derecho Comunitario Europeo*, Vol. 17 No. 45 (May-August 2013), pp. 607-630, at pp. 612-614.

EU's "civilian power"[802], using Duchêne's terminology to distinguish it from Nye's categories of hard and soft power.

Be that as it may, despite the official narrative that proposes a step-by-step story in which the economic cooperation has led to wider political goals, finally adding a strong human rights commitment, Gráinne de Búrca has instead demonstrated that human rights were actually an essential, explicit and strong part of the European project back in 1951-1954, as shown by the drafting process of the (failed) treaty for the European Political Community (EPC) and its surprisingly advanced provisions compared to the current human rights system in the EU. In this sense, human rights did not emerge, but re-emerged, during the European integration project (since the 1970's and 1980's, again with the active role of the ECJ), despite the fact that "Member States continue to resist submitting themselves to human rights monitoring by the EU, and the active assertion of human rights protection as a goal of EU foreign policy remains in sharp contrast to the unwillingness to declare human rights protection to be a general goal or a cross-cutting objective of internal EU policies"[803]. The internal dimension of CSR might be a "third-way" to fill the gap created by this reluctance of Member States, precisely as a "cross-cutting objective of internal EU policies", especially to the extent this institutional weaknesses can affect the "global normative leadership"[804] of the EU. According to Jürgen Habermas, "in the light of a constitutionalisation of International Law", the EU architecture should look forward to a more symmetric repartition of powers of initiative and legal capacity of its different institutions to overcome "the peculiar floating position of the Commission" and the "anomaly" of the Council[805]. Obviously, the insider's view is always more aware of imperfections; notwithstanding improvable institutional aspects, the EU is still a quite successful experiment. Outsiders observe the actual "global regulatory power" of the EU and its international influence when it promotes the CSR agenda. Outsiders have no qualms about saying that "the EU

[802] Unfortunately, we consider that the EU's role in the ex-Yugoslavia in the 1990's and, more recently, in Ukraine, both affected by German interests –insufficiently studied- in relation to the relative failure to reproduce a hegemonic power within the EU, might all together put in question this theory of the EU's "civilian power" or role. For a critical summary of Duchêne's idea, see: V. BACHMANN and J.D. SIDAWAY: "*Zivilmacht Europa*: A Critical Geopolitics of the European Union as a Global Power", *op. cit.*, at p. 97 ff.

[803] G. DE BURCA: "The Road Not Taken: The European Union as a Global Human Rights Actor", in *The American Journal of International Law*, Vol. 105 No. 4 (October 2011), pp. 649-693, at p. 681.

[804] *Ibíd.*, p. 690.

[805] J. HABERMAS: "The Crisis of the European Union in the Light of a Constitutionalisation of International Law" in *European Journal of International Law*, Vol. 23 No. 2 (2012), pp. 335-348, at p. 345 (citations).

is already a superpower and, importantly, a superpower of a meaningful kind"[806], albeit being aware of all these institutional determinants.

### *4.3.2. Substantive contributions and the post-2015 agenda*

After these institutional remarks, it is necessary to finish with some general conclusions on the substantive aspects of Europe's role, without repeating the concrete implementation of CSR in the EU, studied in Chapter III. When undoubtedly well-intended authoritative voices raise their hands in horror, sophisticatedly scandalised, because CSR and soft law appears to them too far away from their dreamed human rights regime, we should just wonder if, given all these institutional and legal determinants, it is reasonable to think that the EU could really act otherwise or go much further. It is commonplace to blame EU institutions for the lack of political will of Member States. Moreover, according to the definition of CSR proposed in the general part of this research, it becomes clear that it should not be aimed at replacing the available International Human Rights Law, but at complementing it with predominantly *ex-ante* and *horizontal* strategies to coinvolve companies. In fact, the first substantive originality of the EU is that *ex-ante* strategies and horizontal legal effects are not unexplored territory, marking the European contribution to global CSR.

Indeed, *ex-ante* strategies are not new in the EU's "market philosophy", differing from other positions within the WTO system: *"la filosofia di mercato europea è basata qui sui principi dello sviluppo sostenibile e della prevenzione dei rischi, oltre che del più generale principio di precauzione. La vigilanza sui prodotti è, almeno in parte, esercitata ex ante (prima cioè dell'immissione sul mercato) e non solo ex post"*[807].

