



# Regulating Transnational Companies

## 46 proposals

PROPOSAL PAPERS SERIES

Yann Queinnec  
William Bourdon

**F<sup>n</sup>WG**  
Forum for a new  
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December 2010



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# FOREWORD

*Mireille Delmas-Marty*

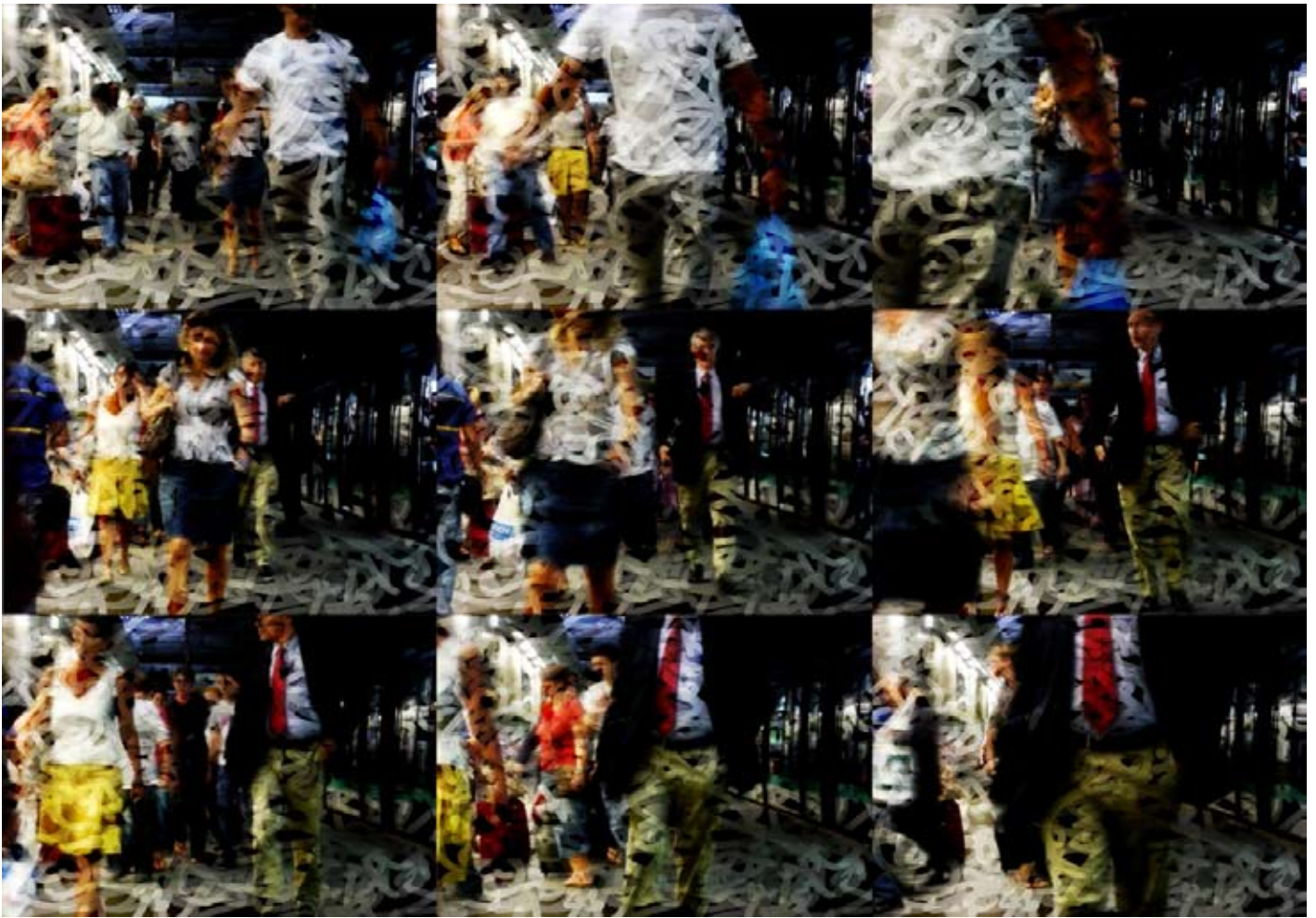
**A**t a time when the future of our societies is cloaked in doubt, redefining the role of transnational companies within the international community has become a central issue.

This Proposal Paper intends to provide readers with a new interpretation of the highly topical issue of regulating transnational companies, taking into account the increasingly complex balances of power between the economic and political worlds.

An assessment of legal systems' capacity to manage these balances of power requires more than reading texts or consulting judicial decisions. We need to rethink the notions that underpin legal responsibility and to reform assessment and monitoring instruments. In other words, we need to call on the "imaginative forces of law" to explore all the possibilities that they offer, or could offer. This is goal of the forty-six proposals presented in this paper by members of the non-for-profit organization Sherpa. The organization has been lobbying for a number of years for the introduction of a process to adapt legal systems to reflect a world undergoing profound changes, a world characterized by increasing interdependence.

Drawing on years of experience gained from working with a range of businesses, and mindful of the theoretical and practical difficulties of such a project, Yann Queinnec and William Bourdon have worked in a concrete and methodical way to come up with suggestions for legal mechanisms suited to the goals they set out: renewing the concept of the business, ensuring protection for basic human rights and the environment in businesses' countries of origin, strengthening legal frameworks in countries where these businesses operate and, lastly, promoting new concepts such as the "sustainable contract" to reflect the increasingly international nature of business and the challenges of sustainability.

This Proposal Paper, modest yet ambitious, realistic and idealistic, has been produced for use by anybody who is concerned by the search for answers to the flagrant problems revealed, aggravated and at times created by the globalized market. It offers innovative answers that should enrich the debate, as well as inciting citizens, businesses and states to get involved.



Marko Echeverria, images taken from the video *C.laV.*, 2010 ([www.uncoupedoeil.com](http://www.uncoupedoeil.com))

## INTRODUCTION

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**W**e have taken the decision to present the topic of transnational corporations (TNCs) and the regulation of their actions by viewing these key players in the process of globalization as living beings who are born into, live and die in an environment comprising other actors (states, citizens, civil society groups, etc.). We consider that a TNC's ability to evolve, its positive and negative impact on its environment, justify an examination of its origins. What is a business? Prior to taking on a global dimension, every transnational company/firm/business amounts simply to a source concept, that of a contract between people pooling their assets in the pursuit of a common goal (*intuitu personae* corporate purpose) with the intention of sharing the gains or profiting from the savings that may result. The specific characteristics of this embryo then serve to guide the nature of the rights and obligations that accompany its evolution, growth, diversification and ties with other actors within its environment.

This Proposal Paper hopes to provide an explanation of the constraints and a series of proposals for a system of TNC regulation. This requires us to first set out the fundamental obstacles that make the question of regulating the activities of TNCs so problematic. The crisis in the financial system that hit economies worldwide proved the importance of regulating for-profit private and public transnational actors. The difficulties states have in agreeing to a common set of rules reflect the scale of the various factors that have to be reconciled if we are to prevent and repair damage to the environment and violations to basic rights. Current negotiations on climate change and tax havens are proof of this problem. The international context over recent decades, marked by liberalization in the movement of goods, services and people is, of course, one of the causes of these difficulties. But this should not serve to mask the existence of a widespread web of principles and mechanisms found in all legal, economic and social cultures. The challenge is not to think of these principles and mechanisms in isolation, but as part of a whole, attempting then to come up with new arrangements for the future that can express them in a manner that accords with the idea of sustainable development. The challenge of corporate social responsibility (CSR)<sup>1</sup> lies in reconciling, within a company, the three pillars of sustainable development—economic, social and environmental; the current position is imbalanced in favour of the first of these dimensions.

Hoping to make a clear presentation of the challenges and areas for reflection, we have adopted progressive levels of analysis that reflect the way in which a transnational company develops: the TNC in its home country (2), the TNC in countries where it operates (3) and the TNC and the international community (4). However, we will start by examining the notion of a business itself (1). A new approach to the concept is needed in order to bridge the widening gap between economic and legal realities.

Our chosen approach requires us to move from the smallest dimension (what are articles of association?) to the largest (what are suitable transnational institutional arrangements?). For each level, the idea is to be able to identify the major obstacles in place and the fundamental characteristics needed for TNCs to properly gauge

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1. Article 25 of the Universal Declaration of Human Rights (UDHR), which describes the minimum conditions that all should enjoy, offers an insight into what social responsibility pertains to: “Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control” (the UDHR can be downloaded from: <http://www.un.org/en/documents/udhr/index.shtml>).

the negative impact caused by their activities. We draw links between each level and the one that follows, similar to the way that a business defines its strategy beforehand and then adapts it in accordance with the various geographical and legal domains within which it operates.

We always favour a preventative approach, and will also be identifying mechanisms for redressing harm or damage. Our basic hypothesis is that current irresponsibility will persist in the absence of any suitable sanctions, bringing in its wake social and environmental consequences that will weigh heavily on future generations. The proposals set out below are therefore chosen to reflect the fact that the voluntary nature of current CSR regimes has reached its limits. Our Proposal Paper aims to provide suggestions for ways to create a clearer and more visible set of rules that will provide better protection for both TNCs and the victims of their excesses.

We must also state that our proposals are guided by the observation that the current situation hinders those businesses genuinely engaged in a sustainable approach from enjoying the legitimate commercial advantages they have a right to expect. Rules that are both clearer and more binding are thus the sole means of ensuring enhanced legal protection and of rebuilding the conditions needed for fair competition. These must enable businesses to actually achieve what is often referred to as the triple bottom line, meaning integrating into their strategies the three objectives generally held to define sustainable development (leaving aside for now the concept's obvious ambiguities): economic prosperity, social justice and environmental quality. Encouraging corporates to aim for the highest common denominator requires that attempts to drive down the lowest common denominators must no longer be attractive in economic, social and environmental terms.

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The working assumptions behind many of the following proposals are based on French or European law, but they have been carefully formulated to be acceptable internationally and participate in the evolution of international law, particularly the *lex mercatoria*. They have been designed to win support by being legal, legitimate and effective. The measures also aim to create conditions that will strongly encourage the practice of self-discipline in market actors, whose voluntary initiatives need to go far beyond “all talk and no action”.

The emphasis on transparency in social and environmental performance is a good example of this approach. We should say that although we are advocates of transparency—a concept overly idealized or even instrumentalized by many economists—as a lever in the development of effective reporting tools that will encourage businesses to improve their social and environmental performance, it is a

far more precise aim that incites us to promote it. The fact is that the value of an enhanced and binding transparency regime lies in the uses that might be made of the information (or lack of information) provided by businesses. Thus, optimized transparency is a means of ensuring that third parties can make proper use of a battery of legal tools.

These measures alone are, of course, insufficient. They would be far more acceptable to economic actors were they to be adopted by all rich countries as well as, progressively, emerging nations. They must therefore be part of a normative multilateral framework yet to be elaborated. Real political backing will be needed to get this in place, partly in the form of additional powers for oversight bodies (judicial or otherwise)<sup>2</sup> and partly in the form of guarantees that independence and impartiality will be fully respected. It also implies that civil society will accept new duties relating to these new obligations, and thereby set in motion the changes we ardently wish to bring about.<sup>3</sup>

---

2. It is interesting to note the resources made available to Neil Barofsky, Special Inspector General in charge of investigating the use of 700 billion dollars of public funds for the US Troubled Asset Relief Program (TARP). He has been working with a 110-person team, including 40 inspectors (soon to rise to 60) and a 2010 budget of 48.4 million dollars (“Le nouvel incorruptible” [The new man who’s incorruptible], Sylvain Cypel, *Le Monde*, 3 February 2010, p. 25). Current debate on government use of mailing lists stolen from Swiss bank accounts also raises the question of the technical means available to the public authorities to combat tax evasion (“M<sup>me</sup> Merkel justifie l’achat d’un listing volé de comptes bancaires en Suisse” [Mrs Merkel justifies the purchase of a stolen list of Swiss bank accounts], Cécile Calla, *Le Monde*, 3 February 2010, p. 14).

3. According to the 2010 Edelman Trust Barometer: “For the third straight year, NGOs are the most trusted institution in eight countries, including the US, UK, Germany, and France. In China, trust in NGOs has surged by 25 points since 2004 (from 31 to 56 percent) – possibly a reflection of growing affluence and the demand for environmental responsibility and public health.” This growing trust in NGOs means that they need to become increasingly responsible and professional. The 2010 Edelman Trust Barometer can be downloaded at: <http://www.edelman.com/trust>.





Peter Klasen, 2 Manettes / fond rouge – noir [2 levers/red-black background] KE 46, 1990, Photo: Gal. Louis Carré / J.-O. Rousseau © ADAGP, Banque d'Images, Paris 2011

# 1

## Globalization in Search of TNC Regulation – Overview

No institution, whether public or private, is now unaware of the Corporate Social Responsibility (CSR) phenomenon.<sup>4</sup> Sustainable development and reduction of CO<sup>2</sup> gas emissions, biodiversity and access to water, living standards, housing, consumption methods, cardio-vascular illnesses, waste management and even access to culture represent some of the diverse themes debated in society which naturally include the role of businesses. This is quite normal: businesses have never been so central to society, and are ranked as a major social institution. While some may deplore this cult of the entrepreneur, presented as a social model, it is never-

theless undeniable that humans have not invented a more appropriate tool than the business for creating wealth.

The question now raised by international demand for sustainable development is as follows: what sort of wealth are we talking about? The narrow definition used today has led to the massive incursion of the CSR theme in all citizen bodies and explains the attempts to incorporate social and environmental performance into the notion of wealth.

It is clear to see that the issue has been pushed to the fore by the failures of financial capitalism to self-regulate. The international debate triggered by the 2007 subprime crisis and financial system meltdown in autumn 2008 demonstrated the mythical nature of transnational corporations' self-regulation. Although industrial companies may sometimes self-regulate in a more efficient manner than financial companies, the normative requirement remains incontrovertible.

A point needs to be made here, given the distinction between small and medium-sized businesses (SMBs), or even very small business (VSBs), and TNCs. While the physical distance between employees or between clients and suppliers differs depending on organizations and sectors, it also marks a fundamental difference between SMBs and TNCs. Responsibilities are not met in the same way if there is immediate contact with those who suffer the consequences: a financial director who makes decisions regarding a subsidiary located thousands of miles from the headquarters where she or he works does not have the same sense of personal obligation as the one who rubs shoulders with the firm's employees every day. This remark applies to relations with stakeholders in the broadest sense (supply chain actors, people living near industrial sites, etc.). The distancing effects are therefore quite different depending on the size of the company. The need to understand the effects of distancing on humans and their rational decision-making is therefore highly relevant to TNCs, and will inform the exploration of appropriate tools in the ideas developed below.<sup>5</sup>

Before detailing our proposals, we need to provide a brief overview of the current state of affairs, in the form of two questions.

## A) Why is regulation necessary?

We will limit ourselves to looking at three major trends that delineate the difficult subject of TNC regulation:

**- The increasing influence of TNCs on states and its effect on the principle of the rule of law** – While the question is prioritized on the agenda at all institutional levels, any developments have been wholly unsatisfactory. With regards to the process of regulating business, companies have a front row seat alongside states. We can state, without risk of error, that most standards adopted throughout the world governing businesses (including tax, business, employment, competition, arbitration and consumption laws) are the direct result of corporate lobbying—lobbying by the most powerful of businesses, which we are calling TNCs in this document. This influence no doubt explains why the normative environment for TNCs spares the most badly behaved businesses and does not reward those committed to a genuine plan to sustainably reconcile short-term profit and the public interest.

**- The existence of an international consensus on the necessary contribution by TNCs to the public interest**<sup>6</sup> – A diversity of developments, from the Global Compact initiated by the UN, the Organization for Economic Cooperation and Development's (OECD) guidelines and the International Labor Organization's (ILO) tripartite declaration to existing tools and those being developed, such as ISO 26000, all point to the same fact: TNCs are a vector for guaranteeing the public interest. As such, the galloping deregulation over the past thirty years has not allowed states and

4. For one example, see the study produced by Olivier Maurel and published by the French National Consultative Commission on Human Rights in 2009, *La responsabilité des entreprises en matière de droits de l'homme - Nouveaux enjeux, nouveaux rôles* [Corporate responsibility regarding human rights – New challenges, new roles] (downloadable from: [http://www.cncdh.fr/IMG/pdf/\\_CNCDH\\_Responsabilite\\_des\\_entreprises\\_VI.pdf](http://www.cncdh.fr/IMG/pdf/_CNCDH_Responsabilite_des_entreprises_VI.pdf)). We also recommend reading the Sherpa document, *Les entreprises transnationales et leur responsabilité sociétale* [Transnational corporations and their social and environmental responsibility], produced by Marie Caroline Caillet and Gora Gnom, 2010, available in Ebook format on the site: <http://www.asso-sherpa.org>.

5. "De l'importance d'être distant" [On the importance of distancing], Pierre-Yves Gomez, *Le Monde*, 9 March 2010, p. 3.

6. It seems important, at this point, to delineate the notion of "public interest". An excerpt of the French Council of State's 1999 report on the issue provides an interesting perspective: "Two perceptions of public interest have been in conflict since the 18th century. One, utilitarian, sees the common interest as merely the sum of individual interests, spontaneously deduced from the act of economic agents seeking their utility. This approach not only leaves little room for government arbitration, but also gives form to a systematic distrust of the state. The other, voluntarist approach is not confined to a provisional and random conjunction of economic interests, which it deems incapable of sustainably supporting a society. In this perspective, the public interest, requiring that we go beyond individual interests, is above all the expression of the general will, which grants the state the mission of pursuing ends necessary for all individuals, beyond their individual interests." (Réflexions sur l'intérêt général [Thoughts on the public interest] 1999 Public Report, Council of State: <http://www.conseil-etat.fr/cde/node.php?articleid=430>). We have chosen this voluntarist concept for our analysis.

regional or international institutions to exercise their prerogatives to orient TNCs' actions towards sustainable development. The UN's mandate for the Secretary-General's Special Representative on human rights, transnational corporations and other business enterprises, entrusted to Prof. John Ruggie, is thus emblematic,<sup>7</sup> just like the recent report by the Special Rapporteur on the Right to Food, which highlights the inadequacy of current measures aimed at encouraging companies to act responsibly.<sup>8</sup>

#### - Significant conceptual and structural obstacles –

The current state of the law makes it impossible to effectively gauge the social and environmental impact of TNC activities. This is due in particular to a twin concept that underpins company law: the principles of legal autonomy and of limited responsibility, which isolate each constituent TNC entity from the civil or criminal consequences of other members' actions. These principles seek to protect entrepreneurs from the financial risks linked to their activity over and above the sums invested, and thus encourage investment. By doing so, they have created an unbalanced situation, whereby a parent company can pocket its subsidiaries' profits without being accountable for the environmental and social consequences of their activities. This situation requires that we question the very definition of a business, the legal regime applicable to parent companies, and that applicable to groups of companies. Moreover, the extra-territorial nature of disputes and the frequent interposition of several "buffer" entities (often located in so-called uncooperative countries) lead to significant procedural difficulties that do not guarantee victims' access to justice.

Nevertheless, these obstacles have not prevented the multiplication of legal procedures implicating the civil and criminal liability of parent companies with regards to violations committed by their foreign subsidiaries.<sup>9</sup> Comparative law studies have been developed in recent years to report on changes in this domain, questioning the use of notions such as complicity, gross negligence and misappropriation of corporate assets, and analyzing the rules of jurisdictional competence, which are strategically important given the extra-territorial nature of disputes.

We clearly see that CSR is an eminently political legal phenomenon reflecting the inadequacy of governance tools in a world where states have seen their influence as well as their relations with transnational companies undergo drastic change.

## B) How can regulation be introduced?

The existence of these legal obstacles, with their deep-reaching cultural and historical roots, as disquieting as they may be, must not overshadow the fact that markets' conversion to the new Holy Grail of sustainable development is a major trend. This development requires that business law be modified, both to protect victims of the excesses of a number of economic actors, and to allow these actors to support a more restrained and sustainable market economy. As for jurists, they have a significant role to play in this process of change. They need to invent the legal instruments to accompany the changes occurring, or even incite such changes by creating the basic legal

7. John Ruggie's scope of action has been gradually honed down to encompass three terms: "protect, respect, and redress", with protection falling under state responsibility and respect aimed at businesses. For more information about this scope of action, which in June 2008 entered a phase aimed at making it operational, see the report dated 22 April 2009: <http://www2.ohchr.org/english/bodies/hrcouncil/docs/11session/A.HRC.11.13.pdf>

8. With regards to the food market, according to Olivier de Schutter, Special Rapporteur on the Right to Food: "In this process of expansion and consolidation, the procurement system too has been modernized: in addition to public standards, private standards have gained increased importance, often imposed through codes of conduct adopted by retailers. Vertical integration has increased, with wholesalers and retailers seeking to secure stability of supply by the use of explicit contracts (long-term arrangements with producers) or techniques such as preferred supplier lists. Procurement is increasingly centralized, as the procurement shed (the area from which companies source) expands from the national to the regional and thence to global networks.

As a result of these developments, concentration in the food production and distribution chains has been significantly increasing over the past years. The resulting market structure gives buyers considerable bargaining strength over their suppliers, with potentially severe implications for the welfare both of producers and consumers. Current measures adopted to encourage companies to act responsibly are unable to tackle this structural dimension." Olivier de Schutter's report dated 22 December 2009 can be downloaded from the following link: <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G09/177/76/PDF/G0917776.pdf?OpenElement>

9. The Business & Human Rights Resource Centre website regularly lists legal proceedings against TNCs: <http://www.business-humanrights.org/LegalPortal/Home>.



framework, currently littered with snags despite the growing success of the notion of governance.<sup>10</sup>

We therefore need to draw on the valuable source provided by general legal theory.<sup>11</sup>

The notion of corporate social responsibility, which has become a major issue in recent years, aspires to a guiding role in the emergence of a more sustainable market economy. How can such an ephemeral concept produce results? Today's CSR-based tools for guiding TNC actions are, for the most part, voluntary. They are producing results, as demonstrated by the increasing importance placed by investors on non-financial performance. Nevertheless, the most flagrant violations (water pollution, unprotected workers, illegal wood imports, etc.) and the less overt (tax fraud, collusion, non-compliant labelling, false advertising, etc.) remain generally unpunished. In addition to the lack of compensation for victims, this situation produces a phenomenon of unfair competition to the detriment of genuinely committed companies. This is the point where CSR's voluntary nature reaches its limits, and where binding rules need to come into play. They are key to promoting a sustainable market economy—as long as they succeed in finding the right measure of normative pressure.<sup>12</sup>



Jean-Pierre Attal, *Alvéoles 54 [Cells 54]*, 2008 (© Jean-Pierre Attal - Courtesy Galerie Olivier Waltman)

10. The 2009 edition of the study produced by Ernst & Young and France Proxy evaluates corporate governance practices for stock market listed firms on the basis of the Afep-Medef's code of governance. It reveals inertia. Of a sample of 113 companies listed on Eurolist A, 18% have weak and 6% very weak governance practices. Among the worst aspects are "transparency" (39% of the sample deemed weak or very weak) and "tools" (28%), i.e. all the means dedicated to corporate governance ("Gouvernance: un quart des "Big caps" françaises à la traîne" [Governance: a quarter of French Big Caps lag behind], Mathieu Rosemain, *Les Échos*, 21 October

11. Georges Abi-Saab (former chairman of the WTO Appellate Body) makes the same point in his preface to Homayoon Arfazadeh's book (*Ordre public et arbitrage international à l'épreuve de la mondialisation* [Public policy doctrine and international arbitration facing the challenge of globalization], Homayoon Arfazadeh, Bruylant, 2005).

12. As Mireille Delmas-Marty describes it in the third volume in the series "Les forces imaginantes du droit" [The Imaginative Forces of Law], entitled *Ordering Pluralism*, this role falls primarily upon judges: "The judge thus varies the degree of normative truth, as it were, following the observable data as closely as possible. In this way, the European Court of Human Rights, for example, contributes to the stability of the structure despite, or perhaps due to, its complexity." (*Ordering Pluralism*, Mireille Delmas-Marty, translated by Naomi Norberg, Hart Publishing, 2009, p. 41).

CSR is a complex phenomenon. Its ramifications are economic—it is a market development—but are also religious, philosophical, sociological and even mathematical, as seen in the development of non-financial data. However, it is without doubt the abstractive force of the law that is best suited to providing the structuring tools that meet a diverse plurality of needs. From codes of conduct to criminal penalties, the law can provide a wide range of responses. On one side lies contractual freedom, on the other judges' arbitration. These two extremities demonstrate how wide the range of legal instruments is and how infinite the organizational possibilities. It therefore makes no sense to reject, on principle and from the outset, legal constraint as a part of the solution. This attitude, which continues to be adopted by TNC representatives within the bodies debating the CSR framework, is counterproductive and indicates a sociologically incorrect trend that confuses the law with disputes. It closes the door on the emergence of hybrid regulatory tools, those that can be used to reconcile the divergences between the profit motive and the public interest in order to respond to citizens' wishes.<sup>13</sup>

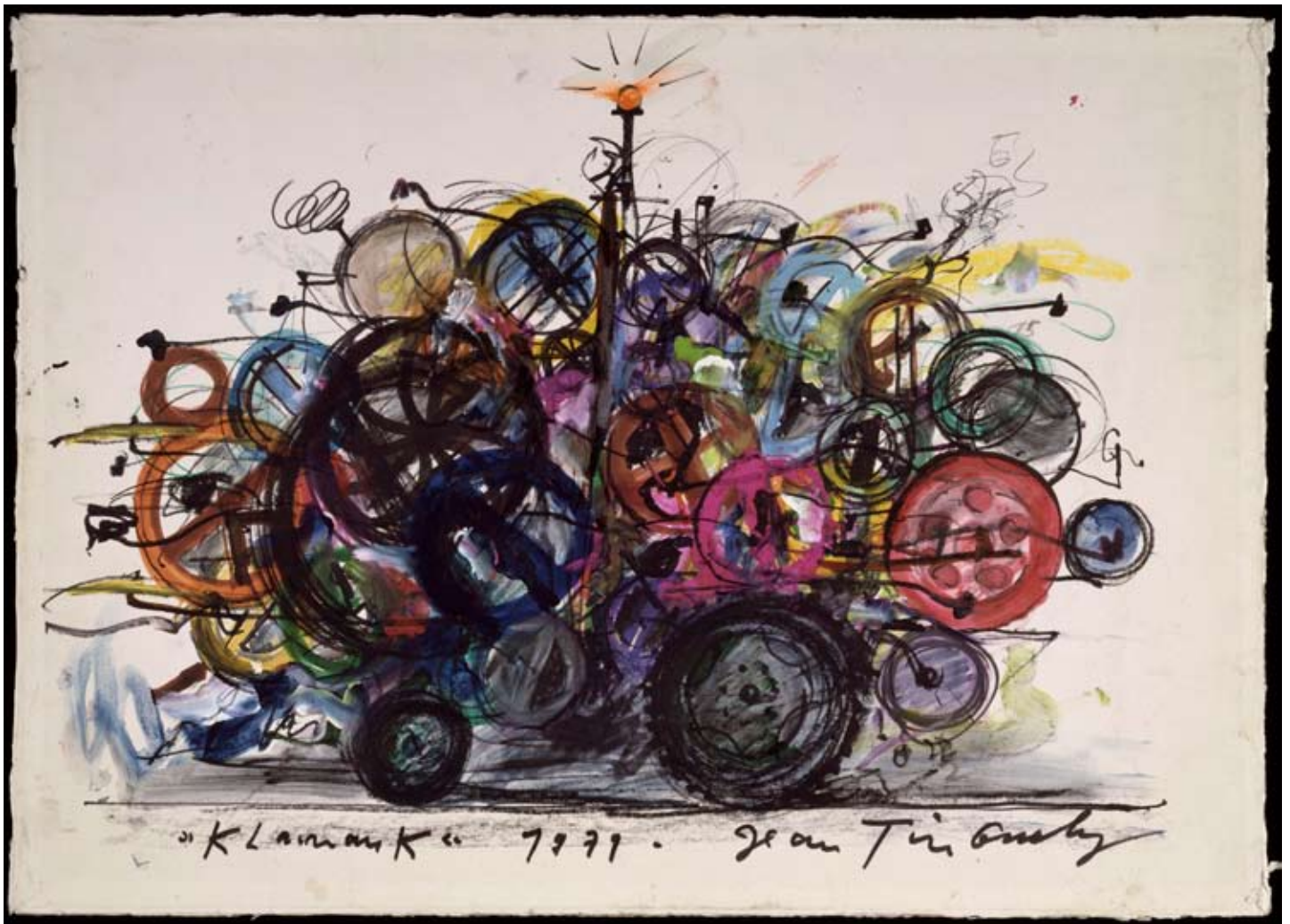
So-called soft law tools, such as voluntary commitments, could help TNCs effectively fulfil the new duties they claim to be taking on, as long as they are combined with a new legal arsenal based on hard law.<sup>14</sup> This arsenal needs to be both dissuasive and binding, adapted to extra-territoriality, lack of transparency in corporate behaviour and diffuse decision-making. The forty-six proposals that follow prefigure such a development. They are guided by the search for legal protection, both for victims and companies, and rooted in the “imaginative forces of law.”<sup>15</sup>

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13. In the third scenario of a projected society in 2050, imagined by HEC students in 2008, called “Label vie” [Life Label], humans have become more responsible. They pool their needs, share and practice bartering, group leasing and non-commercial trade. (“*Vers un monde tout vert?*” [Towards an entirely green world?], Aurélie Charpentier, *Marketing Magazine*, September 2009).

