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# **CLIMATE CHANGE :** **A CHALLENGE** **FOR HUMANITY** **12 Legal Proposals for the** **Paris Climate Conference**

**Mireille Delmas-Marty - Luca d'Ambrosio - Caroline Devaux - Kathia Martin-Chenut**



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# **CLIMATE CHANGE : A CHALLENGE FOR HUMANITY**

## **Twelve Legal Proposals for the Paris Climate Conference**

**Mireille Delmas-Marty - Luca d'Ambrosio - Caroline Devaux - Kathia Martin-Chenut**

October 2015

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# PRESENTATION

This booklet aims to feed the public debate and to solicit the reflection of the different actors who are mobilized by and for the COP 21. It is a revised and shorter version of the Part IV of the book *Prendre la responsabilité au sérieux*, edited by Alain Supiot and Mireille Delmas-Marty and published by *Presses Universitaires de France*. This book proceeds from the International Symposium organized at Collège de France on 11 and 12 Juin 2015 by the Chair « *État social et mondialisation : analyse juridique des solidarités* » with the support of the Charles Léopold Mayer Foundation.

The proposals presented in this booklet reflect a collective work. They have been improved by the contributions of academics and practitioners who participated to the workshop organized at Collège de France on 10 Juin 2015. Most of them are part of the Brazilian, American and Chinese « ID » (*internationalisation du droit*) networks animated by *Mireille Delmas-Marty*: *Diane Marie Amann*, Professor at Georgia University (USA) ; *Vivian Curran*, Professor at University of Pittsburgh School of Law (USA) ; *Li Bin*, Professor at Beijing Normal University (Chine) ; *Michel Capron*, Emeritus Professor at Paris VIII University ; *Emmanuel Decaux*, Professor at Panthéon-Assas University ; *William Fletcher*, Judge at the 9th Circuit Appeal Court (USA) ; *Catherine Le Bris*, researcher at CNRS ; *Adrian Macey*, Senior Associate at the Institute for Governance and Policy Studies, Victoria University of Wellington (New Zealand) ; *Sandrine Maljean-Dubois*, Director of the European and International Studies Center (CERIC) of Aix-en-Provence University ; *Laurent Neyret*, Professor at University of Versailles ; *Valérie Pironon*, Professor at University of Nantes ; *Claudia Perrone Moises*, Professor at São Paulo University ; *Camilla Peruso*, Ph.D candidate at São Paulo and Paris V Universities ; *Danielle Rached*, Ph.D at Edinburg University ; *Jean-Baptiste Racine*, Professor at Nice University ; *Alain Supiot*, Professor at Collège de France ; *Leandro Varison*, Ph.D at Paris 1 University ; *Deisy Ventura*, Professor at São Paulo University.

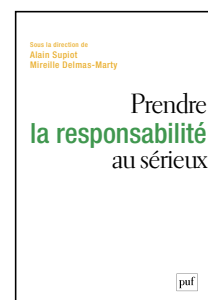
Civil society representatives contributed as well to the common discussion and analysis: *Pierre Calame*, Emeritus President of the Charles Léopold Mayer Foundation ; *Edith Sizoo*, Coordinator of the Alliance for responsible and sustainable societies ; *Nicolas Krausz*, Program coordinator at the Charles Léopold Mayer Foundation ; *Betsan Martin*, Director of the NGO Response ; *Yann Queinnec*, Director of Affectio Mutandi.

The proposals were finally presented at the International Symposium held at Collège de France on 12 juin 2015. They were submitted to representatives of science, corporations, trade unions and civil society, such as *Antoine Frérot*, CEO of Veolia , *Jean Jouzel*, climatologist, *William Bourdon*, President of Sherpa, *Philippe Pochet*, Director of the European Trade Union Institute.

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We would like to express our gratitude to all of them.

*Mireille Delmas-Marty, Luca d'Ambrosio, Caroline Devaux, Kathia Martin-Chenut*



*Prendre la responsabilité au sérieux*  
Sous la direction  
d'Alain Supiot et  
Mireille Delmas-Marty  
Presses Universitaires  
de France, 2015



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# INTRODUCTION

Mireille Delmas-Marty

Climate change could be a challenge for humanity, as it affords an exceptional opportunity to become conscious of our shared destiny and to test our capacity to change the direction of global governance before it is too late.

