CO-REGULATION AND CORPORATE SOCIAL RESPONSIBILITY [*]

Initiatives developed under the banner of *corporate social responsibility* do not appear to demonstrate, *prima facie*, a high level of coherence. Nonetheless, the proliferation of such initiatives reveals a dynamic which places corporations at the center of contemporary concerns regarding respect for human and social rights, and protection of the environment. In this article, we attempt to clarify the reasons for the proliferation of these initiatives. In particular, we underline what, to all intents and purposes, emerges from the interplay of the various practices and tools that accompany this dynamic: the possibility of systematizing and creating a *system of co-regulation* with regard to corporate social responsibility. For many, this is not an idle task. In fact, some cases have already shown that this could eventually result in administrative, legal and financial sanctions against corporations that are responsible for human rights violations, the undermining of social rights, or environmental degradation. It seemed to us more judicious simply to propose, in lieu of any particular case analysis, a reading of the process of corporate social responsibility from a perspective likely to give it meaning.

In what follows, we will examine in detail a variety of tools and practices representative of initiatives in the field of corporate social responsibility, selected and presented according to the particular function they serve. It is not our intention to suggest here that such tools or practices will in fact be the catalysts of this system. The sole objective of this analysis is to provide examples of the types of instruments involved in the implementation of a corporate social responsibility approach, and the role that such instruments can play in the development of a *system of co-regulation*.

The theoretical nature of this article should not lead the reader to believe that the authors in any way adhere to a revival of the theory of 'the invisible hand.' The development of a *system of co-regulation* with regard to corporate social responsibility is not in itself necessary; it is constantly dependent on the actions and decisions, be they collective or individual, of the actors. Furthermore, we do not claim that the regulations involved in a corporate social responsibility approach are a panacea. They must be studied for what they are: flimsy and highly questionable. All in all, they are nonetheless likely to be better understood in relation to the theory of co-regulation. Prior to reviewing the specific instruments and practices that enter into this theory, we shall provide an outline of the theory of co-regulation as a method of regulation.

A. THE THEORY OF CO-REGULATION

We do not intend to propose a general theory of co-regulation distinguishable from the various theses that have been formulated about the evolution of methods of regulation in contemporary society; or to formulate a novel and original theory in this respect. Nonetheless, our research into the trend of corporate social responsibility leads us to believe that the concept of co-regulation is of particular use in the analysis of contemporary developments in this field. Moreover, it is perhaps pertinent to attempt to understand the dynamics of corporate social responsibility in the context of a general hypothesis: the development of a system of co-regulation of corporate conduct concerning social responsibility. For reasons of methodology, in this section we will introduce certain elements that explain the concept of co-regulation as it is used in this article. First, we will place the concept of co-regulation in its theoretical context in order to demonstrate its methodological implications. This will then lead us to consider a more precise characterization and application of co-regulation before going on to present the general theoretical framework of our analysis.

1. The general context of co-regulation theory

The concept of co-regulation implies a certain hypothesis concerning the evolution of methods of regulation according to which the last few decades are said to have witnessed the development of such methods as a result of "governance" rather than "government";[1] that is to say, methods of

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1. In addition to the usage of the concept of *governance* by international institutions, the distinction between *governance* and *government* was popularized in work conducted by Rosenau and Czempiel, in which the concept of governance is used to give prominence to the existence of effective systems of regulation that eventually become independent

regulation that can no longer be correctly understood as a function of the classic model where public authorities define, interpret, and guarantee the respect of norms by private actors.[2] Bearing in mind certain premises that have been the subject of wide-spread research into the weakening of the regulatory capacity of the State, the strengthening of the power of private actors, and the globalisation of economic trade,[3] traditional systems of regulation are supported by new systems. In these systems, as opposed to traditional systems of regulation, the strict line demarcating the public and private sector is blurred.[4] To analyze and come an understanding of regulation in an era of globalization, thus, implies recognizing the central role in regulation of *partnerships* between private and public actors,[5] and perhaps even exclusively between private actors.[6]

We must be wary of the sweeping nature of the hypothesis pertaining to the passage from government to governance,[7] but it is equally advisable not to neglect the intellectual opening that this hypothesis presents. In fact, a reconsideration of the distinction between the public and private sectors implies substantial conceptual shifts insofar as this distinction governs, from a legal point of view, the opposition between law and contracts; from the institutional perspective, that of the market and the State; and in terms of methods of regulation, the opposition between self-regulation and regulation. These conceptual shifts compel us to take seriously the regulatory phenomena to which traditional analyses remain largely blind. While the hypothesis of the passage from government to governance does not have any particular analytical value, it nevertheless conceals a certain heuristic interest in the methodological constraints that it jointly removes and imposes.

We can conceive of the concept of co-regulation as the *expression of the concept of governance in terms of theories of regulation*. These theories strive to define the characteristics of different models of regulation, their mode of operation, as well as the conditions in which these models can prove effective. They oppose, often quite strictly, two principal models: that of self-regulation and traditional regulation, the latter of which is also referred to as the "command and control" model.[8] Numerous specialists on the subject have already underlined[9] the simplistic character of this dualistic opposition. In particular, researchers interested in the regulation of the media sector, as well as those studying the protection of the environment, have called attention to the existence and effectiveness of systems of regulation that combine characteristics typical of both models. In this context, some specialists have

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of the public authority's control. J.N. ROSENAU, E.-O. CZEMPIEL, *Governance Without Government: Order and Change in World Politics*, Cambridge University Press, Cambridge Studies in International Relations, Cambridge, 1992. Since then, studies devoted to governance are innumerable. See, *inter alia*, D. RICHARDS, M. SMITH, *Governance and Public Policy,* Oxford University Press, Oxford, 2000; A.M. KJAER, *Governance*, Polity, Oxford, 2004. For a critical appraisal of the literature on governance, see M.-C. SMOUTS, "La coopération internationale de la coexistence à la gouvernance mondiale" in M.-C. SMOUTS, *Les nouvelles relations internationales. Pratiques et théories*, Presses de la fondation nationale des sciences politiques, Paris, 1998, pp. 135-160.

2. On the development of the paradigm of governance within legal thought, see the excellent study by O. LOBEL, "The renew deal: the fall of regulation and the rise of governance in contemporary legal thought," *Minnesota Law Review*, vol. 89, nº2, pp. 342-470.

3. For a synthesis of the actual transformations tied to globalization, see D. HELD, A. McGREW, D. GOLDBLATT, J. PERRATON, *Global Transformations. Politics, Economics and Culture,* Stanford University Press, Stanford, 1999.

4. Stocker also notes that – despite the reviews of the literature on governance asserting the polysemy of the latter – there is nonetheless "a baseline agreement that governance refers to the development of governing styles in which boundaries between and within public and private sectors have become blurred." G. STOCKER, "Governance as Theory: Five Propositions," *International Social Science Journal*, vol. 155, nº1, March 1998, pp.17-28.

5. In particular, see T.A. BÖRZEL, T. RISSE, "Public-Private Partnerships. Effective and Legitimate Tools of Transnational Governance?," in *Complex Sovereignty: On the Reconstitution of Political Authority in the 21st Century*, E. GRANDE, L.W. PAULY (eds.), University of Toronto Press, Toronto, pp. 195-216.

6. See P. PATTBERG, "The Institutionalization of Private Governance: How Business and Non-profit Organizations Agree on Transnational Rules," *Governance: An International Journal of Policy, Administration, and Institutions*, vol. 18, nº4, October 2005, pp. 589-610.

7. In this respect, note that the study on the use of new instruments of regulation in terms of environmental protection, carried out by Jordan and his colleagues, concludes the non-existence of a clear evolution towards governance – even in terms of environmental protection, a field particularly subject to the use of new methods of regulation. A. JORDAN, R.K.W. WURZEL, A. ZITO, "The Rise of "New" Policy Instruments in Comparative Perspective: Has Governance Eclipsed Government?," *Political Studies*, vol. 53, 2005, pp. 477-496.

8. For a synthesis of the various theories of regulation, see, *inter alia*, R. BALDWIN, M. CAVE, *Understanding Regulation: Theory, Strategy and Practice*, Oxford University Press, Oxford, 1999.

9. See, *inter alia*, D. SINCLAIR, "Self-Regulation Versus Command and Control? Beyond False Dichotomies," *Law & Policy*, vol. 19, nº4, October 1997, pp. 529-559.

also defined typologies which are considerably more ambitious than the former two models.[10] The concept of *co-regulation* is precisely one that is used to designate the systems of regulation that fall between regulation and self-regulation.[11]

In this general sense, the notion of co-regulation is solely negative, and suggests a sort of hybrid model of regulation. Accordingly, it lacks specific content, and is thus not an appropriate instrument of analysis. Prior to attempting to determine its content more precisely, however, we must acknowledge the methodological implications of the notion of co-regulation. In fact, an analysis in terms of co-regulation – like an analysis in terms of governance – imposes certain methodological constraints. Negatively, such an analysis tends not to emphasize certain presuppositions that frame legal analyses. In particular, the distinctions between *soft law* and *hard law*, the different branches of law (commercial law, criminal law, international human rights law, financial law), as well as different legal orders, are treated as insignificant.[12] This framework is not baseless. It is governed by the purpose of analysis, namely, to underline the mechanisms and instruments that produce the *effects of regulation*. Focusing on these effects also implies certain positive methodological constraints. Firstly, instead of concentrating on a particular mechanism of regulation, one would do better to examine the manner in which the interaction between different mechanisms produces the *global effects of regulation* by bringing into play a *multiplicity of actors*. Secondly, an analysis in terms of co-regulation should not attach too much importance to the influence of the actors' intentions. Of course, it does concern the correlation of an analysis centered on these effects. No matter what motivates the actors to participate in a system of regulation, the effective regulation of the conduct is all that matters. Finally, an analysis in terms of co-regulation is not a normative analysis; it does not seek to determine the norms which must be observed by certain actors. It does not even concern the content of the norms either, but rather the manner in which certain norms succeed in determining, *more or less*, the behavior of actors.

In the sense indicated above, the notion of co-regulation clearly possesses no specific content. *Sensu lato*, it comes back to a type of analysis characterized by a general objective – the study of the global effects of regulation – and a certain number of methodological prescriptions. In addition to this general characterization, the concept of co-regulation also denotes a specific method of regulation. It is thus necessary to define co-regulation more precisely, and to distinguish it from a *system of co-regulation*.

2. Co-regulation as a method of regulation and as a system

There is no widely accepted definition of co-regulation. As outlined above, the notion of co-regulation is frequently used in broad terms. It becomes necessary to make a number of theoretical choices in order to use the concept for analytical purposes. Undoubtedly, the most interesting prospect for defining the notion of co-regulation is that offered by analyses of mechanisms and instruments of regulation.[13] This perspective permits a precise definition of co-regulation to be given on the basis of a simple typology of the regulatory mechanisms implied by instruments of regulation.

It is not our objective to evaluate the relevance of the numerous typologies of regulatory mechanisms.[14] We seek instead to present a typology in order to sufficiently define the notion of co-

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10. M. PRIEST, “The Privatization of Regulation: Five Models of Self-Regulation,” *Ottawa Law Review*, vol. 29, nº2, 1997-1998, pp. 233-302.

11. The concept of co-regulation is used, with variable meanings, by a number of authors interested in the new regulations. See, *inter alia*, B. FRYDMAN “Co-regulation: a possible legal model for global governance,” in B. DE SCHUTTER (ed.), *About globalization*, VUB Brussels University Press, Brussels, XXX.

12. It is not surprising, thus, that a number of analyses on developments in the field of corporate social responsibility, or, more generally, on the subject of governance, tend to take up the perspective of *legal pluralism*. See, *inter alia*, the excellent study by Snyder on the regulation of the toy industry: F. SNYDER, “Governing Economic Globalization: Global Legal Pluralism and European Law,” *European Law Journal*, vol. 5, nº4, December 1999, pp. 334-374.

13. For analyses of instruments of regulation, see P. LASCOUMES, P. LES GALES (dir.), *Gouverner par les instruments*, Presses de la fondation nationale des sciences politiques, Paris, 2004; P. ELIADIS, M. HILL, M. HOWLETT (eds.), *Designing Government: From Instruments to Governance*, Montréal, McGill-Queen's University Press, 2005.

14. For an analysis of various typologies, see E. VEDUNG, “Policy Instruments: Typologies and Theories,” in M.-L. BEMELMANS-VIDEC, R.C. RIST, E. VEDUNG (eds.), *Carrots, Sticks & Sermons: Policy Instruments and their Evaluation*, Transaction Publishers, New Brunswick/New Jersey/London, 1998, pp. 21-58.

regulation and, furthermore, to differentiate certain mechanisms that will be relevant to the second part of this article. We are inspired by the analyses of N. Gunningham and D. Sinclair[15] which distinguished five regulatory mechanisms, or categories of instruments, each of which can be presented differently. First, the classic mechanism of *regulation* in which rules are defined by public authorities – with or without the cooperation of private actors – that penalize violations of the rules. Typically, this form of regulation is a matter of civil and criminal law. The second mechanism of regulation comprises the totality of instruments termed *economic*: they may establish market conditions to regulate a subject or sector (for example, negotiable pollution laws), or they may put positive or negative incentives into place in order to promote certain kinds of behavior (for example, subsidies on the installation of solar panels, or eco-taxes). The third type of regulatory mechanism is *self-regulation,* and is best distinguished from *voluntarism*, a separate mechanism altogether. In the case of self-regulation, private actors form an association that regulates the conduct of its members on the basis of certain norms. The latter are eventually compiled in the form of a code of conduct (*i.e.* the *International Federation of Pharmaceutical Manufacturers & Associations* verifies its members' adherence to the federation's code of conduct regarding the marketing of pharmaceuticals). *Voluntarism*, on the other hand, constitutes a particular mechanism of regulation whereby individual private actors unilaterally commit to respect certain regulations independently of formally established constraints or sanctions. Finally, the fifth mechanism of regulation is *information*. This mechanism unites all instruments based on the transmission of knowledge, and includes education and training programs, the publication of reports, and the certification of products by logos, brands, or seals.

Instruments resulting from this group of categories (*regulation*, *economic*, *self-regulation*, *voluntarism*, *information*) are involved in the regulation of the conduct of corporations in the area of social responsibility. However, without neglecting the conceptual relevance of this genre of typology, it is important to keep in mind that these are general categorizations, and that mechanisms of regulation do not generally result from one category alone. In effect, the efficacy of regulatory instruments and of self-regulation often depends on the existence of reliable information and consequently involves the use of instruments of information. Likewise, voluntarism often depends on the existence of economic instruments that induce unilateral commitments, or on instruments of information, like logos, that permit the communication of these voluntary commitments. The relevance of this type of typology does not become apparent until we attempt to analyze possible combinations of instruments of a different nature.

These combinations of instruments can be made in parallel or sequentially. In the case of a *parallel combination,* two instruments are used jointly. This is the case when a law compels corporations to indicate their social and environmental policy, or to publicly explain why they do not possess such a policy (*regulation* and *information*). Similarly, public insurance companies grant reduced premiums to companies that set a social and environmental code of conduct that makes a provision for an external audit (*economic instruments*). The effect of the two instruments is combined in order to encourage the development of social and environmental corporate policy. In the case of a *sequential combination*, a regulatory instrument is used which, if it does not produce the desired effect, is then replaced by another, usually more binding instrument. This is the case when a group of industries implements a system of *self-regulation*, for example, with a view to limiting carbon dioxide emissions, and anticipate that, in the case of failure, the government will implement an eco-tax on this type of pollutant (*economic instruments*). Thus, the effect of regulation of the first instrument is reinforced by the threat of the adoption of a more binding instrument.

The concept of co-regulation does not denote a category of instruments. *Sensu stricto*, it refers to the combination of instrument categories: an instrument of *regulation* or an *economic instrument*, and an instrument of *self-regulation* or *voluntarism*. We will therefore speak of co-regulation *sensu stricto* in two ways, depending on whether these instruments are combined sequentially or in parallel. In the first case, an instrument of *self-regulation* is implemented and, in case of the failure of this system of self-regulation, an instrument of *regulation* legally sanctioning this failure is implemented. In the second case, instruments of *regulation*, *self-regulation* or *voluntarism*, intervene at the same time. A

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15. N. GUNNINGHAM, D. SINCLAIR, “Regulatory Pluralism: Designing Policy Mixes for Environmental Protection,” *Law & Policy*, vol. 21, n°1, January 1999, pp. 49-76.

law, for example, provides for certain general norms, but delegates the precise definition of their implementation to a sectoral organization, in other words, to a system of self-regulation.

At this level of specificity, it is clear that the notion of co-regulation denotes a particular method of regulation based on the interaction between certain types of instruments. From the perspective of a study of the *global effects of regulation*, it is of little importance to know whether the combination, achieved through regulation, of two instruments forming a mechanism of co-regulation is the product of a planned strategy or simply a collateral effect. Nonetheless, co-regulation can be characterized as a strategy of public policy. Over the last few years, within the context of the simplification of its regulatory environment, the European Union has developed *alternative modes of regulation* amongst which co-regulation[16] figures prominently, along with self-regulation and the open method of coordination.[17] In order to avoid confusion, we must point out that our usage of the concept of co-regulation, if it partially overlaps with the sense of the concept as used in the documents of European institutions, is broader in scope; its purpose is to constitute a model of analysis, not to describe a public policy instrument.

We have seen that co-regulation can be understood in two different ways. *Sensu lato*, it is the expression of the notion of governance in terms of a theory of regulation, and it carries certain methodological limitations as well as a general purpose. *Sensu stricto*, co-regulation refers to a mechanism of regulation stemming from the interaction between specific categories of instruments. In both cases, the concept of co-regulation is not capable of qualifying a dynamics like the one taking place in the domain of corporate social responsibility. On the one hand, the concept is too general and does not provide information about the type of regulation this trend implies. On the other hand, the notion is too specific to explain the process implied by the ensemble of regulatory phenomena that occur in the name of corporate social responsibility. This is why we speak of the development of a *system of co-regulation*. Indeed, the general argument developed in this article is that the actual dynamics of corporate social responsibility should be understood in terms of the development of a model of legal regulation at the global level, or of a *system of co-regulation*. This system is the result of the interaction, desired or not, between different instruments of regulation that make the regulatory intervention of numerous private or public actors possible. It is called a *system of co-regulation* because the interaction between the instruments as a whole manages to link an instrument of *self-regulation* or *voluntarism* – a code of conduct, for instance – and an instrument of *regulation* or *economic* instrument, and thus acts as a restraint that can take the form of administrative or legal sanctions if need be.

