

General introduction

“All for one and one for all”¹

SECTION 1: REVIEW OF QUESTIONS

§ 1. Time for Philosophy

1. Philosophical questions: man, nature and State. A special tribute should be paid at this point to philosophers. Relations between man and nature, and indeed the role of the State, have long provided them with food for thought, and today they continue to make their contribution to debate in the community, often in intentionally polemic fashion. For legal scholars, this can provide the perspective and distance they need as they address the tireless workings of the legislative machinery. In these early years of the twenty-first century, ecology has provided philosophy and the human and social sciences with a far-from-negligible field of study. Although current debate between philosophers is lively² and sometimes makes understanding more difficult, if anything, it can still enlighten legal scholars in their critical approach.

The awareness of the need to protect nature has a variety of origins and its roots are deep. It reveals traces of a sort of intellectual “Romanticism”³ inspired to some extent by certain studies⁴ in the English-speaking world. The inclusion of the human factor, the notion that ecological damage must be remediated, and the need for some form of solidarity

¹ A. Dumas, *Les Trois Mousquetaires* (ed.), Baudry, 1st edn 1844; see also D. Zimmermann, *Alexandre Dumas, Le Grand*, Biography, Phébus, 2002, spec. p. 508 et seq.

² Cf. *inter alia* the debate elicited by the publication of the book by D. Bourg, *Pour une 6ème République écologique*, Odile Jacob, 2011; C. Larère and R. Larère, *Du bon usage de la nature, Pour une philosophie de l’environnement*, Champs Essais, Aubier, Flammarion 1997.

³ Proudhon, Fourier and Saint-Simon for romantic socialism.

⁴ Cf. *inter alia* the “classic” by C. Stone, “Should trees have standings, Toward legal rights for natural objects”, *Southern California Law Review*, 1972, Vol. 45(2).

(non-contractual in nature, although the general idea is akin to that of contractual solidarity in its open conception of society and stakeholder relations) have become a focus for business law. The relationship between man and nature has of course evolved through the course of the nineteenth and twentieth centuries, shifting gradually from the idea that man is entitled to make use of everything nature has to offer in the most absolute manner,⁵ to the need to take account of the world's resources, especially in the second half of the twentieth century. This less "de-natured" nature⁶ has become the focus of debate and a key objective for legislative policy, one that environmental law has been seeking to achieve for almost 40 years now. Protecting nature in a way that also protects mankind⁷ would appear to be a middle way that is well suited to the requirements of businesses, although such an approach does raise the issue of the finite nature of the world's resources, according to one school of thought⁸ which advocates "industrial ecology". The issue is a political one, however, and the ecological ambiguity⁹ that is the source of so many utopias, programmes and specific approaches¹⁰ must be dispelled, although the prevailing idea remains the quest for an ideal, for a "natural contract."¹¹

One criticism that can be made of the more sustainability-based approach to ecology is that any form of Corporate Social Responsibility (CSR) that is not challenged by science might leave society in permanent ecological debt.

We will now take a look at some of the key stages in the influence of the philosophers on the emergence of what we refer to as *business ethics*.

2. Aldo Leopold: A Sand County Almanac. It was in the 1930s that this ecological awareness took shape in the United States. For five years

⁵ Notably thanks to the right to property elevated to the rank of an inviolable and sacred right by the terms of Art. 17 of the Declaration of the Rights of Man and the Citizen, a right that extends even to the *res nullius*, while the *res communes* is the subject of police laws, see French Civil Code, Art. 714.

⁶ J. Dorst, *La nature dénaturée*, Point Delachaux, 1970.

⁷ F. Ost, "La crise écologique vers un nouveau paradigme", in *La crise environnementale*, INRA Editions, 1998.

⁸ D. Bourg, cf. among others, *Le nouvel âge de l'écologie*, ed. Charles Léopold Mayer, 2003; G. Ferone, *Le Krach écologique*, Grasset, 2008.

⁹ R. Cans, *Petite histoire du mouvement écolo en France*, Delachaux et Nestlé, 2007.

¹⁰ P. Alphanéry, P. Bitoun and Y. Dupont, *L'équivoque écologique*, La Découverte, Essais, 1991.

¹¹ M. Serres, *Le Contrat naturel* (ed.), François Bourin, 1990.

starting in 1933, for instance, American farmers were encouraged to apply practices that we would describe today as “alternative” in order to protect the resources of the soil. When Aldo Leopold defined the notion of a “land ethic” in his book *A Sand County Almanac*¹² published in 1949, analysing the new relations between man and nature, most contemporary philosophers ignored him. His book did, however, set down the foundations for a new awareness shaped by a Copernican view according to which our planet is small and man (*Homo sapiens*) must no longer behave as the “conqueror” of the land-community, but as a member and citizen.¹³ This moral dimension was to be taken up in some ways by American doctrine in the creation of the notion of *business ethics*.

3. Arne Naess: the “Deep Ecology” movement. The progressivism of the “deep ecology movement” put out an invitation to reflect upon the “land ethic” and the role of businesses. This controversial movement in its time was founded by Norwegian thinker Arne Naess in an article published in 1972.¹⁴ The distinction between “deep ecology” and “shallow ecology” resides in the fact that the former analyses not the effects of pollution, but the production methods that are detrimental to the environment. Naess’s works caused controversy in France and the United States.¹⁵ The eight-point *Deep Ecology Platform* of thoughts and proposals put forward by Arne Naess on the occasion of a study seminar in 1984 only contributed to that controversy, with the movement being described, among other things, as “ecocentric”.¹⁶ The philosophical approach to the “natural question”¹⁷ is rich in lessons, however, in particular on the complex relationships between man and nature. For the

¹² A. Leopold, *A Sand County Almanac*, Oxford University Press, 1949, New York, Oxford University Press, 1960.

¹³ On, the analysis of Land Ethics, cf. J. Baird Callicott, “The Conceptual Foundations of the Land Ethics”, in D.R. Keller, Wiley-Blackwell (eds), *Environmental Ethics, The Big Questions*, Wiley-Blackwell, 2010, p. 201 et seq.

¹⁴ A. Naess, “The shallow and the deep, long-range ecologic movement. A summary”, *Inquiry*, 1973, Vol. 16(1), pp. 95–100; R. Nash, *The rights of nature. A history of environmental ethics*, The University of Wisconsin Press, 1989.

¹⁵ L. Ferry, *Le nouvel Ordre écologique, l’arbre, l’animal et l’homme*, Le Livre de poche, 1992, p. 107 et seq.

¹⁶ R. Eckersley, *Environmentalism and Political Theory: Toward an Eco-centric Approach*, Albany, SUNY Press, 1992; A. Mc Laughlin, *Regarding Nature: Industrialism and Deep Ecology*, Albany, SUNY Press, 1993.

¹⁷ S. Moscovici, *Essai sur l’histoire humaine de la nature*, Paris, Flammarion, 1977, p. 7.

advocates of “deep ecology”¹⁸ who criticised Descartes’ view expressed in his *Discourse on the Method* according to which men are capable of rendering themselves “masters and possessors of nature”,¹⁹ the essential question lies in the way in which man inhabits the earth and shares its resources with all the planet’s other beings. These ideas were to be backed later by the works of philosophers such as Hans Jonas²⁰ and Michel Serres.²¹ The role to be allocated to the environment is of decisive importance, balance is required²² and the link between ecology and liberalism becomes a focus of rich philosophical discussion.²³ Philosophers have continued to feed such debate and their ideas on the way in which the implementation of ecological policy is handled (by State, society and businesses) are instructive.²⁴ Although much of the focus is on a new ecological order, the question of the (essential, non-substitutable?) role of the State is also raised.

4. Social ecology, a significant step. The social ecology movement was an essential step in that it provided a reminder that it is impossible to manage the “ecological crisis” without involving society and its own issues (population growth, technological progress, economic competition, “grow or die” challenges). This movement was seminal in that it prefigured the European focus on the company’s duties “towards society”. It was a call not for morality, but for “social reconstruction” and

¹⁸ On the ideas of A. Naess, see the instructive studies by H.-S. Afeissa, notably, *Éthique de l’environnement. Nature, valeur, respect*, Paris, J. Vrin, 2007.

¹⁹ R. Descartes, *Discours de la méthode*, text established by Victor Cousin, Levrault, 1824, tome I, sixth part; F. Ost, “Écologie et droits de l’homme”, available at <http://www.dhdi.free.fr>, section on “human rights”.

²⁰ O. Fuchs, “Le principe de responsabilité de Hans Jonas, contribution à l’étude de la médiation juridique des rapports de l’homme à la nature”, *RRJ*, 2006-2, pp. 1027 et seq.

²¹ Serres, above n. 11.

²² A. Waite, “The quest for environmental law equilibrium”, *Environmental Law Review*, 2005, Vol. 7(1), pp. 34, 35.

²³ C. Pelluchon, *Écologie et libéralisme*, report August 2011, available at <http://www.fondapol.org/wp-content/uploads/2011/08/OESLV-Note-PELLUCHON-web.pdf>.

²⁴ Cf. Moscovici, above n. 17, p. 7; D. Bourg and K. Whiteside, *Vers une démocratie écologique. Le citoyen, le savant et le politique*, Paris, Seuil, 2010, p. 41.

marked a break, to some extent, from the holistic conception of the notion of “Mother Nature.”²⁵

5. Liberal ecology, a possibility for the future? A movement in favour of liberal ecology is now emerging, offering a middle way between ecological demands and the interests of economic liberalism.²⁶ It will have to find itself a path in today’s “all-State CSR” and even “non-substitutable” State CSR, the leitmotiv of the European Union.²⁷

§ 2. The Relay of Environmental Law

6. The progress and weight of environmental law: its progressive encounter with economic law. The very conception of environmental law has evolved from an administrative police law to an economic law²⁸ and this change has necessarily had an influence on the way the environment is addressed by economic players. The English-speaking world is ahead of others in this area.²⁹ The criticism that is generally made of the definition of the environment is its subjective approach to human needs.³⁰ In France, the inclusion of environmental concerns in business law and the need for change emerged quite late on, in the second half of the twentieth century, partly due to the weight of the history of environmental law. Although this weight is difficult to gauge, we can point to the Law of 22 July 1970 on national nature parks as marking a shift from the “special”³¹ to the “general”. Law number 76-629 of 10 July 1976 on the protection of nature, now incorporated into

²⁵ “Mother Nature”, cf. M. Bockchin, “What is Social Ecology?”, in Keller, Wiley-Blackwell, above n. 13, p. 268 et seq.

²⁶ C. Pelluchon, *Éléments pour une éthique de la vulnérabilité. Les hommes, les animaux, la nature*, Paris, Le Cerf, coll. Humanités, 2011; *Écologie et libéralisme*, essay published by Fondapol, August 2011; see also, V. Hösle, *Philosophie de la crise écologique*, Petite Bibliothèque Payot, 2011.

²⁷ Cf. point 76 below, the pole of the public authorities.

²⁸ F. Franchi, “L’évolution du droit de l’environnement, d’un droit de police administrative à un droit économique”, in *Justice et environnement*, Epe, Working paper, p. 53 et seq.

²⁹ Cf. D.E. Fletcher, “The principles of a contemporary environmental legal system”, *Environmental Law and Management*, 2003, Vol. 15(6), p. 347.

³⁰ J. Holder, “New Age: Rediscovering Natural Law”, *Current Legal Problems*, 2000, Vol. 53, pp. 151–9.

³¹ J. Fromageau, “Histoire de la protection de la nature jusqu’en 1976”, in *20 ans de protection de la nature, Hommage à M. Despax*, PULIM, 1998, p. 19 et seq., and also by the same author, his reference work, *La police de la pollution à Paris de 1666 à 1789*, thesis, Paris II University, 1990.

the Environmental Code, begins with an iconic first article stating that: “the protection of natural spaces and landscapes, the preservation of animal and plant species, the protection of the biological equilibria to which they contribute and the protection of natural resources against all the causes of degradation by which they are threatened are in the general interest”.³² This law marked the “veritable birth of environmental law as a subject”.³³ Environmental law lies at the crossroads between private and public law.³⁴ It permeates commercial law,³⁵ corporation law³⁶ and insolvency law,³⁷ and invigorates contract law.³⁸ Visionary Rafaël Romi sensed that it would be a “*law that makes marginal corrections* to the public regulations in operation in our market societies, through the generalisation of the *discourse of sustainable development*.”³⁹ However, the encounter between corporate law, and primarily the law on listed companies, the only businesses to be concerned by the Law on New Economic Regulations (NRE)⁴⁰ of 15 May 2001, and environmental law

³² Law no. 76-663 of 19 July 1976 relating to classified installations for environmental protection extended the scope of protected interests; cf. J. Untermaier, *La conservation de la nature et le droit public*, thesis, Lyon II University 1972.

³³ R. Romi, *Droit de l'environnement*, 7th edn, Montchrestien, Domat, 2010, p. 1.

³⁴ Romi, *ibid.*, p. 6, notably with the notion of ecological public order, showing that environmental law has undeniably been influenced by scientific ecology, with the notions of biodiversity, ecosystems, habitats, species and GM organisms.

³⁵ A. Reygrobellet, “La problématique environnementale en droit des baux commerciaux”, *Environnement et développement durable*, January 2012, p. 9.

³⁶ V. Vidalens, *La protection de l'environnement et le droit des sociétés*, th. Toulouse I Capitole, C. Saint-Alary-Houin (dir.), 2011.

³⁷ C. Saint-Alary-Houin, “Entreprise en difficulté et environnement durable”, *Journal des sociétés*, July 2012, No. 100, p. 22 et seq., and the many references; B. Rolland, “Environnement et procédures collectives”, *Juris-Classeur Environnement*, fasc. 5100, 2009.

³⁸ M. Boutonnet, “Des obligations environnementales spéciales à l'obligation environnementale générale en droit des contrats”, *D.* 2012, chron., p. 377.

³⁹ Romi, above n. 33, p. 9 (emphasis added).

⁴⁰ Law no. 2001-420 of 15 May 2001 on New Economic Regulations.

has triggered a “movement to correct behaviour” in corporate governance.⁴¹ This new awareness of the impact of business activity on the environment has been a decisive factor in the elaboration of the concept of CSR.⁴²

7. The right to a healthy environment,⁴³ ecology and human rights.

Over quite a few years now, the European Court of Human Rights has had the opportunity to protect man’s environmental rights when they are not established as such by the European Convention on Human Rights. The right to a healthy environment was indeed one of the concerns of René Cassin when he drafted the European Convention on Human Rights.⁴⁴ Legal entities have benefitted from the protection of their fundamental rights,⁴⁵ often via legal anthropomorphism, and even from a movement in favour of recognising their freedom of expression.⁴⁶ The European Court’s decision in the case *Tatar v. Romania*⁴⁷ once again upheld the environmental extensions of the rights guaranteed by the Convention. In this case relating to one of the most serious ecological disasters in recent years, the Strasbourg court condemned Romania for its breach of Article 8 (respect for private and family life).⁴⁸ International commercial law can no longer ignore human rights.⁴⁹

⁴¹ Cf. reputational risk, point 426 et seq. below

⁴² In US law, for example, D.B. Spence, “The Shadow of the Rational Polluter: Rethinking the Role of Rational Actor Models in Environmental Law”, *California Law Review*, 2001, Vol. 89(4), pp. 917–98, spec. pp. 951–65.

⁴³ F.-G. Trébulle, “Du droit de l’homme à un environnement sain” *Environnement* 2005, comm. no. 29.

⁴⁴ C. Malecki, “René Cassin, les droits de l’homme et le xxi^e siècle commençant”, *RRJ*, PUAM, 2002/2, p. 1064.

⁴⁵ N. Mathey, “Les droits et libertés fondamentaux des personnes morales de droit privé”, *RTD civ.* 2008, p. 205 et seq.

⁴⁶ L. Marino, “Plaidoyer pour la liberté d’expression, droit fondamental de l’entreprise”, *RTD com.* 2011, no. 1, p. 1 et seq.

⁴⁷ ECHR, 3rd sect., 17 March 2009, no. 67021/01.

⁴⁸ S. Nadaud, J.-P. Marguénaud, “Chronique des arrêts de la CEDH 2008–2009 (*Tatar*, *Fägerskiöld*, *Borysiewicz* and *Boudäieva* rulings)”, *Rev. jur. env.* 1/2010, p. 61.

⁴⁹ J. Dine, *Companies, International Trade and Human Rights*, Cambridge, Cambridge University Press, 2005.

SECTION 2: CONSTRAINTS, EMERGENCIES AND CONTROVERSIES

§ 1. Demography and Globalisation

8. Demographics and the ambivalence of globalisation. Successive earth summits have shown that this growing political awareness is a worldwide phenomenon, although to varying levels of sensitivity and maturity. This worldwide influence is the “hallmark” of CSR, as well as being, regrettably all too often, its Achilles heel. While the voluntary commitments that are given are a sign of the initiative and sense of responsibility of political and economic players, they come up against the issues of a globalised economy.⁵⁰ The urgent issues are known and often listed with varying degrees of alarm: predatory consumerism is suicidal and man represents a danger for nature. Hydrocarbons, water, metals, forests, biodiversity and fish resources are taken into consideration. The “green” imperative has become a key political issue for future generations⁵¹ because the future of humanity depends on it. Climate change has become the compass of policy making,⁵² as shown by the programmes dedicated to renewable energies.

9. Overpopulation: key driver of the twenty-first century. Whereas there was intense debate in eighteenth-century Enlightenment France, fed in particular by Montesquieu’s *Letters on Depopulation*,⁵³ around the impending decline in the population, twenty-first-century debate is every bit as lively but focused on overpopulation. The world population stood at seven billion in 2013, having been multiplied by seven over the past two centuries, and is likely to reach ten to 11 billion by the end of the

⁵⁰ J. Adda, *La mondialisation de l’économie*, tome 2, La Découverte, coll. Repères, 1996; see also the concept of world-economy, summarised by F. Braudel, in *La dynamique du capitalisme*, Flammarion, coll. Champs, 1988.

⁵¹ Bourg and Whiteside, above n. 24.

⁵² Such as with the carbon tax or the fight against greenhouse gas emissions, see Decree no. 2011-829 of 11 July 2011 on greenhouse gas emissions balance and territorial climate-energy plans, *OFFR* no. 0160 of 12 July 2011, p. 12055, text no. 3.

⁵³ C. Blum, *Croître ou périr, Population, reproduction et pouvoir en France au xviii^e siècle*, pref. Hervé Hasquin, Ined, coll. Études et enquêtes historiques, 2013.

twenty-first century.⁵⁴ This population growth has become an ever-present feature of current debates, with questions focusing in particular on so-called sustainable agriculture,⁵⁵ and requires a fresh examination of the Malthusian debate. Although things have indeed changed three centuries on from the Enlightenment and must be analysed on a worldwide scale, we see the same key trends with a discourse that sometimes seeks to elicit guilt (the “tragedy” of overpopulation), sometimes is fatalistic, and is nearly always alarmist. There can be no question, of course, of minimising the importance of this factor which determines so many others, for studies have demonstrated that overpopulation is a key driver of twenty-first-century policies. However, on the level of CSR itself or of “worldwide CSR”, there is one perhaps naive question that might be asked: is it up to companies,⁵⁶ as key players in the economy, to manage and to try to anticipate this issue?⁵⁷ Is this not in fact the role of that globalised governance that seems so difficult to establish?

§ 2. Climate Change and Controversies

10. A worldwide and European “crusade”:⁵⁸ between “climate sceptics” and “enlightened catastrophism”. Global warming is one of the most important environmental, but also social and economic challenges facing humanity. The terms used are warlike, perhaps somewhat too

⁵⁴ Cf. *Population & Sociétés*, monthly newsletter of the Institut national d'études démographiques, no. 503, September 2013, http://www.ined.fr/fichier/t_publication/1653/publi_pdf1_population_societes_2013_503_population_monde.pdf.

⁵⁵ E.C. Brummer, “Diversity, stability, and sustainable American agriculture”, *Agronomy Journal* 1998, Vol. 90.

⁵⁶ Cf. J.-Y. Trochon and F. Vincke (dir.), *L'Entreprise face à la mondialisation: opportunités et risques. Stratégies juridiques*, Bruxelles, Bruylant, 2006, p. 96; cf. également, E. Loquin, C. Kessedjian (dir.), *La mondialisation du droit*, Paris, CREDIMI, Litec, 2000.

⁵⁷ Cf. the reflection of Garret Hardin on this theme since 1964, *Population, Evolution and Birth Control*, San Francisco, Freeman, 1964 and by the same author, *Exploring New Ethics for Survival: The voyage of the Spaceship Beagle*, New York, Viking, 1972.

⁵⁸ Communication from the Commission of 9 February 2005, “Winning the battle against global climate change”, COM(2005) 35, OJ C 125 of 21 May 2005; Directive 2003/87/EC of the European Parliament and Council of 13 October 2003, establishing a scheme for greenhouse gas emission allowance trading within the Community and amending Council Directive 96/61/EC.

much so,⁵⁹ referring as they do to a fight, crusade or combat on worldwide and European scales. This fight often appears to be in vain, in light of the ever-growing list of industrial catastrophes,⁶⁰ as population-driven energy needs grow inexorably. Specialists in environmental law have long understood that these demands have become an emergency. Politicians, meanwhile, have taken the climate challenges on board with varying degrees of conviction, courage and success. There have been many international, European, national and even local initiatives to determine the legislative policies to be imposed upon organisations, businesses and citizens.

11. The fight against climate change.⁶¹ In France, the fight against climate change is mentioned in the Grenelle II Law⁶² alongside protecting biodiversity, habitats and resources, social cohesion and solidarity between territories and generations. Although the fight against climate change may elicit some scepticism,⁶³ it is backed by a certain amount of hard law, mostly international texts showing that in this area too, the “locomotive of CSR” is an international one. Without being exhaustive, we could mention the Convention on Biological Diversity of 5 June 1992, adopted at the Rio Earth Summit in 1992 and which came into force on 29 December 1993, and the United Nations Framework Convention on Climate Change (UNFCCC) also adopted at the Rio Earth Summit and which came into force on 21 March 1994 and recognises the precautionary principle, the principle of common but differentiated responsibilities and the principle of the right to development. Most importantly, mention should be made of the Kyoto Protocol to the United Nations Framework Convention on Climate Change of 11 December 1997 signed in Kyoto and in force since 16 February 2005, but the results

⁵⁹ Cf. in particular P.-J. Dupuis, *Pour un catastrophisme éclairé, Quand l'impossible est certain*, Points, 2002.

⁶⁰ Accidents in nuclear power plants (Chernobyl and Fukushima, among others) are particularly worrying for the future of public health.

⁶¹ C. Voigt, *Sustainable Development as a Principle of Integration in International Law. Resolving Potential Conflicts between Climate Measures and WTO Law*, Leiden, Martinus Nijhoff Publishers, 2008.