14. *Face aux crimes du marché – Quelles armes juridiques pour les citoyens?* [What legal recourse do citizens of the world have against market crimes?], William Bourdon, *La Découverte*, 2010, p. 275.

15. We would like to pay tribute to Mireille Delmas-Marty, whose visionary work guides our actions and our research. We would like to thank her for her unfailing support of Sherpa since its inception.



Jean Tinguely, *Klamauk (Chahut) [Brouhaha]*, Centre Pompidou Collection, Dist. RM N / Philippe Migeat, ©ADAGP, Paris 2010

## 2

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# A New Approach to the Notion of the Business

Our attempt to set out a body of rules designed to offer greater protection from the ethical excesses of businesses raises the question of what exactly a “business” is.

This question arises from an observable and growing discrepancy between the legal structures used by major groups and their economic realities. On the one hand, the use by economic actors of the legal instru-

ments open to them leads to tree-like transnational structures that respond to the imperatives of globalized trade. On the other hand, the economic reality of transnational groups leads to centralized strategic decision-making and consolidated financial results.

This inevitably leads to the desire to seek a way of reconciling economic actors’ legal regimes with their economic realities.





Denis Robert, *Fouquet's band*, 2008 (Courtesy Galerie W)

This need becomes more pressing still when you consider that the objectives for sustainable development require all relevant actors to make a genuine commitment. The notion of corporate social responsibility is intended to encapsulate changes adopted by economic actors in the face of the challenges of sustainable development.

Without wishing to ignore the inertia that results from the demands of excessive responsibility, several mechanisms operating at critical levels should suffice to prevent the appearance of social and environmen-

tal damage. Targeted proposals concerning responsibility will be made in the chapters below. First, however, it is vital to re-examine key concepts in company law so that the public interest criteria necessary to meet the challenges of sustainability can be incorporated beforehand.

Since every level of a business' internal organization influences the degree to which its actions are or are not virtuous, the ideas that follow are concerned with three fundamental concepts: definition of the very notion of the business, recognition of the notion of a group of companies and recognition of the notion of the parent company. The proposals that follow do not, of course, claim to offer a definitive answer to these fundamental questions; we can only hope that they shine a light on the path that a new definition of the business might take.

## New definition of the business

### Proposal 1 – Define articles of association that factor in the public interest

**Context** – Business law has continuously created new legal forms for constantly evolving human economic activities. Their characteristics vary according to the nature and amplitude of directors', shareholders' and associates' responsibility, accounting rules, transparency, mechanisms for raising funds and distributing profits, etc. These characteristics are a response to the increasing sophistication of economic activity, representing a range of technical solutions that only allow a partial view of what a business is (an economic and human organization) through the notion of articles of association (its legal framework).<sup>16</sup>

16. As early as 1984, Professor Jean Paillusseau outlined the notions of company and business: "What is the relationship between the notions of company and business? Are they the same? Do they represent two independent entities that coexist, but that live in close symbiosis? Or are they simply two essential and complementary aspects of the same entity? The answer, in fact, is very simple: a business is an economic and human organization, whereas a company is merely a legal framework. One belongs to the reality of things, the economy and sociology, the other is a legal construct. However, without a minimum of legal organization, the business cannot exist and grow, while the company is the host structure that allows it to live. In this perspective, the company is the legal organization of the business." (Jean Paillusseau, in *Les fondements modernes du droit des sociétés* [Modern Foundations of Company Law], JCP (E), 1984, 14193, p. 168).

However, the foundations of business law are, now more than ever, being shaken up by the progressive shifting of the boundaries of public interest from the public to the private sphere. We believe that the changing doctrine and the debate triggered by the increasing prominence of CSR calls for the concept underpinning articles of association to be challenged. We must give it the depth it needs to factor in public interest considerations. To use a biological metaphor, questioning the concept of articles of association means looking at the atom generating the complex DNA molecules that form the transnational structures now generally referred to as multinationals.

Sherpa's work in this domain was echoed in the 2009 Nobel Prize in Economics awarded to two North American professors, Elinor Ostrom and Oliver Williamson, whose research entails reviewing the very notion of a business. The increasing importance of the social and solidarity-based economy, success of cooperative status and emergence of specialized normative initiatives<sup>17</sup> are also part of this trend. Nevertheless, these economic models and legal statutes remain marginal.

Currently, the French Civil Code defines articles of association in Article 1832: *"a company is established by two or several persons who agree by a contract to allocate goods or their industry to a common venture with a view to sharing the benefits or profiting from the savings which may result therefrom. It may be established, in the cases provided for by statute, through an act of will of one person alone. The members bind themselves to contribute to losses."* This definition corresponds to that included in the System of National Accounts (SNA), jointly published by the UN, International Monetary Fund (IMF), OECD, World Bank, and European Union Commission, approved in 1993 by a resolution of the United Nations Economic and Social Council. According to the SNA definition, a business is an institutional unit, i.e. *"an economic entity that is capable, in its own right, of owning assets, incurring liabilities and engaging in economic activities and in transactions with other entities."*<sup>18</sup>

**Proposal** – Incorporate environmental and social obligations in the very definition of articles of association. An effective method of grafting CSR concerns onto corporate life at an early stage is by integrating them into their constitutive act. Naming environmental and social obligations in the very definition of the articles of association would place these rules on the same level as financial and accounting obligations resulting from the principle of contributing to losses (a principle explicitly included in the above mentioned article 1832 of the French Civil Code). This explicit expression of a principle of solidarity that binds companies in order to achieve sustainable development, imposed from the outset on all associates/shareholders in a company, would ensure it spreading throughout the entire organization.

Hence, we may legitimately suggest introducing an additional paragraph to article 1832 of the French Civil Code and all equivalent articles in other national and regional legal systems, adding that *"the associates shall satisfy the social and environmental requirements involved in exercising a sustainable and responsible business activity."*

### **Proposal 2 – Recognize the concept of the group of companies**

**Context** – The rise of transnational groups relates to companies' development strategies, requiring their directors to make choices with major legal consequences. They either create subsidiary companies with no independent legal existence, or they create subsidiaries with their own legal identity, but that remain controlled by the parent company. A "group of companies" is the entity formed by several companies with their own legal existence, but that are tied in various ways that allow one of them, the parent company, to hold sway over the others, exercising control over them all and imposing unified decisions.<sup>19</sup> The notion of the group is therefore very much bound up with the idea of control. The parent company is able to exert decisive influence on the way that the entities comprising the group are managed. Aside from

17. For example, on 17 April 2010 the State of Maryland (USA) adopted a law creating a benefit corporation status that allows entrepreneurs to place social and environmental goals on the same level as shareholder satisfaction. *"Under the new Maryland law, benefit corporations must spell out their values in their charters, report annually on activities that benefit the public, and submit to third-party auditing of their societal impact. Becoming a benefit corporation, or shedding that status, would require approval of two-thirds of shareholders."* ("New Legal Protections for Social Entrepreneurs", John Tozzi, in BusinessWeek.com: [http://www.businessweek.com/smallbiz/content/apr2010/sb20100421\\_414362.htm?chan=smallbiz\\_special+report+--+focus+on+entrepreneurs\\_special+report+--+focus+on+entrepreneurs](http://www.businessweek.com/smallbiz/content/apr2010/sb20100421_414362.htm?chan=smallbiz_special+report+--+focus+on+entrepreneurs_special+report+--+focus+on+entrepreneurs)).

18. Definition of a business on the UN website: <http://unstats.un.org/unsd/sna1993/tocLev8.asp?L1=4&L2=1>

19. *Groupes de sociétés*, [Groups of Companies] a practical guide by Francis Lefebvre, 2007-2008, p. 15.

these fundamental characteristics, our concern here is with the absence of any legal framework applicable to groups of companies, and particularly the fact that the group has no legal personality. This does not mean that the law is not cognizant of the group, which is subject to specific tax and employment provisions as part of administration procedures as well as competition law. However, these disparate regimes hinder the establishment of a coherent regulatory framework and make it possible for certain groups to escape their responsibilities by continuing to abuse their corporate status.<sup>20</sup> Such a situation is out of step with economic reality and raises significant legal problems. How can shareholders and creditors (commercial as well social and environmental) ensure that their interests are effectively taken into account? How to reconcile the legal autonomy of entities in a group with the nature of the group itself, i.e. the effective control exercised over them by the parent company?

**Proposal** – Establish a specific legal regime for groups of companies. Although we do not set out to provide all the answers in this Proposal Paper, we do suggest that the legal definition for a group of companies be based on the concepts recognized in accounting law. The development of accounts consolidation for major groups has made it possible to identify the scope that should be used to draw up annual accounts and management reports. This scope refers to the concept of “significant influence”, which can cover cases where one company exercises dominant influence over another by virtue of a statutory contract or clauses, and not simply because it holds share capital and vo-

ting rights.<sup>21</sup> Beyond the adoption of a definition for a group inspired by prevailing accounting norms and the notion of the “sphere of influence”,<sup>22</sup> we further propose adoption of a principle to forbid misuse of legal personality, which currently allows responsibilities to be diluted within the various entities comprising the group. Finally, with the goal of making it possible for victims of groups’ actions to be compensated, we suggest setting up special rules in order to recognize the legal personality of a group in instances where basic human and environmental rights are violated. In this way, judges will be able to circumvent the principle of the legal autonomy of entities comprising a group and identify the entity most able to make proper reparation (cf. the parent company proposal below).

### **Proposal 3 – Adopt a common definition for the notion of parent company**

**Context** – We have just shown the extent to which the discrepancy between a TNC’s economic reality, with its highly centralized decision-making process, and the artfully maintained fiction of the legal autonomy of the entities that comprise a group make it possible to dilute responsibilities and hinder the implementation of effective sustainable development strategies. It is worth reminding ourselves at this point of Professor Claude Champaud’s 1962 definition of the holding company as “a procedure for the financial and structural organization of groups of companies that makes it easy to exert control over corporate assets and to properly ensure coherent economic management of the whole.”<sup>23</sup> Faced

20. According to a sociological survey based on interviews with directors and executives at eight French groups of companies: “managers organize the economic architecture of the group in such a way as to ensure a false semblance of transparency concerning where its borders lie. Subsidiaries’ borders disappear, or reappear, according to the strategic objectives of the company heading the group, which is by statute dominant as it owns the majority of the capital in the subsidiary. This means that groups are able to be or not to be, to exist in a discontinuous manner.” (“Être ou ne pas être: le groupe comme firme unifiée ou comme ensemble de sociétés? Une approche sociologique” [To be or not to be: the group as unified firm or as a set of companies? A sociological approach], Aurélie Catel Duet, *Droit et société*, no. 67 (2007), pp. 615-630: [http://halshs.archives-ouvertes.fr/docs/00/38/47/40/PDF/article\\_catel\\_D\\_S\\_V3.pdf](http://halshs.archives-ouvertes.fr/docs/00/38/47/40/PDF/article_catel_D_S_V3.pdf)).

21. The terms of the Seventh Council Directive 83/349/EEC dated 13 June 1983, by defining the consolidation scope, demarcated the limits to the parent company’s sphere of influence, thus implicitly contributing to the introduction of the notion of the group into positive law, which includes circumstances other than owning an amount of share capital (Article 1 c): “1. A Member State shall require any undertaking governed by its national law to

draw up consolidated accounts and a consolidated annual report if that undertaking (a parent undertaking): [...] c) has the right to exercise a dominant influence over an undertaking (a subsidiary undertaking) of which it is a shareholder or member, pursuant to a contract entered into with that undertaking or to a provision in its memorandum or articles of association, where the law governing that subsidiary undertaking permits its being subject to such contracts or provisions. A Member State need not prescribe that a parent undertaking must be a shareholder in or member of its subsidiary undertaking. Those Member States the laws of which do not provide for such contracts or clauses shall not be required to apply this provision [...]”. See also our study of the problems of the supply chain (*Supply chain and liability, legal tools for parent company’s accountability*, Yann Queinnec, December 2007, pp. 11 et seq.) as well as the study *Redefining the Corporation – How could new EU corporate liability rules help?*, Yann Queinnec, September 2007. downloadable from <http://www.asso-sherpa.org.downloadable> from <http://www.asso-sherpa.org>.

22. Cf. also the 22 March 2010 study coordinated by the office of Michel Doucin, France’s ambassador for bioethics and corporate social responsibility, that Sherpa contributed to, available to download from: [http://www.rse-et-ped.info/IMG/pdf/Due\\_diligence\\_Etude\\_22mars\\_MAE.pdf](http://www.rse-et-ped.info/IMG/pdf/Due_diligence_Etude_22mars_MAE.pdf).





Cerise Queinnec, *Siège social [Headquarters]*, 2010

with the challenges of sustainable development, the idea is take this definition to its logical conclusion. However, this is an enormously complex question, as company law has lagged considerably behind the organic development of transnational companies and centres of decision-making do not conform to any one rule. The organizational structures of TNCs make possible an infinite number of combinations within which the exercise of power is not limited to traditional ownership of a majority of a subsidiary's share capital. We consider that one way to adapt company law to these complexities would be to adopt an open legal definition of what constitutes a parent company. It would be beneficial to acknowledge that the entity entering into commitments and assuming responsibilities at group level is not necessarily unique.

**Proposal** – Adopt a plural definition of the notion of the parent company. Does the parent company control the shares that constitute the group's DNA, its most important assets, its most strategically valuable assets (such as brands and patents), the financial

structure through which the consolidated profits are channelled, the insurance, voting rights, the group's in-house banker? All, or a combination of some of these, may apply.<sup>24</sup> Depending on the circumstances, the parent company might be considered to be a combination of one or more entities within a single group that, singly or jointly, exercise power and ensure solvency. From the legal perspective, these two characteristics, power and solvency, should make it possible to better assess a group's economic reality, which is intimately related to the notion of an entity's sphere of influence, both internal (relative to other entities comprising the group) and external (relative to commercial partners and third parties referred to as stakeholders). This fundamental exercise is both delicate and ambitious. It must be grounded in existing rules and jurisprudence that make it possible to "pierce the corporate veil," rendering the parent company and subsidiaries jointly and severally liable in the event of harm, loss or damage. This already applies to liability for irretrievable debts in French insolvency law. It is also applied in matters of environmental responsibili-

23. Cf. *Le pouvoir de concentration de la société par actions* [The concentrating power of the incorporated company], Claude Champaud, Sirey, Bibliothèque de droit commercial, no. 286, 1962, p. 222.

24. Cf. *Supply chain and liability, legal tools for parent company's accountability*, Yann Queinnec, December 2007, p. 12) as well as the study *Redefining the Corporation – How could new EU corporate liability rules help?*, Yann Queinnec, September 2007. Downloadable from <http://www.asso-sherpa.org> and the ECCJ: <http://www.corporatejustice.org>.

ty, abuse of economic dominance or dependence, and in cases where commitments enshrined in corporate behaviour guidelines are broken (cf. Proposal 17). It would be invaluable to undertake in-depth analysis of these diverse legal principles and associated jurisprudence in order to identify the points where they converge. Even without this analysis, we can already consider entities that own the intellectual property rights to a group's emblematic brands to be covered by this plural definition of a parent company. Their large influence on group solvency, even when they play no part in a group's operational decisions, makes such a position legitimate.

## Internal organization of businesses

### Proposal 4 – Establish an overall standard of behaviour

**Context** – Despite making ever more sweeping sustainable development claims, the gap between what businesses say and what they do continues to trouble consumers,<sup>25</sup> investors<sup>26</sup> and governments.<sup>27</sup> The disparity between international norms and the level of businesses' commitments both contribute to this situation, as do international instruments that recommend codes of conduct to businesses but that are not backed by a suitable legal regime; first amongst these

are the OECD Guidelines for Multinational Enterprises, which are supported by a highly limited mediation mechanism.<sup>28</sup> This context leads to normative overlaps that hamper the visibility of the objectives being pursued and foster a culture of unsatisfactory self-regulation. We take the view that the OECD guidelines nonetheless have the merit of having led to the emergence of a number of interesting areas of consensus. It is thus possible to affirm that there is a common objective that all states, citizens and businesses share, expressed by the concept of sustainable development. The challenge is to transform a recognized principle into an efficient vector for changing the way that businesses behave.

**Proposal** – Put in place a general requirement that sustainable development be taken into account in every decision taken by companies. This rule would be a precursor to the establishment of a responsibility regime within companies and would make it possible to clarify the scope of such responsibility. This obligation might consist of requiring parent companies, directors, shareholders and employees to: a) exercise a positive influence, according to their rank and means, in seeking to optimize a company's contribution to respecting the public interest; b) base their decisions and actions on the notions of sustainability and the precautionary principle. Establishing this cumulative obligation in terms of required behaviour would be of assistance to judges and arbitrators when seeking

25. In 2004, a survey carried out by Ipsos showed that 60% of Europeans did not believe that businesses claiming to adhere to ethical values (fair trade, protection of the environment, etc.) genuinely met their commitments. Conversely, however, 58% of French people trust the ethical commitments made by businesses (<http://www.ipsos.fr/Canallpsos/articles/1332.asp>). According to a recent Edelman Trust Barometer looking at 20 countries, product advertising and corporate communications remain the least trusted source of information, with only 17% finding them credible (The 2010 Edelman Trust Barometer: [http://www.scribd.com/full/25827302?access\\_key=key-x9q37hmaxnm7cevdung](http://www.scribd.com/full/25827302?access_key=key-x9q37hmaxnm7cevdung)).

26. According to Thibault Dauphin (winner of the French SIF 2010 Prize for the Best Master Thesis, examining the impact of environmental performance claims on share prices, based on the Global S&P1200 index between 1 January 2005 and 1 May 2009): *“Investors are fairly immune to greenwashing: they're not fooled by bosses' talk about 'greening'; they are perfectly aware that an oil company can never become 'sustainable'”* (“Retour à la réalité” [Back to Reality], article by Antoine Reverchon, *Le Monde*, 19 January 2010, p. 6)

27. The upsurge in responsible public procurement shows that public procurement officers are keen to use a tender process that favours sustainable development, but that they are to some extent victims of the plethora of labels and voluntary initiatives. Their task is made yet more complicated by the requirement to adhere to strict rules concerning free competition and to accept the most economically advantageous offer, creating the risk that public procurement choices will be challenged. For further information, refer, for example, to the guidance notice published in July 2009 by France's finance ministry concerning socially responsible public procurement: <http://asso-sherpa.org/index.php?page=retcd&ssmenu=operations&id=28>. See also the 4 December 2003 decision of the Court of Justice of the European Communities, which requires a tender to be withdrawn if the criteria are not met: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62001J0448:EN:NOT>.

28. For an analysis of the strengths and weaknesses of this soft law tool, please refer to our study *The OECD Guidelines for multinational enterprises, an evolving legal status*, Yann Queinnec, 2007, postface by Mireille Delmas-Marty (downloadable from <http://www.commddev.org/content/document/detail/697/> and [http://oecdwatch.org/publications-en/Publication\\_3064/](http://oecdwatch.org/publications-en/Publication_3064/)).



to establish responsibilities in the case of a complaint. Clearly, this raises the question of the place occupied by such an obligation within the judicial landscape. The proposed measure might find a home as part of World Trade Organization (WTO) norms. Similarly, it might progressively be incorporated into national company law, and extend Proposal 1 on the adoption of a new definition of articles of association.

### Proposal 5 – Executive responsibility

**Context** – Business governance rules have been widely promoted and adopted over the past twenty years, but continually prove to be ineffective and limited. This is evident in, for example, the way company board memberships are concentrated in the hands of a very small community of people, mostly male, thereby centralizing considerable influence at the risk of engendering conflicts of interest.<sup>29</sup> The same can be said of the habit of remaining a member of a company board for so long that members' independence is undermined, as illustrated by membership of the board of Lehman Brothers prior to its spectacular collapse.<sup>30</sup> More generally, this situation raises the question of directors' responsibility in the exercise of their functions. By directors, we mean executive (CEO) and non-executive board members as well as all other people with a mandate to represent a company (including deputy or associate directors). Arrangements already exist for invoking the civil or criminal responsibility of directors (for example, fraudulent use of corporate property, or in some liquidation procedures), but these are designed to protect the business' assets, shareholders,



Arman, *Le Fauteuil d'Ulysse [Ulysses' Chair]*, 1965, phot. J-C Planchet ©ADAGP Paris 2010

staff and creditors rather than third parties often referred to as external stakeholders. Furthermore, their scope remains highly restricted and the cumulative conditions required are hard to meet. Notwithstanding the above, there is a clear trend towards invoking the responsibility of legal entities rather than company representatives, who can be removed at any time (dismissal *ad nutum*); this dismissal is seen as the supreme sanction, conveniently overlooking the

29. According to the 2009 Ernst & Young and France Proxy report on corporate governance practices, “the circle of board members for CAC40 companies is even more limited, as 98 of them (22%) hold 43% of voting rights” (“Gouvernance: un quart des “Big caps” françaises à la traîne” [Governance: a quarter of French Big Caps lag behind], Mathieu Rosemain, *Les Échos*, 21 October 2009, p. 29).

30. A detailed look at the board of Lehman Brothers is an edifying illustration of this phenomenon: “Richard Fuld, CEO for the past 15 years, was on the board with 10 directors: six had been in office for over 12 years (the upper limit in France, above which their independence is called into doubt) and all 10, after distinguished careers, were retired or still working after forty to fifty years.” (“Victimes de la crise financière: où étaient les administrateurs?” [Victims of the financial crisis: where were the directors?], Frédéric Lemoine, *Les Échos*, 30 September 2008, p. 19).

comfortable golden parachutes and top-up pension payments that are the norm among TNCs.<sup>31</sup>

Although the numerous company law rules governing corporate financial statements and reporting constitute a framework of obligations that are far from devoid of interest, we can but note their relative ineffectiveness in preventing and making redress for businesses' negative social and environmental impact. In practical terms, however attractive on paper, these measures do not encourage sufficient numbers of directors to profoundly alter their growth strategies. The demand expressed by internal and external stakeholders for their views to be given greater weight in directors' decision-making process reveals much about the need to decompartmentalize the scope of their analysis.<sup>32</sup>

It is therefore necessary to think up a regime to govern directors' responsibility that will establish a link between existing governance mechanisms as well as providing stakeholders and victims of negative externalities with a guarantee that their interests will be taken into account. The task is to attempt to determine the shape of a responsibility regime for directors that will encourage them to improve their environmental, social and governance (ESG) performance in order to meet the challenges of sustainable development.

**Proposal** – Set in place a regime for directors' civil and criminal responsibility for non-respect of their obligation to adhere to the overall standard of behaviour (Proposal 4) and associated other obligations, notably the obligation for social and environmental

reporting<sup>33</sup> (Proposal 9). Directors would thus be subject to a triple-tiered obligation: to implement the parent company's reporting obligation at the group level; ensure that the parent company has used all appropriate means, internal and external, to guarantee a reporting process that faithfully reflects the company's social and environmental impact, and take all measures needed to prevent the appearance of or, where relevant, to redress, social and environmental harm identified via the reporting mechanism.

In the event that these obligations are not respected, the applicable responsibility regime might usefully be based on the EU's environmental responsibility regime and, depending on the seriousness of the events, distinguish between absolute responsibility (with minimal permissible mitigation) and relative responsibility (where victims have proved a fault, loss or causal link). Whether the offences are deliberate or not, the judges will need to take into account the ethical messages used by the TNC in order to assess the degree to which it has, or has not, acted in good faith. For instance, there would be a presumption of guilt in the case of a business that had not met its obligation to report its social and environmental impact (Proposal 9), this failure being a sign of a deliberate failure to meet its duty to prevent harm embodied by the obligation to provide information.

Finally, the value of linking the requirement to respect good governance obligations, whose reach extends beyond the frontiers of a business' home country, lies in the fact that it contributes to ensuring that victims, wherever in the world they may be, have access to the

31. For instance, the 2002 class action in the USA for securities fraud against Vivendi resulted, on 29 January 2010, in a conviction for the company, whereas the former directors were acquitted.

32. According to the 2010 Edelman Trust barometer: "In all 22 countries, when asked which stakeholder should be the most important to a CEO's business decisions, respondents replied that 'all stakeholders are equally important'. The 2010 Edelman Trust Barometer can be downloaded at: <http://www.edelman.com/trust>.