In order to highlight the development of a system of co-regulation in terms of corporate social responsibility, four logical phases – which may or may not take the place of chronological phases – are distinguished that allow us to clarify the *corporate social responsibility approach* as the identification of the principal function of associated regulatory instruments, and the characterization of the development of a system of co-regulation with regard to corporate social responsibility. The purpose of the next part is to examine these logical phases.

B. THE PROCESS OF CORPORATE SOCIAL RESPONSIBILITY

The process of corporate social responsibility is the result of the coexistence of different tools that specify the material content of norms and determine procedures surrounding social responsibility. These tools allow different actors to intervene in the conduct of corporations in order to induce or constrain the latter's commitments towards social responsibility. Over the last fifteen years, initiatives tended to formalize and specify corporate social responsibility, and sought to, as the case may be, implement a series of control mechanisms. As an example of this, in a report published in February 2005, the *United Nations Sub-Commission on the Promotion and Protection of Human Rights*,

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16. On this subject, see L. SENDEN, "Soft-law, self-regulation and co-regulation in European law: Where do they meet?," *Electronic Journal of Comparative Law*, vol. 9, nº1, January 2005, available online at http://www.ejcl.org; as well as C. PALZER, "Co-regulation of the media in Europe. European provisions for the establishment of co-regulation frameworks," *Media, Law & Policy,* vol. 13, nº7, Fall 2003, pp. 7-27.

17. On self-regulation and co-regulation in Europe, see the summary document put forward by the European Economic and Social Committee. EESC, "The Current State of Co-regulation and Self-regulation in the Single Market," *EESC Pamphlet Series*, March 2005.

following consultation with private and public partners, estimated that 200 "initiatives and standards" existed concerning corporate responsibility in the area of human rights.[18] These tools do not presently constitute a coherent system, but rather heterogeneous initiatives presented *according to their source* (national public authorities, international organizations, enterprises, civil society); *according to their content* (certain initiatives refer generally to human rights, while others are more specific); *according to their jurisdiction* (certain initiatives, notably legislative initiatives, are limited by the territorial application of law, while others apply to all enterprise activity and are, in certain circumstances, imposed on co-contracting parties); *according to their status* (certain initiatives are legally binding and bind either States or corporations, while others identify with incentives or voluntary commitments, and do not have a constraining character *per se*); and *according to procedures of implementation and follow-up* (certain initiatives lack procedures of this type, others explicitly plan such procedures, and some appeal to autonomous and complimentary procedures). As we have previously stated, this rich mixture of tools and instruments proves to be incompatible with a clear and precise typology. Though our analysis will not be exhaustive, we will examine the most representative and pertinent normative tools and instruments in order to defend our hypothesis. We will not provide an inventory of these tools, but rather will identify their role in a corporate social responsibility approach. In particular, we will show that these different tools enter into a dynamics that can lead to the development of a *system of co-regulation*.

We have identified four stages configuring the dynamics of corporate social responsibility. They correspond to the four logical phases of the development of a system of co-regulation concerning corporate social responsibility. First, a set of social and environmental norms are defined and adopted by the actors involved. The definition and adoption of norms condition the entire process, and are the result of the effects of diverse tools and mechanisms. This first logical phase will be discussed in the first section. Second, defining and adopting standardized norms is not sufficient to configure an effective system of regulation. Again, it is necessary for corporate social and environmental commitments to be accompanied by the implementation of mechanisms guaranteeing such commitments are respected. The purpose of the second section will be to study these mechanisms. Third, an effective system of co-regulation depends upon the regulatory intervention of a multitude of actors. The intervention of these actors is conditioned by access to credible information about social responsibility policies and their implementation. The third section will then concern the analysis of various instruments designed to guarantee this transparency. Finally, a system of co-regulation does not exist without oversight and enforcement in case of infringements. The fourth section will concern the study of a number of regulatory tools capable of overseeing and enforcing corporate respect for social and environmental commitments.

1. Norms

The first logical phase of a system of co-regulation regarding corporate social responsibility concerns the definition and adoption of norms. For the regulation of corporate conduct to be effective and lead to *global effects of regulation*, the content of norms must not remain heterogeneous, and must exhibit some uniformity. This uniformity is the outcome of a set of tools that define standards in terms of social responsibility. If the definition of norms is essential, it is equally important that corporations commit to respect these norms, either on their own initiative, or because they are induced or constrained by other actors, public or private. There are a plurality of tools and mechanisms that promote the adoption of norms by corporations. These tools will be studied in the second phase.

(i) Definition

Due to their diversity and free and voluntary nature of their adoption, the content of corporate codes is not homogeneous. In reality, these codes deal with a rather broad group of themes: the environment, corruption, consumer relations, labor law, workplace safety, relations with foreign governments, etc. The absence of uniformity of content raises difficulties that help explain the liberties taken by certain corporations and some enterprises in unilaterally delimiting the social and

18. United Nations Sub-Commission on the Promotion and Protection of Human Rights and the Office of the United Nations High Commissioner for Human Rights, *Report on the responsibilities of transnational corporations and related business enterprises with regard to human rights*, 15 February 2005, E/CN.4/2005/91.

environmental norms to which they will submit. For example, when codes of conduct refer to the respect of human rights, which is not always the case, not only do certain corporations choose to define the concept of human rights for themselves, but, moreover, they select the laws to which they will adhere. According to some studies,[19] codes of conduct essentially concern labor law and respect for the environment, but also include provisions regarding consumer protection, corruption, competition and transparency. Human rights that are usually included concern forced labor, child labor, conditions of employment, and freedom of association.

The inconsistency of the content of corporate codes of conduct highlights the usefulness of codes with a universal, international or regional scope intended to standardize ethical norms. These texts can emanate from international or regional organizations, specialized bodies, or the private sector. We will successively examine the OECD Guidelines for Multinational Enterprises, the ILO's Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy, the United Nations Global Compact, and the United Nations Sub-Commission's Draft Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, as well as four model codes of conduct emanating from private actors.

The OECD Guidelines

The *OECD Guidelines*[20] *for Multinational Enterprises*[21] are recommendations made by State parties addressed to enterprises operating on or from their territory. These Guidelines are voluntary norms of responsible corporate behavior and good practices that aim to ensure harmony between the multinational enterprises and the governments' policies; to improve the confidence between enterprises and the communities in which they operate; to improve the framework and conditions of foreign investment; and to increase the enterprise's contribution to sustainable development. These Guidelines reinforce and complete private initiatives concerning norms of responsible corporate behavior.

While inviting enterprises to take the point of view of other actors and the policies of the countries in which they operate into account, the general principles introducing the Guidelines are quite broad and not very well defined. They encourage enterprises to contribute to economic, social and environmental progress in order to achieve sustainable development; to cooperate with the local community; to develop human capital; to refuse non-legal exemptions in the areas of taxation, environment, health, security, work, etc.; to abide by principles of good corporate governance; to inform employees about the enterprise's policies; to refrain from punishing employees who denounce bad practices; and to refrain from intervening unduly in local policy activities. The second principle directly relates to human rights and states that enterprises should respect the human rights of the persons affected by their activities, while limiting human rights to those resulting from international agreements of the host country's government. In addition to these general principles, there are different dispositions concerning the publication of information, employment and professional relations, the environment, the fight against corruption, consumer interests, science and technology, competition, and taxation. The Guidelines invite States to demand that their national enterprises respect, in their international activities, the rules and regulations applicable in conformity with the host country's internal law. The measures on employment and relations at work directly concern human rights, since they cover the freedom of association, the ban on child labor, non-discrimination towards employees, the ban on forced or compulsory labor, and on workers' rights. The Guidelines take over

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19. For an analysis of the content of codes, see: E. CARASCO and J. SINGH, "The Content and Focus of the Codes of Ethics of the World's Largest Transnational Corporations," *Business and Society Review*, n°108, 2003, pp. 71-94; M. KAPTEIN, "Business Codes of Multinational Firms: What Do They Say?," *Journal of Business Ethics*, March 2004, pp. 13-31; K. GORDON and M. MIYAKE, "Deciphering Codes of Corporate Conduct," *Working Paper on International Investment,* n°1999/2, 2000, OECD.

20. The OECD Guidelines (Revision 2000). The text of the guidelines is available on the OECD website: www.oecd.org. The Guidelines do not give a definition of the concept of multinational enterprises. At most, they indicate that they can be public, private or mixed. The Guidelines concern all the entities of companies.

21. The Guidelines are part of the *OECD Declaration on international investment and multinational enterprises*, of which the other elements are about national treatment, contradictory obligations imposed on companies as well as incentives and impediments to international investment.

certain dispositions of the 1997 ILO Tripartite Declaration of Principles concerning multinational enterprises and social policy.

If these Guidelines are only recommendations that States commit themselves to address to enterprises without constituting direct legal obligations binding the latter, they nonetheless contain for their implementation a mechanism that relies on dialogue, dissemination and the exchange of information. States that have subscribed to the Guidelines have to set up *National Contact Points* in charge of promoting these Guidelines, replying to requests for information about them and helping to resolve problems concerning the areas dealt with by the Guidelines with the parties concerned. In the case of a dispute, the National Contact Point will, with the agreement of the different parties, facilitate access to consensual and non-contentious means, such as mediation or conciliation. If this procedure fails, the National Contact Point can publish a press release and, eventually, its recommendations concerning the implementation of the Guidelines. The *OECD Committee on International Investment and Multinational Enterprises* (CIME) receives the annual reports of the National Contact Points on the nature and results of their activities, organizes exchanges between States as well as between shareholders, adopts its recommendations aiming at improving the implementation of the Guidelines, and the CIME has the ability to consult experts to draw up reports on more general issues, such as human rights. The CIME reports to the OECD Council.

The Guidelines provide a frame of reference of social and environmental norms to which enterprises are encouraged to adhere, especially in their commercial activities in developing countries.

The International Labor Organization's Tripartite Declaration

The ILO tackled very early on the question of the regulation of the conduct of multinational enterprises, particularly their relations with their host countries. After a long negotiation and discussion process, the representatives of the States, companies, and various social actors finally adopted in 1977 the *Tripartite Declaration concerning Multinational Enterprises and Social Policy* (modified in 2000).[22] The principles it states relate to employment (i.e. the promotion of employment, equality of opportunity, treatment, and job security); training and vocational guidance; working and living conditions (i.e. salaries, allowances, working conditions, minimum age, safety, and health); and inter-professional relations (i.e. the freedom of trade unions and other types of organization, collective bargaining, consultation, and work related conflict solving). Other fields of human rights, however, are not covered by this text. The Declaration confines itself to *recommending* the application and respect of these principles *on a voluntary basis*. The main objective of this Declaration is to provide a frame of reference to multinational enterprises, social actors and governments, in the hope that it may inspire the choice of their measures and initiatives as to social policy. After having recalled that the parties concerned with the Declaration must respect the sovereign rights of the States, the international and national rules and regulations (in particular the International Charter of human rights and the ILO's principles), the companies are invited to conform to the "good practices" defined by the Declaration. The ILO periodically surveys the actors concerned with the Tripartite Declaration on the respect for the *good practices*, and analyzes the answers before publishing summaries. On the occasion of a disagreement of the application and interpretation of the Declaration, the parties involved can request an interpretation of the provisions of the Declaration from the ILO. [23]

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22. The Declaration states that a precise legal definition of multinational enterprises is not essential to make the Declaration reach its objective. It is only giving a practical definition which aims to better understanding its scope. Therefore, "multinational enterprises include enterprises, whether they are of public, mixed or private ownership, which own or control production, distribution, services or other facilities outside the country in which they are based. The degree of autonomy of entities within multinational enterprises in relation to each other varies widely from one such enterprise to another, depending on the nature of the links between such entities and their fields of activity and having regard to the great diversity in the form of ownership, in the size, in the nature and location of the operations of the enterprises concerned. Unless otherwise specified, the term 'multinational enterprise' is used in this Declaration to designate the various entities (parent companies or local entities or both or the organization as a whole) according to the distribution of responsibilities among them, in the expectation that they will cooperate and provide assistance to one another as necessary to facilitate observance of the principles laid down in the Declaration."

23. Board of Directors of the International Labor Office, *Procedure for the examination of disputes concerning the application of the tripartite declaration of principles concerning multinational corporations and social policy by*

Like the Guiding principles, from now on the Tripartite declaration constitutes a frame of reference with regard to corporate social responsibility, particularly in the field of labor law.

The United Nations World Pact (Global Compact)

The Global Compact has a twofold objective which is, on the one hand, to contribute to sustainable development by putting in place partnerships and encouraging good practices; and, on the other hand, to promote globalization based on the market economy beneficial to all. It was drafted in consultation with companies and civil society actors. As to the content, the Global Compact contains ten principles which the adherent companies undertake to respect and promote. The Global Compact urges the leaders of the companies to "embrace, support, and enact" a set of fundamental values in the field of human rights, labor standards, the environment, and the fight against corruption. The ten principles were inspired by the Universal Declaration of Human Rights, the ILO's Declaration on Fundamental Principles and Rights at Work, the Rio Declaration on Environment and Development, and the United Nations Convention against Corruption. The first two principles relate to human rights. Companies must promote and respect the human rights recognized at the international level and must not be party to violations of basic rights. The four following principles relate to labor standards. Companies are encouraged to respect the freedom of association and recognize the right to collective bargaining, eliminate all forms of forced and obligatory labor, effectively abolish child labor, and eliminate discrimination employment. The next three principles aim at the protection of the environment: companies ought to take a more prudent approach to major environmental problems, initiate more responsible environmental practices, and encourage the development and spread of environmentally-friendly technologies. Finally, the last principle encourages companies to act against corruption in all its forms, including bribery and extortion of money.

Several specialized agencies of the United Nations contribute to the follow-up work of the Compact: the International Labor Organization (ILO), the United Nations Development Program (UNDP), the United Nations Environment Program (UNEP), the United Nations High Commissioner for Human Rights, and the United Nations Industrial Development Organization (UNIDO). *A Global Compact Office*, set up under the aegis of the United Nations, ensures the respect of the commitments entered into by the companies. However, this office does not have the means to compel companies to respect their engagements. The application of the Compact depends only on the goodwill of the companies and the degree of social responsibility to which they commit themselves. This office is at the origin of the first Global Compact Guidelines for "Communication on Progress," published in January 2003. These aim in particular to encourage companies to integrate, in their annual report or their report on sustainable development, a description of the application of the Compact's principles. Concretely, the companies which adhere to the Global Compact undertake to present the Compact in their declarations of intent, annual reports, and other internal texts; to give precise examples of their own experience on the Global Compact website; to join the United Nations in partnership projects; and to set out cooperative action plans to achieve the goals of the Compact. Their membership in the Compact enables them to have access to a network of practical information (i.e. data banks and experiment sharing); to use the logo of the Global Compact in their communication materials; to be in contact with various partners throughout the world; and to benefit from a medium of communication conducive to improving their image.[24] The Global Compact already has nearly one thousand three hundred companies from very different branches of industry implanted in fifty six countries. Trade unions and non-governmental organizations can engage equally within the framework of the Global Compact. This is the case in particular with Amnesty International, Human Rights Watch, World Life Fund, and the World Conservation Union.

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interpretation of its provisions, Geneva, March 1986.

24. The provisions of the United Nations Global Compact and the way in which the document considers the relations between the various actors are symptomatic of the evolution of governance on the global level. The Global Compact testifies, according to Backer, of the institutional recognition of the existence of multiple sources of powers and of the competition between a multiplicity of regulating authorities. See the analysis proposed in L.C. BACKER, "Multinational Corporations, Transnational Law: The United Nation's Norms on the Responsibilities of Transnational Corporations as a Harbinger of Corporate Social Responsibility in International Law", *Columbia Human Rights Law Review*, vol.37, 2006, pp. 287-389.

The draft norms on the responsibilities of transnational corporations and other business enterprises with regard to human rights of the Sub-Commission

In August 2003, *the United Nations Sub-commission on the Promotion and Protection of Human Rights* adopted a project entitled “Norms on the Responsibilities of Transnational and Other Business Enterprises with Regard to Human Rights.”[25] At present, this initiative exists only in the form of a project submitted to the United Nations Commission on Human Rights. This text[26] says that it is up to States to promote and protect human rights, while stressing that companies must also, in their respective spheres of activity and influence, *ensure respect of and protect the human rights recognized in international as well as national law, including the rights and interests of indigenous people and other vulnerable groups, and to ensure their achievement*. The Sub-Commission asks that the *Norms* be used as a model of reference to make it possible, for example, to evaluate ethical investment initiatives and the control companies have in the respect of human rights obligations.

In general, the human rights to which the text refers must be understood in terms of civil, political, cultural, economic and social rights, as used in the International Charter of human rights and the other instruments with regard to human rights, as well as the right to development and the rights recognized by international humanitarian law, international refugee law, international labor law, and other relevant instruments adopted within the United Nations system.[27] Companies must respect several specific provisions relating to equal opportunity and non-discrimination, the safety of persons, the rights of workers, respect for national sovereignty and human rights, consumer protection, and the protection of the environment.

The Global Sullivan Principles

The *Global Sullivan Principles* describe a code of reference of private origin.[28] Enacted in 1977 by Reverend Sullivan – former member of the Board of Directors of General Motors – for companies active in South Africa, these principles of social and economic justice and equal opportunity were amended in 1999 to be applied by every company, and not exclusively by the companies operating in the context of apartheid. The companies which subscribe to it engage themselves: to express their engagement in favor of human rights, and in particular to the rights of their workers and the communities in which they operate; to promote the equal opportunity of employees and prohibit discrimination; to respect the freedom of association; to remunerate their employees whilest ensuring that these remunerations enable them to satisfy at least their most elementary needs; to allow them to be organized professionally; to guarantee safety and health in the work place; to protect the environment and promote sustainable development; to promote fair competition, in particular, to respect intellectual property rights; to refrain from committing any act of corruption; to collaborate with the government and local communities in order to improve the quality of life of these communities; and finally, to promote the Sullivan principles amongst their trading partners.