⁶² Law no. 2010-788, 12 July 2010, *OJ* 13 July 2010, Art. 253.

⁶³ B. Sjøfjell, “Why Law Matters: Corporate Social Irresponsibility and the Futility of Voluntary Climate Change Mitigation”, *European Corporate Law*, 2011, Vol. 8(2–3), pp. 56–64, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1774759.

of which have been insufficient.⁶⁴ Since Kyoto, there have been a number of other conferences (Marrakesh, Bali) and then the Copenhagen Climate Conference of 2009⁶⁵ which left an impression of failure. The European and even American roadmap⁶⁶ for businesses is linear and makes no allowance for side-stepping: greenhouse gas emissions must be reduced, deforestation combatted, renewable energy sources developed and waste managed. The *Climate Bonds* initiative is one example among many others of the ways in which the world of finance is addressing climate issues.⁶⁷

12. The work of the IPCC. The Intergovernmental Panel on Climate Change (IPCC)⁶⁸ is a body comprising scientific experts and set up in 1988 within the framework of the United Nations and placed under the authority of the World Meteorological Organization (WMO) and the UN. The IPCC is open to all UN member countries. Its role consists in producing periodic reports providing an objective assessment of the state of scientific knowledge and in putting forward recommendations aiming to mitigate the effects of climate change. The IPCC's Fifth Assessment Report, "Climate Change 2013",^{69,70} indicated that the climate trend was worsening. Most of the potential scenarios (unfortunately) foresee an increase in CO₂ concentrations and a rise in world temperatures and sea levels in the course of the twenty-first century. It is the executive summary produced for the attention of decision-makers by the IPCC after its report that serves as the basis for the work of politicians in this area.⁷¹

⁶⁴ Text accessible at the following address, <https://unfccc.int/resource/docs/convkp/kpeng.pdf>.

⁶⁵ It was held in Copenhagen from 7 to 18 December 2009 but did not succeed in taking up the climate challenge.

⁶⁶ J. Brunnée, "Europe, The United States, and the Global Climate Regime: All together now?", *Journal of Land Use & Environmental Law*, Fall 2008, Vol. 24(1), pp. 1–43.

⁶⁷ Cf. point 485 et seq. below.

⁶⁸ Known by the acronym IPCC (Intergovernmental Panel on Climate Change), <http://www.ipcc.ch/>.

⁶⁹ Climate change 2013 – The Physical Science Basis, http://www.climatechange2013.org/images/uploads/WGIAR5_WGI-12Doc2b_FinalDraft_Chapter01.pdf.

⁷⁰ <https://www.ipcc-wg1.unibe.ch/>.

⁷¹ http://www.climatechange2013.org/images/uploads/WGIAR5-SPM_Approved27Sep2013.pdf.

13. The issue of biodiversity and consensus (?) on global warming under scrutiny: greenhouse gases as the common enemy? The Lisbon Treaty identifies measures to address these problems. The Treaty breaks new ground by introducing the promotion on the international level of measures aiming to address regional or planetary environmental issues and, more particularly, climate change. One of the objectives of the European Union is to foster sustainable development in Europe, based on a high level of protection and significant improvement of the environment.⁷² Reducing greenhouse gas emissions is a worldwide and European challenge: by 2020, the 28 Member States have the threefold objectives defined in the “Energy-Climate Package” of the “Europe 2020” strategy, of reducing their greenhouse gas emissions by 20 per cent from their 1990 levels, reducing their energy consumption by 20 per cent and increasing energy from renewable sources by 20 per cent.

14. Scientific controversies: the goals. The consensus on the objectives to be pursued and the underlying measures is open to criticism, however, as there are still recurring controversies, at least over global warming.⁷³ In France, the objective of the Grenelle II Law is to achieve sustainable development with the ultimate aim, in addition to combatting climate change, being to preserve biodiversity, habitats and resources, social cohesion and solidarity between territories and the generations.⁷⁴

Although it is the subject of debate among scientists, the recognition of the rate at which species are disappearing⁷⁵ has brought an unprecedented level of political awareness. For instance, Directive no. 2004/35/EC of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage, incorporated into French national law by Law no. 2008-757 of 1 August 2008 on environmental liability and various provisions to adapt to Community law in environmental matters, shows that two approaches are required: preventing damage to the environment on the one hand, and remedying

⁷² Cf. Art. 191 of the consolidated version of the Treaty on the Functioning of the European Union, *OJEU*, 30 March 2010, C 83/47; <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2010:083:0047:0200:fr:PDF>.

⁷³ In particular, Danish statistician B. Lomborg, *L'écologiste sceptique*, Éditions du Cherche Midi, 2004, although he went back to some extent on his positions by suggesting investment in renewable energies.

⁷⁴ Cf. the amendment of Art. L. 110-1 Environmental Code.

⁷⁵ Cf. the report by the Centre d'Analyse Stratégique “Approche économique de la biodiversité et des services liés aux écosystèmes—Contribution à la décision publique”, <http://www.strategie.gouv.fr>.

such damage on the basis of the ordinary law on liability.⁷⁶ This new awareness of the link between the future of humanity and that of other living species will be decisive if legislation in this area is to be effective.⁷⁷

15. Demographics and water:⁷⁸ a winning equation against “hydro-colonialism”? Everyone knows that water is one of the key issues of the twenty-first century⁷⁹ and this “blue gold” is the focus of international,⁸⁰ European⁸¹ and national policies⁸² (in particular the Grenelle Forum on the Sea in France). On 28 July 2010, at its 108th plenary session, the UN General Assembly adopted resolution 64/292 which “recognises the right to safe and clean drinking water and sanitation as a human right that is essential for the full enjoyment of life and all human rights”.⁸³ The text

⁷⁶ The question of the reparation of ecological prejudice is being studied, cf. the report submitted on 17 September 2013 to the Minister for Justice, Christiane Taubira, http://www.justice.gouv.fr/art_pix/1_rapport_prejudice_ecologique_2013_0914.pdf; cf. also, L. Neyret and G.J. Martin (dir.), *Nomenclature des préjudices environnementaux*, LGDJ, coll. Droit des affaires, 2012.

⁷⁷ M. Prieur, “Vers un droit de l’environnement renouvelé”, *Cah. Cons. const.*, 2003, no. 15, p. 219, “... human life on earth is closely linked with that of the other living species”.

⁷⁸ On the “commodification” of water, cf. the highly interesting article by S. Manciaux, “La marchandisation de l’eau”, in E. Loquin and A. Martin (dir.), *Droit et Marchandisation*, Université de Bourgogne, Litec, 2010, CREDIMI, p. 218 et seq.

⁷⁹ Y. Lacoste, *L’eau dans le monde, les batailles pour la vie*, Éditions Larousse, 2008; the future of water is an issue that reaches beyond scientific circles, read with interest E. Orsenna, *L’avenir de l’eau, Petit précis de mondialisation II*, Fayard, 2008, the follow-up to Tome I, *Voyage au pays du coton*, Fayard, 2006.

⁸⁰ International Office for Water, <http://www.oieau.fr>; cf. the publications of the Water Academy, <http://www.academie-eau.org>.

⁸¹ Cf. Directive no 2013/39/EU of 12 August 2013 amending Directives 2000/60/EC and 2008/105/EC as regards priority substances in the field of water policy, *OJEU* no. L. 226 of 24 August 2013, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2013:226:0001:0017:EN:PDF>.

⁸² Law no. 92-3 of 3 January 1992 on the preservation of aquatic ecosystems, wetlands and areas and the management of water resources (known as the “Law on Water”).

⁸³ Cf. UNGA 64th session, point 48 of the agenda, resolution no. 64/292, “The human right to water and sanitation”, http://www.ipemed.coop/adminIpemed/media/fich_article/1365758487_AGNU_DroitEau_030810.pdf; cf. also, <http://waterriskfilter.panda.org>; <https://www.cdproject.net/CDPResults/CDP-2010-Water-Disclosure-Global-Report.pdf>.

also reasserts the responsibility of States in the “promotion and protection of all human rights, which are universal, indivisible, interdependent and interrelated, and must be treated globally, in a fair and equal manner, on the same footing and with the same emphasis”. The UN Human Rights Council then recognised the existence of the right to water and sanitation as a human right on 30 September 2010 in its resolution A/64/L.63/Rev.1, by the terms of which “the right to safe and clean drinking water and sanitation as a human right that is essential for the full enjoyment of life and all human rights”. This particular status granted to water and the fact that water consumption is a key information item in non-financial reporting provides new opportunities to ensure that the environment is taken into account, notably via societal commitments. CSR appears to open up the range of possibilities arising from the encounter between human rights and business law, as the extractive industries are big consumers not only of water, but also of oil sands. However, the status of water, symbolising life as it does, is very particular: it constitutes a new planetary challenge that manages almost effortlessly to bring together such new tools as the recent Water Risk Filter module introduced by the WWF and the DEP German Investment Bank:⁸⁴ it offers our societies the possibility of identifying risks, such as the scarcity of fresh water and pollution, the goal being that corporations should implement the necessary changes and make an effective reduction to water-related risks.⁸⁵ To summarize, the challenges of water for businesses imply addressing the question of water savings and therefore limiting their water consumption, assessing the price of water and defining whether their different activities cause pollution or not.⁸⁶ It is therefore no surprise that water should be one of the essential components of non-financial reporting, with all the difficulties that this implies in terms of the legibility of information that is no doubt highly technical, but is also of psychological importance, given that water is essential for life. It is therefore a human right that is the focus of great stakeholder expectations.⁸⁷

⁸⁴ Deutsche Entwicklungsgesellschaft (DEG – German development bank).

⁸⁵ Cf. also the work of the Transnational Institute, <http://www.tni.org/primer/global-water-grab-primer> and the Water Alternatives journal, <http://www.water-alternatives.org/>.

⁸⁶ Cf. Art. 1 of Law no. 76-663 of 19 July 1976 on ICPE (classified facilities for the protection of the environment).

⁸⁷ Cf. also The Water Framework Directive (2000/60/EC).

§ 3. The Sequence of Law

16. The force of law. Although critics of the idea of protecting the environment for future generations are not so many in number, the sustainable development debate is still far from serene, revolving as it does around emergencies, constraints, fears,⁸⁸ combats and pressure groups. While the opposing positions in these controversies are clearly defined, it is a middle (but in no way egalitarian) way that is required; legal science can provide the confidence, rationality and, most importantly, tools to allow liability lawsuits to be initiated, to draw on the vast riches of contract law to give binding force to the many commitments, to find the missing link in a chain of liability and to rediscover the notions of indivisibility, of the contractual whole, of contractual arrangements of all kinds,⁸⁹ of the penalty clause, of purely potestative conditions and of the protection of the weaker stakeholder. The “sequence of law”, which in fact is nothing more than the return of law into an area dominated by managerial sciences or economics,⁹⁰ will bring with it notions, principles and ways of reasoning that will sometimes clash with each other, sometimes complement each other. We will now provide a brief overview of these notions.

17. The notion of ethical security. This concept is emerging gradually under the influence of management sciences,⁹¹ with the question being how to guarantee the rigour, method and credibility of the mission of the auditor, a mission of key importance for the future of CSR.

⁸⁸ With the opposing view put forward by a number of philosophers, cf. among others, P. Bruckner, *Le fanatisme de l'apocalypse, sauver la terre, punir l'homme*, Grasset, Essai, 2011.

⁸⁹ Cf., the reference work by Y. Guyon, *Traité des contrats. Les sociétés, Aménagements statutaire et conventions entre associés*, 4th edn, LGDJ, 2000; P. Mousseron, *Les conventions sociétaires*, LGDJ, coll. Droit des affaires, 2010.

⁹⁰ Cf. J. Sauvagnat, *Essays in Corporate Finance and in Competition Policy*, thesis in economics, P. Rey and A. Landier (dir.), Toulouse, 2013, winner of the IFA Prize 2013 for research in governance.

⁹¹ J. Igalens, M. Joras, *La sûreté éthique, Du concept à l'audit opérationnel*, Éditions EMS, 2010.

18. The precautionary principle⁹² and “future generations”.⁹³ This principle may have drawn criticism, but does play a salutary role and provide a perfect fit with the idea of our collective responsibility towards future generations⁹⁴ and the common heritage of humanity.⁹⁵ When taken to the extreme and combined with the criterion of the long term, it can also have negative repercussions for the short term, notably as regards the health of workers. It is established in domestic law by the Environment Charter⁹⁶ and the Barnier Law.⁹⁷

19. The principle of responsibility. This principle⁹⁸ underlies the sustainable development discourse⁹⁹ and implies taking account of the environmental and societal impacts of the activity of the company, from two main angles: environmental responsibility and CSR. However, if we

⁹² G. Viney, Ph. Kourilsky, *Le principe de précaution*, Report to the Prime Minister, 15 October 1999, <http://www.ladocumentationfrancaise.fr/var/storage/rapports-publics/004000402/0000.pdf>; M. Boutonnet, *Le principe de précaution en droit de la responsabilité civile*, pref. C. Thibierge, LGDJ, Bibl. droit privé, tome 444, 2005.

⁹³ E. Gaillard, *Génération futures et droit privé, Vers un droit des générations futures*, LGDJ, Bibl. droit privé, tome 527, 2011.

⁹⁴ F. Rome, “Haro sur le principe de précaution”, *D.* 29 April 2010, no. 17, Editorial: “Ultimately, via this principle, it is not a question of perpetuating the zero risk myth, but of assuming the guarantee of the living, viable world we owe to future generations, that is at least if we accept that our collective responsibility is no longer conjugated only in the past, but also in the future tense”; V. Mansuyn, “Le principe de précaution: un principe en quête de méthodologie?”, *Environnement*, June 2004, p. 6.

⁹⁵ Ph. Kahn, “Les patrimoines communs de l’humanité: quelques réflexions”, *Mélanges Kiss*, Frison-Roche, 1998, p. 307.

⁹⁶ Cf. no. 103 below; Art. 5 of the Environmental Charter states that “when the realisation of a damage, although uncertain in the current state of scientific knowledge, could seriously and irreversibly affect the environment, the public authorities will provide, by application of the precautionary principle and within the scope of their powers, for the implementation of risk evaluation procedures and the adoption of provisional and proportionate measures to prevent the realisation of that damage”; M. Boutonnet, A. Guegan, *Historique du principe de précaution*, Éditions Odile Jacob, Paris, 2000.

⁹⁷ Law no. 95-101 of 2 February 1995 on the reinforcement of the protection of the environment.

⁹⁸ M.-P. Blin-Franchomme, I. Desbarats, G. Jazottes and V. Vidalens, *Entreprise et développement durable, Approche juridique pour l’acteur économique du xxi^e siècle*, Lamy, coll. Axe Droit, 2011, no. 10, p. 26.

⁹⁹ F. Ost, “La responsabilité, fil d’Ariane du droit de l’environnement”, *Droit et société* 1995, 30/31, p. 281.

consider that the main actor is the company, then it is via the conceptualisation of the notion of sustainable corporate governance that the two angles meet.

20. How should the environment be defined? A definition is proposed by the Recommendation of 13 May 2001:¹⁰⁰ “For the purposes of this recommendation the term environment refers to the natural physical surroundings and includes air, water, land, flora, fauna and non-renewable resources such as fossil fuels and minerals”. Environmental law has evolved through the twenty-first century in contact with economic law.¹⁰¹

21. The “mirage” or “tyranny” of the long term? The notion of the long term is often considered inseparable from that of sustainable development and is very much present, for example, in socially responsible investment. However, this notion may also imply ideas that can be counterproductive,¹⁰² as short- and medium-term demands cannot be entirely banished.¹⁰³ The “CSR strategy” of a company should therefore be a subtle blend of the long term (survival of the company) and of the short and medium term. For example, the Board’s determination of the company’s “orientations of activity”¹⁰⁴ may be inspired by the long-term criterion, while the company’s management will be required to make decisions dictated by short- and medium-term demands.

22. The notion of natural capital: the necessary choice of policies. This notion which is so closely linked to environmental issues is a difficult one to apprehend. The choice of the goals to be attained and the policy to be implemented, in particular when taking account of the demands of corporate law, is an awkward one. In the UK, Colin Mayer

¹⁰⁰ Commission Recommendation of 30 May 2001 on the recognition, measurement and disclosure of environmental issues in the annual accounts and annual reports of companies (notified under document number C(2001) 1495) *OJEC* 13 June 2001 L 156/33.

¹⁰¹ G.J. Martin, “Le droit et l’environnement, Rapport introductif”, in *Le droit et l’environnement*, Journées nationales, t. XI/Caen, Dalloz, Thèmes and Commentaires, 2010, p. 1 et seq., spec. p. 10.

¹⁰² I. Tchotourian, “Concilier long terme et gouvernance renouvelée: ‘the new American way for doing business’”, *Bull. Joly Sociétés*, 2010, p. 845.

¹⁰³ Cf. on this point, J.M. Fried, “The Uneasy Case for Favoring Long-Term Shareholders”, *ECGI Law Working Paper* No. 200, March 2013.

¹⁰⁴ Commercial Code, Art. L. 225-35.

states that everyone does not attach the same importance to the preservation of the Sumatran rhinoceros.¹⁰⁵ He believes that the approach is a subjective one and that it depends on government policies and the cost of implementing them.¹⁰⁶ The notion is an important one for the European Union, however.¹⁰⁷

23. The essential role of fiscal policy, an “integral part of CSR” and a prerequisite for “world CSR”. Achieving a CSR that is “worldwide”, as it must be to succeed, will imply not only a “responsible” supply chain encompassing all or any subcontractors, but also an effective fiscal policy. The two resolutions of the European Parliament of 6 February 2013 rightly “included”, each in its own way, the role of fiscal law in a CSR that might be termed “worldwide CSR”, without which the ambitions of CSR may well remain little more than wishful thinking. For example, the resolution of the European Parliament of 6 February 2013 on “sustainable and inclusive recovery” expresses the idea unequivocally when it considers that “a business’s tax policy should be considered part and parcel of CSR and that socially responsible behaviour consequently leaves no room for strategies aimed at evading tax or exploiting tax havens”.¹⁰⁸ The resolution of 6 February 2013 on “accountable, transparent and responsible business behaviour” goes even further by expressly assigning CSR a role in the “combat” against “illicit money flows.”¹⁰⁹ There can be little doubt that this worldwide fiscal ambition will provide plenty of work for fiscal law experts.

¹⁰⁵ C. Mayer, *Firm Commitment, Why the corporation is failing us and how to restore trust in it*, Oxford University Press, 2013, p. 162.

¹⁰⁶ Mayer, *ibid.*, p. 161: “In other words, values should not be defined by unreliable and subjective discounted future environmental costs, but by the lowest costs at which any level of pollution can be avoided”.

¹⁰⁷ Cf. point 66 below, the two resolutions of 6 February 2013.

¹⁰⁸ Resolution of the European Parliament of 6 February 2013, *Corporate social responsibility: promoting society’s interests and a route to sustainable and inclusive recovery* [2012/2097 (INI)]. <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+PV+20130206+ITEM-007-11+DOC+XML+V0//EN>, Recital 7.

¹⁰⁹ Point 22 of the European Parliament resolution of 6 February 2013 on corporate social responsibility: accountable, transparent and responsible business behaviour and sustainable growth [2012/2098 (INI)] <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P7-TA-2013-0049+0+DOC+XML+V0//EN>; cf., on this aspect, the ideas and perspectives of D. Gutmann, *Droit fiscal*, 4th edn, LGDJ, Domat droit privé, 2013, no. 1021, p. 771 et seq.

SECTION 3: ORIGINS AND DEFINITION OF CSR

§ 1. Paternalism and Enterprise

24. A key player: the company. Establishing the paternity of the concept of CSR is a difficult task. While it cannot be denied that management sciences have led the way, there have also been some outstanding studies of CSR from a historical perspective, notably from the angle of paternalism.¹¹⁰ It must be acknowledged, however, that the time has now come for the legal sciences to play their part in ensuring the effective enforcement of the notion of responsibility (and even refocusing the notion itself) and in finding the sanctions to go with sustainable corporate governance. One actor plays the leading role in this screenplay which would appear to have been written some time ago, although in different terms: the company, or rather “companies” as the European Union reminds us. CSR as it stands in the corporate landscape of our domestic law is the result of many influences. Since the beginning of the twenty-first century, it has gained in specificity as a result of a variety of influences: it is based essentially on voluntary commitments, initiatives and behaviour that are considered as, and seek to be, virtuous. These initiatives are then followed by constraints, creating a subtle mixture of a “standard” of a new kind.

25. Church social doctrine and nineteenth-century paternalism. According to some authors, CSR taken in its broadest sense and emphasising the importance of responsible behaviour may be derived from sources that go back as far as the eighteenth century, and it may even have its roots in the social doctrine of the Church, and in particular the Encyclical *De Rerum Novarum*. Some authors¹¹¹ even consider that the development of paternalism in the nineteenth century can be likened to today’s CSR. For some authors, the beginnings of CSR are to be seen in the boycott by English consumers of cane sugar produced by slavery in the Caribbean or the appearance, in nineteenth-century Europe, of legislation to improve conditions for workers.¹¹² It is indeed true that the

¹¹⁰ M.-C. Loison, *Contribution à l’histoire de la responsabilité sociétale de l’entreprise: du paternalisme au développement durable – Le cas du groupe Pechiney (1855–2003)*, th. Paris-Dauphine, 2009.

¹¹¹ J. Ballet and F. de Bry, *L’entreprise et l’éthique*, Le Seuil, coll. Points, 2001.

¹¹² Cf. E. Dufourcq and G. Besse, *Rapport sur la responsabilité sociale des entreprises*, May 2004, La Documentation française, <http://lesrapports.la>

social dimension of CSR does in some ways recall the paternalism of the nineteenth century as practised by major corporations (Ford, Kodak, Renault ...).

§ 2. American Influence

26. From the American concept of CSR to a European-style CSR.

The American influence is evident in the conceptualisation of CSR,¹¹³ its relations with corporate governance and the notions of performance, the long term and shareholder interests. The concepts have progressed through rich debate between authors, and the concept of CSR, as perceived in the official discourse of the European Commission, although shaped by an American influence, has adapted to the concerns and challenges of “European” corporate governance.¹¹⁴

27. Howard Bowen. Anyone who has read the book by Howard Bowen,¹¹⁵ published in 1953 and considered to be the founding book of CSR¹¹⁶ (RSE in French),¹¹⁷ can see that the emphasis is placed on the “businessman” and not on the business, indeed even in its title. This remark should be borne in mind when we come to the subject of the behaviour of business leaders. Almost 60 years on from the publication of this founding work, what assessment can be made and what lessons learned? The lead taken by American doctrine in the conceptualisation

documentationfrancaise.fr/BRP/044000303/0000.pdf; K. Bartenstein, “Les origines du concept de développement durable”, *Rev. jur. env.* 2005, 3, p. 290.