33. We have attempted to show, via the two reports produced in 2007 for the European Coalition for Corporate Justice (ECCJ), that a genuinely restrictive reporting requirement, i.e. where non-respect will lead to liability being engaged, will have three major legal effects. The reporting requirement would be "an instrument to prevent and repair damages, since the exercise of the reporting obligation by the parent company [and by association its representatives] requires it informing and being informed of all risks and actual incidents that occur within group structures, and to draw such conclusions as are required to prevent reoccurrence." It would also serve as "a legal instrument granting jurisdiction to judges

in the home country [where the group parent company is headquartered] to hear actions brought by victims in other countries." NGOs, consumer associations, local authorities or individual victims unable to benefit from the preventive effect on the parent company of the reporting obligation would be able to claim redress directly, or via local structures where the damage originated; these might be a group subsidiary or a sub-contractor, the latter being able, if convicted by local jurisdiction, to seek redress from the parent company. Thirdly, it takes the burden of proof off the victim, since in the event of a report being incomplete or absent, "the parent company must demonstrate what alternative measures it has taken [to avoid damages occurring]. In this scenario, the victim would only have to provide proof of a lack of adequate reporting." (*Supply chain and liability, legal tools for parent company's accountability*, Yann Queinnec, December 2007, pp. 10 et seq.). See also the study *Redefining the Corporation – How could new EU corporate liability rules help?*, Yann Queinnec, September 2007. Documents can be downloaded from the site: <http://www.asso-sherpa.org> – link on the ECCJ site – <http://www.corporatejustice.org>.



means of redress thereby created. This link is an initial answer to the extraterritoriality problems encountered in disputes relating to TNCs, which we will examine in chapter 4.

### Proposal 6 – Shareholder responsibility

**Context** – It is important to draw a distinction between the obligation to contribute to making up losses incurred by a firm, and the obligation to settle liabilities towards employees. Contributions to losses relate to the relationships between associates within a firm and are governed by common law, which deals with the manner in which associates honour their commitments.<sup>34</sup> The obligation to settle liabilities towards employees concerns the relationship between employee creditors and the associates, and offers a rare chance for the former to take action directly against the latter. It is here that the distinction between companies with limited liability and other companies, whose associates must meet their liabilities towards employees from their personal assets, makes the most sense. Nonetheless, whilst it is true that, according to the doctrine<sup>35</sup>, it is precisely this limitation of responsibility that has encouraged the growth of limited liability companies, the principle set out by the legislation is less than absolute. There is provision for derogations, both in the legislation and the jurisprudence, that acknowledge the hypothesis by which shareholders' responsibility is not related to the size of their holding, but to the entirety of the harm to redress. This situation would occur when a shareholder misuses a majority or minority, or commits a fault of any other type that leads to loss or



Jef Safi, *Rhizome awardophobia*, 2007 (Flickr ©)

harm suffered by the corporate entity. Such a hypothesis, however, only concerns internal relationships. Aside from situations such as this, the abiding rule of associate-company relationships is that the associate gives way to the company, which represents the associate vis-à-vis third parties. In external dealings, the associate is shielded by the corporate entity. Associates are, however, able to come out from behind this shield in other types of company law situations: for example, where the associate is allowed to bring an action—notably a derivative action—against third parties to seek redress for losses incurred by the company. It therefore seems useful to look at this issue the other way round and make it possible for third parties

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34. See in particular article 1832 of the French Civil Code, which states that: “a company is established by two or several persons who agree by a contract to allocate goods or their industry to a common venture with a view to sharing the benefits or profiting from the savings which may result therefrom. It may be established, in the cases provided for by statute, through an act of will of one person alone. The members bind themselves to contribute to losses” as well as article 1844-1, which states that “Unless otherwise agreed, the share of each member in the profits and his contribution to losses are determined in proportion to his share in the capital of the firm and the share of a member who has contributed only his industry is equal to that of the

member who has contributed the least. However, the stipulation by which a member is allotted the whole of the profit gained by the firm, or is exonerated from the whole of the losses, and that by which a member is excluded entirely from the profit or is liable for the whole of the losses shall be deemed not written.”

35. *Le pouvoir de concentration de la société par actions* [The concentrating power of the incorporated company], Claude Champaud, Sirey, Bibliothèque de droit commercial, no. 286, 1962, p. 222.



Jean-Pierre Attal, *Alvéoles 06 [Cells 06]*, 2009  
 (© Jean-Pierre Attal - Courtesy Galerie Olivier Waltman)

from outside the company that suffer from its actions to invoke the liability of shareholders. The administration procedure already makes it possible to seek reparation from the personal assets of shareholders who are found guilty since they are de facto heads of the company. However, in such cases, employee liabilities are only indirectly indemnified.

**Proposal** – Enshrine the ability of third parties to invoke shareholder liability on the basis of their control or exercise of power within a company. Based on the two previous proposals, the rule would be that, once an associate acquires power within a company by whatever means (for instance, a shareholding or contract), in other words, the ability to influence decisions made by the company or its subsidiaries, or even the power to impose said decisions, any third

party damaged as a result of the execution of these decisions would be able to accuse the associate directly. Wherever it appears that, irrespective of a subsidiary's geographical distance or legal autonomy, it essentially or systematically enacts decisions of the parent company, or refers back to it for guidance, it should become possible to invoke the responsibility not only of the parent company, but also of the shareholder that exercises power. This responsibility would reflect the shareholder's ability to impose a type of behaviour on the subsidiary, either positively

(for example, by warning against, or preventing, the implementation of decisions contrary to the behavioural norms discussed in Proposal 4) or negatively (for example, by initiating or not preventing such decisions). If shareholders' responsibilities are to be broadened, then their rights should be increased in proportion. They should be able to exercise their rights as shareholders in the parent company vis-à-vis all entities comprising the group, and be able to appeal to any competent tribunal in order to ensure that their point of view is given due weight.<sup>36</sup>

36. A case in point is the initiative taken by French minority shareholders in Vivendi when they joined a class action in the USA. During the case in the USA pitting Vivendi Universal against its shareholders, Judge Holwell ruled in a statement made on 31 March 2009 that French minority shareholders were able to join the case. He said that: "it is highly likely that a judgement in this case will be recognized once the *exequatur* procedure is underway." ("La présence des actionnaires français dans une "class action" américaine mise en question" [*The presence of French shareholders in a US class action suit challenged*], Grégoire Poussielgue, *Les Échos*, 15 October 2009, p. 24). The trial ended on Friday 29 January 2010 with a verdict declaring Vivendi guilty on 55 counts ("Le verdict américain contre Vivendi met en cause sa défense" [*The US judgement against Vivendi calls its defence into question*], Jamal Henni, *La Tribune*, 1 February 2010, p. 16).

37. A few of the many examples: Nature & Découverte automates CO<sup>2</sup> records and has created an environmental operating account; General Electric has launched a CO<sup>2</sup> certification and pricing programme rewarding sites that achieved a minimum 5% cut in greenhouse gas emissions; as early as 2003, Axa France set up a paper collection and recycling system; Axa Tech, which manages its computers, launched Green Computing in 2008, a programme that, amongst other achievements, created a new print centre that cut water and electricity use by 50%.



## Proposal 7 – Employee responsibility

**Context** – The general behaviour norm discussed in Proposal 4 clearly has to apply to the people that constitute the real force of a company, its employees. The challenge is to ensure everyone’s involvement within a company, at every level. The implications are clearly considerable, especially in sectors that are heavily dependent on fossil fuels, as their economic models are in upheaval at present. The tendency of trade union representatives to try to slow down these changes is wholly understandable. It is caused by the conflict between a mandate that focuses on the protection of jobs, and the medium- to long-term changes needed for sustainable development. Furthermore, unions have very few motivating strategic proposals to make, of the type put forward by management. Although it is becoming very common for employees to get behind strategies to improve energy performance or save paper,<sup>37</sup> there are far fewer strategies to protect jobs<sup>38</sup> and fend off the siren call of aggressive delocalization.<sup>39</sup> In other words, as soon as initiatives to motivate employees, such as a suggestions box, are put in place, environmental issues prevail over labour concerns, and the good ideas that do emerge are not exploited enough.<sup>40</sup>

There are clear signs today of a growing divergence between company management and their personnel.<sup>41</sup> The disappearance of a sense of belonging is one of the most striking features of the past 20 years. Formulating and implementing a sustainable development strategy are now major factors in fostering social cohesion within a business. If we cannot speak on behalf of businesses to decide which strategic option would best suit their individual situations or that of their subsidiaries, it is nevertheless possible to state that pay is one of the natural levers to attract managers and future directors, or to mobilize the workforce as a whole.

If, in return for a salary, employees are required to pay attention to the public interest considerations that we suggest be included in the articles of association (Proposal 1), a corporate environment that fosters changes in daily working practices is likely to develop.

This requires a rethink of employee performance criteria at all levels.<sup>42</sup> Let us, for example, examine the role of buyers working for transnational companies. The most common practice at present is for ordering parties to delegate the task of respecting their own ethical commitments to suppliers or sub-contractors.

38. Lego is a totemic company in the toy sector, a market where almost all production has moved to China: “Lego hasn’t entirely shed its Scandinavian sense of social mission when it comes to making toys. It kept quality high and never moved any manufacturing to China, avoiding the lead paint scare and grabbing market share when rivals stumbled amid multiple recalls.” (“Lego Is Moving Beyond Blocks”, Nelson D. Schwartz, *New York Times*, 19 September 2009, in *Le Monde*, p. 5).

39. Some companies return when they find that delocalizing didn’t cut their costs. In September 2009, Eugène Puma repatriated production of its Pétrole Hahn product, previously sub-contracted to UK pharmaceutical group Boots. The advantage: “a saving of around 10% on manufacturing, transport and warehousing costs,” according to company president Didier Martin, speaking to *L’Usine Nouvelle* (9 September 2009). Renault has calculated the true cost of parts made in Asia, once they reach the assembly lines in Europe. Assembling a car in France from parts made wholly in China would be on average 28% more expensive than making the same car from parts made in France (“Ces délocalisations qui reviennent en loques” [*Delocalizations that fail*], *Canard enchaîné*, 30 December 2009, p. 4). Delocalization is hard to accept by people whose jobs are affected. It is a complex issue, but we agree with Jacques Baratier, who said: “if we are capable of taking a longer view, expanding our vision both in time and space, then risk is transformed into opportunity.” He shows the truth of this in his account of the actions undertaken by Agrisud International, which he founded, in his book *L’entreprise contre la pauvreté* [*Fighting poverty through enterprise*] (Autrement, 2005, pp. 146 et seq.).

40. Commenting on staff motivation schemes, Jean-Marc Jancovici, founder of the Carbone 4 company, feels that “you need major actions for major challenges. Only top management can change company strategy in these directions. Right now, no major group has done it, but things are changing.” (“Quand les salariés pensent ‘écologie’” [When staff think green], Mathieu Quiret and Frank Niedercorn, *Les Échos*, 17 November 2008, p. 12).

41. According to a 2009 poll by TNS Sofres, only 42.7% of employees trusted their management, and 40.8% felt that their interests and those of management converged (“Les “institutions invisibles” de l’entreprise” [*Businesses’ invisible institutions*], Jean-Marc Legall, *Le Monde*, 22 December 2009, p. 3).

42. For so-called unqualified staff, who are the first victims of delocalizations and lower wages, setting up sustainable development strategies within a business paves the way for innumerable opportunities for their functions to be recognized. Without having to wait until everybody retrains to become an energy-saving specialist, the challenges of the changing role of the business will create job functions that do not yet exist. This will make it possible to reverse the observation made by Stefano Scarpeta (head of the employment analysis and policy division at the OECD) about the effects of lowered wages, that he says result from globalization, on workers with poor qualifications who “pay the price for this globalization with its rapid technological changes.” (“La globalisation a fait baisser la part du salaire dans la valeur ajoutée” [Globalisation has driven down the wage cost element within added value], interviewed by Anne Rodier, *Le Monde*, 22 December 2009, p. 5).

We have nothing against this in principle, as it helps to spread ideas about consideration for the public interest throughout every link in a business' supply chain. Sadly, this worthwhile practice goes hand-in-hand with another, less worthy custom: purchasing at the lowest cost possible, irrespective of the negative impact on workers' living conditions or water cleanliness in the river that runs alongside a faraway factory. Hence the importance of raising awareness via training and salary payments amongst purchasing department staff. The task is to enhance their responsibilities to include social and environmental considerations. Purchasing is just one example, but the same issues apply to every area of a business' activity. Getting so-called non-qualified staff involved opens the door to an infinite range of possibilities.<sup>43</sup>

**Proposal** – Increase employee responsibility towards the impact their job has in terms of sustainable development. When working, they should take every decision first and foremost as a function of the company's interest, but should also consider the impact on the public interest (cf. Proposal 4).<sup>44</sup> Remember that there are already rules that require staff to look after their own safety and that of others around them, and a failure to respect this instruction can, in some cases, lead to dismissal.<sup>45</sup> The proposal is to extend this responsibility to include sustainable development concerns that employees have influence over. Another means of promoting the emergence of this

type of responsibility is the ethical charter, a vital tool for every TNC. Linking the content of such a charter to the guidelines already established by the company's internal regulations would enable the commitments made within the charter to be submitted for adoption and verification to a well-established employee representation process.<sup>46</sup> This would undeniably require that methods of payment be adapted as a function of economic performance criteria, but it would also include social and environmental criteria so that motivation mechanisms could be fine-tuned for best effect.<sup>47</sup> This obligation must be accompanied by a greater emphasis on employees' views about the future of the business and the creation of in-house teams to support staff. This obligation also relates to Proposal 37, on the creation of a protective status for whistleblowers.

43. Consider, for example, all aspects that contribute to fostering a business' local roots, via the collective or individual involvement of this category of workers. This could involve taking part in developing the local economy, for example, via purchasing fruit and vegetables from a local farmers' association (AMAP) and thus helping to promote the growth of local organic farms. All such actions, when coordinated by employee bodies, help to build a company's local roots thanks to the contribution of employees working in the most modest positions. Many other forms of initiative are possible, via partnerships with NGOs or local authorities. Jacques Baratier, business leader and founder of the NGO Agrisud International, which fights poverty by supporting the creation of very small farming businesses, tells the story in his book *L'entreprise contre la pauvreté* [Fighting poverty through enterprise] (Autrement, 2005) of the involvement of the staff from the Saint Denis de l'Hôtel dairy, who donated two hours' worth of production to support the association. This meant that Agrisud received 50,000 euros, which it used to back the creation of 48 very small businesses between 2005 and 2008 (Agrisud 2008 Report: <http://www.agrisud.org/images/PDF/ra%20agrisud%202008.pdf>).

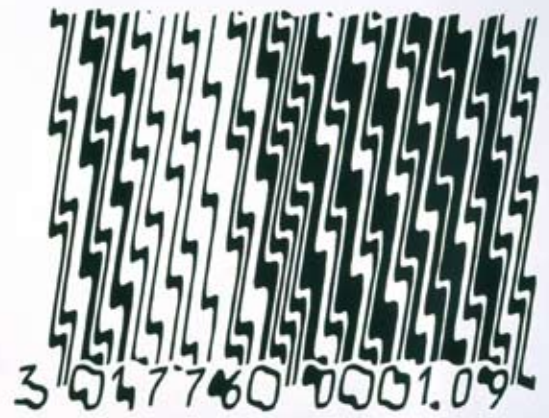
44. There is a clear trend towards employees taking greater environmental responsibility when professional and environmental risks overlap. One example, in France, is law 2003-699 of 30 July 2003 on the prevention of natural and technological risks. Specifically drafted to cover high-risk installations, this law also serves to increase the influence of employees, who have the right to be informed and consulted via the company health, safety and working conditions committee. ("RSE et milieu du travail: éléments juridiques pour une montée en puissance environnementale des parties prenantes internes" [CSR and the working environment: legal pointers for greater environmental influence of internal stakeholders], Marie-Pierre Blin-Franchomme, *Journal des sociétés*, no. 69, October 2009, p. 24).

45. Article L. 4122-1 of France's Labour Code states that: "acting in conformity with instructions provided by the employer, under such conditions as are imposed by the internal regulations, in cases where the company is required to maintain such rules, it is the responsibility of each worker to take care, as a function of his or her training and in accordance with his or her capacities, of his or her health and safety as well as that of others effected by his or her acts or omissions at work."

46. A ministerial circular dated 19 November 2008 set out, for France, the condition under which ethical charters could be assimilated into internal regulations. It makes a distinction between charters designed as mere communications tools and those that enshrine genuine commitments, which can be assimilated with internal memorandums in the sense meant by L. 1321-4 of the Labour Code (DGT circular 2008/22 of 19 November 2008 concerning ethical charters, whistleblowing and internal regulations ([http://www.ccip94.fr/upload/pdf/caprh012009\\_actu\\_circ\\_chartes\\_ethiques\\_19112008.pdf](http://www.ccip94.fr/upload/pdf/caprh012009_actu_circ_chartes_ethiques_19112008.pdf)). The value of using a code of conduct to render this proposal effective is highlighted by the Dassault decision by the social chamber of the Court of Cassation, dated 8 December 2009, which found that the whistleblowing mechanism set up by Dassault Système to comply with the terms of the USA's Sarbanes Oxley Act did not meet the legal requirements for the protection of personal data. Decision 2524 dated 8 December 2009 (08-17.191), Court of Cassation, Social Chamber, can be downloaded from [http://www.courdecassation.fr/jurisprudence\\_2/chambre\\_sociale\\_576/2524\\_8\\_14408.html](http://www.courdecassation.fr/jurisprudence_2/chambre_sociale_576/2524_8_14408.html).

47. France Télécom, which suffered an unprecedented wave of staff suicides during 2009, has taken steps in this direction. According to its CEO Stéphane Richard: *"We want to add a social element to our pay structure. I am proposing that from 2010, around one-third of the variable element for the group's 1,100 senior managers, including the board, be indexed to the group's social performance;"* (interviewed by Cécile Ducourtieux and Stéphane Lauer, *Le Monde*, 26 February 2010, p. 11). The task of re-engineering pay structures cannot be accomplished until the company defines its own criteria for social and environmental performance, using tools that are widely accepted by the international community (Proposal 11). Before such criteria are established, the board of directors and the shareholders must approve the project presented by the senior management team. The management team will be responsible for planning company policy for a 15-year period (Proposal 8), and will have decided on the code of conduct the company intends to follow. This shows the extent to which everything is interdependent, and how similar the problem of changing a business' strategies is to the metaphor of the chicken and the egg, thus continuing to encourage inertia.

24 petit beurre



Raymond Hains, "Bien lu, mal lu. Le Code du petit-beurre LU" [Correctly read, badly read. Code for the LU biscuit], 1983 (Photo: A. Chudeau Col. F RAC des Pays de la Loire) ©ADAGP Paris 2010

3

## National External Level – the TNC in its Home Country

**M**oving on from the fundamental rules that should, we believe, govern the internal organization of a TNC, we shall now examine the question of the nature of its relationships with its external environment. Before setting its sights on international territory, a TNC is above all a parent company established in the country that hosts its head office. Which begs the question: what form should legislation in the home country take? The challenge is to learn the lessons of the holding company definition that we have already referred to: “a procedure for the financial and structural organization of groups of companies that makes it easy to exert control over corporate assets and to properly ensure coherent economic management of the whole”.<sup>48</sup> This is an important question, because any norm imposed on a parent or holding company is likely to guide its actions at the group level—although it does so insufficiently at present, as we will demonstrate.

This is a legitimate area of concern. A parent company centralizes information and strategic decisions

at the group level. It is therefore a legal entity that governments in TNC home countries as well as those where subsidiaries operate should pay close attention to. Its awareness of risks, the possibility of them spreading, the measures needed to mitigate negative impact all create a heavy responsibility to be borne by the company at the head of a group. Such companies are making ever more use of global advertising campaigns to highlight their ethical positions, but without putting in place the operational mechanisms needed to ensure effective prevention and redress for their social and environmental impact.

The proposals that follow are intended to provide an answer to the dearth of effective judicial recourse enabling infringements of fundamental and environmental rights to be prevented and redressed. This initial series of proposals aims to assist businesses to take decisions that meet the imperatives of sustainable development, and to check that they are respected.

48. *Le pouvoir de concentration de la société par actions* [The concentrating power of the incorporated company], Claude Champaud, Sirey, Bibliothèque de droit commercial, 1962, no. 286, p. 222.



## Tools for preventing violations of basic rights and the environment

### Decision-support tools

Managing a business demands appropriate tools for tracking very diverse projects and indicators, all of which form decision-support tools. Adapting these tools to the demands of sustainable development requires an enhanced and more reliable process for collecting, processing and reporting information on social and environmental performance, as already occurs for financial performance. The process of checking and measuring performance in these areas will be looked at in the section below. The aim of the first measures proposed here is to improve the visibility of the sustainable development strategies put in place by TNCs. The proposals hope to contribute to establishing a faithful picture of these performances, social and environmental as well as financial, so as to encourage businesses to direct their actions to improving their social and environmental performance.

It is currently more profitable for a business to close its eyes to the social and environmental harm its activities generate than to invest in preventing them. In order to encourage management decisions that take a long-term perspective, conditions need to be put in place to ensure that stock market values represent not only TNCs' financial performance, but their non-financial performance as well. The fact is that without some form of return on their social investment, the most recalcitrant TNCs will never move in this

direction. The following proposals seek to establish the conditions needed to create value for businesses, whilst enriching the definition of what constitutes a business (for international accounting standards, see also the recommendations made by the Publish What You Pay coalition, covered in Proposal 44).

### Proposal 8 – Projection tool – Demand that TNCs establish a 15-year social and environmental plan

**Context** – The way that transnationals have approached sustainable development means that social and environmental concerns have been neglected in favour of profit. The imbalance remains flagrant between the requirements (not to say reliability) of the 3-year business plans they present to their shareholders and the approximations that litter their sustainable development commitments, which are usually nothing more than PR exercises. The fact that timescales are longer for social and environmental concerns should encourage the creation of suitable business plans. There is no denying the existence of certain cultural obstacles within businesses subject to pressure from shareholders and boards of directors, both of which demand levels of financial performance that are hard to reconcile with a long-term vision. Yet there are clear signs of change by businesses seeking to plan for the developments that the future will bring<sup>49</sup> and to satisfy the growing demand for socially responsible investments (SRI, cf. Proposal 33). There is also the favourable context offered by businesses with a large family shareholding element.<sup>50</sup> There is, furthermore, a trend to take greater account of how well-rooted a company's activities are locally.<sup>51</sup>

49. Many businesses fund university chairs to examine the future of corporate governance. To cite just one example, the ESC Rennes School of Business and Canon Research Centre France launched a teaching and research chair on 18 November 2009 entitled: "Which governance models for global firms or very large enterprises in the 21st century?" The purpose of this chair is to develop research and knowledge in the field of sustainability at large, with a forward-looking orientation, and more specifically, to explore the interactions between four large domains: foresight, globality, governance and the common good (<http://www.esc-rennes.fr/index.php/fr/chaire-denseignement-et-de-recherche-canon>).

50. Thierry de la Tour d'Artaise, CEO of the SEB group, a leading electrical appliance manufacturer, recently stated that: "In 2001, when we took over Moulinex, I warned the board that our share price would probably slide. They replied that it was an operation in our long-term interests." (*Les Échos*, 14 December 2009, p. 13). Michel Cicurel, chair of the board of Compagnie Financière Edmond de Rothschild, said that: "One of our core aims is to become a major player over the next ten or so years. That's one of the pleasures of family ownership, which allows us to plan for a generation at a time..." (*Les Échos*, 4 January 2010, p. 10)

51. We share the views set out by Patrick d'Humières in his recent book: "The renewal of a national approach to strategies is a trend that large groups cannot escape, if they want to make the most of local aspirations and capacities and better meet the cultural expectations of their local clients, employees and partners." (*Le développement durable va-t-il tuer le capitalisme? – Les réponses de l'éco-capitalisme* [Will sustainable development kill capitalism? — The Eco-Capitalist Answers], Patrick d'Humières, Maxima, 2010, p. 49).

**Proposal** – Require TNCs to publish an annual social and environmental business plan for the coming 15 years. As this would not be simple to translate into a formal legal obligation, the priority would be to raise awareness amongst private and public investors about the importance of ensuring that companies are able to take a long-term view. This requirement to be forward-looking will be more demanding for social impact (the environment and basic rights) than for economic and financial criteria. Creating business plans covering such a long period of time cannot, of course, be applied to every business or sector. The idea is to set out a minimum social and/or environmental impact threshold above which this obligation would apply, along the same lines as the thresholds applied [in France] to require companies to establish staff councils or measures that require environmental impact studies to be carried out.

### **Proposal 9 – Information Tool – Require TNCs to issue annual social and environmental impact reports**

**Context** – The emergence of voluntary social and environmental reporting practices that began in the 1970s has undergone significant development in the last twenty years, with social aspects joining the more

“traditional” environmental aspects in the 1990s. This growth has been particularly significant in recent years in France, Germany, Japan, and the United Kingdom. Denmark, the Netherlands, Norway Sweden, and France have adopted legislation requiring that TNCs publish reports with varying degrees of social and environmental detail.<sup>52</sup> However, extended and increasingly complex supply chains require particular attention, which has been lacking, since the indicators European companies publish apply to barely 20% of the relevant domain.<sup>53</sup> Under current legislation, a TNC may decline to indicate in its annual report the social or environmental risks or damages caused by one of its foreign subsidiaries, as long as no complaint is made with supporting evidence. By only requiring a passive obligation to provide information, this legislation serves to cover up negligence.<sup>54</sup> It is crucial to reverse this trend, in order to incite TNCs to make all due effort to prevent these risks.<sup>55</sup> We suggest that the development of voluntary reporting schemes be more strictly supervised, with a view to comparing companies’ social and environmental performance levels (cf. Proposal 11) and establishing conditions of fair competition.<sup>56</sup> This concurs, for example, with the recent conclusions of the OECD’s Agriculture Ministers, who believe that governments should ensure that “public action and regulatory frameworks

52. At the European level, this legislative development has been driven or supported by Community bodies. One notable example is the European Parliament and Council’s directive 2003/51/EC for modernizing accounting standards dated 18 June 2003 that, amending directives no. 78/660 and no. 83/349, contains article 1.14: “To the extent necessary for an understanding of the company’s development, performance or position, the analysis shall include both financial and, where appropriate, non-financial key performance indicators relevant to the particular business, including information relating to environmental and employee matters.” An amendment to the same directives proposed by the Commission and adopted by the Parliament and Council on 27 October 2004 provides that “where appropriate, companies may also provide an analysis of environmental and social aspects required for understanding the company’s development, performance and position”. (see *Ethos, Reporting environnemental et social : cadres légaux et volontaires* [Environmental and social reporting: legal and voluntary frameworks], December 2005, 14 p.).

53. According to a study in February 2010 conducted by Vigeo (leading European non-financial ratings agency) on the basis of information published or communicated to Vigeo by more than 700 European firms between 2007 and 2009: “The most frequently encountered problems in providing performance indicators involve incorporating social and environmental factors in the purchasing process.” (RSE: de quoi les entreprises rendent-elles compte? Analyse du reporting des entreprises européennes sur l’exercice de leur responsabilité sociale [CSR: what do businesses report? Analysis of social responsibility reports published by European businesses], 2010, p. 9).