Pope Francis is right to say that “everything is closely interrelated”, and to call for an “integral ecology”<sup>1</sup>. Everything is unquestionably interrelated, from the climate to humans’ relations with nature, and from nature to economic, social and cultural issues, and even to human relations. With globalization extending from real commodities to “fictive” ones – like money, but also nature, health and employment, and therefore humans themselves<sup>2</sup> –, warning signs are multiplying: financial crises are recurring, with their trail of precariousness and exclusion, while terrorism is globalizing and blurring the notions of war and peace, to the point where the punishment of crime is starting to look more like a global civil war. If we add to this unemployment, health crises and environmental threats, we can realise how human migration has become a real humanitarian disaster, when it is both humanly and economically desirable and in fact inevitable for demographic reasons.

It is therefore particularly important for the Paris Conference on Climate Change (COP 21) in December 2015 to be a success. This is probably the only area where an agreement on a new model of global governance

would be possible. With climate change, the fact that we all belong to the same planet is starting to gain recognition from a growing global civil society, composed by economic actors (transnational corporations), scientific actors (experts) as well as a wide range of other actors such as non-governmental organizations (NGOs), trade unions and even religious communities. These actors do not all have the same capacity for global coordination. By definition, transnational corporations are clearly organized beyond national borders. The same goes for the experts, as shown in particular by the way the Intergovernmental Panel on Climate Change (IPCC) operates, and for NGOs who are gradually turning into “charitable multinationals”. Trade unions, however, are still essentially national actors that are only just starting to tackle international issues on a European scale (this is already the role of European Work Councils) and then an international scale<sup>3</sup>.

Nonetheless, this growing awareness, which exemplifies “Global citizenship”, could exert pressure on States to reach an agreement marking a clear change of direction. As public actors, States are still essentially concerned with defending national interests. Local authorities, on the other hand, face a different situation, particularly large cities that have started to coordinate at international level, and even States seem to be evolving. Political decision makers are starting to lend importance to climate issues, whether they belong to more threatened areas like islands, regions like Europe that already demonstrate awareness, or even continent-countries like the United States and China that jealously guard their sovereignty.

1. Pope Francis, *Praise Be to You, Encyclical Letter Laudato si* on Care for Our Common Home, Libreria Editrice Vaticana 2015, p. 93

2. See Alain Supiot’s introduction “Face à l’insoutenable : les ressources du droit de la responsabilité” in A. Supiot and M. Delmas-Marty (eds.), *Prendre la responsabilité au sérieux*, Presses Universitaires de France, p. 9 ss. .

3. See in particular Philippe Pochet’s comments in A. Supiot and M. Delmas-Marty, *Prendre la responsabilité au sérieux*, op. cit., p. 383 ss.





Photo CC: William Chevalier

This conjunction of converging factors is exceptional, which is why the failure of the Paris Conference for Climate Change would foreshadow lasting chaos. It seems unlikely that such convergence could be achieved in other globalization-sensitive areas such as terrorism or migration, where fear tends instead to foster sovereignism and strategies of control and exclusion, following an authoritarian model. Meanwhile, financial, social and health crises risk consolidating a governance model informed more by the imperialism of the powerful (States or Transnational corporations) than by a democratic vision of the world. Yet a true global community cannot grow in a spirit of securitization fuelled by fear of the other, nor in a spirit of competition driven solely by profit. It can thrive only in a spirit of freedom, cooperation and solidarity. In this sense, an ambitious agreement on climate change would contribute not only to protecting nature and the ecosystem, but also more generally to preparing the future of humankind.

Using climate change as a mirror of most issues surrounding accountability law in the context of globalization, we have drawn up twelve proposals, based on two types of strategies: innovation strategies for climate change, and more generally adaptation strategies to economic and financial globalization.

**1. In terms of climate change,** it is particularly clear that while humans have always transformed their environment, their action is now decisive. The IPCC is increasingly clearly highlighting the fact that the impact of human activity on the climate is unprecedented,

in both its pace and its magnitude<sup>4</sup>. In fact, the “great acceleration” of this anthropic pressure on the planet is said to be a sign of the beginning of the Anthropocene era<sup>5</sup>. This is hardly surprising. Just think of demographic explosion: it took millions of years for humankind to appear, ten thousand years for the modern world to form and for humankind to reach one billion human beings (in 1750) and another 200 years to reach three billion (in 1950), but only 60 years to reach seven billion (from 2010), and probably over 11 billion at the end of the century<sup>6</sup>.