Principles of Human Rights for Companies (Amnesty International)

The non-governmental organization Amnesty International, for its part, published a text with the aim of encouraging multinational corporations, in their codes of conduct, to insist on the need for the respect and promotion of human rights by enumerating them (particularly on the basis of the Universal Declaration of Human Rights, ILO conventions, and the ILO Tripartite Declaration), and pointed out the pressing need for a mechanism of independent and credible control in the form of a regular social audit to be put in place.[29] Under the terms of this text, companies are invited to adopt an explicit policy

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25. Sub-commission for the promotion and protection of human rights, Draft standard on the responsibility for transnational companies and other companies regarding human rights, E/CN.4/Sub.2/2003/12/Rev.2. (Below "Draft standard.")

26. The material contents of the Draft norms are examined in the contribution of Pierre-François Docquir and Ludovic Hennebel published within this volume.

27. *Draft standard*, Article 23.

28. See, on these principles, information available online published by the Sullivan Foundation at the following address: http://www.thesullivanfoundation.org.

29. The text can be consulted online in French at: www.amnistie.qc.ca/economie/pdf/ACT70-001-98.pdf.

of fundamental rights, comprising a public commitment to respect the provisions of the Universal Declaration of Human Rights; to lay down procedures allowing them to make sure that all their activities are examined according to their potential impact on the rights of human beings, such as guarantees intended to prevent members of their staff from being accomplice to infringements of fundamental rights; to ensure that any safety provision protects the rights of the human person and is compatible with international standards for the maintenance of law and order; to take reasonable measures to make sure that their activities do not hinder the exercise of human rights of the members of the community within which they operate; to ensure that their policy and practices prevent any discrimination based on ethnic origin, sex, race, language, national or social origin, economic situation, political or religious convictions or for any other reason of conscience, birth or situation; to ensure that their policy and practices prohibit dominance over people due to debt, forced labor, and children or prisoners working under constraint; to ensure that their policy and practices are in conformity with health and safety requirements as far as working conditions and product conditions are concerned; to ensure that every employee can exert his or her rights of freedom of expression, assembly, and other forms of peaceful association; to ensure that their personnel benefit from equitable and satisfactory working conditions, reasonable job security, as well as adequate and equitable remuneration and allowances; and, finally, to create mechanisms which give them the authority to effectively bring the whole of their activities in line with the codes of conduct and international instruments of basic human rights.

The Caux Round Table – Principles for Business Conduct

Convinced that the business world has a substantial role to play in the improvement of economic and social conditions, the participants of the Caux Round Table decided to draft principles for business conduct which aim to offer a global standard for companies to refer to.[30] These principles find there origin in two fundamental ethical concepts: the Japanese concept of *kyosei*, and the concept of human dignity. *Kyosei* means to live and work together for the common good in a way which reconciles cooperation and mutual prosperity with healthy and honest competition. Human dignity refers to the sacred nature of the human being, each individual being recognized as an end in itself and not as an instrument used to achieve the objectives of others or the will of the majority. These general principles underline the role and responsibilities of companies in their activities with their partners and the community; the need to take into account the economic and social impact of companies, especially those operating abroad; respect for honest behavior in business management; compliance with the laws; the importance of the support of companies for multilateral trade; respect of the environment; and the obligation to abstain from any illicit operation. The principles with regard to their partners specify the elementary guidelines of respect within the framework of relations between the company and its customers (for example, to provide quality services and products, or to respect the cultural integrity of the customers); the employees (for example, to protect employees against industrial accidents, or to prohibit discriminatory practices); the investors (for example, to preserve and protect their credit); the suppliers (for example, to encourage suppliers to respect human dignity); the competitors (for example, to support the opening of investment and trade markets); and the communities (for example, to encourage peace and respect the integrity of local cultures).

The Ethical Trading Initiative Code of Conduct

Certain model codes of conduct are written and carried out by several private actors. Such codes of conduct as the *Ethical Trading Initiative* are promoted by networks of companies, civil society actors, and social partners. The Ethical Trading Initiative (ETI) code of conduct rests on nine principles:[31] the free choice of employment; freedom of association and the right to collective bargaining; the compliance of working conditions with health and safety rules; the prohibition of child labor; a minimum wage; a limit on working hours; the principle of non-discrimination; the steadiness of employment; and the prohibition of severe or inhuman treatment. The companies which join the

30. The text can be consulted online in French at: http://cauxroundtable.org.
31. The text can be consulted online in French at: http://www.ethicaltrade.org/Z/lib/base/index.shtml.

ETI[32] must adopt this code or include it in their existing code. Moreover, they must agree to subscribe to the code's implementation based on an independent and external oversight mechanism, the publication of an annual report, and to provide workers with a confidential procedure to denounce a violation of the code.

The model codes define the material content of social responsibility obligations. However, there is virtually no appeal possible against companies if they do not adopt the rules and principles which these codes contain. Therefore, a set of tools has been created to encourage or force companies to adopt certain standards of social responsibility.

(i) Adoption

The development of an effective system of co-regulation implies the adoption of standards by companies. They can choose to adopt them either on their own initiative or because they are encouraged or forced to by other actors, public or private. Control is exerted by third parties via various tools. We will examine three of these tools in particular: codes of conduct, contracts and public policy legislation.

Codes of Conduct

Many companies have adopted codes of conduct in which they state their social responsibility engagements broadly in terms of good governance. There are a variety of codes of conduct. We can distinguish between, on the one hand, codes adopted by only one company or a group of companies and, on the other hand, the codes of multi-enterprises covering sectoral codes, codes of company clubs, codes negotiated by "*multistakeholders,*" and codes of corporate networks. In a study published in 2003, Emily Carasco and Jang Singh, two researchers from the University of Windsor (Ontario), identify five main reasons why companies adopt codes or engage in a social and environmental policy.[33] First, such codes make it possible to reinforce the image and reputation of the company, even the reputation of the brand of certain products. Second, thanks to these codes, the company communicates a clear message to the parties involved by showing itself to be an ethical and socially responsible actor. In the event of a crisis, if the ethics of the company come under attack, codes of conduct can be put forward as the rule, while presenting the incident as the exception. Third, codes can create and even strengthen a coherent company culture. Fourth, codes can, in certain cases, as we will see, make it possible for companies to avoid administrative or legal sanctions. Finally, fifth, respect for good commercial practices that rely on universal standards and values which transcend national laws and local cultures increases the prospects of the development of emerging economies and guarantees future output for the companies.

The result of regulating multi-enterprise codes

The codes of conduct established by several companies[34] appear as one of the most elementary instruments supporting the adoption, and, if necessary, the standardization, of codes of conduct by companies. This type of code is an instrument of *self-regulation* which has the effect of organizing competition between companies which subscribe to it. Having thus organized the market, the multi-enterprise codes encourage, to different degrees, firms outside the regime of *self-regulation* to either join this regime or propose alternative initiatives. We clearly see, therefore, the double role played by the adoption of a multi-enterprise code. On the one hand, self-regulation aims to avoid recourse to

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32. They are primarily companies active in the British market, *BBC*, *Levi Strauss & Co*, *Gap Inc.*, *Body Shop International*, to quote only a few that are members.

33. E. CARASCO and J. SINGH, "The Content and Focus of the Codes of Ethics of the World's Largest Transnational Corporations," in *Business and Society Review*, n° 108, 2003, pp. 71-94. The observers and analysts do not agree on the question of the incidence of the codes in commercial terms. According to some of them, the codes would not have any particular influence on the behavior of employees or that of consumers. Others concede that the codes would affect to a certain extent the image of the company and the internal coherence of the company culture and entrepreneurship.

34. If the codes adopted by only one company are most numerous, their detailed study is only of minor interest to highlight the logic of the dynamics of corporate social responsibility. This type of code is not indeed generally likely to produce, *per se*, global effects of regulation, except in certain cases examined hereafter. We restrict consequently our analysis to the codes multi-enterprises which function, from the start, as mechanisms of regulation.

instruments of *regulation*.[35] On the other hand, the adoption of such codes also directly carries economic stakes. As Gendron, Lapointe, and Turcotte show, companies set up systems of self-regulation "in order to conform more quickly or even to contribute to the development of new standards, and thus acquire a competitive advantage." The potential enforcement of the these standards by the public authorities makes it possible "to create or crystallize new rules of the game at the advantage of the leading companies, forcing the others to adjust themselves afterwards to standards, and even sometimes a technology, fixed by others."[36] In addition to their role as instruments of *self-regulation*, the codes of conduct of multi-enterprises play the role of *economic* regulatory instruments. For this reason, the adoption of a code of conduct of multi-enterprises favors the adoption of other codes by different companies.

The war of standards

If the codes of multi-enterprises are thus likely to encourage the adoption of other codes by different companies, this incentive helps contribute to a "war of standards" between companies or sectors. For example, alternative initiatives were adopted in order to counter general resort to the SA8000 device.[37] The latter is a mechanism of socially responsible management which comprises a *multistakeholder* code of conduct, making express reference to various principles and rules that are issued from international human rights law and which integrates a particularly constraining system of management and audit. After many rumors stating the intention of the United States and the European Union to close their markets to products which would not satisfy the SA8000 system,[38] the Chinese organization representing the textile and clothing sector (*China National Textile and Apparel Council*) set up in 2005 a device competing with the SA8000 system, called CSC9000T (*Social Compliance for Textile and Apparel Industry Clouded China Social Compliance for Textile and Apparel Industry*). The standards integrated in the CSC9000T device are not very demanding standards with regard to the protection of human rights. For example, while the code of conduct integrated into the device includes the prohibition of forced labor, the concept of forced labor it provides does not include either the work done under the terms of the obligatory military service rules, or work done within the framework of normal civil obligations.[39] If this definition of forced labor takes international human rights law as its starting point,[40] its integration into a code of conduct used by companies anticipates a certain indulgence with regard to the application of international standards of the prohibition of forced labor. Another example is that the code of conduct of the CSC9000T device does not include the freedom of association, but only the right of workers to adhere to the single Chinese trade union.[41] From the point of view of implementation, if the CSC9000T standard provides for a system of management as well as the organization of an internal audit, it does not define any specific procedure, but leaves it up to the directors of the company to lay down the rules they consider relevant.[42] The case of the CSC9000T

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35. See, *inter alia*, C. GENDRON, MR.-F TURCOTTE, "Environment, concertation, derèglementation: la modernisation règlementaire à l'heure des méta-enjeux," *Sociologies Pratiques*, n° 7, July 2003, pp. 130-156; K HARRISON, "Voluntarisme et gouvernance environnementale," in *Gérer l'environenment: défis constants, solutions incertaines*, E. PARSONS (Dir), Montreal, Les Presses de l'Université de Montreal, 2001, pp. 209-247; K RONIT, V SCHNEIDER, "Global Governance through Private Organizations," *Governance: An International Journal of Policy and Administration*, vol.12, n° 3, July 1999, pp.243-266.

36. C. GENDRON, A. LAPOINTE, M.-F. TURCOTTE, "Responsabilité sociale et régulation de l'entreprise mondialisée," *Relations Industrielles/Industrial Relations*, vol.59, n°1, 2004, pp. 78.

37. See, *infra*, pp. 194 and following.

38. See "China comes to grips with new labor standard," *The Daily Star Web Edition*, vol. 5, n° 53, July 18, 2004, available online at: http://www.thedailystar.net/2004/07/18/d40718050552.htm.

39. "[T]he term forced or compulsory labor shall not include: 1) any work or service exacted in virtue of compulsory military service laws for work of a purely military character; 2) any work or service which forms part of the normal civic obligations; […]." "CSC9000T. China Social Compliance for Textile & Apparel Industry: Principles and Guidelines 2005," pp. 8 (available online at http://www.csc9000.org.cn/download/CSC9000T_ENG_2005.pdf).

40. See in particular Article 8 of the International Covenant on Civil and Political Rights.

41. "[T]he right of employees to form and join the trade union and to bargain collectively," *ibid.*, pp. 11. It understands "the trade union" as referring to "the All-China Federation of Trade Unions and all the trade union organizations under it representing the interests of all employees and safeguarding the legitimate rights and interests of employees," *ibid.*, pp. 8.

42. See, *ibid.,* pp. 18-27.

system and others[43] highlights the effect of regulation produced by the development of multi-enterprise codes. The firms placed outside the mode of *self-regulation* are encouraged either to adopt it, or to create a different mode based on other standards. In both cases, the companies are encouraged to adopt codes of conduct.

Sectoral codes

Within the multi-enterprise codes, it is important to pay particular attention to the sectoral codes. Indeed, many companies are organized more or less formally into sectoral organizations. These organizations play the role of regulator towards their members by forming self-regulation regimes that, for example, can relate to matters of corporate social responsibility. Therefore, certain companies adopt codes of conduct that they are strongly encouraged to subscribe to because of their commercial activities in a given industry.[44] For example, the toy industry adopted a code of commercial practices upon the initiative of *the International Federation of Toy Industries.*[45] This federation promises to take part, in the name of the companies which compose it, in action aiming to guarantee that the toy manufacturing factories operate within the law and under perfect health and safety conditions. Of the principles underlying its activities is the prohibition of child labor, forced labor, working in prisons, the condemnation of discrimination based on sex, ethnic origin, religion, and membership in any organization or association, and the respect of factories for environmental protection legislation. The adoption of a code of conduct at the level of the organization of a branch of industry encourages, even makes compulsory, the adoption of the code by all the companies in the sector.

Contracts

The contract is a flexible regulatory instrument insofar as the parties profit from a great freedom to establish the content of their obligations. Within the framework of corporate social responsibility, contractual clauses are the preferred instrument to impose respect for social and environmental standards on the contracting companies. Thus, a contractual clause can, for example, directly compel respect for certain social or environmental standards, or else compel the respect or adoption of a particular code of conduct. Without claiming exhaustiveness, we can distinguish different types of cases in which these contractual clauses are used. We will examine two categories of cases in particular: first, the case of a company or a group of companies imposing respect for a code of conduct or of certain social and environmental standards on their contracting parties; and, second, the recourse public authorities have to these clauses within the framework of contracts with public contractors or with the beneficiaries of public aid.

Contracts between companies

In the first place, a company can impose respect for its own code of conduct or of certain social standards on its contracting parties. Indeed, it is the whole production line which needs to be taken into account in order to guarantee the respect of human rights and social policies in the production process.[46] One solution, thus, consists in imposing on the subcontractors certain standards or principles

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43. In Europe, within the initiatives which are developed in order to avoid the standardization of recourse to the SA8000 system, it is necessary to count on the *Business Social Compliance Initiative* set up by the *Foreign Trade Association,* the European pressure group in the field of foreign trade. The management system developed within the framework of this initiative – which we will not analyze here – constitutes a light version of the SA8000 system. See http://www.bsci-eu.org.

44. The multi-enterprise codes, sectoral codes in particular, contribute as we mentioned above to organized competition on the market. Can they, however, be regarded as having restrictive effects on competition? We are of the opinion that the sectoral codes cannot be regarded as impediments to free competition *per se*. By their nature, they aim precisely at organizing competition by aligning the social and environmental commitments of all the economic actors of the same sector. On the other hand, we do not exclude that the companies of a sector use a sectoral code in order to hinder competition, in violation of Article 81 of the EC Treaty.

45. See http://www.toy-icti.org/info / code.htm.

46. On this subject, see A. SOBCZAK, "Codes of Conduct in Subcontracting Networks: A Labor Law Perspective," *Newspaper of Business Ethics*, May 2003, pp. 226 and following.

stated in a company code of conduct through a suitable contractual clause.[47] The company *Gap* was one of the first to impose a code of conduct on its subcontractors.[48] The technique, which consists in imposing respect for codes or standards by means of contractual clauses, can produce significant *global effects of regulation* with a domino effect when a market leader decides to require respect for such a code from its subcontractors. Thus, *Nike*, which entrusts the making of its products to foreign companies, primarily in Southeast Asia, states that it requires its subcontractors to respect its codes of conduct concerning, above all, respect for social and environmentally acceptable standards.[49] If these standards are not respected, *Nike* can decide not to renew its contracts. Taking into account the dominant position of *Nike* on the market, imposing their code of conduct by contractual clause has resulted in equipping a considerable number of companies with a code of conduct. Henceforth, this mechanism has often been used. Several examples make it possible to illustrate its operation. We will look at two cases more closely: that of the code of conduct imposed by contract by the company *Fruit of the Loom*, and that of the electronics industry.

Fruit of the Loom, the clothing company, established a specific code of conduct for its contracting partners in the form of a contract.[50] This contract urges the contracting company to comply with certain rules within the framework of production entrusted to it. These rules cover, in particular, respect for the country's law of the territory on which the contracting partner operates; the prohibition of recourse to forced labor and child labor; the prohibition of the use of corporal punishment; and the prohibition of discrimination of employees on the basis of sex, race, national origin or religious convictions. The contract says that the sub-contracting company must provide all the necessary assistance to *Fruit of the Loom* in monitoring the respect of the code of conduct by it and its subcontractors, including access to all relevant documents, access to production sites in order to carry out inspections, and the right to hear employees' testimonies. If the contracting company subcontracts all or part of the production, the contract forces the company to annex to it, on the one hand, a form declaring the complete identity of the subcontractor(s), and on the other hand, a form signed by the subcontractors of the *Fruit of the Loom Contractor Code of Conduct*. If the rules embodied in the code of conduct are not complied with, the contract provides that *Fruit of the Loom* has the right to communicate all relevant information as to the illegal activities of the contracting partner or of its subcontractors to the authorities. In the event of a breach of the code of conduct, *Fruit of the Loom* also reserves the right to put an end to the subcontract as well as that to require the retrocession of all sums that the company would have already paid, including those intended to cover already committed expenses by the subcontractor for purchasing raw materials.