54. It is interesting to note that the European Parliament’s resolution of 13 March 2007 stated that: “the Commission was asked to put forward a proposal to amend the Fourth Company Law Directive so that social and environmental reporting was included alongside financial reporting”. (INI/2006/2133: <http://www.europarl.europa.eu/oeil/resume.jsp?id=5353972&eventId=989154&backToCaller=NO&language=en>); the Johannesburg Plan of Implementation also refers to the importance of the reporting obligation by confirming, in paragraph 18, the need to enhance social and environmental responsibilities, including actions to: “Encourage industry to improve social and environmental performance through voluntary initiatives, including environmental management systems, codes of conduct, certification and public reporting on environmental and social issues [...]” ([http://www.un.org/esa/sustdev/documents/WSSD\\_POI\\_PD/English/POIChapter3.htm](http://www.un.org/esa/sustdev/documents/WSSD_POI_PD/English/POIChapter3.htm)).

55. The debate in France on adoption of the Grenelle 2 bill gave us the opportunity to express the value of an effective obligation to publish non-financial information reports: “Non-financial information is decisive.” Interview with Yann Quiennec, January 2010, published on the Novethic site: ([http://www.novethic.fr/novethic/finance/gouvernance/les\\_informations\\_extra\\_financieres\\_sont\\_determinantes/122945.jsp](http://www.novethic.fr/novethic/finance/gouvernance/les_informations_extra_financieres_sont_determinantes/122945.jsp)).

56. Ans Kolk: “Reporting may become an instrument for some governments as well, aiming to check compliance or the appropriateness of self-regulation. Although this could be associated with litigation, especially in the US context, this development is not necessarily bad to firms. To the contrary,



Yann Queinnec, *Les bulles bleues* [Blue Bubbles], 2002

are implemented to allow farming and food product markets to operate rationally, effectively, transparently, and equitably.”<sup>57</sup> Publishing reports is also useful in laying down the foundations for reliable social and environmental performance labelling, an emerging trend in major retail chains (cf. Proposal 39).

**Proposal** – Require that all parent companies report annually on the social and environmental impact of their action, including all entities that make up the group. The relevant scope could refer to the notion of accounting consolidation. The scheme’s success would depend on: a) the increasing involvement of auditors and changes in accounting practices (cf. Proposal 10); b) the emergence of comprehensible indicators for comparing companies’ social and envi-

ronmental performance (cf. Proposal 11); c) the possibility for stakeholders (employees, clients, suppliers and civil society organizations) to play a monitoring role alongside auditors and shareholders. Criteria must be established to make the degree of detail in the reported information modifiable. Depending on the relevance of the issues, reports could be published for each entity, or in consolidated form.

**Proposal 10 – Measurement tool – Reform TNC accounting to include non-financial performance**

**Context** – TNCs’ social and environmental performance currently only marginally influences assessment of the value they create, and this deficit must be remedied. The enhanced role of auditors with regards

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*when ‘forced’ in this way to watch the validity, the whole management system might be geared to providing the correct and relevant information, leading to an additional control on efficiency and effectiveness.” (“Trajectories of Sustainability Reporting by MNCs”, Ans Kolk, Journal of World Business, forthcoming, p. 13: [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1426270](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1426270)*

57. “L’OCDE dénonce la spéculation sur les produits alimentaires” [The OECD denounces speculation on food products], Jessica Berthereau, *Les Échos*, 1 March 2010, p. 10. The ministers’ press release dated 26 February 2010 can be downloaded from: [http://www.oecd.org/document/36/0,3343,fr\\_2649\\_34487\\_44664932\\_1\\_1\\_1\\_1,00.html](http://www.oecd.org/document/36/0,3343,fr_2649_34487_44664932_1_1_1_1,00.html).





Regis R, *Plastic City*, 2010

58. It is interesting to note the concerns of the insurance sector. After the absence of binding commitments expressed during the Copenhagen Summit in December 2009, Munich Re, a German reinsurance company, “joined the chorus of consternation about the failure of world leaders to agree legally binding cuts to carbon dioxide emissions at the United Nations conference” (*Financial Times*, 30 December 2009, p. 14).

59. As regards environmental issues, paragraph 19 of the Johannesburg Plan of Implementation encourages the relevant authorities at every level to: “Continue to promote the internalization of environmental costs and the use of economic instruments, taking into account the approach that the polluter should, in principle, bear the costs of pollution, with due regard to the public interest and without distorting international trade and investment.” ([http://www.un.org/esa/sustdev/documents/WSSD\\_POI\\_PD/English/POIChapter3.htm](http://www.un.org/esa/sustdev/documents/WSSD_POI_PD/English/POIChapter3.htm)).

60. At the EU level, following a discussion during the meeting of G8+5 environment ministers held in Potsdam in May 2007, Pavan Sukhdev was tasked with undertaking a study on the economy of ecosystems and biodiversity; a progress report was published in 2008 ([http://ec.europa.eu/environment/nature/biodiversity/economics/pdf/teeb\\_report\\_fr.pdf](http://ec.europa.eu/environment/nature/biodiversity/economics/pdf/teeb_report_fr.pdf)).

to social and environmental impact must be accompanied by a change in accounting practices. Tools such as CO<sub>2</sub> emission quotas<sup>58</sup> need to go further to include the fair price for natural resources used in economic circuits.<sup>59</sup> It is a matter of ensuring that basic rights and respect for the environment are correctly factored in by accounting standards in drawing up a reliable picture of the company, by rebalancing accounting processes applicable to the three dimensions (economic, social, and environmental) of sustainable development. Enhancing the notion of added value with data reflecting social and environmental performance would help to guide economic actors’ priorities in the right direction.<sup>60</sup>

**Proposal** – Integrate into corporate accounting the value of using natural assets in their production of goods and services, as well as of their contribution to the enjoyment of basic rights. Public and private accounting must, for the sake of coherence, develop in unison in this domain, which links into the need for states to adopt new “wealth indicators”. The upcoming reform of the IASB’s (International Accounting Standards Board) international accounting standards must give priority to this issue on its agenda,<sup>61</sup> alongside other changes required in TNC accounting (cf. Proposal 44).

61. It is interesting to note the initiative of 2 August 2010 supported by the IASB. The Prince of Wales’ Accounting for Sustainability (A4S) and the Global Reporting Initiative (GRI) announced the creation of an “International Integrated Reporting Committee”. This committee’s goal is to create a reference framework for gathering financial information as well as environmental, social responsibility and governance information in a clear, concise, coherent, and comparable format. IIRC comprises representatives of civil society, NGOs, IGOs (Inter-Governmental Organizations) as well as the business, accounting, real estate, regulation and standardization sectors: <http://www.integratedreporting.org/>.

### Proposal 11 – Comparison tool – Create indicators for non-financial performance

**Context** – Ensuring that TNCs adhere to the requirements to provide information as set out in Proposal 9 is only part of the task, as there are currently no indicators for comparing their non-financial performance. The time and money that need spending, in terms of the added responsibilities and involvement of internal personnel resources, auditors and stakeholders such as NGOs, represent the price to be paid in order to re-establish a climate of fair competition between operators<sup>62</sup> and enable consumers and investors to play their part to the full. Work carried out in this area by the Global Reporting Initiative (GRI), aiming to draw up a precise table of criteria for the environmental, social and governance (ESG) performance of businesses, is certainly important. But the risk of this approach is to end up with a set of criteria that are too complex, resulting in operators enjoying so much latitude that it becomes almost impossible to compare their performances. Aside from the GRI, other tools exist for the environmental, social and governance aspects respectively. These include measures from the ISO (ISO 9001 and ISO 26000, in preparation), the EU (Emas) and NGOs (SA 8000, FSC, etc.), as well as various national arrangements, such as the requirement for all companies with over 300 employees to issue a social audit.<sup>63</sup> This profusion of tools illustrates heightened awareness, but fails to

create the conditions under which true comparisons can be made. The absence of shared references and the weakness of the oversight mechanisms for non-financial reporting strongly increase the purely symbolic nature of CSR practices as represented by the reporting process.<sup>64</sup> The current state of the process of standardizing information is insufficient to allow the definition of qualitative characteristics that are consistent, verifiable and standardized.<sup>65</sup>

**Proposal** – Establish a limited number<sup>66</sup> of relevant indicators (headline indicators) making it possible to provide clear and comparable inter-TNC information, with breakdowns by category and by geographical sector, completed by country and activity. This process must set out to establish a few simple criteria whose meaning can be understood by all. The challenge is to set in place two types of ESG performance criteria for TNCs: the first to apply to parent companies within their home country, which might include allowance for cultural, regional and territorial differences; the second setting out a very short list of internationally recognized criteria. This task must be performed under the aegis of relevant international bodies (UN, WTO, ILO, ISO, etc.). Adopting them progressively would allow the international community enough time to undertake the necessary consultations and to adopt any corrective measures that might prove necessary.

62. It is interesting to note recent comments by Jean-Louis Chaussade, CEO of Suez Environnement, one of the world's largest water companies: "We want to be judged and paid according to how our services perform, especially in environmental terms." (*Le Monde*, interview with Isabelle Rey-Lefebvre).

63. [http://www.lettre-insertion.fr/evaluer-sa-responsabilite-sociale-et-environnementale\\_fr\\_art\\_350\\_28044.html?PHPS ESSID=h74ergb5aen847f3u49mapa3q5](http://www.lettre-insertion.fr/evaluer-sa-responsabilite-sociale-et-environnementale_fr_art_350_28044.html?PHPS ESSID=h74ergb5aen847f3u49mapa3q5).

64. According to the Vigeo study cited previously, and based on information published or communicated to Vigeo by 700 European businesses from 2007 to 2009: "81% of objectives indicators are accessible, as opposed to 49% of results indicators. In other words, businesses are more ready to publicize their visions and objectives than their achievements in social, environmental and governance terms." Furthermore, the same study shows that only "30% of commitments made by businesses have any meaningful content, i.e. they conform wholly to the enforceable objectives and aims defining responsibility" (RSE: de quoi les entreprises rendent-elles compte? Analyse du reporting des entreprises européennes sur l'exercice de leur responsabilité sociale, 2010 [CSR: what do businesses report? Analysis of social responsibility reports published by European businesses], p. 5).

65. Nicolas Meisel, *Comptabilité, audit et responsabilité sociale de l'entreprise – Étude du processus de légitimation des acteurs et du cadre conceptuel* [Accounting, audits and corporate social responsibility—a study of the process of legitimization of actors and the conceptual framework].

66. We think that cutting the number of indicators is not just a good idea—it is also achievable. When setting up its sustainable development indicators, France managed to cut the number from 307 in 2001 to 45 in 2003. Some commentators, however, maintain that 45 is still too high a figure and explain the tool's limited success (saturation) (Sustainable development indicators workshop, *Rapport de synthèse* [Summary Report] 1 June 2006, Université Laval, Quebec, pp. 6 and 7: <http://www.mddep.gouv.qc.ca/developpement/indicateurs/atelier.pdf>).

Three global performance indicators could thus be defined: a) respect for article 25 of the Universal Declaration of Human Rights within the business' sphere of influence; b) respect for the environment within the same sphere of influence; c) effective rate of taxation on annual revenues. These three criteria will need to draw on national sustainable development indicators that are already in operation, as well as existing initiatives such as the information framework created by the Global Reporting Initiative. The data gathered would need to be weighted as a function of how the sphere of influence is defined,<sup>67</sup> which remains to be determined, and the quality of governance in the country of operation. One suggested direction would be to present results ranked by efficiency, along the lines of the labelling system used for domestic appliances.

**Proposal 12 – Partnership tool – Systematize and provide a legal framework for partnerships between civil society organizations (CSOs) and TNCs**

**Context** – Since the 1990s, there has been a considerable rise in partnerships between TNCs and civil society organizations. Irrespective of their primary aims, such partnerships can also play a part in improving business practices and serve as tools for collecting data on ESG performance.<sup>68</sup> However, legal structu-

res for these relationships are seriously complicated by the imperative for reconciling very divergent approaches and cultures, not to mention the often highly unequal balance of power between the two parties in terms of access to legal expertise<sup>69</sup> and the fears that NGOs have of being instrumentalized.<sup>70</sup> Although contract law offers infinite possibilities, the challenge is to ensure that contractual freedom does not negate original good intentions. This makes the initial agreement negotiations even more strategically important in building a sustainable and efficient relationship.<sup>71</sup>

**Proposal** – Define a precise legal framework for partnerships between civil society organizations and TNCs. Despite the large disparities, several fundamentals nonetheless emerge: a preamble setting out the partnership's guiding spirit, the scope of its purpose, the respective parties' obligations, monitoring mechanisms and division of powers as well as employee involvement is vital in providing the legal components needed to prevent partnerships of this type failing.

Other partnership parameters, which we cannot go into here,<sup>72</sup> should also be closely studied by both parties during negotiations. These include evaluation mechanisms that require both parties to agree on performance criteria, the role of a trusted third party, the geographical extent of the partnership (which raises

67. We feel that the information that businesses are required to provide must be proportional to their sphere of influence, i.e. to their social and environmental impact and the manner in which it is checked. John Ruggie (Special Representative of the Secretary-General on human rights and transnational corporations and other business enterprises) voiced the same opinion in a recent article. He does, however, conclude that use of the notion of a sphere of influence is unsuitable for measuring TNCs' obligation to respect human rights. He feels it to potentially place too much responsibility on them, preferring instead due diligence. We feel quite the opposite, that the definition he provides (“I note that sphere of influence combines together two very different meanings of influence: one is influence as ‘impact’, where the company may be the cause of harm ; the other is influence as whatever ‘leverage’ a company may be able to exert over other actors with which it may or may not have a business relation”) only underlines the value of developing a legal definition of the idea. The application of any principle depends on the circumstances. The trick is to have the courage to set out where the boundaries lie. This is the role of organizations and people invested with arbitrational powers when confronted with a dispute. (Response by John Ruggie to *Ethical Corporation Magazine*, 10 June 2008: <http://www.ethicalcorp.com/content.asp?ContentID=5949>). Cf. also the 22 March 2010 study coordinated by the office of Michel Doucin, France's ambassador for bioethics and corporate social responsibility, that Sherpa contributed to, downloadable from: [http://www.rse-et-ped.info/IMG/pdf/Due\\_diligence\\_Etude\\_22mars\\_MAE.pdf](http://www.rse-et-ped.info/IMG/pdf/Due_diligence_Etude_22mars_MAE.pdf).

68. In 2009, WWF France, which has a strong tradition of partnerships with businesses, published its first annual report giving details of its evaluation of these partnerships (<http://www.wwf.fr/s-informer/actualites/premier-rapport-wwf-france-sur-les-partenariats-entreprises>). Following a suggestion from Sherpa, WWF France and other NGOs that set up partnerships with businesses are currently working to harmonize the terms for these alliances. The aim is to draw up a common set of terms, seeking to prevent businesses from picking and choosing the least demanding NGOs in terms of improving practices. The harmonization process faces the problems raised by the variety of partnership cultures and goals. The process, albeit a long one, is very important due to its potential as a lever.

69. The innovative agreement signed on 18 June 2009 between Sherpa, Médecins du Monde and Areva symbolises the infinite variety of possible partnerships. Part transaction and part partnership, the agreement sets out the terms for worker payments and a monitoring mechanism consisting of health watchdogs at mining sites operated by Areva. (For further information, please see the relevant page at <http://www.asso-sherpa.org>).

70. One example is Amnesty International France (AIF), which ended its six-year partnership with the Casino supermarket group in April 2009 as it felt that Casino had failed to keep its side of the bargain. According to an AIF press release dated 21 July 2009: “this decision is born of the conclusion that no significant actions have been carried out

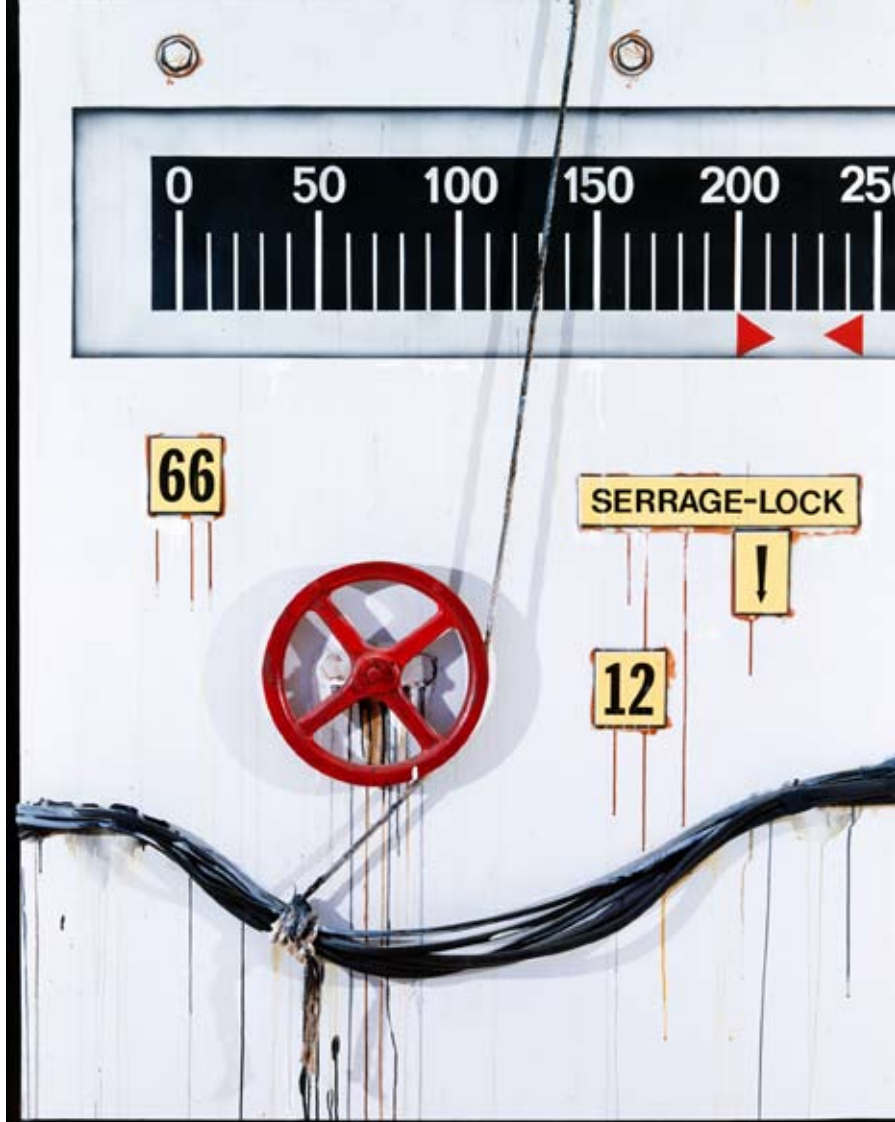


the question of the behaviour of subsidiary companies), financial arrangements concerning costs incurred in implementing the partnership, insurance and how to sever the arrangement. Success for civil society-TNC partnerships also hinges on an unambiguous tax regime for any resulting trade.

## TNC oversight tools

### Proposal 13 – Transparency – Guarantee third party access to TNC non-financial information

**Context** – Availability of information about the social and environmental impact of TNCs' activities is a crucial issue. We have already stressed the requirement for transparency in social and environmental performance reporting (see Proposal 9 on the annual reporting obligation). This Proposal takes that requirement a step further. Specifically, the aim is to gain access to information that does not appear in the annual reports when justified by specific circumstances, such as an industrial investment project or accident. Currently, only shareholders and, to a certain extent, employees and governments can demand that businesses provide information of this nature; states have the right to require a relatively wide range of information.<sup>73</sup> Although widespread use of environmental assessment reports is one example, it remains, in the



Peter Klasen, *Volant/serrage-lock [Wheel/tightening-lock]*, 1989, Cliché G al. Louis Carré / J.-O. Rousseau © ADAGP, Banque d'Images, Paris 2010

together for several years now, despite a number of proposals made by Amnesty International France. AIF considers that implementation of the protocol signed in 2003 and renewed in 2006 has been inadequate. Aside from a few sporadic actions relating to human rights, AIF has not been able to identify any meaningful advance in steps taken to prevent abuses of human rights that may result from the group's activities. AIF had asked Casino to make a commitment that exceeded simple declarations of principle, putting in place a global strategy aiming to ensure respect for the human rights of all its stakeholders." ([http://www.amnesty.fr/index.php/amnesty/s\\_informer/communiqués\\_de\\_presse/ai\\_France\\_met\\_fin\\_au\\_partenariat\\_avec\\_le\\_groupe\\_casino](http://www.amnesty.fr/index.php/amnesty/s_informer/communiqués_de_presse/ai_France_met_fin_au_partenariat_avec_le_groupe_casino)).

71. A recent qualitative survey by Be-Linked carried out on behalf of Coordination SUD (an umbrella body for 130 French international solidarity NGOs) and Medef (the leading employers' association, with a membership of 700,000 businesses) provides an overview, and confirms the difficulties as well as the motivations for partnerships between civil society organizations and businesses (*Entreprises et ONG de solidarité internationale – Quels partenariats pour quels objectifs* [Businesses and international solidarity NGOs—What partnerships, what goals?], Jérôme Auriac, January 2010:

downloadable from: [http://www.coordinationsud.org/IMG/pdf/ONG-entreprise\\_165x240.pdf](http://www.coordinationsud.org/IMG/pdf/ONG-entreprise_165x240.pdf)).

72. For further details, please refer to *Contractualisation des partenariats ONG/entreprises* [Contractualisation of NGO-business partnerships], Yann Queindec, 19 January 2009, downloadable from <http://www.asso-sherpa.org>.

73. For an overview of the situation in France, and suggestions as to how it might be improved, please refer to the Lepage February 2008 report, commissioned for the *Grenelle de l'environnement* [an environmental round table bringing together the government, local authorities, trade unions, business and voluntary sectors to draw up a plan of action of concrete measures to tackle environmental issues] ([http://www.legrenelle-environnement.fr/grenelle-environnement/IMG/pdf/1202291368\\_Mission\\_Corinne\\_Lepage\\_Rapport\\_Final.pdf](http://www.legrenelle-environnement.fr/grenelle-environnement/IMG/pdf/1202291368_Mission_Corinne_Lepage_Rapport_Final.pdf)).

absence of effective redress, wholly insufficient.<sup>74</sup> It is also worth noting that the measures taken to ensure product traceability during various food scares (mad cow disease, bird flu, etc.) stand as examples of their technical feasibility from a normative and operational standpoint.<sup>75</sup>

The same can be said of the diamond industry and its Kimberley Process,<sup>76</sup> which most of the major players have signed up to, or the oil industry's EITI, whose standards have been adopted by several countries.<sup>77</sup> All of these measures confirm the existence of an international consensus regarding the importance of ESG information and the technical feasibility of requiring them to be made available. However, access to the information is not guaranteed for stakeholders external to the business, people close to industrial sites, NGOs and consumer associations.<sup>78</sup> The importance of their whistleblowing and monitoring role is a legitimate reason for providing such access: it will enable all interested persons to swell the ranks of those able to play a role in either a preventative or reparatory capacity.<sup>79</sup> The challenge is above all to meet the growing social demand for information about the impact of the goods and services that we consume, a trend evidenced by the increasing number of environ-

mental and social certification labels. It is important to establish a general right to information if people are to have confidence in these new tools.

**Proposal** – Provide stakeholders concerned with defending the public interest (public health, protection of the environment, social rights, etc.) and all other victims of a wrong with guaranteed access to businesses' social and environmental information. We should say that although we are advocates of transparency—a concept overly idealized by many economists—as a lever in the development of effective reporting tools that will encourage businesses to improve their social and environmental performance, it is a far more precise aim that incites us to promote it. The value of an enhanced and binding transparency regime also lies in the uses that might be made of the information (or lack of information) provided by businesses. From this perspective, optimizing transparency is a means of ensuring that third parties are able to make proper use of legal recourses. Finally, we should also point out that safeguarding sensitive industrial and commercial data, which constitutes one of the major limitations to such measures, does not represent an insurmountable obstacle.

74. For an overview of the situation in France, and suggestions as to how it might be improved, please refer to the Lepage February 2008 report, commissioned for the *Grenelle de l'environnement* [an environmental round table bringing together the government, local authorities, trade unions, business and voluntary sectors to draw up a plan of action of concrete measures to tackle environmental issues] ([http://www.legrenelle-environnement.fr/grenelle-environnement/IMG/pdf/1202291368\\_Mission\\_Corinne\\_Lepage\\_Rapport\\_Final.pdf](http://www.legrenelle-environnement.fr/grenelle-environnement/IMG/pdf/1202291368_Mission_Corinne_Lepage_Rapport_Final.pdf)).

75. Article 18 of EU regulation 178/2002, entitled Traceability, obliges “all food and feed business operators” to set up a traceability system applicable from 1 January 2005. The regulation covers all food and all substances used to make it, provides for the complete identification of suppliers and clients and the setting up of specific systems and procedures, and requires that all requisite information be made available to the competent authorities on demand. Regulation 178/2002 is designed to offer “farm to fork” traceability. This concept is refined in regulation 852/2004, dated 29 April 2004, concerning the hygiene of foodstuffs, and applicable as of 1 January 2006. Application of this regulation chiefly concerns primary production, which means the production, rearing or growing of products intended for use as food or animal feed; regulation 178/2002 can be downloaded from: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2002:031:0001:0024:EN:PDF>.

76. The Kimberly Process Certification Scheme imposes numerous conditions on its members to make it possible to certify that trade in uncut diamonds is not used to finance armed conflicts. Since September 2007, the

Kimberly Process counts 48 participants from 74 countries, with the EU and its member states counting as a single participant. For further details, see the website: [http://www.kimberleyprocess.com/home/index\\_fr.html](http://www.kimberleyprocess.com/home/index_fr.html).

77. A group of countries, businesses and civil society bodies met at the 2003 Lancaster House conference in London, held at the behest of the UK government. The countries agreed a declaration of principle designed to increase transparency regarding payments and revenue generated by extractive industries. As of March 2010, 32 countries are involved in the process. For further information, visit the EITI website: <http://eitransparency.org>.

78. During an investigation by Sherpa in 2007 into the legal framework surrounding the mineral extraction industry in French Guiana, the local préfecture refused to provide the investigator with details of gold extraction licences granted, citing the confidential nature of the documents requested. On 24 July 2007, Sherpa petitioned the Commission in charge of access to official documents (CADA), which found in its favour. Its judgement, delivered on 24 September 2007, stated that all the information requested should be provided (for more details, please visit <http://www.naturavox.fr/societe/Excellence-environnementale-Francaise-et-la-Guyane?forum=article>). Sherpa's report is available at <http://www.asso-sherpa.org>. See also the study carried out in September 2008 by France Nature Environnement, *Or vert contre or jaune. Quel avenir pour la Guyane?* [Green gold versus yellow gold. What future for Guiana?] ([http://www.uicn.fr/IMG/pdf/Rapport\\_Or\\_vert\\_contre\\_or\\_jaune\\_-\\_September\\_08.pdf](http://www.uicn.fr/IMG/pdf/Rapport_Or_vert_contre_or_jaune_-_September_08.pdf)).



