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Analysis of the notions of "due diligence" and "sphere of influence" in the context of corporate respect for human rights: the issues for delineating the scope of application of CSR standards.

Summary

In his Note to the International Organisation for Standardisation in November 2009, the Special Representative of the Secretary-General on the issue of business and human rights, Professor John Ruggie, stated that the notion of "sphere of influence" would be inappropriate for determining corporate responsibility regarding human rights and that it should be replaced with "due diligence". The questions raised by such a proposal concern not only ISO 26000 but also the OECD Guidelines for Multinational Enterprises and jurisprudence currently being developed in Europe. This study, undertaken with the support of a group of Law and Economics researchers, aims in turn to shed light on the legal and economic aspects of the grounds of such a proposal and its inherent issues.

The study's main conclusions are as follows:

1. The meaning of "due diligence" varies depending on the fields in which it is used: it can be found in international environmental law, law covering diplomatic protection, international investment, financial reporting and private corporate law. The features common to all of these definitions indicate that "due diligence" entails an obligation of means, requiring certain minimum standards of behaviour, the evaluation of which remains broadly subjective. In private law, it stems from North American jurisprudence according to which entrepreneurs are bound by fiduciary duties toward their shareholders, the company and all other stakeholders to act in good faith. It merely requires the due observance of procedures, which may be restrictive to greater or lesser degrees, dictated by the habitual practices of the sector. This leaves the company free to extricate itself from its responsibility and to establish a rebuttable presumption in the firm's favour.

2. The concept of "sphere of influence", already recognised in most international instruments on CSR and by case law of the Court of Justice of the European Communities, makes it possible to define the scope of application – both physical and temporal – of companies' obligations. ISO 26000 defines it as an "area or political, contractual or economic relationships across which an organization has the ability to affect the decisions or activities

of individuals or organizations". Definition of the scope of application is governed by objective criteria which take into consideration the characteristics of the sector, the company, the nature of the products, their production processes and marketing.

3. The concept of sphere of influence is suited to a pro-active approach to respecting rights because firms are encouraged to play a positive role, as envisaged in the OECD Guidelines: "Multinational enterprises are frequently regarded as leaders in their respective fields, so the potential for a "demonstration effect" on other enterprises should not be overlooked." Moreover, the concept also addresses both the requirements for implementing CSR policies as well as those of an overarching sustainable development policy.

4. When a company's responsibility extends to its entire sphere of influence it is easier to apprehend the notion of a "group of firms" and to counter the legal fiction of subsidiary companies' independence from the parent company, which encourages the "outsourcing of human rights". Multinational corporations, given their legal status, are poorly apprehended by the legal system: neither national jurisdictions nor international jurisdictions are truly equipped to deal with their reality, in other words with their global nature. Efforts are under way to improve this: European competition law recognises, for example, the notion of "economic unity" of a parent company and its subsidiaries as well as the notion of "decisive influence" over the latter. Above all, the notion of "sphere of influence" is currently being mainstreamed into a growing body of case law: this enables the judge, in damages cases, to go beyond appearances and examine the real power or complicity at work. The Court of Justice of the European Communities has thus established a rebuttable presumption regarding the "influence" that a parent company necessarily exerts over a subsidiary when the former is the sole holder of the latter's capital.

5. Because of its ambivalent meaning, the concept of "due diligence" hardly helps clear the confusion in international law surrounding human rights obligations. But in combination with the concept of sphere of influence it may be able to help identify corporate responsibilities, especially as concerns human rights: "due diligence", used in companies' decision-making processes for identifying risks, is informed by the sphere of influence, a method for delineating the scope of application in accordance with objective criteria. The use of the "due diligence" process in the field of human rights would only seem appropriate if it were used in conjunction with the notion of "sphere of influence".

Introduction

The activity of the United Nations regarding corporate social responsibility (CSR) is particularly interesting in that it has undergone a revival with the appointment of Professor John Ruggie, on 20 April 2005[1], as Special Representative of the Secretary-General (SRSG) of the United Nations on business and human rights. His mandate, recently extended, led him to produce several reports on the issue of respect for human rights in the private sector, which have made a considerable and universally welcomed contribution to current deliberations on CSR.

Following on with this encouraging momentum the SRSG John Ruggie submitted to the Human Rights Council, on 7 April 2008, a report entitled "Protect, Respect and Remedy: a Framework for Business and Human Rights". It contains three axes for reflection:

- *Protect*: the State's duty to protect against human rights violations committed by third parties,
- *Respect*: the corporate responsibility to respect human rights,
- *Remedy*: more effective access to redress for victims of these violations.

This study shall focus on the second point of the report, and most particularly on the question of demarcating the scope of application of the companies' obligations to "respect". In reference to the specific field of corporate social responsibility, the word "obligation" shall be used here in its broadest sense, meaning a duty, an imperative imposed by moral rules, social laws[2], and not to refer exclusively to an obligation in the legal sense of the term, the notion stemming from a contract or law.

It would be simplistic to think that the question of scope of application of these obligations is only of secondary importance in comparison with that of defining the content of these obligations as such. Firstly, it would seem difficult to separate the definition of these obligations from the definition of their scope of application, particularly as concerns the respect of human rights. Secondly, the existence of transnational enterprises raises the issue of their apprehension by legal instruments: how can cases against these entities be brought? The scope of application of regulations designed for companies is therefore a question of crucial importance.

The SRSG's report to the United Nations Human Rights Council explicitly takes a position on this question. It suggests that the notion of "due diligence" be used exclusively for defining the scope of application of the obligations to be imposed on firms. Moreover, in a letter addressed to the working group tasked with drafting ISO 26000, the SRSG advocates deleting any reference to the notion of "sphere of influence" in the text, preferring instead the exclusive use of the concept of "due diligence": "I very much hope – and indeed would urge – that the Working Group responsible for drafting the ISO 26000 Guidance document review all references to sphere of influence in the document"[3].

This study aims to clarify the content of these notions, "sphere of influence" and "due diligence", and to analyse the issues associated with them as regards the demand for the respect of human rights advocated by CSR instruments.

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[1] Human Rights Commission, *Resolution 2005/69*, 20 April 2005.
[2] Definition from the Larousse Dictionary (in French).
[3] RUGGIE (J.), *Note on ISO 26000 Guidance Draft Document*, p. 3.

The report's proposal led to the creation of an informal working group, upon the initiative of Mr Michel Doucin, Ambassador responsible for corporate social responsibility at the French Ministry of Foreign and European Affairs. This working group, comprising mainly French-speaking jurists and an economist, spent two months discussing their observations which have informed this current study.

In this way, valuable contributions to this study were made by (in chronological order): Isabelle Daugareilh (Director of Research, CNRS, Bordeaux IV), Yann Queinnec (Jurist, Sherpa Association), Isabelle Cadet (Doctor of Laws, Lecturer-Researcher, ESDES, Lyons Catholic University), François-Guy Trebulle (Law Professor, René Descartes University Paris 5), Louis-Daniel Muka Tshibende (Doctor of Laws, Sherpa Association), Risa Lieberwitz (Law Professor, Cornell University, USA), Hervé Ascensio (Professor, Sorbonne Law School, Panthéon Sorbonne University Paris 1), Marie Nigon (AFNOR Expert for ISO 26000, *France Nature Environment*, Transparency International France) and Jean-Claude Dupuis (Economics Professor, School of Commerce and Management –ESDES- Lyons Catholic University). A summary of these exchanges (in French) can be found in the Appendix at the end of this document[4].

When discussing this question in a French-speaking environment, the problem of translating the expressions from English arises. When it comes to standards, each nuance of the translation counts. While the notion of "corporate sphere of influence" can easily be transposed into the French expression "*sphère d'influence*", the translation of "due diligence" creates somewhat greater difficulties. Although the concept is no stranger to French vocabulary, it can nevertheless be expressed in various different ways: "*devoir de vigilance*", "*diligence reasonable*", "*obligation de prudence*", "*diligence due*", "*obligation de vigilance*", etc. The meaning to be given to this notion becomes all the more confusing because, as shall be seen, the meaning varies depending on the context where the term is used. For the purposes of this study, so as to remain as neutral as possible, it is the English expression that appears, in quotation marks, in the French version of this study (« *due diligence* »). The various official translations used in international instruments attest to the difficulty, revealing a whole problem unto itself, into which the current study shall not delve. Developments pertaining to this aspect can nonetheless be found in the exchanges among members of the working group, reproduced in the Appendix.

This study shall examine the notions of "due diligence" and "sphere of influence" and their adaptability to the issue of human rights (**I**), before analysing the consequences of accepting an exclusive use of the concept of "due diligence" in international CSR instruments (**II**).

[4] Cf. p. 33 ff.

I. The notions of "due diligence" and "sphere of influence": notions suited to the issue of human rights?

The SRSG's report puts forward the notion of "due diligence" through a critique of the notion of "corporate sphere of influence". By first looking into the meaning and relevance of using the notion of "due diligence" in the context of human rights (**A**), this study shall then proceed to examine the grounds for rejecting the notion of "sphere of influence" as proposed in the SRSG's report (**B**).

A . "Due diligence": a notion suited to the context of human rights?

The notion of "due diligence" covers a broad array of meanings. References to this concept can be found in varied fields, ranging from international environmental law to corporate law. The meaning varies depending on the context where the expression is used. A brief study of how it is used in different domains sheds some light on the main characteristics and contours of this notion and offers a response to the question: is this notion suitable for use in the framework of human rights?

1. Use of the notion of "due diligence" in inter-State relations

"The notion of 'due diligence' does not only concern finance. It has also long since been found in international law"[5]. This concept is also recognised as an obligation imposed by general international law, even outside international conventions, and is to be found in different areas of this international law.

- *"due diligence" in international environmental law:*

Here it is used through the principle from international law of non-harmful utilisation of a State's territory, notably in issues concerning trans-border pollution.

This principle was defined by the International Court of Justice as "every State's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States"[6]. The obligation incumbent on States under this principle resembles a duty to show "prudence", or "care": Thus the ban on causing appreciable damage is analysed as an obligation of *due diligence*, a best efforts obligation and not a results-based obligation, the meaning of which is not at all far from the French Civil Law concept of '*bon père de famille*' [*bonus pater familias*][7].
As Hélène Ruiz-Fabri points out, this concept means that States are to respect a best efforts obligation, but there is absolutely no obligation to achieve a particular result. It implies that

[5] CADET (I.), *extract from working group exchanges*, reproduced in the Appendix to this study. Cf "*ISO 26000: innovation?*" Minutes from the ADERSE Colloquium (French acronym for Association for the Development of Education and Research on Corporate Social Responsibility), 24-26 March 2010, La Rochelle, France.

[6] International Court of Justice, Corfu Channel case, Rec. 1949, p.22.

[7] RUIZ FABRI (H.), "*Règles coutumières générales et international law fluvial*" (General Customary Rules and International Law on Rivers), *Annuaire Français de Droit International* (French Yearbook of International Law), volume 36, n°1, 1990, p. 841 (in French).

the party is to do everything reasonably within its power to achieve a given result: "Parties are required 'to take all appropriate measures' with a view to reaching the result pursued by the obligations in point"[8]. While the objective to be achieved may be quite precisely delineated, generally by a regulation (domestic or international), the behaviour required in order to ensure this is not: the requirement of "due diligence" merely obliges the party to take any measures that seem reasonably appropriate so that the rule in question is not contravened. In addition, "the concept of due diligence is also very restrictive in terms of legal obligations since only actions considered reasonable can be required of the party"[9].
In terms of engaging a State's international responsibility, a breach of an obligation of diligence is therefore quite independent to the violation of the substantive rule with which the former was supposed to ensure compliance.
Thus, in the case of transboundary pollution, an area in which the concept is frequently applied, the fact that a State is deemed responsible for pollution on another State's territory does not necessarily mean that the former will be held responsible for violating the "due diligence" obligation incumbent on it under general international law. If the State is able to demonstrate that it took all measures judged appropriate to avoid the occurrence of the transboundary pollution, then it has not infringed its "due diligence" obligation and it cannot, as such, be held liable. Similarly, when an objective determined by a rule of international conventional law is not immediately achieved following ratification or accession to a treaty, a State's responsibility with regard to that treaty is not engaged, unless the State has failed to fulfil its obligation of diligence: "The fact that the result aimed at by a given provision has not been reached immediately upon ratification/accession, would not necessarily amount to a case of non-compliance proper, unless the Party concerned has not started with due diligence the process of adoption of the 'appropriate measures' for achieving the result eventually required of by the relevant provisions"[10]. This is clearly a reference to a best efforts obligation as concerns the State's behaviour, independent of the desired result.

The use of "due diligence" in international environmental law also highlights the difficulty in identifying the obligations incumbent on the party. A best efforts obligation, yes, but how is it to be gauged? By which criteria?

Indeed, while it is easy to assess the fulfilment or otherwise of a results-based obligation, evaluating respect of the best efforts obligation is somewhat more difficult.
What we are attempting to assess is whether or not the party upon which the obligation is incumbent has demonstrated average behaviour, in accordance with what could reasonably be expected of the party in endeavouring to achieve the situation prescribed by the rule: obligations requiring diligence only call for average behaviour[11].

[8] Working Group on Integrated Water Resources Management, *Draft concept of a guide for implementation of the Convention on the protection and use of transboundary watercourses and international lakes,* 3rd meeting, 22-24 October 2008, p. 2.

[9] DAUGAREILH (I.), *extract from working group exchanges*, reproduced in the Appendix to this study.

[10] Working Group on Integrated Water Resources Management, *Draft concept of a guide for implementation of the Convention on the protection and use of transboundary watercourses and international lakes,* 3rd meeting, 22-24 October 2008, p. 2.

[11] RUIZ FABRI (H.), "*Règles coutumières générales et droit international fluvial*" (General Customary Rules and International Law on Rivers), *Annuaire Français de Droit International* (French Yearbook of International Law), volume 36, n°1, 1990, p. 841 (in French).

> The same idea is expressed by the repeated reference to "*bon père de famille*" in French law and in some foreign legal codes[12]: the search for a yardstick of average behaviour; behaviour that could be reasonably expected of someone in a given situation. This yardstick of behaviour would ideally be embodied by a person who is neither over-cautious nor too negligent. According to a French contract law dictionary, *Dictionnaire pratique du droit des contrats*, the "*bon père de famille*" concept recalls a standard of reference, representing an individual who is normally diligent, sensible or prudent, the attitude of whom is judged *in abstracto* in law (in other words, independently of the person's individual qualities and faculties, as opposed to an *in concreto* judgement, where such personal features are taken in account) so as to determine whether the person has honoured or failed to honour the obligations[13]. This brief look at French Civil Law, without aiming to draw an analogy between international and national law any more than is necessary as this is often scarcely relevant, does nonetheless help shed some light on the concept of "due diligence" in its theoretical meaning.

Given this definition, all the inherent relativism of such a notion becomes clear. The obligation of diligence, just as with the notion of "*bon père de famille*" which it implicitly echoes, can be described in this regard as a framework notion, malleable depending on the context in which it is invoked. Such a concept leaves room for a great deal of subjectivity as to what constitutes "reasonable" or "appropriate" behaviour: "The due diligence nature of the obligations in point and the concept of 'appropriateness' of the measures required involve a large measure of relativity as to both contents and time frame of the conduct which is to be taken by Parties"[14].

The large degree of resultant discretion when assessing behaviour may nevertheless be reduced by taking into consideration the context, unique to each situation. In the field of transboundary pollution, criteria may be established, for example, for gauging the tolerable discretion in evaluating the behaviour in question: "Such relativity would be proportionate to the capacity of the Party concerned, as well as to the nature and degree of the risk of occurrence of transboundary impact."[15] The degree of subjectivity in assessing the behaviour can, in this way, be reduced, although not eliminated altogether. While it is true that the notion of "due diligence" takes the circumstances into account for the assessment, it is the behaviour itself that is adopted in these same circumstances which is evaluated, as compared with a yardstick of behaviour deemed reasonable *in abstracto*, in the absence of context. This aspect is clearly expressed in the legal definitions of the obligation of "due diligence": "due diligence in a broad sense refers to the level of judgement, care, prudence, determination, and activity that a person would reasonably be expected to do under particular circumstances"[16].

An examination of its use in international environmental law leads to the conclusion, furthermore, that the content of the obligation of due diligence is necessarily a best efforts obligation, the interpretation of which *in abstracto* gives rise to ample subjectivity.

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[12] In the French Civil Code, reference is made to the notion of "*bon père de famille*", notably, in Articles 1728 and 1729: "*Si le preneur n'use pas de la chose louée en bon père de famille ou emploie la chose louée à un autre usage que celui auquel elle a été destinée…*" (translated by Legifrance in terms of the lessee not using the leased thing as a prudent administrator or using the leased thing for a purpose other than that for which it was intended…)

[13] *Dictionnaire pratique du droit des contrats* (in French) (http://www.lawperationnel.com/EncyclopedieJur/bonperedefamille.html).

[14] Working Group on Integrated Water Resources Management, *Draft concept of a guide for implementation of the Convention on the protection and use of transboundary watercourses and international lakes,* 3rd meeting, 22-24 October 2008, p. 2.

[15] *Ibid.*

[16] US-Legal, due diligence law and legal definition (http://definitions.uslegal.com/d/due-diligence/)

Reference to the obligation of diligence, in the broad sense of the word, is also made in other areas of international law, from which the same conclusion can be drawn as far as the notion's content is concerned.

- *"due diligence" in the exercise of diplomatic protection:*

An illustration of the use of the "due diligence" concept also appears in the exercise of diplomatic protection by a State concerning one of its nationals. While the exercise of diplomatic protection is a State's discretionary prerogative, which may or may not be brought to bear as the State sees fit, there are cases where the refusal to offer such protection to a citizen is justified by the "clean hands" maxim. According to Mr Luis Garcia-Arias this means that a State may not present a claim on behalf of a natural or legal person – for which it is entitled to offer diplomatic protection from another State – if said person has not observed correct conduct toward that other State[17]. One form of conduct deemed "incorrect" from the citizen abroad could be, among other things, through an offence against the neutrality of his or her State of origin. Therefore, to paraphrase Jean Salmon on the subject of neutrality, a neutral State must not only respect its obligations but also ensure with "due diligence" that its nationals also respect them[18].