Nor is *horizontality* a novel problem in the EU. It is perhaps less obvious in human rights issues, since they are seen as binding only on States: however, that is to say it has to "permeate all areas of law" and, therefore, there is a State duty to prevent –and

[806] A. BRADFORD: "The Brussels Effect", in *Northwestern University Law Review*, Vol. 107 No. 1 (2012), pp. 1-67, at p.67.
[807] L. S. ROSSI: "Verso una nuova etica del Commercio Internazionale?", in L. S. ROSSI (a cura di): *Commercio Internazionale sostenibile? WTO e Unione Europea*, Bologna 2003, Il Mulino Ed., pp. 11-25, at p. 23.

remediate– third-party violations[808]. It is a well-established doctrine that the State's failure to respect human rights can be determined by act or omission[809], so that the failure to prosecute an abuse by a private actor can constitute a violation of the main human rights treaties (at least in terms of effective judicial remedies). In particular, the principle of non-discrimination has always been the spearhead of a progressive and indirect *horizontalization* of human rights obligations, including this principle in legal relationships *inter privatos*[810]. When the ECJ has balanced the right of free movement of goods and the freedom of speech and assembly (in cases of demonstrations), it has ruled the duty of the State to restrict fundamental freedoms, under certain conditions, to guarantee the fundamental rights of other private actors, "weighing the protected interests of the involved private parties"[811]. If restrictions to the freedom of speech and assembly are possible to ensure the free movement of goods, why the ECJ might find unlawful partial restrictions to the freedom of companies to make effective the State's duty to respect human rights with regard to other private actors, provided they are proportional and justified? The way CSR is materialising in the EU seems close to this

[808] Building on German Constitutional Jurisprudence, it could be described as an "effect of radiation": E. J. LOHSE: "Fundamental Freedoms and Private Actors –Towards an 'Indirect Horizontal Effect'", in *European Public Law*, Vol. 13 No. 1 (2007), pp. 159-190, at pp. 169-170.

[809] The ECHR has ruled in cases of environmental complaints that the failure to act is also punishable under the Convention. In some cases a right enshrined in the Convention that "does not merely compel the State to abstain from such interference: in addition to this primarily negative undertaking, there may be positive obligations" –Case of *Guerra and Others v. Italy*, Judgment of 19 February 1998 (Grand Chamber), Application No. 14967/89, para. 58. This doctrine was confirmed by linking environmental cases to article 8 on private and family life, to the extent environmental damages can be assessed under this light, since the seminal Case of *López Ostra v. Spain*, Judgment of 9 December 1994, Application No. 16798/90, para. 51, 52 and 58.

[810] In particularly evocative terms, the ECJ has said that the prohibition of discrimination might be extended "likewise to agreements and rules which do not emanate from public authorities" (in that case the reason was nationality, all the more poignant within the EU). Case 36/74, *Walrave and Koch v. Assoc. Union Cycliste Internationale et al.*, Judgment of 12 December 1974, para. 21.

[811] The idea would be to extrapolate some of the conclusions of the ECJ in *Commission v. France* and *Schmidberger* as proposed by E. J. LOHSE (*Ibíd.*, p. 183): "For the 'infringer' this not change anything: in order to fulfil its duty of protection the State has to restrict his/her freedom. However, states in the Community legal order are likewise bound not to infringe fundamental rights. It has been actively discussed if the state could take into account those rights of the private 'infringer', as in *Commission v. France* the ECJ did not mention a possible fundamental right of the farmers to demonstrate which would probably have existed, although violent demonstrations do not enjoy much protection. However, *Schmidberger* established respect for the other private party's fundamental rights as an acceptable justification for a 'failure to act' which resulted in a 'pyramidal' construction. In the particular case, the action of the state could be justified by the protection of freedom of expression and assembly, fundamental rights […] When weighing the protected interests of the involved private parties, freedom of assembly prevailed because there was a legitimate goal of the demonstration and the main aim was not to hinder trade (which would be an illegal exercise of a fundamental right) but to express an opinion. Applied to *Commission v. France*, a test of balance between the 'freedom of speech' of the farmers and the free movement of goods would have pointed in the opposite direction as here the main goal was the obstruction of trade and the fundamental right was exercised in a violent way not in accordance with national laws. Obviously, this reasoning is not restricted to the above-mentioned fundamental rights but applies to all fundamental rights on the Community level".

balance between the protected freedoms of companies and the State's duty to ensure human rights, also *inter privatos* by virtue of the 'permeation' or 'radiation' of human rights law to all spheres, resulting in a pyramidal construction between States and private parties. Yet it is not a consolidated development, there are sound reasons to consider, at least, "indirect horizontal effects" in the EU.