**Proposal 14 – Monitoring  
– Create a national centre  
monitoring non-financial  
performance**

**Context** – Mechanisms for monitoring non-financial practices and results remain largely voluntary and based on private initiatives. They cannot be used to compare companies. Non-financial rating agencies, used by the companies that fund them, either do not take adequate action, or the action they do take causes problems. Adoption of the ISO 26000 standard in 2010 may well trigger an exponential development of ESG information monitoring. The standard is a good thing: the text essentially encourages a global vision of CSR, and will allow new actors

to set up innovative mechanisms for collecting, processing and reporting data. This development of new activities should also go hand in hand with greater involvement by CSOs, which are thus being given the opportunity and legitimacy to play an important role. The goal of creating a real monitoring mechanism for businesses in their native country requires somewhere to pool resources and centralize data. We should also remember that the reporting obligation (Proposal 9) depends on the reliability of the data that form the backbone of social and environmental performance labelling (Proposal 39).

**Proposal** – Create an independent national monitoring centre financed by public funds. The centre would concentrate in a single place all information produced by the country's TNCs on the social and environmental impact of their activities, including, obviously, the activities of their subsidiaries in other



*Regis R, Plastic City, 2010*

countries. The monitoring centre would be a platform for collecting, processing and presenting intelligible ESG performance figures for national TNCs, which would then be easy to compare. It would also serve as a pool of information available to citizens and researchers and to encourage corporate practices to improve by highlighting the companies that have made the most progress in this domain. Information technologies would be used to implement effective processes for reporting and processing data. The stakeholders involved with the monitoring centre should include consumer associations, public procurement officers, environmental protection organizations and human rights groups as well as auditors and, conditionally, non-financial rating agencies.

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79. In the wake of the *Grenelle de l'environnement*, the role of NGOs and union has increased and they are acting in a more concerted and structured manner (see "L'Union qui change tout" [The unions that changes everything], *Enjeux Les Échos*, no. 260, Sept. 2009, pp. 46-47).

### Proposal 15 – Financing – Encourage public offerings for TNCs with good ESG performance

**Context** – Public offerings, when securities are traded on the regulated market, offer an excellent opportunity for informing investors and the public about the trading company’s social and environmental performance. Company law already requires publication of a prospectus featuring fairly comprehensive information, including social and environmental figures.<sup>80</sup> However, it would be useful to add to mechanisms such as this with measures that offer more of an incentive.

**Proposal** – Encourage companies with good ESG performance by granting tax advantages to the securities they trade on the market. This mechanism would motivate investors and strengthen trading companies’ investment capacity, while encouraging them to improve their social and environmental performance. The institutional arrangements framing the mechanism could serve as an opportunity to coordinate the role of financial market police and civil society watchdogs. Naturally, the national monitoring centre discussed in Proposal 14 could also have a role to play.

### Proposal 16 – Public procurement – Encourage responsible public procurement policies

**Context** – Since public procurement is increasingly guided by sustainable development concerns, public procurement officers can have a major influence on TNC practices.<sup>81</sup> Beyond environmental concerns, this mission is particularly important in terms of supply chains, whose impact on sustainable development is key. The extension of supply chains complicates the task of TNCs that wish to ensure respect of basic rights and the environment in the production chain relaying their goods and services. This situation encourages the public procurement officer to impose re-

quirements, while reducing the risk of discrimination between bidders since they are all subject to the same restrictions. An ambitious public procurement approach can contribute to relocalizing certain sections of the economy without contravening the freedom to trade or the WTO’s basic regulations.

**Proposal** – Provide a range of tools for public procurement officers, whatever method they use (continuous improvement approach, audit procedure, reference systems), whose inclusion in the key phases of public procurement contracts could produce positive effects in terms of sustainable development. We would thus recommend including the following requirements in execution conditions:

- transparency: the bidding TNC must make its ethical commitments public and must not avoid its responsibilities by delegating, by means of a contract, respect for its own commitments at any stage of the supply chain without ensuring that its partners have the means to take over responsibility;
- prevention: the procurement officer can demand that the TNC makes every effort to prevent the occurrence of violations of ILO and environmental protection provisions in its supply chain and that it brings to bear the full weight of its influence to this end;
- good faith: the TNC must undertake to execute in good faith its contractual obligations, forbid all abuse of rights towards its suppliers and sub-contractors in a position of economic dependency, and provide all the advice needed to ensure that the contract endures;
- reporting obligation: the TNC is bound to report all incidents arising in the sub-contracting chain likely to have an impact on respect for basic ILO and environmental protection provisions. This obligation is extended to cover the group level, in accordance with the regulations applicable to accounting consolidation (cf. Proposal 9).

80. At the European level, directive 2003/71/EC of 4 November 2003 and regulation (EC) no. 809/2004 of 29 April 2004 govern publication of this information. According to a document published by the Financial Markets Authority (AMF) in 2008, 367 reference documents were submitted to the AMF, which then checks them (for further details, see the AMF document, *Les documents d’information diffusés par les sociétés cotées* [Information documents circulated by listed companies], October 2009, available at: [http://www.amf-france.org/documents/general/6347\\_1.pdf](http://www.amf-france.org/documents/general/6347_1.pdf)).

81. At the European Union level, the process for promoting sustainable public procurement was initiated by the European Commission on 30 January 2001, followed among others by the publication of two interpretative communications: no. 2001/C 333/07 of 4 July 2001 on the “Community law applicable to public procurement and the

possibilities for integrating environmental considerations into public procurement”, published in the OJCE, no. C 333, 28 November 2001; no. 2001/C 333/08 of 15 October 2001 on the “the Community law applicable to public procurement and the possibilities for integrating social considerations into public procurement”, published in the OJCE, no. C 333, 28 November 2001). See the French national action plan for sustainable public procurement: <http://www.ecologie.gouv.fr/IMG/pdf/PNAAPD.pdf>. See also the 3 December 2008 circular concerning the state’s exemplary role in terms of sustainable development in the operation of its services and public establishments: <http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000020243534>.



*Alain Bublex, Plug-in City (2000) – Leipzigerstrasse, 2003 (Courtesy Galerie GP & N Vallois, Paris)*

The proposal concerns obligations in terms of method rather than results, leaving the door open for case-by-case interpretations. These criteria could be adapted to suit the diversity of situations and should, if they are to be fully effective, be implemented by procurement officers who are very familiar with the contracts in question.

**Proposal 17 – Responsible communications – Eradicate false advertising relating to sustainable development**

**Context** – TNCs increasingly use communications campaigns to convince consumers that they are the allies of future generations, that their products are sold in conditions that help the fight against the greenhouse effect and protect local workers and their rights, and so on.<sup>82</sup> In short, that they are in tune with sustainable development goals. This ethical and environmental propaganda (known variously as greenwashing and fairwashing, when it does not correspond to reality) is becoming more widespread, but there are no legal instruments that incriminate

TNCs using this type of advertising, even when their subsidiaries on the other side of the world operate in more or less total contradiction to the claims made, the labelling on their products and the terms of their ethical commitments.<sup>83</sup> A case in point is the legal action taken by North American citizen Marc Kasky against Nike for misleading advertising. He cited the gap between the company’s message to customers about its respect of basic rights and reality.<sup>84</sup> The company claimed that its contractual relations were built on ethical foundations, whilst using sub-contractors whose practices violated norms for protecting workers. In the Kasky v. Nike May 2002 ruling, the California Supreme Court confirmed that the non-respect of an undertaking engaged as part of a code of conduct can be penalized on the basis of misleading advertising.<sup>85</sup> This was the first major case to mark out the limits of such communications practices. More broadly, it raised the question of the legal value assigned to ethical undertakings expressed by TNCs in their codes of conduct. Who are they addressing? Should messages be considered as real undertakings or simple slogans with no substance? The question deserves to be asked



at a time when communications and one of its most effective forms, story telling, are overrunning the political as well as the business world.<sup>86</sup>

**Proposal** – Extend the “misleading advertising” offence to information on the ethical or environmental nature of products. The offence modified in this way would get rid of all advertising comprising “*allegations, indications or presentations that are false or liable to lead to error, when they relate to one or more elements such as the product’s nature, composition, origin or price.*” It would also be useful to expressly include non-respect of ethical undertakings concerning punishable unfair practices, affecting both competitors and consumers, as the EU asks member states to do by referring to “*unfair commercial practices*” in its 11 May 2005 directive.<sup>87</sup>

## Tools for redressing violations of basic rights and the environment

The current state of the law makes it impossible to effectively gauge the social and environmental impact of TNC activities. The main reason is related to a twin concept that underpins company law: the principles of legal autonomy and of limited responsibility, which isolate each constituent TNC entity from the civil or criminal obligations of the other members. This key principle in company law seeks to protect entrepreneurs from the financial risks linked to their activity over and above the sums invested, and thus encourage investment. However, this fact has created an unbalanced situation, whereby a parent company

82. These communications policies are used by both corporations and the advertising industry. For instance, major industrial and service corporations, like Lafarge and Carrefour, have signed partnerships with the WWF to define action plans for reducing their CO<sub>2</sub> emissions; between 2005 and 2009, the percentage of companies on the SBF 120 index participating in the Deloitte “Carbon Disclosure Project” report on CO<sub>2</sub> communication rose from 45% to 63% (see “Environnement: entreprises et citoyens chassent le CO<sub>2</sub>”, *Enjeux Les Échos*, no. 264, January 2010, pp. 36-37). In addition, advertising agencies put out an increasing amount of information on the extent to which their own communications take environmental impact into account. Hence, the Advertisers Union’s (UDA) Charter for Responsible Communications features the inclusion of environmental impact in the criteria for selecting their communications tools (see “Éthique: des campagnes de pub écoresponsables” [Ethics: eco-responsible ad campaigns], *Enjeux Les Échos*, no. 254, February 2009, p. 24). Cf. *La communication responsable – La communication face au développement durable* [Responsible communications – Communications and the challenge of sustainable development], Alice Audouin, Eyrolles, 2009.

83. Oil company Shell was found guilty of misleading advertising by the British Advertising Standards Authority (ASA) on 13 August 2008. Following a complaint lodged by the WWF (World Wildlife Fund), the ASA criticized the fact that Shell used an advert in the *Financial Times* on 1 February 2008 to present its oil sands operation in Canada as respectful of the environment and in line with sustainable development. Drawing on the conclusions of a 2006 study by the Canadian National Energy Board, which said that “*mining of the oil sands could have significant social and environmental consequences, particularly in terms of water conservation, greenhouse gas emissions, defacing the landscape and waste management*”, the ASA ruled the Shell advert to be “misleading” due to its ambiguous use of the term “sustainable”. See “Shell rapped by ASA for ‘greenwash’ advert” at <http://www.guardian.co.uk/environment/2008/aug/13/corporatesocialresponsibility.fossilfuels>.

84. For detailed information on the case see: [http://www.reclaimdemocracy.org/nike/kasky\\_nike\\_justfacts.html](http://www.reclaimdemocracy.org/nike/kasky_nike_justfacts.html).

85. *Kasky v. Nike* (2002), 27 Cal. 4th 939 (no. S087859, 2 May 2002). His complaint having been initially dismissed by the local court, the California Supreme Court then overturned the ruling in 2002. Nike thus took the case to the United States Supreme Court, which declared itself incompetent in July 2003, sending the case back to a federal court for judgment. The company did not want to be caught in the glare of the media, and decided to agree to a settlement whereby it undertook to finance audit, education and credit programmes for a total of 1.5 million dollars for the NGO Fair Labor Association. For an analysis of the case and description of measures adopted by Nike, see the study *Supply chain and liability, legal tools for parent company’s accountability* (Yann Queinnec, 2007, p. 32, downloadable from the site: <http://www.asso-sherpa.org/nos-programmes/gdh/nos-publications-ii>).

86. The consequence is a “real inflation of information” on the subject of sustainable development. See “De Stockholm à Copenhague, des principes aux actes: la désormais incontournable RSE” [From Stockholm to Copenhagen, from principles to actions: ubiquitous CSR], C. Malecki, feature on “La responsabilité sociétale des entreprises” [Companies’ social and environmental responsibility], *Journal des sociétés*, no. 69, October 2009, p. 9.

87. According to the European directive of 11 May 2005, no. 2005/29 EC, concerning unfair business-to-consumer commercial practices in the internal market (art. 6.2): “*A commercial practice shall also be regarded as misleading if [...] it involves [...] (b) non-compliance by the trader with commitments contained in codes of conduct by which the trader has undertaken to be bound, where: (i) the commitment is not aspirational but is firm and is capable of being verified, and (ii) the trader indicates in a commercial practice that he is bound by the code.*” In February 2010, at the end of a series of seminars on European companies’ transparency and social, environmental and ethical governance practices (ESG Disclosure Workshops) organized by the European Commission, the French authorities expressed a wish to see an assessment of implementation of directive no. 2005/29 EC, downloadable from: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2005:149:0022:0039:EN:PDF>



can pocket its subsidiaries' profits without taking any responsibility for the environmental and social consequences of their activities. Although recourse to the notions of complicity or misappropriation is always possible, Sherpa's experience has shown that major obstacles exist that make it extremely difficult to pin down civil or criminal liability. The lack of texts governing groups of companies in all their aspects has encouraged TNCs to play off one legislation against another rather than adopting effective preventive measures. Although we can take recent social and environmental innovations from some TNCs as an encouraging sign, social business does nothing to solve the problem of effective punishment for violations of basic rights and the environment. The impetus comes from the public.



M.C. Escher's, "Puddle", 1952 (©2010 The M. C. Escher Company-Holland. All rights reserved. www.mcescher.com)

### Proposal 18 – Recognize the criminal liability of legal entities

**Context** – Above and beyond the responsibility of individual people who take decisions within a company, the responsibility of the corporate entity also needs to be engaged. However, despite the influence of a handful of fairly recent international texts<sup>88</sup> encouraging national legislators to introduce the criminal liability of legal entities, it has only recently been recognized, and only by a limited number of states.<sup>89</sup> It is also still being challenged. The spectre of the judge deciding every instance of criminal liability has tended to be brandished in exaggerated fashion by those who wish to reject what they consider to be an extreme measure, going as far as invoking the death penalty for companies.<sup>90</sup> However, this repressive threat is not confirmed by the available quantitative

data, which highlights the deterrent effect that such legislation essentially has.<sup>91</sup> This situation is partially explained by the difficulty of implementing notions of complicity or misappropriation, for example (cf. Proposals 26 and 27). These notions represent tools for questioning parent companies' criminal liability for their subsidiaries' actions. In practice, however, it is difficult to make use of them due to the principle of legal autonomy of the entities that form a group of companies, and difficulties in assessing a virtual entity's criminal intent (the principle that governs criminal law). Nevertheless, recognition of companies' criminal liability is useful in drawing up lines not to be crossed in terms of social and environmental impact. These lines can be used by victims to ensure their interests are taken into account, and by companies themselves so they can adapt their activities accordingly.

88. For example: the 19 June 1997 protocol of the Convention on the protection of the European communities' financial interests; the OECD 17 December 1997 Convention on Combating Bribery of Foreign Public Officials in International Business Transactions; the 23 November 2001 Council of Europe Convention on Cybercrime; the UN Convention against Transnational Organized Crime of 12 December 2000; the EU Council Framework Decision on combating corruption in the private sector of 22 July 2003, and the 19 July 2002 Framework Decision on combating trafficking in human beings (in *Dépénalisation de la vie des affaires et responsabilité pénale des personnes morales. Éléments de droit comparé* [Decriminalization of business life and criminal liability of legal entities. Elements of comparative law], Cristina Mauro, PUF, 2010, p. 62).

89. The Netherlands, Switzerland, Italy, Portugal and Canada. The term "business" has often been used rather than the expression "legal entity" to broadly cover all organizations regardless of their legal character. This is the case in the USA. The same applies in Chinese law, where production units can be declared criminally liable. For a recent presentation of comparative law, see *Dépénalisation de la vie des affaires et responsabilité pénale des personnes morales. Éléments de droit comparé* [Decriminalization of business life and criminal liability of legal entities. Elements of comparative law], Cristina Mauro, PUF, 2010, pp. 61 et seq.

90. The case of the Andersen practice involved in the Enron scandal is very illustrative of the extreme situations made possible by criminal law. It was the first criminal indictment of an audit firm in the USA. Arraigned when Enron bankruptcy was announced on 2 December 2001,

**Proposal** – Adopt national regulations that recognize the criminal liability of legal entities, and extend this responsibility to all existing infractions (such as in France, for example)<sup>92</sup> by adapting the regulations concerning strict responsibility (punishing negligence or infractions known as involuntary) and subjective responsibility (requiring the demonstration of three conditions: intentional fault, harm and causal link). These sanctions, mainly financial if necessary, should be “sufficiently dissuasive”,<sup>93</sup> backed up with more effective sanctioning of the offences of complicity and misappropriation, and recognize victims’ right to take action (Proposals 25 to 28).<sup>94</sup> States will have to play the role of drawing up and implementing an ambitious criminal policy in terms of the fight against economic crime. The challenge is to guarantee the effectiveness of sanctions against companies that fail to respect the rules and thus help further consolidate the competitive advantage of companies that are properly committed.

**Proposal 19 – Make widespread use of administrative sanctions excluding TNCs with inadequate non-financial performance from public procurement contracts**

**Context** – In view of the fact that establishing a consensus for recognizing legal entities’ criminal liability is difficult, the use of administrative sanctions could serve as a faster method of obtaining participation by states. Public procurement contracts represent a major lever and should be widely applied (privatization process, contracts for supplying goods and services, public-private partnerships) in order to encourage the widespread use of good practices. A number of provisions currently prohibit companies or their directors from bidding on public procurement contracts or exercising managerial functions after having committed certain infractions. It would be expedient to extend their scope to social and environmental impacts inside or outside the state hosting a TNC’s head office (cf. Proposal 16).

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on 10 January Arthur Andersen admitted to destroying accounting documents. Paul Volcker, former president of the Federal Reserve and head of the American branch since 22 March, announced 7,000 redundancies, while offices in the international network joined the competition. On 15 June, the Houston (Texas) Court declared the firm guilty of obstructing justice. As a result, the company was banned from acting as an auditor. Just before the scandal that would lead to its downfall broke, the audit firm was at the pinnacle of its glory, with a 9,336-million-dollar turnover and 85,000 staff members working in over 380 offices around the world. See the article in *Lettre des juristes d'affaires – Le Magazine*, no. 3, December 2002: [http://www.juriforum.fr/modules/lja\\_controller.php?PAGE=archives\\_mag&numero\\_mag=03&fichier\\_article=FC\\_MJA0034001.html](http://www.juriforum.fr/modules/lja_controller.php?PAGE=archives_mag&numero_mag=03&fichier_article=FC_MJA0034001.html) 91. See the studies carried out in 2006 by the International Commission of Jurists, with contributions from Sherpa. The three reports are available on the Business and Human Rights website: <http://www.business-humanrights.org/Updates/Archive/ICJPaneloncomplicity>.

94. During the *Grenelle de l'environnement*, Sherpa presented a number of proposed amendments aimed at removing the procedural obstacles preventing victims of a French group’s overseas subsidiary from holding the parent company to account. The proposals concerned the following articles of the Criminal Code in particular: L. 113-5, L. 113-6 and L. 113-8 (*Grenelle de l'environnement – Group 5 – Sherpa proposals*, 23 August 2007, pp. 3 to 5, downloadable from <http://www.asso-sherpa.org>). On 24 March 2010, when the National Assembly’s sustainable development commission was examining the Grenelle 2 bill, amendments along these lines were rejected for reasons that reflect the climate of overcautiousness that still prevails where this question is concerned: <http://www.assemblee-nationale.fr/13/cr-dvp/09-10/c0910041.asp>.

92. Recognized in connection with a number of infractions in France in 1994, the criminal liability of companies was extended to all Criminal Code infractions with the adoption of the law of 9 March 2004.

93. In autumn 2008, Pascal Hustings (head of Greenpeace France), Jean-Christophe Le Guidou (CGT secretary general) and Alain Bazot (president of UFC-Que choisir) co-signed a text presented to members of parliament suggesting that sanctions such as these be adopted at the EU level to force car manufacturers, in particular, to respect the collective engagement established on the reduction of car CO<sub>2</sub>/km emissions (see “L’Union qui change tout” [The union that changes everything], *Enjeux Les Échos*, no. 260, September 2009, pp. 46-47).



**Proposal** – Introduce a ban on TNCs with inadequate non-financial performance bidding on public procurement contracts. These performance levels would be assessed using information the TNCs would need to produce on their ESG impact (cf. Proposal 9). Taking account of a group’s effective global tax level (cf. Proposals 4 and 44) in allowing access to and awarding public procurement contracts would also be a powerful lever in reducing misuse of tax optimization. Modifying the length and scope of sanctions would enable the response to be adapted to suit the seriousness of the actions being penalized.



Chris Jordan, *Recycling Yard #6, Seattle, 2004* ( [www.chrisjordan.com](http://www.chrisjordan.com) )

#### **Proposal 20 – Harmonize the legal arsenal and resources available to national jurisdictions**

**Context** – In response to the established lack of effectiveness of environmental law in most countries, the question is whether it should purely and simply disappear or, on the contrary, be radicalized. In the first hypothesis, TNCs would be responsible for respecting their voluntary undertakings, a highly unlikely scenario given current greenwashing and fairwashing practices. The second flawed solution would be to add to an already overburdened and ineffectual legal arsenal. In France, some 60,000 infractions of environmental law are recorded every year, leading to only 4,000 convictions. There is thus a yawning gap between the increase in laws and their application in the field. In addition, the convictions fail to be really dissuasive. Although the focus here is on the environment, we can see the same phenomenon in all areas of financial crime (combating corruption, influence peddling, tax evasion, insider trading, etc.). Despite the extensive media coverage given to competition law when record-breaking fines are applied, it clearly does not prevent the same thing recurring; the situation requires a change to the system.<sup>95</sup>

**Proposal** – Increase the human and financial resources available to administrative and judicial bodies in charge of ensuring respect for the environment and fighting economic and financial crime. The environmental sphere would be funded by a 1% to 5% levy on the amount of indemnities granted by a national jurisdiction to redress ecological damage. This is a legitimate levy in response to current uncertainty, as symbolized by the random assessment of indemnities granted by jurisdictions to compensate a victim, such as nature, the environment or *Pachamama* (meaning Mother Earth in Andean Indian culture), lacking in legal status but entitled to compensation. The *Erika* lawsuit in France provides a good illustration of this difficulty. This proposal would require making available a dedicated international compensation fund, similar to IOPC Funds (International Oil Pollution Compensation Funds set up in 1971 and formed by three intergovernmental organizations). The introduction of interjurisdictional financial flows would also build a link that would encourage harmonization of currently heterogeneous national jurisdiction practices (see also Proposal 43).

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95. To cite just one of the most recent examples, in 2009 Intel was sentenced to a fine of over a billion euros (David Bosco, *Contrats Concurrence Consommation*, no. 11, comm. 269, November 2009).



Gaëlle Mauvillain, *La dernière des reines* [The last of the queens], 2004

## 4

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# 48 International External Level – TNCs in their Host Countries

Outside its national borders, a TNC maintains multiple ties with its subsidiaries, suppliers, sub-contractors and other partners. This international arena is the perfect terrain for globalized trade: acquisition of raw materials, processing, assembly, transports and various sub-contracted operations including in the R&D sphere. It provides a highly potent playing field. To some extent, it represents glo-

balization in its primitive state, when every excess is allowed, from the abuse of legislations with a lenient stance towards employment, environmental and tax laws to the exploitation of economic dependency.

A set of basic rules could help to regulate this playing field so as to curb the natural tendency towards market crimes and their lack of punishment. The main



idea would be to re-establish a link between a TNC's legal reality and economic reality. The next step would be to ensure good quality relationships with stakeholders by adopting tools for preventing and redressing violations against human, environmental and social rights.

## Adapting the legal framework to an international corporate scope

The proposals below aim to establish a link between trade globalization and the legal status of the main participants: TNCs. In particular, they seek to understand the balances of power between a group's parent company and its partners, both internal (intra-group subsidiaries) and external (supply chain actors).

### Proposal 21 – Recognize the legal responsibility of a group's parent company for actions undertaken by its overseas subsidiaries

**Context** – The notion of a group is currently only partially recognized in legal terms, via laws governing competition, employment, accounting and taxes (cf. Proposal 2), despite the fact that, according to the OECD, intra-group operations account for 60% of international trade. This situation creates an ever-widening gap between the economic reality of major groups and the way in which employment and environmental responsibilities are divided up among their component entities. Although it is generally recognized in competition law that a parent company that owns 100% of the capital of a subsidiary behaving in a reprehensible manner can be penalized thanks to a simple presumption whereby the subsidiary has acted in strict application of the parent company's instructions, the presumption itself is far from being in common use.<sup>96</sup> This situation produces a lack of legal protection in terms of groups' negative impact on the

environmental and social spheres. This lack of protection affects not just the victims but also the companies, which remain exposed to the risk of legal action whose consequences are unpredictable in the absence of a clearly identified framework for responsibility.

**Proposal** – Make holding companies assume full responsibility for the social and environmental consequences of the activities of all the entities that form the group, and thus encourage them to make every effort to avoid and redress the social and environmental impact of these activities.<sup>97</sup> Proving the involvement of a parent company in the responsibility of a guilty subsidiary should not be an obstacle for victims seeking redress.<sup>98</sup> This requires reforming the rules of responsibility in both civil and criminal law. In civil law, the parent company would have full responsibility for all harm caused by a violation of basic rights or damage to the environment perpetrated by an entity over which it exercised legal or effective control (through owning shares or application of contractual agreements). The parent company would be exonerated from responsibility for paying civil damages if it could prove that it could not reasonably have had any knowledge of the violations in question. In criminal law, the parent company's responsibility would be engaged for its role as accessory and as co-author, when it is proven that the autonomy of the subsidiary or sub-branch is totally fictitious. Thus, the more evidence there is showing the existence of the parent company's interference in the subsidiary's affairs (for example, shared auditors, legal and tax advisors, banks and directors), the more urgent the need for a presumption of complicity in supplying means or instructions, or even exercising coercion. The "child's" subjection to the "parent's" orders and strategies would thus be suitably translated in criminal law. Added to these proposals would be specific responsibility regimes for administrators and directors (Proposal 3).

96. Frédérique Chaput, partner and lawyer at Cabinet Racine, "L'autonomie de la filiale en droit des pratiques anticoncurrentielles" [The subsidiary's autonomy in competition law], *Contrats Concurrence Consommation*, no. 1, study 1, January 2010: "In order to get beyond the lines drawn by legal personality, the authorities resort to the notion of a business, a notion specific to competition law that translates a totally factual and concrete approach to the notions of 'control' and, its opposite, 'autonomy'." ("La société mère est responsable des infractions commises par sa filiale détenue à 100%" [The parent company is responsible for infractions committed by its 100% owned subsidiary], Georges Decocq, *Contrats Concurrence Consommation*, no. 12, comm. 293, December 2009).

97. Sherpa has taken an active part in a project to draw up a proposal on this question, supported at the European Union level by the European Coalition for Corporate Justice (see the document published by ECCJ), *With power comes responsibility* – <http://www.corporatejustice.org/two-new-eccj-publications,240.html?lang=en> and the different documents published by Sherpa on this issue: <http://www.asso-sherpa.org>).