¹¹³ Cf. P. Abadie, *Entreprise responsable et environnement, Recherche d'une systématisation en droits français et américain*, th. Paris I Panthéon-Sorbonne, November 2011, J. Morand-Deville, F.-G. Trébulle (dir.), Bruylant, coll. Droit et Économie, Brussels, 2013.

¹¹⁴ Cf. O. de Schutter, “Corporate Social Responsibility European Style”, *European Law Journal*, 2008, Vol. 14(2), pp. 203–36; G. Jackson, A. Apostoloukou, “Corporate Social Responsibility in Western Europe: An institutional Mirror or Substitute?”, *Journal of Business Ethics*, 2010, Vol. 94(3), pp. 371–94.

¹¹⁵ H.R. Bowen, *Social Responsibilities of the Businessman*, Harper and Brothers, 1953.

¹¹⁶ *Corporate Social Responsibility* of which RSE is the generally accepted, if imperfect, translation in French.

¹¹⁷ M. Blowfield and A. Murray, *Corporate Responsibility: A Critical Introduction*, Oxford, OUP, 2008; D.G. Goyder, *Responsible Company*, Oxford, Blackwell Publishers, 1961 also defended the idea of the responsible company.

and even the inventory¹¹⁸ of CSR theories is patent:¹¹⁹ for example, we have seen the appearance alongside CSR of CSP (*Corporate Social Performance*) which is more of a behavioural strategy rooted in the CSR values adopted by the company and also implying taking account of *social cost*¹²⁰ as well as specifying certain terms.¹²¹

Over the past ten years or so in France, doctrinal thinking on CSR has evolved and found its own footing.¹²² Between enterprise and society, the viewpoint of Keynesian economist Howard R. Bowen tends to focus on society, with the concern being to maximise social well-being, rather than to seek corporate performance.¹²³ He based himself (and this is far from negligible in light of the advent of “societal corporate governance”), on the founding works in corporate governance by Adolf A. Berle and Gardiner Means (1932),¹²⁴ Edwin Merrick Dodd (1932) and William

¹¹⁸ M.P. Lee, “A review of the theories of *corporate social responsibility*: its evolutionary path and the road ahead”, *International Journal of Management Review*, 2008, Vol. 10, pp. 53–73.

¹¹⁹ P.F. Drucker, “The New Meaning of Corporate Social Responsibility”, *California Management Review*, 1984, Vol. 26(2), pp. 53–63.

¹²⁰ R. Coase, “The Problem of Social Cost”, *Journal of Law and Economics*, 1960, Vol. 3; M.L. Pava and J. Krausz, “The association between corporate social-responsibility and financial performance: the paradox of social cost”, *Journal of Business Ethics*, March 1996, Vol. 15(3), pp. 321–57.

¹²¹ A. Johnston, “Facing up to Social Cost, The Real Meaning of Corporate Social Responsibility”, *Griffith Law Review*, 2011, Vol. 20(1), pp. 221–44.

¹²² Cf. also for the conceptualisation in the English-speaking world, E. Garriga and D. Mele, “Corporate Social Responsibility Theories: Mapping the Territory”, *Journal of Business Ethics*, 2004, Vol. 53, pp. 51–71, and also, “Corporate Social Responsibility—organization, levels, definition, model, type, company, business, history” <http://www.referenceforbusiness.com/management/Comp-De/Corporate-Social-Responsibility.html#ixzz1VJLFdIMx>.

¹²³ Cf. the article and many references by A. Acquier and J.-P. Gond, “Aux sources de la responsabilité sociale de l’entreprise: à la (re)découverte d’un ouvrage fondateur, Social Responsibilities of the Businessman d’Howard Bowen”, *Finance Contrôle Stratégie*, 2007 Vol. 10(2), pp. 5–35, the authors clearly show (p. 13 et seq.) that this book was an order by religious institutions and is “one of the works in a series of six dedicated to the broader study of *Christian ethics and business life*.”

¹²⁴ Edwin Merrick Dodd who had written a premonitory article, E.M. Dodd, “For whom are Corporate Managers Trustees?”, *Harvard Law Review*, 1932, Vol. 45, pp. 1145–8.

Clark (1933). In 1978,¹²⁵ Howard R. Bowen considered that a purely voluntary approach was not sufficient and that more binding approaches would be necessary to implement CSR.¹²⁶ This conception of CSR is essentially Protestant and managerial. It cannot but be observed that Howard R. Bowen's conception requires fresh consideration 60 years on, no matter how visionary it might have been. On the one hand, the religious dimension is no longer as prevalent as it once was and, on the other, self-regulation and co-regulation or even meta-regulation,¹²⁷ against a backdrop of globalisation, have considerably changed the elements likely to foster or frame CSR in the twenty-first century. International and European initiatives have taken over in this respect.¹²⁸

28. American controversies: Shareholder Primacy versus the Stakeholder Oriented Model. “*Social responsibility*” has given rise to heated controversies in the United States, drawing the hostility of a number of authors, some of them prominent. It is interesting to note, however, that although quite a number of authors are hostile to CSR (and not to *Stakeholder Theory*), their reasons differ. There is Theodore Levitt¹²⁹ who warned against no less than “the dangers” of social responsibility as early as 1958; Milton Friedman, winner of the Nobel Prize for Economics, who focused the debate in his book *Capitalism and Freedom*, with one sentence in a famous article published in the *New York Times Magazine* in 1970 remaining in people's memories: “The Social Responsibility of Business is to Increase its Profits”¹³⁰ companies cannot be socially responsible as they have not been legally invested with this

¹²⁵ H.R. Bowen, “Social Responsibility of the Businessman – Twenty Years Later”, in E.M. Epstein and D. Votaw (eds), *Rationality, Legitimacy, Responsibility: The Search for New Directions in Business and Society*, Goodyear Publishing Co., 1978, pp. 116–30.

¹²⁶ A.B. Carroll, “Corporate Social Responsibility: Evolution of a Definitional Construct”, *Business and Society*, 1999, Vol. 38(3), pp. 268–95.

¹²⁷ Meta-regulation would seem to offer prospects for promoting CSR more particularly in countries with weaker economies, cf. M.M. Rahim, “Meta-regulation Approach of Law: A Potential Legal Strategy to Develop Socially Responsible Business Self-regulation in Least Developed Common Law Countries”, *Common Law World Review*, June 2011, Vol. 40(2), pp. 174–206.

¹²⁸ de Schutter, above n. 114.

¹²⁹ T. Levitt, “The dangers of social responsibility”, *Harvard Business Review*, 1958, Vol. 36(5), pp. 41–9.

¹³⁰ See, however, T. Mulligan, “A Critique of Milton Friedman's Essay ‘The Social Responsibility of Business Is to Increase Its Profits’”, *Journal of Business Ethics*, August 1986, Vol. 5(4), pp. 265–9.

role and their role is to make profits and concentrate on shareholder primacy to the exclusion of all else. This conception was criticised notably at the time when the *Cadbury Code* was drafted in England. Also in the UK, the works of Andrew Keay in particular on the more general future of *Shareholder Primacy* have considerably and constantly enriched critical thinking in this area¹³¹ and can be instructive in defining the fundamentals of sustainable corporate governance, even though the role of shareholders is not perceived in similar ways on the two sides of the English Channel.¹³²

29. Kenneth Goodpaster and the example of the “Ford Pinto”: new controversies. In 1983, the largely philosophically and morally inspired founding article by Kenneth Goodpaster defined the “concept of *Corporate Responsibility*”¹³³ on the basis of one fact (the “*Ford Pinto example*”) which he used to emphasise (already) the duties of *top managers* and the idea of “perception” in corporate governance decision making, implying a “psychological” dimension.

There has been no shortage of criticisms, even more recently, of this still-embryonic concept; mention should be made above all of David Henderson in 2001,¹³⁴ although he does acknowledge that public opinion has growing influence, that the world has seen some important changes and that businesses must play a role in offering capitalism with a “human face”. According to this author, CSR “forms one element of new millennium collectivism”, but he has significant reservations towards the concept, believing that the link between CSR and growing profits will depend essentially on the pressure imposed by society’s expectations of CSR and by “reputational risk”, although he remains sceptical as to the profit CSR may generate. For him, the constraints arising from CSR are potentially obstacles to profit. It can be noted that the notion of CSR which, ten years on, in Europe at least and within the European

¹³¹ Cf. in particular, A. Keay, “Shareholder Primacy in Corporate Law: Can it survive? Should it survive?”, *ECFR* 2010, 3, pp. 370–411; on these issues of corporate governance, see point 294 below.

¹³² Although perhaps not so differently when you look at the advent of “Say on Pay” in France.

¹³³ K.E. Goodpaster, “The Concept of Corporate Responsibility”, *Journal of Business Ethics*, 1983, Vol. 2, pp. 1–22, spec. p. 20; his words are those of a visionary: “Boards of directors, often if not always the custodians of the longer-range values of corporations, must increase both their vigilance and their effect participate in governance. They must contribute directly to the legitimation for moral discourse in long-term planning and evaluation”.

¹³⁴ http://papers.ssrn.com/sol3/papers.cfm?abstract_id=681168.

Commission, appears to benefit from such a consensus that it is to be the driver of “sustainable and inclusive growth”, was not afforded the same reception in the United States. The reasons behind the controversy are comprehensible: it should be remembered that Milton Friedman’s standpoint is based on the debate between Adolf A. Berle and Edwin Merrick Dodd in 1932, and therefore on the very roots of corporate governance.¹³⁵ In his well-known book *Supercapitalism*,¹³⁶ Robert Reich sharply criticises CSR, in particular in its “generous” version; in a nutshell, he considers that we must dispel the myth of corporate citizenship and social responsibility which is not an effective solution, and he states that “supercapitalism” is a threat to democracy. Other controversies concerning *Shareholder Value*¹³⁷ only go to confirm that CSR is not unanimously accepted. However, it is via these currents carrying ideas across the Atlantic, the Channel and even the North Sea (with the advances made by the Scandinavian business schools) that CSR is being enriched and metamorphosed into a very European-influenced CSR which is of course not perfect, as it cannot provide the remedy to all evils, and we should not try to delude ourselves on that point. Even Carroll’s pyramid shows that CSR is going to need a “pinch” of hard law.

30. Carroll’s pyramid. The notion of CSR¹³⁸ was studied by Archie B. Carroll in 1979,¹³⁹ although there are differences between the approaches to CSR in English and American law.¹⁴⁰ However, even

¹³⁵ Very rich debate in particular on the role of shareholders, “the Shareholder Value model”, challenged notably by Professors Henry Hansmann and Reinier Kraackman in their work *The End of History of Corporate Law*, version available online at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=204528.

¹³⁶ “Companies are not interested in the public good. It is not their responsibility to be good”; cf. in French, R. Reich, *Supercapitalisme, Le choc entre le système économique émergent et la démocratie*, Vuibert, 2008.

¹³⁷ Cf. points 360 and 381 below.

¹³⁸ D. McBarnet, A. Voiculescu and T. Campbell (eds), *The New Corporate Accountability, Corporate Social Responsibility and the Law*, Cambridge University Press, 2007.

¹³⁹ Cf. “the social responsibility of business encompasses the economic, legal, ethical, and discretionary expectations that society has of organizations at a given time”, A.B. Carroll, “A Three-dimensional Conceptual Model of Corporate Social Performance”, *Academy of Management Review*, 1979, No. 4, and also by the same author, an article tracing the evolution of CSR, “Corporate Social Responsibility, Evolution of a Definitional Construct”, *Business Society*, September 1999, Vol. 38(3), pp. 268–95.

¹⁴⁰ R.V. Aguilera, C.A. Williams, J.M. Conley and D. Rupp, “Corporate Governance and Social Responsibility: A Comparative Analysis of the UK and

before the term itself was coined, expressing the link (evident or not, questionable or not) with *corporate governance*, CSR drew its conceptual source from the works of the authors who had made their mark on its development. Back in 1979, Archie B. Carroll¹⁴¹ proposed a model that was redefined and conceptualised in the form of a pyramid¹⁴² comprising, from the base upwards, economic, legal, ethical and philanthropic responsibilities. The pyramid was challenged more particularly on its economic and philanthropic criteria, but it did enable progress in other theoretical studies of CSR, notably on the legal dimension which was to go on to come into its full dimension. According to this author, so-called legal responsibility means that compliance with, and the binding nature of the law, are essential. A few years ahead of its time, it was a call for hard law similar to that we are now seeing in contemporary developments in CSR.

31. John Elkington's "triple bottom line".¹⁴³ We should also mention the "triple bottom line" (*people, planet, profit*), developed by Englishman John Elkington in his provocative and originally titled book, defining three dimensions (economic, social and environmental) not of CSR, but of "sustainable capitalism". This triptych has become a must in business schools and symbolises companies' new awareness of their role (and also lobbying), in particular in the face of intergenerational debt.¹⁴⁴ The term that seems to us to be the most central is that of profit. Will that profit be generated by and for everyone? Will it be necessary to define a "common utility" on a planetary scale? We immediately see one of the major issues for CSR. This book was certainly behind the duty of "transparency" for

the US", *Corporate Governance: an International Review*, May 2006, Vol. 14(3), pp. 147–58.

¹⁴¹ Carroll, n. 139 above, pp. 497–50.

¹⁴² A.B. Carroll, "The Pyramid of Corporate Social Responsibility: Towards the Moral Management of Organizational Stakeholders", *Business Horizons*, 1991, no. 34, pp. 39–48; this author has published a lot, constantly adapting his definition of CSR, cf. among others, "Corporate Social Responsibility, Evolution of a Definitional Construct", *Business and Society*, September 1999, Vol. 38(3), pp. 268–95.

¹⁴³ J. Elkington, *Cannibals with Forks: The Triple Bottom Line of 21st Century Business*, Capstone Publishing Ltd, 1999.

¹⁴⁴ A. Holland, "Sustainability: should we start from here?", in A. Dobson (ed.), *Fairness and Futurity*, Oxford University Press, 1999, pp. 46–68 and, R.M. Sollow, "On the intergenerational allocation of natural resources", *Scandinavian Journal of Economics*, 1986, Vol. 88, pp. 141–9; cf. on the right of future generations, Gaillard, above n. 93.

businesses in this area and influenced the nascent approach to CSR. It should also be remembered that it was preceded by a frighteningly titled essay by Francis Fukuyama, “The End of History”.¹⁴⁵ There are parallel reflection processes underway (in political sciences and legislative policy, notably in corporate law) that may prove not to be particularly constructive and be contradicted by the evolution or even “continuation” of history.¹⁴⁶ By establishing the position of the stakeholder,¹⁴⁷ CSR will show that Shareholder Primacy is no panacea, but then again taking account of stakeholders it is not necessarily any more so,¹⁴⁸ unless implemented rationally.

§ 3. Terminology: from sustainable development to CSR

32. Set theory. What difference is there between sustainable development and CSR? The question is well worth asking given that the two notions are very close to each other. Sustainable development has been promoted in Europe since the Club of Rome on the limits to economic growth¹⁴⁹ and was defined in the 1972 Stockholm Declaration:¹⁵⁰ “To defend and improve the human environment for present and future generations has become an imperative goal for mankind—a goal to be pursued together with, and in harmony with, the established and

¹⁴⁵ F. Fukuyama, *The End of History and the Last Man*, Hamish Hamilton, 1992, although the author went on to pursue his reflection on the future of the liberal democracies under a more optimistic title, cf. *Le début de l'histoire. Des origines de la politique à nos jours*, Éditions Saint-Simon, 2012, translation P. Guglielmina.

¹⁴⁶ A. Couret, “La continuation de l’histoire et le droit des sociétés”, *Bull. Joly Sociétés*, February 2012, Editorial, p. 89.

¹⁴⁷ Issues of *Stakeholder Theory*, cf. nos. 304 and 371 below.

¹⁴⁸ The conceptualisation of CSR has taken the form of a number of cycles, cf. C.A. Harwell Wells, “The Cycles of Corporate Social Responsibility: An Historical Retrospective for the Twenty-First Century”, 51 *University of Kansas Law Review*, 2002, Vol. 51, pp. 77–140; and also, R.S. Avi-Yonah, “The Cyclical Transformation of the Corporate Form: A Historical Perspective on Corporate Social Responsibility”, *Delaware Journal of Corporate Law*, 2005, Vol. 30, pp. 767, 813–18.

¹⁴⁹ D. Meadow, J. Randers and W. Behren, *The Limits to Growth*, Universe Books, 1972; *Journal des sociétés* no. 69, October 2009, “Dossier: la RSE”, p. 9 et seq.

¹⁵⁰ The United Nations Conference on the Human Environment, held in Stockholm from 5 to 16 June 1972, <http://www.unep.org/Documents.Multilingual/Default.asp?DocumentID=97&ArticleID=1503&l=fr>. The Declaration was actually published after the conference.

fundamental goals of peace and of worldwide economic and social development”.

Sustainable development is often used to refer to a way of thinking, legislation and behaviour to be dictated. However, sustainable development was initially a *discourse*¹⁵¹ and not a structured, conceptualised legal system. Likewise, the notions it conveys, which are often imported from other legal systems that were quicker to take them on board or because these systems were more easily receptive to them, are largely new to our law (as is the case of stakeholders, for example). Sustainable development has elicited fierce debates that are often presented as being dead ends (interrupted growth against the curse of prosperity), when a pragmatic middle way is possible in order to focus on being competitive while also taking account of environmental demands.¹⁵²

Sustainable development is not mere rhetoric,¹⁵³ however, and not just a matter of discourse, quite the contrary. This notion can be considered to be *upstream* from CSR, with the latter applying *downstream* and focusing on the objectives of sustainable development: the business, or rather businesses. CSR is a more structured manifestation of the application of the objectives of sustainable development. With its predominantly financial directives (on takeover bids in particular and markets in financial instruments), this first quarter of the twenty-first century has brought a shift towards globalisation—even if this often serves as a foil—and towards the standardisation of the legal systems of each of the European Union Member States. CSR cannot usefully be understood without this observation, which is even reflected in the language that is used (as in, once again, the example of “stakeholders”). The discourse of sustainable development brings with it the often-overused concepts of ethics and corporate citizenship.¹⁵⁴ These notions also have the merit of helping to

¹⁵¹ C. Cans, “Le développement durable en droit interne: apparence du droit et droit des apparences”, *AJDA*, 10 February 2003, p. 211.

¹⁵² What should we make of “ecological equality, the key to sustainable development?”, cf. J.-P. Fitoussi, E. Laurent, *La nouvelle écologie politique, Économie et développement humain*, Seuil, 2008.

¹⁵³ On the contrary, cf. E. Naim-Gesbert, *Droit général de l’environnement*, Lexis-Nexis, Objectif Droit, 2011, no. 205, p. 120: “It is the perfect example of a notion taken from outside of the law that enters the legal sphere, colours it profoundly, shapes and ascribes purposes to it. *It is one of the great normative concepts of our time*”, author’s italics.

¹⁵⁴ A. Hugon, *Les mutations du droit de l’entreprise et l’objectif de développement durable*, thesis, University of Limoges, M. Bayle (supervisor), 2010.

speed up practices that are often, paradoxically, swiftly transposed into corporate governance codes.¹⁵⁵

33. Terminological issues regarding the French acronym “RSE”: “social” or “societal” corporate responsibility? The French acronym “RSE” (CSR) is not immune to the pitfalls of translation or of importing an English acronym and the many approximations and misunderstandings this entails. We cannot escape the fact that the French term “RSE” is an unfortunate and, above all, incomplete and inaccurate translation of the English acronym “CSR” (“Corporate Social Responsibility”).¹⁵⁶ The French expression used by the European Union to translate the acronym “CSR” is “responsabilité sociale des entreprises”, whereas Article L. 225-102-1, paragraph 12 of the Commercial Code, which was introduced under the Grenelle II law, refers to “responsabilité sociétale des entreprises”.¹⁵⁷ We are therefore left with the question of which is correct: *sociale* (“social”) or *sociétale*¹⁵⁸ (“societal”)? When used in conjunction with *responsabilité* (“responsibility”), *sociale* seems more fitting. It is also the adjective used by the European institutions and corresponds more closely to the origins of CSR. The use of the adjective *sociétale*, limited as it is to societal obligations, fails to encompass the environmental and social considerations that are vital to non-financial reporting. The term *responsabilité sociale des entreprises* is therefore more appropriate as it is more in line with a European-style CSR. Should we be troubled by such terminological issues? Certainly not. CSR is

¹⁵⁵ These codes are also constantly being updated, as though in a (hellish?) race against legislators to ultimately avoid an intervention by the latter (take, for example, the amendment of the AFEP-MEDEF Code of 16 June 2013 introducing a French take on “Say on Pay”, http://www.medef.com/fileadmin/www.medef.fr/documents/AFEP-MEDEF/Code_de_gouvernement_d_entreprise_des_societes_cotees_juin_2013_FR.pdf).

¹⁵⁶ F.-G. Trébulle, “Propos introductifs, Quel droit pour la RSE?”, in F.-G. Trébulle and O. Uzan (eds), *Responsabilité sociale des entreprises, Regards croisés Droit et Gestion*, Economica, “Études juridiques” collection, Vol. 42, 2011, p. 3 et seq.

¹⁵⁷ Commercial Code, Art. L. 225-102-1, paragraph 12: “As from 1 January 2011, the Government shall present a report to Parliament every three years on the application of the provisions referred to in the fifth paragraph by companies and on the actions that it is promoting in France, Europe and at the international level to encourage corporate social responsibility”; cf. F.-G. Trébulle and O. Uzan, above n. 156, p. 3 et seq.

¹⁵⁸ Even though the arguments in favour of using the term *sociétal* are understandable, cf. D. de la Garanderie, *La longue marche*, Éditions de Guibert, Paris, 2008.

sufficiently complex as to require the addition of subtle nuances to the name we give to it. The same is true of the term “non-financial”, which the European Union is increasingly using instead of “extra-financial”.

Furthermore, if we were to push the terminological analysis further, it would not be the choice between the adjectives *sociale* and *sociétale* that would spark controversy¹⁵⁹ so much as the term “responsibility”, which does not have the same legal meaning as it does in the United States, where the concept of CSR first emerged. Indeed, it is not a case of systematically making a company “responsible” (in the sense of civil liability) for all environmental, social or societal risks. To do so would be simplistic, particularly with respect to the notions of “accountability” and “transparency” in corporate governance.¹⁶⁰

The term “responsibility” does not have the same legal meaning as that of *responsable* (“liable”) used in French law. It is more general and encompasses the taking of initiatives or decisions as well. Across the Atlantic, the term “responsibility” has collided with the Continental approach to the notion of *responsabilité*—itself highly complex. Because it is an integral part of a way of thinking (CSR), this term resists any direct and hasty likening to the French conception of *responsabilité*, particularly if we invoke, for example, the notion of *réparation* (“repair”) found in Article 1382 of the Civil Code. It is not so much a question of “repairing” a “damage”, but rather of anticipating and preventing such damage in the broadest sense, those affected being not “others”, but, “society” more broadly, understood in the widest possible sense (and even in a way that could be troubling as its *limits* are not defined in advance). In its most recent communication,¹⁶¹ the European Union defines CSR as “the responsibility of enterprises for their impacts on society”. This very broad definition implies that companies must put in place *socially responsible corporate governance*, which can be described more simply and generally as “sustainable corporate governance”.