Recourse to contractual clauses to make the adoption of codes of conduct or respect for certain standards compulsory can also be seen in the multi-enterprise codes. As such, multi-enterprise codes are not limited to encouraging companies to submit to codes, rather they can force companies to if they wish to establish economic relations with one or more signatories companies. Thus, certain sectoral codes force companies which subscribe to them to impose respect for their content upon their subcontractors. For example, *the Electronics Industry Code of Conduct*[51] was developed in 2004 by the companies *Hewlett-Packard*, *Dell* and *IBM* as an initiative specifically designed to control the entire production process. Since its creation, a significant number of electronic sector leaders[52] have adhered to this code. The code provides that, once adopted, it must ideally be imposed on the entire

47. The practice which consists in integrating a contractual clause relating to the respect of a code of conduct, in particular providing for certain mechanisms of control, in the contracts between a seller company and a buyer company seems to have spread. The generalization of this practice even tends sometimes to place contracting parties which maintain trade with several companies in situations where they are subjected to different standards, even contradictory ones, as well as to different systems of control. See on this point H.B. JØRGENSEN, P.M. PRUZAN - JØRGENSEN, MR. JUNGK, A. CRAMER, *Strengthening Implementation of Corporate Social Responsibility in Global Supply Chains*, Report prepared for the Corporate Social Responsibility (CSR) Practice in the Investment Climate Department of the World Bank Group, October 2003.

48. MR. HOPKINS, *The Planetary Bargain. Corporate Social Responsibility Matters*, International MHC, 2003, pp. 70.

49. See on this point the information published by *Nike* on the website http://www.nike.com/nikebiz.

50. It is the *Fruit of the Loom Contractor Code of Conduct*. Available online at http://www.itglwf.org/doc/FruitoftheLoom.doc.

51. Available online at http://www.eicc.info/docs/EICC_code.pdf.

52. In October 2005, the companies *Celestica*, *Cisco*, *Dell*, *Flextronics*, *Foxconn*, *HP*, *IBM*, *INTEL*, *Jabil*, *Lucent*, *Microsoft*, *Sanmina*, *SCI*, *Seagate*, *Solectron*, and *Sony* all adhered to this code.

production process,[53] and at the very least on first-level subcontractors.[54] In 2005, an oversight group of *the Electronics Industry Code of Conduct* was created aiming at installing common tools for the implementation of the code in the entire production process. In accordance with the code, *Hewlett-Packard* imposes an agreement, the *Supplier Social & Environmental Responsibility Agreement*,[55] upon its subcontractors, the terms of which are complementary with any other subcontract agreement. This agreement requires that the subcontracting company commit itself to respect the code of conduct of *Hewlett-Packard*[56] – which comprises *the Electronics Industry Code of Conduct* – as well as the environmental standards of the company.[57]

Markets and government aid

Secondly, recourse to contractual clauses requiring the adoption of codes of conduct and respect for certain social and environmental standards does not exclusively concern contracts drawn up between private partners. Indeed, the authorities can also resort to these clauses within the framework of contracts with public contractors[58] or the beneficiaries of public aid.

On the one hand, access to loans and government aid can be accompanied by contractual clauses that impose certain obligations directly on companies with regard to human rights. This technique is used in particular with regard to the facilities granted by public organizations to companies operating abroad. As an example, the U.S. governmental agency, the *Overseas Private Investment Corporation* (OPIC), grants certain advantages to companies in order to promote and facilitate American investments in emerging markets. To this end, the OPIC can either grant financial assistance, or provide insurance for non-commercial risks. When a company wishes to obtain help from the OPIC, for whatever the help required, the request form asks for information on the social and environmental effects of the project.[59] According to the risks arising out of the project, the OPIC has the right to require additional information including impact studies. These requirements are already likely to encourage companies to adopt codes of conduct. Nevertheless, the OPIC is not satisfied merely with the social and environmental policies of companies. Indeed, if the OPIC decides to allocate the required assistance, U.S. law forces it to include in its contracts with investors a specific clause[60] according to which the investor commits to respect certain fundamental social rights.[61] This practice is not strictly American. Many member states of the OECD, for example, have integrated *the*

53. "The Code may be voluntarily adopted by any business in the electronics sector and subsequently applied by that business to its supply chain and subcontractors." Electronic Industry Codes of Conduct, ver. 2.0, October 2005, available online at http://www.eicc.info/docs/EICC_code.pdf.

54. "For the Code to be successful, it is acknowledged that participants should regard the code as a total supply chain initiative. At a minimum, participants should require its next tier suppliers to acknowledge and implement the Code." *Ibid.*

55. Available online at http://www.hp.com/hpinfo/globalcitizenship/environment/pdf/supagree.pdf.

56. If the company *Hewlett Packard* has imposed its code of conduct on its subcontractors since 2002, it remains that this practice becomes very extensive as soon as similar provisions are taken by all the leaders of the sector who adhered to *the Electronics Industry Code of Conduct*.

57. Available online at http://www.hp.com/hpinfo/globalcitizenship/environment/pdf/gse.pdf.

58. The *California Department of Industrial Relations* thus imposes its *Sweatfree Code of Conduct* on the successful tenderers of Californian public contracts relating to the acquisition and bleaching of clothing. See http://www.dir.ca.gov/sweatfreecode.htm.

59. For requests for financial assistance, see *Application for Financing*, OPIC 115, OMB No 3420-0015, Exp. 12/31/07, share. E (Available online at http://www.opic.gov/forms/Form%20115_finapp_123107.doc). For requests for non-commercial insurances, see *Application for Political Risk Insurance*, Share. 7, 33 (social effects –good corporate citizenship); Part 8 (worker rights); Part 11 (Environmental Effects). Available online at http://www.opic.gov/forms/Form%2052_insapp_123107.pdf.

60. U.S. states that the OPIC "shall also include the following language, in substantially the following form, in all contracts which the Corporation enters into with eligible investors to provide financial support under this subpart: The investor agrees not to take actions to prevent employees of the foreign enterprise from lawfully exercising their right of association and their right to organize and bargain collectively. The investor further agrees to observe applicable laws relating to a minimum age for employment of children, acceptable conditions of work with respect to minimum wages, hours of work, and occupational health and safety, and not to use forced labor. The investor is not responsible under this paragraph for the actions of a foreign government." 22 U.S.C. par. 2191a.

61. Let us stress that in Belgium a propostion of law aiming at making the granting of government aid for foreign investments subject to the respect of certain social and environmental standards by the beneficiary companies and their subcontractors was deposited at the Chamber [ref.].

OECD Guiding principles (see above) in their exportation and foreign investment policies.[62]

In addition, the authorities can impose on public contractors a contractual clause requiring respect for various social and environmental clauses throughout the duration of the contract. Thus, in Belgium, the act providing a framework for governmental programs ('loi-programme') of April 8, 2003, modified, in its chapter XII, the law of December 24, 1993 concerning public contracts, construction services, and supply contracts. These modifications aimed at allowing the integration of social preferences into the rules of public markets. These modifications make it especially possible for the authorities to take environmental characteristics and considerations of a social and ethical nature into account when awarding contracts.[63] They also envisage the possibility of imposing by contract the "conditions for contractors to take account of social and ethical objectives and those relating to the obligation to implement training activities for the unemployed and young people, as well as to respect, substantially, the provisions of the basic conventions of the International Labor Organization, on the assumption that those would not have already been implemented in the law of the candidate's or the tenderer's country of origin."[64] Belgian law, therefore, expressly provides the contracting authority the possibility to impose certain obligations regarding social and environmental matters by contract.

What should we think about the provisions of this law with regard to the market's operational conditions in comparison with the freedom of competition rules within the European Union? In 1988, within the framework of a preliminary hearing on the interpretation of the European Council Directive 71/305 of July 26, 1971, on the coordination of procedures for awarding public works contracts, the Court of Justice of the European Communities decided, in the *Gebroeders Beentjes BV C Netherlands* case, to impose social and environmental rules on the execution of contracts.[65] In this case, the Court considered that the obligation to recruit, through regional employment offices, at least 70% of the workforce assigned to the operation of the contract from amongst the long-term unemployed, did not constitute a violation of the European right to competition. The Court judged here that this type of obligation constituted an additional condition only if it was not discriminatory towards other member states of the Community and if it was duly mentioned in the invitation to tender.

Legislation and Public Policy

In addition to recourse to contractual clauses, the authorities have other mechanisms at their disposal enabling them to encourage or force companies to adopt codes of conduct or comply with certain rules on social and environmental matters. The authorities can thus directly oblige companies to adopt a code of conduct by legislative means, effectively encouraging or forcing them to adopt a certain social or environmental policy. To illustrate the use of the legislative instrument in this context, we have identified four categories of cases: first, the authorities can condition access to public contracts to compliance with certain social or environmental rules; second, the authorities can impose the adoption of a code of conduct on companies by means of rules of corporate governance; third, the authorities can encourage companies to adopt social and environmental policies via rules laid out in legal and administrative policies; finally, fourth, apart from a defined legislative context, the authorities can encourage the adoption of codes of conduct by companies, in particular within the framework of social dialogue.

Access to public contracts

If the authorities can require respect for social and environmental rules from the contracting authorities during the fulfillment of public contracts,[66] they can also decide to make the awarding of public contracts conditional on the respect of human rights or specific social or environmental

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62. See the summary table in *The OECD Guidelines concerning Multinational Corporations: annual meeting of the National Contact Points of 2005, Report of the President*, pp. 11-12.

63. See Loi-programme of April 8, 2003, art.101, M.B. April 17, 2003. This type of provision relates to the access to the public markets and is studied hereafter.

64. Loi-programme of April 8, 2003, art.102, M.B. April 17, 2003.

65. CEJ, *Gebroeders Beentjes BV C Netherlands*, September 20, 1988, C-31/87.

66. See *supra* pp. XXX.

engagements. For example, Article 14 of the French law of March 2001 [67] seeking to reform the public contracts code (*code des marches* publics) authorizes the taking into account of social and environmental considerations in the allocation of contracts.

The Italian region of Umbria, in response to a petition emanating from many inhabitants of the region and supported in particular by the distribution company *Coop*, adopted a regional rule concerning taking account of ethical, social and environmental criteria in the awarding public contracts. The regional law n° 20 of November 12, 2002 envisages the opening of the "register of the companies possessing the compliance certificate standard SA8000."[68] The companies appearing on this register benefit from, *ceteris paribus*, a certain priority over the other companies during the awarding of public contracts.[69] The region of Umbria consequently integrated the mechanism of socially responsible management SA8000 (see below) within its legislation. Certified companies benefit from a priority in the allocation of contracts when they are in contention with other companies also meeting the conditions of the offer. This law, thus, strongly encourages companies to adopt the SA8000 mechanism in its entirety.

Here, too, one can wonder about the validity of this type of requirement in relation to freedom of competition rules,[70] in particular within the European Union. The Court of Justice of the European Communities does not regard the introduction of social and environmental criteria in the awarding of public contracts as contrary to the rules of free competition. Thus, in a judgment delivered on September 17, 2002, the Court of Luxembourg addressed a prejudicial question addressed by a Finnish jurisdiction relating to a lawsuit between the company *Concordia Bus Finland Oy Ab*, and the city of Helsinki together with the company *HKL-Bussiliikenne*, concerning the validity of a decision by the *liikepalvelulautakunta* (commission of commercial services) of the city of Helsinki to award a contract relating to the management of a network of urban buses to *HKL*.[71] In awarding the management contract, the city took environmental data in account, not exclusively the price of the contract candidates. The Court judged that in the case of a public contract relating to the provision of urban bus transport services, the authority who must decide to award this contract to the candidate having presented the most economically advantageous offer, can take into consideration the reduction of the nitric oxide emissions or the noise level of the vehicles so that, if these emissions or noise level are

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67. Article 14 states that "the definition of the conditions for implementation of a market in the terms of reference can aim at promoting the recruitment of people meeting particular difficulties of insertion, to combat unemployment or to protect the environment. These conditions for implementation should not have any discriminatory effect with regard to the potential candidates." *Code des Marches Publics*, chapitre V, art.14.

68. The Italian law states in its Article 2, par. 1 that "Al fine di favorire lo sviluppo tra i cittadini umbri di una maggiore sensibilità nei confronti delle problematiche relative alla responsabilità sociale degli operatori economici e di promuovere le attività delle imprese di produzione e di commercializzazione che rispettano i principi della responsabilità sociale, è istituito l'Albo delle imprese in possesso del certificato di conformità allo standard SA 8000". Legge regionale del 12 November 2002 n°20, "Istituzione dell'Albo delle imprese certificate SA 8000," Bollettino Ufficiale n°51 del 27/11/2002.

69. *Ibid*., art.4, par. 1, d.

70. At the international level, this question raises the problems of the insertion of social clauses within commercial treaties. Economists who plead for the liberalization of trade perceive this type of clause to be an attack to liberalization and an unacceptable distortion of the global commercial mechanisms. To impose social clauses in commercial treaties between Western and developing countries can also be interpreted as a disguised form of protectionism. Without claiming to solve the problem, it is possible to adopt the same response as the one proposed by Lopez-Hurtad concerning the incentive of States to the use social labels. This type of practice is not contrary to the WTO rules as long as we remain in the context of very generally accepted standards. As soon as one takes into account the detail of international human rights legal standards, the answer cannot be this clear-cut. See on this question, Cl. GRANGER and J-M. SIROEN, "La clause sociale dans les traités commerciaux," in *Travail, droits fondamentaux et mondialisation*, I DAUGAREILH (ed.), Bruylant, Brussels, 2005, pp. 181-212. This contribution can also be consulted at the following address: http://www.dauphine.fr/ceresa/siroen/clausesociale.pdf; J. BHAGWATI, *The Wind of the Hundred Days*, MIT Press, Cambridge, 2000 and J. BHAGWATI and R. HUDEC, eds., *Fair Trade and Harmonization. Prerequisites for free trade,?* MIT Press (2 vol.), Cambridge, 1996; C. LOPEZ-HURTAD, "Social Labelling and WTO law," *Journal of International Economic Law*, vol. 5, n° 3, August 2002, pp.719-746.

71. Technically, the Court gave a preliminary hearing on the interpretation of Articles 2, paragraphs 1, under a.) 2, under c.), and 4, as well as 34, paragraph 1, of Directive 93/38/EEC of the Council, of June 14, 1993, bearing coordination of the procedures of markets award in the energy, water, transport and telecommunications sectors (OJ L 199, pp. 84), as modified by the act relating to the conditions of membership of the Republic of Austria, the Republic of Finland and the Kingdom of Sweden and to the adaptations of the treaties on which is founded the European Union (OJ 1994, C 241, pp. 21, and OJ 1995, L 1, pp. 1), and of Article 36, paragraph 1, of Directive 92/50/EEC of the Council, of June 18, 1992, bearing coordination of the procedures for the award of public service contracts (OJ L 209, pp. 1).

below a certain limit, additional points can be attributed for the purpose of comparison with other offers. Taking into account these kinds of elements is valuable insofar as they are related to the purpose of the contract; do not give the public authority unconditional freedom of choice; are expressly mentioned in the terms of the contract; and respect the principle of non-discrimination.[72]

Directive 2004/18/CE on the coordination of procedures for the allocation of public works contracts, public supply contracts, and public service contracts,[73] established the jurisprudence of the European Court of Justice and clarifies how contracting authorities can contribute to the protection of the environment and the promotion of sustainable development while guaranteeing the possibility to obtain the best quality-price ratio for their markets. Thus, the contracting authorities seeking to define environmental needs within the technical particularities of a given market can prescribe environmental characteristics such as a particular method of production and/or the specific environmental effects of groups of products or services. They can, albeit without obligation, use the appropriate specifications as defined by eco-labels, like the European eco-label, the (pluri)national eco-label, or any other ecological label insofar as: they are adapted to define the characteristics of the supplies or services concerned for a given market; the requirements of the label are developed based on scientific information; the eco-labels are adopted by a process in which all parties concerned, such as government agencies, consumers, manufacturers, distributors and environmental organizations, can take part; and are accessible to all parties involved. The contracting authorities can point out that the products or services containing the eco-label are supposed to satisfy the technical specifications defined in the terms of reference; they must accept any other appropriate means of proof, such as a technical report from the manufacturer or a test report from a recognized organization.[74] As far as possible, the contracting authorities should establish technical specifications that take into consideration accessibility for disabled people and for all users. The technical specifications should be mentioned clearly, so that all the candidates know which criteria have been established by the contracting authorities.[75] Moreover, the conditions for implementation of a contract can, in particular, aim at supporting vocational training on building sites and the recruitment of people for combating unemployment or protecting the environment. As an example, the Directive quotes, *inter alia*, the obligations, applicable to the operation of the contract, to recruit the long-term unemployed or to implement training activities for unemployed or young people; to comply with the fundamental provisions of the conventions of the International Labor Organization (ILO) if these have not been implemented in national law; and to recruit a number of disabled people which would go beyond what is required by the national legislation.[76] In cases where the nature of works and/or services justifies measures or systems of environmental management to be applied during the operation of the public contract, the application of such measures or systems can be made obligatory. Systems of environmental management, irrespective of their registration in accordance with European Community instruments such as regulation (EC) n° 761/2001(17) (EMAS), can demonstrate the technical ability of the economic operator to carry out the contract.[77] In order to guarantee equal treatment, the criteria for contract allocation should make it possible to compare offers and evaluate them in an objective way. If these conditions are met, economic and qualitative criteria of allocation, like those that refer to the satisfaction of environmental requirements, allow the contracting authority to meet the needs expressed in the contract specifications of the local authorities. It is under these same conditions that a contracting authority can specify criteria aiming to satisfy certain social requirements, especially the needs of the underprivileged who are the beneficiaries of the public works, supplies, and services which are the object of the contract.[78]

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72. CEJ, Concordia Drunk, September 17, 2002, C-513/99, by. 64.

73. Directive 2004/18/CE of the European Parliament and the Council of March 31, 2004 relating to the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts, *Official Journal n° L 134 of the 30/04/2004*, pp. 0114 –0240.

74. Article 23.6 of the Directive 2004/18/EC of the European Parliament and the Council of March 31, 2004.

75. 29th Preamble Directive 2004/18/ EC of the European Parliament and the Council of March 31, 2004.

76. 33rd Preamble Directive 2004/18/ EC of the European Parliament and the Council of March 31, 2004. See article 26 of Directive 2004/18/EC of the European Parliament and the Council of March 31, 2004.

77. Article 50 of Directive 2004/18/ EC of the European Parliament and the Council of March 31, 2004.

78. 46th Preamble Directive 2004/18/ EC of the European Parliament and the Council of March 31, 2004.