98. "Pour une responsabilité des sociétés mères du fait de leurs filiales" [In favour of parent company responsibility for their subsidiaries], Benoît Grimonprez, senior lecturer at Franche-Comté university, *Revue des sociétés* 2009, p. 715. The author quotes Claude Champaud among others: "Since the collective interest of the group prevails over the individual interest of each company, it may seem inequitable to maintain a compartmentalization of assets whose effects are only felt in one direction, unfavourable to those the legislator usually protects."

## Proposal 22 – Engage the parent company’s responsibility towards supply chain actors

**Context** – The economic reality of transnational groups reveals the existence of myriads of relationships created between ordering parties and their suppliers and sub-contractors installed throughout the world. Although many TNCs have incorporated clauses in their purchase conditions requiring suppliers and sub-contractors to respect social and environmental standards, there is also a tendency for legal departments to set up as many safeguards as possible to lessen the risks of the company’s responsibility being engaged. The fact that this tendency is totally legitimate does not make it any more acceptable. It encourages widespread practice of contractually delegating the ordering party’s ethical responsibilities to its sub-contractors and suppliers, with no guarantee that the latter have the means to really respect them.<sup>99</sup> The preventative aspect is largely overlooked, with the focus on keeping costs as low as possible (cf. Proposal 7). Practical difficulties spring from the increasing complexity of corporate structures and contractual systems. The obstacles also result from a market-driven approach that does not encourage the creation of enduring contractual relationships<sup>100</sup> and generates cultural barriers.<sup>101</sup>

It would be useful at this stage to ask if it is legitimate, or even equitable, to look for parent company responsibility for actors in its supply chain. In our opinion, the answer is yes.<sup>102</sup> Mainly because today’s multi-national companies reason and act globally, organizing their activity around their many component entities. This very common *modus operandi* corresponds paradoxically to, on the one hand, a group’s entities become detached and autonomous<sup>103</sup> and, on the other, globalization of purchases, marketing campaigns, profits and ethical commitments, which are expressed at the group level. Hence, even where subsidiaries are tending to becoming increasingly autonomous, the parent company enjoys a great deal of influence over how operations are conducted, and reaps the benefits (by the rise in dividends as well as the system of management fees and transfer pricing). This situation has a major impact on relations between the ordering party—which may be the parent company or one of the component entities—and suppliers and sub-contractors, often resulting in imbalances between an ordering party and business partners that depend on it on a regular basis.<sup>104</sup>

**Proposal** – Demand that holding companies respect their obligation to exercise due diligence. They should take all reasonable measures to identify and

99. This phenomenon is described in a 2007 study produced by the International Institute for Labour Studies, which says that: “While MNCs are promoting CSR on one hand, the delivery schedule and price given are more and more tight on the other hand. Unconvinced suppliers see MNCs as the beneficiary profiting from a vicious competition in developing countries” (“Secondary Effect in Implementation of CSR in Supply Chain”, in *Governance, international law and corporate social responsibility*, Yun Gao, International Labour Organization, 2007, Research document no. 182, p. 121: <http://www.ilo.org/public/english/bureau/inst/publications/discussion/dp18207.pdf>).

100. “The supplier will usually concentrate on the most severe constraint (Abernethy and Chua, 1996); if CSR monitoring is not very binding, compliance becomes purely a matter of form (Auberger et al., 2005). This market-driven approach regularly results in competition between suppliers and frequent changes of supplier; if relationships are only short term, it is impossible to build a long-lasting understanding of CSR with suppliers. In other words, when inter-organizational economic control is driven by the market alone, CSR monitoring can only be token; if the group of suppliers is liable to generate significant reputation-damaging risks, monitoring will become bureaucratic, with only token influence and minimal supplier compliance and without any significant improvement in practices.” (in *Contrôle et RSE aux frontières de l’entreprise : la gestion responsable de la relation fournisseurs dans les grands groupes industriels* [Control and CSR at the corporate boundary: responsible management of supplier relations within large industrial groups], Françoise Quairel, p. 16: <http://www.iae.univ-poitiers.fr/afc07/Programme/PDF/p202.pdf>).

101. “Inter-organizational control is primarily put in place by operational stakeholders: business unit buyers and managers. These buyers’ culture and incentive systems are far removed from sustainable development and CSR. Their training and profession are rooted in the culture of technical and economic efficiency; for many of them, environmental criteria and, most especially, employment criteria not covered by legislation are not included in “normal” supply requirements. The notion of overall cost is not a criteria that affects their decisions. They do not want to interfere in their supplier’s business by increasing conditions and monitoring that are already extensive, and thus make negotiations even more difficult. In addition, their incentive system depends on profit-driven financial criteria, so they are not at all likely to concede higher prices to obtain better quality CSR. In a survey of purchasing managers at thirty-eight major French companies (O. Bruel and O. Menuet [2006]), only 10% of companies questioned carried out assessments of individual and corporate performance that included a sustainable development element. The proactive companies we encountered were setting up training courses to raise buyer awareness, but buyers’ incentive and assessment systems remained based on financial criteria (profit margins, quality, lead times).” (in *Contrôle et RSE aux frontières de l’entreprise : la gestion responsable de la relation fournisseurs dans les grands groupes industriels* [Control and CSR at the corporate boundary: responsible management of supplier relations within large industrial groups], Françoise Quairel, p. 17 – <http://www.iae.univ-poitiers.fr/afc07/Programme/PDF/p202.pdf>).

avoid any violation of basic rights and environmental damage that fall within their sphere of responsibility.<sup>105</sup> The parent company's civil or criminal responsibility would be engaged if it could be proved that it had not done everything possible to avoid such violations occurring. The numerous judicial precedents relating to abuse of a dominant position in the field of competition law will provide a useful reference tool for standards of conduct.<sup>106</sup> Equally useful would be recognition of the notion of abuse of rights by all legal systems.<sup>107</sup> Our ideas on the presumption of complicity by supplying means or instructions in Proposal 21 also contribute usefully to this discussion of the relationship between ordering party and supplier.

## Tools for preventing violations of basic rights and the environment

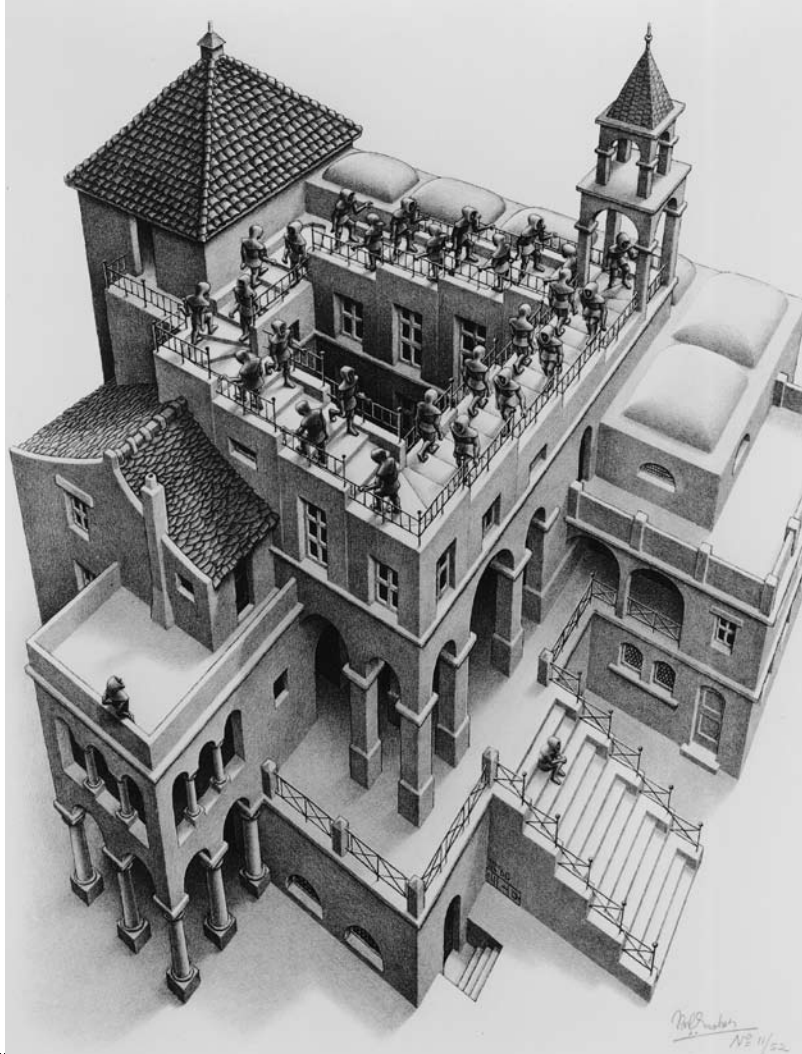
We propose the creation of real links between TNCs' internal and external stakeholders. This represents the international aspect of the pooling of resources discussed in Proposal 12, and seeks to link up the methods for gathering, processing and reporting ESG data used within the company and by external stakeholders.

102. As part of the project undertaken for the ECCJ, Sherpa drew up a study that takes a more in-depth look at this issue (*Supply chain and liability, legal tools for parent company's accountability*, Yann Queinnec, 2007: <http://www.asso-sherpa.org/nos-programmes/gdh/nos-publications-ii>).

103. Control of the networked company produced by new forms of organization and production is part of this approach. "Networked companies are decentralized organizations, made up of production and/or decision-making centres that are relatively autonomous." (Mariotti, 2005, p. 21, in *Contrôle et RSE aux frontières de l'entreprise: la gestion responsable de la relation fournisseurs dans les grands groupes industriels* [Control and CSR at the corporate boundary: responsible management of supplier relations within large industrial groups], p. 13: <http://www.iae.univ-poitiers.fr/afc07/Programme/PDF/p202.pdf>).

104. We can cite the example of the Indian sector for recycling electronic waste, 95% of which is made up of stakeholders from the informal sector. Despite the emergence of projects to improve processes, Mr Peetambaram Parthasarathy, director of E-Parisaraa, one of six government-approved companies, says: "If the government does not oblige companies to hand over their waste to approved companies, how are we supposed to find a solution?" ("Le grand défi du recyclage des déchets électroniques" [The major challenge of recycling electronic waste], Julien Bouissou, *Le Monde*, 25 February 2010, p. 4).

105. This proposal is supported by the ECCJ at the EU level (see the document published by the ECCJ, *With power comes responsibility*: <http://www.corporatejustice.org/two-new-eccj-publications,240.html?lang=en>).



M. C. Escher's, "Ascending and descending", 1960 (©2010 The M. C. Escher Company-Holland. All rights reserved. [www.mcescher.com](http://www.mcescher.com))

106. To cite only one example from the more recent cases, Intel was sentenced to a fine of over a billion euros in 2009 (David Bosco, *Contrats Concurrence Consommation*, no. 11, comm. 269, November 2009).

107. A number of states have incorporated a general principle in their legislation penalizing abuse of rights. They include: the French Civil Code (art. 1382), which determines that "Any act whatever of man, which causes damage to another, obliges the one by whose fault it occurred, to compensate it"; the Swiss Civil Code (art. 2), which lays down the principle that "the obvious abuse of a right is not protected by the law"; the German Civil Code (BGB) (art. 226), stipulating: "The exercise of a right is not permitted if its only possible purpose consists in causing damage to another"; article 833 of the Italian Civil Code, although limited to the right of property; the Austrian Civil Code (art. 1295, al. 2); the Spanish Civil Code (art. 7), with a very broad formulation, and the Civil Code of Luxembourg (art. 6, al. first). Outside Europe, other countries include comparable provisions in their legislation: the Quebec Civil Code (1991) (art. 7) states: "No right may be exercised with the intent of injuring another or in an excessive and unreasonable manner which is contrary to the requirements of good faith", and the Lebanese Civil Code lays down that "he who has caused harm to another, when exercising his right, by exceeding the limits set by good faith or by the purpose for which the right was bestowed" owes reparation.



### Proposal 23 – Strengthen the preventive role of TNC staff regarding ESG impacts

**Context** – Involvement of TNC staff in the company's non-financial performance is currently inadequate. A great many managerial analyses confirm that the greatest difficulty lies in the mechanisms used to help staff towards a far-reaching change in practices. Although many companies have a department in charge of sustainable development, there is still a general lack of resources made available to these departments so they can carry out their tasks. In the wake of the creation of European Works Councils (EWC) in 1994 and the International Trade Union Confederation (ITUC) in 2006, the conditions are right to give an international scope to the role played by employees and their representatives. The use of social audits has already been valuable in identifying the strengths and weaknesses in this domain.<sup>108</sup>

**Proposal** – Strengthen the preventive role played by TNC staff at the transnational level, by giving them the material and human resources to gather and circulate data relative to environmental, social and governance issues. This would imply the creation of an organization for each TNC with an international remit, in charge of gathering, analyzing and reporting data by means of regular audits and occasional warning procedures. In France, the CHSCT (committees on health, safety and working conditions) would seem the natural choice for this role.<sup>109</sup> Their equivalents exist in most countries. The results of these tasks would necessarily be examined by auditors with a view to checking social and environmental performance (cf. Proposal 9) and submitted for shareholder approval. From this standpoint, the process of optimizing transparency as mentioned above would be a means to guarantee that employees, or even external stakeholders, could make real use of an arsenal of legal tools.

### Proposal 24 – Set up an international network of stakeholders to provide high quality reporting on social and environmental impacts

**Context** – One of the main obstacles to good quality comparable data on TNCs' social and environmental impacts is the disparity of approaches and actors. A multitude of mandates and methods coexist, including auditors, rating agencies, ethical investors and employee organizations in charge of health and se-

curity issues. This fragmentation can lead to lenient practices, contradictory conclusions and the opposite effect of that intended: doubt is thrown over the reliability of the data. Although this reality reveals the complexity of international trade and of the social and environmental issues that affect the company, the era of globalization has given rise to a number of tools for coordinating roles, including the growing role of civil society actors. Their knowledge of the field and local participants helps considerably to guarantee the reliability of the gathered data and a quick response in the event of an incident. Now that statisticians are saying they are happy to start checking non-financial data, the context is favourable for improving coordination of actions with a shared goal: obtain knowledge of TNCs' ESG performance levels.

**Proposal** – Under the aegis of an international organization (the UN or WTO), create an international network of stakeholders with guaranteed skills, representativity and ethics. The role of network members would be to respond to requests by TNCs, their staff (cf. Proposal 23), their auditors, the financial market authorities and NGOs by carrying out field surveys together and reporting detailed information on an operator's social and environmental performance or that of its subsidiary. Their conclusions would be combined with recommendations approved by the overseeing organization and auditors and submitted to the vote of employee representatives, the board of directors and shareholders.

## Tools for redressing violations of basic rights and the environment

### Proposal 25 – Extraterritorialize the law

**Context** – Once harm has been inflicted by an overseas subsidiary, the main obstacle encountered by local victims is accessing justice in the parent company's country. This is especially difficult when the country where the subsidiary operates or the harm has occurred suffers from a defective legal system, and when the subsidiary does not have the means to compensate the victims. For example, the provisions laid out in articles 113-6 and subsequent in the French Criminal Code give the state prosecutor the right to veto the opening of an inquiry pertaining to an offence committed by a French national overseas against

108. See, for example, the documents produced by the 25th social audit summer university, organized by the International Social Audit Institute on 6 September 2007: <http://iasuniversites.online.fr/actes2007b.pdf>.

109. For further information, see "La compétence environnementale du CHSCT: réalité ou utopie" [CHST environmental aptitude: reality or utopia], *Revue Lamy droit des affaires*, I. Desbarats, 2008, no. 24, p. 66. Cf. also the page on Sherpa's website covering the Grenelle de l'environnement: <http://www.asso-sherpa.org>.





*Daniel Pommereulle, Cible par d'autres visées [Target through other sightings], Collection Centre Pompidou, Dist. RM N / G. Meguerditchian, © ADAGP Paris 2010*

a foreigner. This discretionary power is obsolete and, furthermore, allows the executive power, through the intervention of the state prosecutor's office, to paralyze a number of inquiries, particularly concerning financial crimes committed by French nationals abroad. Moreover, the provisions of article 113-5 of the Criminal Code establish real immunity for French TNCs that covers all aspects of their activities in southern hemisphere countries.<sup>110</sup>

In 2007, this issue of foreign victims accessing justice was insistently brought to the notice of the European Commission by a number of organizations, including Sherpa as part of its work with the European Coalition for Corporate Justice. In late 2009, the Commission launched an inquiry, assigned to the University of Edinburgh. UN Special Representative John Ruggie, after observing how central the question has become, has set in motion a new round of work to examine it.

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110. Examination of the 2007 bill on the fight against corruption was marked by the refusal to adopt the amendment seeking to make complicity in crimes or offences committed overseas punishable, even where the infraction has not been recorded by a definitive judicial decision within the foreign jurisdiction (Robert Badinter's amendment, National Assembly Official Journal, minutes, 10 October 2007, law no. 2007-1598 of 13 November 2007 on combating corruption). The refusal was justified by invoking an offence against state sovereignty and the need to wait for a Europe-wide policy. These arguments seem to us to be debatable, since it is possible to legitimize an action at the state level by invoking a case of force majeure or denial of justice. See also "Entreprises multinationales, lois extraterritoriales et droit international des droits de l'homme" [Multinationals; extraterritorial laws and human rights international law], William Bourdon, *Revue de science criminelle* 2005, p. 747.



Koko Komégné, *Le modèle français en question*  
[*The French model under question*], 2001

**Proposal** – As part of the *Grenelle de l'environnement* [an environmental round table bringing together the government, local authorities, trade unions, business and voluntary sectors to draw up a plan of action of concrete measures to tackle environmental issues], Sherpa recommended that the following paragraph be added to article 113-8 of the Criminal Code: “The prosecutor’s decision not to open an inquiry following a complaint registered by the victim of an offence committed by a French national abroad must, on the one hand, be justified; and, on the other hand, can be appealed by the victim or his/her legal successors before the Court of Appeal.” Sherpa also requested a further adjustment

to the Criminal Code’s blocking provision in article 113-5, which allows a French judge to seek the responsibility of a French accomplice of the main perpetrator, French national or foreigner, guilty of a crime or offence committed overseas. There are two conditions: firstly, the crime or offence must be punished by French law and foreign law (this dual incrimination condition is met in almost every case), but the second condition must be abolished, since it requires the victim to prove that the infraction has been recorded by a definitive decision by the foreign jurisdiction. Since, in practice, the judicial authority in certain states cannot carry out its functions properly, this requirement is an insurmountable obstacle that creates a situation of denial of justice.<sup>111</sup>

### Proposal 26 – Define an initial extension to the offence of misappropriation

**Context** – Existing legal instruments are inadequate to the task of curbing offences or crimes relating to the exploitation by TNCs and other actors of natural resources, particularly in countries lacking an appropriate legal framework or the infrastructure to put it in place. Thus, the often unlawful exploitation of these countries’ forest resources constitutes a serious offence against biodiversity, a factor in exacerbating the greenhouse effect and a source of great harm to local populations (harm that a process such as the Forest Law Enforcement Governance and Trade, launched at the European level, can not do much to prevent or redress, since it depends solely on voluntary partnership agreements; in December 2009, the European Council of Agriculture Ministers finally opted for minimal legislation in this domain).<sup>112</sup> Even traffic in protected plant and animal species, which generates profits for the major financial crime sector, is insufficiently checked.<sup>113</sup> As for mining, it is sometimes undertaken in violation of local law, or even international law, since the victims do not tend to have the means at their disposal to ensure their rights are respected.

111. On 24 March 2010, when the National Assembly’s Sustainable Development Commission was examining the Grenelle 2 bill, amendments along these lines were rejected for reasons that reflect the climate of overcautiousness that still prevails where this question is concerned: <http://www.assemblee-nationale.fr/13/cr-dvp/09-10/c0910041.asp>.

112. “Bois illégal : les ministres européens de l’Agriculture trouvent un accord sur le projet de règlement” [Illegal wood: European agriculture ministers come to an agreement on the legislating bill], Rachida Boughriet, Actua-Environnement.com – 16 December 2009. On 22 April 2009, the European Parliament proposed legislation that was greeted favourably by Sherpa and other NGOs. However, on 15 December 2009, the Council of European Ministers of Agriculture

rejected several of the proposals, refusing, in particular, to establish wood traceability on the European market. The burden of proof still lies with the victims and NGOs fighting against illegal wood imports.

113. On 18 November 2009, Sherpa and other NGOs lodged a complaint against the forestry company DHL for “receiving illegal wood”. DHL is accused of having helped to finance the civil war in Liberia (for more information, look on the Sherpa website: <http://www.asso-sherpa.org>).

114. “Recel de crime contre l’humanité” [Harbouring a crime against humanity], William Bourdon, *Libération*, 13 October 2009.

**Proposal** – Define a new form of enforced responsibility for TNCs, which will need to be extended to at least the European level to be fully implemented. Sherpa proposes starting by extending 321-1 of the French Criminal Code, which tackles the offence of misappropriation, with an article 321-2 as follows: “*The offence of misappropriation also comprises the acts of importing, exporting, hiding, holding and selling vegetable, animal or mineral species and, more generally, all natural resources protected by international law that have been exploited and taken illegally.*” The “illegal” dimension in this case results from a violation of local, criminal, administrative or international law (including embargos decided by UN authorities).

### **Proposal 27 – Define a second extension to the offence of misappropriation**

**Context** – During the 2000s, the efforts of the English organization Global Witness led to widespread condemnation of the exploitation of “blood diamonds” in a number of conflict zones, including West Africa, and, more recently, use of “blood milk” from Zimbabwe (which led, in September 2009, to Nestlé halting sales of milk from farms owned by the wife of dictator Robert Mugabe). The exploitation and sale of natural resources or manufactured products often go hand in hand with serious violations of human rights, or help to fund activities undertaken by people or companies that are directly responsible for such violations; importers are fully aware of this situation, but continue to go almost totally unpunished.<sup>114</sup>

The offence of misappropriation is extremely useful in stopping this type of behaviour. It allows the fruits of the infraction and their owner to be monitored, wherever they may be, with no time limit since the infraction is defined as “continuous”.

**Proposal** – Introduce a new misappropriation offence as follows: “*The offence of misappropriation also comprises the acts of importing, exporting, hiding, holding and selling protected vegetable, animal or mineral species and, more generally, all protected natural resources as well as all manufactured products when they have been made available at the cost of serious violations of basic rights, or when their use knowingly helps to fund militia and private or public groups that have perpetrated serious violations of basic rights.*”

### **Proposal 28 – Guarantee access to justice for NGOs combating environmental damage and corruption**

**Context** – In France, the law has progressively made provision for certain NGOs, such as those fighting racism and sexual abuse of children, to have access, under certain conditions, to criminal proceedings and at times exercise the right to public prosecution in accordance with articles 2.1 to 2.21 of the Criminal Procedure Code. Although a number of environmental protection NGOs can, in accordance with article 142-2 of the environment code, exercise their rights to bring criminal proceedings, their scope for action remains subject to strict conditions. On the other hand, French law provides very little opportunity for NGOs campaigning against corruption to take action. One example is the procedure initiated in France in March 2009 by Transparency International (supported by Sherpa) on the subject of the conditions underpinning acquisition of luxurious real estate by the families of African heads of state Denis Sassou-Nguesso (Congo Brazzaville), Omar Bongo (Gabon) and Teodoro Obiang Nguema (Equatorial Guinea). Jurisprudence in this area has made some progress, but the outcome of the proceedings remains uncertain, as shown by the decision of the inadmissibility of Transparency International, handed down on 29 October 2009 by the Paris Court of Appeal’s investigating chamber (an appeal has been lodged against the decision).<sup>115</sup>

**Proposal** – Modify article 2 of the French Criminal Procedure Code in order to give NGOs combating environmental damage and corruption (and, more broadly, all forms of financial crime) better access to legal action. The law should also authorize them to denounce offences committed abroad by French nationals or by foreign operations controlled by French companies.<sup>116</sup> This extension should also cover NGOs established under foreign law, as long as they have an office in France, as required by the law of 1 July 1901; this would allow NGOs consisting of African tax payers, for example, to lodge complaints to French judges concerning embezzlement of public money when they are the primary victims. This type of provision should be adapted for use in all jurisdictions.

115. “L’affaire des “biens mal acquis” ou le droit pour la société civile de contribuer judiciairement à la lutte contre la corruption” [The case of ‘ill gotten gains’ or civil society’s right to participate judicially in the fight against corruption], Chantal Cutajar, *La Semaine juridique* (general edition), no. 22, 27 May 2009. “Affaire des “biens mal acquis”, un arrêt qui ne clôt pas le débat” [The case of ‘ill gotten gains’, a ruling that does not end the debate], Chantal Cutajar, *La Semaine juridique* (general edition), no. 51, 14 December 2009, 563.

116. As part of the Grenelle de l’environnement process initiated by the French government in 2007, Sherpa proposed several amendments to the Criminal Code and Criminal Procedure Code (for further details, see the report produced in August 2007 – <http://asso-sherpa.org>).





HeHe, Nuage vert Ruoholahti 2 [Green cloud Ruoholahti 2], 2007 (© HeHe)

## 5

# Global Level – TNCs and the international community

**W**e have now reached the borderless terrain of globalization, where norms rooted both in hard law and, especially, soft law are created and coexist. This is the sphere of international agreements and customary international law, converging with the terrain inhabited by world governance debate, where TNCs rub shoulders with states without having to answer to a responsibility regime that reflects the scope of their influence. The proposals below are modelled on mechanisms for creating norms resulting

from the spread of contractual practices, similar to *lex mercatoria* (although adopting a different approach), whose rules grew from the development of trading practices. The proposals primarily concern the necessary changes to the conceptual framework of business law, the modification of legal structures to provide for TNCs taking real responsibility, and the role played by TNCs in terms of financing development.



## Adapting business law to address sustainable development concerns

To establish the right conditions for an economic development that is more restrained and in harmony with the biosphere's equilibrium, we propose to adapt a number of rules governing international investment. This goal takes the form of a new reading of the basic concepts of business law and the structural measures for getting TNCs to assume their responsibilities.

### Proposal 29 – Recognize the TNC as subject to international law

**Context** – Over two-thirds of the hundred biggest economic entities worldwide are now companies and not states. Nevertheless, only states and individuals are currently considered to be subject to international law, conventions and jurisdictions. Although TNCs can claim respect for their basic rights, such as the freedom to come and go, before jurisdictions such as the European Court of Human Rights, their obligations are relegated to second place, despite the fact that some of them have resources that exceed several states put together. They thus develop within a legal environment that allows them to juggle with national and regional rights, draw up a customary law specific to them, *lex mercatoria*, while eluding the body of rules that applies to those subject to international law, in particular the Charter of Fundamental Rights and *jus cogens* (a fundamental principle of international law accepted as a norm from which no derogation is ever permitted). It is worth noting the conclusions of the UN Special Representative on human rights, transnational corporations and other business enterprises, who made a distinction between states' obligation to *protect* human rights and companies' obligation to *respect* them. This distinction reminds us of the effects of TNC influence, which sometimes leads

certain states to restrict their regulatory capacity for fear of failing to attract investors.<sup>117</sup> Nevertheless, regulatory capacity is the tool states have to implement their obligation to protect human rights. When this fundamental issue is ignored, situations of imbalance and irresponsibility are allowed to persist.