34. Organisational social responsibility (OSR). Corporate social responsibility is not confined to businesses but also applies to organisations more broadly. In the field of procurement, in particular,

¹⁵⁹ Which, like any controversy over terminology, could ultimately prove somewhat pointless.

¹⁶⁰ Cf. points 122 and 317 below.

¹⁶¹ European Commission Communication (2011) 681 final of 25 October 2011.

OSR¹⁶² shows the extent to which social and environmental issues are omnipresent.¹⁶³

35. Sustainable or socially responsible corporate governance. In as much as “RSE” is an unfortunate translation of “CSR”, it is possible to opt instead for the term “sustainable corporate governance”, which has the merit of encompassing the three dimensions (social, environmental and societal) of non-financial reporting.¹⁶⁴ The use of the notion of “sustainable” companies could begin to look like a way of legitimising a strategy or even in some cases misleading “window dressing”. The same applies to the terms “green” or “citizen”. Despite this, there is no need to reject such terms. We should remember that the term “governance” itself has also been overused at times.

36. The discourse of virtue versus a catalogue of good intentions. Separating the wheat from the chaff. CSR implicitly conceals a virtuous discourse,¹⁶⁵ but we need to treat this idea with caution as sustainability reporting can also be confined to a catalogue of good intentions. It is all the more difficult to grasp as a concept because its origins are very varied.

§ 4. The “New Definition” of CSR: a “Strategic” European Definition

37. From 2001 to the present day. Definitions of CSR have evolved in line with changes in the European Commission’s strategy over the course

¹⁶² The same comments regarding terminology also apply to OSR; we are referring to organisational *social* responsibility.

¹⁶³ As demonstrated by the title of the report by Brovelli, Drago and Molinié, “Responsabilité et performance des organisations, 20 propositions pour renforcer la démarche de responsabilité sociale des entreprises (RSE)” (Organisational responsibility and performance: 20 proposals to improve CSR strategy), http://travail-emploi.gouv.fr/IMG/pdf/Rapport_BROVELLI_-_DRAGO_-_MOLINIE.pdf.

¹⁶⁴ For reasons of faithfulness to the broad concept of sustainable development that underpins the three dimensions (social, environmental and societal) of non-financial reporting, we will therefore be discussing not “responsible, environmental and societal” but rather “sustainable” corporate governance—a term that encompasses all of these areas. To ensure even greater faithfulness to the concept of CSR, the ideal approach would be to qualify such corporate governance as “socially responsible”.

¹⁶⁵ D. Vogel, *Le marché de la vertu*, Economica, 2008.

of the past ten years. Let us look at the two key definitions that have determined the European Union's strategy.

- In 2001, CSR was defined as “a concept whereby companies integrate social and environmental concerns in their business operations and in their interaction with their stakeholders on a voluntary basis”.¹⁶⁶
- In 2011, the European Commission proposed “a new definition” of CSR, redefining it as “the responsibility of enterprises for their impacts on society”.¹⁶⁷

This new definition is already having an impact with respect to sustainable corporate governance.¹⁶⁸

SECTION 4: A VARIETY OF SOURCES

38. Origins. The international dimension of sustainable development and the various conceptual approaches to CSR¹⁶⁹ are its “original hallmarks”. They demonstrate how, in practice, major initiatives (on the environment, population size, growth and combating poverty and inequality) are most often taken at two levels—international and European. The European Union plays a key role in implementing CSR through its almost unrivalled legal and regulatory system. Day by day, a social, controlled, regulated and indeed co-regulated “European-style CSR” is increasingly becoming established. France does not do too badly: it is a good, if not very good, pupil in the “European class”, despite its occasional toing and froing, slow progress and hold-ups in publishing orders and decrees, the final practical stages needed to achieve key objectives that generally bring together the most varied aims. We will now look at its initiatives, its intermediaries within the European Commission and the support for work done by ParisEuroplace on sustainable or responsible finance.

¹⁶⁶ European Commission, COM(2001) 366.

¹⁶⁷ “A renewed EU strategy 2011–14 for Corporate Social Responsibility”, COM(2011) 681 final, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2011:0681:FIN:en:PDF>; point 3.1 p. 6 “a new definition”.

¹⁶⁸ On the terminology used, cf. point 290 et seq. below.

¹⁶⁹ I. Daugareilh, “La dimension internationale de la responsabilité sociale des entreprises européennes: Observations sur une normativité à vocation transnationale”, in M.A. Moreau, F. Caffagi and F. Francioni, *La dimension pluridisciplinaire de la responsabilité sociale de l'entreprise*, PUAM, Aix-Marseille, 2007, pp. 275–307.

39. Challenges, limitations, current trends. The success of CSR will depend largely on the behaviour of economic actors, hence the essential role of sustainable corporate governance. In our globalised economy, however, the efforts made by some can quickly be restricted to within the borders of the European Union and initiatives—however urgent and welcome they may be—can prove powerless. Thinking on economic aspects is well-developed¹⁷⁰ and revolves around taking into account the consequences of corporate irresponsibility on those living in developing countries. Thinking on corporate governance, particularly in the United States,¹⁷¹ puts forward proposals based on a critical analysis that seem to tend towards improvements in board responsibility, but immediately raise questions about the next vital step: finding the most effective means of compelling action and ensuring that failures in corporate governance do not “harm”¹⁷² the most vulnerable stakeholders. Such thinking, controversies and debates focus on questions of regulation, co-regulation and even meta-regulation. This idea of protecting and taking care (the “care” society) of “vulnerable and disadvantaged groups in the job market”¹⁷³ is also a priority of the European Union. This trend towards “Protect, respect, remedy”¹⁷⁴ is taken into account by the Union, which, in its role in creating a “social Europe”, insists on the “promotion and dissemination of social and labour standards worldwide”.¹⁷⁵

A brief overview of the international, European and national origins of CSR should not therefore cause us to lose sight of the importance of these reflections, without which the best system of corporate governance could prove a complete failure.

¹⁷⁰ J. Stiglitz, *Making Globalisation Work: The Next Steps to Global Justice*, Camberwell, Allen Lane, Penguin Books, 2007.

¹⁷¹ K. Greenfield, *The Failure of Corporate Law: Fundamental Flaws and Progressive Possibilities*, Chicago, IL: University of Chicago Press, 2006. In the United Kingdom, cf. Mayer, above n. 105.

¹⁷² Cf. Janet Dine’s reflections in favour of meta-regulation of CSR, Dine, above n. 49.

¹⁷³ European Parliament Resolution of 6 February 2013 on corporate social responsibility: promoting society’s interests and a route to sustainable and inclusive recovery [2012/2097 (INI)]; <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+PV+20130206+ITEM-007-11+DOC+XML+V0//EN>, point 25.

¹⁷⁴ United Nations Framework for Business and Human Rights and Guiding Principles on Business and Human Rights, 2008, http://www.ituc-csi.org/IMG/pdf/12-04-21_ruggie_briefing_note_mk_3_-_fr.pdf.

¹⁷⁵ Resolution of 6 February 2013, above n. 174, point 51.

§ 1. International Sources

40. The OECD Guidelines for Multinational Enterprises. These guidelines were adopted by the OECD Member States in 1976 and have since played an increasingly important role. They are a key tool in promoting responsible corporate behaviour. The 2004 edition incorporated “Stakeholder Theory” and the OECD subsequently emphasised the benefits of adopting an environmental management system.¹⁷⁶ These guidelines promote an economic analysis of businesses,¹⁷⁷ as well as taking into account¹⁷⁸ relations with suppliers and subcontractors.¹⁷⁹ The introduction of National Contact Points (NCP) has enabled Member States that adhere to the OECD guidelines to bring a binding dimension to CSR, as disclosing whether or not it is implementing these guidelines impacts upon a company’s image.¹⁸⁰ The French NCP is attached to the French Ministry for Finance. Relations between international law and sustainable development are the subject of ongoing in-depth studies.¹⁸¹ The vitality and usefulness of these Guidelines lie in the fact that they are continually updated, with new versions distributed widely in the form of guides.¹⁸² Mediation is the preferred solution for resolving problems.

¹⁷⁶ OECD “Environment and the OECD Guidelines for Multinational Enterprises: Corporate Tools and Approaches”, OECD, September 2005, a system that “can be used to deliver ‘external value’ by communicating with stakeholders, including customers, clients, investors, and advocacy non-governmental organisations (NGOs)”.

¹⁷⁷ But also stress the social dimension, cf. I. Daugareilh, “La dimension sociale des principes directeurs de l’OCDE à l’intention des entreprises multinationales”, *RGDIP*, 2008, no. 3.

¹⁷⁸ On this point, cf. European Parliament Resolution of 25 November 2010 on corporate social responsibility in international trade agreements (2009/2201(INI)) <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P7-TA-2010-0446+0+DOC+XML+V0//EN>.

¹⁷⁹ The OECD produces a range of highly informative guidelines, particularly on the topic of NCPs, which play a key role in “reflecting the behaviour” of multinational companies. The NCP statements for each member state are revealing: <http://www.oecd.org/daf/inv/mne/ncpstatements.htm>.

¹⁸⁰ S. Aktypis, “Les points de contacts nationaux de l’OCDE”, in *La responsabilité des entreprises multinationales en matière de droits de l’homme*, Bruylant, “Droit et Justice” collection, no. 89, 2010, p. 185.

¹⁸¹ S. Doumbe-Bille, “Droit international et développement durable”, in *Mélanges A. Kiss*, 1998, Éditions Frison-Roche, p. 245.

¹⁸² The 2012 annual report is scheduled for publication. The publication of the 2011 annual report (11th edition), “A new agenda for the future”, coincided with the OECD’s fiftieth anniversary and covered additional key themes such as

41. The WTO Trade and Environment Committee. In 2001, the Committee “strongly” reaffirmed its “commitment to the objective of sustainable development” in the Doha Declaration.¹⁸³ The WTO Trade and Environment Committee must take sustainable development into account (particularly in sectors such as agriculture, non-agricultural markets and services).

42. UNCTAD initiatives. The aim of the United Nations Conference on Trade and Development (UNCTAD) is to help developing countries integrate into the world economy in line with national policies and international action. In terms of CSR, it intervenes in a range of very different areas, playing, for example, an educational role with its “Guidance on Corporate Responsibility Indicators in Annual Reports” and helping to encourage public-private partnerships. One of the most shocking and appalling weaknesses of CSR relates to working conditions in developing countries;¹⁸⁴ the international dimension of the subcontracting chain is also one of the areas that European Union institutions are currently addressing. The aim of these partnerships is to promote the creation of shared values throughout the value chain in order to improve economic and development processes. The recent UNCTAD partnership seeks “to provide channels for further development, sharing and transferring of knowledge throughout the value chain, as well as the implementation of respective capacity-building activities at the supplier and producer level”.¹⁸⁵

human rights and the application of these guidelines to supply chains and other business relationships in which multinational companies are involved.

¹⁸³ Ministerial Declaration of 14 November 2001, which launched the Doha Round, WT/MIN(01)/DEC/1 20 November 2001, https://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_e.htm. Cf. also the WTO Symposium on Trade and Sustainable Development within the framework of paragraph 51 of the Doha Ministerial Declaration.

¹⁸⁴ Cf. the NCP report on the implementation of the OECD’s guidelines in the textiles and clothing industry published on 2 December 2013, following the referral by the French International Trade Minister, Nicole Bricq, <https://www.tresor.economie.gouv.fr/File/393376>.

¹⁸⁵ Cf. the Responsible Ecosystems Sourcing Platform (RESP) of the fashion, cosmetics and jewellery industries, UNCTAD, 11 February 2013, no. 34, p. 17, http://unctad.org/meetings/en/SessionalDocuments/ciem3d2_en.pdf.

43. United Nations Earth Summits and Environment Programme.

The United Nations Conference on the Human Environment in Stockholm¹⁸⁶ resulted in a Declaration made up of seven points and 26 articles expressly advocating “a duty to protect and improve the environment for present and future generations”. The famous Brundtland report¹⁸⁷ published in 1987 proposed a definition of sustainable development and was followed by a series of Earth Summits: Rio in June 1992, New York in 1997, Johannesburg in 2002 and Copenhagen in 2009. The principles drawn from no fewer than 300 multilateral treaties can be found in French domestic law. Ultimately, they force companies to approach the twenty-first century with objectives that were absent from, for example, the Law of 24 July 1966 on trading companies, in particular the precautionary principle and principle of participation (that would later form part of the Grenelle II Law).¹⁸⁸ International awareness of the “promising”¹⁸⁹ dialogue between sustainable development and corporate governance has given rise to many reports and guides, reflecting the significance of soft law in this area.¹⁹⁰ Future commitments on sustainable development were defined at the most recent “Rio +20” Earth Summit.¹⁹¹

44. The Aarhus Convention of 25 June 1998 on access to information, public participation in decision-making and access to justice in environmental matters: making environmental information accessible to the “public”. This convention¹⁹² enshrines environmental

¹⁸⁶ 5–16 June 1972.

¹⁸⁷ This report was the first international measure taken in favour of sustainable development. Written by Gro Harlem Brundtland and published in 1987 by the United Nations World Commission on Environment and Development, it states that sustainable development “meets the needs of the present without compromising the ability of future generations to meet their own needs.”

¹⁸⁸ On this point, cf. R. Romi, above n. 33, p. 43 and the many references to the doctrinal debate over the notion of the “common heritage of mankind”, cf. his article “Sur la notion de patrimoine commun de l’humanité en droit de l’environnement”, *Quot. jur.* 9 September 1989.

¹⁸⁹ T. Wiedermann-Goiran (ed.), “Le rapport Développement durable et gouvernement d’entreprise: un dialogue prometteur”, *Les cahiers de l’Orse*, Editions d’Organisation, 2002.

¹⁹⁰ UNCTAD, “Guidance on Good Practices in Corporate Governance Disclosure”, 2006, http://unctad.org/en/Docs/iteteb20063_en.pdf.

¹⁹¹ <http://www.unctad2012.org/>.

¹⁹² <http://www.unece.org/fileadmin/DAM/env/pp/documents/cep43e.pdf>; cf. Aarhus Convention, *Rev. jur. env.* 1999, special issue.

democracy and is based expressly on the Rio Declaration on Environment and Development.¹⁹³ Here, “information” is understood in the broadest sense, both in terms of the media on which it is contained and its content, and “the public” means “one or more natural or legal persons, and, in accordance with national legislation or practice, their associations, organisations or groups” (Article 2-4).¹⁹⁴ The recent Protocol on Pollutant Release and Transfer Registers (PRTRs), which aims to “facilitate the participation of the public in environmental decision-making and contribute to the prevention and reduction of pollution of the environment”,¹⁹⁵ plays an important role in giving “the public” access to such information. It also contributes to the emergence of sustainable corporate governance.

45. The International Labour Organization (ILO): progress in labour law. International standards on working environments took into account the protection of workers’ health and safety very early on.¹⁹⁶ The

¹⁹³ Rio Declaration on Environment and Development, 3–4 June 1992, <http://www.un.org/documents/ga/conf151/aconf15126-1annex1.htm>, Principle 10 “Environmental issues are best handled with the participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided.”

¹⁹⁴ Cf. Art. 2.4 of the Aarhus Convention and Art. 2-5, which clarifies the term “the public concerned” as meaning “the public affected or likely to be affected by, or having an interest in, the environmental decision-making; for the purposes of this definition, non-governmental organisations promoting environmental protection and meeting any requirements under national law shall be deemed to have an interest.”

¹⁹⁵ Decree 2013-188 of 4 March 2013 on the publication of the Protocol on Pollutant Release and Transfer Registers relating to the 1988 convention on access to information, public participation in decision-making and access to justice in environmental matters (four annexes in total), signed in Kiev on 21 May 2003, text 1, *OJFR* no. 0055 of 6 March 2013, p. 4033, extracts Art. 1; Art. 15.1 is revealing as it stipulates that “Each Party shall promote public awareness of its pollutant release and transfer register, and shall ensure that assistance and guidance are provided in accessing its register and in understanding and using the information contained in it.”

¹⁹⁶ In 1906, one of the first international conventions on employment was adopted in Bern prohibiting the use of white phosphorus in the production of matches, J.-M. Servais, *Normes internationales du travail*, LGDJ, Paris, 2004, p. 172.

ILO was set up in 1919 and its conventions have promoted social justice ever since, to the extent that workers' rights to health and safety have now become a "general principle of European labour law".¹⁹⁷ The most striking achievement of the ILO in its drive to promote "best practice" in the field of employment was the publication of the "Tripartite declaration of principles concerning multinational enterprises and social policy (MNE Declaration)"¹⁹⁸ in 2006. The promotion of the global strategy on health and safety at work adopted by the ILO in 2003 is the economic criterion.¹⁹⁹

46. International framework agreements. The international framework agreements (IFAs)²⁰⁰ agreed between international businesses and trade unions are powerful vehicles for CSR. They are negotiated at group level and affect the employment issues and working conditions of a group's entire workforce, to such an extent that they leave that group in a position whereby it sits alongside national law.²⁰¹ They illustrate perfectly the initiatives taken in relation to CSR and are founded on the ILO standards, which serve as a basis for negotiations. In particular, this type of agreement makes it possible to highlight the human dimension of a business. This recognition, indeed realisation, by the European Union of

¹⁹⁷ E. Mazuyer, "Les normes internationales et européennes de protection de l'environnement du travail", in *Droit du travail et droit de l'environnement, Regards croisés sur le développement durable*, M.-P. Blin-Franchomme and I. Desbarats (eds), "Lamy Axe Droit" collection, 2010, p. 25 et seq., esp. no. 44, p. 46; D. de la Garanderie, "La reconnaissance et la promotion de la responsabilité sociale des entreprises par l'Union européenne", *Journal des sociétés*, Oct. 2009, no. 69, p. 10.

¹⁹⁸ http://www.ilo.org/wcmsp5/groups/public/—ed_emp/—emp_ent/—multi/documents/publication/wcms_094386.pdf.

¹⁹⁹ E. Mazuyer, above n. 198, no. 54, p. 53; cf. Commission Communication, 21 February 2007, "Improving quality and productivity at work: Community strategy 2007–2012 on health and safety at work", COM(2007) 62, final, not published in the Official Journal, <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=URISERV:l10114>; S. de La Rosa, "L'encadrement communautaire et international de la responsabilité sociale des entreprises", in E. Mazuyer (ed.), *Regards croisés sur le phénomène de responsabilité sociale de l'entreprise*, La Documentation française, 2010, p. 123.

²⁰⁰ I. Daugareilh, "Les accords cadres internationaux: une réponse européenne à la mondialisation de l'économie", in M. Descolonges and B. Saincy, *Les nouveaux enjeux de la négociation sociale internationale*, La Découverte, 2006, pp. 116–29; Abadie, above n. 113, no. 723, p. 654.

²⁰¹ On this point, cf. developments by D. Jacotot, "Le 'groupe employeur' et la RSE", *RLDA*, July–August 2013, no. 84, p. 92 et seq.

the importance of CSR and its necessary movement towards binding measures was reflected in the European Parliament Resolution of 25 November 2010 on corporate social responsibility in international trade agreements, which introduced the “CSR clause” into EU trade contracts.²⁰² The European Commission is also launching consultations on the transparency of information disclosed by listed companies, such as the recent consultation on the Transparency Directive 2004/109/EC,²⁰³ which produced some revealing responses.²⁰⁴

Major questions inevitably arise over the effectiveness of such agreements, whether they are unilateral (coming from businesses only) or multilateral, the governing law²⁰⁵ and the reopening of negotiations with trade union groups. Christine Neau-Leduc has already anticipated the legal issues raised by such tricky questions.²⁰⁶

47. The United Nations Global Compact:²⁰⁷ a successful UN initiative. The Global Compact was launched at the 1999 World Economic Forum in Davos by the then UN Secretary-General, Kofi Annan, as a tool to promote dialogue between states, NGOs and businesses. This non-binding compact²⁰⁸ offers a range of tools to help businesses reflect upon and implement best practice in the field of CSR.²⁰⁹ It is structured around ten principles drawn from, among other sources, the Universal Declaration of Human Rights, the ILO Declaration on Fundamental Principles and Rights at Work, the Rio Declaration on Environment and Development and the United Nations Convention against Corruption.

The Global Compact is important in that it is also aimed at company directors. It states that, by making a personal commitment, managing

²⁰² Resolution 2009/2201 (INI), points 25 to 30.

²⁰³ http://ec.europa.eu/internal_market/securities/docs/transparency/directive/consultation_questions_en.pdf.

²⁰⁴ Cf. the summary of responses, http://ec.europa.eu/internal_market/securities/docs/transparency/transparency-consultation-summary_en.pdf.

²⁰⁵ B. Teyssié, “La loi applicable aux accords transnationaux d’entreprise ou de groupe”, in *Liber amicorum—Hélène Gaudemet-Tallon: Vers de nouveaux équilibres entre ordres juridiques*, Dalloz, 2008, pp. 821–30, 824.

²⁰⁶ C. Neau-Leduc, “Les accords sur ‘la responsabilité sociale de l’entreprise’”, *Dr. social* 2008, no. 1, p. 75 and, by the same author, “La responsabilité sociale de l’entreprise: quels enjeux juridiques?”, *Dr. social* 2006, no. 11, p. 952.

²⁰⁷ Cf. point 357 below.

²⁰⁸ <http://www.unglobalcompact.org/Languages/french/index.html>.

²⁰⁹ The inclusion of the Global Compact logo on products sold by “responsible companies” is a sign of progress in this area.

directors send a signal to all of their employees and other stakeholders that being a good corporate citizen²¹⁰ is a priority for their company. However, although “granting citizenship to a corporation no longer seems as absurd as initial analysis may suggest”²¹¹ and even if there no longer appear to be any limits to the anthropomorphism of corporate law,²¹² in terms of the principles of corporate governance, this notion is tricky to implement when it comes to possible sanctions. A corporation’s nationality cannot be likened to its citizenship; it is the individuals involved (company directors, boards and stakeholders) who must behave in a socially responsible manner.