Rules of corporate governance

Public policy can directly oblige, or at least strongly encourage, certain companies to adopt a code of conduct. This type of legislation can be seen more specifically in the context of defining rules of *corporate governance*. In this respect, the most characteristic example is certainly the *Sarbanes-Oxley Act*, a U.S. law adopted after the financial scandals of 2001.[79] The Sarbanes-Oxley act, which requires the directors of companies registered in the United States to certify their accounts with the *Securities and Exchanges Commission* (SEC), the organization that regulates American financial markets, states that companies must reveal in their annual report, the existence, or absence, within the company, of a code of conduct[80] binding on its senior financial officers, or binding on a chief executive officer.[81] Publishing these codes on the company's website as well as in an appendix of the company's financial report is strongly encouraged by the SEC.[82] A company which does not adopt a code of conduct must justify itself. Companies must also make public any amendments made to their code. The ethical code is defined as *standards that are reasonably necessary to promote (1) honest and ethical conduct, including the ethical handling of actual or apparent conflicts of interest between personal and professional relationships; (2) full, fair, accurate, timely, and understandable disclosure in the periodic reports required to be filed by the issuer; and (3) compliance with applicable governmental rules and regulations.*[83] The SEC thinks that it is up to the company to define the ethical principles to which it subscribes, but is able to impose sanctions in the case of violation.[84] These codes initially concern all the rules and practices which govern relations between the company and its shareholders. However, these codes are likely to reinforce the legal value granted to corporate social and environmental commitments by U.S. judges. Indeed, most registered American companies have adopted ethical codes which are not limited to the definition of the rules and practices governing relations between the company and its shareholders, but also include the company's social and environmental commitments. For example, *Nike's* ethical code, entitled *Inside the Lines: the Nike Code of Ethics*, constitutes the response of the company to the obligations imposed by the Sarbanes-Oxley Act. This code does not simply provide rules in the event of a conflict of interest or other rules relating to corporate governance strictly speaking. It also provides rules with regard to equal opportunity, harassment, respect for the environment, respect for the code of conduct by subcontractors, and work place safety – rules which directly concern social responsibility.[85] All in all,

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79. The Sarbanes-Oxley Act introduced some significant transformations in the American system of monitoring companies, so much so that Backer sees an analogy between this system and the panopticon prison model studied by M. Foucault. See L.C. BACKER, "Monitoring and control: privatizing and nationalizing corporate monitoring after Sarbanes-Oxley," *Michigan State Law Review*, be 2004, pp. 327-440.

80. Section 406, Sarbanes-Oxley Act of 2002.

81. SEC, 17 CFR PARTS 228, 229 and 249, [RELEASE NOS. 33-8177; 34-47235; File No. S7-40-02], RIN 3235-AI66, Disclosure Required by Sections 406 and 407 of the Sarbanes-Oxley Act of 2002.

82. SEC, 17 CFR PARTS 228, 229 and 249, [RELEASE NOS. 33-8177; 34-47235; File No. S7-40-02], RIN 3235-AI66, Disclosure Required by Sections 406 and 407 of the Sarbanes-Oxley Act of 2002.

83. The Commission, in charge of the interpretation and execution of the legislation, gives a broader meaning to the concept of ethical code and defines it as the "written standards that are reasonably designed to deter wrongdoing and to promote: Honest and ethical conduct, including the ethical handling of actual or apparent conflicts of interest between personal and professional relationships; Full, fair, accurate, timely, and understandable disclosure in reports and documents that a registrant files with, or submits to, the Commission and in other public communications made by the registrant; Compliance with applicable governmental laws, rules and regulations; The prompt internal reporting to an appropriate person or persons identified in the code of violations of the code; and Accountability for adherence to the code." SEC, 17 CFR PARTS 228, 229 and 249, [RELEASE NOS. 33-8177; 34-47235; File No. S7-40-02], RIN 3235-AI66, Disclosure Required by Sections 406 and 407 of the Sarbanes-Oxley Act of 2002.

84. SEC, 17 CFR PARTS 228, 229 and 249, [RELEASE NOS. 33-8177; 34-47235; File No. S7-40-02], RIN 3235-AI66, Disclosure Required by Sections 406 and 407 of the Sarbanes-Oxley Act of 2002. "We are not adopting commentators' suggestions that we set forth additional ethical principles that the code of ethics should address. We continue to believe that ethical codes do, and should, vary from company to company and that decisions as to the specific provisions of the code, compliance procedures and disciplinary measures for ethical breaches are best left to the company. Such an approach is consistent with our disclosure-based regulatory scheme. Therefore, the rules do not specify every detail that the company must address in its code of ethics, or prescribe any specific language that the code of ethics must include. They further do not specify the procedures that the company should develop, or the types of sanctions that the company should impose, to ensure compliance with its code of ethics. We strongly encourage companies to adopt codes that are broader and more comprehensive than necessary to meet the new disclosure requirements."

85. "*Inside the Lines*: *The Nike Codes of Ethics,*" available online at

the Sarbanes-Oxley Act was at the center of an increase in the number of companies adopting a code of conduct. The results of a statistical study on the first one hundred companies of the 2002 *Fortune Global 500* classification showed that more than 80% of American companies had a "code of conduct" document, while this number was hardly more than 60% for European companies.[86] This example highlights the fact that the adoption of legislation defining the rules of corporate governance is likely to encourage companies to adopt codes of conduct which include social and environmental commitments.

In this way, the *Belgian Corporate Governance Code*[87] states at the end of subparagraph 5 of its preamble, that company's have an obligation to establish a *Charter of Corporate Governance*. As in the case of *Nike* in the U.S., Belgian companies tend to indicate in this Charter their social commitments. For example, on November 9, 2005 the *Delhaize* group adopted its code of governance[88] which stated its ethical commitments in business operations.[89] These commitments relate, *inter alia*, to the protection of the environment, the protection of health, and work place safety.

Legal and administrative policy rules

Legal and administrative rules can also encourage companies to adopt an ethical code or to make social commitments. Legislation may, for example, provide that the codes and the social policies of companies can, in certain cases, make it possible for companies to mitigate sanctions. By means of this type of *economic* instrument of regulation, companies are encouraged to adopt an ethical code in order to prevent or reduce potential sanctions.

For example, the *Federal Sentencing Guidelines for Organizations* (FSGO) legislation, adopted by the U.S. Congress in 1991, states that a company can reduce the sanctions to which it is exposed, or even avoid legal proceedings[90] if, in spite of its bad conduct, it is equipped with a code of ethics.[91] The FSGO was developed by the *United States Sentencing Commission*, a public agency created in 1984 to standardize sentences for violations of federal criminal laws. After having adopted a first guide to the standardization of sentences relating to violations of individual rights in 1987, the Sentencing Commission adopted the FSGO in 1991 with regard to the sentences sanctioning corporate violations of federal criminal laws. The FSGO[92] acts a handbook for federal judges, allowing them to determine the sentence corresponding to the infringements committed by companies. Standardization was essential, not only to counter strong divergences in the jurisprudence on this matter, but also because the fines to which companies were condemned were not dissuasive enough: some empirical studies showed that the average size of the fines to which companies were condemned was generally lower than the cost to conform to the law. The FSGO aims to encourage companies to prevent violations of the law by developing an ethical policy. In particular, it encourages the installation of internal mechanisms intended to prevent, identify and denounce penal infringements within companies. The latter must set up an "effective compliance program" which includes, *inter alia*, the

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http://www.nike.com/nikebiz/investors/corporate_governance/docs/codeofethics.pdf.

86. S. REICH, "When Firms Behave 'Responsibly', are the roots national or global?," *International Social Science Journal*, vol. 57, n° 185, 2005, pp. 509-528 – in particular pp. 514. These figures relate only to the existence of a code of conduct and not the existence of a social and environmental corporate policy. In this respect, the difference between European and American companies decreases since 91% of American companies have documents relating to a social and environmental policy as opposed to 85% of European companies.

87. "Code belge de gouvernance d'entreprise," available online at http://www.corporategovernancecommittee.be/library/documents/final%20code/CorpGov _FR5.pdf.

88. "*Charte de gouvernance d'entreprise du groupe Delhaize,*" available online at http://www.delhaizegroup.com/documents/Charter2005-12-30-FR.pdf.

89. The detailed content of these commitments is specified in its "*Code d'éthique et de conduite des affaires*" annexed to the Charter.

90. The possibility for the companies to avoid any proceeding was the subject of much criticism. Some do not hesitate to speak in this respect of a "trading of favors." See W.S. LAUFER, "Corporate prosecution, cooperation, and the trading of favors," *Iowa Law Review*, vol. 87, Jan. 2002, pp. 643-667.

91. D. IZRAELI and M.S. SCHWARTZ, "What Can We Learn From the U.S. Federal Sentencing Guidelines for Organizational Ethics?," European Institute for Business Ethics, http://www.itcilo.it/english/actrav/telearn/global/ilo/code/whatcan.htm.

92. United States Sentencing Commission, *Federal Sentencing Guidelines*, 2005, Chapter 8. The text is available on the Commission's website: http://www.ussc.gov.

adoption and respect for standards (such as ethical codes), the communication and diffusion of these standards (for example, through appropriate training), the setting up of monitoring procedures, and the designation of qualified personnel (for example, a department in charge of the corporate social responsibility policy).[93] In accordance with the FSGO, judges are invited to take account of the steps taken by the implicated company in order to prevent violations. Thus, a company which shows that it adopted an "effective compliance program" before the litigious violation can mitigate the sentence up to 95%.[94] Since 1986, Australia is also equipped with similar legislation, called the *Trade Practices Act* (TPA). According to this legislation, an "effective compliance program" can not only reduce the sentence or the fine to which the company can be condemned, as is the case with the FSGO, but can also be a means to support the legal defense strategy of the company. An additional step forward was achieved in Australia when it amended its penal code in 1994 by providing that, from then on, a company can be held criminally responsible if it can be shown *that a corporate culture existed within the corporate body that directed, encouraged, tolerated or led to non-compliance with the relevant provision* or if it is proven that *the corporate body failed to create and maintain a corporate culture that required compliance with the relevant provision*.[95]

Social dialogue

In order to regulate a particular commercial sector, the authorities sometimes encourage social dialogue leading to the adoption of a code of conduct. Thus, on the initiative of the European Union, several European sectoral codes were adopted primarily in the following sectors:[96] trade, textile, sugar, wood, leather and shoes. For example, the code of conduct in the leather and tannery sector is the result of sectoral social dialogue held at the European level and bringing together the different partners representative of the sector, in particular, *The Confederation of National Associations of Tanners and Dressers of the European Community* and *The European Trade Union Federation of Textiles, Clothing and Leather*, which invite their members to actively encourage companies and workers to respect and include in their potential codes of conduct, directly or indirectly, in all the countries of the world in which they operate, various standards set by the International Labor Organization.[97] These relate to the prohibition of forced labor,[98] the prohibition of child labor,[99] the freedom of association and negotiation,[100] and non-discrimination.[101] Companies must also guarantee decent working

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93. United States Sentencing Commission, *Federal Sentencing Guidelines*, 2005, Chapter 8: An "effective program to prevent and detect violations of law" refers to a program that has been reasonably designed, implemented, and enforced so that it generally will be effective in preventing and detecting criminal conduct. Failure to prevent or detect the offense, by itself, does not mean that the program was not effective. The hallmark of an effective program to prevent and detect violations of law is that the organization exercised due diligence in seeking to prevent and detect criminal conduct by its employees and other agents. Due diligence requires at a minimum that the organization must have taken the following steps: (1) The organization must have established compliance standards and procedures to be followed by its employees and other agents that are reasonably capable of reducing the prospect of criminal conduct. (2) Specific individual(s) within high-level personnel of the organization must have been assigned overall responsibility to oversee compliance with such standards and procedures. (3) The organization must have taken due care not to delegate substantial discretionary authority to individuals whom the organization knew, or should have known through the exercise of due diligence, had a propensity to engage in illegal activities. (4) The organization must have taken steps to communicate effectively its standards and procedures to all employees and other agents, e.g., by requiring participation in training programs or by disseminating publications that explain in a practical manner what is required. (5) The organization must have taken reasonable steps to achieve compliance with its standards, e.g., by utilizing monitoring and auditing systems reasonably designed to detect criminal conduct by its employees and other agents and by having in place and publicizing a reporting system whereby employees and other agents could report criminal conduct by others within the organization without fear of retribution. (6) The standards must have been consistently enforced through appropriate disciplinary mechanisms, including, as appropriate, discipline of individuals responsible for the failure to detect an offense. Adequate discipline of individuals responsible for an offense is a necessary component of enforcement; however, the form of discipline that will be appropriate will be case specific. (7) After an offense has been detected, the organization must have taken all reasonable steps to respond appropriately to the offense and to prevent further similar offenses – including any necessary modifications to its program to prevent and detect violations of law.

94. See Chapter 8 "Sentencing Organizations," paragraph 8 C2.5.f. relating to the reduction of the "*culpability score.*"

95. Australian penal code, Criminal Codes Bill 1994, Part 2.5, Division 12, Section 12.3(2) (c and d).

96. See http://europa.eu.int/comm/employment_social/soc-dial/csr/csr_doc.htm.

97. See Article 1 "Contents of the code of conduct" of the Code.

98. Conventions 29 and 105.

99. Conventions 138 and 182.

100. Conventions 87 and 98.

conditions,[102] reasonable schedules,[103] and a reasonable wage.[104]

These instruments encourage or force companies to adopt codes of conduct or take social responsibilities seriously.[105] However, these instruments are of no resort if adequate mechanisms of implementation are not set up. In accordance with the various logical stages of the development of a system of co-regulation which we identified above, the definition and adoption of standards, the first logical stage, must be followed by the definition of mechanisms of implementation, the second logical stage.

1. Implementation

The second logical stage of the development of a system of co-regulation relates to the implementation of the standardized norms defined in the first logical stage. The credibility of a corporate social policy is conditional upon the mechanisms of its implementation. Companies must therefore use specific tools that allow them to ensure the implementation of their social and environmental commitments. These tools are called *socially responsible management mechanisms*. We are able to distinguish the *generic* mechanisms used by all companies, from mechanisms that are *specific* to a company or a group of companies. Generic mechanisms of socially responsible management are usually presented in the form of technical standards. We will examine the content of some of these standards in order to grasp their operation and the role they play in the process of corporate social responsibility. Some technical standards also contribute to the material definition and standardization of social and environmental commitments. In order to preserve coherency in the presentation and analysis of these tools, in this section we have chosen to examine what these technical standards require as a whole, including their material requirements.

(i) Generic mechanisms of socially responsible management

Among the generic mechanisms of socially responsible management, we will mainly look at the SA8000 standard of socially responsible management. This examination is supplemented by a short outline of other generic systems of management: AA1000, Ilo-osh2001, OHSAS18001, ISO Standards, and EMAS.

The SA8000 Standard

The SA8000 standard states different rules of social responsibility to which companies must be subjected, and in particular rules with regard to respect for the basic rights of workers.[106] Enacted in 1997[107] by a U.S. organization, the CEPAA (*Council on Economic Priorities Accreditation Agency*), now called the SAI (*Social Accountability International*), the SA8000 standard is directed at companies owning purchase or production centers in countries where it is necessary to make sure that operations are carried out under decent working conditions. When companies producing goods wish to have their manufacturing units certified SA8000, the accredited certifiers carry out an audit in each manufacturing unit to check for respect of the standards. Companies which combine the sale and production of goods can decide to join the *SA8000 Corporate Involvement Program* which is intended

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101. Conventions 100 and 111.

102. The work environment must be safe and healthy and the physical abuses, threats, punitive practices and sexual harassments or any other act of intimidation must be strictly prohibited. See Article 1.6 of the Code.

103. The maximum is fixed at 48 hours per week. Overtime must be compensated and cannot exceed 12 hours per weeks and cannot be regularly required. One day off must be granted every seven days. See Article 1.5 of the Code.

104. The wages must be in conformity with the minimal legal standards or with the minimal standards of the industry but must also allow the worker to meet his or her fundamental needs. Reserves on wages by way of disciplinary action are prohibited. See Article 1.7 of the Code.

105. In addition, many proposals already exist to reinforce this movement of adoption of codes of conduct by companies. See, *inter alia,* MURPHY, S.D., "Taking Multinational Corporate Codes of Conduct to the Next Level," *Columbia Journal of Transnational Law*, vol. 43, n° 2, 2005, pp.389-433.

106. On the SA8000 standard, see the website of the SAI organization: www.sa-intl.org. The French version of the text of the standard was published on October 10, 2005 and is accessible online.

107. The 1997 version of the standard was re-examined in 2001. The 2001 version came into effect with regard to all parties involved from January 1, 2005 onwards. We refer here to the 2001 version of the standard.

to help companies implement these standards and publishes the results of the programs of implementation. This program includes training company managers, suppliers, and workers; technical assistance for the implementation of the standards; and the right to use the SAI or SA8000 logo in their communication materials.

The objective of the SA8000 standard is to be a reference for companies to use in order to develop, maintain and apply policies and procedures that enable them to manage the questions and problems they can control or influence, while showing to all parties involved that their policies, procedures and practices are in conformity with the requirements prescribed by the standard. These requirements are universal and are applicable whatever the geographical situation, industrial sector, or size of the company. Under the terms of the standard, the company must respect the national legislation, its other social responsibility commitments, and the content of the standard itself. In the event of conflicting rules, the most constraining rule applies.