In general terms and compared to other organisations, the EU reacted slowly to the emergence of CSR in the international agenda, but rapidly catched up and has even overcome the blocking dichotomy between pure voluntarism advocates and hard-law enthusiasts. As with the EU Charter of Fundamental Rights, in the case of CSR, the EU is inspired by external sources to finally go well beyond those international influences in terms of precision and detail[812]. CSR 'cake' now looks harder and more toasted on the outside, and still soft and juicy inside: the substantive implementation of CSR shows an evolution in which the EU has reconciled the aforementioned dichotomy creating *harder* frameworks with *soft* contents. Before 2009, the first initiatives pointed to a very different result and the Commission was widely criticised for being more inclined to the so-called 'business-case' and merely voluntary formulas. The crisis since 2008 might have played a role in the re-balancing of CSR policies –perhaps switching on the oven instead of cooking a cold cake. Nobody knows what the result will be; it is an on-going process during which an increasing *consensus* among Member States might change the scenario –the temperature, in our metaphor.

It is early to know to what extent we face a change of scenery towards ever *harder* initiatives. The relative hardening of CSR within the EU is consistent with two international developments that seem to go in the same direction. Firstly, in 2000 the OECD Council made it obligatory to establish National Contact Points for the States adhered to the Guidelines on MNEs, even though we have seen that NCPs widely differ as for their powers and structure. Secondly, the 2003 UN *Norms on the Responsibility of Transnational Corporations and Other Business Enterprises with regard to human rights obligations* also reflect a harder approach: "the [UN] Norms are the closest thing to an example of a hard regulatory approach to CSR that could be envisaged in

[812] "La Carta, fonte interna all'ordinamento dell'UE, è molto più precisa e dettagliata di quanto siano le fonti 'esterne' cui la protezione dell'Unione ha sin qui dichiarato di ispirarsi". L. S. ROSSI: "La Carta dei Diritti Fondamentali dell'UE: una sfida costituzionale", in L. S. ROSSI (a cura di): *La protezione dei diritti fondamentali. Carta dei diritti UE e standards internazionali (XV Convegno della Società Italiana di Dirittto Internazionale –Bologna 10-11 Giugno 2010)*, Napoli 2011, Ed. Scientifica, pp. 19-22, at p. 19.

traditional international law. They do not attempt to reconcile hard regulation and voluntarism" –in this light, their difficult enforcement through litigation is also a typical problem under traditional international law[813].

The EU is halfway and reflects this wider tendency towards hardening some aspects of CSR, while reconciling these positions. The EU's substantive contribution is, also, this mixed and pragmatic approach adopted so far. A proof is the sustained effort to maintain a multi-stakeholder informative and promotion agenda even after the discouraging failure of the first EMS Forum, all of this combined with a parallel –unexpected– impact on EU Law (already commented upon in Chapter III) and its transfer to the institutional-international arena.

In this respect, it must be emphasised that the substantive contribution of the EU further has a notable international effect. If the "de-pillarization caused […] a fuzzier demarcation between the external aspects of the AFSJ and other external competences"[814], we think it has happened the same with other policy areas after Lisbon, to a degree that the internal dimension of CSR makes little sense without its external one, as it can be the case with almost any other policy.

This is the result, from a substantive point of view, of an increasingly coordinated reading of diverse treaty provisions, in particular: articles 1 to 4, 9 to 12 and 13 of the TEU, jointly with articles 11, 21 and 205 of the TFEU. Besides, to jointly read all these articles might lead to clearer "substantive obligations, which must be followed up on in a different and more comprehensive way than they are today"[815]. The partial implementation of the CSR agenda has shown the incipient possibilities of jointly reading these treaty provisions: "EU Law then has the potential of taking the lead globally and turning the trend of short-term growth mania into a reflective, long-term sustainable development"[816].

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[813] S. MacLEOD: "Reconciling Regulatory Approaches to Corporate Social Responsibility: The European Union, OECD and United Nations Compared", in *European Public Law*, Vol. 13 No. 4 (2007), pp. 671-702, at p. 694.
[814] L. S. ROSSI: "From EU Pillar to Area: The Impact of the Lisbon Treaty on the External Dimension of Freedom Security and Justice", in C. FLAESCH-MOUGIN and L. S. ROSSI (Dirs.): *La dimension extérieurse de l'Espace de Liberté, de Sécurité et de Justice de l'Union Européenne après le Traité de Lisbonne*, Bruxelles 2013, Éd. Bruylant, pp. 5-21, at p. 8.
[815] B. SJAFJELL: "Quo Vadis Europe? The significance of sustainable development as objective, principle ad rule of EU Law", in C. M. BAILLET (Ed.): *Non-State Actors, Soft Law and Protective Regimes. From the Margins*, Cambridge 2012, Cambridge University Press, pp. 254-280, at p. 267.
[816] *Ibíd.*, p. 280.