The United Nations Global Compact is not intended to be a code of conduct for businesses, but rather a “framework for reference and dialogue”. The initiative was made more visible with the introduction of “Communication On Progress” (COP) reports²¹³ in January 2003, the aim of which is to inform stakeholders (e.g. employees, customers, suppliers, local authorities and residents) of a company’s progress in implementing the ten principles of the Global Compact. This visibility was further enhanced by the publication of a digital version of companies’ COPs in the Global Compact database.²¹⁴

48. The Principles for Responsible Investment (PRI). These principles²¹⁵ were introduced in 2005 by the UN Secretary-General, who initially invited a group of 20 investors from 12 countries to debate and promote guidelines on socially responsible investment.²¹⁶

49. At what point should an international environment agency be set up (and is this appropriate)? The creation of the French Sustainable Development and “Grenelle Environnement” Committee under Decree

²¹⁰ F.-G. Trébulle, “L’entreprise citoyenne?”, in E. Desmons (ed.), *Figures de la citoyenneté*, Paris, L’Harmattan, 2006, pp. 195–239; European Parliament Resolution of 6 February 2013, point 63 invites business people to promote and develop the concept of a “good corporate citizen”.

²¹¹ F.-G. Trébulle, “Personnalité morale et citoyenneté, considérations sur ‘l’entreprise citoyenne’”, *Rev. sociétés*, 2006, no. 1, p. 41, esp. no. 6, p. 43.

²¹² Cf. *contra*, P. Chauveau, “Des abus de la notion de personnalité morale des sociétés”, *Rev. gén. dr. com.* 1939, p. 397.

²¹³ http://www.unglobalcompact.org/docs/languages/french/cop_guidelines_french.pdf.

²¹⁴ As well as, where possible, a link (URL) on the company’s website redirecting to this document (<http://www.unglobalcompact.org/admin>).

²¹⁵ <http://www.unpri.org/>.

²¹⁶ Cf. points 514 and 516 below.

2010-370 of 13 April 2010 was an important step. The idea, put forward several years ago by Germany and France, is to set up a large agency similar to the World Health Organization or ILO, which would be headquartered in Nairobi. The United Nations Environment Programme (UNEP) was set up 40 years ago to put in place ad hoc programmes in response to environmental issues (such as climate change, coral reefs, biodiversity and migratory species). There is now a need to ensure consistency between the 500 agreements, conventions and treaties in place,²¹⁷ as the UNEP lacks the authority to streamline the system and make it more efficient.²¹⁸ There are those who support the establishment of such an organisation, but they have yet to agree on the method to be adopted (there is a big difference between simply “tidying up” an existing programme and setting up a major new agency). The environment being the weakest element of sustainable development in comparison with social and economic considerations, there is no shortage of arguments.

CSR is therefore seen as the way of reconciling economic, social and environmental aims and the European Union wants businesses to be able to take action in this area in conjunction with their partners.

§ 2. European Sources

A. The founding texts

50. The Charter of Fundamental Rights of the European Union:²¹⁹ **an express reference to sustainable development.** The Charter of Fundamental Rights of 7 December 2000 was made legally binding by the Treaty of Lisbon. Article 37, entitled “Environmental protection”, stipulates that “a high level of environmental protection and the improvement of the quality of the environment must be integrated into the

²¹⁷ The United Nations Commission on Sustainable Development is already working on this issue by organising its work in themed cycles, http://www.un.org/esa/dsd/csd/csd_index.shtml.

²¹⁸ However, there are now nearly 500 multilateral environmental agreements (MEAs) over which the UNEP has no authority as the Conferences Of the Parties (COP) to multilateral environmental agreements have also been granted decision-making powers; cf. S. Maljean-Dubois, “Le foisonnement des institutions conventionnelles”, in *L'effectivité du droit international de l'environnement*, Economica, 1998.

²¹⁹ *OJEC*, 18 December 2000 C 364/1; http://www.europarl.europa.eu/charter/pdf/text_en.pdf.

policies of the Union and ensured in accordance with the principle of sustainable development.”

51. The European Social Charter. This charter, a Council of Europe convention that was signed in Turin in 1961 and revised in 1996, plays a key role in relation to social rights (housing, health, education, employment, working conditions, the right to strike, collective bargaining, equal pay for equal work, maternity allowance, legal and social protection, the free movement of people and non-discrimination, protection against poverty and exclusion and disabled and migrant workers’ rights). The Charter reflects European progress in this area and demonstrates, despite its supranationality being limited and the fact that it gives rise to “recommendations”, that the “tools” in terms of fundamental rights were available half a century before the emergence of sustainable corporate governance, the aim of which will be to provide stakeholders with information on such social issues, in particular by means of non-financial reporting. There will naturally remain the practical, truly progressive phase that will be supported by the various warning signs published in, among other things, the work of the European Committee of Social Rights (ECSR).²²⁰ We will see that this sustainable corporate governance will not proceed behind closed doors as the practices (which are desirable and labelled as “good”) will be visible to the largest possible number of people (including stakeholders, international and European institutions and the observatories of all kinds that are currently thriving).²²¹

52. The treaties: developing a community environmental policy. The Treaty of Rome of 25 March 1957 refers to the protection of the environment in Article 2.²²² However, it was above all the Single

²²⁰ Cf. point 93 below.

²²¹ This “window” onto corporate governance is reflected in the various measures that have been made “public”, cf. the restrictions recently introduced in the new version of the AFEP/MEDEF Code that apply to compensation committees when implementing a French-style “Say on Pay”.

²²² “The Community shall have as its task ... to promote throughout the Community a harmonious, balanced and sustainable development of economic activities, a high level of employment and of social protection, equality between men and women, sustainable and non-inflationary growth, a high degree of competitiveness and convergence of economic performance, a high level of protection and improvement of the quality of the environment, the raising of the standard of living and quality of life, and economic and social cohesion and solidarity among Member States” and in Art. 3, point J Art. 174, Title XIX.

European Act²²³ that incorporated a section on the environment, followed by the Maastricht Treaty.²²⁴ The Treaty of Amsterdam²²⁵ recognises that integrating environmental protection requirements into other policies is a key factor in promoting sustainable development (Article 6 of the Treaty Establishing the European Community). The Treaty of Nice²²⁶ expressly provides for a series of objectives for the community environmental policy. Article 11 of the Treaty on the Functioning of the European Union²²⁷ specifies that “environmental protection requirements must be integrated into the definition and implementation of the Union’s policies and activities, in particular with a view to promoting sustainable development”.²²⁸ However, there is no explicit reference to CSR in the Treaty.²²⁹

53. Strategies: the Lisbon Strategy. The Lisbon Strategy was developed at the meeting of the European Council held in Lisbon in March 2000 and incorporated economic, social and environmental considerations. It had produced quite limited results by the time it came to an end in 2010. This is why, during the European Parliament debate²³⁰ on the Europe 2020 “Strategy for smart, sustainable and inclusive growth”,

²²³ Adopted on 17 and 26 February 1986.

²²⁴ Came into force on 1 November 1993. In the preamble, one of the objectives is “... to promote economic and social progress for their peoples, taking into account the principle of sustainable development and within the context of the accomplishment of the internal market and of reinforced cohesion and environmental protection, and to implement policies ensuring that advances in economic integration are accompanied by parallel progress in other fields” and in Art. 2.

²²⁵ Came into force on 1 May 1999; reference is made to protecting the environment and sustainable development.

²²⁶ Came into force on 1 February 2003.

²²⁷ Came into force on 1 December 2009.

²²⁸ B. Sjøfjell, “Sustainable Development, EU Law and Companies: The EU Law Framework for the Sustainable Companies Project”, *International and Comparative Corporate Law Journal*, 2010, Vol. 8, no. 1, pp. 1–14, University of Oslo Faculty of Law Research Paper No. 2010-01, First Sustainable Companies Workshop, Oslo, January 2010.

²²⁹ B. Sjøfjell, “Internalizing Externalities in EU Law: Why Neither Corporate Governance nor Corporate Social Responsibility Provides the Answers”, *George Washington International Law Review*, Vol. 40(4), pp. 977–1024, 2009; *Nordic & European Corporate Law Working Paper* No. 10-10.

²³⁰ <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+IM-PRESS+20100304IPR69984+0+DOC+XML+V0//EN>.

some MEPs expressed their reservations about this new programme.²³¹ The objectives of the new strategy are more realistic: investment in research, innovation and training is maintained as part of a wider coordination of national and European policies.

B. The Impetus of the European Commission,²³² Parliament and Council

54. Different roadmaps: the development of the various definitions of CSR. European sources apply flexible standards to CSR. Communications, recommendations, green papers and resolutions have defined the outlines of CSR to such an extent that this “soft law” seems to no longer come with penalties. It is a truncated image of the normative power of soft law. These influences vary between soft, very soft and more binding law, creating the concept of “co-regulation”.²³³

It is within the European Union that CSR has gradually been defined using a range of normative tools. Although the concept of CSR first emerged in the United States, it is under the European Union’s unique normative system that it has been brought into widespread use, popularised, rationalised and thought through at European level, with successive rafts of existing and future legislation from each of the Member States. It is therefore a European-style CSR that is tending to emerge.

Since 2000, the Union has increasingly made its voice heard. Although European initiatives have come a long way in ten years, progress has perhaps been more disappointing when it comes to making sustainable corporate governance a reality. The Union faces an enormous task, the fields in which it is involved are hugely varied and it has previously had to “jump on the bandwagon of international initiatives”. Now, it is the driving force. The role of the Union in factoring in both environmental strategy and responsibility is not new. Take, for example, the Communication from the Commission to the Council and the European Parliament on the review of the Sustainable Development Strategy (13 December 2005),²³⁴ which stated in proposal 38 that the Commission would launch a public consultation (green paper) on corporate governance, which was

²³¹ http://ec.europa.eu/europe2020/index_en.htm.

²³² L. Krämer, *EC Environmental Law*, 6th edn, London, Sweet & Maxwell, 2007.

²³³ J. Igalens, “Essai d’analyse de la nouvelle stratégie de l’Union européenne pour la période 2011–2014”, *Journal des sociétés*, July 2012, no. 100, p. 11 et seq. on the concept of “co-regulation”.

²³⁴ Commission Communication, 13 December 2005, COM(2005) 658 final, Brussels.

subsequently carried out. It would also launch a public consultation on the options for improving the transparency of information disclosed by companies on social and environmental matters and those relating to human rights. These consultations would give rise to more binding initiatives.

Coordinated European action has been reflected in the treaties²³⁵ and the use of recommendations, communications, green papers and expert group meetings.

1) Communications, resolutions and recommendations

55. The growing influence of Brussels and Strasbourg. Europe is increasingly taking coordinated action. In 1992, the European Commission published its fifth environment action programme entitled “Towards sustainability”.²³⁶

A) COMMUNICATIONS

56. As there are many communications, we shall focus here on the most recent.²³⁷

57. In 1999, the Commission adopted a communication entitled “**Single Market and Environment**” [COM(1999) 263 of 8 June 1999], the aim of which is to ensure that policies on environmental issues and the single market support and strengthen one another, while at the same time developing positive synergies between them. In 2001, the Commission adopted a communication on the sixth environment action programme [COM(2001) 31 final of 24 January 2001].²³⁸

58. The European Commission laid the foundations of CSR in its Communication of 2 July 2002 on “**Corporate social responsibility: a**

²³⁵ Cf. I. Tchotourian, “La responsabilité sociale des entreprises vue sous l’angle du développement durable ou quand le monde des entreprises change”, *Lex Electronica*, Winter 2009, Vol. 13(3), pp. 1–53.

²³⁶ “Towards sustainability” [COM(92) 23], *OJ C* 138 of 17 May 1993. Programme last amended by Decision 2179/98/EC of the European Parliament and Council of 24 September 1998 (*OJ L* 275 of 10 October 1998).

²³⁷ Cf. also “Rio+20: towards the green economy and better governance”, COM(2011) 363.

²³⁸ Cf. also P5_TA (2002) 0200, “European Parliament resolution on the Communication from the Commission concerning Corporate Social Responsibility: A business contribution to Sustainable Development”, *OJEC*, no. C 64 E/73, 17 March 2004.

business contribution to sustainable development”,²³⁹ recognising the voluntary nature of CSR and the need to make CSR practices credible and transparent, focus on activities, adopt a holistic approach to CSR and comply with international agreements and instruments. The Commission also stressed the importance of environmental accounting.²⁴⁰

A series of Commission communications then followed in which the Commission gradually stressed the role of labels and standards (ILO and environmental standards)²⁴¹ and, having deemed sustainable development a “fundamental objective”,²⁴² set about reviewing the strategy to be adopted in this area²⁴³ and started the process of setting up a European Alliance for Corporate Social Responsibility.²⁴⁴ This element of partnership with no regulatory aspect is the Commission’s guideline²⁴⁵ and is not quite the same as that upheld by the European Parliament on this matter.

When it comes to environmental information, access to which is organised and protected by the European Union, the European Commission has even laid the foundations for a shared environmental information

²³⁹ European Commission Communication of 2 July 2002 on “Corporate social responsibility: a business contribution to sustainable development”, COM(2002) 347 final, not published in the *Official Journal*.

²⁴⁰ Cf. in particular Commission Recommendation 2001/256/EC of 15 November 2002 on quality assurance for the statutory audit in the European Union: minimum requirements (*OJ* no. L 91 of 31 March 2001, p. 91); Commission Communication of 13 June 2000 on “EU Financial Reporting Strategy: the way forward”.

²⁴¹ Communication from the Commission to the Council and the European Parliament, “The World Summit on Sustainable Development one year on: implementing our commitments”, Brussels, 23 December 2003, COM(2003), 829 final.

²⁴² Communication from the Commission to the Council and the European Parliament, “The 2005 Review of the EU Sustainable Development Strategy: Initial Stocktaking and Future Orientations”, Brussels, 9 February 2005, COM(2003) 37 final.

²⁴³ Communication from the Commission to the Council and the European Parliament, “Review of the Sustainable Development Strategy – A platform for action”, Brussels, 13 December 2005, COM(2005), 658 final.

²⁴⁴ Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee, “Implementing the partnership for growth and jobs: making Europe a pole of excellence on corporate social responsibility”, Brussels, 22 March 2006, COM(2006) 136 final.

²⁴⁵ European Parliament Resolution 2006/2133 (INI) of 13 March 2007 on corporate social responsibility: a new partnership.

system,²⁴⁶ with an emphasis on empowering European citizens “by making relevant, timely information available to them, enabling them to take informed decisions concerning their environment, including taking appropriate action in cases of emergency, and to influence public policy”.²⁴⁷

59. A “new definition” of CSR: a “global” framework—from a general political framework advocating a voluntary approach to “the responsibility of enterprises for their impacts on society”. A largely voluntary approach to CSR was initially defined by the European Union²⁴⁸ as follows: “a concept whereby companies integrate social and environmental concerns in their business operations and in their interaction with their stakeholders on a voluntary basis. It is about enterprises deciding to go beyond minimum legal requirements and obligations stemming from collective agreements in order to address societal needs”. This definition was also used in the Commission Communication of 22 March 2006.²⁴⁹

60. The Commission Communication of 25 October 2011, “A renewed EU strategy 2011–14 for Corporate Social Responsibility” [COM (2011) 0681]:²⁵⁰ a change of direction? The term “voluntary” is no longer anywhere to be found in this communication.²⁵¹ Instead, the European Commission puts forward a “new definition” of CSR, proposing that it be “redefined” as “the responsibility of enterprises for their impacts on society”. Many have seen this as a significant change of

²⁴⁶ *Shared Environmental Information System, SEIS*, Communication of 23 January 2008, COM(2008) 46 final, *OJEC* no. C 118, 15 May 2008, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2008:0046:FIN:EN:PDF>; the Communication of 2 July 2002 had previously provided for the creation of a “European forum” that “should be a place for exchanging experiences, cooperation and identifying areas where European action is required.”

²⁴⁷ Art. 5.3.

²⁴⁸ EC Communication, COM(2006) 136 final, 25 March 2006.

²⁴⁹ EC Communication, COM(2006) 136 final, 22 March 2006.

²⁵⁰ “A renewed EU strategy 2011–14 for Corporate Social Responsibility”, COM(2011) 681 final, http://ec.europa.eu/enterprise/policies/sustainable-business/files/csr/new-csr/act_fr.pdf; L. Roglev, J. Beckhard and V. Becker, “Responsabilité des entreprises: une *compliance* à l’européenne?”, *RLDA*, January 2012, no. 67, p. 10.

²⁵¹ EU Communication, COM(2011) 681, above n. 162, 3, 3.1 “a new definition”.

direction. It is true that this communication marks a paradigm shift and it is difficult to predict all of the later changes this could entail.

61. The Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions of 6 December 2012 on renewable energy.²⁵² This communication is aimed not only at Member States but also at consumers and CSR stakeholders and focuses on growth areas in research (particularly marine technologies).

62. Communication of 12 December 2012.²⁵³ This communication is entitled “Action Plan: European corporate law and corporate governance – a modern legal framework for more engaged shareholders and sustainable companies”. It demonstrates the European Commission’s involvement in the development of social corporate governance, both in terms of the emphasis on shareholder engagement and of the role of social accounting.

B) RESOLUTIONS

63. As there are many resolutions, we shall focus here on the most recent and symbolic.²⁵⁴

64. European Parliament Resolution of 13 March 2007 on corporate social responsibility: a new partnership. In 2007, the European Parliament recommended that the Commission “extends the responsibility of directors of companies with more than 1 000 employees to encompass the duty for the directors themselves to minimise any harmful social and environmental impact of companies’ activities”.²⁵⁵

²⁵² “Renewable Energy: a major player in the European energy market”, COM(2012)271/final, http://ec.europa.eu/energy/renewables/doc/communication/2012/comm_fr.pdf.

²⁵³ EU Communication, 12 December 2012, COM(2012) 740/2; I. Tcho-tourian, “Modernisation du droit européen des sociétés: transparence, engagement et croissance comme objectifs”, *Bull. Joly Sociétés*, February 2013, *Éclairage*, p. 106.

²⁵⁴ Cf. point 338 below on the European Parliament Resolution of 29 March 2012 on a corporate governance framework for European companies.

²⁵⁵ P6_TA (2007)0062, “Corporate social responsibility: a new partnership”, European Parliament Resolution of 13 March 2007 on corporate social responsibility: a new partnership (2006/2133(INI)); resolution of 23 May 2007 on “Promoting decent work for all”.

65. A major step forward: the European Parliament Resolution of 25 November 2010 on corporate social responsibility in international trade agreements. Recital A of this resolution, also known as the “supply chain” resolution,²⁵⁶ states that “corporations and their subsidiaries are one of the major players in economic globalisation and international trade”. Let us focus on one of the provisions of this resolution: the inclusion of CSR clauses in all European Union trade agreements.

Point 25 “proposes, in more general terms, that future trade agreements negotiated by the Union should incorporate a chapter on sustainable development which includes a CSR clause, based, in part, on the 2010 update of the OECD Guidelines for Multinational Enterprises”. Point 26 proposes that this “CSR clause” should incorporate “(a) a mutual undertaking by the two parties to promote internationally-agreed CSR instruments in the context of the agreement and their trade relations; (b) incentives to encourage undertakings to enter into CSR commitments negotiated with all their stakeholders, including the trade unions, consumer organisations, local authorities and civil society organisations concerned.”

66. The two resolutions of 6 February 2013: the move towards a more social “worldwide CSR”.²⁵⁷ The European Parliament resolutions of 6 February 2013 on “Corporate social responsibility: accountable, transparent and responsible business behaviour and sustainable growth”²⁵⁸ and “Corporate Social Responsibility: promoting society’s interests and a route to sustainable and inclusive recovery”²⁵⁹ bring CSR into the twenty-first century. These two resolutions cover significant ground and reveal a strong drive towards a “modern understanding of

²⁵⁶ European Parliament Resolution [2009/2201 (INI)], <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P7-TA-2010-0446+0+DOC+XML+V0//EN>.

²⁵⁷ C. Malecki, “L’irrésistible montée en puissance de la RSE: les impulsions européennes et françaises de l’année 2013”, *Bull. Joly Sociétés*, September 2013, p. 594 et seq.

²⁵⁸ EU Resolution of 6 February 2013, 2012/2098 (INI), “Corporate social responsibility: accountable, transparent and responsible business behaviour and sustainable growth”, <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P7-TA-2013-0049+0+DOC+XML+V0//EN>.

²⁵⁹ EU Resolution of 6 February 2013, 2012/2097 (INI), “Corporate Social Responsibility: promoting society’s interests and a route to sustainable and inclusive recovery”, <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P7-TA-2013-0050+0+DOC+XML+V0//EN>.

CSR”, which involves making CSR policies more transparent and effective and takes account of the “compliance issues and relations with third countries”. They stress the social aspects, multi-stakeholder approaches and international dimension and are unapologetically realistic in highlighting “the limitations of CSR as currently implemented”.²⁶⁰ These two resolutions take a long-term view²⁶¹ by forging a link between “sustainable and inclusive recovery” and “sustainable growth”.

The key trends of these resolutions create a roadmap for the CSR of tomorrow, one that is international, intentionally operational and more social.

a) The resolution on “promoting society’s interests and a route to sustainable and inclusive recovery”

67. Big ambitions. The European Parliament Resolution of 6 February 2013 on “Promoting society’s interests and a route to sustainable and inclusive recovery” has a broad scope and reveals some of the newer aspects of CSR in line with the Communication of 25 October 2011, which proposed a new definition of CSR.²⁶² If we start from the aim stated at the end of the resolution that “CSR can ensure that gains are shared equitably in order to develop sustainable economic and social prosperity and to lift more people out of poverty, especially in times of financial crisis” (§ 91), then the key themes covered in this text seem entirely logical. Having said this, given the “wide angle” adopted by the European Parliament, we may well ask whether any field now does not fall within the remit of CSR.²⁶³

68. Creating a “worldwide” CSR that does not exclude a local approach. The limits of CSR often stop at the borders of Member States or, more optimistically, at those of the European Union itself. There are

²⁶⁰ EU Resolution of 6 February 2013, “Corporate Social Responsibility: promoting society’s interests and a route to sustainable and inclusive recovery”, point 83 “... points out that the way in which extractive industries operate in developing countries requires a move beyond a voluntary approach; stresses that investment by the petroleum industry in Nigeria is a good example of the limitations of CSR as currently implemented ...”.

²⁶¹ Malecki, above n. 257.

²⁶² EC Communication, “A renewed EU strategy 2011–14 for Corporate Social Responsibility”, 25 October 2010: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2011:0681:FIN:en:PDF>.

²⁶³ From travel to hospitality, insurance, telecommunications, media, journalism, mining, innovative transport, education, young people and sport, is there any sector that is no longer, is not or will no longer be affected by CSR?

many obvious, alarming and reprehensible questions over child labour, the failure to comply with social standards in “third countries” and the devastating effects of mining activities. This raises the need for “global” initiatives²⁶⁴ (§ 16), global “social and natural capital” (§ 7) and the promotion of “global CSR instruments” (§ 8). It is also necessary to take into account subcontractors and supply chains (§ 77). The OECD guidelines remain the absolute and constant source of reference in all fields and are also mentioned in relation to the inclusion of “contractual clauses” in “finance for trade and development” (§ 35). These constant references to the OECD guidelines are a vital part of an international approach to CSR, which must be an “active” approach to these guidelines. International investment and multinational companies, the EU’s “delegations” in third countries, are encouraged to adopt this approach (§ 42), which does not rule out “working closely” with local populations, governments and business partners. Understanding the international dimension of CSR is an ongoing concern of the European Parliament, which advocates “a new global convention on corporate responsibility within the UN system”, drawing attention to the fact that “new forms of global governance in relation to CSR might emerge” (§ 47).