**Proposal** – Endow TNCs with the status of being subject to international law. The idea is to go further than recognition of the legal existence of groups and parent companies (Proposals 2 and 3) and clearly define their worldwide legal responsibility, without taking into account the national borders of their native country; they would be required to protect and respect human and environmental rights within their sphere of influence, in accordance with international pacts states have agreed to in this domain (that will therefore have to be modified). This explicit recognition would certainly be a tool for respect of human and environmental rights to really become incorporated into daily international business practices.<sup>118</sup> It does not entail the creation of a dedicated international judicial authority, since TNCs are already liable to be penalized for international crimes. It would apply to all judicial and arbitration authorities dealing with transnational proceedings, authorities that would have to learn to pass judgements by incorporating criteria of public interest and specific extraterritorial factors (cf. Proposal 43 on creating a mechanism for international judicial cooperation). This recognition would help to incorporate *lex mercatoria* into *jus cogens* and thus make good current deficiencies in international public policy doctrine.<sup>119</sup>

### Proposal 30 – Incorporate respect of international agreements on protecting the environment and basic rights into international investment law

**Context** – As things currently stand, the major lawsuits between investors and host states are almost all

117. This influence was again invoked on 2 February 2010 in a submission made by a work group comprising eight national commissions on human rights (Kenya, Togo, Canada, Nicaragua, Venezuela, Denmark, Korea and Scotland) to the Human Rights Council (para. 9): “It has also been suggested that, in the context of the right to food, there are extraterritorial dimensions of the State duty to protect: the protection of human rights can be undermined where company structure and globalized company operations facilitate corporate evasion of state jurisdiction, for example.” (Information presented by the Working Group on Business and Human Rights of the International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights (ICC), 24 February 2010: <http://www.reports-and-materials.org/Working-Group-ICC-of-NHRIs-submission-to-Special-Rapporteur-on-right-to-food-24-Feb-2010.pdf>).

118. For a demonstration that CSR has become part of the sphere of customary international law and that this legitimizes recognition of TNCs as subject to international law, see our study *The OECD Guidelines for multinational enterprises, an evolving legal status* (Yann Queinnec, 2007, postface by Mireille Delmas-Marty: <http://www.commdev.org/content/document/detail/697/> and [http://oecdwatch.org/publications-en/Publication\\_3064/](http://oecdwatch.org/publications-en/Publication_3064/)).

119. Georges Abi-Saab (former chairman of the WTO Appellate Body) confirms the relevance of a project of this kind in his foreword to Homayoon Arfazadeh's book (*Ordre public et arbitrage international à l'épreuve de la mondialisation* [Public policy doctrine and international arbitration facing the challenge of globalization], Homayoon Arfazadeh, Bruylant, 2005).

settled by two arbitration authorities: the International Chamber of Commerce (ICC) and the International Centre for Settlement of Investment Disputes (ICSID). The arbitrators decide between the litigants by drawing on some 3,000 existing bilateral investment treaties (BIT). The rights these treaties accord investors are very extensive: for example, they guarantee access to water, even though this right is not respected for individuals. The lack of transparency that characterizes these procedures (cf. Proposal 41) and silence of BIT on sustainable development concerns can create grotesque situations. For instance, arbitrating authorities are sometimes appealed to by investors when a contract has been broken; the investors claim compensation from the host country for a “loss of opportunity” and the “harm” suffered to the earnings they could have generated if the contract had run as expected. Public-private partnerships that are scheduled for up to twenty-five years give an idea of the amounts claimed. This situation reveals a disparity between the body of rules arbitrators have to conform to and the public interest considerations that the lawsuits submitted to them may imply. It raises the fundamental issue of the hierarchy of norms and the possible emergence of an international public policy doctrine that arbitrators would have to refer to. This tendency is strengthened by the fact that arbitrators cannot overlook public policy doctrine, since the extension of the domain of “arbitrability” forbids them from doing so.<sup>120</sup>

**Proposal** – Incorporate the body of international agreements on protecting the environment and human rights into the scope of bilateral investment treaties. The idea would be to require arbitrators to take them into account when they draw up their arbitration awards.<sup>121</sup> Such measures should also have their equivalent in rules applicable to the World Trade Organization.<sup>122</sup> The role of national judges should be put under close consideration when they are required to intercede in the execution of the arbitration award. In the case of an international arbitration award, the state judge liable to overrule or execute the sentence could be led to draw on a multitude of sources, both national and international. In order to formulate a decision, the national judge could use this opportunity to develop a conception of public policy doctrine that meets the requirements specific to transnational relations and the public and private interests in play.<sup>123</sup>

### **Proposal 31 – Define competition law favouring sustainable partnerships between companies**

**Context** – At a time when several crises are hitting at once, competition between economic actors is leading to significant loss of human and financial resources.<sup>124</sup> Moreover, competition on a market is often only a façade, as illustrated in the sanctions periodically handed down against mobile phone operators on the French market, which do not, however,

120. It is interesting to note that the notion of “denial of justice”, which comes under the remit of public policy doctrine, could be brought into play by a jurisdiction without an association with a lawsuit, when guaranteeing the constitution of a Court of Arbitration to a signatory to an arbitration clause (whereby the parties agree to submit all lawsuits to arbitration). According to the Court of Appeal’s decision on a pronouncement made on 1 February 2005: “[...] *The impossibility of a party having access to the judge, even when arbitral, [...] and thus exercising a right covered by international public policy doctrine sanctioned by the principles of international arbitration and article 6.1 of the European Human Rights Convention constitutes a denial of justice that establishes the international remit of the president of the Parisian Court.*” According to Homayoon Arfazadeh: “Consequently, a neutral judge with no significant link to the parties or their lawsuit [the case was a lawsuit between a company, NIOC, and the Israeli government] is authorized to assist one of them in forming a Court of Arbitration to remedy a case of manifest denial of justice.” (Judgment no. 404 FS-P+B, in *Ordre public et arbitrage international à l’épreuve de la mondialisation* [Public policy doctrine and international arbitration facing the challenge of globalization], Homayoon Arfazadeh, Bruylant, 2005, pp. 63 et seq.). We can logically extend this reasoning to consider that the emergence of sustainable development concerns within the scope of international public policy doctrine could constitute an important foundation, by means of national judges if necessary, for arbitrators to take account of an economic operator’s social and environmental impacts in their sentences.

121. Howard Mann teamed up with Konrad von Moltke, Luke Eric Peterson and Aaron Cosby to write *Model International Agreement on Investment for Sustainable Development – Negotiators’ Handbook*. This looks at the consequences of the fact that the direction taken by international negotiations on investment and the ensuing decisions no longer have any connection to the goals of international development and sustainable development that are meant to underpin international economic negotiations (April 2005, revised and translated in 2006: [http://www.iisd.org/pdf/2005/investment\\_model\\_int\\_handbook.pdf](http://www.iisd.org/pdf/2005/investment_model_int_handbook.pdf)) See also a discussion of this subject in the recent study produced by Lorenzo Cotula from the International Institute for Environment and Development (*Getting a Better Deal – How to Make Contracts for Fairer and More Sustainable Natural Resource Investments*, 2010, Natural Resources Issues, no. 20, IIED London: <http://www.iied.org/pubs/pdfs/17507IIED.pdf>).

122. According to Gabrielle Marceau (Counsellor for the Legal Affairs Division of the WTO Secretariat): “It is suggested that WTO law must evolve and be interpreted consistently with international law, including human rights law. Thus, a good faith interpretation of the provisions of the WTO, including its exception provisions, should lead to a reading and application of WTO law consistent with human rights [...]” (*European Journal of International Law*, 2002 13(4):753-814: <http://ejil.oxfordjournals.org/cgi/content/abstract/13/4/753>). See also the parallel established between international trade regulations applicable in the European

succeed in encouraging them to put an end to their de facto agreement to maintain higher prices for their services.<sup>125</sup> On the other hand, we note that the increasing numbers of common platforms for actors in a given sector has demonstrated the virtues of teaming up in terms of innovation.<sup>126</sup> Although the “co-design” phenomenon is not recent, it is a growing trend, as evidenced by the emergence of the term “coope-tition.”<sup>127</sup> We believe that the complexity induced by the challenges of sustainable development makes the multiplication of sustainable strategic partnerships between companies a positive development. Waiving the prohibition against agreements between competitors would encourage companies to pool their resources with a view towards contributing to sustainable development; such contribution would concern innovation as well as working conditions and town and country planning.<sup>128</sup>



Jef Safi, *Ouwwwpoian topological space*, 2009 (Flickr ©)

Union and WTO regulations (“Squaring the Circle for Tomorrow’s World: A Comparative Analysis of the EC and WTO Approaches to Balancing Economic and Non-economic Interests in International Trade”, Emily Reid, in *European Law For the XXIth century*, Oxford & Portland Oregon, Hart Publishing, 2004).

123. *Ordre public et arbitrage international à l’épreuve de la mondialisation* [Public policy doctrine and international arbitration facing the challenge of globalization], Homayoon Arfazadeh, Bruylant, 2005, p. 4.

124. On a more profound level, certain clear-sighted actors are asking what use there is in continuing to endorse competition with the role of driving the economy when supply is equal to or exceeds demand (*L’entreprise contre la pauvreté – La dernière chance du capitalisme* [Fighting poverty through enterprise – capitalism’s last chance] Jacques Baratier, Autrement, 2005, p. 30).

125. In a case brought by UFC-Que Choisir [a French consumers association], the Competition Council delivered a decision on 30 November 2005 whereby it condemned Orange, SFR and Bouygues Télécom for their illicit behavior. It acknowledged that these three operators collaborated to distribute the mobile phone market between them with the effect of establishing retail prices at an artificially high level during the 2000-2002 period. Given the seriousness of these practices, the Competition Council sanctioned these firms with fines for a cumulative amount of €34 million. There is also the record fine by the European Commission on 13 May 2007 against Intel for abusing its dominant position to the detriment of its rival Advanced Micro Devices (AMD) (“Bruxelles inflige 1 milliard d’euros

d’amende à Intel” [Brussels fines Intel 1 million], Cécile Ducourtieux and Philippe Ricard, *Le Monde*, 14 May 2009, p. 13).<sup>126</sup> “For example, the USB port introduced compatibility that amplified innovative dynamics for computer peripherals (Gawer and Cusumano, 2008)” (“Les jeux de conception d’une plate-forme entre coopération et concurrence, le cas du Métro” [Design issues for a platform between cooperation and competition: the Métro case], Blanche Segrestin, in *Le Libellio d’AEGIS, dossier spécial Concurrence et coopération : diversité d’approches et de contextes* [Competition and Cooperation special issue: Diverse approaches and contexts], Winter 2008-2009, volume 4, number 3, p. 7).

127. Speaking of this phenomenon in the defence industry, Colette Depeyre and Hervé Dumez explain that “system complexity makes coope-tition inherent: a single firm cannot take care of both design and production” (“Le concept de coope-tition: quelques voies de recherche à partir d’une analyse de cas” [The coope-tition concept: research opportunities based on a case study], Colette Depeyre and Hervé Dumez, in *Le Libellio d’AEGIS, dossier spécial Concurrence et coopération : diversité d’approches et de contextes* [Competition and Cooperation special issue: Diverse approaches and contexts], Winter 2008-2009, volume 4, number 3, p. 14).

128. It is interesting to see the initiatives underway in France in the luxury sector: “Christian Estrosi, Industry Minister, recently called on actors in the French luxury and fashion sectors to rebuild their relationships with their sub-contractors. He promised that a charter of good conduct would be in place by the end of January 2010, linking the leading French designer brands with the companies that guarantee the label ‘Made in France’. Faced with this unprecedented move, the bosses of Dior, Hermès, LVMH, Chanel, Lanvin, Balenciaga,



**Proposal** – Authorize agreements between competitors aimed at sustainable development goals, particularly in order to move TNCs' R&D strategies in the right direction. To encourage them to take the risk of working with their competitors or partners in the same sector, they must be guaranteed a competitive advantage with the appropriate mechanisms for allocating intellectual property rights.<sup>129</sup> The levers represented by public procurement and the normalization of certain processes with regards to energy efficiency should, for example, accompany this trend.<sup>130</sup> Market mechanisms will do the rest by granting a comparative advantage to companies that have established more effective partnerships in terms of social and environmental progress.

### Proposal 32 – Promote the concept of the sustainable contract

**Context** – There are now countless contracts between private partners whose social and environmental impact affects the public interest. Forestry, for example, affects biodiversity and climate change. Similarly, contracts organizing the production and supply of manufactured goods in factories where employees

do not benefit from the protection afforded by ILO standards raise social questions within the field of public interest. Private contracts for goods and services include ESG components that can no longer be ignored, especially in the case of private-public partnerships (PPP).<sup>131</sup> Sherpa takes the view that it would be useful to develop a specific legal instrument, combining contractual freedom with respect for the aims of sustainable development. The sustainable contract would also help to “ensure that the interplay among key actors in society can never be reduced to a mere expression of power, but continuously fosters the emergence and realization of a common interest.”<sup>132</sup>

**Proposal** – Promote the concept of the sustainable contract between private partners as well as within PPPs.<sup>133</sup> The concept is defined as follows: “Any contract the purpose and forms of execution of which reconcile its economic, social and environmental components with the purpose of promoting the protection of human rights and the environment.” In practical terms,<sup>134</sup> the value of this concept would be to serve a triple role: an interpretative tool available for use by judges and arbitrators seeking to settle disputes, a decision-support tool for businesses facing situations where their

Jean-Paul Gaultier, Céline, Sonia Rykiel, Lefranc Ferrand and Agnès b are feeling alarmed, and may only commit to minimum orders.” (“Façonnières du luxe, un secteur à l’agonie” [Luxury manufacturers: a sector on its deathbed], Nicole Vulser, *Le Monde*, 13-14 December 2009, p. 11).

129. The likely dispute between competitors over who gets the intellectual property rights to co-innovations is not an insurmountable obstacle. In 2010, “two brands, Pepsi and Gourmet, a sports shoes specialist, took the advice of consultancy firm Epiphany to team up for a limited-edition version of the Gourmet UNO high-top sneaker. Nothing out of the ordinary in that, Emporio Armani and Reebok have already done the same; however, where they limited themselves to juxtaposing their names, Pepsi and Gourmet took the innovative step of combining their logos to create a special logo for the model.” (“Pepsi et Gourmet co-fusionnent leur logo” [Pepsi and Gourmet combine their logos], Florence Berthier, *Influencia*, 27 January 2010: [http://www.influencia.net/fr/archives/the-way.html?actu\\_id=638](http://www.influencia.net/fr/archives/the-way.html?actu_id=638)). This logo combination, highly rare in the marketing world and drawing on the symbolic incarnation of Pepsi, showed that it should be possible to come to an agreement over other types of intangible asset, such as patents, designs and models, and copyright.

130. The rapidly growing electric car market provides a good illustration of the current need to secure alliances. “The sector will be confronted with unprecedented financing requirements and an extremely limited outlook for financial gain.” (“La voiture électrique, un marché embryonnaire qui suscite de nouvelles alliances” [Electric Cars: an embryonic market giving rise to new alliances], Denis Fainsilber, *Les Échos*, 13 October 2009, p. 21).

131. In a recent report published on 23 October 2009, the World Bank looked at the contribution made by private operators to water distribution and treatment in developing countries (<http://www.ppiaf.org/ppiaf/sites/ppiaf.org/files/FINAL-PPPsforUrbanWaterUtilities-PhMarin.pdf>). The report estimates that approximately 7% of city dwellers in developing countries have daily access to water supplied by private operators. The suspicions that subsist between supporters of private management and their opponents justify the development of PPP that meet sustainable contract criteria. (“Les multinationales de l’eau sont concurrencées par les acteurs des pays émergents” [Water multinationals in competition with actors in emerging countries], Isabelle Rey-Lefebvre, *Le Monde*, 27 October 2009, p. 14).

132. Nicolas Meisel, *Governance, Culture and Development – A Different Perspective on Corporate Governance*, May 2004, OECD [http://books.google.fr/books?id=Z4byrGQHxBYC&pg=PP2&dq=%22Governance+Culture+and+Development+A+Different+Perspective+on+Corporate+Governance%22&hl=fr&ei=18JTfKMcit8QOc4d3uBw&sa=X&oi=book\\_result&ct=result&resnum=3&ved=0CD0Q6AEwAg#v=onepage&q&f=false](http://books.google.fr/books?id=Z4byrGQHxBYC&pg=PP2&dq=%22Governance+Culture+and+Development+A+Different+Perspective+on+Corporate+Governance%22&hl=fr&ei=18JTfKMcit8QOc4d3uBw&sa=X&oi=book_result&ct=result&resnum=3&ved=0CD0Q6AEwAg#v=onepage&q&f=false)).

133. The working group forming part of John Ruggie’s team (Special Representative of the Secretary-General on human rights and transnational corporations and other business enterprises) on the theme of Responsible Contracting identified the concept of the sustainable contract developed by Sherpa as being worthy of further consideration and officially backed its development (for further information, refer to the minutes of the June 2009 working group meeting that shows clear areas of overlap with the sustainable contract concept: <http://198.170.85.29/Report-on-Ruggie-responsible-contracting-workshop-25-26-Jun-2009.pdf>).



social and environmental responsibility is in play, and a contractual tool in its own right able to usher in new standards. As far as standards are concerned, the sustainable contract would serve to limit the excesses created by abuses of contractual freedoms committed by some operators in a position of power over their contracting partners,<sup>135</sup> as expressed in a preamble suggested by Sherpa: “Each party undertakes to act in good faith, not to misuse any of its rights and to provide the other party with any advice that might help to ensure the lasting nature of the contract.”

The sustainable contract aims to inject a dose of responsibility for the public interest into the interstices of contractual relations, an area where a legal void needs to be filled. Once the contract’s DNA has been modified in this way, the consequences of executing contracts would be anticipated as part of an on-going respect for future generations.

The terms of a sustainable contract depend on two separate parameters: one, the effects of the contract concerned on public interest considerations resulting from a quest for sustainable development and, two, the relative strength of the parties to the contract, which evokes the notion of sphere of influence.

Drawing up a sustainable contract requires a prior assessment of potential and known impacts on the environment (sustainability of resources, pollution, biodiversity, etc.) and basic rights (including social rights and those set out in the International Declaration of Human Rights) that execution of the projected contract will entail. This assessment will make it possible to identify public interest obligations to be included in the contract’s terms. This initial stage



Olav Westphalen, *Drums Série Coopérative de la Fertilité [Drums Cooperative Fertility Series]*, 2010 (Courtesy Galerie G.- P. et N. Vallois, Paris and Milliken Gallery, Stockholm)

requires the use of impact studies, which are already widely carried out and lie at the heart of the debate about CSR. We note that the requirement to act preventively has yet to reach maturity in contractual terms. The sustainable contract aims to provide mechanisms with the highest possible levels of prevention. Aside from the technical aspects of any particular contract and the activities it is intended to structure, the sustainable contract’s primary aim is to prevent disputes and damage whilst equitably dividing up the responsibilities of both parties. Furthermore, parties to a sustainable contract become parties to the main contract or, at least, parties to a chain of contracts. This is one of the fundamental features of the productive approach to contracts our proposal seeks to highlight.

134. Pierre Calame, in his book *Essai sur l’oeconomie* [Essay on the Oeconomy] (ed. Charles Léopold Mayer, 2009, pp. 78 and 441 et seq.) identifies the sustainable contract concept as being worthy of further reflection. Similarly, it is interesting to note the ambitions expressed by France’s Industry Minister Christian Estrosi: “Goodbye to so-called professional branches, hello to sectors (automobile, aeronautics, pharmaceutical, etc.) organized around major groups that will deal with SMEs and sub-contractors in the manner of the Japanese giants” (“Dur retour à l’industrie” [Hard to get manufacturing back], Hervé Nathan, Marianne, 7 to 13 November 2009, p. 48).

135. France’s Commercial Code recently introduced (via the Economy Modernisation Act [LME] of 4 August 2008, which modifies article L. 442-6) the notion of a “significant imbalance between commercial partners”. This is a notion inspired by consumer law and the Scrivener Act of 10 January 1978 on unfair conditions; “significant imbalance” replaces the concept of “unfair economic dependency” contained in the New Economic Regulations

Act of 15 May 2001. The previous legislation aimed to punish abuses of dependent relationships where the dependent partner was forced to accept unjustifiable commercial arrangements. With the removal of the requirement to be able to permanently justify differential pricing, and introduction of the possibility of negotiating specific sales conditions, the article was deleted and replaced by the prohibition on using such a differentiation mechanism to create a significant imbalance between the rights and obligations of the parties. This paves the way for civil jurisdictions to be able to petition the Trade Practices Commission for an opinion, and should—in theory—lead to the creation of jurisprudence concerning “significant imbalance” (see the interview with Jean-Paul Charité, deputy for the Loiret and rapporteur for the LME act (<http://entoutefranchise.free.fr/pdf/CHARIE/Negociations%20fournisseurs%20distributeurs%20JP%20CHARIE.pdf>) as well as his legislative report of 22 May 2008 carried out for the Commission for Economic Affairs, the Environment and Territories: <http://www.assemblee-nationale.fr/13/rapports/r0908.asp>).

The division between parties to the contract of obligations and their correlative responsibilities demands an analysis of their relative strengths on the one hand, and of their respective influence on public interest considerations on the other. This analysis is designed to ensure that respect for the obligations identified is the responsibility of the party most able to assume the task. It is at this stage that the sustainable contract concept represents a radical departure from the current position, as it requires private operators to meet obligations that they have previously avoided, or that were dealt with on a strictly voluntary basis. The idea is to moderate the excessive imbalances regularly observed between an ordering party and its contractor, such as unequal expertise or economic dependency, which in turn often lead to unsuitable contract conditions that undermine the sustainability of the contract. Above all, the aim is to ensure that the contract terms address the way that social and environmental impacts are dealt with, thereby recreating a link between the legitimate pursuit of private interests and their negative externalities.

Setting up this tool requires the emergence of an international legal doctrine able to extract a coherent synthesis from a range of disparate norms. *Amicus curiae* briefs within the dispute arbitration process would be the ideal terrain for such a doctrine. We believe that a powerful lever for such a synthesis lies in the fundamental standards derived from *lex mercatoria* (good faith, legitimate expectation, constructive knowledge, etc.); as general legal principles and principles of international customary law, they offer the advantage of a scope suited to the supranational nature of TNCs.

The sustainable contract would only be relevant if it succeeded in encompassing the complex legal environment of CSR. As shown above, this environment lies at the crossroads of the diverse legal instruments

that comprise the DNA of the sustainable contract as we define it. We could say that the general framework is provided by the concept of sustainable development and the UN's Millennium Development Goals. Other more specific legal instruments would also be needed, including:

- contract law (for example, via PPP contracts, the notion of a unilateral undertaking or of reasonable management);
- consumer law (consumer protection provisions contain many notions useful in determining the degree of vulnerability of a party to a contract);
- competition law (especially the notions of abuse of rights, economic dependency and a group of companies);
- investment law (particularly for the trend towards internal arbitration<sup>136</sup> that, although still marginal, is starting to open up to public interest considerations);
- company law (via obligations to submit reports on social and environmental impacts, the notions of the group of companies, parent company, limited liability, etc.);
- tax law (transfer pricing, management fees that impact the tax revenue of the host country);
- accounting law (which, aside from the development of accounting practices such as provisions for non-financial risks, also provides tools such as consolidation to identify the structure of groups of companies);
- environmental law (especially the way that it has enshrined the use of preliminary impact studies and the precautionary and polluter pays principles).

This contractual mechanism binding together a TNC and its stakeholders would provide the latter with a role in formulating and monitoring investment projects, reduce the effect of clauses that exonerate or limit responsibility, and influence the setting of fair prices.<sup>137</sup>

136. One example is the CIRDI *Aguas Argentinas v. Argentina* lawsuit's recognition of the specific issues affecting the water sector. On 12 February 2007, the arbitrators agreed to receive an *amicus curiae* brief from five NGOs, in the belief that they were dealing with "complex public and international law questions, including human rights considerations", CIRDI, no. ARB/03/19, Order in Response to a Petition by Five Non-governmental Organizations for Permission to Make an *Amicus Curiae* Submission, 12 February 2007, para.18.

137. Amongst the numerous aberrations relating to non-sustainable pricing, it is interesting to note what Liao Yuan, as the head of international trade at the Changrun Garment Company in China, which exports jeans to Europe and the USA, has to say: "The buyers are getting more and more tough in bargaining for lower prices, especially American buyers. They offer \$2.85 per pair of jeans for a package of a dozen, when the reasonable price is \$7." ("In Slump, China Solidifies its Lead in Global Trade", David Barboza, *New York Times*, in *Le Monde*, 24 October 2009, p. 5).

### Proposal 33 – Encourage investors and financial actors to choose socially responsible investments

**Context** – The crisis that hit the financial system demonstrated that the banks, which serve the public interest in their task of guaranteeing the fluidity of liquid assets in the economy, can go astray when they fail to consider the consequences of their actions.<sup>138</sup> The attitude consisting of constantly repeating “Human rights and the environment are nothing to do with us, don’t expect us to do anything” is no longer acceptable. The emergence of socially responsible investment (SRI)<sup>139</sup> reflects a change in the financial sector, although it remains marginal.<sup>140</sup> International negotiations seeking to learn the lessons of the financial crisis, particularly within the G20, show that recognition of social and environmental impact has not yet reached the point of being included in the criteria for remunerating banking sector employees, particularly traders.<sup>141</sup>



Chris Jordan, *E-Bank, Tacoma, 2004* (www.chrisjordan.com ©)

**Proposal** – Encourage financial investors to always opt for projects that conform to sustainable development goals.<sup>142</sup> They could thus be asked to provide targets with precise figures in this field, linked to each investment project and with a customized schedule. A bank could also be called upon to guarantee the payment of indemnities due to victims of harm when it has been caused by a project it has financed.

138. A failure that Lord Adair Turner (chairman of the Financial Services Authority), among others, described in the following terms: “We long believed that the more liquid assets there were, the better. However, beyond a certain point, more liquid assets are not necessarily desirable or socially useful. We need to let go of an overly simplistic school of thought and regulation, the school of the Washington Consensus, Alan Greenspan’s doctrine, efficient markets, and so on, which has been shattered by reality.” (“Nous avons oublié les règles de base du métier bancaire [“We have forgotten the ground rules of the banking profession], interview by Nicolas Barré and Nicolas Madelaine, *Les Échos*, 13 October 2009, p. 31).

139. It is interesting to note Warren Buffet’s recent investment in the American railway sector. The businessman bought an entire railway company, Burlington Northern Santa Fe, for \$26 billion, his biggest purchase ever. He explained that “the future prosperity of our country depends on the existence of an efficient railway system in good condition” and that “BNSF is extraordinarily ecological” (“Warren Buffet investit massivement sur l’essor du rail américain” [Warren Buffet invests hugely in the future of American rail], Sylvain Cypel, *Le Monde*, 5 November 2009, p. 14).

141. Georges Pauget, Managing Director of Crédit agricole SA, said in September 2009: “I am only sorry that the G20, in seeming to extend the application of remuneration regulations

to a large proportion of bank employees, is only taking financial criteria into account and not criteria such as management, customer service or social and environmental impact.” (interview by Laura Berny, *Le Monde*, 28 September 2009, p. 10).