In this context, the only obligation incumbent on the State is that it adopt conduct aiming to ensure that its own nationals do not compromise its neutrality. If the latter is violated, the State will not necessarily engage its international responsibility, unless there is proof that it failed to take all measures *deemed reasonable* to prevent this type of behaviour from its nationals. Judgement as to whether the State's attitude is reasonable leaves a lot of room for subjectivity. This reference, under the "clean hands" maxim, to the obligation of diligence echoes, here again, a best efforts obligation, the content and scope of which are left largely to States' judgement.
This conception of "due diligence" can be found in the draft Article B that the International Law Commission adopted in 1995.
"The commentary read as follows:

> 'The obligation of States to take preventive or minimization measures is one of due diligence, requiring States to take certain unilateral measures to prevent or minimize a risk of significant transboundary harm. The obligation imposed by this article is not an obligation of result. It is the conduct of a State that will determine whether the State has complied with its obligation under the present articles'[19],,[20].

- *"due diligence" in international investment law:*

The standards of protection for foreign investments, such as "fair and equitable treatment" and "full protection and security" of foreign investment, encompass several notions. Among

[17] SALMON (J.), *Des mains propres comme conditions de recevabilité des réclamations internationales* (Clean Hands as an Admissibility Condition for International Claims), *Annuaire Français de Droit International* (French Yearbook of International Law)*,* 1964, volume 10, n°1, p. 226 (in French).

[18] SALMON (J.), *Des mains propres comme conditions de recevabilité des réclamations internationales* (Clean Hands as an Admissibility Condition for International Claims), *Annuaire Français de Droit International* (French Yearbook of International Law)*,* 1964, volume 10, n°1, p. 251 (in French).

[19] Y.I.L.C, 1995, vol. II, Part Two, p.93, sub-para 4.

[20] DAUGAREILH (I.), *extract from working group exchanges*, reproduced in the Appendix to this study.

the components comprising these principles of investment protection, admitted by the courts of arbitration, the obligation of vigilance is cited, also phrased as an obligation to exercise due diligence in protecting foreign investment[21].

This reference to the notion of "due diligence" in the field of foreign investment is explained by Dionisio Anzilotti in the following terms: it is part of a State's international duties consisting of exercising vigilance over persons under its authority as befits its invested functions and powers. The State does not have an international obligation to prevent, in an absolute manner, certain acts from being committed; but it has a duty to exercise vigilance in order to prevent their occurrence, which is part of its ordinary functions. Failing to exercise such vigilance is an inobservance of a duty imposed by international law, while not being considered a misdeed as such[22]. This definition of the obligation of vigilance, added to the duty to exercise "due diligence", thus tends to recognise the State's responsibility only in the ambit of its so-called "ordinary" powers and functions. There is no requirement for the State to bring to bear any additional vigilance, over and above the "ordinary vigilance", to prevent the occurrence of damaging acts on its territory.

In other words, "due diligence" refers to a standard of behaviour deemed reasonable for a "normal" State: In all measures of repression, the State must develop, as it does in preventive measures, the activity of a *normal State*. Judging whether or not the preventive or responsive measures (…) are sufficient from the perspective of people's rights (…) must therefore be done in accordance with the *international standard* principle. In the opinion of governments, the diligence to take into consideration is that which could be expected from a civilised State.[23] Apart from the reference to the concept of a "civilised State", which remains historically and socially dated, the notion of "due diligence" signifies a minimum duty incumbent on the party. Failing to satisfy this duty would seem difficult, except in cases of outright negligence.

> An example of such negligence may be seen in the case "Wena Hotels Ltd (United Kingdom) v. Arab Republic of Egypt[24]: a British firm had signed a contract with an Egyptian company with a view to renovating two hotels on Egyptian soil. Following a lease-related dispute, the Egyptian company took possession, by force, of the buildings in question. The ICSID Tribunal, to which the case was referred, not only demonstrated that Egypt was perfectly aware of its company's intention to take possession of the buildings; it also proved that no preventive measures had been taken in the face of these circumstances; that nothing had been done to protect the investment of the applicant firm after the seizure; neither was any attempt made to return the buildings to the applicant firm. Finally, Egypt had refused to compensate the British firm and launch proceedings against the Egyptian company. In the case in point, the Arab Republic of Egypt had shown clear and easily identifiable negligence of its "due diligence" obligation, leading the arbitral judges of the ICSID to state that it "had failed in its obligation to accord to the British firm's investments fair and equitable treatment and full protection and security"[25]. In

[21] OECD, *International Investment Law: A Changing Landscape. A Companion Volume to International Investment Perspectives*, OECD Publishing, 2006, p. 105.

[22] ANZILOTTI (D.), "*La responsabilité internationale des Etats à raison des dommages soufferts par les étrangers*" (The International Responsibility of the State for Damages Suffered by Foreigners), *Revue Générale de droit international public* (Journal of International Public Law)*,* 1906, p. 291 (in French).

[23] VERDROSS (A.), "*Les règles internationales concernant le traitement des étrangers*" (International Rules concerning the Treatment of Foreigners), *Recueil des Cours de l'Académie de Droit International* (Compendium of Lessons, Academy of International Law)*,* 325 (193), 1931, p. 388 (in French).

[24] *Wena Hotels Ltd. (United Kingdom) v. Arab Republic of Egypt,* ICSID, Case N° ARB/98/4, 8 December, 2000.

[25] *Ibid.*

> this case, Egypt did not exhibit the behaviour of a "normal" State, failing to show "due diligence" through its clear and repeated negligence regarding the investments of the British firm on its territory. The penalty imposed was for breach of a minimum behaviour requirement: This idea of 'due diligence', of 'good governance' in conformity with the circumstances, is linked to the existence of Minimum Standards for States' behaviour ('sufficient diligence') required at the international level.[26]

Given the various fields in which the notion of "due diligence" – understood in broad terms – appears in international law, it transpires that all this notion requires of States, via the obligations it entails, is:

- the fulfilment of a minimal behaviour requirement,
- the assessment of which is performed in a subjective manner,
- in accordance with an average and previously defined standard,
- and taking into account the circumstances.

2. Use of the notion of "due diligence" in private law

In the context of the private sector, the expression "due diligence" can mean either of two things. It either designates a required level of prudence in business relations, or a particular process prior to decision-making within a firm or between a firm and a contracting party. However, these two meanings overlap and become confused to a large extent: "'due diligence' is, above all, a process, not a technical regulation"[27].

So in the business context, "due diligence" may be mainstreamed into any of the activities in which the firm engages: financial transactions, merger-acquisitions of companies, outsourcing contracts, etc. Similarly, it appears in all fields related to these same activities and may be incorporated into companies' decision-making processes. The concept of "due diligence" in corporate law can therefore be schematized as *the minimum requirement of prudence for taking an external standard into account in corporate decision-making*. It may, for example, serve to ensure that environmental concerns are mainstreamed into decision-making (and it is therefore termed "environmental due diligence"), or concerns relating to money laundering and the funding of terrorism[28], or, more commonly, the mere concern for the economic viability of the decision. In this sense, "'due diligence' usefully identifies the [company's] responsibility vis-à-vis, for example, local authorities (aside from the corruption circuit) or communities not working directly for the company"[29]. Finally, this concept may be used for taking into consideration, as advocated in the SRSG's report, the issue of respecting human rights in the company's decision-making process.

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[26] DRNAS DE CLEMENT (Z.), "*La diligence due comme lien entre la responsabilité découlant d'un acte illicite international et la responsabilité découlant de conséquences préjudiciables d'activities non interdites par le droit international – La valeur des normes de droit interne relatives à la substance de la diligence due*" (Due Diligence as the Link between Responsibility following an Illicit Act under International Law and Responsibility following Harmful Consequences of Non-illicit Activities under International Law – The Value of Domestic Legal Regulations regarding the Substance of Due Diligence). (In French)

[27] CADET (I.), *extract from working group exchanges*, reproduced in the Appendix to this study. Cf "*ISO 26000: innovation?*" Minutes from the ADERSE Colloquium (French acronym for Association for the Development of Education and Research on Corporate Social Responsibility), 24-26 March 2010, La Rochelle, France.

[28] "Ordinance on Professional Due Diligence in the Combating of Money Laundering, Organised Crime and Terrorist Financing (Due Diligence Ordinance, DDO)", *Liechtenstein Law Gazette,* no. 98, 23 February 2009.

[29] ASCENSIO (H.), *extract from working group exchanges*, reproduced in the Appendix to this study.

The expression "due diligence" is, above all, an expression that emanates from the Anglo-American legal systems: "The term due diligence is mainly a creature of the American securities laws."[30] It stems "largely from North American jurisprudence (…) according to which managers and Boards are bound by fiduciary duties toward their shareholders, the enterprise and the company as such, or, in other words, to all of its stakeholders. This requirement of probity (administration on behalf of others) is complemented by the notion of 'business judgment', which endows managers with reasonable discretion with which to ensure that the business is run efficiently, provided that they act in good faith (*bona fide*). Managers of these enterprises could therefore be held responsible for any violation of their fiduciary duties which are to hold them accountable when it comes to shareholder value and rights as well as those of other parties"[31]. While the appearance of the English expression is a relatively recent phenomenon, the principle that it covers has nonetheless existed since the birth of transnational trade: "The concept of due diligence has been with us from the very beginning of transactions between strangers (…). This practical advice forms part of the general process by which reasonable business people inform themselves about the transaction they are contemplating so they may satisfy themselves, their superiors, their shareholders, or their principals that the transaction is what it appears to be. The Americans may have come up with a catchy name in 'due diligence', but (…) they did not invent the concept."[32] The process associated with "due diligence" is integrated into entrepreneurial decision-making, especially in the area of finance. However, it was never found, until now, in the process of mainstreaming the respect for human rights into business decisions.

The French Official Gazette, or *Journal Officiel*, dated 28 December 2006[33], under the heading "Economics and Finance Vocabulary", offers a worthwhile clarification. French equivalents for the English expression "due diligence" include such phrases as "*audit préalable*" and "*obligation de vigilance*". The notion of the preliminary audit (*audit préalable*) is described in that section of the Gazette as an investigation involving consultation with experts – notably accounting, financial, legal or taxation experts – whose conclusions are to serve as a basis for investors' decision-making[34] whereas the duty to exercise vigilance (*obligation de vigilance*) is a corpus of legal prescriptions imposing controls – on credit establishments and any individual collecting funds – aimed at identifying their interlocutor and the source of the resources they handle.[35] These two concepts refer to one single idea: due diligence is a procedure aiming to introduce a dimension of prudence, by conducting a preliminary audit or carrying out various checks on the decision-making process, regarding external factors that could affect the firm's viability. Thus "the notion of due diligence suggests focussing on the relationship with the external context. The exercise of 'due diligence' is particularly present when it comes to accounting and finances, embodied

[30] DUFFY (J.P.), "Some thoughts on due diligence, or the importance of due diligence in business transactions" (www.http:/bergduffy.com/Personnel/Articles/95ddartl.htm), p. 1.

[31] NIGON (M.), *extract from working group exchanges*, reproduced in the Appendix to this study.

[32] DUFFY (J.P.), "Some thoughts on due diligence, or the importance of due diligence in business transactions" (www.http:/bergduffy.com/Personnel/Articles/95ddartl.htm), p. 1.

[33] It should be recalled that, as noted in the introduction, this study has opted not to deal with the issue of how best to translate the expression "due diligence" from English into French. Some developments that help shed light on this can nevertheless be found in the exchanges among working group members, reproduced in the Appendix.

[34] *Journal Officiel de la République française* (an official bulletin describing laws and making official anouncements), 28 December 2006. (http://www.dglf.culture.gouv.fr/cogeter/28-12-06-economie.htm) (in French).

[35] *Ibid.*

namely in those measures employed when conducting structural or random verification missions."[36]

More specifically, this entails an examination, prior to taking decisions, of the real identity of the company's contracting partner and of all the relevant information surrounding the decisions to be made. For decisions concerning the acquisition of companies, for example, exercising "due diligence" means carrying out a financial, accounting and sometimes environmental audit, so as to identify the inherent risks in the acquisition decision. The same is true for decisions on divestiture of assets or major financial investments. The obligation to respect a process of "due diligence" needs to be mainstreamed into the decision-making process itself. This has even become common practice, given the proliferation of responsibility regulations, particularly regarding the environment, that can affect the enterprise: "Due diligence is used any time the law imposes duties of careful investigation or for private reasons, the parties to a transaction want to be as informed as reasonably possible about all of its material aspects."[37] The "due diligence" process aims to protect the company itself from any potential negative facets, especially of a financial nature, inherent in the decisions it makes: "An efficient due diligence process can save companies from making costly mistakes that may have profound consequences for the firm's other operational areas and/or its corporate reputation."[38]

However, any binding power associated with "due diligence" in the private sector remains relatively weak. Indeed, non-observance of the "due diligence" process may lead the firm to a situation that is potentially hazardous for its own financial health and/or reputation, but it will not lead to legal sanctions, unless of course this non-observance constitutes a breach of contractual engagements. The very most that one could imagine would be a scenario where a company takes in-house disciplinary action against employees who fail to comply with the 'obligation' of due diligence when making a decision under their remit.

While the party is encouraged to make decisions in the light of a reasonably thorough prior investigation, what is to be deemed reasonable appears to be left to the better judgement of a third party (who is not, this time, a court judge) without there being any applicable set criteria for reaching such a judgement. The subjectiveness associated with the concept of "due diligence", already noted in international law, thus crops up again in corporate law. This same subjectiveness can be seen in the embryonic "theory of appearances" sometimes attached to the description of the company's "due diligence" process implementation, where the image – or appearance – as seen from the outside prevails over the facts of the situation in identifying human rights violations: "The focus of due diligence should be to identify risks to the rights of people (…). These risks may arise from company involvement in human right abuse, or from the perception on the part of stakeholders that the company is a participant in abuses."[39]

Finally, "due diligence" recalls the notion of "average behaviour", compliance with which does not necessarily result in conformity with the standard imposed. The process of "due diligence", as understood in corporate law, means that the party subscribing to it may be

[36] TREBULLE (F.-G.), *extract from working group exchanges*, reproduced in the Appendix to this study.

[37] DUFFY (J.P.), "Some thoughts on due diligence, or the importance of due diligence in business transactions" (www.http:/bergduffy.com/Personnel/Articles/95ddartl.htm), p. 1.

[38] US-Legal, due diligence law and legal definition (http://definitions.uslegal.com/d/due-diligence/)

[39] TAYLOR (M. B.), ZANDVLIET (L.), FOROUHAR (M.), "Due diligence for human rights: a risk-based approach", Harvard University, working paper no. 53, October 2009, p. 7.

content to observe the formalities, which may be more or less binding in nature, demanded by "due diligence" which absolves the buyer of all responsibility when it comes to subsequent phases of the operation: "In the USA, the American Society of Testing and Materials has developed a Phase I scope which if completed gives the purchaser 'innocent purchaser status.'"[40] In "American law, [due diligence] establishes a presumption in favour of the firm's management. A presumption, even a rebuttable one, complicates things from the point of view of proof and in any case limits the scope of the action in question: as long as the firm has duly complied with the formalities upstream of its operation, it will be discharged of its obligation."[41]

Can this notion be suitably applied to the issue of human rights?

The different uses of the concept of "due diligence" raise several difficulties regarding its potential application in this domain.

Because of the ambivalence in meaning, the concept of "due diligence" hardly helps to dissipate the existing confusion in international law surrounding human rights obligations. Its meaning differs depending on whether it is used in the context of international law or corporate law. Since the field of CSR is nourished by both international law (via drafting of regulations or recommendations at the international level) and corporate law (as it is designed for the corporate world), use of the notion of "due diligence" here is ambivalent. On the one hand, "it opens up some interesting prospects: Business leaders are not meant to substitute governments in promoting human rights for the common good. But neither can they hide behind governments' shortcomings in this field without becoming, to some extent, an accomplice to those shortcomings. On the other hand, governments have a duty to encourage good social conduct in the private sector and must facilitate respect for ethical standards. It is precisely where this public governance (States) and private governance (organisations) intersect that the full meaning of "due diligence" is brought to bear as an applicable regulation in private law and public law; where it becomes both a source and model of behaviour."[42]

However, the vagueness surrounding the concept of "due diligence", despite its common identifiable characteristics, means that the appropriateness of its use for human rights is called into question: subjectivity, best efforts obligations, requirement for minimum behaviour, unclear link with possibilities for engaging responsibility, etc. Moreover, adopting it in the context of respect for human rights without prior clarification would surely only add to the fuzziness surrounding the scope of companies' obligations in this domain: "In the case of substituting the notion of "sphere of influence" with "due diligence", it is to be feared that firms' respect for human rights will quite simply be dodged."[43]

[40] FARTHING (E.), "Environmental Due diligence – Development and Process", *Due diligence Review: M&A Behind the Scenes*, 2004, p. 18.

[41] DUGAREILH (I.), *extract from working group exchanges*, reproduced in the Appendix to this study.

[42] NIGON (M.), *extract from working group exchanges*, reproduced in the Appendix to this study.

[43] ASCENSIO (H.), *extract from working group exchanges*, reproduced in the Appendix to this study.

B. Is it appropriate to reject the notion of "sphere of influence"?

In his report "Protect, Respect and Remedy"[44] of 7 April 2008, John Ruggie rejects the notion of "sphere of influence", preferring instead "due diligence": "It is necessary to point out that my report in fact finds that the concept of 'sphere of influence' is unhelpful for further elucidating the boundaries of the responsibility to respect. Instead, I refer to the concept of 'due diligence' as a useful tool"[45] [emphasis added].
The institution of "due diligence" would suffice to clarify the scope of the obligations incumbent on companies, whereas they would be ill-defined by the concept of "sphere of influence".

The definition for each of expressions can be found within the text of ISO 26000[46]. The definition of "due diligence" reads as follows: "Comprehensive, proactive effort to identify risks over the entire life cycle of a project or organizational activity, with the aim of avoiding and mitigating those risks."[47]

The expression "sphere of influence" is described as the: "Area of political, contractual or economic relationships across which an organization has the ability to affect the decisions or activities of individuals or organizations."[48]

What can be deduced from these two definitions is that the two concepts stem from different approaches. The definition of "sphere of influence" deals with the identification of an area where relations of all kinds develop between the enterprise and its environment (persons or other enterprises). The definition of "due diligence" is based on the existence of an effort toward identifying the risks associated with an activity or a project in the broadest sense.

While the concept of "sphere of influence" prompts us to identify a domain or relational flows in an *objective* way – since the criteria for identifying these have already been previously defined as the possibility for the enterprise to exert influence through its relations with its environment and partners – the notion of "due diligence" prompts us to envisage the risks associated with the enterprise's activity, but the scope of said activity goes undefined: it is defined in a manner specific to the enterprise in question, in a *subjective* way.

At first glance, therefore, the motivation behind the choice to use the concept of "due diligence" rather than "sphere of influence" appears to be one of offering the enterprise some elbow room when it comes to defining the scope of application of its human rights obligations.

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[44] RUGGIE (J.), "Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development. Protect, Respect and Remedy: a Framework for Business and Human Rights", *Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie*, Human Rights Council, A/HRC/8/5, 7 April 2008.