Various recurrent themes emerge when discussing the progress of CSR at global level, such as the role of “multinational enterprises” (§ 51) and the recognition of the “know your end user” principle (§ 53), as well as “supply chains and production or market flows” (§ 53) and “assistance to third-country governments” (§ 86).

69. Standardisation, labelling. Proposals will be put forward to reduce the “governance gaps” with regard to “international CSR standards” (§ 66). Standardisation (§ 66) and labelling (§ 68), particularly for the benefit of ethical consumers, are strongly encouraged.

70. Stakeholders: “companies of any size”. Businesses are always stakeholders in CSR, particularly multinationals, although there is a strong movement (as can be seen in the other resolution of 6 February 2013) to involve “companies of any size” (§ 3), enabling SMEs to play “a strategic role” (§ 4) by means of, among other things, “multi-stakeholder platforms”. To achieve this, CSR must be “geared more closely to SMEs” to allow it to “spread more widely in all parts of Europe” (§ 73) and businesses “should be involved in solving social problems” (§ 22). We can see that the social, protective dimension of

²⁶⁴ See the references in recital N to China, India, Brazil, South Africa and Malaysia.

CSR is being considerably broadened to encompass all categories of vulnerable populations. There is significant expansion on this element in this resolution, which stresses the benefits of this approach for the “image” of companies (§ 26).

71. CSR “for all” with a strong social, charitable and humanitarian focus. The European Parliament “considers it regrettable that CSR continues to be focused on environmental standards at the expense of social standards” (§ 5). This resolution highlights the need to address the “pressing and overriding challenges of environmental degradation and social disintegration” (§ 6) and confirms the new definition of CSR set out in the Communication of 25 October 2011, describing the failure to comply with laws, rules and international standards as “anti-social acts” (§ 11) and child and forced labour as “criminal”. It is almost sounding an alarm in recognising that “social indicators lag behind environmental indices” (§ 59) and calling for a debate on “better integrating social impact into sustainable business management” (§ 59). The social aspect of CSR is clearly defined in terms of “social measures” (§ 16); CSR has a protective purpose (the “care” society) and must combat “extreme poverty”, child labour and inequality, as well as more conventional challenges such as carbon emissions and water acidification. It must protect vulnerable populations, women, young people and “those affected by multiple disadvantages, such as Roma and disabled people” (§ 21) and promote “the employment of vulnerable groups within society” (§ 25) by encouraging new employment models through cooperatives and fair trade, as well as taking into account “differences among pension systems” (§ 29), “biodiversity” and “climate change” (§ 28) and ensuring “resource efficiency”.

The implementation of a “worldwide”, social CSR will depend on a number of different factors, including the role of the ILO, ties with third countries involving the European Union’s Directorate-General for Employment and respect for “decent work” (§ 44), as well as the “promotion and dissemination of social and labour standards worldwide” (§ 51) and the fight against “discrimination and social exclusion” (§ 54). CSR should “complement, but in no way replace” (§ 45) dialogue with trade unions.

“Charitable” CSR is encouraged through “benevolent humanitarian and positive social activities” by the European Volunteer Centre (§ 56) and the “future European Voluntary Humanitarian Aid Corps” (§ 57). Even the “primary focus” (§ 69) of socially responsible investment (SRI) must not be confined to environmental aspects. The “social report” produced by a company should be verified by an “external body” (§ 72), while a

“sectoral and cross-sectoral social dialogue” (§ 74) and the “blacklisting” of companies found to be in breach of labour standards by banning them from receiving EU funding (§ 75) are also strongly encouraged. *The CSR enshrined here is a “CSR for all”.*

72. The future of the concept of “responsible supply chain management”. CSR should apply to “the entire global supply chain” so as to make it possible to offer “fair pay and decent working conditions” (§ 81). This requirement for decent work is particularly emphasised in relation to the mining industry.

73. CSR: a factor in sustainable growth that can mitigate the effects of crises? CSR is now viewed in a completely new way, demonstrating the significant paradigm shift that has taken place in the space of a decade. It is expressly seen as a way of combating crises and contributing to a “sustainable recovery”; it comes into play “following the crisis” (§ 29), which is “financial” (§ 29, § 91) in nature.

74. A far-reaching CSR. The aims of the European Parliament are extremely varied. We therefore find freedom of expression and the protection of privacy (§ 33, § 34) and the “family life of all their employees” (§ 58) alongside “export credits to businesses” (§ 35). The European Union will also raise awareness among businesses of the contribution they can make in the fields of “culture, education, sport and youth” (§ 92). Companies operating in the media industry are singled out, particularly with regard to protecting sources and the rights of “whistleblowers” (§ 93).

75. A functional approach to human rights. Human rights have always been central to CSR; preventing violations is recommended in the resolution (§ 53). A practical, more functional approach is beginning to emerge through the development of “sector-specific human rights guidance” (§ 38, 39, 40). The concept of “responsible competitiveness” is similarly endorsed by the European Parliament (§ 41). The effect of new technologies on human rights must be taken into account “as early ... as possible” (§ 90).

76. The essential and “non-substitutable” role of public authorities. Public authorities play a key role in encouraging CSR, particularly with regard to public procurement (§ 48). This is further enhanced by the inclusion of “specific clauses” (§ 49) involving state-owned enterprises,

joint ventures and—an important global reference—“export credit guarantees and large-scale projects in third countries” (§ 49). The resolution highlights the role of public procurement in promoting CSR practices, a role that should be strengthened by research into the inclusion of “CSR clauses” in purchasing (§ 60).

b) The resolution on “accountable, transparent and responsible business behaviour and sustainable growth”

77. In praise of CSR as a way to mitigate the economic crisis. Like the previous resolution, this one covers CSR relations with third countries and the role assigned to SMEs. It also seeks to define a modern conception of CSR and make CSR policies more transparent and effective, while at the same time stipulating that businesses “cannot take over public authorities’ responsibility for promoting, implementing and monitoring social and environmental standards” (§ 1). It highlights that CSR “can make a great contribution towards restoring lost confidence” in periods of “economic crisis” (§ 2), particularly that of investors and consumers (§ 21). The resolution also emphasises the need to take into account the “supply chain and, where applicable ... subcontractors” (§ 8) and to “promote CSR in relations with other countries and regions around the world” (§ 55), as well as advocating “innovative solutions” (§ 11) and raising the possibility of introducing a “European social label”. It “welcomes the idea of establishing multi-stakeholder CSR platforms” (§ 13), calls for the “dissemination of best practice” (§ 14) and is in favour of “more responsible consumption” (§ 15), as well as highlighting the need to factor social and environmental considerations into public procurement (§ 17), tackle climate change (§ 18) and assist third-country governments (§ 19). It considers the role of SRI (§ 20) and encourages “education and training in CSR” (§ 28). There is a specific reference to companies operating in the media industry, who are invited to put in place “transparent journalism standards in their CSR policies” (§ 29). Finally, the European Parliament endorses the use of minimum standards for victims (§ 37) in relevant sectors such as travel, insurance, accommodation and telecommunications.

As in the previous one, this resolution takes into account relations with third countries, promotes services for those “seeking alternatives to court litigation” (§ 51), stresses the need to exchange good practices with partners in other countries (§ 53) and highlights that “businesses” must play “a leading role” (§ 56).

78. Invaluable lessons for “sustainable” corporate governance. The primary merit of these resolutions lies in the fact that they highlight the

essential role played by businesses in implementing the ever more “fragmented” aims of CSR. This conceptual refocusing is invaluable as although CSR can also take the form of OSR (organisational social responsibility), it must nonetheless factor in the specific legal constraints imposed by the national legal systems of Member States. How can we fail to be delighted that the European Parliament itself welcomes “a link between good corporate responsibility and good corporate governance” (§ 23)? How can we not approve of the fact that this resolution is more focused on the role of businesses in creating a “social market economy” (§ 3)? How can we fail to infer from this that this is a new, positive (indeed optimistic) version of corporate governance that will be able to coordinate and fulfil these aims? “Euroscptics” will no doubt find ammunition in support of their arguments for rejecting a type of CSR dictated by the Union, which aims to protect the most vulnerable, reduce inequality and poverty²⁶⁵ and enable the emergence of a “social” State (is this *really* the aim of CSR?).

We need not be fervent Europhiles to appreciate the value of the *real codes of conduct* proposed explicitly and helpfully by the European Parliament for the future of “sustainable” corporate governance, lessons that our various laws and corporate governance codes have so far failed to implement clearly or forcefully. For example, the resolution states that “in cases where a business is in difficulty, excessive bonuses, compensation and salaries paid to managers are incompatible with socially responsible behaviour” (§ 6). The fight against “greenwashing” (§ 16), the disclosure of “information on sustainability” and “risks” in this area (§ 21) will be key components of this sustainable corporate governance.

More specifically, CSR strategies will have to be determined at board level (§ 23). This resolution calls on the Commission and Member States to introduce corporate stewardship codes (unlike recital I of the previous resolution, which is much more critical of such codes), but above all establishes a clear link between the “performance” of a company, CSR and its financial results (§ 23). It emphasises that we must respond to “the needs of investors and other stakeholders as well as the need to provide consumers with easy access to information on businesses’ impact on society” and implement a “life cycle cost methodology” (§ 26) “as quickly as possible” (§ 32). Above all, it stresses the need to adopt a pragmatic approach to ensure that reporting on essential sustainability

²⁶⁵ On changes in the distribution of wealth, cf. T. Piketty, *Le capital au xxi^e siècle*, Seuil, Les livres du Nouveau Monde, 2013, in particular p. 766 et seq. and on demographics cf. p. 136 et seq.

information “does not overburden companies” (§ 35), by giving them a transition period to comply with disclosure requirements for non-financial reporting. The fight against “tax avoidance and illicit money flows” forms part of this approach (§ 22).

79. SMEs are implementing CSR without knowing it. When it comes to SMEs, the emphasis is on the “think small first” principle (§ 39). This confirms a local and indeed regional approach to CSR and SMEs’ “informal” and “intuitive” approach to it, which leads to the observation that “most of these SMEs do not know that they are actually implementing sustainability, CSR and good corporate governance practices” (§ 41). On the basis of this observation, the resolution invites the Commission “to first examine SMEs’ current practices before considering specific CSR strategies for SMEs” and to put forward methods specific to SMEs by producing “guides and handbooks” for them (§ 45). It even recommends that “specific measures should be drawn up for small and micro-enterprises” (§ 47). The resolution concludes by stating the possible need for “regulatory measures” (§ 54).

80. The European desire for a “modern” CSR that can help create a social market economy. These two resolutions therefore propose a holistic, worldwide, cross-disciplinary, pragmatic, humanitarian and financially viable approach to CSR that can be both self- and co-regulated and is above all protective and charitable. Public authorities and businesses will be key players in this approach, while employees, consumers, end users and vulnerable populations will be the—ideally proactive—beneficiaries. It will also call for the involvement of a range of institutions, as well as international, European and local organisations. Although this version of CSR is appealing and welcome in that it responds to the challenges of the twenty-first century, it will give rise to legitimate questions about Member States. More specifically, is a liberal form of CSR abortive inasmuch as the State is “essential and non-substitutable”? This brings us on to the question of liberal ecology.

2) *The use of green papers*

81. A participatory process. The use of European Commission green papers forms part of an approach that invites those affected to participate in a process of consultation and debate on the topic in question. The European Council, European Commission and European Parliament have already taken social and environmental data into account. A European

multi-stakeholder CSR forum was introduced in 2002 to bring together businesses and stakeholders and allow for a community partnership on CSR.

82. Green Paper of 8 March 2000 on greenhouse gas emissions trading within the European Union.²⁶⁶ This paper marks an important step in recognising the need for environmental protection. It follows on from the international trading scheme for greenhouse gas quotas provided for by the Kyoto Protocol. The EU Emissions Trading System (EU ETS) has allowed for the creation of a European market for carbon dioxide (CO₂) and other greenhouse gases.

83. Green Paper of 18 July 2001 on “promoting a European framework for corporate social responsibility”. This green paper²⁶⁷ invites public authorities, understood in the broadest sense, “to express their views on how to build a partnership for the development of a new framework for the promotion of corporate social responsibility”. The Commission proposes the establishment of a consultation process for stakeholders on the concept of CSR.²⁶⁸ The use of green papers is in keeping with the spirit and essence of CSR,²⁶⁹ allowing for “consensual standardisation, the democratisation of institutions and dynamic construction”.²⁷⁰ In this area, it is a case above all of “raising awareness” and “stimulating” debate.²⁷¹ The paper’s main findings are that in Europe,

²⁶⁶ Green Paper, 8 March 2000, COM(2000) 87 final, <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52000DC0087&from=EN>.

²⁶⁷ “Promoting a European framework for corporate social responsibility”, COM(2001) 366 final.

²⁶⁸ Communication from the Commission concerning Corporate Social Responsibility, July 2001, COM(2002) 347 final, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2002:0347:FIN:en:PDF>.

²⁶⁹ White papers are produced at a later stage of the process. The Commission draws up an official set of proposals and puts in place an instrument for developing them, D. Dero-Bugny, “Le ‘Livre vert’ de la Commission européenne”, *RTDE* 2005, p. 85.

²⁷⁰ V. Lasserre-Kiesow, “Les Livres verts et les Livres blancs de la Commission européenne”, in *Le Droit souple*, Dalloz, “Thèmes et commentaires” collection, 2009, p. 75 et seq., esp. p. 79.

²⁷¹ Cf. p. 25 of the 2001 Green Paper on CSR: “The main aim of this Green Paper is to raise awareness and stimulate debate on new ways of promoting corporate social responsibility” and the green paper on market-based instruments for environment and related policy purposes, COM(2007) 140 final, p. 18: “By means of this paper the Commission would like to generate a discussion about more active contribution of Community market-based instruments to these

CSR is viewed as a voluntary approach based on the concept of “good governance”.

84. Green Paper of 10 November 2010 on “the development policy in support of inclusive growth and sustainable development—Increasing the impact of EU development policy”.²⁷² This green paper plays an important role in developing the strategy to be adopted for promoting CSR.

85. Green Paper of 4 April 2011 on “the EU corporate governance framework”: a precursor of humanitarian corporate governance. The Green Paper on “the EU corporate governance framework”²⁷³ shows that social obligations should be a concern for the boards of directors and supervisory boards of listed companies.²⁷⁴

3) Directives

86. The Environmental Liability Directive of 21 April 2004: a powerful driver.²⁷⁵ This directive marks a vital step that could not have been achieved without the White Paper on Environmental Liability of 9 February 2000.²⁷⁶ The mechanism put in place provides for not only the remedy but also the prevention of damage to the environment.²⁷⁷

objectives, in particular when it comes to indirect taxation”, <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52007DC0140&from=EN>.

²⁷² EU Communication, (COM) 2010, 629; F.-G. Trébulle, “Entreprise et développement durable” (Part 1) Summer 2010–Summer 2011, *Environnement*, November 2011, col. 3.

²⁷³ Dated 5 April 2011, http://ec.europa.eu/internal_market/company/docs/modern/com2011-164_en.pdf.

²⁷⁴ C. Malecki, “La synthèse des réponses du Livre vert ‘Le cadre de la gouvernance d’entreprise dans l’UE’: la *Soft Law* et la self-regulation plébiscitées”, *Bull. Joly Sociétés*, no. 2, February 2012, Éclairage, p. 94.

²⁷⁵ Directive 2004/35/EC of the European Parliament and the Council of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage, <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=URISERV:128120>.

²⁷⁶ White Paper on Environmental Liability, COM(2000) 9 February 2000, 66, final.

²⁷⁷ Prevention is central to the decree implementing Law 2008-757 of 1 August 2008, Decree 2009-468 of 23 April 2009 on the prevention and remedying of certain environmental damage.

Environmental law acts as a political catalyst.²⁷⁸ Cases such as *Exxon Valdez*, *Enron*²⁷⁹ and *Erika*²⁸⁰ are imprinted on our memories. The Treaty of Nice²⁸¹ expressly provides for a series of objectives for the community environmental policy. Article 11 of the Treaty on the Functioning of the European Union²⁸² specifies that “environmental protection requirements must be integrated into the definition and implementation of the Union’s policies and activities, in particular with a view to promoting sustainable development”. The explicit reference to sustainable development is key here. This term first entered French corporate law with the Grenelle II Law of 12 July 2010. Although the introduction of CSR into French domestic law was generally met with a lukewarm consensus, at least until the adoption of the Decree of 24 April 2012, debates have arisen around the question of environmental liability. On the one hand, we should not demonise short-termism²⁸³—long-termism, despite its apparent merits, can also be called into question—and, on the other, liberal ecology raises questions over the assumption of environmental risk.²⁸⁴ As a result, some have argued in favour of moving civil liability law towards the precautionary principle and making the risk of damage a new “condition” of civil liability.²⁸⁵

87. Proposal of 16 April 2013 for a Directive of the European Parliament and of the Council. On 30 April 2002, the European

²⁷⁸ C. Malecki, “Responsabilité environnementale: les nouveaux enjeux de la gouvernance d’entreprise”, in C. Cans (ed.), *Responsabilité environnementale: Prévention, imputation, réparation*, pref. by G. Viney, Dalloz, 2009, p. 381 et seq.

²⁷⁹ M. Heal Paul and G. Palepu Krishna, “The Fall of Enron”, *Journal of Economic Perspectives*, Spring 2003, Vol. 17(2), pp. 3–26. The Enron case resulted in the introduction of whistleblowing schemes, cf. on this point, F. Barière, “À propos de l’arrêt du 8 déc. 2009 de la Chambre commerciale de la Cour de cassation”, *Rev. sociétés*, 2010, p. 483 et seq., esp. no. 9, p. 485. Such whistleblowing could help to prevent similar cases, which are hugely detrimental to a company’s image, from arising in future.

²⁸⁰ L. Neyret, “L’affaire Erika: moteur d’évolution des responsabilités civile et pénale”, *D.* 2010, col. p. 2238 et seq.

²⁸¹ Came into force on 1 February 2003.

²⁸² Came into force on 1 December 2009.

²⁸³ F. Rachline, *D’où vient l’argent?*, Éditions Panama, 2006, followed by *Pour une Banque centrale mondiale*, Hermann, 2011.

²⁸⁴ Cf. Pelluchon, above n. 23.

²⁸⁵ M. Boutonnet, “Le risque, condition ‘de droit’ de la responsabilité civile, au nom du principe de précaution? (à propos de CA Versailles, 4, févr. 2009)”, *D.* 2009, Point de vue, p. 819.

Parliament published a report²⁸⁶ in which it proposed the introduction, in the long term, of a European directive that would require SMEs to report on the social and environmental impact of their activities both within and outside of Europe on an annual basis, in accordance with a set of minimum standards.²⁸⁷ This eventually led to the long-awaited²⁸⁸ Proposal of 16 April 2013²⁸⁹ for a Directive of the European Parliament and of the Council amending Council Directives 78/660/EEC and 83/349/EEC as regards disclosure of non-financial and diversity information by certain large companies and groups (COM(2013) 207 final).

C. European bodies and courts

88. The European Economic and Social Committee. This committee has published opinions on how the EU is taking account of sustainable development,²⁹⁰ including in its fiscal policy.²⁹¹

89. The Court of Justice of the European Union and environmental law. The Court of Justice will play an increasingly important role in relation to environmental law and cannot be overlooked when it comes to the development of CSR.²⁹²

²⁸⁶ European Parliament report of 30 April 2002 on the Commission Green Paper of 18 July 2001 entitled “Promoting a European framework for corporate social responsibility”. Cf. P. Arnaud, “L’information environnementale: un enjeu à moyen terme pour toutes les entreprises”, *RF compt.*, June 2003, p. 32.

²⁸⁷ According to the rapporteur Richard Howitt, “SMEs may require different time scales to achieve certain objectives according to their capabilities, and may effectively be addressed through the supply chains of larger companies. However, this is not to say that they should not be fully required to fulfil recommendations and legal requirements established at a European level. In most European countries the majority of people are employed by SMEs. This makes them prime players in the CSR debate and means their needs and roles can not (sic) be under exaggerated”, report op. cit., p. 20.

²⁸⁸ B. Lecourt, “Publications d’informations non financières par les sociétés: faut-il un texte européen?”, *Rev. sociétés*, 2011, p. 652.

²⁸⁹ <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52013PC0207&from=EN>; cf. points 114 and 306 below.

²⁹⁰ Opinion of the European Economic and Social Committee on “Assessing the EU sustainable development strategy”, 2004/C 117/08, *OJEC*, no. C 117, 30 April 2004, p. 22.

²⁹¹ Opinion of the European Economic and Social Committee on “The role of sustainable development within the forthcoming financial perspectives”, 2005/C 267/04, *OJEC*, no. C 267, 27 October 2005, p. 22.

²⁹² F. Jacobs, “The Role of the European Court of Justice in the Protection of the Environment”, *Journal of Environmental Law*, 2006, 18, pp. 185–205.

90. The European Environment Agency (EEA). The EEA was set up in 1990²⁹³ and helps Member States to incorporate environmental protection into their policies. It also coordinates the European Environment Information and Observation Network (Eionet).²⁹⁴

91. The European Union and its “normative time machine”. Although CSR has its theoretical roots in the United States, day after day the Union is producing communications, resolutions, recommendations and directives with a view to creating a European-style social corporate governance that is operational, rational and standardised. This European “DNA” makes CSR part of each and every Member State and offers a rare opportunity for corporate governance to be reviewed by—and almost *for*—the Union. Rarely has political influence created the conditions for rethinking corporate governance so quickly.

92. The Steering Committee for Human Rights (CDDH). This committee plays an important role in supporting the Secretariat of the Council of Europe. More specifically, it has tasked the Secretariat with exploring the feasibility of and added value offered by the various options open to the Council of Europe in incorporating the United Nations Guiding Principles as part of the implementation of the “Protect, Respect, Remedy” framework. This approach is in line with that expressly advocated in principle 10 of the United Nations Guiding Principles, which advises States to encourage the international institutions of which they are members to adopt policies that promote human rights in this area. The CDDH therefore proposes to focus on specific topics, such as its recent Internet Governance Strategy 2012–2015, and on certain categories of vulnerable groups that are particularly likely to be affected by the actions of businesses (e.g. children,²⁹⁵ the elderly, women, sexual and religious minorities, disabled people, migrant workers and refugees). Beyond this, however, as the report observes, the question of extraterritoriality is a tricky one as “no European state recognises such an extensive application in its domestic law as the Alien Tort Claims Act

²⁹³ Council Regulation 1210/90/EEC of 7 May 1990.