With its imperfections, articles 9 to 12 should be more widely used to scrutinise almost any action of the EU, as they are a significant "European lesson" for international organisations, as a viable and realistic supranational democracy instead of idealistically extrapolating *XIX*$^{th}$ -Century nationalist criteria on democracy[817]. By the way, it should not go unnoticed the unique European experience with regard to the penetrating international subjectivity of individuals, utterly important in human rights: very early the ECJ confirmed that "the *[then]* Community constitutes a new legal order of international law for the benefit of which the states have limited their sovereign rights, albeit within limited fields, and *the subjects* of which comprise not only Member States but *also their nationals*"[818]. Equality and sovereignty, essential concepts in the theory of international organisations, have suffered many changes going through the European filter: from merely formal equality, we have walked towards a more substantive equality by sharing sovereignty[819], mainly guided by human rights concerns[820].

Finally, it appears throughout this research that European initiatives have followed a rather specific and concrete style after 2009, reflecting this "substantive" vocation of the EU. At the same time that general principles were settled, there has been a parallel bottom-up process in which dispersed new CSR provisions in technicalities finally become a true cross-cutting CSR strategy –whilst other international organisations usually work the other way round (from the general to the particular, as we have seen).

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[817] "The experience of the European Union, where democratic legitimation is derived from direct elections by equal citizens (via the European Parliament) and indirectly through the peoples of the Member States (via the European Council and Council), exemplifies that different bases for legitimation can not only coexist, but can be mutually supportive. The democratic legitimation of supra- and international institutions needs to be conceived as composite and 'multilevel'". A. Von BOGDANDY: "The European Lesson for International Democracy: the Significance of Articles 9-12 EU Treaty for International Organisations", in *European Journal of International Law*, Vol. 23 No. 2 (2012), pp. 315-334, at p. 325.

[818] Case 26/62, *Van Gend en Loos v. Nederlandse Administratie der Belastingen*, Judgement of 5 February 1963, p. 12.

[819] L.S. ROSSI: Inaugural speech on the occasion of the International Congress on the Principle of Equality in EU Law, University of Bologna, 19 May 2015 –not published.

[820] It is impossible to guess the final result of this process, as very early indicated E.H. Carr (1892-1982) in his seminal Twenty Years' Crisis, first published in 1939 (with corrections in the second edition of 1945). When he wonders on the survival of nations as units of power, he answers (Spanish translation): "Marx tuvo razón al percibir que el individuo aislado no podía ser la unidad efectiva en la lucha por los derechos humanos y la igualdad humana. Pero se equivocó al suponer que la unidad última era la clase social y al infravalorar las cualidades de cohesión y unificación de la unidad nacional. […] Hoy no hay por qué cometer el error, que cometió Marx con la clase social, de tratar a la nación como la unidad-grupo definitiva de la sociedad humana". E.H. CARR: *La crisis de los veinte años (1919-1939). Una Introducción al Estudio de las Relaciones Internacionales*, Madrid 2004, Ed. Catarata, pp. 306-308.

We have to acknowledge, in this sense, that the EU has the merit of a detailed approach able to show some very technical –but not less important– problems, as illustrated with the crucial issue of access to justice. The EU has essentially followed the work of other international organisations, but now has a potential leadership to define concrete solutions for these practical problems thanks to its previous and unique experience. Unfortunately, since the 2008 crisis began, unemployment has risen and labour is more and more considered as a *cost* instead of a *factor* of production so that a good part of the progress made has been reversed or simply left aside. The problems have been studied in detail by the EU institutions, with –not less important–contributions made by Member States. The path is opened; we shall not get left behind.

# CONCLUSIONS

## I. Corporate Social Responsibility at a global level

### *1. Against ontological and ideological incompatibilities*

'Business and Human Rights' studies would not exist if there was an ontological incompatibility between globalisation and fundamental rights. Starting out from this premise, the social legitimation of globalisation trends will depend on the definition of Corporate Social Responsibility and on its capacity to balance States' power, societal expectations and global capitalism. The success of CSR will, in turn, depend on how we build the very concept of CSR, within which we must acknowledge the necessary centrality of human rights and the interplay between both hard- and soft-law instruments. There is also a need for a consensual, institutional, interdisciplinary, integrative, and human rights approach to this subject, in order to systematise the current initiatives and infer the eventual trends for the future. This is the way to overcome any apparently ontological incompatibility between business and human rights, between hard and soft law, between subjects and objects of IL, between ideologies on the market economy and any other pair of related concepts that, otherwise, would block any reasonable study of CSR.