[45] RUGGIE (J.), "Response by John Ruggie to Ethical Corporation Magazine", 10 June 2008 (http://www.ethicalcorp.com/content.asp?ContentID=5949).

[46] ISO 26000, *Guidance on social responsibility,* ISO/TMB WG SR, 4 September 2009.

[47] ISO 26000, *Guidance on social responsibility,* ISO/TMB WG SR, 4 September 2009, Article 2.1.4.

[48] ISO 26000, *Guidance on social responsibility,* ISO/TMB WG SR, 4 September 2009, Article 2.1.19.

1. "Sphere of influence": a concept already recognised by other CSR standards

As Yann Queinnec underscores, the "issue of the sphere of influence has long been identified":

> For instance, this excerpt from a 1986 article by Professor Jean Paillusseau: "To protect and safeguard their interests, enterprises tend to react by following guidelines opposed to those of society or some of the latter's constituent groups. (...) The action of enterprises in these various fields, and thence its opposition to society or some of its constituent groups, is in relation to the former's power. While action by a small or medium enterprise is completely negligible on a macroeconomic scale, that of an international or multinational company may be significant, particularly in a small nation. This is why multinational corporations excite such passions and breed so much controversy." [*Qu'est-ce-que l'entreprise?* (What is an enterprise?) *Les Petites Affiches* (public notices) no. 43, 9 April 1986, p.32, no. 172][49]

Furthermore, international instruments relating to CSR, initially designed to try to limit abuses in the activities of multinational enterprises, have taken this notion on board. It can be found in various texts:

- *Use of "sphere of influence" in the OECD Guidelines for Multinational Enterprises:*

Adopted in 1997, subsequently revised in 2000, the OECD Guidelines were the first to define the notion of influence. Among the 11 Guidelines, the tenth one states that enterprises should: "Encourage, where practicable, business partners, including suppliers and sub-contractors, to apply principles of corporate conduct compatible with the *Guidelines*."[50]

The commentaries, included in the same document, refer to "the ability of enterprises to influence the conduct of their business partners"[51] or the fact that "multinational enterprises have certain responsibilities in other parts of the product life cycle."[52] This idea is presented as positive, being able, in the long run, to facilitate foreign investments: "Multinational enterprises are frequently regarded as leaders in their respective fields, so the potential for a 'demonstration effect' on other enterprises should not be overlooked. Ensuring that the environment of the countries in which multinational enterprises operate also benefits from available technologies is an important way of building support for international investment activities more generally."[53] So the Guidelines, while not using the exact expression "sphere of influence", refer several times to the idea it conveys.

The Committee on International Investment and Multinational Enterprises (CIME) has interpreted the scope of the OECD Guidelines more broadly, reinforcing the reference to the idea of sphere of influence: "The CIME has adopted a very pragmatic position, which can be summarised thus: 'the reach of the Guidelines depends on enterprises' capacity for influencing the behaviour of the business partners in relation to which their role may be likened to that of investors.' (…) This pragmatism is (…) consistent with the fact that the OECD Declaration provides no definition for multinational enterprises nor for international

[49] QUEINNEC (Y.), "The OECD Guidelines for Multinational Enterprises – An evolving legal status", Sherpa Association, June 2007, p. 20.
[50] OCDE, *The OECD Guidelines for Multinational Enterprises*, 2008, p. 14.
[51] OCDE, *ibid.,* p. 41.
[52] OCDE, *ibid.,* p. 47.
[53] OCDE, *ibid.,* p. 48.

investment (…)."[54] With this interpretation "two scenarios can be envisaged. The first, corresponding to a foreign direct investment (FDI) situation, refers to control that presupposes direct influence conducive to the application of the Guidelines. The second covers cases where, even without direct investment or investment in the conventional sense of the word, the enterprise may nonetheless be able to influence its partners (through its sheer commercial might, for example, or through business practices such as systems for approval or product traceability or quality), to such an extent that the Guidelines become applicable to its contracting partners."[55]
The OECD Guidelines have been adopted by 42 States to date, including 12 which are not members of the Organisation.

- *Use of "sphere of influence" in the United Nations Global Compact:*

The expression "sphere of influence" was introduced into the field of CSR by the Global Compact of 2000. It "asks companies to embrace, support and enact, within their sphere of influence, a set of core values in the areas of human rights, labour standards, the environment, and anti-corruption"[56] [emphasis added]. The notion is referred to again in the first of the ten principles making up the Compact [French version]: Businesses should, in their sphere of influence, support and respect the protection of internationally proclaimed human rights[57] [emphasis added]. To date there are more than 5,000 enterprises on all continents that have joined the Global Compact.

- *Use of "sphere of influence" in ISO 26000:*

The ISO 26000 draft guidance document, upon which work commenced in 2005 across 90 States, also makes several references to the notion of "sphere of influence". For example, "Clause 5 (…) provides guidance on the relationship between an organization, its stakeholders and society, recognizing the core subjects and issues of social responsibility and an organization's sphere of influence"[58] [emphasis added]. It is this reference to the concept of "sphere of influence" which met with the SRSG's disapproval: "In short, I have serious concerns about these inconsistencies regarding the sphere of influence: within the ISO Guidance document itself, and between it and the UN 'protect, respect and remedy' framework."[59]

The notion of "sphere of influence" is thus currently utilised and already recognised by several international instruments relating to CSR and deemed, notably, relevant for defining the scope of application of the CSR standards to be respected.

Now let us examine, in the next section, the arguments that have challenged this recognition.

[54] DAUGAREILH (I.), *extract from working group exchanges*, reproduced in the Appendix to this study.
[55] DAUGAREILH (I.) *ibid.*
[56] Text of the United Nations Global Compact (text available from http://www.unglobalcompact.org)
[57] Principle no. 1 of the United Nations Global Compact [French version]. (http://www.un.org/fr/globalcompact/principles.shtml) (in French).
[58] ISO 26000, *Guidance on social responsibility,* ISO/TMB WG SR, 4 September 2009, p. vii.
[59] RUGGIE (J.), *Note on ISO 26000 Guidance Draft Document*, p. 3.

2. The arguments against "sphere of influence"

- According to the SRSG's report, the notion of "sphere of influence" is, first and foremost, itself subject to influence, and there is debate surrounding its interpretation: Entreprises are striving to reduce its reach (for example to the boundary of factory premises) while NGOs are trying to extend it (in their eyes, paying taxes to a political regime that shows contempt for human rights amounts to supporting those who violate these rights).[60] For John Ruggie, "using influence as a basis for assigning responsibility invites strategic manipulation […] because influence can only be defined in relation to someone or something. Thus, it is itself subject to 'influence.'"[61] The definition of the concept of "sphere of influence" would leave room for broader or narrower interpretations as to what it encompasses, depending on the stakeholders concerned and their respective interests in the case in point.

- It is argued that this notion is not useful for delineating corporate responsibility regarding the respect for human rights: "It is necessary to point out that my report in fact finds that the concept of 'sphere of influence' is unhelpful for further elucidating the boundaries of the responsibility to respect"[62] [emphasis added]. However, the definition offered by ISO 26000 does permit such an assessment to be made objectively in accordance with the circumstances by requiring predefined criteria for identifying the domain of responsibility. Section 7.3.2 of the text, entitled "An organization's sphere of influence", carefully outlines what is meant by "influence" in the framework of an enterprise's activities and which entities may be influenced by an enterprise[63].

Incidentally, it is important to remember that the task of interpreting *in concreto* that is required whenever applying a theoretical notion, of whichever nature, is like the role of judges when a court case is referred to them. Indeed, "applying any principle means adapting to the circumstances, and so it requires courage to establish the boundaries. It is the role handed to organisations and persons authorised to pronounce the law when a case is referred to them."[64] What is more, case law is gradually developing in this area: "jurisprudence, when dealing with professional obligations based on 'due diligence', especially in matters of accounting, is perfectly well-equipped to decide what is to be considered reasonable or otherwise."[65]

The ISO 26000 text supports this conception: "The responsibility for exercising influence in any situation will depend on various factors, including the actual ability of the organization to influence others and the matter concerned. Generally, the responsibility for exercising influence increases with the ability to influence."[66] So while "it is true that the notion of 'sphere of influence' remains hazy, the advantage to it, as with sustainable development, is that the problem can be approached in a holistic manner and allows a raft of decisions,

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[60] LEISINGER (K.), "*Droits de l'homme et responsabilité des enterprises*" (Human Rights and Companies' Responsibility), *InfoSud, Human Rights Tribune*, 30 September 2008 (http://www.humanrights-geneva.info/Droits-de-l-homme-et,3555) (in French).

[61] RUGGIE (J.), *Note on ISO 26000 Guidance Draft Document I,* p. 2.

[62] RUGGIE (J.), "Response by John Ruggie to Ethical Corporation Magazine", 10 June 2008 (http://www.ethicalcorp.com/content.asp?ContentID=5949).

[63] Cf. ISO 26000, *Guidance on social responsibility,* ISO/TMB WG SR, 4 September 2009; Article 7.3.2.

[64] QUIENNEC (Y.), *extract from working group exchanges*, reproduced in the Appendix to this study.

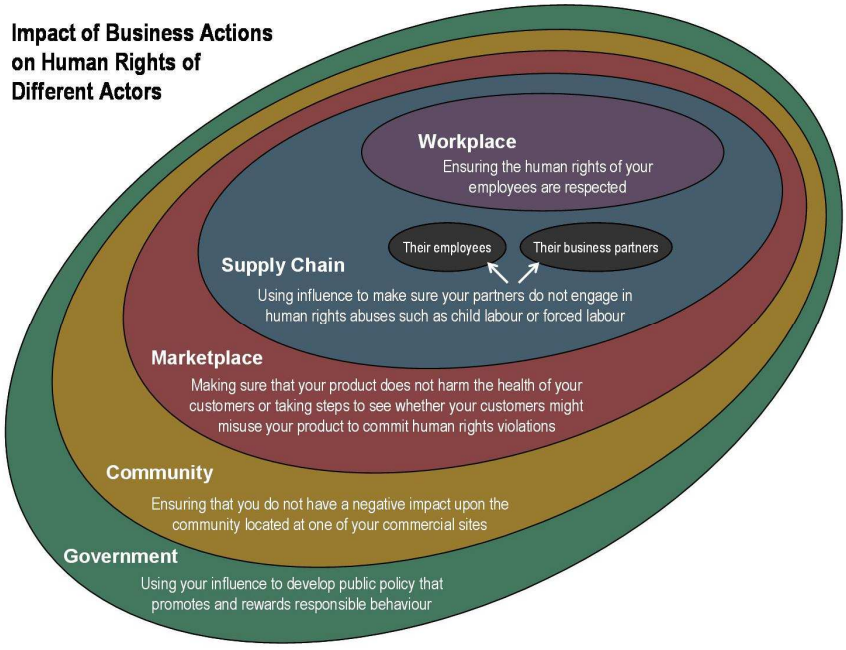
[65] TREBULLE (F.-G.), *extract from working group exchanges*, reproduced in the Appendix to this study.

[66] ISO 26000, *Guidance on social responsibility,* ISO/TMB WG SR, 4 September 2009, Article 5.2.3.

tailored to each situation, to develop."[67] Although the concept of "sphere of influence" is open to interpretation, as is any concept and as is that of "due diligence", this does not mean that it is an unusable tool for determining the extent of corporate responsibility.

- The SRSG's report of 7 April 2008 also advocates making a distinction between activities over which companies have a direct effect, and those over which they only have a capacity to influence. While it is reasonable for firms to accept responsibility for activities over which they have a direct impact, it is on the other hand inopportune for them to shoulder such a responsibility for activities over which they merely have influence: "Companies cannot be held responsible for the human rights impacts of every entity over which they may have some leverage, because this would include cases in which they are not contributing to, nor are a causal agent of the harm in question (…)."[68]

This proposal would appear to support a twisted reading of the concept of "sphere of influence". Indeed, with regard to the definition provided by ISO 26000, the "sphere of influence" is a unitary concept, and is meaningless if considered any other way. The 'cutting out', or explosion, of the "sphere of influence" suggested by the wording of the report tends to empty the notion of all meaning. Indeed, the "corporate sphere of influence" is traditionally shown diagrammatically, particularly in the model developed by the United Nations Global Compact, as a series of concentric circles with, at the centre, the employees at the production site, then the supply chain, followed by the marketplace, etc.[69]



So "one of the particularly useful aspects of the notion of sphere of influence is that it can depict in this way the control of influence via concentric circles (idea of a sphere) which suggests a gradation in influence, which may be correlated to a gradation in responsibility: the closer a third party is to the core, the more heavily influenced it is, and the more said core

[67] QUIENNEC (Y.), *extract from working group exchanges*, reproduced in the Appendix to this study.
[68] RUGGIE (J.), *Note on ISO 26000 Guidance Draft Document*, p. 2.
[69] http://www.unssc.org/web/hrb/images/CIRCLES%20-%20Complete%20BIG.jpg

may be seen as a driver for that third party's action or, in any case, in a position to influence it. The influence itself may result in duties and/or obligations."[70]

This graduated, concentric conception of "sphere of influence" precludes any explosion of the notion into its constituent parts. It does permit, on the other hand, the "development of an organic, open relationship"[71] in delineating the extent of the obligations incumbent on firms. As the wording of ISO 26000 recalls, the responsibility to respect human rights must be commensurate with the capacity to influence, in line with these same circles of influence: The ISO draft explicitly stipulates that, unlike responsibility linked to control, responsibility in the strict sense of the word linked to influence does not directly involve an obligation for reparations but rather an obligation to prevent and that this responsibility to act is proportional to the company's level of influence.[72] This means that "responsibility is not necessarily associated to the observation that some form of influence exists, but rather (…) that it needs to be taken into consideration, in whatever form it takes (responsibility in the legal sense, economic sense, etc.)."[73]

As it would seem hardly reasonable to expect a firm to take responsibility for ensuring the respect of human rights vis-à-vis a field of activity with which it only entertains remote and derived relations, one should bear in mind "the variability in the multinational's capacity for influencing its partners in the chain of production and business. It depends, in fact, on the characteristics of the sector, the company, on the nature and characteristics of the products, their production process, marketing process, etc. The way that the textile industry is structured is completely different to the way the energy sector operates."[74] What is more, the ISO text is explicit on this subject: "An organization's opportunities to support human rights will often be greatest among its own operations and employees and its suppliers, peers or competitors, with its ability to influence weakening outward along the value chain, in broader communities and beyond."[75] This distinction made in the SRSG's report arises from a simplified idea of sphere of influence, limited to the activities over which the company has a direct impact, therefore entailing responsibility, and to those where the company only has a power of influence, entailing a mere "voluntary support" for human rights on the part of the firm: "to support human rights voluntarily where they have leverage."[76]

- Professor Ruggie also mentions the risk that a State may unload its human rights responsibilities onto the private sector: "A government can deliberately fail to perform its duties in the hope or expectation that a company will yield to social pressures to promote or fulfil certain rights that constitute duties of States."[77] If this risk truly does exist, is it at all heightened by the reference to the company's sphere of influence as a point of reference for delineating its responsibility regarding human rights violations? ISO 26000 does recognise

[70] TREBULLE (F.-G.), *extract from working group exchanges*, reproduced in the Appendix to this study.
[71] TREBULLE (F.-G.), *extract from working group exchanges*, reproduced in the Appendix to this study.
[72] DUPUIS (J.-C.), EYQUEM-RENAULT (M.), *A la recherche des nouvelles frontières de l'entreprise* (In Search of the New Corporate Frontiers), November 2009, p. 10 (in French).
[73] TREBULLE (F.-G.), *extract from working group exchanges*, reproduced in the Appendix to this study.
[74] DAUGAREILH (I.), *extract from working group exchanges*, reproduced in the Appendix to this study.
[75] ISO 26000, *Guidance on social responsibility,* ISO/TMB WG SR, 4 September 2009, Article 6.3.2.2.
[76] RUGGIE (J.), *Note on ISO 26000 Guidance Draft Document*, p. 2.
[77] RUGGIE (J.), *Note on ISO 26000 Guidance Draft Document*, pp. 2-3.

that, in the case of a clear shortcoming on the part of the State, private entities mainstream the respect for human rights into their activities: "Where the State fails in its duty to protect, an organization may have to take additional measures to ensure that it respects human rights in all of its operations."[78] But the vocabulary employed here definitely evokes a choice ("may have to") and not an obligation.

A distinction needs to be made between the delegation of a State's powers to a company and the fact that an enterprise chooses to compensate for a State's failure to perform one of its duties. In other words, attribution of a responsibility to the enterprise regarding respect for human rights is not to be understood as the delegation of a State's power to protect human rights, for example through the exercise of justice and the power of coercion, which rightly belongs to the State – and to the State alone – and may in no case be delegated. Moreover, "the enterprise most certainly does not have the authority to protect human rights in the stead of public authorities, although it is true that confusion can arise in some cases, for example when use is made of private security services (…)."[79]

- Rather than establishing responsibility over a broad domain, which in practice would only concern a limited number of rights, the SRSG advocates the establishment of a limited responsibility, but which would concern all human rights in conformity with the principle of indivisibility of human rights: "The norms would have extended to companies essentially the entire range of duties that States have, separated only by the undefined concepts of 'primary' versus 'secondary' obligations and 'corporate sphere of influence'. This formula emphasizes precisely the wrong side of the equation: defining a limited list of rights linked to imprecise and expansive responsibilities, rather than defining the specific responsibilities of companies with regard to all rights."[80]

The ISO 26000 standard is designed to cover all human rights that one can expect to see proclaimed in the corporate domain. By referring in particular to the Charter of Human Rights, which is to say the Universal Declaration of Human Rights and the two International Covenants, as well as seven other international instruments covering the protection of human rights[81], the ISO 26000 text covers the entire corpus of human rights: "Taken together, these instruments form the basis for international standards for universal human rights."[82] Its authors have not accepted the idea of a potential contradiction between responsibility and an overarching approach to human rights.

The argument according to which human rights would be best supported through a restricted domain of responsibility for the enterprise appears to gloss over the growing problem of the fact that multinational enterprises cannot be brought to justice: The employer (juridical) often

[78] ISO 26000, *Guidance on social responsibility,* ISO/TMB WG SR, 4 September 2009, Article 6.3.2.2.

[79] ASCENSIO (H.), *extract from working group exchanges*, reproduced in the Appendix to this study.

[80] RUGGIE (J.), "Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development. Protect, Respect and Remedy: a Framework for Business and Human Rights", *Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie*, Human Rights Council, A/HRC/8/5, 7 April 2008, pp. 14-15.