The SA8000 contains primarily two types of requirements. On the one hand, in order for a company to be certified SA8000, it must respect the most fundamental workers' rights.[108] In this regard, the standards are backed up by important texts relating to human rights, of which the UN Universal Declaration of Human Rights, the ILO Conventions and the UN Convention on the Rights of the Child.[109] The SA8000[110] prohibits *child labor* under age fifteen and forces the company to set up procedures of rehabilitation, in particular, schools for children who have been employed; prohibits *forced labor*; requires the company to procure *a healthy and safe working environment*, take adequate measures in order to prevent incidents, appoint a representative responsible for the hygiene and safety of the entire personnel, organize regular trainings of the personnel on this matter, and set up prevention mechanisms; requires the company to respect *trade union freedom* and *the right to collective bargaining*; prohibits the practice of *discrimination* in recruitment, remuneration, education, promotion, dismissal, retirement, and interference in the exercise of the employees' rights to follow dogmas or other practices; prohibits *corporal punishment, harassment and verbal abuses*; compliance with *the working time* fixed by the national legislation (the normal work week which, at any rate, cannot exceed forty-eight hours, with a maximum of twelve additional voluntary and remunerated working hours); requires the company to ensure *wages* are at least equal to the legal *minima* or those of the industrial sector concerned, and that they are always sufficient to satisfy the basic needs of the personnel. In addition, the standard requires the respect of "management systems." These management mechanisms can be reassembled under seven categories. First, the leading bodies must lay down the policy of the company with regard to social responsibility and working conditions while being committed to conform to all the provisions of the SA8000 standard; to respect the national legislations as well as the international instruments mentioned by the standard; to commit to a process of continuous improvement; and to publish their commitments and make these available to their personnel. Secondly, the company must constantly evaluate its social responsibility policy and amend it if necessary.[111] Third, it must appoint a representative who will ensure that the standard is respected.[112] Fourth, in order to ensure the implementation of the standard's content, the company must guarantee their employees training and sensitivity exercises, and organize a permanent overseer of the activities and results in order to prove that the company's policy complies with the requirements of the standard.[113] Fifth, the company must develop procedures to evaluate and choose its suppliers

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108. The standard denotes: the prohibition of child labor; the prohibition of forced labor; respect for health and safety conditions; discipline within the company; non-discrimination; the right of assembly and expression (trade unions); working time; remuneration.

109. See title II of the Standard. ILO Conventions n° 29 and 105 (Forced and obligatory labor); ILO Convention n° 87 (Trade-union freedom); ILO Convention n° 98 (Right to collective negotiation); ILO Conventions n° 100 and 111 (Equal remuneration between men and women for a work of equal value; Discrimination); ILO Convention n° 135 (Convention on workers' representatives); ILO Convention n° 138 and Recommandation n° 146 (Minimum age and Recommendation); ILO Convention n° 155 and Recommandation n° 164 (Hygiene and Safety of workers); ILO Convention n° 159 (Professional reclassification and employment of disabled people); ILO Convention n° 177 (Domestic work): Universal Declaration of Human Rights; United Nations Convention on the Rights of the Child; United Nations Convention on the Elimination of Discrimination Against Women.

110. See title IV of the Standard, Articles 1-8.

111. Articles IV 9.1 and 9.2 of the SA8000 Standard.

112. Articles IV 9.3 and 9.4 of the SA8000 Standard.

113. Article IV 9.5 of the SA8000 Standard.

and subcontractors according to their capacity to fulfill the requirements of the standard. The latter must commit to this in writing and it is up to the company to prove that its suppliers and subcontractors respect the content of the standard.[114] Sixth, the company must inquire, study and answer their employees and other interested parties' concerns and doubts about the conformity of the company's policy with the standard, and adopt the amendments and make the necessary repairs in the event of nonconformity.[115] Finally, the company must be able to communicate the data and other information relating to its performance in the area of social responsibility.[116] The SA8000 standard has imposed itself as an authority on this matter.[117] It is characterized by a corporate social responsibility approach grounded in adequate procedures of management and an external mechanism of regular inspection by means of independent audits. The SA8000 standard constitutes the most complete generic mechanism of socially responsible management. Other systems of management, although less exact, should also be mentioned.

ILO-OSH 2001: Guidelines on occupational safety and health management systems

These guidelines[118] on occupational safety and health management systems were elaborated by the International Labor Organization (ILO) and were defined by the tripartite principals of the ILO. Although these principles are qualified by the ILO as a system of management, our opinion is that this qualification is incorrect since these principles are limited to offering a frame of reference for occupational safety and health management system in general. The stated recommendations and principles are aimed those in the areas of occupational safety and health management who bear responsibility. They are not constraining and do not aim at either replacing the applicable standards or the national legislation. The guidelines are not accompanied by a certification process. The purpose of these principles is to provide a frame of reference to employers for the implementation of a safety and health management system. Moreover, they aim at allowing the institution of a national framework for occupational safety and health management systems, and at contributing to the creation of voluntary mechanisms that reinforce the existing regulations.[119] The principles contain a series of concrete recommendations for the development of a national policy, but also for the development of appropriate management policies within companies, for example, the creation of councils of implementation, evaluation, and continuous improvement.

OHSAS 18001

In 1996, the *British Standards Institution (BSI)* adopted certain guidelines concerning occupational safety and health management (BS8800). Considering that this document was not intended to be used as a basis for procedures of certification, several parties worked out their own standards inspired by or based on the BS8800 aiming at framing certification procedures. Consequently, certification rested on heterogeneous criteria and standards, making impossible a comparative and effective reading of the results. For this reason, several certification agencies jointly elaborated the OHSAS 18001 which is now used as a reference for international certifiable systems of occupational safety and health management.

ISO Standards

The *International Standardization Organization* (ISO) is a private organization with links to national organizations and has the task of elaborating international standards. Therefore, to meet increasing ecological and environmental concerns, the ISO defined a new series of standards which

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114. Article IV 9.6 – 9.9 of the SA8000 Standard.

115. Articles IV 9.10 and 9.11 of the SA8000 Standard.

116. Articles IV 9.12 –9.14 of the SA8000 Standard.

117. On September 30, 2005, 763 companies of 47 different countries and covering 54 branches of industry were certified SA8000. The country having the most SA8000 certified companies is Italy, then come India, China, Brazil, Pakistan and Vietnam. See SA8000 certified facilities as of September 30, 2005, available online at: http://www.sa-intl.org/index.cfm?fuseaction=document.showDocumentByID&nodeID=1&DocumentID=142.

118. International Labor Organization, *Guidelines on Occupational Safety and Health Management Systems*, June 2001.

119. Article 1, Guidelines on Occupational Safety and Health Managment Systems.

integrate environmental management: *the ISO 14000 standards*. The ISO 14000 standards state the essentials of a management system, allowing a company or any other organization to evaluate and monitor in a continuous way the impact of its activities, products, and services on the environment. A project currently in hand aims at adopting an ISO standard with regard to corporate social responsibility.[120]

EMAS

The *EMAS*,[121] a European Community system of eco-management and audit scheme which allows organizations to participate on a voluntary basis, was designed to oversee the evaluation and improvement of environmental policies of companies and other organizations, and to monitor information relevant to the public and other interested parties. To do so, it calls for environmental management systems to be put in place within and by organizations; the systematic, objective, and periodic evaluation of these systems; information to be presented to the public of the results obtained; and the active participation of the employees in this process. A company can be registered EMAS provided that it respects requirements such as undertaking environmental audits and publishes an environmental declaration. The organizations which apply European or international standards on environmental matters within the framework of the EMAS and which are recognized, according to the adapted certification procedures, to be respecting these standards, can use the EMAS logo under certain conditions. Each member state is invited to organize and set up the necessary structures for the operation of the system, in particular, those related to the certification.

(ii) Specific mechanisms of socially responsible management

For various reasons, some companies do not wish to adhere to generic mechanisms of socially responsible management, in which case they can establish for themselves a management mechanism guaranteeing respect for their social commitments. Resort to specific mechanisms of management can be justified by the nature of the sector's activities or by the refusal to resort to the type of constraint implied by the generic mechanisms.

For example, the oil company *Chevron* developed a mechanism of socially responsible management called the *Operational Excellence Management System* (OEMS).[122] This mechanism distinguishes three levels of management for which specific criteria are established: *leadership accountability*, *management systems processing*, and *operational excellence expectations*. At each one of these three levels, the operational units must secure the implementation of the social, environmental, and performance principles established by *Chevron*. These thirteen principles, called *Operational Excellence Operating Elements*, relate particularly to the safety of people, respect for the environment, the risk management of products during their life cycle, and the company's relationship with the communities in which it operates.[123] Specific teams are given a mandate by *Chevron* to check the implementation of the principles in each operational unit every three to five years. If the inspections are not satisfactory, a report is drawn up indicating the improvements to be implemented. The operational unit then has sixty days to propose an action plan in order to improve its performance. The management system also includes continuous training for employees with important responsibilities. These employees must obtain, after successfully passing four modules of training, a certificate of "operational excellence."

The mechanisms of socially responsible management – generic or specific – cause corporate social and environmental policy to be put at the heart of the management processes. Within the hypothetical framework of developing of a system of co-regulation, these mechanisms make it possible to ensure the implementation of standardized norms. This implementation must be

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120. See ISO Advisory Group on Social Responsibility, *Working Report on Social Responsibility*, April 30, 2004.

121. Regulation (EC) n° 761/2001 of the European Parliament and the Council of March 19, 2001 allowing voluntary participation by organizations in a Community eco-management and audit scheme (EMAS), *Official Journal n° L 114 of the 24/04/2001* pp. 0001–0029.

122. See http://www.chevron.com/cr_report/2004/management_approach/corporate_governance/management_system.asp.

123. See http://www.chevron.com/cr_report/2004/management_approach/corporate_governance/operating_elements.asp.

accompanied by the publication of relevant information on, and the transparency of, corporate social and environmental policy.

2. Transparency and Information

The third logical stage of the development of a system of co-regulation relates to the types of transparency and information required by third parties. This third stage follows the definition and adoption of the standards (first stage), and their implementation (second stage). This third stage is fundamental for constituting a form of control. Indeed, transparency forces the company to make public its social and environmental policy and its operation measures by subjecting it to the *Dracula effect*: the exposure of evil to the daylight of the outside world often makes it dry out and disappear. Moreover, transparency allows the other actors – shareholders, activists, the media, etc. – to intervene or not with full knowledge of the facts of a company's behavior.

Therefore, to be able to control a company's respect for their social and environmental commitments in a suitable way, it is first necessary to have access to information "assessing" the matter on a regular basis. Non-governmental organizations, in this respect, have played a fundamental role during many years of denouncing certain practices of companies. More recently, because of an increased awareness of the concept of social responsibility on the part of companies, and thanks to various mechanisms which encourage or constrain companies in this way, companies have submitted themselves to internal or external review and have published non-financial reports on their social policy. Transparency is now essential and represents the key element likely to attest or not to the credibility of a company's social policy. We will primarily distinguish three mechanisms which guarantee transparency and provide information on this matter: audits, non-financial reports, and political hearings or public confrontation.

(i) Audits

Companies are agreeing more and more to be subjected to the assessment of external and independent organizations. These audits help clarify and reinforce the credibility of the social policy of the audited company. Most social responsibility tools call for regular oversight procedures. A certain number of tools exist that attempt to standardize the evaluation of corporate social responsibility. We will study in particular the AA1000 Assurance Standard and the ISAE3000.

The AA1000 Assurance Standard

The *Institute of Social and Ethical Accountability* developed, among its tools relating to corporate social responsibility, an instrument specifically intended for the hearing and certification of non-financial reports. Launched in March 2003, the AA1000 Assurance Standard[124] is not a very technical instrument. Nevertheless, it places the auditor within the framework of the certification of non-financial reports by indicating certain principles on which he or she must focus. There are three principles. The first principle, the *materiality principle*, consists in making sure that the non-financial report contains all the relevant information so that the company's stakeholders can judge the performance of the company. The second principle, the *completeness principle*, requires the auditor to check the completeness and preciseness of the information contained in the report so that it shows the capacity of the company to evaluate and understand its social and environmental performance. The third principle, the *responsiveness principle*, requires the auditor to evaluate whether the company coherently addresses the expectations of the parties involved. More precisely, the auditor must check that the company: first, decided the way in which it intends to address the interests and concerns of the parties involved; second, established some policies, objectives and indicators in accordance with these interests; third, showed that it allocated sufficient resources to undertake its policies and commitments; and fourth, communicated all these elements in a satisfactory way in its non-financial report. By evaluating the company's report, the auditor must check that the company provided reasonable evidence to support the information contained in the report, as well as ascertain the quality of the

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124. One specificity of the standard is that it is free to use. The AA1000 Assurance Standard is available online at http://www.accountability.org.uk/uploadstore/cms/docs/Assurance%20Standard%20for%20Web.pdf.

system and procedures which led to report's coming to be. In addition to these principles, the AA1000 Assurance Standard also calls for a set of rules on the drawing up of the audit report. It specifies the information which the report must contain and that which can be inserted by the auditor. It defines, moreover, certain qualities that the auditor and the audit company must satisfy, particularly in terms of competency and conflicts of interests. The AA1000 Assurance Standard was specifically developed to be compatible with the *Global Reporting Initiative* (GRI) as well as with all the instruments of the AA1000 series. Its modular character partially explains the success of the standard. For example, one of the most important audit companies, *Ernst & Young*, has adopted the AA1000 Assurance Standard for its audits in the field of corporate social responsibility.

International Standard on Assurance Engagements 3000 (ISAE3000)

This instrument is also intended for the audit of non-financial reports, but the procedures it defines follow a different method. Conceived in 2004 by the *International Federation of Accountants*, the ISAE3000 was designed to guide audits relating to all information other than financial. The audit procedure is more traditional than in the case of the AA1000 Assurance Standard. Indeed, the only objective of the ISAE3000 audit is to guarantee the precision and completeness of the information contained in a report, as specified by the recipients of the report. In the case of non-financial reports, the reports are intended mainly for the shareholders. The auditor, therefore, using the ISAE3000 standard, will only take into account the information necessary to the shareholders and not, as with the AA1000 Assurance Standard plans, that of other parties involved. Some specialists call for the combined use of the two standards.[125]

(ii) Non-financial report

Audits are meaningful and influence the dynamics of corporate social responsibility only insofar as the audited reports are required and, eventually, made public. Therefore, companies are invited more and more to give an account not only of their financial performance, but also of the state of their social performance commitments. These non-financial reports, as long as they fulfill certain criteria, are essential to be able to assess the degree of social responsibility companies are willing to undertake. We will examine, on the one hand, initiatives taken to standardize the content and format of non-financial reports and, on the other hand, legislative instruments forcing companies to publish non-financial reports.

For a non-financial report to be useful, it must contain certain elements which allow it to be evaluated. Created in the U.S. in 1997 by the *Coalition for Environmentally Responsible Economies* (CERES), the *Global Reporting Initiative* (GRI), a multistakeholders association with its headquarters in Amsterdam,[126] published guidelines in 2002 on the basis of reports in the field of corporate social responsibility. This document rests on eleven principles which can be classified into four categories: first, principles concerning the drafting process of the report (transparency, dialogue, suitability for certification); second, principles concerning the quality of the report (exhaustiveness, relevance, prospects); third, principles guaranteeing the reliability of the data (precision, neutrality, homogeneity); and fourth, principles ensuring access to the report (clearness and regularity). The GRI is now regarded as the top source for the standardization of non-financial reports. It has the advantage of standardizing their structure, thereby ensuring greater clarity.[127]

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125. J. IANSEN-ROGERS, J. OELSCHLAEGEL, *Assurance Standards Briefing: AA1000 Assurance Standard & ISAE3000*, The Netherlands, 2005.

126. The GRI is open to all organizations and to all private individuals having an interest in *the reporting* of CSR. Today there are more than 5000 members who regularly contribute to its productions and their improvements. The GRI is structured around three institutions: the *Organisational Stakeholders* elect the *Stakeholder Council*, and make contributions representing a significant part of the financing of the GRI. The *Stakeholder Council* gathers sixty members selected so as to reflect the diversity of civil society. This council elects the members of the Management Committee, and discusses all the questions with which the organization is confronted. Finally, the *Technical Advisory Committee* gathers ten to fifteen specialists on various topics such as the economy, environment, human rights, etc. It ensures the revision of the GRI guidelines.

127. In this way also, the Canadian government published a guide on the reports in the field of sustainable development. (See http://www.sustainabilityreporting.ca/). Other private initiatives exist and aim at standardizing the

Even if non-financial reports are more credible, companies are generally not obliged to produce them. Therefore, besides pressure from investors and other parties, the use of *regulation* tools can force companies to become transparent with regard to their social and environmental performance. The publication of this type of report, thus, can be made compulsory by the law. For example, Article 116 of the French Law on *New Economic Regulations*[128] requires listed companies to provide social and environmental information in their annual reports. It enumerates the social and environmental criteria of both a qualitative and quantitative nature which must be indicated.[129] This ranges from greenhouse gas emissions, to equality between men and women at work, to the inclusion of disabled people. In a resolution adopted by the European Parliament in 2002, following the European Commission's publication of the Green book "promoting a European framework for corporate social responsibility," the Parliament *invites the Commission to bring forward a proposal in the Fourth Council Directive 78/660/EEC of 25 July 1978 based on Article 54(3)(g) of the Treaty on the annual accounts of certain types of companies*[130] *(the Fourth Company Law Directive) for social and environmental reporting to be included alongside financial reporting requirements*. In this resolution, the Parliament is also in favor of establishing a regime of responsibility for the members of the Board of Directors of companies with regard to their social and environmental practices.[131]

(iii) Political hearings and public confrontation

In January 1999, the European Parliament adopted a resolution[132] suggested by Richard Howitt, the European Parliament's *rapporteur* on corporate social responsibility, aiming to provide a framework for the responsibility of European multinational corporations. The preamble of the resolution presents voluntary codes of conduct as a useful means to improve and cleanse commercial practices. After referring to the OECD guidelines, the preamble stresses that voluntary and constraining approaches are not mutually exclusive on the subject and that it is necessary to gradually tackle the question of determining the standards applicable to European companies. On this question, the Parliament asked the European Council to adopt a joint position on the codes of conduct while stating that "self-discipline" is not always adequate with regard to corporate responsibility. In this context, the European Parliament asked the Commission and the Council to make proposals in order to define the legal basis governing the operations of companies on a global scale.[133] While awaiting the establishment of specific and constraining mechanisms of control,[134] the Parliament proposed to appoint special *rapporteurs* and to organize public audits to examine concrete cases of the commercial activities of European companies in developing countries, to which all the parties involved would then be invited. A committee on development, set up within the Parliament, takes charge of organizing hearings. Its members first select sectors. In 2000, they took up the infant nutrition and sporting clothes sectors. They decided to invite, on the one hand, *Nestlé* (concerning its marketing policy in

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contents of non-financial reports, such as the societal assessment of the *Centre des jeunes dirigeants et des acteurs de l'économie sociale* (See http://www.cjdes.org/8-Bilan_societal).

128. Law n° 2001-420 of May 15, 2001 with regard to new economic regulations, J.O., n° 113 of May 16, 2001 pp. 7776.

129. Décret n°2002-221 du 20 février 2002 pris pour l'application de l'article L. 225-102-1 du code de commerce et modifiant le décret n° 67-236 du 23 mars 1967 sur les sociétés commerciales.