### *2. Definition and characteristics of CSR*

The practice of International Organisations at a global level and of the European Union at a regional level supports the definition of CSR that we have proposed: CSR is *a complementary strategy to increase the horizontal effects of current internationally recognised human rights, mixing hard and soft-law instruments, in their particular interaction with the activities of all kind of business enterprises, with a predominantly preventive vocation*. Our definition comprises all possible nuances and can be clarified *sensu contrario*: CSR is *not* corporate philanthropy or charity; it is *not only* about voluntary initiatives since it includes baseline legal requirements; it is *not only* preventive though being aimed at completing IHRL with mostly *ex ante* strategies with

regard to which traditional IHRL suffers from important gaps; it is *not* a substitute or alternative for treaty-based obligations, but a complement; it does *not* place *direct* duties on private actors for the moment, but develops and specifies indirect horizontal effects upon them, through the national implementation of existing International Law. In this line, we deduce three characteristic elements of CSR: 1) the close connection with the type of business and the inherent impact of its concrete operations; 2) a sustainability criteria focused on long-term effects rather than incidental responses; 3) and a clear purpose to respect human rights, which is its legal foundation.

### *3. CSR and customary international law*

The interrelation observed between hard law and soft law hides a deeper dialectic between treaty law and the customary path in the development of CSR, which do not seem irreconcilable options. However, this work does not advocate for the creation of a new treaty or binding instrument on business and human rights, because we observe a historical inertia against new international treaties, especially after the 11 September 2001 attacks. Suffice it to mention the General Assembly's failure to finally adopt the ILC projects on the responsibility of States or on diplomatic protection. The 'treaty curse' adds arguments against an eventual treaty: its slow negotiation and risks of compromise solutions of minimum contents, and its slower ratification (distinguishing between signatures and ratifications). We shall add the possibility of hindering reservations; the time lag before the entry into force; the need of monitoring mechanisms for treaty implementation; and that the home countries of most TNCs did not support the creation of the UN Working Group to negotiate a binding instrument, which is not a good omen. Instead, the already initiated customary path shows the opportunity to progress more rapidly (there is not a time requirement) in the construction of a wider *consensus*. Of course, we do not idealise the customary way as it can be obscure in its contents and States might be ambiguous in explaining their practice not to risk future obligations. This is why our preference for the customary path should not be interpreted at the expense of existing treaty law, which has proved to be indispensable to frame and discipline the current CSR initiatives. But these initiatives have not reached a sufficient degree of normative maturity to act otherwise –in other words, we put forward the potential of the customary path seen as a light and drizzling

rain over time (if adequately channelled). The multiplication of national action plans contribute to move forward down the customary path.

### *4. Soft law and the development of CSR*

CSR is an emerging normative system with subcategories, which vary in legal value, specificity and scope. Many of its components are soft-law instruments, within the framework of pre-existing human rights law. In this connection, soft law has three advantages that mark its contribution to the development of CSR: *1)* it allows the introduction of new debates and International Law issues, such as the international subjectivity and eventual duties of private actors, at the same time it facilitates agreements leaving room to differences and particularities, therefore encouraging the progressive building of a global *consensus*; *2)* it allows the interpretation of existing instruments in order to specify their implications and fill gaps with regard to the complex interaction between human rights and TNCs' activities; *3)* and in the long run, it is a useful tool to generate customary practices among States and IOs to further regulate the human rights' impact of TNCs. In light of this, CSR has a potential *per se*, beyond its gradual 'hardening'. In terms of regulatory processes, instead of creating *ex novo* instruments that only respond to our ideals in a deductive manner deprived of practical experience, CSR has evolved into a case-based, empiric and cumulative regulatory process.

### *5. The role of International Organisations*

International Organisations have a prominent role to play in this regulatory process. First of all, IOs heavily influence the progressive development of International Law and can promote the effective implementation of existing human rights instruments alongside their progressive interpretation to gradually cover business practices and responsibilities. Secondly, IOs greatly contribute to expand and accelerate States' practice in the same direction; in fact, the priority of the UN Working Group that followed Ruggie's mandate is to foster national action plans on CSR. This is a far from negligible effort because the generalisation and universalisation of national actions plans is absolutely crucial for the normative consolidation of CSR at an international

level, in customary terms –even regardless of their effectiveness (this can come later). IOs also help ensure a greater degree of institutional coordination and substantive consistency of national action plans.