[81] "The elimination of all forms of racial discrimination, elimination of all forms of discrimination against women, measures to prevent and eliminate torture and other cruel, inhuman or degrading treatment or punishment, rights of the child, involvement of children in armed conflicts, sale of children, child prostitution and child pornography, protection of migrant workers and their families, protection of all persons from enforced disappearances."

[82] ISO 26000, *Guidance on social responsibility,* ISO/TMB WG SR, 4 September 2009, Article 6.3.1.1. (box 6).

shares managerial powers with other parties, notably the clients-principals. The attempt to extend the spatial boundary seems in part bound to a fragmentation of the managerial hub and the multi-polarisation of the professional relations engendered by networked enterprises via a new division of labour.[83] When a company's responsibility extends to its entire sphere of influence it is easier to apprehend the notion of a "group of firms" and its hitherto largely ignored consequences, and to counter the legal fiction of subsidiary companies' independence from the parent company, which encourages the "outsourcing of human rights": "The notion of sphere of influence offers a way of overcoming the effects of the legal autonomy of the companies that make up the network-enterprise. It means that a judge handling a damages case (and not only where there has been direct violation of a human right) may go beyond appearances and examine the real power or complicity at work. This notion enables the judge to *pierce the veil*."[84] Thus a 100%-owned subsidiary, a "simple" subsidiary, a supplier in a situation of economic dependence, a sub-contractor, etc., could all see their position in the sphere of responsibility assessed with regard to specific elements, regardless of their theoretical legal independence."[85]

- Finally, the SRSG advocates abandoning the reference to "corporate sphere of influence" in international CSR instruments in the name of greater consistency between the latter and his reports to the Human Rights Council. In the conclusion to his Note to the Working Group drafting the ISO 26000 text, he writes: "I very much hope – and indeed would urge – that the Working Group responsible for drafting the ISO 26000 Guidance document review all references to sphere of influence in the document to ensure that they are consistent with the UN Framework not only in the human rights section but throughout…"[86]

Let us pass over the affirmation that the text is intrinsically inconsistent in that the concept of sphere of influence used in the "Human Rights" section of the document does not appear in any other section: "However, the same alignment on 'sphere of influence' does not exist elsewhere in the document". This is no doubt due to an excessively rapid reading of the ISO 26000 text, which does in fact refer to the "sphere of influence" in most of the sections[87]. The notion of sphere of influence, utilised on several accounts in the ISO 26000 standard, even appears to be one of its "main threads". ISO 26000 is above all incompatible, in the opinion of the SRSG, with his conclusions approved by the Human Rights Council[88]: "I have serious concerns about these inconsistencies regarding the sphere of influence : within the ISO Guidance document itself, and between it and the UN 'protect, respect and remedy' framework"[89] [emphasis added]. This approach is surprising in that it states that the draft

[83] DUPUIS (J.-C.), EYQUEM-RENAULT (M.), *A la recherche des nouvelles frontières de l'entreprise* (In Search of the New Corporate Frontiers), November 2009, p. 11 (in French).

[84] DAUGAREILH (I.), *extract from working group exchanges*, reproduced in the Appendix to this study.

[85] TREBULLE (F.-G.), *ibid.*

[86] RUGGIE (J.), *Note on ISO 26000 Guidance Draft Document*, p. 3.

[87] Such is, for example, the case in the "Environment" section: "an organization should assume responsibility for the environmental burden caused by its activity (…). It should act to improve its own performance, as well as the performance of others within its control or sphere of influence". Other references to the sphere of influence can be found in the section "Fair operating practices: promoting social responsibility in the sphere of influence".

[88] RUGGIE (J.), "Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development. Protect, Respect and Remedy: a Framework for Business and Human Rights", *Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie,* Human Rights Council, A/HRC/8/5, 7 April 2008.

[89] RUGGIE (J.), *Note on ISO 26000 Guidance Draft Document*, p. 3.

standard is inconsistent with a report which – while naturally valuable from the point of view of deliberations on CSR – is bereft of any binding force, while the exclusive character of "due diligence" as opposed to "sphere of influence" is far from certain.

II. Is it appropriate to only use "due diligence" in order to achieve the CSR objectives concerning human rights?

After having attempted to define, in the first part of this study, the content of the notions "due diligence" and "sphere of influence", it would be proper to consider what the potential consequences of utilising the first of these two notions exclusively could be in the context of respect for human rights by companies. We shall first examine the consequences of using only this notion as regards the respect for human rights (**A**), and then the complementary nature of these two concepts, before finally, more broadly, discussing the drawbacks of a "due diligence" approach given the requirements of CSR and sustainable development (**B**).

A. Is "due diligence" an appropriate tool given the characteristics of multinational firms?

The need for international CSR instruments has arisen in response to the lack of a defined legal status for the multinational enterprise. Although it is subject to national law, and is endowed with legal personality, the multinational enterprise is not yet recognised as responsible, in civil or criminal law, in all States[90]. Even when its responsibility is recognised, national jurisdiction is applicable to establishments situated on the territory of that State alone and not, as a rule, outside its borders. Therefore, a multinational company's subsidiaries abroad are not generally subject to the law of the State where the parent company is located when it comes to acts they have perpetrated on foreign soil[91]. The potential victims of human rights violations, committed by firms in these States, do not generally have any legal recourse against these subsidiaries as they are located on the territory of a State which does not penalise the intrigues of these firms, or has insufficient resources and/or interest in doing so. In the face of blackmail-like threats to move their business elsewhere that national and transnational firms use to secure agreements from certain States not to apply the laws in force on their territory, we therefore find areas that are a real "no-man's land, and there are several thousand of them today (…): areas where companies have made arrangements so that international law and national law are held in abeyance"[92]. This situation is only exacerbated by the principle of subsidiaries' legal autonomy vis-à-vis the parent company, a legal fiction aiming to limit the latter's responsibility in the course of its activity.

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[90] In France, Article 121-2 of the Criminal Code explicitly recognises the responsibility of legal entities: "Juridical persons, with the exception of the State, are criminally liable for the offences committed on their account by their organs or representatives, according to the distinctions set out in articles 121-4 and 121-7 and in the cases provided for by statute or regulations."

[91] Some legislative provisions do, however, enable subsidiaries in another country to be taken to court for violations of the law of the State of the company's nationality. This is true of the French law of 9 March 2004 (known as *Perben II*) which introduced the following provisions to Article 113-6 of the Criminal Code: "French criminal law is applicable to any felony committed by a French national outside the territory of the French Republic. It is applicable to misdemeanours committed by French nationals outside the territory of the French Republic if the conduct is punishable under the legislation of the country in which it was committed." Implementing this provision, however, remains difficult because, when it comes to reprehensible acts committed by French firms abroad, French law stipulates three conditions: the infraction must be considered a criminal offence in the foreign country were the act was committed; there must be an official denunciation from the foreign authorities; and, finally, the French Public Prosecutor's Office must take the initiative in referring the case to the French jurisdiction.

[92] DOUCIN (M.), *Interactive dialogue with the Special Representative of the Secretary-General for business and human rights.* Question raised by Ambassador Michel Doucin on behalf of the French delegation, Human Rights Council, Geneva, 27 March 2007.

However, conventional international law cannot tidily compensate for national jurisdictions' impotence on bringing transnationals to justice: traditionally, it is not private enterprises and persons generally that are the subjects of the international legal order. And yet companies do now play a real role in the international legal order, since there is recognition that "they have certain rights under bilateral investment treaties; they are also subject to duties under several civil liability conventions dealing with environmental pollution"[93]. In fact, given the undeniable corporate influence on the international stage, it would appear legitimate that, in a parallel fashion, "the risk environment for companies is expanding slowly but steadily, as are remedial options for victims."[94] However, while it is unquestionable that companies occupy an increasingly active place in international life, they still do not have a recognised international legal personality and can therefore not, as a general rule, be the direct addressees of rights and obligations emanating from international conventions.

Multinational corporations, given their legal status, are thus poorly apprehended by the legal system: neither national jurisdictions nor international jurisdictions are truly equipped to deal with their reality, in other words with their global nature. Regulations "slide off their back" and there seems no way to get a legal grip on them. So it is not really surprising that the international organisations concerned, conscious of this difficulty, have resorted to non-binding standards, or soft law, to address this problem at the international level: With no easy way of closing what appears today to be a gaping juridical loophole, international institutions resorted, in the seventies, to soft law instruments to mobilise transnational enterprises regarding the need to foster practices that respected human rights.[95]

So "companies are only subject to the law (…) of the host country, which is to say nothing or next-to-nothing."[96] Overcoming this obstacle, which is only made all the thornier because of the legal fiction of subsidiaries' independence from the parent company, constitutes one of the major issues at stake in the CSR standardisation process, in particular through the ISO 26000 standard, which is aimed at all organisations, and hence *a fortiori* all forms of private enterprise.

Previous sections in this study have demonstrated that the meaning given to the expression "due diligence" was erroneous, but that the term designated, more generally, a process rather than a field of application, a method rather than a domain. This is the meaning that is used in the report "Protect, Respect and Remedy" of 7 April 2008[97]: "to discharge the responsibility to respect requires due diligence. This concept describes the steps a company must take to

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[93] RUGGIE (J.), "Business and human rights: mapping international standards of responsibility and accountability for corporate acts", *Implementation of Resolution 60/251, General Assembly, 15 March 2006,* A/HRC/4/35, Human Rights Council, 19 February 2007, p. 8.

[94] *Ibid.,* p. 10.

[95] DAUGAREILH (I.), "Social Responsibility of Transnational Enterprises: Critical analysis and legal prospects", published in Spanish under the title "*Responsabilidad social de las empresas transnacionales: Análisis crítico y prospectiva jurídica*" in *Cuadernos de relaciones laborales* (Labour Relations Journals), no. 1, vol.27, pp.93-123, 2009, p. 7 (in Spanish).

[96] CADET (I.), *extract from working group exchanges*, reproduced in the Appendix to this study. Cf "*ISO 26000: innovation?*" Minutes from the ADERSE Colloquium (French acronym for Association for the Development of Education and Research on Corporate Social Responsibility), 24-26 March 2010, La Rochelle, France.

[97] RUGGIE (J.), "Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development. Protect, Respect and Remedy: a Framework for Business and Human Rights", *Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie*, Human Rights Council, A/HRC/8/5, 7 April 2008.

become aware of, prevent and address adverse human rights impacts."[98] In addition, the following problem is raised: how can a concept specifically describing a particular process be used to define the scope of application? The abovementioned report itself asks this very question: "If companies are to carry out due diligence, what is its scope?"[99] In other words, can the notion of "due diligence" be sufficient unto itself? Is it functional as an autonomous unit?

The section of the SRSG's report that deals specifically with the notion of "due diligence"[100] stipulates what its content ought to be, using international regulations and standards, to which the process of due diligence should refer, as a starting point: "For the substantive content of the due diligence process, companies should look, at a minimum, to the international bill of rights and the core conventions of the ILO."[101] Next, the elements that should be part of the "due diligence" procedure are identified: "human right policies", "impact assessments", "integration", "tracking performance", etc. However, while the process is described in a detailed and pertinent manner, there is no indication as to its scope of application. The only such reference at all comes, indirectly, in the brief discussion on external circumstances that need to be taken into consideration by the "due diligence" process: "Companies should consider three sets of factors: (…) the third is whether they might contribute to abuse through the relationships connected to their activities, such as with business partners, suppliers, State agencies, and other non-State actors."[102] Without further clarification, it is difficult to see how such a process may be effectively utilised in terms of respecting human rights without any explicit definition of its addressees. The question of scope of application of "due diligence" is therefore left unresolved and the only way to reach a conclusion is to assess the "circumstances" subjectively: "How far or how deep this process must go will depend on circumstances."[103]
From this, one can reasonably conclude that "due diligence" is not an autonomous notion: while it describes a procedure to be applied by the enterprise, it cannot stand alone without a defined scope of application in order to define its reach.

- "Due diligence" and "sphere of influence": two concepts that shed light on one another.

One feature of the notion of "sphere of influence" is precisely that it does define a scope of application, and "foreshadows (…) the enterprise's perimeter of responsibility, which is not limited to that which is demarcated by corporate law"[104]. The perimeter of the enterprise's action as concerns the respect for human rights is illustrated by the concentric circles of influence, in which external factors also come into play, so that the area of responsibility can be tailored to the reality of the situation. This is how the Global Compact describes the concept of "sphere of influence". Some firms integrate the concept of "sphere of influence", in conformity with their commitments under the United Nations Global Compact, with no particular difficulty, into their human rights approach. This is true, for example, for this

[98] *Ibid.,* p. 17.
[99] *Ibid.*
[100] RUGGIE (J.), "Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development. Protect, Respect and Remedy: a Framework for Business and Human Rights", *Loc. cit;* pp. 17-19.
[101] *Ibid.,* p. 17.
[102] *Ibid.*
[103] *Ibid.*
[104] DAUGAREILH (I.), *extract from working group exchanges*, reproduced in the Appendix to this study.

multinational company from the mining industry – a sector which is under particular scrutiny for the non-respect of human rights – which depicts its corporate sphere of influence in the following manner:

BHP Billiton manages human rights across our various relationships according to the UN Global Compact's 'Sphere of Influence' model.

HUMAN RIGHTS 'SPHERE OF INFLUENCE' MANAGEMENT MODEL

[105]

The scope of application suggested by the concept of "sphere of influence" has thus already been integrated by part of the entrepreneurial sector, and companies are thus perfectly capable of transposing this concept into a concrete reality.

It would appear that studies on the "due diligence" process refer to the required scope of application definition: "for a company, human rights risk occurs when an existing practice, relationship or situation places the company at risk of involvement in human right abuse, either directly through company acts or indirectly through the actions of contractors, joint venture partners, government agencies and others with whom the company is associated through its business activities."[106] The notion of "sphere of influence" must thus be used to complement the approach based on "due diligence", defining the latter's zone of application in an objective manner and in accordance with pre-established criteria. Thus, "the concepts of 'due diligence' and 'sphere of influence' are not in the least alternatives to one another or contradictory; rather, they are (...) complementary, with the former serving as a basis for societal responsibility, and the latter defining its extent in the chain of production."[107]

What is more, jurisprudence commonly uses notions that could be compared, in certain respects, with that of "sphere of influence", especially in attributing responsibility to multinational enterprises. In this area, CSR action is complementary to developments in

[105] http://hsecreport.bhpbilliton.com/2006/community/ourApproach/humanRights.asp

[106] TAYLOR (M. B.), ZANDVLIET (L.), FOROUHAR (M.), "Due diligence for human rights: a risk-based approach", Harvard University, working paper no. 53, October 2009, p. 7.

[107] NIGON (M.), *extract from working group exchanges*, reproduced in the Appendix to this study.

jurisprudence which accord increasing importance to the notion of the group and aim to reconstruct the enterprise's missing legal and economic unity.[108]

- European competition law recognises, for example, the notion of "economic unity" between a parent company and its subsidiaries. It is well-established case-law in this domain that a parent company can be held responsible for anti-competitive behaviour by a subsidiary, despite the fact that they have distinct legal personalities. This is the case when a subsidiary turns out to have contented itself with acting upon the instructions dictated by its parent company instead of operating freely on the market, in view of, in particular, the economic and organisational bonds that exist between the two. So under European competition law[109], the parent company and its subsidiary are but components of a single economic entity and are thus deemed to be just one enterprise.

- Going even further, the Court of Justice of the European Communities has established a rebuttable presumption concerning the influence that a parent company has, necessarily, over a subsidiary when the former is the sole holder of the latter's capital. This 'capitalistic presumption'[110] was affirmed in a decision dated 25 October 1983: "As AEG has not disputed that it was in a position to exert a decisive influence on the distribution and pricing policy of its subsidiaries, consideration must still be given to the question whether it actually made use of this power. However, such a check appears superfluous in the case of TFR which, as a wholly-owned subsidiary of AEG, necessarily follows a policy laid down by the same bodies as, under its statutes, determine AEG's policy."[111]

This CJEC case-law was recently confirmed by its decision of 10 September 2009 concerning the company *Akzo Nobel NV*. Firstly recalling established case-law pertaining to the economic unity of companies, the Court affirmed that where a parent company is the sole holder of all of its subsidiary's capital (case of a "wholly-owned subsidiary"), "that company was in a position to exert decisive influence over the commercial policy of its subsidiaries, in which it held, directly or indirectly, all of the shares, and that it could be assumed that it in fact did so"[112]. The company can overcome this presumption if it proves, notably through economic and organisational aspects, that the subsidiary acted independently of its directives.

European case-law is developing toward more and more explicit recognition of the notion of a group of companies, a notion not dissimilar to that of "sphere of influence" in that it enables a broader extension of a company's responsibility to acts committed by the entities over which it exerts a direct influence. Supporting evidence for this sentiment is the use of the term "influence" by the Luxembourg judges in their decision. This development is all the more striking because the decision directly contradicts a previous judgement from the Court of First Instance of the European Communities dated 26 April 2007, in which holding 100 per cent of

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[108] DUPUIS (J.-C.), "*La responsabilité sociale de l'entreprise: gouvernance partenariale de la firme ou gouvernance de réseau?*" (Corporate Social Responsibility: Partnered governance by the firm or networked governance?), Electronic working papers series*,* Research Group on Organisations' Management and Economics, E.S.D.E.S., Lyons, no. 2007-02, p. 18.

[109] Especially Articles 81 and 82 of the EC Treaty.

[110] DEBROUX (M.), "*Sanction des cartels en droit communautaire: définition et conséquences d'une responsabilité de groupe*" (Cartel Sanctions in Community Law: Definition and consequences of group responsibility), *Concurrences* (Competition)*,* no. 1-2008, p. 3.

[111] CJEC, Allgemeine Elektrizitäts-Gesellschaft AEG-Telefunken AG v Commission of the European Communities*, Judgement of the Court* of 25 October 1983, case 107-82, §50.

[112] CJEC, Akzo Nobel NV v Commission of the European Communities*, Judgement of the Court* of 10 September 2009, case C-97/08 P, §15.

a subsidiary's capital was considered merely a sign of the parent company's influence over it, but did not, alone, suffice to hold the parent company liable for the infringement of the wholly-owned subsidiary[113].