²⁹⁴ <http://eionet.europa.eu/> and <http://www.eea.europa.eu/>.

²⁹⁵ With respect to children, it recommends promoting the implementation of the “Children’s Rights and Business Principles”, which were adopted on 12 March 2012 by UNICEF, the United Nations Global Compact and Save the Children, http://www.unglobalcompact.org/Issues/human_rights/childrens_principles.html. It also refers to the work done by the ILO and the Council of Europe Strategy for the Rights of the Child, <http://www.coe.int/t/dg3/children/>.

does under US law”.²⁹⁶ Future questions will naturally revolve around issues regarding the responsibility of parent companies for the acts or omissions of their subsidiaries, subcontractors or suppliers.²⁹⁷

93. The European Committee of Social Rights (ECSR). This committee is responsible for determining whether States that are party to the European Social Charter are compliant with it, both legally and in practice. It adopts conclusions and decisions as part of the collective complaints procedure. The 2012 Activity Report, which coincided with the fifty-first anniversary of the 1961 European Social Charter and the sixteenth anniversary of the revised 1996 Charter, states optimistically that “the Social Charter’s majority stakeholders are the millions of human beings who benefit from it.”²⁹⁸

D. European financial programmes

94. A wide range of funding. There are many sources of European funding in the fields of new technologies, innovation and eco-innovation. Although some are somewhat abstruse, they nonetheless demonstrate the link between competitiveness and CSR and between CSR and SMEs. We can highlight in particular the European Social Fund (ESF) and the European Regional Development Fund (ERDF), both of which play a role in relation to employment and economic and social cohesion. Microbusinesses and SMEs can benefit from specific funding to train their employees. “Employee training” is a key item in non-financial

²⁹⁶ Draft Preliminary Study on Corporate Social Responsibility in the Field of Human Rights, 16 September 2012, CDDH (2012) 017, no. 31, p. 14, https://www.coe.int/t/dghl/standardsetting/hrpolicy/Other_Committees/HR_and_Business/Documents/CDDH_2012_012_Study_EN.pdf. This text contains many new proposals on, among other things, the possibility of extending the jurisdiction of the ECHR to “implicitly touch upon certain obligations of private companies on human rights issues.”

²⁹⁷ Cf. D. Augenstein, *Étude du cadre juridique en matière de droits de l’homme et d’environnement applicable aux entreprises européennes opérant en dehors de l’Union européenne*, University of Edinburgh, 2010.

²⁹⁸ Cf. ECSR Activity Report 2012, http://www.coe.int/t/dghl/monitoring/socialcharter/Presentation/ActivityReport2012_fr.pdf, introduction, p. 9. In its conclusions of 29 January 2013, the ECSR states that it adopted 608 conclusions for 42 countries, recorded 277 compliance cases (42%) and 156 violations (25%) and granted 175 postponements (28%).

reporting. Environmental protection initiatives can be funded through the LIFE programme (the EU's financial instrument for environmental projects).²⁹⁹

§ 3. National Sources: France's Influence

95. A French specificity. These sources are very varied. The French government is creating a strong impetus that is reflected in the production of analytical reports by institutions that are proactive in the field of CSR.

A. Government impetus: setting the standard for CSR

96. The French National Sustainable Development Strategy. The French government is a driving force in promoting sustainable development. Take, for example, the National Sustainable Development Strategy (*stratégie nationale pour le développement durable* or "SNDD")³⁰⁰ and "the competent State administrative authority in environmental matters" provided for in Articles L. 122-1 and L. 122-3 of the Environmental Code.³⁰¹ This recently established body advises contracting authorities and project managers who are subject to environmental assessments. Once a project, plan or programme is completed, it provides an opinion on the quality of the environmental impact assessment.

97. The "Organisational responsibility and performance" report: the cross-disciplinary nature of CSR. This document, known as the "Brovelli, Drago, Molinié" report after its authors, is entitled "20 proposals to improve CSR strategy" and was submitted to the French government on 13 June 2013.³⁰² It identifies 20 key areas for public authorities that are divided into four broad areas for improvement. Among these 20 proposals, which are inspired by those of the Union, one is particularly symbolic of French influence in the field of CSR. Proposal 20, the

²⁹⁹ This programme is made up of three components: LIFE+ Nature and Biodiversity, LIFE+ Environment Policy and Governance and LIFE+ Information and Communication, cf. <http://ec.europa.eu/environment/life/>.

³⁰⁰ NSDS 2010–2013, <http://www.developpement-durable.gouv.fr/IMG/pdf/NSDSp60.pdf>, p. 5, which refers to the role of "governance, which must make it easier for us to adapt to the change and help our society to evolve by involving all stakeholders" and promises to take "corporate social responsibility into account" (p. 21).

³⁰¹ Decree 2009-496 of 30 April 2009, *JO*, 3 May 2009.

³⁰² "Brovelli, Drago, Molinié" report, 13 June 2013, <http://www.economie.gouv.fr/files/rapport-brovelli-drago.pdf>.

denouement of the report, states that it falls to “French diplomacy—the credibility of which is regularly highlighted—to pursue French ideas on global responsibility in international fora and negotiations”. The report also emphasises the cross-disciplinary nature of CSR, stating that state-owned companies must lead the way in implementing exemplary responsible procurement policies.³⁰³ Proposal 3, “From intentions to actions: becoming a model State”, falls under the area for improvement³⁰⁴ entitled “Developing a culture of overall performance within businesses, organisations and government”. The authors’ observation is highly critical: “as employers, buyers and service providers, the behaviour of government bodies (central governments, local authorities and hospitals) and their devolved services (e.g. operators and public institutions) in relation to social and environmental matters has not always been on a par with their mission to act in the public interest”.³⁰⁵ This awareness of the role of CSR as part of a strategy to improve overall performance demonstrates that it can no longer be underestimated or overlooked and how it will contribute to the current drive to modernise government bodies.³⁰⁶

98. Public procurement: environmental criteria and social clauses. It has not always been easy to incorporate social and environmental criteria

³⁰³ Report op. cit., p. 20 reveals the extent to which attitudes have changed: “When local authorities purchase a fleet of electric vehicles to replace their existing petrol and diesel ones, they are doing much more than simply incorporating non-financial performance criteria for suppliers; they are changing the way in which they will deliver a public service by buying vehicles that are designed to be shared, as well as being more economical and less polluting.”

³⁰⁴ Report op. cit., p. 14.

³⁰⁵ Report op. cit., p. 17.

³⁰⁶ Cf. the creation of the Sustainable Development Club for Public Institutions and State-owned Companies (*club développement durable des établissements et entreprises publics* or “CDDEP”) and guides on incorporating CSR in the public sector, e.g. *Mise en œuvre des principes, visions et valeurs de la responsabilité sociétale des organismes publics*, report published by the French Ministry for Ecology, March 2013; *Les indicateurs de gouvernance des organismes publics en réponse aux enjeux du développement durable*, report published by the French Ministry for Ecology, March 2013; *Guide du dialogue avec les parties prenantes*, report published by the French Ministry for Ecology, March 2013, http://www.developpement-durable.gouv.fr/IMG/pdf/Guide_3_-_Dialogue.pdf.

into public procurement,³⁰⁷ even though it seems obvious that such contracts are affected by CSR-related issues.³⁰⁸ Christopher McCrudden showed the links between EU, public procurement and CSR.³⁰⁹ We should emphasise that such criteria have been taken into account at European and national level in the Grenelle II Law and in particular two directives of the European Parliament and of the Council: Directive 2004/18/EC of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts³¹⁰ and Directive 2004/17/EC coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors.³¹¹ Both of these directives were transposed into French law by Decree 2006-975 of 1 August 2006 on the French Public Procurement Code (*Code des marchés publics*), which has been analysed in detail by Bernard-Michel Bloch.³¹² This progress was also reflected in the *Concordia Bus Finland* case,³¹³ where the Community court ruled that an environmental criterion relating to the purpose of the tender was legal, despite not being economic in nature. Under Article 53 of the Public Procurement Code, contracting authorities can make a decision on the basis of “environmental protection performance” criteria. The recent case law of the Council of State is particularly important with regard to

³⁰⁷ H. Pongérard-Payet, “Critères sociaux et écologiques des marchés publics: droits communautaire et interne entre guerre et paix”, *Europe*, October 2004, § 10, p. 6 et seq.

³⁰⁸ Cf. M.-P. Blin-Franchomme, I. Desbarats, G. Jazottes and V. Vidalens, *Entreprise et développement durable*, “Lamy Axe Droit” collection, 2011, “La prise en considération des exigences du développement durable dans l’achat public”, p. 146, no. 193 et seq.

³⁰⁹ C. McCrudden, “Corporate social responsibility and public procurement”, in *The New Corporate Accountability, Corporate Social Responsibility and the Law*, D. McBarnet, A. Voiculescu and T. Campbell (eds), Cambridge University Press, 2007, p. 93.

³¹⁰ <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CONSLEG:2004L0018:20120101:EN:PDF>.

³¹¹ <http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32004L0017&from=en>.

³¹² B.-M. Bloch, *Code des Marchés publics commenté*, 13th edn, Berger Levraut, 2013, no. 43, p. 41, “Sustainable development objectives: Art. 14 of the Code allows public sector procurers to include sustainable development objectives in their calls for tenders. This issue can also be found in Arts. 5 (definition of needs), 6 (technical specifications), 45 (presentation of tenders) and 53 (criteria for selecting tenders) of the French Public Procurement Code.”

³¹³ CJEC, 17 September 2002, case C-513/99.

the inclusion of social clauses in sustainable development contracts. In a first important ruling in the *Derichebourg Polyurbaine* case,³¹⁴ a procedure for awarding contracts was declared invalid as it failed to define the need that had led the contracting authority to include a social clause in its “environmentally friendly” contract. This need is therefore broader and encompasses social clauses, including supporting disadvantaged groups to access employment. In its *Département de l’Isère* ruling,³¹⁵ the Council of State upheld the petition of the Isère department by deciding that the “performance criterion for supporting disadvantaged groups to access employment used to assess candidates’ tenders is in line with the purpose of this public works contract, which is likely to be at least partly executed by employees participating in welfare-to-work schemes”.³¹⁶ The Council of State therefore recognises the validity of including a “welfare-to-work” clause in a public contract, irrespective of the nature of the work it covers. These rulings are entirely in keeping with the role that the European Parliament wants to see public procurement play in relation to CSR. The European Parliament “welcomes the recognition of the role which must be played by public procurement in promoting CSR in practice, including access to training, equality, fair trade and the social integration of disadvantaged workers and people with disabilities, so as to provide businesses with an incentive to increase their social responsibility”.³¹⁷

99. The Paris appeal³¹⁸ for greater recognition of CSR. This appeal was launched the day before the G 20³¹⁹ by political and economic stakeholders involved in the development of CSR and was aimed directly at heads of state. It called on them to recognise CSR as a key element in

³¹⁴ Council of State, 15 February 2013, case 363921, *Derichebourg Polyurbaine*.

³¹⁵ Council of State, 25 March 2013, case 364950, *Département de l’Isère*.

³¹⁶ *Ibid.*

³¹⁷ European Parliament Resolution of 6 February 2013 on “corporate social responsibility: promoting society’s interests and a route to sustainable and inclusive recovery” [2012/2097 (INI)]; <http://www.europarl.europa.eu/sides/getDoc.do?type=TA&reference=P7-TA-2013-0050&language=EN>, points 60 and 48 refer to “public procurement”.

³¹⁸ Appeal launched on 12 September 2011, http://www.bertrandpancher.com/?/communiqués_de_presse/15_septembre_2011_bertrand_pancher_acteurs_rse_lancent_un_appel_paris_rse_dans_cadre_g20_-158206.html.

³¹⁹ Held in Los Cabos, Mexico, on 18 and 19 September 2012. On the “Gs”, and the G 20 more specifically, cf. T. Bonneau, *Régulation bancaire et financière européenne et internationale*, Bruylant, 2012, no. 21 p. 18 – no. 33 p. 20.

state regulation of procurement contracts and an incentive measure for good state governance. The signatories of the Paris appeal put forward five commitments, including granting CSR the status of a public policy, encouraging the generalisation of CSR standards and including information on CSR performance in financial statements.

100. The work of the ESEC. The Economic, Social and Environmental Council (ESEC) is a stimulating forum for discussion and reflection. It produces between 25 and 30 opinions each year³²⁰ and publishes reports on its work. The many ongoing referrals relating to CSR³²¹ address questions that are in line with society and the constraints imposed by environmental considerations and corporate governance, such as assessing the economic benefits that “diversity policies” can have for businesses’ competitiveness. Its hearings with civil society stakeholders on CSR, many of which can be viewed online, are particularly interesting.³²² The current referral on “CSR: a pathway towards economic, social and environmental transition”³²³ demonstrates the ESEC’s interest in CSR.

B. The example of the Grenelle I and II Laws: the drive towards participatory governance

101. The symbolism of the Grenelle laws. Another way of approaching the policy emerges under the influence of ecological democracy. There are those who advocate such ecological democracy because it must take into account the general interest of future generations, underpinned by

³²⁰ Cf., for example, the opinions on “Corporate governance and performance”, A. Rafael, 28 May 2013, http://www.lecese.fr/sites/default/files/travaux_multilingue/2013_13_performance_gouvernance_entreprise_EN.pdf and “CSR: a pathway towards economic, social and environmental transition”, A. Delmas, 28 June 2013, http://www.lecese.fr/sites/default/files/travaux_multilingue/rse_%20EN.pdf, both of which demonstrate the ESEC’s interest in this area.

³²¹ <http://www.lecese.fr/en/publications/financing-environmental-and-energy-transition>.

³²² For example, the hearing held on 5 March 2013 with Michel Doucin, Ambassador for bioethics and corporate social responsibility, by the ESEC’s section for European and International Affairs as part of the development of his opinion on “CSR: a tool in the economic, social and environmental transition”, <http://www.lecese.fr/content/interview-de-michel-doucine>.

³²³ The referral dated 26 February 2013, NS130920, is instructive as it specifies that “Far from being a constraint, sustainable development can in fact serve as a tool in creating a new form of economic development that helps to promote a new understanding of global society and its human relations”, <http://www.lecese.fr/en/publications/csr-pathway-towards-economic-social-and-environmental-transition>.

the noble idea that all opinions should be expressed. Thus, in France, the Grenelle (I and II) laws symbolise participation, the idea that participants from a range of different backgrounds are able to debate freely and separately from members of parliament. The term “Grenelle” evokes the Grenelle agreements of 1968, a symbol of negotiation. However, there are few similarities between the two methods, particularly with regard to the number of participants. The Grenelle laws of the twenty-first century were debated widely in discussions involving the French government, local authorities, charities, trade unions and professionals, as well as among citizens via a website. This five-way dialogue (between trade unions, NGOs, elected representatives, businesses and government) resulted in the publication of a general report, the aim of which was to provide “a framework to make public action more coherent”. However, the method used instead gave rise to a “new mix, of all the hybrids in the area, of soft and hard law, unilateralism and participatory approaches, the Grenelle Laws and the New Deal”.³²⁴ In any case, it helped bring about a change in the sources of law and, with respect to corporate law, it could be argued that the Grenelle II Law has served to bring together French corporate law and CSR.

102. The Grenelle II Law and the new twenty-first century “social contract”. Environmental law acts as a political catalyst.³²⁵ We cannot help but think of Rousseau, who seems to have disappeared from today’s political discourse, when considering this recognition of humans as social beings who lie at the heart of sustainable development. It would certainly be premature to see the Grenelle II Law as a new “social contract”, but this opening up of business to new stakeholders under the pressure of increasingly pressing social and environmental concerns, with clear

³²⁴ Cf. P. Deumier, “Qu’est-ce qu’un Grenelle? (la source d’un New Deal)”, *RTD civ.* 2008, p. 63 et seq., as well as the various references, where the author rightly concludes on p. 66 that “Adding a symbolic and positive dimension to a method and a commitment that were previously vague, the ‘Grenelle’ Laws could above all be the marketing needed to sell ‘governance through participatory social dialogue’ in domestic law”; F.-G. Trébulle, “Droit de l’environnement”, May 2007–May 2008, *D.* 2008, p. 2390, esp. p. 2391, “In any case, seeking consensus at any cost sets a dangerous trap in that any changes decided at a later point by, for example, parliament, are seen as a betrayal by those who participated.”

³²⁵ Malecki, above n. 278.

progress in labour law,³²⁶ also calls for reflection upon corporate interest. CSR will play an increasingly important role in corporate law treaties and texts within corporate governance and, in any case, invites us to *rethink corporate governance*.³²⁷

C. The “constitutionalisation of the environment” and its prospects
103. The ten articles of the French Charter for the Environment. The French Charter for the Environment³²⁸ was introduced in 2005³²⁹ and is

³²⁶ A. Supiot (*L'Esprit de Philadelphie, La justice sociale face au marché total*, Seuil, 2010) provides a good explanation of this progress in labour law thanks to the ILO.

³²⁷ Cf. M.M. Blair, *Ownership and control: Rethinking corporate governance for the twenty-first century*, The Brookings Institution, Washington D.C., 1995.

³²⁸ M. Prieur, “Vers un droit de l’environnement renouvelé”, in *La Constitution et l’environnement, Cah. Cons. const.* 2003, p. 15; Y. Jégouzo and F. Loloum, “La portée juridique de la Charte de l’environnement”, *Dr. adm.* 2004, col. 5; D. Guihal, “La Charte de l’environnement et le juge judiciaire”, *Rev. jur. env.* special issue/2005, p. 245.

³²⁹ These simple yet powerful articles are very much in the great French tradition of declarations and merit being reproduced here in full: Art. 1: “Everyone has the right to live in a balanced environment which shows due respect for health”; Art. 2: “Everyone is under a duty to participate in preserving and enhancing the environment”; Art. 3: “Everyone shall, in the conditions provided for by law, foresee and avoid the occurrence of any damage which he or she may cause to the environment or, failing that, limit the consequences of such damage”; Art. 4: “Everyone shall be required, in the conditions provided for by law, to contribute to the making good of any damage he or she may have caused to the environment”; Art. 5: “When the occurrence of any damage, albeit unpredictable in the current state of scientific knowledge, may seriously and irreversibly harm the environment, public authorities shall, with due respect for the principle of precaution and the areas within their jurisdiction, ensure the implementation of procedures for risk assessment and the adoption of temporary measures commensurate with the risk involved in order to preclude the occurrence of such damage”; Art. 6: “Public policies shall promote sustainable development. To this end they shall reconcile the protection and enhancement of the environment with economic development and social progress”; Art. 7: “Everyone has the right, in the conditions and to the extent provided for by law, to have access to information pertaining to the environment in the possession of public bodies and to participate in the public decision-taking process likely to affect the environment”; Art. 8: “Education and training with regard to the environment shall contribute to the exercising of the rights and duties set out in this Charter”; Art. 9: “Research and innovation shall contribute to the preservation and development of the environment”; Art. 10: “This Charter shall inspire France’s actions at both European and international levels”, Constitutional Law 2005-205 of 1 March 2005 on the Charter for the Environment,

made up of ten articles. It “constitutionalises” a number of so-called “3rd generation”³³⁰ rights and principles that had previously been incorporated into legislative and, more often, international texts. It establishes a new individual right to live in a balanced and healthy environment (Article 1), as well as the “polluter pays” and “precautionary” principles.

Its constitutional value is central to the debate.³³¹ Indeed, in its ruling of 19 June 2008 on the law on NGOs, the Constitutional Council highlighted that “all of the rights and duties defined in the Charter for the Environment have constitutional value”.³³² The Charter will no doubt play an increasingly important role in the priority preliminary ruling on the issue of constitutionality (*question prioritaire de constitutionnalité* or “QPC”) relating to corporate environmental responsibility.

Although the Charter for the Environment is “neither a green hell nor heaven”,³³³ to use Professor Yves Jégouzo’s delightful expression, it has nonetheless opened up new avenues³³⁴ in relation to the priority preliminary ruling on the issue of constitutionality.³³⁵

[http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT00000790249&dateTexte=.](http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT00000790249&dateTexte=)

³³⁰ A constitutional text that puts principles promoting environmental protection on the same footing as human and civil rights. France was the first country to include a charter of this kind (which was adopted by Congress on 28 February 2005) in its constitution. It added this charter to the Preamble to the Constitution, alongside the Declaration of the Rights of Man and of the Citizen of 1789. The French Constitutional Council (29 December 2009, *Finance Law*) and Council of State (CS, Assembly of 3 October 2008, case 297931, *Municipality of Annecy*) have recognised it as having full legal force.

³³¹ Y. Aguila, “La valeur constitutionnelle de la Charte de l’environnement. Conclusions sur Conseil d’État, assemblée, 3 October 2008, *Commune d’Annecy*”, *RFDA* 2008, p. 1149.

³³² R. Kempf, “Cinq ans et quelques arrêts après la Charte de l’environnement: retour à la case départ?”, *Droits-Libertés.org*, 6 February 2009; G.-J. Martin, “Observations d’un privatiste sur la Charte de l’environnement”, *RDP* 2004, p. 1206; Y. Jégouzo and F. Loloum, “La portée juridique de la Charte de l’environnement”, *Dr. adm.* 2004, col. 5.

³³³ Y. Jégouzo, “Charte de l’environnement: ni l’enfer vert, ni le paradis”, *AJDA*, 2004, no. 21, p. 1105.

³³⁴ N. Hutten and M.-A. Cohendet, “La Charte de l’environnement deux ans après: chronique d’une anesthésie au Palais Royal”, *Rev. jur. env.* 2007, no. 3, pp. 277–93.

³³⁵ Introduced by Constitutional Law 2008-724 of 23 July 2008, cf. B. de Lamy, “Brèves observations sur la question préjudicielle de constitutionnalité en attendant la loi organique”, *D.* 2009, p. 177.

104. The priority preliminary ruling on the issue of constitutionality: the principle of participation and ... the internet. The recent QPC³³⁶ puts the Charter for the Environment into perspective, even though the Constitutional Council has only recognised the “rights and duties defined in the Charter for the Environment” as having constitutional value. Indeed, the questions raised by CSR could give rise to interesting QPCs as the Constitutional Council has already used the recitals of the 1946 preamble to develop its case law, in particular the constitutional principle of preserving human dignity. This could also apply to “biological diversity”, which, “although it is not included *per se* in the ‘rights and duties’ defined in the Charter, could in the future be taken into account by the Constitutional Council ‘in a form that it would determine’”.³³⁷ It will be necessary to factor in the current problem of the direct enforceability of the articles of the Charter in the absence of legislative provisions.