130. OJ L 222, 14.8.1978, pp. 11.

131. European Parliament resolution on the Commission Green Paper on promoting a European framework for corporate social responsibility (COM (2001) 366 – C5-0161/2002 – 2002/2069(COS)).

132. The text of the resolution can be consulted at the following address: http://europa.eu.int/eur-lex/pri/fr/oj/dat/1999/c_104/c_10419990414fr01800184.pdf. For a criticism of this resolution by Amnesty International, see http://www.amnesty.asso.fr/05_amnesty/55_france/554/src_ent/act70_01_99.htm.

133. It recommends that a code of conduct for European companies would rely on the following standards: the Tripartite Declaration and ILO basic conventions; the OECD guidelines for multinational enterprises; the United Nations Universal Declaration of Human Rights as well as the United Nations Pacts relating to human rights; the Rio Declaration on the environment, the United Nations Convention on biological diversity and the other Community and international instruments applicable as regards environmental protection; Article 3 of the Geneva Convention and the United Nations Code of Conduct for law enforcement officials; as well as the OECD Convention against corruption and bribery in international commercial transactions. The Parliament reaffirms moreover its support for the creation of a European social label.

134. On the procedural level, it asks the European Commission to study the possibility of setting up a European Observatory. It also recommends the implementation of coordinated action within the OECD, the ILO, and other international forums to promote the introduction of a monitoring mechanism truly independent and impartial at the international level.

Pakistan), a Pakistani association for consumer protection, and UNICEF; and, on the other hand, *Adidas* (concerning respect for social rights in Indonesia) and some Indonesian and European civil society actors. These two companies at first decided to boycott the hearing. Thanks to its press coverage, however, the concerned companies appeared at the hearings.[135] To date, this resolution of the European Parliament has not been followed by other European authorities.[136] The mechanism of the hearings organized by the European Parliament is not fundamentally different, at least from the standpoint of its overall goal, from the constant oversight by non-governmental organizations and consumers defense associations for example.

Public confrontation can be carried out by non-governmental organizations, the media, or trade unions. For example, *Global Exchange* publishes annually a list of the twenty-five companies with the worst human rights records.[137] The organization *Corporate Watch* publishes on its website[138] information, reports, and critical analyses of the behaviors of multinational corporations and their of corporate social responsibility "failures." Besides transmitting information, organizations such as the *Clean Clothes Campaign* set up demonstrations or support initiatives which also tend to force companies to explain their practices. The information spread by these non-governmental organizations, or the initiatives they develop, force companies to explain their practices which contradict the standards of their codes of conduct. Public confrontation, thus, can promote the transparency of a company's behavior as well as the respect for the principles to which they have committed themselves.[139] Therefore, the importance of information in the development of a system of co-regulation can be measured in terms of corporate social responsibility.

3. Control and Sanction

Finally, the fourth and last stage of the development of a system of co-regulation regarding corporate social responsibility is oversight and enforcement of social and environmental commitments in the event of non-observance. Guarantee for the respect of these commitments is not necessarily, it is important to underline, the role of the public authority: indeed, with regard to social responsibility, the third party responsible is not necessarily the State anymore.[140] We will examine four mechanisms ensuring the oversight and, if necessary, the enforcement of respect for social and environmental commitments: unfair practice and misleading advertising; contractual liability; consumer accusations

135. This information is given by Richard Howitt, author of the resolution of the European Parliament and member of the Committee on development. See http://www.cleanclothes.org/legal/01-04-10.htm.

136. However, it should be noted that on June 8, 1998, the fifteen Ministers for Foreign Affairs of the European Union adopted, in the form of a Declaration of the Council, a code of conduct on exports with regard to armament. This text aims at creating strict common standards that constitute a minimal base of control of the transfers of conventional weapons by the E.U. member states, and to reinforce the exchange of information in this field. It provides that a country must check before granting an export license to companies on its territory the fulfillment of eight cumulative criteria: respect for international commitments by the member states (and in particular of the sanctions issued by the United Nations Security Council and by the European Union); respect for human rights in the country of final destination, and internal situation in the country of final destination (tensions or conflicts); safeguarding regional peace, security and stability; national security of the member states and their allies; behavior of the purchasing country with regard to the international community, and the existence the diversion of materials inside the country or risk of re-exportation; compatibility of exports of weapons with the technical and economic capability of the country of final destination. To endeavor to reduce the divergences between States in the interpretation of these criteria and national decisions of export, a mechanism of consultation and notification is created between the EU countries: a.) each State refusing a license of export informs its partners by the diplomatic way, by justifying its decision; b.) a country which intends to grant a license for an "overall identical" export to an operation having been refused beforehand by another member states within the last three years must first consult the latter; c.) if, after consultation, this country persists in its intention to export, it must notify its decision and explain its position to the member states (or the member states) having submitted the first refusal. The final decision to grant or refuse the authorization remains the sovereign decision of each country.

137. See http://www.globalexchange.org/getInvolved/corporateHRviolators.html.

138. See http://www.corporatewatch.org/.

139. Some consider that the development of the access to information on the practices of companies abroad is the genuine angular stone of the evolution of corporate social responsibility. See A. SIMAIKA, "The Value of Information: Alternatives to Liability in Influencing Corporate Behavior Overseas," *Columbia Journal of Law and Social Problems*, vol.38, 2005, pp.321-363.

140. See on this subject the reflexions of A. SUPIOT, *Hommo Juridicus. Essai sur la fonction anthropologique du Droit*, Paris, Seuil, 2005, pp. 223 -273.

and boycotts; and the investment policies of shareholders and financial institutions.

(i) Unfair practices and misleading advertising

False information contained in codes, or the non-observance of commitments listed in some codes of conduct can, in certain cases, be regarded as unfair practices or misleading publicity. Two European directives precisely highlight the fact that a company can be legally bound to respect its contents when it adopts a code of conduct. Failing that, competitors or consumers have the ability to undertake proceedings based on the unfair character of the practice or the misleading character of company's advertisement. As we will see, such actions are also possible in the United States.

Unfair Practices

In accordance with Directive 2005/29/EC on unfair commercial practices,[141] a company which adopts a code of conduct and publishes it can be held responsible if it does not respect the contents of the code. This Directive, which had been proposed by the European Commission in June 2003, was signed by the European Parliament and the Council on May 11, 2005.[142] It aims at specifying consumers' rights and at facilitating trans-border trade through the harmonization of member states' rules on the commercial practices of companies towards consumers. It describes the dishonest practices which are prohibited in the European Union, such as forced sales, misleading commercial practices, and unfair advertising. This text ensures consumers similar protection against aggressive or misleading commercial practices, whether they purchase a product in a local shop or in another member state. The objective of the Directive, moreover, is to make it possible for companies to benefit from a common regulatory framework in the E.U., replacing the multiplicity of existing rules and decisions of national courts. Article 2.f. of the Directive defines a code of conduct as "an agreement or set of rules not imposed by law, regulation or administrative provision of a member state which defines the behavior of traders who undertake to be bound by the code in relation to one or more particular commercial practice or business sector." Article 17 requires that "an agreement or set of rules not imposed by law, regulation or administrative provision of a member state which defines the behavior of traders who undertake to be bound by the code in relation to one or more particular commercial practices or business sectors." Article 6.2.b. qualifies misleading actions as the: "non-compliance by the trader with commitments contained in codes of conduct by which the trader has undertaken to be bound, where: the commitment is not aspirational but is firm and is capable of being verified, and the trader indicates in a commercial practice that he is bound by the code." Annex 1 of the Directive, which specifies unfair commercial practices in any circumstance, qualifies a professional claiming to be the signatory of a code of conduct when he is not (annex 1, subparagraph 1), or, stating that a code of conduct received the approval of the public or another organization when it is not the case (annex 1, Al. 3) as misleading commercial practices. This Directive sets up a relatively subtle mechanism in order to confer a binding nature on the codes of conduct of companies. Indeed, it defines the code of conduct as a set of rules or an agreement to which the professional agrees to be bound. If a company refuses to consider that its code is binding, it is not, according to the terms of the Directive, a code of conduct. In this case, the company cannot call its code a "code of conduct" since, if it claimed to be a signatory to a "code of conduct" when it is not, that would also constitute an unfair commercial practice. If it is established that a company has a code of conduct to which it agrees to be bound, the non-observance of firm and verifiable commitments would constitute an unfair practice, and proceedings can therefore be instituted, for instance, by competing companies.

Misleading Advertising

Moreover, Council Directive 84/450/EEC of September 10, 1984 relating to the approximation

141. Directive 25/29 EC of the European Parliament and the Council of May 11, 2005 relating to unfair business-to-consumer commercial practices in the internal market and modifying Directive 84/450/EEC of the Council and Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and the Council and regulation (EC) n° 2006/2004 of the European Parliament and the Council ("directive on the commercial practices unfair"), *Official Journal of the European Union*, L 149/22, June 11, 2005.

142. The Directive was published in the *Official Journal* on June 11, 2005. The provisions of the Directive will be valid in the member states at the latest two and a half years after the date of publication in the *Official Journal*.

of the laws, regulations, and administrative provisions of the member states concerning misleading advertising[143] broadly defines advertising as "a representation in any form in connection with a trade, business, craft or profession in order to promote the supply of goods or services, including immovable property, rights and obligations" (article 2.1), which is likely to cover codes of conduct.[144] Moreover, article 2.2 of the Directive defines misleading publicity as "any advertising which in any way, including its presentation, deceives or is likely to deceive the persons to whom it is addressed or whom it reaches and which, by reason of its deceptive nature, is likely to affect their economic behavior or which, for those reasons, injures or is likely to injure a competitor."[145] To determine the misleading nature of advertising, one must take into account "the characteristics of goods or services, such as their availability, nature, execution, composition, method and date of manufacture or provision, fitness for purpose, uses, quantity, specification, geographical or commercial origin or the results to be expected from their use, or the results and material features of tests or checks carried out on the goods or services."[146] Thus, when a code of conduct contains false information, including on the geographical origin of the production of products for example, that is likely to affect the consumers' economic behavior, the member states of the E.U. must take appropriate measures to penalize misleading advertising in order to protect the consumer and the competitors.[147] Finally, during civil or administrative proceedings, the member states must confer upon the courts or administrative authorities powers enabling them: a.) to require the advertiser to furnish evidence as to the accuracy of factual claims in advertising if, taking into account the legitimate interests of the advertiser and any other party to the proceedings, such a requirement appears appropriate on the basis of the circumstances of the particular case; and b.) to consider factual claims as inaccurate if the evidence demanded in accordance with a.) is not furnished or is considered insufficient by the court or administrative authority.[148] From the same point of view, certain legal proceedings can also be based on the content of social reports either because the information they contain is misleading, or because the commitments entered into are not respected. Therefore, in a case decided in 1978, a Dutch judge expressly agreed to take the reference made by the company *Batco Tobacco* in its annual report to the OECD guidelines into account. *Batco Tobacco* stated in its report that its policies were in accordance with its principles whereas it was about to relocate some of its factories without consulting trade unions.[149] In the United States, the Supreme Court case of *Kasky vs. Nike* highlights the fact that codes of conduct and other publications relating to corporate social responsibility can institute a civil proceeding on the basis of laws prohibiting unfair practices and misleading advertising. After 1996, there a series of allegations were brought against *Nike* claiming that the workers of the company's subcontractors were ill-treated. *Nike* reacted to these allegations by publishing a series of press releases and reports affirming that its subcontractors fully respected the social standards. In April 1998, Mark Kasky, an American citizen residing in California, brought a civil proceeding against *Nike* based on the Californian law against unfair competition and misleading advertising. It argued that *Nike* neglected to reveal certain information or communicated erroneous data as to the working conditions of the workers employed in the factories of its subcontractors in order to maintain or increase its sales. The claimant did not invoke a personal damage charge, but made his case in the name of the "general public of the State of California and on information and belief." This lawsuit, which ended up in an amicable settlement, is particularly interesting as it allowed the State of Californian to give its opinion on the status of the code of conduct. Indeed, *Nike* claimed that the contents of the code were not of a commercial nature and that it should therefore fall under the protection of freedom of expression of the First Amendment. The Supreme Court of California judged that the contents of the code of conduct concerned commercial speech as well and, thus, were not protected by the freedom of expression. The

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143. Directive 84/450/EEC of the Council of September 10, 1984 relating to the approximation of the laws, regulations, and administrative provisions of the member states concerning misleading advertising, *Official Journal n° L 250 of the 19/09/1984,* pp. 0017–0020.

144. See on this question: O. DE SCHUTTER, "The Liability of Multinationals for Human Rights Violations in European Law," in *Bedrijven en mensenrechten. Verantwoordelijkheid en aansprakelijkheid,* E. BREMS and P. VANDEN HEEDE (eds.), Antwerpen-Apeldoorn, Maklu, 2003, pp. 45-106, and part pp. 96.

145. Article 2.2 of Directive 84/450/EEC of the Council of September 10, 1984.

146. Article 3.a of Directive 84/450/EEC of the Council of September 10, 1984.

147. Article 4 of Directive 84/450/EEC of the Council of September 10, 1984.

148. Article 6 of Directive 84/450/EEC of the Council of September 10, 1984.

149. Court of Appeal of Amsterdam, *Batco*, June 21, 1979, NJ 1980, 71, by. 6.

Supreme Court of the United States[150] refuses to come to a conclusion on this point. In accordance with the amicable settlement, *Nike* was to pay a sum of $1.5 million to the independent coalition, the *Fair Labor Association*.

(ii) Contractual liability

When a company imposes, by contract, respect for definite social standards on its contracting partners or to its suppliers, through its code of conduct for example, a violation of these standards constitutes a breach of contract. In the case of such a violation, the company can bring forward a case with the objective of requiring the *specific performance* of the contractual obligations of the contracting partner or, more simply, to refuse on this basis to renew the subcontract. *Nike*, for example, stated in its non-financial report of 2004 that it suspended trade relations with subcontractors who did not respect their requirements concerning social responsibility.[151] The company *Gap* also used its contracts to impose its code of conduct on its subcontractors. Before the adoption of its code, *Gap* was buying its clothing from the company *Madarin International Apparel Factory* located in El Salvador. However, the unethical practices of this subcontractor, notably the dismissal of workers who wanted to organize a trade union within one of the company's factories, quickly sullied *Gap*'s reputation. To counter this bad publicity, *Gap* decided to terminate the contracts binding it to its partners in El Salvador. *Gap* then re-opened trade with these companies on the double condition that they adhere to the principles of its code – containing, for example, prescriptions relating to labor law – and that they commit themselves to be audited by an independent organization.[152] If the termination of the contract or the suspension of trade can be an adequate sanction for a subcontractor, a socially responsible company can also consider its role to be greater and that it should work alongside its subcontractors to build their social policy on adequate training and accountability.[153]

Can a company be held legally responsible for violations of the code of conduct which it imposed by contract on its subcontractors? Such an argument for corporate social responsibility is currently being invoked against *Wal-Mart* in the U.S. Judgment on these charges has yet to be rendered but, if the argument for corporate social responsibility was to be taken up, such jurisprudence would open the gates for a particularly strong system of co-regulation. The charges in question were lodged on September 13, 2005 in California.[154] They constitute a *class action* complaint against *Wal-Mart* with the aim of obtaining damages, mainly for the actions of the subcontractors of *Wal-Mart* abroad.[155] The essential argument of the employees of the subcontracting companies is that: first, the code of conduct imposed by *Wal-Mart* on its subcontractors constitutes a contract between *Wal-Mart* and the subcontracting company; second, the contract was known by the employees of *Wal-Mart* since it was posted in the buildings of the subcontracting company; third, certain clauses of the contract related to human rights, and the employees had the right to consider that these clauses were to their direct benefit; fourth, *Wal-Mart* had, within the terms of the contract, the means necessary to put an end to the human rights violations committed by the subcontractors; fifth, *Wal-Mart* did not take the necessary measures to guarantee respect for the rights guaranteed in the contract on behalf of the employees of the subcontracting companies; and sixth, *Wal-Mart* consequently terminated the contract constituted by the code of conduct to the detriment of plaintiffs who required compensation for the damage. This complaint constitutes, without a doubt, the perfect case for establishing a system of co-regulation of corporate social responsibility which takes the form of the contractualisation of human rights. The case has not yet been tried by the American courts. Supposing that the applicants win the case, however, this decision would likely alter corporate social responsibility litigation considerably.

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150. *Nike Inc and Al v. Marc Kasky*, United States Supreme Court, CERT. Dismissed as Improvidently Granted: June 26, 2003.

151. See http://www.nike.com/nikebiz.

152. MR. HOPKINS, *The Planetary Bargain, Social Corporate Responsibility Matters*, International MHC, 2003, pp. 70.

153. On this topic, see also the declarations of *Nike* in its 2004 report. See http://www.nike.com/nikebiz.

154. See the text of the complaint at http://www.laborrights.org/projects/corporate/walmart/WalMartComplaint091305.pdf.

155. The complaint also concerns Americans who saw their wages decreased following the establishment of *Wal-Mart* in California. The applicants consider that, considering the conditions which made it possible, the financial growth of *Wal-Mart* is unjust. Consequently, they ask for repair for the damage.

Such a decision would make it systematically possible to identify the contractual clause imposed by a company (the stipulating party) on its subcontractor (the promising party) aiming at respect for a code of conduct or commitments relating to workers rights (third party beneficiaries), and to the enforcement of contractual obligations by third parties to the contract.

(iii) Labels and boycotts

The growing interest of consumers in the production process and the sale of products and services has encouraged various actors to adopt social, fair trade, or environmental labels. Concretely, these labels aim to influence the behavior of the purchaser (consumers, subcontractors, retailers, etc.) by providing them with the possibility to choose a product or a service conceived or sold in accordance with one or more specific criteria. Labels make it possible, thus, for the consumer to coerce companies which do not respect the human rights guaranteed by the label. Different from quality labels, which attest to the intrinsic quality of a product, social labels aim at providing information as to the method of production and sale of the product. There does not exist, to date, a specific label covering corporate social responsibility as a whole, or even relating precisely to human rights by, for example, guaranteeing that a product or a service is produced with respect for the entire doctrine of human rights. However, certain initiatives to attach labels do not completely ignore social and environmental commitments. In this regard, we must distinguish public from private labels.