- National jurisdiction in European countries is also moving in this direction. In fact, the notion of influence is also present in the mention of consolidation (Article L233-16 of France's Commercial Code), evoking the fact that the consolidating company exerts "significant influence" over the subsidiary. This article suggests an open reading of the influence that can arise from a contract or statutory clauses and holds that "significant influence over a company's management and its financial policy is deemed to exist when another company directly or indirectly holds a fraction of its voting rights equal to at least one fifth."[114]

Indeed, "with 'due diligence' it is not possible to highlight the reach of the powers – economic, political or social – of the multinational enterprise beyond its legal boundaries as a commercial entity. Consequently it is likewise impossible to depict the balance, or simply the relationship, between power and responsibility, which is nonetheless the very heart of what we call the law of obligations."[115] And yet it seems crucial for CSR issues that these new forms of corporate organisation are taken into account: The fragmentation of the enterprise means that the distance between the decision-maker and the figure of the (legal) employer is growing; there is ever-decreasing correlation between decision-maker and employer. With the disintegration of enterprises and the development of autonomous labour, decision-making power is distributed in the networks of economic stakeholders and less concentrated in the figure of the employer. Taking this reality on board, CSR embodies an adjustment of socio-economic regulation and aims to toughen the decision-maker's responsibility, making it less lax, pushing it into different economic roles: employer, yes, but also and above all a producer and an investor. CSR action also translates as, in particular, the development of political consumerism and shareholder activism. It supports the re-composition of employee relations, which are also seeking to adapt to the reality of internationalised network-enterprises: legal recognition of the notion of the group, internationalisation of trade union structures, conclusion of framework agreements, etc.[116].

[113] CFIEC, *Bolloré SA,* 26 April 2007.

[114] TREBULLE (F.-G.), *extract from working group exchanges*, reproduced in the Appendix to this study.

[115] DAUGAREILH (I.), *ibid.*.

[116] DUPUIS (J.-C.), "*La responsabilité sociale de l'entreprise: gouvernance partenariale de la firme ou gouvernance de réseau?*" (Corporate Social Responsibility: Partnered governance by the firm or networked governance?), *Electronic working papers series,* Research Group on Organisations' Management and Economics, E.S.D.E.S., Lyons, no. 2007-02, pp. 17-18 (in French).

B. "Due diligence" in the face of dynamic CSR concepts and sustainable development

Use of the notion of "due diligence" also examines the demands of CSR on the one hand, and sustainable development on the other, upon which the concept of CSR broadly rests.

- "Due diligence" in the face of the dynamic concept of CSR

Despite the encouraging abundance of international instruments in this area, corporate social responsibility (CSR) can not be considered a successfully completed concept. On the contrary, it is a work in progress whose development will depend on the interplay among stakeholders[117]. One can easily see the importance and the stakes of the current deliberations underway in this domain. Attempts to define and identify its content can in no way be confined to purely academic interest, but are instead part of an effort of construction aiming to turn this notion into an effective instrument: CSR is an edifice of which the greater proportion still remains to be constructed. The hopes placed therein never cease to grow: Could corporate social responsibility (…) help in overcoming the multiple perils that lie in wait for humanity, especially in terms of human rights –in the workplace– and the environment?[118]

Utilisation of the concept of "due diligence" in the field of CSR comes into contradiction with the very definition of the latter. It must be remembered that in the European Commission's green paper on the subject CSR is described as companies' voluntary integration of social and environmental concerns in their business operations (…). It also mentions that firms adopt, in this regard, socially responsible behaviour going above and beyond legal expectations on a voluntary basis because they deem it to be in their long-term interests[119]. This definition enables us to appreciate the nexus between CSR standards, especially from the international level, and current domestic law: CSR appears as a complement to the law, as the latter is considered as being, and necessarily remaining, the privileged mode of regulating social, political and economic relations[120]. Moreover, it is vital to make no mistake as to the objectives of the international CSR standards: their goal is not to make companies respect what the law already requires of them in the territory where they are present, but rather to encourage them to "adopt a comprehensive and voluntary approach, which the notion of 'due diligence' does not take into account"[121].

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[117] BODET (C.), LAMARCHE (T.), "Corporate Social Responsibility (CSR) as an institutional innovation. A regulationist view", *Revue de la régulation* (Regulation Review), no. 1, June 2007, p. 3 (in French; abstract in English).

[118] DAUGAREILH (I.), "Social Responsibility of Transnational Enterprises: Critical analysis and legal prospects", published in Spanish under the title "*Responsabilidad social de las empresas transnacionales: Análisis crítico y prospectiva jurídica*" in *Cuadernos de relaciones laborales* (Labour Relations Journals), no. 1, vol.27, p.93-123, 2009, p. 2 (in Spanish).

[119] European Commission Green Paper, "Promoting a European Framework for Corporate Social Responsibility", Brussels, July 2001.

[120] DAUGAREILH (I.), "Social Responsibility of Transnational Enterprises: Critical analysis and legal prospects", published in Spanish under the title "*Responsabilidad social de las empresas transnacionales: Análisis crítico y prospectiva jurídica*" in *Cuadernos de relaciones laborales* (Labour Relations Journals), no. 1, vol.27, p.93-123, 2009, p. 3(in Spanish).

[121] DOUCIN (M.), oral presentation to the AFNOR ISO 26000 working group, 4 February 2010.

In fact, the *a minima* approach which "due diligence" conveys in the field of human rights seems to clash with the very nature of CSR standards. This contradiction can be seen in the different studies conducted of implementation of "due diligence" processes in companies. In addition, the latter attest to the need for there to be an "accommodation" of the firm's activity so that it will fulfil human rights obligations: "There are (…) due diligence processes that a corporation must undertake to meet its general legal obligations that either accommodate or are at least amenable to consideration of human rights laws or standards"[122] [emphasis added].

On the one hand, the "due diligence" process aims to bring the enterprise into conformity with the minimum standards, a vision which stands in opposition to the voluntary and dynamic nature of the CSR concept which aims for enterprises to adopt socially responsible behaviour going *beyond basic legal obligations*[123]. On the other hand, the reference to "legal obligations", even basic ones, recalls the regulations already bearing the weight of the law, whether emanating from national law or international instruments; the respect for such rules is altogether of a different nature to the behaviour promoted by CSR standards. While "ethical principles command that one go beyond legal obligations, the SRSG's approach merely focuses on ensuring that they are respected when they exist and if it is appropriate"[124].

The SRSG's report, referring often to a legal and binding vision of corporate responsibility, thus situates the debate in an entirely different register to that of CSR. Hence the author's confusion concerning the concept of "sphere of influence" and the attribution of responsibility on this basis. In this regard, the report of 7 April 2008 draws a questionable distinction: "Asking companies to support human rights voluntarily where they have influence is one thing; but attributing responsibility to them on that basis alone is quite another."[125] In fact, reference is made in the SRSG's report to two types of responsibility; they may well be complementary, but are nevertheless perfectly distinct.

The concept of *social* responsibility – not legal – is aptly described as follows: *"*in addition to compliance with national laws, the baseline responsibility of companies is to respect human rights. Failure to meet this responsibility can subject companies to the courts of public opinion – comprising employees, communities, consumers, civil society, as well as investors – and occasionally to charges in actual courts*"*[126][emphasis added]. And yet whenever the notion of "sphere of influence" is mentioned in this same report, it is always imbued with responsibility of a legal nature. This dichotomy sows confusion as to the type of responsibility associated with "sphere of influence" in CSR instruments, which are based predominantly on voluntary action and not legal requirements.

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[122] ROBINSON (A.A.), "Corporate duty and human rights under Australian law", prepared for the Special Representative, p. 1 (http://business-humanrights.org/Updates/Archive/SpecialRepPapers).

[123] European Commission Green Paper, "Promoting a European Framework for Corporate Social Responsibility", Brussels, July 2001.

[124] CADET (I.), *extract from working group exchanges*, reproduced in the Appendix to this study. Cf "*ISO 26000: innovation?*" Minutes from the ADERSE Colloquium (French acronym for Association for the Development of Education and Research on Corporate Social Responsibility), 24-26 March 2010, La Rochelle, France.

[125] RUGGIE (J.), "Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development. Protect, Respect and Remedy: a Framework for Business and Human Rights", *Loc. cit;* p. 20.

[126] RUGGIE (J.), "Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development. Protect, Respect and Remedy: a Framework for Business and Human Rights", *Loc. cit;* p. 16.

It is also harmful that the notion of "due diligence" fails to enable economic, social and cultural rights (ESCR) to be included in the corpus of rights that the enterprise should bear in mind in its activities. Emanating from the 1966 International Covenant on Economic, Social and Cultural Rights, ESCR encompasses a series of provisions, concerning in particular the right to an adequate standard of living, that intersect with the demands of CSR. For example, Article 6 of the Covenant requires that: "The States Parties to the present Covenant recognize the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts, and will take appropriate steps to safeguard this right."[127] Several of the rights appearing in the Covenant are deemed, from a legal standpoint, to be what is referred to in French literature as *droits programmatoires*, having a prospective, proclamatory nature and not able to be immediately enforced because they presuppose that some operator (in the case in point, a State) first endow them with real content by applying them. Since the 1966 Covenant bears the weight of an international treaty, it addresses its States Parties and invites them to create the conditions so that these *droits programmatoires* can be applied, and does not, in theory, address private persons. So while enterprises are not bound to respect the Covenant's content, the State has a duty to ensure that enterprises operating on its territory do respect its provisions. The notion of "due diligence", however, by demanding that the enterprise adopt behaviour demonstrating a minimum of prudence, excludes those ESCR which are not a part of the corpus of human rights. This is regrettable given the understanding of CSR as being something that invites the enterprise to go beyond what is already required by law. "Due diligence" thus negates the possibility of endowing these rights with a binding value with regard to enterprises' activities. The reference to this notion leads to a restrictive, closed approach to the issue of human rights. The inherent originality of the SRSG's approach, extolling companies' respect for human rights, is thus kept in check by the reference to "due diligence" and is in contradiction with itself.

Having noted the concept's shortcomings, some have suggested replacing the phrase, or complementing it, with "duty of care": "If the notion of 'due diligence' were to be the order of the day, then it should serve to focus the attention so as to enrich its content, notably by working on that of 'duty of care.'"[128] This latter is "often associated and sometimes used instead of 'due diligence'. It is true that they are very similar, but what sets them apart is their content because the notion of 'duty of care' presupposes a substantial obligation whereas 'due diligence' is a procedural obligation, which is more comfortable for companies"[129].

In short, the weak degree of requirement conveyed by the notion of "due diligence" fails to match the ambitions of CSR in that it does not encourage firms to voluntarily go beyond what is required by positive law but, rather, to content themselves with ensuring that their activities comply with the minimum rules in force. This recurrent reference to positive law also helps stir confusion around the notion of responsibility in the field of CSR, as is the case of the debate surrounding the content of the ISO 26000 standard: "the SRSG's reports discuss firms' minimum legal obligations with regard to human rights whereas the objective of ISO 26000 is to propose CSR implementation methods, with CSR being defined as that which the firm can do over and above its legal obligations."[130]

We could add that this minimal degree of requirement "would be damaging not only for human rights, but also for the enterprises themselves, which could end up being mistaken as

[127] Article 6 §1 of the International Covenant on Economic, Social and Cultural Rights.
[128] QUEINNEC (Y.), *extract from working group exchanges*, reproduced in the Appendix to this study.
[129] DAUGAREILH (I.), *ibid.*
[130] DOUCIN (M.), *ibid.*

to the legal risks that they are running, (…) since many domestic laws make them liable well beyond what is suggested by the concept of 'due diligence', even when they based their judgements on obligations stemming from international law – such as the Alien Tort Claims Act in the United States"[131].

- "Due diligence" and the requirements of sustainable development

Corporate social responsibility is no stranger to the concept of sustainable development, which has gradually become a part of companies' vocabulary, around the world. The interpretation of CSR as the application of the notion of sustainable development within the enterprise is now widely accepted[132]. The text of the ISO 26000 standard makes this explicit: "The aim of social responsibility is to contribute to sustainable development."[133] The same is true for the OECD Guidelines for Multinational Enterprises: firms are invited "to conduct their activities in a manner contributing to the wider goal of sustainable development"[134]. Analogous to the three constituent parts, or three pillars, upon which the concept of sustainable development is built, as defined at the 1992 Rio Earth Summit, CSR also needs to take into consideration the impact of firms' activities in these three same areas: companies' activities need to be viable economically and socially, while remaining ever-respectful of the environment. The "social" and "environmental" aspects that constitute a major part of sustainable development thus find resonance, in the concept of CSR, with the respect for human rights that it advocates, particularly in labour relations.

The concept of sustainable development in which CSR finds a foothold must not be excluded from a definition of the scope of application of international regulations when it comes to respect for human rights by companies. Indeed, it would be an oversimplification to imagine that sustainable development strategies could only make an impact on the protection of the environment and not on the protection of human rights. The human being is both a component of, and at the centre of, the biosphere. As such, protection of the environment and protection of human rights are interdependent and not easily separated. This vision harks back to the very definition of the concept of sustainable development as described in the Report from the World Commission on Environment and Development of the UN – the Brundtland Report – of April 1987. In the words of the Report, sustainable development "meets the needs of the present without compromising the ability of future generations to meet their own needs" [emphasis added].

There is thus a temporal facet to the scope of application of corporate social responsibility which needs to be taken on board. The notion of "sphere of influence" enables, in an extensive interpretation, the rediscovery not only of the materiel aspect, but also of the temporal aspect. A company needs to bear in mind, in the conduct of its activities, the impact of these activities on future generations, thus fulfilling the requirement of sustainability which is part of CSR. This aspect is particularly pertinent in relation to enterprises whose activities are directly linked to the safeguarding of the environment. These include firms handling non-

[131] ASCENSIO (H.), *ibid.*

[132] DUFOURCQ (E.) (Chair), BESSE (G.) (Rapporteur), *Rapport sur la responsabilité sociale des entreprises, synthèse des travaux du groupe inter-directions* (Report on Corporate Social Responsibility, Summary of Discussions from the Inter-Directorate Group)*, La documentation française*, March 2004 (in French).

[133] ISO 26000, *Guidance on social responsibility,* ISO/TMB WG SR, 4 September 2009, p. vi.

[134] OECD, *Guidelines for Multinational Enterprises*, 2008, p. 19.

renewable natural resources directly, such as companies in the forestry sector or mining industry, but also those whose products have a very long life cycle: nuclear or chemical industries.

The notion of "due diligence", which makes no call for the definition of a temporal perimeter for the respect of human rights, does not provide for the delivery of such requirements, while "the notion of 'sphere of influence' enables a projection further afield, especially as concerns questions about future generations, biodiversity, etc.; domains where there are as yet very few obligations. This notion therefore appears to be the best-suited to deliberations on CSR."[135]

There is therefore a discursive discrepancy between the approach advocated by the SRSG and that to which the CSR standards aspire: while the approach of the former is limited to the domain of human rights in the restricted sense of those for which the enterprise is immediately liable (in other words, essentially civil and political rights), the international CSR standard aims to also extend to the protection of the environment and, even more broadly, to community issues.

Underlying the debate – apparently theoretical – pitting the notions of "due diligence" and "sphere of influence" against one another there is in fact a whole series of important and concrete issues relating to the scope and depth of corporate responsibility. The notion of due diligence, disconnected from that of sphere of influence, cannot claim to deliver on the ambitions of sustainable development and the hopes of a humanistic capitalism.

[135] DOUCIN (M.), *extract from working group exchanges*, reproduced in the Appendix to this study.

Appendix

Summary of the exchanges between the members of the French informal working group :

Le débat a été lancé autour de la lettre adressée par le Représentant Spécial du Secrétaire Général au groupe de travail chargé de la rédaction de l'ISO 26 000.

- **Michel DOUCIN**, Ambassadeur chargé de la bioéthique et de la responsabilité sociale des entreprises, Ministère des Affaires étrangères et européennes

Il me semble qu'au fond, il y a malentendu :

- Les rapports du RSSG traitent des obligations légales minimales des entreprises au regard des droits de l'Homme alors que l'objectif d'ISO 26000 est de proposer des méthodes de mise en oeuvre de la RSE, celle-ci étant définie comme ce que l'entreprise peut faire au delà de ses obligations légales.

- Si la "*due diligence*" est un concept restrictif, il paraît toutefois adapté au registre des obligations. Cependant, la notion de "sphère d'influence" permet d'aller plus loin, notamment de se poser des questions par rapport aux générations futures, à la biodiversité, etc. domaines où les obligations sont encore très restreintes. Cette notion apparaît donc plus adaptée aux réflexions sur la RSE.

La note demandant le remplacement de la notion de sphère d'influence par celle de "*due diligence*" dans ISO 26000 est donc, de mon point de vue, une erreur. Cette erreur signale aussi une tendance à restreindre le mandat à une réflexion sur les seules obligations des entreprises au regard des droits de l'homme. Or, celui-ci est plus étendu et comprend la question de l'inclusion des droits de l'homme au sein de la RSE.

The exchanges are reproduced as follow in chronological order :

- **Yann QUEINNEC**, juriste, association Sherpa

La démarche de John Ruggie semble nier le potentiel juridique que recouvre la notion de "*sphere of influence*".

Il serait tout d'abord intéressant d'établir un parallèle entre la notion de "*due diligence*" et celle de "*duty of care*" qui est une notion largement reconnue par la *common law* (qui constitue d'ailleurs la seconde proposition de l'*European Coalition for Corporate Justice*[136]) et qui va plus loin que celle de "*due diligence*".

Ensuite, le rapport du RSSG nie l'usage qui peut être fait par la communauté juridique de la notion de "sphère d'influence" en ne la considérant que comme un outil d'aide à la décision

[136] http://www.corporatejustice.org/IMG/pdf/ECC_001-08.pdf

pour les entreprises : "*it can be a useful metaphor for companies to employ in identifying opportunities to support human rights*".

Enfin, des jurisprudences existantes peuvent être identifiées se rapportant à cette fameuse métaphore de la "sphère d'influence". C'est le cas en matière d'action en comblement de passif, de définition de la notion d'unité économique et sociale, en droit de la concurrence, etc. Ceci permettrait de contester l'affirmation selon laquelle : "*influence in itself is not an appropriate basis on which to attribute specific social responsabilities to companies*".

Il est vrai que la notion de « sphère d'influence » demeure floue mais elle a le mérite, comme celle de développement durable, d'appréhender la problématique de façon complète et de laisser se développer un courant de décisions adaptées à chaque fait.
D'ailleurs, l'argument évoqué par John Ruggie dans une rectification faite d'un article paru sur le site Ethicalcorp[137] pour expliquer sa préférence entre les notions de "*due diligence*" et de "sphère d'influence" ne semble pas convainquant :

"*I note that sphere of influence combines together two very different meanings of influence: one is influence as "impact," where the company may be the cause of harm; the other is influence as whatever "leverage" a company may be able to exert over other actors with which it may or may not have a business relation. Impact falls squarely within a company's responsibility to respect human rights; leverage may or may not, depending on circumstances*"

Au contraire, cette argumentation aide à conforter le développement de la notion de « sphère d'influence ». En effet, l'application de tout principe dépend des circonstances, dès lors il faut avoir le courage de laisser s'établir des lignes rouges. C'est le rôle dévolu aux organisations et aux personnes habilitées à dire le droit quand elles sont saisies d'un cas.
Le fait même que l'ISO 26000 à son stade de développement ait maintenu que "*generally, the responsability for exercising influence increases with the ability to influence*" ou encore que "*there will be situations where an organization's ability to influence others will be accompanied by a responsability to exercise that influence*" est un signal que la notion ne doit pas être écartée aussi promptement.