### *6. Incipient crystallisation of CSR*

For the time being, two principles are the most advanced in crystallising at the customary level or, at least, enjoy a very promising degree of international legal recognition. We are referring first of all to the ever-growing acknowledgement of private correlative duties upon corporate actors in terms of human rights, as an indirect permeation of international human rights law. Even though we still lack of sufficient details on its contents, *indirect horizontal obligations* between private actors to protect human rights have gained much credit within the international society, as proclaimed by many soft instruments and, also, a good amount of authoritative interpretations of treaty bodies, arbitral mechanisms and even some national Courts that all point in the same direction. The second principle in its way to crystallise is the transversal character of human rights within general international law. This should not be understood in hierarchical terms but in line with the relational character of IL. Almost all IOs have accepted to incorporate human rights' concerns into their daily activities regardless of their founding priorities, even economic organisations that were traditionally less active in this regard like the World Bank or the World Trade Organisation. At the States' level, it starts to be commonplace to bear in mind human rights concerns when dealing with apparently unrelated issues and negotiations, far more often and in unprecedented manners in relation to trade and investments –though still improvable. The recognition of some kind of private correlative duties upon TNCs, indirect emanation of IHRL, and human rights' institutional mainstreaming are –in the practice of both States and IOs– the most normatively consolidated aspects of CSR: they may obviously await further specification, but they already seem irreversible.

### *7. The problematic of trade and investments*

As for human rights' mainstreaming, the practice surveyed shows that the ICSID tribunals and the WTO dispute settlement bodies have had no prejudices or reluctance

to acknowledge the relational character of International Law and, indirectly, eventual human rights concerns. Related human rights issues have been addressed on a number of occasions. Their reasoning is twofold: the integration within general international law and, secondly, the eventual place of human rights. However, States generally fail to identify and benefit from the current opportunity niches for human rights' protection within trade and investment disputes. States' failure in this area is generally due to the inadequacy of hierarchical claims and maximalist wishes in favour of human rights over other international obligations, so that arbitral tribunals end up with their back against the wall, instead of reasonably arguing the relational character of International Law and the need to counterbalance concurring international obligations, which would be the strategy with greater chances to succeed. On several other occasions, States' failure is caused –in summary– by a lack of good faith and coordination in the way they regularly cope with these concurring international obligations, unduly alleging human rights' protection to hide internal problematics and inconsistencies. In fact, most disputes surveyed show that the first phase of the test is passed and arbitral bodies accept the relevance of human rights in some cases. It is at a second stage when most States fail: when it comes to demonstrate that the measures adopted were necessary (the impact in relation to the public good pursued), proportional (the least-inconsistent option reasonably available was chosen), and non-discriminatory (in comparison to other States, investors or internal legislation). It is therefore the responsibility of States to adequately make use of the existing possibilities, both institutional and substantive: to 'grease' those open windows and adequately open them.

### *8. The UN leadership and policy transfers.*

Whether positivists like it or not, soft law is not a new phenomenon within International Law. Nor is it strange to EU Law, in its interplay with proper norms in many law-fields. The UN, FAO, the WHO, the OECD, the ILO, the World Bank Group, and private organisations (like the ISO) have all worked on CSR and issued guidelines, recommendations, declarations, etc. Moreover, as time passed and the UN had released its main contributions (the three-level framework and the UNGPs), all the above-mentioned organisations have expressly made an effort of coordination to gradually put their own standards in line with the UN ones, citing each other's instruments. IOs at a

global level already acknowledge and even promote a high level of policy transfers between them in the area of CSR, which permeates States' policies and some private-led initiatives. The proliferation of national action plans are a good example.

## II. Corporate Social Responsibility in the European Union

### *9. Particularities of CSR in the EU*

The above-mentioned International Organisations have determined the first European initiatives, but it is very important to recall the United States influence (the Alien Tort Statute, the Sarbanes-Oxley Act and Dodd-Frank Act). In this context, it has been made clear the European Union's receptivity to welcome the development of IL and CSR, perhaps a bit slowly at the beginning, but in the end including it among its working priorities for the new millennium, reinterpreting its contents with substantive improvements and, finally, re-upload CSR at a global level while exercising an important influence –having hardened some of its aspects. If International Organisations at a global level have worked from the general to the particular, the European Union has worked the other way round, from technicalities to more general principles. This explains why the European Union has had a *'CSR before CSR'*, unlabelled and implicit, especially to regulate consumer's protection and environmental issues with an initial focus *ad intra*. The EU has needed some time to accept the emergence of CSR as such and to catch up; after 2009, it can be said that the EU became a key player. In this evolution, the EU quite rapidly understood the external dimension of CSR and the importance to resituate this concept within international human rights law, being also a human rights appeal *ad extra*. In general terms, we have deduced that CSR in the EU has set itself up as a mainstreaming governance tool or crosscutting transversal policy rather than a classic and separate policy *per se*. Finally, apart from alleviating the tensions caused by globalisation, CSR in the EU has an additional and utterly important role: it navigates between a market-oriented and a rights-based integration project, thus contributing to their precarious equilibrium.