142. The Grenelle 2 bill adopted on 11 May 2010 includes a measure obtained by Sherpa, which seeks to require management companies to take account of ESG criteria in their investment policies. For more details on the issues affecting these discussions, see Yann Queinnec’s January 2010 interview on the Novethic website. ([http://www.novethic.fr/novethic/finance/gouvernance/les\\_informations\\_extra\\_financieres\\_sont\\_determinantes/122945.jsp](http://www.novethic.fr/novethic/finance/gouvernance/les_informations_extra_financieres_sont_determinantes/122945.jsp)). It is worth noting that the Forum for Responsible Investment (FIR) encouraged the adoption of this measure. The FIR is a multipartite not-for-profit organization founded in 2001 with the goal of promoting SRI among political, social and economic stakeholders and, of course, financial investors. The organization is made up of stakeholders from the entire French SRI value chain: investors, management companies, brokers, non-financial rating agencies, investment advisors, market organizations, but also academics, trade union representatives and committed professionals. In late 2009, SRI open-end funds managed by its members amounted to 24 billion euros, accounting for around 70% of SRI funds sold nationally.



### Proposal 34 – Convince law practitioners to operate in favour of sustainable development

**Context** – The key role played by legal and tax advisors in corporate decision-making processes needs to be examined.<sup>143</sup> Their advice can have major practical consequences, particularly in terms of employment, environmental protection and the tax system,<sup>144</sup> which gives them a particular burden of responsibility. However, various insurance mechanisms encourage these professionals to offer companies extremely offensive, not to say illegal, advice in return for huge fees (along the lines of, “Don’t worry, follow my advice and if you’re caught out by the administration, my insurance will pay the amount claimed for you.”). Although the insurance sector is becoming aware of its influence on sustainable development concerns, the measures announced so far do not expressly address this type of practice.<sup>145</sup>

**Proposal** – Draw up an international charter for legal and tax advisors committing the legal professions to systematically take account of the social and environmental impact of their activities. Ban insurance policies that cover tax and social penalties relating to the implementation of mechanisms corresponding to abuse of rights.

## The necessary creation of preventative tools

### Proposal 35 – Expertise – Create an international task force for states and authorities to ensure well-balanced international negotiations

**Context** – The balances of power need to be adjusted so as to give priority to public interest, particularly that of the poorest states and their bilateral and multilateral relations with international investors and more powerful states (relations with PPP-type investors, WTO negotiations, the negotiation of bilateral investment treaties, etc.). This adjustment needs to go hand in hand with tools to strengthen the rule of law (effective legislation, due process). States and governments also need access to the skills and expertise enabling them to negotiate on an equal basis with economic operators (conditions for subsidies, mechanisms for monitoring agreements, negotiation of major public procurement contracts, etc.).<sup>146</sup>

**Proposal** – Create an independent international task force, to be implemented by the international community. The task force would enable the states and governments with the least resources to understand and ensure respect for their rights by making them better equipped to negotiate with states and investors. The UN could legitimately be the host institution for such a task force, funding it with contributions from member states and providing the guarantee of the required independence and competence.

Its operating mechanisms would respect the strictest norms in terms of expertise (impartiality, absence of conflict of interest, transparent targets and results). The board would be composed of representatives of the major civil society organizations (consumer associations, environmental protection and human rights organizations, etc.) as well as state representatives appointed after being proposed by the secretary general and validated by the general assembly.

143. In January 2009, John Ruggie launched a project for consulting leading law firms from around the world on the links between corporate law and human rights (see the 28 January 2009 press release: <http://www.unhchr.ch/hurricane/hurricane.nsf/07EA020BFC9AD5D6AC125754C00585115?opendocument>). During an interview given on 25 November 2009, he admitted: “Of the 19 firms, none of them had ever before focused on human rights issues.”

144. From this standpoint, the practice of transfer pricing is very illuminating, and the focus of close attention since the financial crisis and the fight against tax havens. This mechanism allows a TNC to use purchase and sales operations of intra-group products or services to localize taxable profits in countries with low taxes and minimize its profits in countries with heavy taxes. Pascal Saint-Amans, tax expert at the OECD and promoted to the head of the secretariat of the Global Forum on Transparency and Exchange of Information for Tax Purposes, feels that putting a figure on tax fraud is impossible, in view of the impenetrability of prices practised by companies. However, he does point out that 60% of world trade is “intra-group”. Daniel Lebégue, president of Transparency International France, says “It seems curious that in France the effective tax rate paid by big companies on their profits is 10% whereas

SMEs pay 30%” (“Ces sociétés qui s’évadent vers les paradis fiscaux” [The companies that escape to tax havens], Anne Michel, *Le Monde*, 28 January 2010, p. 13).

145. For example, on 20 January 2009 the French Insurance Association adopted a sustainable development charter, whose article III-3 stipulates the need to: “Encourage the identification and assessment of links between environmental, social and governance criteria and companies’ and states’ long-term performance”: [http://www.associationfrancaisedelassurance.fr/webassf/assf/assf.nsf/html/l-association-francaise-de-l-assurance-se-dote-d-une-charte-de-developpement-durable/\\$file/20090120-charteDD.pdf](http://www.associationfrancaisedelassurance.fr/webassf/assf/assf.nsf/html/l-association-francaise-de-l-assurance-se-dote-d-une-charte-de-developpement-durable/$file/20090120-charteDD.pdf).

146. This proposal overlaps with Pierre Calame’s ideas (Proposal 9) expressed in his Proposal Paper *For a Legitimate, Efficient, and Democratic Global Governance*, Pierre Calame (dir.), Éditions Charles Léopold Mayer, Paris, 2003. A similar proposal was also suggested by the CIDSE (Coopération Internationale pour le Développement et la Solidarité) in 2007 and supported by Sherpa, which put it to John Ruggie, UN Special Representative of the Secretary-General on human rights and transnational corporations and other business enterprises.





Chris Jordan, *Midway: Message from the Gyre series*, 2009  
([www.chrisjordan.com](http://www.chrisjordan.com) ©)

The task force would be made up of jurists, economists and the whole range of experts covering the required know-how for the different operations. The list of experts would be validated by board members after being proposed by international civil society organizations. If an international economic and social commission ever emerges, it would be the ideal body to fulfil this task.

### **Proposal 36 – Monitoring – Create an international centre monitoring corporate social and environmental performance**

**Context** – Although no efficient mechanisms for national and regional monitoring of corporate social and environmental performance currently exist, the lack is even more significant at the international level. Since sustainable development concerns do not recognize national borders, the international community needs to equip itself with a tool of this kind. It is interesting to note the development of websites providing information on legal proceedings taken against TNCs.<sup>147</sup>

**Proposal** – Create an international monitoring centre centralizing information from national centres monitoring corporate social and environmental performance (cf. Proposal 14). In addition to adequate resources,

the institution would also benefit from the support of the skills offered by specialist consultancies, which should make experienced staff available.

### **Proposal 37 – Whistleblowing – Adopt an international status for whistleblowers to protect them from pressure**

**Context** – The term “whistleblower” designates a person, or group of people, who have discovered information about TNC or state activities they consider as threatening to people, society and the environment, and wish to inform the official authorities, NGOs and media, sometimes against the wishes of their hierarchy.

Whistleblowers differ from informers in that they are not seeking to accuse one particular person. They are vital links in the prevention of social and environmental risks. However, in the absence of an appropriate protective status, these people may be forced to remain silent under the threat of professional sanctions, among others. A number of states (the United Kingdom, USA, New Zealand, Australia and South Africa) have adopted specific tools, and employment law, in principle, protects employees against sanctions and unlawful dismissals. But experience shows that these mechanisms are inadequate, particularly in the face of powerful TNCs and their major arsenal of instruments for neutralizing revelations by scientists or journalists on certain practices that inflict social or environmental harm.

**Proposal** – Create an international status for protecting whistleblowers and designate an ad hoc institution in each country to apply it. It will need to have the power to coerce companies or institutions that take measures to sideline whistleblowers, as well as the means to ensure that whistleblowers in difficulty can carry on their work.

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147. See, among others, the website <http://www.business-humanrights.org/>.



Yann Lestrat, *Sans titre 15 (Et in Arcadia ego) [No title 15]*, 2008 - Image: Marc Loyon - *Intervention in situ* ([www.yannlestrat.com](http://www.yannlestrat.com))

## Protecting and informing consumers

### Proposal 38 – Enforce a general duty for companies to protect consumers of their products and services

**Context** – The guarantee applicable to faulty products is a widely used measure (as provided for, for example, by the European directive of 25 July 1985, and adopted by France thirteen years later) covered by a special regime pertaining to producer responsibility: the civil responsibility of producers can be engaged by the consumer even if there is no direct link between them; its inclusion in public policy doctrine, which no agreement can depart from, lapses after ten years. This mechanism could be extended to cover respect for basic rights and the environment.

**Proposal** – Create a general duty to protect, applicable to producers of goods and services likely to have an impact on basic rights and the environment. The notion of protection is used in the broad sense: the protection of vulnerability and elimination of social and environmental harm. The duty to protect would go hand in hand with an obligation to ensure social and environmental traceability, modelled on the traceability applied to the food safety field. Consumers, regardless of location, could thus take action against a producer or supplier whose products and services have negative social and environmental impacts.

### Proposal 39 – Introduce an international obligation to label products and services with social and environmental performance figures

**Context** – According to regular polls, almost three out of four people in France are willing to choose a product or service that guarantees production conditions respectful of the environment and human rights, even if it is more expensive. However, only a small percentage of them follow through by actually buying such products. Aside from the price aspect, an important factor during a period when consumers' buying power is undergoing a crisis, consumers cannot currently distinguish one ethical product or service from another due a lack of reliable and comprehensible information. Although certain TNCs,<sup>148</sup> standardization bodies (ISO 14024)<sup>149</sup> and governments<sup>150</sup> are launching initiatives in this area, they primarily target environmental parameters (analysis of life cycle, carbon footprint, energy performance levels, etc.). In providing more detailed information, these initiatives are another step forward on the path opened up

148. For example, French retail corporation Casino set up a carbon index for its own-brand products in June 2008. Over 3,000 food products in the Casino range are concerned (for example: yoghurt, fizzy drinks, pasta sauces, cereals, etc.) representing around 1.5 million units sold annually. See also the Afnor site. Afnor's activities in this field include extending the process initiated by the *Grenelle de l'environnement*: <http://affichage-environnemental.afnor.org/>.

149. See the ISO press release of 31 May 2006 <http://www.iso.org/iso/fr/pressrelease.htm?refid=Ref1012>.

150. The *Grenelle de l'environnement* gave France the opportunity to launch a major initiative. A pilot project concerning environmental data on everyday consumer products is due to begin on 1 January 2011. The UK has adopted the PAS2050 standard, France has instituted the Afnor BP X 30-323 reference system and similar initiatives exist in countries including Germany, Belgium and Japan.

151. The European ecolabel relating to goods and services has been in force since 20 February 2010 and originated in regulation (EC) no. 66/2010 25 November 2009. <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2010:027:0001:0019:FR:PDF>.





non-patentability, confirmed in 2005 by the European Union to avoid slowing down software industry growth, we can legitimately question the relevance of rights granted for innovations that do not provide any benefits in terms of sustainable development. The question needs to be addressed, not only to direct corporate action towards a sustainable economy, but also to ensure a competitive advantage to companies already committed to a sustainable approach.<sup>154</sup>

**Proposal** – Measure the innovative character of inventions in terms of sustainable development. Only innovations providing a social or environmental benefit would be protected,<sup>155</sup> others would be subject to limited protection in terms of duration and geographic scope. For manufactured products in general, granting a monopoly could be subject to how long products can be used, based on conclusive product life cycle analysis. This measurement would encourage companies to pool their R&D activities relating to new technologies and favour the adoption of new standards.

## Changes to national and international authorities in charge of settling litigation

### Proposal 41 – Open up international arbitration authorities to stakeholders in state/company litigation

**Context** – As we have seen (cf. Proposal 30), international arbitration is characterized by the strategic importance of the lawsuits submitted to the highest legal authorities (particularly the ICC in Paris and

ICSID in Washington) and the lack of transparency in proceedings that take place almost totally in camera. When public policy doctrine concerns are at stake, this lack of transparency becomes a dangerous barrier to the good administration of justice, particularly in terms of social acceptance of sentences. Although the leading international arbitration institutions (ICSID and ICC) seem to have become aware of these difficulties over the last few years, this awareness has yet to take concrete form. And in terms of *ad hoc* arbitration proceedings, the problem remains entirely unresolved.<sup>156</sup>

**Proposal** – Improve the transparency of arbitration mechanisms by guaranteeing stakeholders in litigation between a company and a state access to the legal authorities, so they can put forward their viewpoints and arguments. On condition that these stakeholders provide relevant elements that throw light on the matter for the arbitrators, the latter would be obliged to receive such elements, particularly by means of *amicus curiae* submissions, take them into account in their decisions, and explain the reasons for rejecting them where relevant.<sup>157</sup>

### Proposal 42 – Convert National Contact Points into real arbitration structures

**Context** – In 1976, the OECD set up guidelines for multinational corporations. The list of ten recommendations was extended in the 2000s with a highly original mediation procedure known as “specific circumstances”. Each OECD member state has to create a National Contact Point (NCP) in charge of mediating and putting an end to litigation between companies and people or organizations claiming to be victims of harm caused by the companies’ acti-

154. Illustration: “In 2007, Philips committed to green products accounting for 30% of its sales figures in 2030. A goal that it should reach well before the deadline, as the group has only announced ecological innovations since taking the decision.” (“Vers un monde tout vert?” [Towards an entirely green world?], Aurélie Charpentier, Marketing Magazine, September 2009).

155. According to the terms of Article 7 of the WTO’s TRIPS Agreement (trade-related aspects of intellectual property rights) that came into force on 1 January 1995, the search for social well-being is included as one of the goals of the protection and enforcement of intellectual property rights, which: “should contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations. duties.” ([http://www.wto.org/english/docs\\_e/legal\\_e/27-trips\\_03\\_e.htm](http://www.wto.org/english/docs_e/legal_e/27-trips_03_e.htm))

156. See discussions of this subject in the recent study by Lorenzo Cotula of the International Institute for Environment and Development (*Getting a Better Deal – How to Make Contracts for Fairer and More Sustainable Natural Resource Investments*, Natural Resources Issues, no. 20, IIED London, 2010, pp. 76 et seq. – <http://www.iied.org/pubs/pdfs/17507IIED.pdf>).

157. We recommend reading the handbook written by Howard Mann, Konrad von Moltke, Luke Eric Peterson and Aaron Cosbey, *Model International Agreement on Investment for Sustainable Development – Negotiators’ Handbook*. (April 2005, revised and translated in 2006: [http://www.iisd.org/pdf/2005/investment\\_model\\_int\\_handbook.pdf](http://www.iisd.org/pdf/2005/investment_model_int_handbook.pdf)).



vities (in terms of employment, environmental protection and corruption law, etc.) The NCPs' mediating role, however, has been greatly impeded by the lack of effectiveness and independence.<sup>158</sup> Nonetheless, the underpinnings of this mechanism are key to harmonizing rules for interpreting notions as important as “sphere of influence” in the complex context of relations between parent companies and subsidiaries or supply chains.

**Proposal** – Endow NCPs with the status of a real arbitrator, whose decisions would be binding on litigants. The obligations of such a status in terms of expertise, independence and executory force would require OECD member states to implement all the human and financial resources needed to ensure that they function correctly.<sup>159</sup>



Don Jacot, *Rush hour*, 2007 (Courtesy Galerie Rive gauche, Paris)

**Proposal 43 – Create a mechanism for international judicial cooperation between national jurisdictions specializing in economic and financial affairs**

**Context** – National jurisdictions are only just beginning to take into account the international dimension of certain lawsuits involving TNCs. The change in law resulting from trade globalization is a slow and complex process that should be speeded up by using better weapons to combat the excesses of globalization. In this respect, establishing an international jurisdiction that would be dedicated to punishing violations of human rights and the environment committed by TNCs (similar to the International Criminal Court for certain state and individual crimes) is not actually such a good idea.<sup>160</sup> An approach

that is more respectful of state sovereignty and gives national jurisdictions a strategic role would certainly be more realistic and promising. The challenge lies in establishing constructive relationships between global and national levels.

**Proposal** – Set up a mechanism for international judicial cooperation for each national jurisdiction in charge of economic and financial cases that have an international dimension. The mechanism would consist of bringing in judges from corresponding jurisdictions in other countries. It would serve to harmonize jurisprudence so as to guarantee due process, enabling national judges to be educated in international culture as part of an effective judicial movement to punish and prevent globalization excesses.

158. The OECD Watch coalition, whose stakeholders include Sherpa, published a document in September 2007 that provides an inventory of places where the National Contact Points are seen not to function correctly, and offers several proposals for improving the situation: [http://oecdwatch.org/publications-fr/Publication\\_2223-fr/view](http://oecdwatch.org/publications-fr/Publication_2223-fr/view).

159. To look deeper into the subject, see our study *The OECD Guidelines for multinational enterprises, an evolving legal status*, Yann Queinnec, 2007, postface by Mireille Delmas-Marty, <http://www.commdev.org/content/document/detail/697/> and [http://oecdwatch.org/publications-en/Publication\\_3064](http://oecdwatch.org/publications-en/Publication_3064).

160. See critical developments of this subject in the recent work published by William Bourdon (*Face aux crimes du marché – Quelles armes juridiques pour les citoyens?* [What legal recourse do citizens of the world have against market crimes?], William Bourdon, La Découverte, 2010, chap. 5).

## Financing development

The proposals that follow seek to tackle the disastrous effects on southern countries' public finances caused by the lack of transparency in international accounting standards, which encourage the use of tax havens, and absence of efficient mechanisms for recovering "ill gotten gains", the fruit of embezzlement of public funds. These two great flaws currently prevent many states from managing their resources sustainably and represent one of the most spectacular examples of TNCs' social and environmental impacts.

### Proposal 44 – Require TNCs to adopt an accounting system that reflects intra-group flows on a country-by-country basis

**Context** – Current accounting standards do not require detailed transactions between a group's subsidiaries to be published. Profits and results are consolidated each year at the parent company level, which means that the actual profits made by each TNC in each country where it operates and the taxes it pays are unknown. When they publish their accounts, TNCs can group their profits together as a regional figure, allowing them to cover up the delocalization of their profits in their least-heavily taxed subsidiaries thanks to the practice of transfer pricing, highly convenient for intra-group transactions. These transactions, which the OECD tells us now account for 60% of international trade, are consequently one of the main sources of tax fraud: along with falsified invoicing, they are estimated to cost southern countries 125 billion euros every year.

**Proposal** – Include a requirement for country-by-country reporting in international accounting standards, as Sherpa and other organizations recommend as part of the civil society initiative, *Paradis fiscaux et judiciaires* [Tax and Legal Havens], and the Hold-up international campaign for a Europe that regulates its multinationals.<sup>161</sup> Sector-specific initiatives already exist, including EITI (Extractive Industries Transparency Initiative), but they are dependent on companies' voluntary participation. A reform of accounting standards at the international level is vital, since the gradual introduction of this requirement solely at the level of national legislations is difficult to imagine due to the distortion of competition it would produce. The European Union, as the first market to apply IASB (International Accounting Standards Board) standards, could be the driving force behind a project of this kind. In September 2008, the European Parliament recommended that the European Commission "consult the IASB about including the country-by-country reporting requirement in international accounting standards for multinationals in every sector."

### Proposal 45 – Abolish the anonymity of tax haven beneficiaries

**Context** – In their fight against tax fraud and money laundering, states come up against both the slow rhythm of cooperation procedures between administrations, and the lack of transparency in front companies that are set up at various points of the circuits taken by funds, blurring the picture so that the actual profits remain unknown. There are around 2.4 million front companies of this kind in seventy-two tax havens around the world. If the country-by-country reporting recommended in the previous proposal is to be effective, the financial flows transiting via these companies need to be more visible.

**Proposal** – Create a European register of economic legal entities and trusts created on European territory, which would shed light on their actual beneficiaries and owners. Proposed as part of the *Paradis fiscaux et judiciaires* platform that Sherpa contributes to, a measure of this kind should of course be then extended to the rest of the world, but it would be faster and more realistic to start at the EU level. The information in the register would be as follows: name, corporate name, location, profession and address of protagonists involved. The people included in the register would be both individuals exercising a business or artistic activity professionally, and businesses, civil society companies and any other form of economic legal entity, including trust companies. The register would be informed of all events affecting companies (transfer, cessation, increase or drop in capital, etc.), as well as any judgment concerning companies and their representatives. This information should be published on a permanent basis, be accessible by simple request to the authorities concerned, and be managed and checked by the register, which would provide extracts on demand.

### Proposal 46 – Create an international bank to help restore "ill gotten gains"

**Context** – During the 2000s, several agreements were drawn up between a number of northern states (mainly Switzerland) and southern states in order to restore financial assets misappropriated by their corrupt former leaders. But all too often the justice meted out was just a façade, with the act of restoration producing injustice to the real victims, taxpayers in the countries concerned.<sup>162</sup> In April 2007, the World Bank did launch a Stolen Asset Recovery Initiative. And in September of the same year, a World Bank and UN Office document against drugs and crime (ONUDD) pointed out that financial crimes were the cause of African countries losing 25% of their GDP every year, amounting to \$148 billion. However, in

spite of these initiatives and increasing awareness of the issue, it is undeniable that those monopolizing “ill gotten gains” still tend to go unpunished.

**Proposal** – Obtain adoption by the UN and its member states of an international agreement instituting a universal mechanism for recovering and restoring assets stolen by corrupt political leaders. This agreement would seek to create an *ad hoc* international bank with two central missions: a) hold all funds acquired fraudulently, apprehended abroad and claimed by certain states; b) in line with the situation of these debtor states, ensure that the funds are actually made available to the populations concerned. The bank would be placed under the control of a committee composed of representatives of the major international NGOs with expertise in this field and groups representing the citizens of the countries concerned.



Zambé, *Sans titre [No title]*, 2004

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161. See the campaign website: <http://www.ccf.asso.fr/hold-up/?PHPSESSID=801f6e979b6861f1f34d11d6637a60c9>.

162. See the critical ideas on this subject in William Bourdon's book (*Face aux crimes du marché – Quelles armes juridiques pour les citoyens?* [What legal recourse do citizens of the world have against market crimes?], William Bourdon, La Découverte, 2010, chap. 4).



# CONCLUSION

**A**s this Proposal Paper goes to print, events are speeding up and overturning many fixed beliefs. The belief that states are protected from bankruptcy by the fragile shield of their sovereignty has been toppled by speculators. Belief in the market's invisible hand has been restored to the position its creators say it should never have left. As for rating agencies, their grading systems continue to shore up investors' shortsightedness within a permanent conflict of interests. The successive failures of the public and private governance systems tasked with organizing the balance between supply and demand from citizens and consumers require that these systems be rethought or reformed to reflect sustainable development issues.

In the same way that breakaway technologies are needed to meet the challenge of climate change and protecting ecosystems, governance issues also call for breakaway ideas.

## What have we learnt from recent events?

The rescue plan drawn up over a weekend in May 2010 by European Union states under pressure of the financial markets illustrates the feasibility of radical change, made possible in a crisis context. The resulting departure from the no bail out principle, which forbids forcing one state to help out another whose public accounts cause it to fear bankruptcy, is the sign of a new approach to the duty of solidarity between states in difficulty. And when we see Germany accepting this infringement of a principle included, maybe wrongly, in the Treaty of Lisbon, we can allow ourselves an analogy. If this approach is possible between states, why not accept the same principle of solidarity between a parent company and its subsidiaries, even if it means counteracting the legal principle of autonomy that has been discussed at length in this paper?

Another example is the legal action taken on 16 April 2010 by the Securities and Exchange Commission (SEC – regulator of American financial markets) against Goldman Sachs; although it had an undeniably political dimension, in accompanying the financial reform project presented to Congress, and ended in a settlement, the action was still a first for the USA. Let us hope that the same wind of change blows over France and Europe.

Even though these bursts of reforming fervour clearly have their limitations, they also point to the emergence of a positive political context that has no qualms in overturning taboos. Just a few weeks ago, it was impossible to imagine all these events. And although we do not expect the discussions and texts currently being debated to provide solutions that really address the problems, we should at least make the most of the situation.





Dorothy-Shoes, S'asseoir, c'est mourir un peu [To sit down is to die a little], 2008 (© Dorothy-Shoes - [www.dorothy-shoes.com](http://www.dorothy-shoes.com))

We should not, however, allow the financial crisis context to lead us off course. The issue of ethics in the financial sector raises more questions than it answers, as the main parties involved constantly repeat. What role is there for financial actors tasked with irrigating the economy so that it produces wealth? Will they continue to behave like swindlers of an economic system that is seeking a fresh start somewhere between the pillars of sustainable development, on the margins of morality? Should we remind them that ethics are perfectly compatible with the utilitarian vision of human behaviour they incarnate so wonderfully, insofar as ethics serve everyone's interests, including swindlers? Are they capable of understanding? We shall soon see the effects of an article adopted by the French parliament in May 2010 as part of the Grenelle de l'environnement. Supported by Sherpa, an amendment to the Monetary and Financial Code requires management companies to include in their annual report the mechanisms used to take account of social, environmental and governance criteria in their investment policies, and if they fail to do so, to explain why.

The climate is also favourable to tackling subjects other than regulating the financial system. The challenges posed by demographics, climate change, access to water and, more broadly, the enjoyment of the most basic rights represent issues where the role played by companies needs to be addressed by states. In terms of the food market, Olivier de Schutter, Special Rapporteur on the Right to Food, said exactly that in his December 2009 report: "[...] concentration in the food production and distribution chains has been significantly increasing over the past years. The resulting market structure gives buyers considerable bargaining strength over their suppliers, with potentially severe implications for the welfare both of producers and consumers. Current measures adopted to encourage companies to act responsibly are unable to tackle this structural dimension." It is primarily due to this concentration in the food production and distribution chains that in July 2009, one year after the bubble burst in the raw materials markets, prices were higher in certain developing countries than a year earlier.

The interests that may be shaken up by some of the proposals outlined in this paper are powerful. Although they are factors of inertia, they are also waiting for a sign, which could come either in the form of "Business as usual" or "Let's work together to invent a new economy." We cannot accept the status quo. Unequal access to wealth, learning, food security and water are some of the many issues that transnational corporations impact strategically.

We trust in the advent of a new generation of corporate leaders who know how to reconcile economic, social and environmental performance. The new generation expects its elders to show proof of far-sightedness and a sense of responsibility that is taking its time to emerge. It is up to civil society and states to bring it to the surface by means of constructive proposals. Such is the aim of this Proposal Paper.



# Regulating transnational companies

## 46 proposals

“This Proposal Paper, modest yet ambitious, realistic and idealistic, has been produced for use by anybody who is concerned by the search for answers to the flagrant problems revealed, aggravated and at times created by the globalized market. It offers innovative answers that should enrich the debate, as well as inciting citizens, businesses and the state to get involved.”

Mireille DELMAS-MARTY

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