Par ailleurs il serait opportun de relever que l'ISO 26000 vise les organisations (y compris les collectivités territoriales qui exercent des fonctions déléguées par les Etats...) et non seulement les entreprises.
La démarche du RSSG consisterait donc à établir une dérogation "au profit" des entreprises, ce sans argumentaire solide, et risquerait donc d'entraîner des discussions sans fin au sein de l'ISO 26000, avec pour seule conséquence d'éventuelles complications des négociations sur ce sujet.

Enfin si la notion de "*due diligence*" devait finalement s'imposer, c'est elle qui devrait focaliser l'attention afin d'enrichir son contenu, notamment à travers un travail sur celle de "*duty of care*".

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[137] http://www.ethicalcorp.com/content.asp?ContentID=5949

- **Isabelle CADET**, Docteur en droit, enseignant-chercheur, ESDES, université Catholique de Lyon

I. Il est nécessaire de repartir de la hiérarchie des normes et de tirer les conséquences de l'absence de recours ou d'effectivité des droits de l'Homme dans de nombreux Etats pour comprendre le succès de la démarche initiées par John Ruggie. En France, comme en Europe, le droit international prime sur le droit interne. Le respect de la loi est assimilé à l'Etat de droit. Donc l'ISO 26000, norme privée, doit être conforme à cette hiérarchie, raison pour laquelle le respect de la loi est un préalable. Mais en dehors du champ légal, sur quoi peut-elle se fonder?

Il faut rappeler qu'aucune entreprise n'est soumise au Droit (règle juridique) au sens large, *a fortiori* à des normes "comportementales" ou "éthiques". Seuls les Etats sont soumis au Droit international public, donc à des conventions relatives, notamment en ce qui concerne l'ISO26000, aux droits de l'Homme. En tout état de cause, seules des obligations de moyens et non de résultat sont mises à leur charge. Et toutes les déclarations et recommandations ne sont pas impératives en la matière. Ainsi, la Déclaration universelle des droits de l'Homme est une référence mais, juridiquement, ce n'est qu'un principe général du droit. Seuls les pactes internationaux de 1966 et les traités ou conventions qui ont suivi sont obligatoires pour leurs signataires. Encore faut-il, selon les systèmes monistes ou dualistes, parfois une ratification pour permettre leur entrée en vigueur. Et la France n'est pas un exemple en ce domaine. En effet, la France a mis 24 ans pour ratifier la Convention européenne des droits de l'Homme et 14 ans pour reconnaître les deux Pactes des Nations Unies. Tous les Etats n'admettent pas non plus le recours individuel que ce soit devant la CEDH ou devant le Comité des droits de l'Homme. La Déclaration des Droits de l'Homme et du Citoyen de 1789 n'a intégré le bloc de constitutionnalité qu'en 1971 suite à une décision du Conseil Constitutionnel.

Les exceptions sont peu nombreuses: on peut citer le succès du *Global Compact* (avec toutefois une limite : seules les entreprises adhérentes doivent s'y soumettre) ou encore les principes directeurs de l'OCDE, devenus usages internationaux grâce à la jurisprudence de la Cour Internationale de Justice. Les entreprises ne sont soumises qu'à la loi et en règle générale du pays hôte, c'est-à-dire parfois rien ou presque. Ce n'est que de manière détournée avec les règles de l'OMC ou à partir des exigences légales ou autres fixées aux multinationales dans les pays investisseurs que les entreprises sont pressées de respecter les droits de l'Homme. Or, de quelle loi parle-t-on le plus souvent? Du droit interne ou du droit international? Les droits de l'Homme sont-il du droit objectif ou subjectif?

La notion de responsabilité n'a donc de sens que si on est capable de répondre à la question : devant qui est on responsable ? Et envers qui? Et de quoi?

L'ISO 26000 est ambitieuse car la prise de conscience s'étend et se généralise ; la revendication universelle dérange, mais elle n'est pas rigoureuse quant à sa terminologie. N'étant ni une norme de management ni une norme à vocation contractuelle ou pouvant fonder une plainte en justice, elle n'est pas non plus une norme processuelle : que reste-t-il, sinon du flou? D'une part, elle ne reprend pas à son compte l'ensemble des dispositions s'appliquant aux Etats en matière de droits de l'Homme, ce qui aurait eu le mérite de la clarification, mais elle laisse en suspens les moyens pour y parvenir sans tenir compte des disparités de traductions possibles de termes ambigus (par exemple : « complicité non juridique ») voire inconnus avec une acception complètement différente selon les pays.

Le mot « responsabilité » a, par exemple, deux significations essentielles : assumer une charge, ou un devoir de rendre des comptes. Toutefois, sa signification diffère fortement selon les régions.

En Afrique, le mot « responsabilité » ("lingala") signifie « poids » ou « grossesse ». Dans les pays du Sud, il est synonyme de charges inévitables envers la communauté. En Inde, « responsabilité » est un devoir pour accomplir son *dharma*, envers soi-même et les autres. En chinois, le même idéogramme signifie « charge » ou « digne de confiance » et en Occident: « acte volontaire », « initiative individuelle », « tâche confiée par autrui ». Au Kenya, « responsabilité » renvoie à une mission décrétée par Dieu; définition qui a une résonance dans les pays arabes islamiques (à travers le verset 72 du Coran) correspondant en fait à l'initiative humaine volontaire, qui endosse la responsabilité d'un acte en toute ignorance de sa portée, donc une notion proche de l'irresponsabilité.

Pour certains, il s'agit donc d'une volonté, pour d'autres d'une charge. On comprend mieux ainsi le clivage entre le respect de la loi (notion de contrainte) que la « responsabilité » induit pour les uns et le dépassement de la loi (notion éthique ou morale) qu'elle induit pour d'autres.

(Partie I extraite de notre article « ISO 26000 : innovation ? », Actes du colloque de l'ADERSE *Association pour le Développement et l'Enseignement de la Responsabilité Sociale de l'Entreprise*, 24-26 mars 2010, La Rochelle)

II. Ainsi, le concept flou de "*due diligence*" semble sonner juste car il reprend à son compte la hiérarchie exposée plus haut : l'Etat a une obligation de protection, l'article 4 de la DUDH ("ne pas nuire à autrui") s'impose lui aux entreprises à travers l'obligation de respect (purement passive : aucune complicité, aucune responsabilité prescriptive), enfin l'amélioration de l'accès à des recours judiciaires ou autres. D'autre part, il propose une démarche d'amélioration continue pragmatique donnant l'état de l'art au niveau mondial – niveau d'exigence requis par l'ISO à force de négociation – pour obtenir un consensus: ce concept est uniquement fondé sur la casuistique et le contextuel.

Cette notion de « *due diligence* » ne concerne pas uniquement les finances. On la trouve depuis longtemps en droit international (CIJ, *affaire des otages américains à Téhéran*, 1980). L'appliquer au droit économique n'est pas surprenant aujourd'hui. Dans certains cas, les entreprises vont ainsi aller au-delà de la loi (inexistante) ou seront en-deçà. En tout état de cause, elles ne perdront pas d'avantage concurrentiel à respecter les droits de l'Homme si ce n'est pas possible à leurs yeux. C'est la même philosophie qui anime l'OMC dans le règlement des différends par l'ORD (Organe de Règlement des Différends): la violation des droits de l'Homme dans les PMP (Procédés et Méthodes de Production) n'est considérée comme une distorsion dans les échanges.

La plus grande critique que l'on puisse adresser à la démarche du RSSG est qu'il ne fait pas progresser les droits de l'Homme, puisque ces exigences sont conditionnées à l'interprétation faite par l'entreprise considérée dans une situation donnée. Tout au plus y a t-il renversement de la charge de la preuve: l'entreprise doit faire preuve de transparence et une certaine évaluation doit être possible par des organismes extérieurs (une alternative à la certification). Les principes éthiques commandent d'aller au-delà des prescriptions légales: la démarche de John Ruggie se borne à faire en sorte de les respecter quand il y en a et si c'est opportun. La

notion de diligence raisonnable est un concept "fourre-tout" et n'apporte aucun plus. Dans une telle conception subjective, comment harmoniser les pratiques?

Elle peut aussi être considérée comme une tendance régressive du droit, car les droits de l'Homme ne sont alors plus considérés comme impératifs pour tous. Or, cela s'oppose à la montée en puissance du *jus cogens* en la matière qui exclut l'hypothèse de la réciprocité comme condition d'application des droits de l'Homme par un Etat et même en dehors de l'Etat signataire des Conventions. De même le principe de responsabilité dégagé par la jurisprudence sur l'article 4 est occulté. La réduction des impacts en matière de développement durable ne suffit plus. Or, la notion de « *due diligence* » se borne à limiter l'impact: le *window dressing* n'est pas loin. Les directives européennes en matière environnementales sont tellement exigeantes que l'on voit mal ce concept progresser sur ce volet: l'obligation de résultat s'impose. Il faut montrer non pas que ce concept est novateur mais, au contraire, qu'il est dépassé (en s'appuyant sur la notion de bien commun mondial). Aussi, valider en Assemblée Générale des Nations Unies ce concept revient à s'opposer aux conventions et recommandations de l'OIT. Les Nations Unies ne peuvent pas accepter, sans se contredire, ce concept séduisant certes mais réducteur. A titre d'exemple, le NOEI (le Nouvel Ordre Economique International) est considéré comme un principe de droit international : la « *due diligence* » n'est pas une coutume qui supplanterait ce principe.

En outre, la « *due diligence* » est un procédé non une norme technique. Elle ne peut supplanter l'ISO 26000 sur le fond. Elle peut, au mieux , s'y intégrer.

L'harmonisation des enjeux et de la recherche de lignes directrices au niveau international, l'effort de démocratisation dans le processus d'appropriation et d'échanges entre le Nord et le Sud paraissent bien plus porteurs si l'on va au terme du processus en prenant bien en compte les demandes de lisibilité, de simplification, de traductions terminologiques exactes, etc.

La RSE, qui n'est pas un concept juridique à proprement parler, n'est pas évoquée ici. Ces éléments de réflexion se limitent volontairement au domaine des droits de l'homme.

Sur la question des différentes traductions françaises existantes de l'expression « due diligence » :

Le devoir ou l'obligation de surveillance est devenue, avec la jurisprudence de la Cour de cassation en 2002, une obligation de sécurité de résultat pour l'employeur en matière d'hygiène et de sécurité au travail, au point que le respect des normes a été exclu comme cause d'exonération de responsabilité possible pour l'employeur en cas d'accidents du travail. La prudence, la prévention ou la précaution ont un sens précis en droit, il s'agit encore d'autres notions.

Le devoir est plus d'ordre subjectif, moral ou éthique, donc la sanction peut être juridique ou autre, parfois même plus lourde. L'obligation (sauf naturelle) juridique appelle une sanction juridique et bien souvent en matière de RSE, cette dernière fait défaut : on glisse progressivement en la matière de la *soft law* à la *fuzzy law* dans le cadre de l'intégration normative et de la mondialisation du droit. Par exemple, l'exigence du rapport de développement durable pour les sociétés cotées n'est assortie d'aucune sanction juridique, en cas d'absence.

En tout état de cause, la *due diligence* n'a aucune valeur juridique car elle demeure trop floue.

Les pays de *Common Law* sont plus sensibles à ce terme, plus proche de leur système de raisonnement juridique, fortement imprégné de *soft law*. Les Anglo-saxons manient ces concepts facilement, le *lobbying* fait le reste: en droit international, tout est une question de rapport de force et l'anglais est la langue officielle. Quant aux Chinois, qui ne connaissent le droit qu'à partir du moment où il s'agit de droit pénal, la "*due diligence*" doit avoir une résonance favorable, rappelant les règles d'usage, de civisme, de comportement, non codifiées, où chaque partie prenante l'entend à sa façon, selon ses us et coutumes.

- **François-Guy TREBULLE**, Professeur de droit, université René Descartes Paris 5

A vrai dire ni la notion de sphère d'influence ni celle de « diligences raisonnables » ne correspondent réellement à des notions juridiques assises en droit interne français, lequel est plus habitué à appréhender la réalité envisagée par référence à la notion de « contrôle ».

Par exemple, très peu de décisions de la Chambre commerciale de la Cour de cassation comprennent des références à la notion de sphère d'influence; encore moins sont relatives à la notion de « diligences raisonnables ». En revanche l'évocation du contrôle est, elle, plus fréquente.

La notion d'influence est cependant reçue en droit :

Elle l'est notamment par le droit de la concurrence, matière dans laquelle un arrêt de la Cour de Justice des Communautés Européennes du 10 septembre 2009[138] a rappelé l'état du droit en soulignant que la notion d'entreprise, en droit de la concurrence « doit être comprise comme désignant une unité économique même si, du point de vue juridique, cette unité économique est constituée de plusieurs personnes physiques ou morales ».

La Cour souligne qu'en la matière, « *le comportement d'une filiale peut être imputé à la société mère notamment lorsque, bien qu'ayant une personnalité juridique distincte, cette filiale ne détermine pas de façon autonome son comportement sur le marché, mais applique pour l'essentiel les instructions qui lui sont données par la société mère* »[139]. Dans le cas d'une filiale à 100% la cour souligne l'existence d'une présomption « selon laquelle ladite société mère exerce effectivement une influence déterminante sur le comportement de sa filiale ». Cette présomption étant simple la mère peut établir qu'il n'en va pas ainsi et que les deux sociétés ne « constituent pas une seule entité économique ».

La notion d'influence est également présente dans l'évocation de la consolidation (article L233-16 du Code de commerce) qui évoque le fait que la consolidante exerce « une influence notable » sur la filiale. Cet article a une lecture ouverte de l'influence qui peut procéder d'un contrat ou de clauses statutaires et retient (IV) que « l'influence notable sur la gestion et la politique financière d'une entreprise est présumée lorsqu'une société dispose, directement ou indirectement, d'une fraction au moins égale au cinquième des droits de vote de cette entreprise »

[138] CJCE, *Akzo Nobel NV*, affaire C-97/08 P, 10 septembre 2009.
[139] *Ibidem,* § 58.

A défaut de la notion de « contrôle » prise en tant que telle, qui ne semble guère être promue dans le cadre des travaux liés à la normalisation en matière de RSE, la notion de diligences raisonnables pourrait être problématique en ce qu'elle induit un contrôle *a minima* – par la référence au « raisonnable » - et suggère de se placer dans un rapport d'extériorité. Les mesures de *due diligence*s sont particulièrement présentes en matière comptable et financière comme reposant sur ceux qui sont investis d'une mission de vérification (structurelle ou ponctuelle).

La notion de sphère d'influence a ceci de particulièrement intéressant qu'elle permet un contrôle de l'influence par cercles concentriques (idée de sphère) qui suggère une gradation dans l'influence qui peut être corrélée avec une gradation dans la responsabilité : plus le tiers est proche du noyau, plus il est sous influence, et plus ledit noyau peut être regardé comme moteur de son action ou, en tout état de cause, en position de l'influencer. L'influence étant pouvoir elle induit des devoirs et/ou des obligations.

Une filiale à 100%, une filiale « simple », un fournisseur en situation de dépendance économique, un sous-traita etc., tous sont susceptibles de voir leur position dans la sphère de responsabilité appréciée au regard d'éléments concrets indépendamment de leur indépendance juridique théorique.

L'intérêt majeur de la notion réside probablement dans le fait que, précisément, elle permet de s'adapter aux réalités envisagées et de pouvoir s'appliquer à toute situation dans laquelle la réalité de fait – l'influence – est caractérisée ; indépendamment de l'identification a priori des diligences requises comme raisonnables.

Cela ne signifie pas que la responsabilité sera nécessairement associée au constat de l'existence d'une influence mais bien qu'il devra en être tenu compte et ceci sous toutes ses formes (juridique, économique...).

Permettant le développement d'un rapport organique ouvert, en droit des sociétés et au-delà du droit des sociétés, en droit social, en droit des contrats etc., la notion de « sphère d'influence » apparaît bien de nature à permettre de se saisir de la question difficile des violations des droits de l'homme dans un cadre transnational.

On peut évidemment soutenir que les diligences raisonnables le permettent également, mais la référence à cette notion suppose un rapport assez radicalement inversé à l'objet qui n'est plus la réalité d'une situation « l'influence » mais la préexistence d'une exigence normative : la diligence à l'aune de laquelle il faudra apprécier le comportement en cause.

S'il y a un enjeu réel en terme d'orientation, on peut remarquer que la jurisprudence, lorsqu'elle se saisit d'obligations professionnelles reposant sur des « *due diligence*s » notamment en matière comptable, sait parfaitement appréhender ce qu'il convient de retenir comme raisonnable ou non. De ce point de vue, si la prise en compte des groupes de société ou des chaînes de contrats et situations de dépendance est moins aisée avec les diligences raisonnables qu'avec la sphère d'influence, il n'est pas impossible de s'en saisir utilement. Mais il n'en demeure pas moins que le passage de l'un à l'autre entraînera mécaniquement des difficultés liées, notamment, à l'identification des diligences.

- **Yann QUEINNEC**, juriste, association Sherpa

Au sujet de la définition de la '*due diligence*', n'accordons pas une importance démesurée à sa valeur juridique. Néanmoins, cette traduction française est tout de même l' occasion d'éviter de trop grandes dérives vers la *soft law*.

Nous effectuons une recherche plus approfondie sur la distinction entre 'devoir' et 'obligation'. Outre que le terme 'devoir' dissipe des potentiels conflits avec le caractère non contraignant de l'ISO 26000 que ne manquerait pas de provoquer la notion d' « obligation », il nous permet toutefois de renvoyer à un encadrement juridique existant, nous rapprochant ainsi de notre tradition juridique.

La notion d' « obligation » renvoie à un acte positif ou négatif susceptible d'entraîner des sanctions juridiques et recouvre un caractère ponctuel.
Celle de 'devoir' induit une attitude générale attendue d'un sujet de droit qui peut résulter de l'application d'un corpus de règles existantes (représentant plusieurs obligations). Appréhendée ainsi, la notion de devoir comprend celle d'obligation.