### *10. Grey zones*

However, it must be noted that the EU has not always been the torchbearer of CSR, as seen at an early stage: for example, in *Commission v. France* (Case C-225/98) the Commission contested a French public contract based on social requirements; or when the then European Communities threatened to bring a WTO-complaint against some US public-procurement restrictions affecting Myanmar's repressive regime in 1997 (WT/D88/3). The EU is not a monolithic reality and it has been checked that, at times, some States like France or the Netherlands, were ahead of EU institutions in the development of some CSR-aspects, when the ECJ has become a face-saving actor. Even later, with an apparently consolidated CSR agenda, we have found grey zones that show the institutional complexity of the EU: in several occasions, the Council has rejected the more daring aspects of some CSR regulatory proposals of the Commission and, at times, even the European Parliament slows down negotiations just to artificially boost its own importance without really making substantive corrections to proposals. For example, the regulation of supply chains in highly sensitive trade of minerals like tin, tantalum and tungsten, their ores, and gold; it is true that it took three years for the Commission to draft a proposal, but the Parliament unrealistically wants to exaggerate its contents (good enough), while it postpones delivering results and putting pressure on the Council, which is actually the less enthusiastic EU institution in this subject.

### *11. Legal spill-overs*

The 2008' financial and economic crisis might have contributed to this evolution, encouraging the hardening of some aspects. Indeed, there are important CSR "legal spill-overs". CSR has grown well beyond the initial borders of mere voluntariness, as it becomes evident in the following hard norms: Directive 2013/34/EU has established compulsory reporting for the extractive industry on payments to any government over € 100,000 within a financial year, in money or in kind; Directive 2014/95/EU has made mandatory non-financial reporting for companies over 500 employees specifying concrete and explicit human rights concerns, including corporate governance reports and details on companies' governing bodies; Directives 2014/24/EU and 214/25/EU have incorporated and consolidated obligatory CSR requirements into public procurement regulation in all sectors; and Regulation 1286/2014 has further increased

the protection of small shareholders and retail investors against aggressive practices in the financial sector. The recentness of these initiatives makes it impossible to analyse the level of national implementation, which is probably an interesting study to be made in the near future in continuation of this research.

### *12. Access to justice*

This research has analysed access to justice for human rights' victims of TNCs with a view to liberating this debate from ideological overtones, even though we take a stance to conform to Dante's famous warning: "the hottest place in hell will be reserved for those who, in times of great moral crisis, have chosen to stay neutral". First of all, we advocate for civil proceedings instead of criminal law procedures, not only because of its pecuniary aspect (essential in the conflict between human rights' protection and business interests), but also to avoid a highly risky overreliance and overdependence on public prosecutors' role. In our view, the problem of access to justice should be reframed in terms of *extraterritorial adjudicative jurisdiction* and *extra-contractual civil responsibilities*. The EU rules on jurisdiction lack of an admissibility criterion on 'related actions' of companies, built upon the contents of the litigious, to make EU-based TNCs accountable for their activities in third countries (through subsidiaries or otherwise), as a sufficient jurisdictional link regardless of other factors (nationality of victims, etc.). Despite the absence of such admissibility criterion, the EU may take over precisely when the US Alien Tort Statute is at a low ebb.

In practice, obviating idealistic stances that we have rejected due to the absence of political will to undertake revolutionary normative innovations, our functional approach has demonstrated for instance that complex corporate structures and veils can be pierced on the basis of experience gained so far in the area of competition law and taxation law, both at an international and a European level. The leading British and Dutch case-law has shown that, against the doctrine of *forum non conveniens*, a certain *forum necessitatis* can emerge in the EU to avoid intolerable denials of justice or eventually irreconcilable judgements, according to art. 47 of the European Charter of Human Rights and art. 6 of the European Convention for Human Rights. In this line, it seems more or less feasible to further explore art. 7 of Reg. 864/2007: it certainly refers to environmental damages (always in advance in comparison to other human rights), but it

could be extended to human rights violations in more general terms. Indeed, art. 7 of Rome II Regulation establishes a link with the 'place giving rise to the damage', which might open a window to vindicate the jurisdiction of a European court since concrete damages can occur outside the EU, but the decisions leading to them might have been made in European headquarters, if this can be proved. Besides, in the seminal *Owusu v. Jackson* (Case C-281-02), the ECJ has ruled that art. 2 of Reg. No. 44/2001 also regulates relationships with the Courts of non-Contracting States and that it can be read jointly with art. 6(1): EU national courts have some room for manoeuvre in determining under what circumstances 'reasons of efficiency and justice' would justify exercising its jurisdiction, thus validating joint hearings of cases affecting subsidiaries and parent companies and bypassing this way other jurisdictional obstacles. The European Parliament has proposed changes to improve these limited possibilities, while the Commission encourages the adoption 1980 Hague Convention. Importantly enough, the main European contribution in this subject has consisted of discreetly preserving the margin of appreciation of States when it comes to interpret and make use of the limited flexibility under the Brussels Convention (Reg. 44/2001) and Rome II (Regulation 864/2007). It is up to European States to go down this road, timidly advanced by some EU national courts.