Public labels

On February 27, 2002, Belgium adopted a law aiming to promote *socially responsible production*. This legislation creates a label which is affixed on the companies' products and certifies that all the stages of the production process conform to the criteria of social responsibility. The products must have been completed by respecting fundamental principles laid out by the International Labor Organization: trade-union freedom and collective bargaining, prohibition of forced labor, prohibition of child labor, equality and non-discrimination. The company requiring the label for one of its products must prove that, like itself, the subcontractors and suppliers taking part in the production – in practice, all the participants in the production line[156] – also respect these principles. Social audit companies accredited by the Ministry of Economics are responsible for verifying this procedure. The procedure consists in a preliminary submission to a committee for socially responsible production, instituted by law,[157] of a request which will establish the specific guidelines of the concrete case. If the preliminary request is accepted, the company is invited to choose a recognized and accredited social audit company, called an oversight organization, which will carry out an audit and write a report. The

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156. The committee determines, upon request, which part of the production line must be monitored.

157. This committee is established by Article 7 of the law, par. 2. The committee gives, on its initiative or at the request of the government, the President of the Chamber of Representatives, or the Senate, its opinion on all the projects and modification law proposals, and on all the projects related to decrees of the execution of this law. The opinion request states the time limit in which the opinion must be given. This limit cannot be less than one month. If the opinion is not given within the time allotted, it can be ignored. The committee gives an opinion to the minister on the requests for granting the label, the control of the use of the label, and complaints relating to this use and the withdrawal of the label, in accordance with the provisions of Articles 3, 4 and 10, by. 3. The King appoints the members of the committee. The committee is composed of sixteen members, including the President and the Vice-President, and of sixteen substitute members, designated according to the same rules. The committee is composed as follows: 1.) two members chosen among the candidates proposed by the organizations representative of workers sitting at the Council of Consumption; 2.) two members chosen among the candidates proposed by the organizations representative of employers sitting at the Council of Consumption; 3.) two members chosen among the candidates proposed by consumer protection organizations; 4.) two members chosen among the candidates proposed by the recognized non-governmental organizations for development cooperation, sitting at the federal Council of sustainable development; 5.) a member proposed by the minister; 6.) a member proposed by the minister having social Economy qualifications; 7.) a member proposed by the minister having Development cooperation qualifications; 8.) a member proposed by the minister having Employment and Work qualifications; 9.) a member proposed by the federal Council of sustainable development; 10.) the Flemish government, the Walloon government and the government of the Region of Brussels-Capital are each invited to indicate a member to serve in an advisory capacity. The members of the committee are named for a four-year renewable term. The committee counts as many French-speaking members as Dutch-speaking members. The King appoints, on the proposal of the minister, the president and Vice-President of the committee. The President alternatively is selected among the French-speaking members and the Dutch-speaking members. By. 4. The ministry of Economic affairs appoints the secretariat of the committee. Par. 5. The committee establishes its internal regulation. The latter is subjected to the approval of the minister.

audit consists in a “screening” based on a retrieval of information and an investigation of shareholders as well as oversight in the field. Apart from the initial audit, the procedure calls for a monitoring audit every year, an extension audit upon request, and a continuation audit upon request every three years. In theory, the oversight can be carried out by organizations which follow the European EN-45004 or ISO-17020 standards as well as by other organizations recognized by the Ministry within the framework of Article 4 paragraph 2 of the law of February 27, 2002. The committee recognizes the oversight organizations accredited by *Social Accountability International* which use the SA8000 standard framework. After analysis of the final report, the committee relays to the Ministry a positive or negative judgment. In the event of a positive judgment, the Ministry can introduce the label.[158] Belgian social labels rest purely on a voluntarist conception since the company is not obliged to submit its products to the certification procedure. However, when a company obtains the requested label for a product or service, it commits itself to comply with certain rules. The law calls for a mechanism of control and penal sanctions in the event of non-compliance with these rules. The company which obtains the label must commit itself to promote respect for the ILO standards and to impose the compliance of these standards on its partners, in particular, its subcontractors.

In France, a “professional equality” label, founded with support of the Ministry of Industry, aims to develop a combination of co-ed and professional equality in companies, administrations, or any other organization. Launched in the spring of 2004 by the Prime Minister after thorough discussions with other social partners, many companies showed their interest for this label. The professional equality label aims at developing equality between men and women, providing a professional mix at the heart of the company, but also within its administration. Companies can obtain the label through the French certification agency AFAQ AFNOR according to specific terms of reference that include eighteen criteria articulated around three areas: action carried out in the company in favor of professional equality (these actions are evaluated by taking account of the information and raising awareness about the equality of leaders, employees, and other representatives); human resources management and overall management (which are recognized by looking at the actions carried out to reinforce the equal access of women and men to vocational training, and the analysis of indicators relating to the general conditions of employment and training of men and women in the company); and the taking into account of parental involvement within the professional sphere (actions of the company to help employees enjoy both a professional and family life are evaluated). This label is valid for a duration of three years, with an intermediate evaluation after eighteen months to check if the label structure still satisfies the terms of reference and that it evolves in a way that shows continuous improvement. Other projects exist in France that aim to set up legal labels in the field of social responsibility.

Private Labels

There are many private labels. For example, the products carrying the “Max Havelaar” label[159] must be produced and marketed according to international fair trade standards. The “Forest Stewardship Council”[160] label, set up by environmental organizations (WWF, World Institute Resources, etc.) in partnership with various economic actors of the wood industry, aims to protect forests by introducing a set of environmental rules that take into account the impact of wood production on the environment and implement forest conservation measures.

The role of socially responsible consumption in the oversight and enforcement of corporate social responsibility is difficult to evaluate from the point of view of the effectiveness of labels. Thus, certain opinion polls indicate that more than 70% of consumers would agree to pay 25% more for clothes produced under acceptable social conditions.[161] However, these indications do not match consumer habits. Indeed, a study undertaken in 2003 in Great Britain indicated that responsible

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158. So far, two services and a product have been granted the label: the temporary work of Randstad, Home Comfort Plus Ethias and la Pierre Bleue du Hainaut de Carrières du Hainaut.

159. See http://www.maxhavelaar.org.

160. See http://www.fsc.org/en/.

161. D. O' ROURKE, *Opportunities and Obstacles for Corporate Social Reponsibility Reporting in Developing Countries*, Report for the Corporate Social Reponsibility Practice of the World Bank Group, March 2004, pp.22.

consumption hardly represented 2% of transactions on the market.[162]

(iv) Investment policies of financial institutions

In addition to consumers, investors can also play a key role in the oversight and enforcement of respect by companies for certain social responsibility rules. There are various tools which encourage and allow investors to take the social and environmental aspects of their investments into account. We will pay particular attention to ethical funds, stock market indexes, and the more specific case of the *Equator Principles*.

Ethical Funds

Ethical funds are financial products which integrate sustainable development and corporate social responsibility criteria into the selection of titles of an investment fund. The trust companies which propose such products can resort to several methods to build these types of funds. A first method consists in carrying out a *negative screening* by excluding from the funds the titles of companies belonging to a sector whose activities are considered to be unethical.[163] These types of funds relate to corporate social responsibility only in an indirect way, that is, insofar as there is no single sector where the respect of social rights is excluded by principle. A second method consists in taking the existence and quality of corporate social and environmental policies into account. In this case, the funds will be built on the basis of *positive screening* and will exclusively contain the titles of companies which commit themselves to serious sustainable development policies. The third method to which a trust company can resort to constitute ethical funds no longer concerns a particular method of title selection, but rather the trust company's engagement in promoting sustainable development. In this case, a trust company commits itself to using its voting rights at the shareholders' general meetings to support the adoption of social and environmental policies by the companies which it holds titles to. This practice of management is known as *shareholder activism*.

By investing in ethical funds, investors are likely to control and sanction corporate social responsibility. In particular, funds based on a *positive screening* or shareholder activism can appear effective in overseeing corporate social responsibility. This is the case, for example, when significant institutional investors, like the pension funds of civil servants in California, the *California Public Employees' Retirement System* (CalPERS), get involved in socially responsible investment and shareholder activism.[164] The Norwegian government instituted an ethics committee in 2004 responsible for determining whether the public investment of a particular company is contrary to *the ethical rules* to which the investment is supposed to conform.[165] The Ministry of Finance can then decide to exclude a company from public investment funds, which include the *Government Pension Fund–Global* (in the past, the *Oil Funds*) and the *Government Pension Fund–Norway*. In accordance with ethical rules, the companies which produce weapons prohibited by humanitarian law are in principle excluded by means of an initial *negative screening*. Moreover, the Ministry must exclude companies if it can be shown that there is an "unacceptable" risk that the investment is likely to contribute to serious and systematic violations of human rights (murder, torture, arbitrary deprivation of freedom, forced labor, child exploitation); serious violations of individual rights in conflict situations; serious environmental damage; corruption; or any other serious violation of fundamental ethical standards. For instance, on January 5, 2006 the Norwegian Ministry of Finance published a press release indicating that it had decided to exclude seven companies (*BAE Systems Plc.*, *Boeing Co.*, *Finmeccanica Sp.A.*, *Honeywell International Inc.*, *Northrop Grumman Corp.*, *Saffron SA,* and *United Technologies Corp.*) of the funds because of their implication in the production of nuclear weapons, amounting to a total of 3.3 billion Norwegian crowns.[166] On the other hand, the ethics

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162. The Co-operative Bank, *Ethical Consumerism Report 2003*, London, 2003.

163. The sectors the most often concerned are tobacco, armament, alcohol, pornography and gambling.

164. About the investment policy of CalPERS, see the critical outline proposed by I.I. ENGLISH, T.I. SMYTHE, C.R. MCNEIL, "The 'CalPERS' effect revisited, "*Journal of Corporate Finances*, vol. 10, 2004, pp. 157-174.

165. The Information relating to this initiative and the details of the recommendations of the ethical Committee and the decisions of exclusion, are available on the Committee's website (in English) at: http://odin.dep.no/fin/english/bn.html.

166. On September 2, 2005, the Minister announced to have excluded from the Funds eight companies which contributed to the production of cluster bombs: *Alliant Techsystems Inc.*, *EADS Co* (*European Aeronautic Defence and Space*

committee judged that the activities of *Total* in Burma do not contribute to the violation of human rights committed by the Burmese government. On June 6, 2005, the Norwegian Finance Minister announced the exclusion of *Kerr McGee Corporation* because of the oil exploitation activities in Western Sahara of its subsidiary company in partnership with the Moroccan public company. Based on the fact that Morocco occupies this territory despite repeated judgments of the United Nations, the economic activity of *Kerr McGee Corporation* was, according to the ethics committee, likely to, *inter alia*, reinforce the Moroccan claims of sovereignty on this territory and to hamper the smooth operation of the peace process.

As shown by the Norwegian example, the inclusion of social and environmental criteria in the portfolios of institutional investors can be supported by the authorities. The latter can also force pension funds to declare the integration of non-financial considerations in their investment policy. For example, in 1999 the British legislation reformed their law on pension funds. Within the framework of this reform, it was requested that the funds make public "a.) the extent (if at all) to which social, environmental or ethical considerations are taken into account in the selection, retention and realization of investments, and b.) their policy (if any) in relation to the rights (including voting rights) attached to investments."[167] This type of obligation has also been established in many other countries. Thus, the Belgian law of March 28, 2003 relating to a complementary pension and tax system, and to certain prerequisites with regard to social security, in Article 42 requires the pension organization, the person designated in the collective agreement, or the pension regulator to write a report on the management of the allocation of the pension. In particular, this report must contain information on "the long and short term investment strategy and the degree to which they take social, ethical and environmental aspects into account."[168]

Stock Market Index

Another instrument supporting the control and sanction of shareholders with regard to non-scrupulous companies in the area social responsibility rests on the constitution of stock market indexes that are specific to corporate social responsibility. This type of index can produce notable regulation effects since the sanction is, so to speak, direct and systematic. These indexes usually select certain titles according to the information transmitted by a rating agency. If this one modifies its rating according to new information (for instance, the non-observance of the code of conduct or violation of human rights), the titles of a company can possibly be taken out of the index. The exclusion of the titles of a company from the index creates an immediate penalty for the latter. Indeed, certain funds determine their investments according to such a reference index. For a listed company, to be taken out of an index, therefore, means that it will lose the benefit of a certain number of investments.

For example, the *FTSE4Good Index Series* is a series of stock market indexes created in 2001 and constructed on the *FTSE's standard index*. The selection of companies whose titles are included in these indexes is made according to three general criteria: respect for the environment, the development of positive relationships with all parties involved, and respect for human rights. Concerning the respect for human rights, the criteria of the index series are based on the UN Global Compact, the UN Universal Declaration of Human Rights, and the International Labor Organization's fundamental standards. If a company wishes to be "introduced" into these indexes, it must be subjected to an evaluation created by the British *Ethical Investment Research Service* (EIRIS).[169] The latter will evaluate the respect for the three fundamental criteria on the basis of a set of specific elements such as the existence of a code of conduct, the implementation of an audit, or the publication of a non-financial report. The companies which cease to fulfill the criteria or which do not demonstrate a continuously improving social and environmental policy, are excluded from the index series and will suffer the financial consequences. Thus, the *FTSE4Good* Committee recently decided to require new inclusion criteria concerning the production lines of the listed companies considered to be of high-risk

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Company), *EADS Finances BV*, *General Dynamics Corporation*, *L3 Communications Holdings Inc.*, *Lockheed Martin Corp.*, *Raytheon Co.*, and *Thales SA*.

167. *The Occupational Pension Schemes*, Amendment Regulation 1999, Statutory Instrument 1999, n° 1849.

168. *Moniteur belge*, May 15, 2003, pp. 26420.

169. See http://www.eiris.org/.

because of the products they sell, the countries in which they are supplied, and the level of dependence of their income to high-risk products coming from high-risk countries. To be maintained in the *FTSE4Good* indexes, companies were required, before July 1, 2006, to conform to a set of criteria regarding their policy and their management system. As to their policy, they had to clearly include in their code of conduct their commitment to respect the standards of the four fundamental conventions of the International Labor Organization relating to child labor, forced labor, equality and non-discrimination, and the freedom of association and the right to collective bargaining. Moreover, the code of conduct had to address at least one of the three following areas: working hours, wages, or disciplinary proceedings. Moreover, it required the company to present its health and safety policy. This code had to be published, and made accessible to the public, by the July 1, 2006 deadline. As to management structures, companies had to arrange for an audit of their suppliers, as well as communicate the code of conduct to all the suppliers with whom the company has direct contact. Responsibility for implementing the code fell on one or more members of the Board of Directors or by one or more senior executive managers. The company was also required to train employees, including those of the supplier, as to the social policy laid out in the code. In the event of a failure to realize the principles of the code, the company had to have a procedure to systematically remedy these breaches. Since January 1, 2007, high-risk companies on the *FTSE4Good* indexes have an obligation to publicly communicate any information relating to their social policy and management structure. These criteria are expected to be reinforced in the future in order to anticipate the need for additional obligations with regard to audits, commercial endeavors, imposing the code on the entire production process, and the publication of information about the performances of the code of conduct once implemented.

The Equator Principles

In addition to financial markets, companies also have access to financial institutions to finance their projects. These institutions also take part in the process of corporate social responsibility by taking social and environmental factors into consideration when making the decision to finance certain projects. Adopted in June 2003, the *Equator Principles*,[170] composed of thirty-nine[171] key actors of the financial sector emanating from the most important financial institutions, are guidelines aimed at committing companies in the financial sector not to finance projects of more than $50 million that do not meet the social and environmental criteria defined by the Equator Principles. These Principles categorize projects according to the risks they present. As such, the Principles provide for various types of evaluation of the social and environmental impact of the project which the applicant companies must pass on to the financial institution from which they seek funding. For example, projects that present a significant impact on the environment are part of Category A. To be given finances for a project in this category, the project manager must write a full report evaluating: the conformity of the project with the legislation of the country where it is to take place as well as with the relevant international treaties; the impact of the project on the environment, indigenous communities, and local groups;[172] and alternative ways of implementing the project which would be more respectful of the environment or otherwise socially preferable. The project managers of a Category A project must also submit an environmental management plan to the financial institution which is based on the conclusions of the report and which indicates the plan of action, measures for monitoring the project, risk management procedures, and the project's agenda.

Conclusion

This article has sought to capture the dynamics of corporate social responsibility. To do so, we studied the way in which the instruments and initiatives of the various actors taken together is likely to produce global effects of regulation. We proposed to examine the matter by distinguishing four logical phases: first, the definition and adoption of standards; second, their implementation; third, recourse to

170. Available online at http://www.equator-principles.com/documents/Equator_Principles.pdf.

171. January 2005.

172. For these projects, the financial institution must make sure that the borrower, or a specially commissioned expert, has consulted the groups particularly affected by the project. The results of these consultations must be duly taken into account in the evaluation report and the management plan. The evaluation report or a summary of it must, moreover, be placed at the disposal of the populations affected by the project in the local language.

tools of transparency and information; and finally, fourth, through methods of control and sanction. This analysis has shown, first of all, the logic underlying the contemporary development of corporate social responsibility. In particular, it allowed us to identify the types of actors involved as well as the various tools and instruments that are used. It is important to keep in mind that a purely statistical analysis of corporate social responsibility would miss the very particularity of the phenomenon, which is that it can only be understood from a dynamic point of view.

By distinguishing four logical phases in the process of corporate social responsibility, we did not merely aim to propose a new typology of instruments. We also wished to highlight the possibility, as seen in the interaction between the different regulatory tools and instruments, to produce a system of co-regulation with regard to corporate social responsibility. This possibility, according to us, was sufficiently highlighted by the fact that the interaction between the regulatory tools and instruments ultimately leads to more accountability as well as potential legal and administrative sanctions. Indeed, instruments of self-regulation and voluntarism end up being "connected" to economic regulation or regulatory instruments.

In fine, corporate social responsibility has been presented in the form of a new *reflexive prism*, making it possible to identify a new logic of regulation in an era of globalization through instruments which, when taken separately, are already familiar. If this logic can be used in the field of corporate social responsibility, it is very likely that it is not particular to it, and could even appear as a paradigm for the study of the emergence of global right.