- **Louis Daniel MUKA TSHIBENDE**, Docteur en droit, association Sherpa

Il apparaît, aux termes du dictionnaire du vocabulaire juridique "Cornu", que le terme devoir est généralement employé comme un synonyme du mot obligation[140]. Cependant, lorsque le besoin se fait sentir de distinguer les deux et de faire preuve de plus de précision, le devoir est défini comme étant un ensemble de "règles de conduite d'origine légale et de caractère permanent (qui se trouve avoir aussi une coloration morale)"[141]. Et dans un sens voisin, le terme devoir désigne "des obligations préétablies que la loi impose, non envers une personne déterminée, mais d'une manière générale, soit à une personne en raison de ses fonctions ou de sa profession, soit à tout homme envers ses semblables"[142].

L'idée qui transparaît est que le devoir est une norme comportementale générale, tandis qu'une obligation est une norme comportementale ponctuelle. La doctrine semble également être portée vers ce sens[143].

Il découle de ces considération que la "*due diligence*" ne peut être qu'un "devoir" et non une "obligation" ; autrement, tout ce qu'on établirait confinerait à l'inefficacité.

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[140] CORNU (G.), *Vocabulaire juridique*, Association Henri Capitant, 8ème éd., Quadrige-P.U.F., 2007, p. 307.

[141] *Ibidem.*

[142] *Ibidem.*

[143] GROSSI (I.), *Les devoirs des dirigeants sociaux. Bilan et perspectives*, Thèse, Aix-Marseille III, 1998, p. 7-8, n° 6 ; LIKILLIMBA (G.-A.), *La fidélité en droit privé*, PUAM, 2003, p. 25, n° 3.

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I. Définitions des termes par des dictionnaires juridiques de langue française

1. Définition du terme due diligence

1.1. Définition du dictionnaire de droit international public[144]

Diligence due **:** traduction littérale de l'expression anglaise « *due diligence* ». En français, il convient de parler d' « obligation de diligence » ou d' « obligation de vigilance ».

La Commission de droit international avait adopté en 1995 un projet d'article B relatif à la prévention dans le cadre de ses travaux relatifs à la responsabilité internationale pour les conséquences préjudiciables d'activités non interdites. Le commentaire se lisait comme suit :
« L'obligation qu'ont les Etats de prendre des mesures pour prévenir ou réduire au minimum un risque de dommage transfrontière significatif est une obligation de *due diligence*, exigeant d'eux qu'ils adoptent à cet effet certaines mesures unilatérales. L'obligation imposée par le présent article n'est pas une obligation de résultat. C'est le comportement de l'Etat qui déterminera s'il s'est acquitté de l'obligation qui lui incombe en vertu des présents articles »[145]. L'année suivante, l'article en question devint l'article 4 du projet. Le commentaire resta identique, sinon que l'adjectif « due » fut, à bon droit, supprimé dans toutes les parties du commentaire où il apparaissait pour conserver simplement l'expression « obligation de diligence »[146] .

Due diligence **:** expression anglaise communément utilisée. La transposition littérale en langue française « diligence due » est à éviter. Il est préférable d'utiliser en français l'expression « obligation de vigilance ».

Obligation de vigilance : obligation requérant un sujet de droit international de protéger les Etats étrangers (ou d'autres sujets de droit international), leurs représentants et leurs ressortissants ou des espaces, contre tout acte illicite perpétré par des particuliers, que ces actes se réalisent sur son territoire ou sous sa juridiction ou sons son contrôle.
Une double charge compose l'obligation de vigilance : celle de prévenir et celle de réprimer ces actes illicites (obligation de prévention, obligation de répression).
Les obligations de vigilance couvrent un vaste domaine du droit international, de la neutralité ou de l'environnement à la protection des personnes.

1.2. Définition du Dictionnaire du vocabulaire juridique[147]

Diligence due **:** obligation pour l'Etat, ses propres organes ou ses agents, d'éviter toute négligence, erreur, omission ou retard dans l'accomplissement des divers devoirs prescrits par le droit international à l'égard des étrangers : devoir de protection, devoir de permettre l'accès aux tribunaux nationaux et de rendre une bonne justice, etc. (le manquement à la diligence due est de nature à engager la responsabilité de l'Etat).

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[144] SALMON (J.), (dir.),*Dictionnaire de droit international public,* éd. Bruylant/AUF, 2001.
[145] A.C.D.I., 1995, vol. II, 2ème partie, p.97, §4.
[146] A.C.D.I., 1996, vol. II, 2ème partie, p.120, §§4 et ss.
[147] CORNU (G.), *Vocabulaire juridique*, Association Henri Capitant, 8ème éd., Quadrige-P.U.F., 2007

2. *Définition de « Duty of care » dans le Dictionnaire juridique Dahl:*

Devoir de diligence : les sources de ce devoir sont la jurisprudence, les lois ou règlements que le tribunal jugera applicables en la matière. Théorie de la négligence : avant de déclarer qu'un défendeur a manqué à son devoir de diligence, le tribunal s'assure d'abord qu'un des objectifs de la loi est précisément de créer un droit d'action en responsabilité civile pour la victime d'un préjudice dû à l'inobservation par le défendeur de son devoir.

3. *Définition de « devoir » – dans le dictionnaire du vocabulaire juridique « Cornu »*[148]

- Souvent synonyme d'obligation, soit dans un sens vague (pour désigner tout ce qu'une personne doit ou ne doit pas faire), soit dans un sens technique précis (rapport de droit : par exemple le devoir de réparation à la charge du responsable).
- Désigne plus exactement certains règles de conduite d'origine et de caractère permanents (qui se trouvent aussi avoir une coloration morale) : devoirs du mariage, devoirs de famille.
- Dans un sens voisin, désigne des obligations préétablies que la loi impose, non envers une personne déterminée, mais d'une manière générale, soit à une personne en raison de ses fonctions ou de sa profession (devoirs d'état), soit à tout homme envers ses semblables : devoir de ne pas s'enrichir injustement au détriment d'autrui.

4. *Définition d' « obligation » – dans le dictionnaire du vocabulaire juridique « Cornu »*[149]

Dans un sens technique : face passive du droit personnel par lequel une ou plusieurs personnes sont tenues d'une prestation (fait ou abstention) envers une ou plusieurs autres en vertu d'un contrat ou d'un quasi contrat, d'un délit ou d'un quasi délit, ou de la loi.
(…) Désigne normalement l'obligation juridique, par opposition à l'obligation morale, et même plus spécialement l'obligation civile part opposition à l'obligation naturelle.

Obligation de moyens (dite aussi obligation générale de prudence et de diligence) : obligation pour le débiteur non de parvenir à un résultat déterminé mais d'y appliquer ses soins et ses capacités de telle sorte que la responsabilité du débiteur n'est engagée que si le créancier prouve de la part de ce débiteur un manquement à ses devoirs de prudence et de diligence.

Obligation de résultat (dite parfois obligation déterminée) : obligation pour le débiteur de parvenir à un résultat déterminé de telle sorte que la responsabilité du débiteur est engagée sur la seule preuve que le fait n'est pas réalisé, sauf à se justifier en prouvant que le dommage vient d'une cause étrangère.

5. *La notion de « sphère d'influence »(à partir des Principes Directeurs de l'OCDE à l'intention des entreprises multinationales - extraits de l'article d'Isabelle Daugareilh, RGDIP 2008).*

La notion de « sphère d'influence » à notre connaissance ne figure pas dans les dictionnaires juridiques de langue française à notre disposition et ne semble pas davantage être une notion juridique définie par la doctrine ou par une loi (du moins dans nos domaines de compétence : droit social, droit social international).

[148] *Ibidem.*
[149] *Ibidem.*

En revanche, c'est une notion que l'on peut trouver dans certains textes de droit international (*soft law*) s'adressant à des entreprises comme les *Guidelines* de l'OCDE à l'intention des multinationales. La notion y a été développée pour déterminer le champ d'application desdits Principes.

Ainsi le CIME a adopté une position très pragmatique qui peut se résumer de la manière suivante : « la portée des Principes dépend de la capacité des entreprises à influencer la conduite des partenaires commerciaux vis-à-vis desquels elles peuvent être assimilées à des investisseurs ». Il est donc recommandé d'examiner au cas par cas la nature de la relation commerciale et le degré d'influence exercé. Le CIME n'a pas adopté de position dogmatique ou de principe. Ce pragmatisme est doublement cohérent avec le fait d'une part que la Déclaration de l'OCDE ne donne de définition ni des entreprises multinationales ni de l'investissement international[150], et d'autre part avec le Commentaire qui a été fait au point II-10 de la Déclaration.

Le Commentaire de l'article II-10 de la Déclaration met en effet l'accent sur les limites et la variabilité de la capacité d'influence de la multinationale sur les partenaires de la chaîne de production et commerciale. Elle dépend en effet des caractéristiques du secteur, de l'entreprise, de la nature et des caractéristiques des produits et de leur processus de production, de commercialisation… La structuration de la filière du textile n'a effectivement rien à voir avec celle de l'énergie. Le Commentaire permet d'envisager deux hypothèses. La première, qui correspond à une situation d'investissement direct étranger (IDE), se traduit par un contrôle qui suppose une influence directe propre à l'application des Principes. La deuxième consiste à considérer que, même en l'absence d'investissement direct ou d'investissement au sens traditionnel du terme, l'entreprise peut malgré tout être en mesure d'influencer ses partenaires (par sa puissance commerciale par exemple ou par des pratiques commerciales telles que les systèmes d'agrément et de traçage ou de qualité des produits), au point de rendre les Principes applicables à ses cocontractants.

Ainsi dans sa Déclaration de 2003, le CIME indique très clairement qu'il n'y a pas lieu d'intégrer expressément toute opération de commerce dans le champ d'application des Principes. Et effectivement une telle position peut s'avérer contre-productive et, en tout cas, être contraire à l'idée de la Clarification apportée au Concept et Principes, selon laquelle il ne saurait être question de poser un principe général de responsabilité de la société vis-à-vis de ses filiales et a fortiori de ses cocontractants. En revanche, le CIME propose de ne pas exclure a priori la possibilité ou, du moins, de ne pas s'en tenir à une vision étroite et stricte de l'investissement direct étranger. Cette position, qui a le mérite d'être pragmatique et réaliste, laisse cependant prise à l'interprétation.

II. Quelques réflexions, interprétations et orientations proposées sur les notions suivantes : Sphère d'influence – Complicité - *Due diligence*- Droits de l'homme - Alien Torts Act.

[150] D. Carreau et P. Julliard (*op.cit*., sp. p. 383-385) estiment, en l'absence de définition dans le texte des Principes de l'OCDE, que l'investissement direct repose sur les éléments suivants : il faut un apport, en capital, permettant d'établir des liens durables (qui ne sont pas nécessairement des liens juridiques) qui permettent à l'investisseur (une entreprise) d' « exercer une réelle influence sur la gestion de l'entreprise qu'il a investie ». « L'intérêt de la communauté internationale économique exige que les entrepreneurs et les entreprises puissent se localiser, se délocaliser et se relocaliser en fonction des perspectives de rentabilité à moyen et long terme : l'impératif de mobilité n'est pas la volatilité, comme le montre l'exigence du lien durable, inhérente à la notion d'investissement ».

1. *Traduction de la due diligence :*

Eu égard aux définitions données par les dictionnaires juridiques, il paraît nécessaire de défendre la traduction d' « obligation de vigilance » puisque c'est celle qui prévaut en droit international public (on peut estimer qu'il existe un consensus ou une tendance majoritaire des Etats sur ce point, voir I). Par ailleurs, comme cela a déjà été signalé dans un des commentaires envoyés à Michel Doucin, le devoir en droit se rapporte toujours à un comportement espéré d'une figure standard (comme notre bon père de famille) et non à une obligation précise juridiquement exigible pouvant être source de responsabilité. Avec le devoir on « flirte » avec la sphère morale (on est effectivement dans la responsabilité sociale), et le cas échéant on peut se situer dans l'infra droit. Avec l'obligation, il s'agit clairement d'une prescription juridique pouvant donner lieu à action devant le juge et donc à une sanction déterminée par la loi.

2. *Portée de la notion de due diligence*

En aucun cas l'obligation de diligence ne peut être une obligation de résultat. Ce ne pourra être qu'une obligation de moyens. Elle peut être, dans ce cas et si elle est traduite comme telle, un fondement juridique pour une responsabilité civile délictuelle ou contractuelle. Mais comme le signale ma collègue Risa Liebervitz, il s'agit plus d'une obligation procédurale que substantielle. De plus, en droit américain, elle établit une présomption en faveur de la direction de l'entreprise. Or on sait qu'une présomption même simple complique les choses du point de vue de la preuve et limite en tout cas la portée de l'action : il suffit que l'entreprise ait fait des démarches préalables à son opération pour s'acquitter de son obligation. La *due diligence* se décompose en trois éléments :

- devoir de s'informer sur le contexte dans lequel le projet de l'entreprise va se réaliser ;
- devoir d'évaluation du risque (ou de pesée du risque) en confrontant les éléments connus du contexte et le projet au regard du positionnement du projet dans la chaîne (industrie manufacturière, service, sous-traitant, fournisseur ou employeur). Le résultat de l'évaluation est relatif et proportionnel au degré de proximité avec le contexte et au statut de l'opération projetée ;
- devoir de s'informer sur le(s) partenaire(s) de l'opération et spécialement de son/leur attitude vis-à-vis des droits de l'homme.

3. *Domaine de la due diligence*

La « *due diligence* » une notion juridique qui vient du système anglo-saxon, utilisée en droit international public mais aussi dans le droit de l'entreprise. Elle est donc assez pratique parce qu'elle peut figurer dans des normes de droit international ou de droit national et peut s'adresser à des entités ou des sujets de droit très différents : Etat, entreprises. En outre, comme le précise John Ruggie mais aussi l'auteur de l'article en annexe, elle peut concerner toute entreprise de quelque taille que ce soit et n'est donc pas réservée aux grandes entreprises ou plutôt aux entreprises transnationales, ce qui serait le cas de la notion de sphère d'influence selon John Ruggie.

Que peut signifier cette proposition -ou plutôt ce parti pris- ? Plus une notion est abstraite, plus elle s'apparente à un standard et plus elle a vocation à s'adresser à des sujets aussi différents en termes de moyens et de ressources qu'une TPE (toute petite entreprise) ou une PME (Petite et Moyenne Entreprise) d'un côté et de l'autre une multinationale –comme Total ou Areva- et plus le contenu de la notion sera faible. C'est un premier point.
Le deuxième c'est que la « *due diligence* » ne permet pas de mettre en évidence l'étendue des pouvoirs –économique, politique, social – de l'entreprise multinationale aux delà de ses frontières juridiques comme société commerciale et donc ne permet pas de mettre en adéquation, ou simplement en relation, pouvoir et responsabilité, ce qui constitue pourtant le cœur de ce que nous appelons le droit des obligations. Il semblerait donc que la « *due diligence* » soit une notion protectrice à un double titre des entreprises multinationales, parce qu'elle permet de ne pas les stigmatiser comme telles. En même temps, et c'est là la force de l'argument, elle ne permet pas non plus de les exonérer complètement à certaines conditions que nous verrons ci-après.

4. *Duty of care*

La notion est souvent associée et parfois utilisée en lieu et place de celle de « *due diligence* ». Elles sont, il est vrai, très proches, mais se distinguent dans leur contenu puisque la notion de « *duty of care* » suppose une obligation substantielle alors que la « *due diligence* » est une obligation procédurale, ce qui est plus confortable pour les entreprises.

5. *Distinction entre les notions de « due diligence » et de « sphère d'influence »*

Les notions de « *due diligence* » et de « sphère d'influence » ne se recoupent pas véritablement, notamment parce que la notion de « sphère d'influence » (développée notamment dans des textes de l'OCDE) permet de préfigurer voire d'établir un périmètre de responsabilité de l'entreprise qui ne se limite à celui dessiné par le droit des sociétés. En intégrant la sphère d'influence comme critère de détermination, c'est une posture qui consiste à rechercher, à localiser et identifier qui détient réellement le pouvoir derrière les apparences, les fictions et les écrans créés par le droit des affaires et par la complexité de la structure des entreprises contemporaines. La sphère d'influence est un critère qui permet d'avoir une approche flexible, pragmatique et concrète et non abstraite de l'entreprise. Il permet de ne pas partir du postulat selon lequel seuls les actes directement commis par l'entreprise peuvent faire naître sa responsabilité. Il permet d'élargir le périmètre de la responsabilité aux actes commis par un de ses cocontractants sur lequel l'entreprise aurait eu une influence (économique, administrative, ...). Et effectivement, le périmètre peut changer selon la nature ou l'objet de l'acte ou de l'omission reprochés. Cette approche *in concreto*, certes fluctuante, crée à la fois des incertitudes pour les entreprises (puisque la nature et la portée de l'obligation sont variables) et élargit le domaine de responsabilité de celles-ci, qui pourrait ne pas être réservé à celui des droits de l'homme (au sens de la DUDH) mais pourrait tout à fait intégrer le domaine des droits des travailleurs. On pense ici à la question de l'emploi, en termes de conditions d'emploi décent au sens de l'OIT qui déborde largement des droits sociaux fondamentaux, ou en termes de suppression d'emplois par délocalisation ou dégraissages massifs et soudains, etc. Il semble que John Ruggie ait très bien identifié le potentiel –voire la puissance – juridique de la notion de sphère d'influence pour s'employer à lui substituer une notion qui, elle, a effectivement « droit de cité » en droit américain. De plus, l'emploi de la « *due diligence* » permet de conserver sa ligne de conduite ou sa cohérence avec le rapport du 7 avril 2008, lequel n'entend pas rejeter toute responsabilité des entreprises multinationales mais conditionne celle-ci à trois exigences :

- que cela soit réservé aux droits de l'homme au sens le plus restrictif du terme,
- qu'il s'agisse d'une violation directement commise par l'entreprise elle- même (déni de la complicité),
- et enfin que l'entreprise n'ait pas fait preuve de diligence au sens de « *due diligence* », c'est-à-dire qu'elle n'ait pas pris le soin de s'informer et d'évaluer les risques au regard de l'intérêt des *shareholders* (et non des *stakeholders*) de l'entreprise.

La notion de « sphère d'influence » permet de dépasser les effets de l'autonomie juridique des sociétés constitutives de l'entreprise-réseau. Elle permet au juge saisi en cas de dommage (et pas seulement en cas de violation directe d'un droit de l'homme) de rechercher derrière les apparences le pouvoir réel ou les complicités. Cette notion permet au juge de mettre en œuvre la doctrine « *percing the veil ».* C'est une notion qui rappelle la construction jurisprudentielle française de l'Unité économique et sociale en droit social (pour mettre en place des institutions représentatives du personnel nonobstant des effectifs apparemment insuffisants du fait des découpages de l'entreprise en toutes petites sociétés). Cela rappelle également la tentative –certes insatisfaisante- de la construction légale en droit social français de groupe. La sphère d'influence est une notion qui pour des juristes de droit social européens est véritablement intéressante pour fonder de nouvelles jurisprudences ou pour établir de nouvelles règles.