### *13. National policies in the EU*

EU member-States have worked reactively rather than proactively, many times making the mistake of designing crisis-motivated and internally-oriented CSR policies, instead of assuming its global dimension in terms of human rights and development, as promoted by IOs at a global level and by the EU at a regional level. For the moment 24 European countries have adhered to the OECD Guidelines on MNEs, accordingly establishing their respective National Contact Points, of discussable benefits. Many EU member-States have approved National Action Plans on CSR, but only five States specifically address 'business and human rights', which is perhaps caused by some hesitancy to intensify the human rights language within CSR, despite the international agreement in tying CSR to human rights. In any case, the presence of NAPs is only a small part of the CSR-performance of States and we should also look at other regulations, starting with the prompt transposition of recent Directives in the area of

corporate governance, public procurement, environment and consumer's protection. We concluded that the Commission should not promote two different national action plans (on CSR and a separate one on 'business and human rights'), given that it generates an undesirable conceptual confusion: the best policy option is a single and precise action plan, if possible approved by the Parliament or at the level of the Council of Ministers, in which States should recognise the centrality of human rights within CSR, also coherently with the action plans promoted by the UN.

Besides, instead of creating new institutions for the NCPs and other CSR-organs, we rather defend that national human rights institutions should have an utterly important role in developing and monitoring CSR. National human rights institutions, being official but to a certain point functionally independent from governments, are a good option to host non-judicial grievance and mediation mechanisms on business and human rights –without excluding proper access to justice. Finally, NHRIs could also foster social awareness and generate public CSR-certificates for products and companies, ideally in coordination with new CSR-certificates at the EU level, making sure that they remain as independent as possible from both governmental and corporate influences. It is unlikely to be a top-down process: CSR-certificates created in Brussels will be hardly acceptable for France, Germany or the United Kingdom, in relation to their respective multinational corporations. It is more likely to be a bottom-up process in which each State (ideally through its national human rights institution) generates a CSR certificate that somehow penetrates into EU law after some time. In any case, the most important point is to avoid the proliferation of for-sale private CSR-certificates.

### *14. Some easily improvable aspects*

CSR is developing at a good speed in the EU, but there are some improvable or, at times, forgotten aspects that it is worth recalling now because most of them might be easily corrected. The institutional promotion of CSR moves between *punitive* and *persuasive* initiatives, between hard and soft law, being all necessary. At times, a more punitive approach can be interesting: the Commission could put in place a blacklist of poor performing companies. A complementary and more persuasive way is to work on a public European CSR-certificate with a human rights-based approach, before the appearance of for-sale and private certification schemes. The Commission is wrong to

assert that two national action plans are necessary; a single NAP on CSR and human rights is enough, if adequately designed. At the same time, close attention should be paid to how States finally implement the incipient legal spill-overs of CSR –States may communicate policies and pieces of legislation that in reality do not correspond to the EU's requirements, even though it is early to make an assessment on that. Finally, it must be noted that new bureaucratising bodies are probably a diversionary manoeuvre that hides concrete goals and deadlines; we already have in the EU national human rights institutions that can be tasked with CSR.

On the international front, the EU sometimes lament over the fact that WTO dispute bodies rule against European standards on phytosanitary products, public procurement and a variety of safety requirements that third States contest as unlawful restrictions on trade. A comprehensive EU strategy on international standards is urgent. Especially in relation to the SPS Agreement, TBT Agreement and GATT itself, the WTO increasingly refers to guidelines and standards created by other international organisations; if the EU does not find safe certain *hormones*, for example, the EU must realise that it can indirectly influence trade rules on safety by putting more pressure on those other standard-setting organisations (mainly, the WHO, FAO and ISO) to align themselves with the EU's views on certain products, provided that the EU is not acting in a protectionist manner or defending spurious interests, and bearing in mind that the EU is not "the navel of the earth".

The effectiveness of the European contribution to global CSR also depends on how the EU standardises human rights clauses in trade and investment agreements; the EU should adopt a general modus operandi rather than a case by case proceeding to negotiate these treaties –of course, leaving some room for certain cautions and particularities. There is a lot of pending work to put in order investment agreements, since the Treaty of Lisbon granted the EU exclusive trade competencies and over foreign direct investments (but not *all* investments). In sum, despite improvable aspects and the long way to go, it starts to be reckless and highly risky for companies to ignore or neglect this emerging normative scenario.

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**INDEX OF TABLES AND DIAGRAMS**