Companies will be affected by the requirements set out in the Charter, which expressly covers “everyone”—both natural persons and legal entities (see Articles 2, 3 and 4 of the Charter). Article 2 sets out the general principle of “preserving and enhancing the environment”, while Articles 3 and 4 refer to the “conditions provided for by law” in relation to their implementation: the principles of “avoiding” and “making good” damage to the environment are binding upon “everyone”. Law 2008-757 of 1 August 2008 on environmental liability and the various provisions for adapting environmental community law (LRE) applies the principle of prevention and remedy by recognising a specific type of damage, known as “pure” environmental damage. Companies are subject to the LRE law on the basis that business activities are likely to give rise to environmental liability.³³⁸

The Constitutional Council will be called upon to write many pages in order to combine the ways in which French laws and acts are reviewed to

³³⁶ C. Huglo, “Premiers éléments de réflexion sur la question prioritaire de constitutionnalité, le droit de l’environnement et l’avocat”, *Gaz. Pal.*, 27 March 2010, no. 86, p. 19; D. Rousseau (ed.), *Guide pratique: la question prioritaire de constitutionnalité*, 2nd edn, Gazette du Palais, 2012.

³³⁷ O. Schrameck, “L’environnement”, in *La constitutionnalité du droit de l’entreprise: champs d’application*, RLDA, supplement to no. 55, December 2010, p. 60 et seq.

³³⁸ Cf. Decree 2009-468 of 23 April 2009 pursuant to the LRE law, which lists some of the potentially most polluting business activities that are subject to absolute liability regulations.

ensure compliance with France's constitution and international obligations. The definition of sustainable development used in Article 6 of the Charter for the Environment³³⁹ imposes the need to reconcile economic and social requirements with those relating to environmental protection and obliges constitutional courts to determine ways in which this principle should be implemented.³⁴⁰ So far, the Constitutional Council has only been asked to rule on a QPC relating to the Charter for the Environment in a case involving a neighbour dispute.³⁴¹

The Law of 27 December 2012 on the implementation of the principle of public participation in decision-making processes, as defined in Article 7 of the Charter,³⁴² draws on the conclusions of the Constitutional Council's recent decision "to give Article 7 of the Charter for the Environment its full scope" in order to allow citizens "to participate in the adoption of public decisions having an impact on the environment".³⁴³ Draft decisions, other than individual decisions, made by government authorities and public institutions that have an impact on the environment are made available to the public in digital format, together

³³⁹ Which, as O. Schrameck highlights in his article, above n. 338, is similar to the 1987 Brundtland in that it "meets the needs of the present without compromising the ability of future generations to meet their own needs", but also adopts a more economic approach, cf. Art. 6 of the Charter *op. cit.*, where it is stated that "public policies shall promote sustainable development", which involves reconciling "the protection and enhancement of the environment with economic development and social progress."

³⁴⁰ Constitutional Council Decision 2005-514 DC of 28 April 2005; Constitutional Council Decision 2005-516 DC of 7 July 2005.

³⁴¹ V. Rebeyrol, "L'environnement devant le Conseil constitutionnel: l'occasion manquée", *D.* 2011, no. 18, pp. 1258–61; K. Foucher, "La première application de la Charte de l'environnement par le Conseil constitutionnel dans le cadre de la QPC: de l'inédit, de l'inutile et du flou", *AJDA*, 13 June 2011, no. 20, pp. 1158–61; cf. also Constitutional Council Decision 2011-183/184 QPC of 14 October 2011, *Association France Nature Environnement [Draft nomenclature and general requirements relating to classified installations for the protection of the environment]*, available online at <http://www.conseil-constitutionnel.fr/conseil-constitutionnel/english/priority-preliminary-rulings-on-the-issue-of-constitutionality/decisions-of-the-constitutional-council-qpc/decision-no-2011-183-184-qpc-of-14-october-2011.103823.html>.

³⁴² Law 2012-1460, *OJFR* no. 0302 of 28 December 2012, p. 20578, text no. 1, amending in particular Arts L. 120-1-I. and L. 120-1-II of the Environmental Code; Ch. Huglo, "Environnement et développement durable", 2013, *repère* 2.

³⁴³ Constitutional Council Decisions 2012-269 QPC of 27 July 2012 and 2012-270 QPC of 28 July 2012, *JO*, pp. 12356 and 12357.

with their introductory notes, and can also be provided in hard copy for consultation at prefectures and sub-prefectures upon request. The Decree of 28 May 2013³⁴⁴ sets out the conditions for arranging such a consultation. However, the removal of the words “direct and significant” qualifying “impact on the environment” in Article L. 120-1 of the Environmental Code is not without its consequences.³⁴⁵

105. The “delightful” origins³⁴⁶ of CSR. The question of the “texture” of CSR law cannot be avoided. It is all the more tricky given that CSR itself is always evolving, particularly in its far-reaching, cross-disciplinary and intentionally holistic form. The techniques used in sustainable corporate governance (assessment, self-assessment, recognition of social and environmental risks, the CSR strategies of boards of directors, the use of the internet and the expectations of stakeholders) are constantly “taking the pulse” of CSR. Its credibility, particularly in relation to protecting basic rights, is examined on an ongoing basis.³⁴⁷ It would be a mistake to state that its texture relates to pure “soft law”, given that recent events in the European Union have injected it with a

³⁴⁴ Decree 2013-441, 28 May 2013, *JO*, 30 May 2013, p. 8905. The request must be made in person at the prefecture or one of the sub-prefectures of the department(s) within the area affected by the decision, no later than four working days before the end of the consultation period. The documents are made available to the applicant at the location and time indicated in their request within two working days of it being submitted.

³⁴⁵ Cf. K. Foucher, who highlights that “Although a broad understanding of the scope of Article 7 of the Charter is clearly likely to add value to the constitutional principle of public participation, too wide a definition risks diluting the requirements arising from the Charter. The duties and principles that it sets out aim to prevent and remedy damage caused to the environment. It is therefore logical that the rights it enshrines should contribute to this objective and, as a result, the principle of participation only applies to decisions that *a priori* have a negative impact on the environment”, “L’apport en demi-teinte de la QPC à la protection du droit de participer en matière d’environnement” (on Decisions 262, 269 and 270 QPC made in July 2012 by the Constitutional Council and Council of State (Volkswind France and Innovent, cases 353565 and 353577)), *Constitutions*, October–December 2012, pp. 657–65.

³⁴⁶ Ph. Jestaz, “Source délicieuse ... (Remarques en cascades sur les sources du droit), Variétés”, *RTD civ.* 1993, p. 73 et seq.

³⁴⁷ P. Deumier, “La responsabilité sociétale de l’entreprise et les droits fondamentaux”, *D.* 2013, no. 23, p. 1564 et seq., esp. p. 1567: “Multinational companies then pick up from where government has failed to balance the level of protection around uniform standards.”

dose of “hard law”. A study of sustainable corporate governance³⁴⁸ will show that what we are dealing with may be a “co-regulated soft law”, one that is very specific as the sources from which CSR is drawn are unique. It is not a case of trying to “elude” the law with, for example, a corporate governance code, but rather of fusing soft and hard law in a harmonious way that takes account of: the influence of public authorities in all their guises; the influence of organisations in a range of fields such as the Alliance for Business, the European Academy of Business In Society (EABIS), the European association for the promotion and advancement of sustainable and responsible investment (Eurosif) and the European Coalition for Corporate Justice (ECCJ); the influence of the principles for responsible investment (PRIs); and the processes of certification and labelling that play a decisive social role.³⁴⁹ Large or small,³⁵⁰ the origins of CSR are very varied and their immediate effectiveness or inadequacy are continually being put to the test by multinational companies—stakeholders in this sustainable corporate governance—who may or may not be able to make “worldwide CSR” a reality. This kind of CSR must remain our ultimate goal, without which the CSR of wealthy countries would trample over that of poorer ones.

SECTION 5: THE SUCCESS FACTORS OF CSR

106. The challenges of CSR: value creation, social and financial performance, competitiveness. The success of CSR will depend in large part on rational studies that can prove that implementing CSR principles effectively contributes to reducing costs and risks and improving consumer relations and corporate image³⁵¹ through predominantly philanthropic measures³⁵² and transparent practices, as well as creating

³⁴⁸ Cf. point 358 below.

³⁴⁹ P. Rozec, “La norme ISO 26000: un nouveau souffle pour la responsabilité sociale des entreprises?”, *JCP S* 2010, 1548.

³⁵⁰ S. Gerry-Vernières, *Les « petites » sources du droit*, Economica, 2012.

³⁵¹ A.B. Carroll and A.K. Buchholtz, *Business and Society: Ethics, Sustainability and Stakeholder Management*, 8th edn, Mason, OH: South-Western Cengage Learning, 2012, 305.

³⁵² B. Seifert, S.A. Morris and B.R. Bartkus, “Comparing Big Givers and Small Givers: Financial Correlates of Corporate Philanthropy”, *Journal of Business Ethics*, Vol. 45(3), pp. 195–211, 2003; H. Bruch and F. Walter, “The Keys to Rethinking Corporate Philanthropy”, *MIT Sloan Management Review*, 2005, Vol. 47(1), pp. 48–56; J.C. Chen, M. Dennis and R. Roberts, “Corporate

value,³⁵³ particularly through charitable activities in support of education and the interests of stakeholders. CSR raises several key questions. Steps will need to be taken to ensure that it is successful. How can we *measure* social performance? How can we compare such performance in management reports? What kind of social audits should be implemented? How does CSR impact upon positive law?³⁵⁴ What are the dangers of the “report or explain” rule?

As cost is a crucial factor, we must find a way of measuring the profit generated for businesses by having a good reputation for social responsibility. Although a stage involving hard law is dreaded, it will be a factor in helping to standardise and interpret information for stakeholders. We should not forget that accounting became more efficient with the introduction of International Accounting Standards Board (IASB) standards.

Such standardisation will be applied to non-financial information as part of an approach that will promote *competitiveness*. The European Parliament Resolution of 25 November 2010 on corporate social responsibility in international trade agreements (2009/2201(INI))³⁵⁵ similarly deems CSR values to be

an effective tool for improving competitiveness, skills and training opportunities, occupational safety and the working environment, protecting workers’ rights and the rights of local and indigenous communities, promoting a sustainable environmental policy and encouraging exchanges of good practice at local, national, European and world level, although it clearly cannot supplant labour regulations or general or sectoral collective agreements.³⁵⁶

The most recent signals from the European Parliament are along these lines.³⁵⁷

Charitable Contributions: A Corporate Social Performance or Legitimacy Strategy?”, *Journal of Business Ethics*, 2008, pp. 131–44.

³⁵³ C. Wheeler, B. Colbert and R.E. Freeman, “Focusing on Value: Reconciling Corporate Social Responsibility, Sustainability and a Stakeholder Approach in a Network World”, *Journal of General Management*, 2003, Vol. 28(3), pp. 1–28.

³⁵⁴ C. Neau-Leduc, “L’impact de la RSE sur le droit positif”, *Rev. dr. fiscal* 2011, no. 131, p. 22 et seq.

³⁵⁵ <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P7-TA-2010-0446+0+DOC+XML+V0//EN>.

³⁵⁶ <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P7-TA-2010-0446+0+DOC+XML+V0//EN>.

³⁵⁷ Cf. the two resolutions of 6 February 2013 op. cit.

107. Profit:³⁵⁸ **for whom and on what scale?** Make no mistake—the success factors of CSR will lie in profit.³⁵⁹ But profit for whom? From a conciliatory perspective, profit for all? This would deserve to be considered in greater detail, dissected and argued, particularly with respect to corporate law and above all sustainable corporate governance aims. We have to acknowledge that 30 years ago, corporate governance was thought of by some as a “legal UFO” (*OVNI juridique*) and by others as a foil or simply a tool for managers to win over their employees. Today, it is so much a part of the legal corporate landscape that the questions it raises now revolve around improving its mechanisms (individuals holding more than one post simultaneously, worker representatives on boards of directors and supervisory boards, the establishment of liability, rationalising the various aspects of corporate strategy and the bodies responsible for implementing it) or figuring out its purpose (long-term profit, sometimes with an overly aggressive questioning of the short and medium term).

The various conceptions of CSR must always be subject to scrutiny, rather like Pierre Leroux, the inventor of socialism, who let neither the government, politics nor socialism get in his way. The same approach should be adopted with CSR, with this difference, that it brings with it the weaknesses of its international aspirations, whereas in fact it is at global level³⁶⁰ that it becomes both meaningful and effective. Although scientific developments show that, in practical terms, the planet is within the reach of humans, a “worldwide CSR” is the Achilles heel in effectively protecting basic rights. The need for responsible supply chains is proof of this, as are attempts to make contracting businesses more responsible.³⁶¹ This “worldwide CSR” will call for effective extra-territorial monitoring and inspection tools, without which even the best intentions will grind to a halt at the borders of the European Union. Outsourcing procedures, mediation, the notion of a “sphere of influence”

³⁵⁸ T. Hahn and F. Figge, “Beyond the Bounded Instrumentality in Current Corporate Sustainability Research: Toward an Inclusive Notion of Profitability”, *Journal of Business Ethics*, Vol. 104, pp. 325–45, 2011.

³⁵⁹ J. Poirot, “Assumer le coût de la responsabilité sociale: un défi pour les entreprises et leurs parties prenantes”, in the proceedings from the symposium on *La responsabilité sociale de l'entreprise: réalité, mythe ou mystification* held in Nancy on 17 and 18 March 2005.

³⁶⁰ Which is often the richest level in terms of initiatives if we consider PRIs, the role of the ILO and even a “global” tax on capital, cf. Piketty, above n. 266, p. 835 et seq.

³⁶¹ Cf. point 399 below.

and analysing the impact of non-financial reporting all form part of the colossal task of building this CSR at global level. The example of incorporating CSR into international agreements, which have their own procedures for imposing contractual, economic and reputational sanctions, particularly with National Contact Points (NCP), shows how CSR transcends the line that separates hard and so-called “soft” law. Generally speaking, it has already shaken up legal sources in record time since the recognition of the role of ethics in business.³⁶²

108. The necessary fight against ideologies or the myth of the market for virtue.³⁶³ Although sustainable development, as a means of protecting the environment, does have its detractors,³⁶⁴ we need to recognise that CSR also serves as a vehicle for some virtuous yet inefficient notions. *Sustainable corporate governance offers it this possibility of experimenting, this moment of truth.* We must be vigilant in this area, as the implementation of the “report or explain” principle and the cost of non-financial accounting may be invoked to avoid “sustainable” accounting. The cost of implementing CSR principles must not therefore be ignored and yet it is only if businesses perform well that CSR will achieve the success of the desired approaches.³⁶⁵ The very nature of such performance, which tends to no longer be exclusively financial, but is rather a *sustainable performance*, remains to be defined. However, it is already the central theme of CSR, which goes beyond simply observing the emergence of new values, new concepts, a variety of stakeholders and

³⁶² Since the important research into this notion, which began with B. Oppetit’s “Éthique et vie des affaires”, *Mélanges offerts à André Colomer*, Litec, 1993, p. 321, there has been significant expansion on it, cf. P. Deumier, “Les sources de l’éthique des affaires”, in *Libre Droit, Mélanges en l’honneur de Philippe Le Tourneau*, Paris, Dalloz-Sirey, 2008, p. 350, but has this term (which does not correspond exactly to the English “business ethics”) been overused?

³⁶³ D. J. Vogel, “Is there a market for virtue? The business case for corporate social responsibility”, *California Management Review*, Vol. 47, pp. 19–45, 2005; I.E. Berger, P. Cunningham and M.E. Drumwright, “Mainstreaming corporate and social responsibility: developing markets for virtue”, *California Management Review*, Vol. 49, pp. 132–57, 2007.

³⁶⁴ Cans, above n. 151.

³⁶⁵ M. Kramer and M.E. Porter, “Strategy and Society: The Link Between Competitive Advantage and Corporate Social Responsibility”, *Harvard Business Review*, Vol. 84, no. 12, 2006.

new terminologies.³⁶⁶ Vital work still needs to be done as no consensus has yet been reached³⁶⁷ on how to measure social performance.

109. Promoting dialogue. The European Commission attaches great importance to dialogue with and between stakeholders. To this end, it has periodically organised review meetings during multi-stakeholder fora.³⁶⁸ A variety of perspectives on CSR have already emerged based on the different perceptions of this concept in EU Member States. A comparative study reveals that the UK and US conception, particularly among stakeholders, corresponds to different approaches to corporate governance and different levels of awareness of CSR in certain EU Member States. However, it is still and will always be dialogue that is central to these approaches to promoting best practice in corporate governance. The meeting held in February 2009 during the EU multi-stakeholder forum ended with the adoption of the European Parliament Resolution of 26 March 2009,³⁶⁹ which relates more specifically to “subcontracting undertakings in production chains”. In this resolution, the Parliament calls on the Commission to raise awareness of “good practices, existing guidelines and standards and social responsibility practices” among businesses, whether they are contractors or subcontractors. It is a foretaste of the role of stakeholders in CSR. The European Parliament asks the Commission to increase transparency in subcontracting processes and secure better enforcement of European and national law, emphasising that such a study should be cross-sectoral. It invites contractors and subcontractors to take the lead in promoting “cooperative subcontracting for specific one-off tasks on the one hand, and for the restriction of the multiplication of subcontracting on the other”.

This resolution complements that of 13 March 2007, in which the European Parliament recommends that the Commission “extends the responsibility of directors of companies with more than 1 000 employees

³⁶⁶ Such as the use of the French term “entreprise”.

³⁶⁷ J. Margolis and J. Walsh, *People and Profits? The Search for a Link between a Company's Social and Financial Performance*, Rhawah, Lawrence Erlbaum Associates, 2001.

³⁶⁸ EU Multi-stakeholder CSR fora held in 2002, 2004 and on 7 December 2006.

³⁶⁹ Resolution of the European Parliament and of the Council of 26 March 2009 on “the social responsibility of subcontracting undertakings in production chains”.

to encompass the duty for the directors themselves to minimise any harmful social and environmental impact of companies' activities."³⁷⁰

110. European advances in favour of stakeholders.³⁷¹ For several years now, European corporate law has taken into account the notion of "third parties". Article 48 of the Treaty³⁷² provides for the protection of the interests of members and third parties. The First,³⁷³ Second³⁷⁴ and Fourth³⁷⁵ Council Directives factor in the notion of third parties from the perspectives of either information or employee involvement.³⁷⁶ It is possible to imagine that the notion of "third parties" was a precursor to that of "stakeholders" as is now used in French domestic law.

111. Prospects for sustainable corporate governance. Over the course of the twenty-first century, CSR could contribute not only to greater integration of technology (e.g. the use of new technologies and methods for measuring greenhouse gases), but also, paradoxically, to taking into account social questions that open up a whole host of new avenues, shattering what we mean by "corporate interest" and lending it a human

³⁷⁰ Resolution of 13 March 2007 on "corporate social responsibility: a new partnership" and the Resolution of 23 May 2007 on "promoting decent work for all".

³⁷¹ Cf. point 359 et seq. below.

³⁷² L. Idot, "La notion d'entreprise", *Rev. sociétés*, 2001, p. 191; J. Hilaire, "Une histoire du concept d'entreprise", *Archives de la Philosophie du Droit*, 1997, no. 41, p. 341 et seq.

³⁷³ First Council Directive 68/151/EEC of 9 March 1968, which provides for the disclosure of company documents with a view to protecting third parties.

³⁷⁴ Second Council Directive 77/91/EEC of 13 December 1976, which covers "any interested person".

³⁷⁵ Fourth Council Directive 78/660/EEC of 25 July 1978 on annual accounts and annual reports, which aims to protect members and "third parties".

³⁷⁶ Cf. Council Directive 2001/86/EC of 8 October 2001 supplementing the Statute for a European company with regard to the involvement of employees and Council Regulation (EC) 2157/2001 of 8 October 2001 on the Statute for a European company (SE), *OJEU*, no. L. 294, 10 November 2001, p. 1.

element.³⁷⁷ The success of CSR policies will also depend on the attitude of the government.³⁷⁸

Sustainable corporate governance is an opportunity that must be seized. Although its trajectory is increasingly determined by the European institutions, its implementation will depend largely upon the “good-will” of certain women and men.

From a disembodied technique—the company, a contract between members—the company has become a living technique—a mould for business—, but one that comes in multiple forms—a range of guises for different types of businesses, big or small, from family-run businesses to listed companies—and one that is constantly in flux as a result of the many interests that must be taken into account and the various purposes imposed upon it.³⁷⁹

This analysis by Jean-Jacques Daigre³⁸⁰ of changes in corporate law since the mid-1960s could be adapted to apply to sustainable corporate governance, something that is both technical and human, in the hope that it will be able to fulfil the ever growing and ever more pressing purposes assigned to it.

112. Structure of the book. Non-financial reporting is a vehicle for promoting transparency, a constant and almost historic theme in European CSR strategy. It is through such reporting that CSR-related issues

³⁷⁷ CSR brings back the human dimension to corporate governance and echoes the words of J. Carbonnier: “Men and women, it goes without saying: men for want of another term; humans if you prefer. It is time to reintroduce them: contemporary sociology would end up losing them behind standards and systems”, which invokes “the effect of the *human condition* on law”, *Sociologie juridique*, PUF, Quadrige Manuels, 2nd edn, 2004, p. 388, author’s italics.

³⁷⁸ P. Deumier, “La réception du droit souple par l’ordre juridique”, in *Le Droit souple, Thèmes et commentaires*, Dalloz, 2009, p. 113 et seq., esp. p. 126: “... although soft law is defined by standards, it is entirely dependent on the way in which the legal system will receive it as this alone will determine its level of binding force: recognition of a voluntary commitment, a pure proposal, systematic consultation, assent, referral via a state rule, delegation of regulatory authority ...”, by the same author, *Introduction générale au droit*, LGDJ, 2nd edn, 2013.

³⁷⁹ J.-J. Daigre, “Le droit des sociétés, droit technique?”, *Bull. Joly Sociétés*, October 2012, Editorial, p. 685.

³⁸⁰ Cf. Daigre, *ibid.*, who also highlights that corporate law “must give ... citizens the feeling that companies have a sense of their social and environmental responsibilities”.

have entered into our corporate law. The first part of the book will therefore provide an analysis of non-financial reporting.

The issues involved in sustainable corporate governance have their roots in non-financial reporting, but emerge gradually, revealing their specific features.³⁸¹ The second part of the book will address the behaviours and sanctions to be defined, discovered or rediscovered.

Socially responsible investment—one component of the vast concept of so-called “sustainable finance”—could have been addressed in the second part of the book as it too involves behaviours and sanctions—transparency of voting on ESG (Environmental, Social and Governance) criteria, responsible investors. However, this was not conceivable as sustainable finance has its own constantly evolving legislative, practical and doctrinal source that determines how it works and its requirements. The third part of the book, which will no doubt be expanded upon in the years to come, is devoted to this area.

³⁸¹ A. Couret, “Corporate governance, RSE et communication financière”, *Dr. fisc.* 2012, study 131.