L'article en annexe nous montre bien que la « *due diligence* » est très restrictive sur le plan du droit des obligations puisque l'exigible doit rester raisonnable. Selon l'article de doctrine américaine ci-joint, il paraît clairement que cela doit rester raisonnable pour l'entreprise et spécialement pour les *shareholders*. Par ailleurs, c'est une notion qui défend la logique et la philosophie de l'intérêt de l'entreprise (dont nous savons en droit social français que c'est une notion qui est toujours utilisée en dernier recours – à défaut d'une disposition légale appropriée – par le juge pour faire face à une action des travailleurs). D'autre part, l'article nous indique que la *due diligence* établit une présomption en faveur de l'entreprise, une présomption qui semble être simple mais dont on nous dit qu'elle ne peut être renversée que dans des cas extrêmement restrictifs : imprudence blâmable, illégalité, fraude, conflit d'intérêts, participation directe au dommage. L'article insiste sur le fait que la *due diligence* vient protéger l'intérêt de l'entreprise et sécuriser les décisions de l'entreprise parce qu'elle crée une présomption visiblement difficile à renverser. Enfin l'article montre que la *due diligence* est une parade juridique à la jurisprudence si novatrice sur le fondement de *l'Alien Torts Act* qui permet d'établir la responsabilité d'une société américaine pour des dommages causés à l'étranger par un co-entreprise étrangère et dont les victimes sont elles-mêmes à l'étranger et étrangères. Il paraît évident que si la notion de sphère d'influence venait à accéder à une notoriété internationale via l'ISO – qui ne serait donc pas une reconnaissance juridique – mais qui pourrait de ce fait circuler et être reprise par des plaideurs, le risque existe bel et bien pour les entreprises multinationales d'être confrontées à des actions judiciaires ailleurs qu'aux USA et sans doute de manière plus extensive que ne le permet l'*Alien Tort Act*.

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Commentaires sur l'article de Lucien J. DHOOGE*,* « *Due diligence* as a defense to corporate liability pursuant to the Alien Tort Statute »*, Emory International Law Review,* 2008[151].

L'auteur propose d'appliquer la norme de « *due diligence* » comme une défense pour les entreprises contre les revendications des droits de l'homme sous la loi américaine du « *Alien Tort Claims Act* ». En traitant ce sujet, l'auteur explique quelques aspects importants de la norme de « *due diligence* ».

Le principe de « *due diligence* » concerne des questions de droit du commerce, surtout le droit de l'entreprise et de la gouvernance de l'entreprise (« *corporate law* » et « *corporate governance* »). Le sens de « *due diligence* » vient du droit de l'entreprise dans les lois des états (« *state laws* »), lesquelles sont interprétées par les juges dans les tribunaux des états (« *state court judges* »). Le principe de « *due diligence* » est fondé sur l'obligation de diligence « *duty of care* » qui oblige les directeurs des entreprises (« *Board of Directors* ») à soutenir les intérêts des « *shareholders* » et l'entreprise lui-même.

Le principe de « *due diligence* » concerne les obligations de procédure plus que les obligations substantives. Il y a des aspects substantifs dans la définition de l'obligation de diligence (« *duty of care* ») des directeurs de l'entreprise, mais la preuve de la « *due diligence* » consiste à faire état des actes de la direction, par exemple en recherchant des renseignements pertinents avant la prise de décision par l'entreprise.

Le principe de « *due diligence*» est fondé sur l'obligation des directeurs de l'entreprise de prendre des décisions et des actes raisonnables en toute bonne foi («*reasonableness and good faith of actions and decisions of the Board of Directors* »). L'auteur de l'article établit un parallèle entre la « *due diligence* » la règle de « *business judgment rule* » des entreprises. Celle-ci crée une présomption selon laquelle les actes des directeurs de l'entreprise sont basés sur les renseignements pertinents et sont pris en toute bonne foi et avec la conviction sincère que ces actes soutiennent les meilleurs intérêts de l'entreprise. En anglais: *the business judgment rule "creates a presumption that in making the decision in question, the directors 'acted on an informed basis in good faith and in the honest belief that the action was taken in the best interests of the company."*'" (p. 477).

Selon cet article, le principe de « *due diligence*» remplacerait positivement l'obligation de se conformer aux normes de droits de l'homme par les principes de gouvernance de l'entreprise, basés sur le droit de l'entreprise américain et sur les pratiques des entreprises aux Etats-Unis et dans le contexte de la mondialisation :

[151] Il a été choisi de ne pas reproduire cet article, éclairant et de taille conséquente, dans son intégralité au sein de la présente annexe. Références complètes : DHOOGE (L. J.), « *Due diligence* as a defense to corporate liability pursuant to the Alien Tort Statute », *Emory International Law Review*, n° 455, Emory university school of law, Lexis-Nexis, 2008.

"[T]he language of the Framework transforms the discussion of transnational corporations and human rights from one of normative compliance to one of corporate governance consistent with U.S. domestic legal requirements, business practices, and globalization.

The due diligence standard is transformative to the extent that it rejects previous efforts focusing on compliance with substantive norms. Gone is the Norms' list of components of the International Bill of Rights to which transnational corporations must conform. In its place, the Framework substitutes the language of corporate governance as exemplified by due diligence. While directors and executives may know little about the substance of human rights law, corporate leadership understands the concept of due diligence."

- **Hervé ASCENSIO**, Professeur à l'Ecole de droit de la Sorbonne -Université Paris 1 Panthéon-Sorbonne

Les travaux du RSSG John Ruggie ont eu le mérite de faire progresser une réflexion sur un thème complexe, la responsabilité des entreprises au regard des droits de l'homme, à partir de notions peu juridiques comme celle de "sphère d'influence", et cela sans réouvrir le questionnement sur le contenu des obligations elles-mêmes. Il faut pourtant revenir un minimum à la théorie des obligations pour prendre position à propos des techniques de responsabilité les plus adaptées.

En droit international des droits de l'homme, une classification classique consiste à distinguer les obligations d'abstention ("*respect*"), les obligations de faire ou obligations positives ("*protect*") et les obligations de mettre en place et d'assurer le bon fonctionnement des voies de recours ("*guarantee*"). En droit international toujours, la notion de "*due diligence*" peut contenir une obligation de comportement (norme primaire), mais peut aussi être utilisée comme technique de responsabilité (norme secondaire). La proposition du RSSG paraît relever du deuxième genre, car elle est présentée comme transversale et n'entend rien ajouter ni retrancher aux obligations primaires en matière de droits de l'homme. Par ailleurs, ses mérites sont comparés à ceux de notions propres à un régime de responsabilité comme la complicité.

Dès lors, on peut douter que la « due diligence » permette de rendre compte de tout type de violation des droits de l'homme. Envisagée comme technique de responsabilité juridique, elle est généralement associée aux seules obligations d'agir ("*protect*"). Pour les obligations d'abstention, elle n'est pas adaptée. D'ailleurs, les notions les plus généralement utilisées dans le droit international de la responsabilité sont la commission directe ou la complicité (je m'appuie sur les régimes de responsabilité internationale de l'Etat ou des individus, voire celui émergeant pour les organisations internationales).

Transposé aux entreprises multinationales, le débat consiste donc à savoir :

- à quelles conditions les actes d'une filiale, voire d'un fournisseur très dépendant, peuvent être attribués à la maison-mère (notions de contrôle, de directive, d'organe *de facto*, etc.) ?

- à quelles conditions la maison-mère peut-elle être tenue pour complice, à défaut d'une commission directe ?

- à quelles conditions pèsent sur l'une ou l'autre des sociétés d'un groupe des obligations d'agir vis-à-vis des tiers pour des actes qui ne peuvent pas considérés comme les leur (commission directe) ou dont elles ne sont pas complices ?

A mon sens, la notion de « *due diligence* », comprise comme concept relevant d'un régime de responsabilité, intervient seulement dans la troisième hypothèse. Elle précise alors utilement la responsabilité vis-à-vis, par exemple, des pouvoirs locaux (hors circuit de corruption) ou des populations ne travaillant pas directement pour l'entreprise. A l'intérieur du groupe d'entreprises, cela semble beaucoup plus compliqué, et en tout cas en deçà du minimum acceptable pour nombre d'activités.

Dans le cas d'une substitution de la notion de « *due diligence* » en lieu et place de celle de « sphère d'influence », il est à craindre que le "respect" des droits de l'homme par l'entreprise soit tout simplement escamoté. Un tel remplacement serait dommageable non seulement pour les droits de l'homme, mais pour les entreprises elles-mêmes, qui risquent d'être trompées sur le risque juridique qu'elles encourent, car de nombreux droits internes les rendent responsables bien au-delà de ce que suggère le concept de « *due diligence* », y compris en s'appuyant sur des obligations issues du droit international - comme l'*Alien Tort Claims Act* aux Etats-Unis.

Ces questions de responsabilité au sein des groupes de société sont d'une extrême complexité, compliquée par la tentative d'élévation du débat au niveau international et, en un sens, au niveau du droit international coutumier, puisqu'il s'agit de rien moins que faire apparaître une responsabilité internationale pour violation des normes universellement admises en matière de droits de l'homme. Si le RSSG souhaite, par l'intermédiaire du projet ISO 26 000, s'engager dans une œuvre de codification et de développement du droit international dépassant les objectifs assignés jusqu'ici à ce genre de norme, il faudrait que le projet signale qu'il existe des régions, ou des systèmes conventionnels, nettement plus exigeants en la matière . Une formule adaptée pourrait être : « sans préjudice des obligations au regard des droits internes ou des obligations internationales des Etats concernés par les activités des entreprises ».

- **Michel DOUCIN**, Ambassadeur chargé de la bioéthique et de la responsabilité sociale des entreprises, Ministère des Affaires étrangères et européennes

Lors du débat qui a eu lieu le jeudi 4 février 2010 à l'AFNOR, auquel ont participé deux juristes associés à ces échanges, la France a pris comme position de s'en tenir à la rédaction actuelle d'ISO 26000, ajoutant l'argument :

"*The French mirror committee underlines the importance of the concept of sphere of influence as a key aspect of ISO 26000. Within the scope of a voluntary approach, the notion of sphere of influence provides the basis for a dynamic attitude to the boundaries of an organisation's responsibility. The notion of sphere of influence helps to prevent externalisation of social responsibility and should therefore be preserved. Within ISO 26000, sphere of influence should not be understood as a legal approach to an organization's*

responsibility. Responsibility within the sphere of influence may be assumed, for example, through the organisation's implementation of due diligence."

- **Marie NIGON**, expert AFNOR ISO 26000, France Nature Environnement, Transparence-International (France)

Si on retrace l'histoire des origines des deux concepts, il apparaît qu'elles ne sont en aucun cas contradictoires mais bien qu'elles se complètent mutuellement et que partant, il serait judicieux de les trouver côte à côte dans la rédaction de ISO 26 000.

J'illustrerai mon propos à la lumière de deux instruments internationaux qui ont semble-t-il fait leurs preuves et qui tiennent compte de l'utilisation de ces deux notions, à savoir les "Principes de l'OCDE relatifs au gouvernement d'entreprise".

La notion de « *due diligence* » (devoir de vigilance) trouve son origine dans les systèmes anglo-saxons du droit des affaires. Cette notion est très largement issue de la jurisprudence nord-américaine dans la définition qu'elle fournit, selon laquelle les dirigeants et les conseils d'administration sont soumis à l'obligation fiduciaire (*fiduciary duties*) envers les actionnaires, l'entreprise, et la société en tant que telle, c'est à dire à l'ensemble des parties prenantes. Cette obligation de fiducie (gérer pour autrui) est complétée par la notion du « *business judgment* », qui représente la marge raisonnable d'appréciation conférée aux dirigeants pour leur permettre de représenter l'intérêt d'une conduite des affaires efficace, pourvu que ces derniers agissent de bonne foi (*bona fide*). Les dirigeants de ces entreprises pourraient donc être tenus pour responsables de la violation de leur obligation de fiducie qui les rend comptable au regard des patrimoines et droits des actionnaires et des autres parties prenantes.

Avec le développement des nouvelles règles de comportement élaborées par les organisations internationales, la notion de « *due diligence* » a été sortie de son contexte jurisprudentiel et s'est considérablement enrichie : dans ces instances, il fait aujourd'hui consensus que, face aux défis planétaires, il n'est plus acceptable qu'une entreprise ignore les principes d'un développement durable et soutenable et qu'elle enfreigne les normes de bonne conduite. Quel que soit le caractère juridique, contraignant ou non, des normes, principes, etc., l'entreprise qui les méconnaît court le risque certain de subir une perte de réputation et d'image, dommageable au regard de sa situation concurrentielle. De plus, elle risque de voir survenir des conflits qui affecteront le succès de ses activités.

Cette réflexion peut parfaitement être adaptée à l'ensemble des organisations, petites et grandes, et trouve sa place dans ISO 26000.

A titre d'illustration, les Principes de gouvernement d'entreprise de l'OCDE (révisés en 2004) sont explicites: selon le Principe VI-A, « les administrateurs doivent agir en toute connaissance de cause, de bonne foi, avec toute la diligence et le soin requis et dans l'intérêt de la société et de ses actionnaires ». Selon le Principe VI6C, « le conseil d'administration doit appliquer les normes éthiques élevées. Il doit prendre en considération les intérêts des parties prenantes ».

Aujourd'hui, face aux défis planétaires, le concept de *"due diligence"* reflète l'articulation entre la bonne gestion de l'entreprise et les normes de bonne conduite sociétale. Il en ressort un élargissement de la responsabilité des dirigeants. Ces derniers ne sont pas censés se substituer aux gouvernements pour faire valoir les droits de l'homme et l'intérêt général. Mais ils ne peuvent pas non plus se retrancher derrière les carences des gouvernements dans ce domaine, sans en quelque sorte, devenir les complices de ces carences. De leur coté, les gouvernements ont le devoir d'encourager la bonne conduite sociétale des entreprises et doivent leur faciliter le respect des normes éthiques. C'est dans cette articulation entre gouvernance publique (les Etats) et gouvernance privée (les organisations) que la notion de *"due diligence"* prend toute sa signification en tant que règle applicable en droit privé et en droit public, et qu'elle devient source et modèle de comportement.

La notion de *"sphere of influence*" définit quant à elle l'étendue et l'intensité de cette obligation de *"due diligence",* élaborée au regard des dirigeants des entreprises multinationales, et ceci en fonction de la règle du partage des ressources et des systèmes de contrôle effectivement exercés (qui est la définition de l'entreprise multinationale retenue par les Principes directeurs de l'OCDE à l'intention des entreprises multinationales). Selon la sphère d'influence, la responsabilité des sociétés s'étend au-delà de leur propre structure pour capter les relations contractuelles et factuelles dans la "chaîne de production" (et inclut par ex. les fournisseurs et les sous-traitants dépendant économiquement de l'entreprise considérée).

Il en ressort de ces réflexions que les concepts de *"due diligence*" et *"sphere of influence",* loin d'être alternatifs ou contradictoires sont bel et bien complémentaires, le premier servant de base à la responsabilité sociétal, le second définissant l'étendue de celle-ci dans la chaîne de production. Les deux notions devront donc trouver leur place côte à côte dans lSO 26000.

- **Hervé ASCENSIO**, Professeur à l'Ecole de droit de la Sorbonne, Université Paris 1 Panthéon-Sorbonne.

Concernant l'explication des trois hypothèses d'utilisation de la notion de complicité, elle attire judicieusement l'attention des entreprises sur le risque encouru au pénal ou au civil (ATCA) dans certains Etats. Là où le texte du rapport du RSSG est troublant, c'est lorsqu'il est dit, aux lignes 1235 et 1236, "*An organization can become aware of, prevent and address risks of complicity by integrating the common features of legal and societal benchmarks into its due diligence processes.*" Je ne suis pas convaincu que les "*due diligences processes*", tels que décrits dans le document, suffisent à couvrir les trois hypothèses de complicité et à se prémunir contre des poursuites dans tous les cas.

Sans doute l'entreprise n'a-t-elle pas vocation à protéger les droits de l'homme à la place des pouvoirs publics, mais il existe aussi des hypothèses de confusion des fonctions (par exemple dans l'usage de services de sécurité privés, question partiellement identifiée au §6.3.5.2). D'où l'utilité de ne pas tout miser sur la "*due diligence*" pour les obligations d'agir, même si l'expression vient utilement préciser les limites de la responsabilité des entreprises dans des cas probablement plus nombreux. Pour autant, la complicité ne peut être diluée dans la "*due diligence*".

La "sphère d'influence", moins précise et plus englobante, semble, en attendant mieux, plus adaptée.

- **Jean-Claude DUPUIS**, Professeur d'Economie à l'Ecole Supérieure de Commerce et de Management (ESDES) de l'Université Catholique de Lyon

Sur le fond, je partage vos conclusions concernant la complémentarité des deux notions.

Je pense cependant que la présentation de la notion de « sphère d'influence » aurait gagnée à être également présentée sous l'angle du droit comptable. Généalogiquement, elle est d'ailleurs issue des pratiques de consolidation comptable. Cela aurait permis éventuellement de saisir l'articulation entre « sphère de contrôle » et sphère d'influence *stricto sensu* ainsi que leurs liens avec le droit de propriété.
Plus largement, la comparaison avec une notion tierce, en l'occurrence celle d' « *accountability* » qui constitue, selon l'ISO 26000, le premier principe de responsabilité social, enrichirait la discussion. En effet cette notion, distincte de celle de « *responsibility* », est centrale dans la discussion ainsi engagée et reste difficilement compréhensible par les européens.

La notion d' « *accountability* » est décrite comme suit dans l'ISO 26 000 :

« 613. *The principle is: an organization should be accountable for its impacts on society and the environment. This principle suggests that an organization should accept appropriate scrutiny and also accept a duty to respond to this scrutiny. Accountability imposes an obligation on management to be answerable to the controlling interests of the organization and on the organization to be answerable to legal authorities with respect to laws and regulations. Accountability also implies that the organization is answerable to those affected by its decisions and activities, as well as to society in general, for the overall impact on society of its decisions and activities.*
Being accountable will have a positive impact on both the organization and society. The degree of accountability may vary, but should always correspond to the amount or extent of authority. Those organizations with ultimate authority are likely to take greater care for the quality of their decisions and, taking the appropriate measures to remedy the wrongdoing and taking action to prevent it from being repeated.
An organization should account for:
- the results of its decisions and activities, including significant consequences, and should prevent repetition where these decisions activities were unintended or unforeseen; and
- the significant impacts of its decisions and activities on society and the environment ».

Table of contents

Appendix

Summary of the exchanges of the informal working group (in French) :