Caught in an unavoidable movement of “globalization” (in the strict sense of the word, for the Earth’s spherical shape prevents humans’ unlimited expansion), we are forced to organize the protection of our habitat, as we cannot rule out the possibility of a major collapse of the planet. Given the urgency, why are responses so slow?

Some attribute this to the United Nations’ universalist model. Since the first Earth Summit (Rio 1992) and the texts that followed (the 1992 Convention on Climate Change and the 1997 Kyoto Protocol), the UN has been striving for a universal agreement (which would apply to all States based on common objectives) binding on States (with a schedule, an evaluation system and perhaps even a sanction mechanism). To achieve this, the European

4. Voir notamment les Conclusions du cinquième Rapport d'évaluation du GIEC présentées en novembre 2014.

5. W. Stephen & al., “The Trajectory of the Anthropocene. The Great Acceleration”, *The Anthropocene Review*, 2015, p. 1-18.

6. Voir Conseil économique et social Onu, *World population Prospects – The 2015 Revision*.

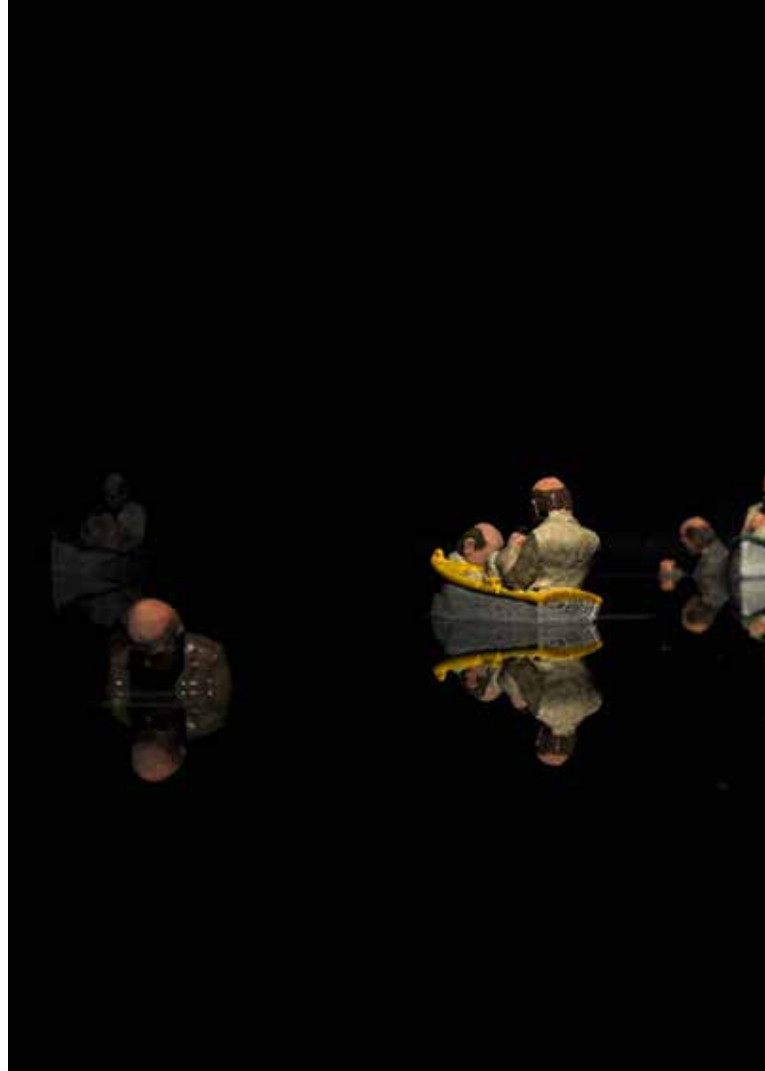
Union and most developing countries advocate a top-down process, also supported by NGOs and scientists. This universalist model, seemingly rational, is nevertheless criticized on two counts. First, some argue that it fails to sufficiently take into account differences between human groups, both in space (climate risks are not the same in the North, in the South and for island territories) and in time, as it is necessary to take into account the past (industrialized countries' "ecological debt"), the present (emerging countries catching up and economic and social difficulties in developing countries) and the future (preserving an inhabitable Earth for future generations). Moreover, the universalist model seems to ignore the reality of power dynamics and the strength of resistance. At the Copenhagen Summit in 2009, the United States and large emerging countries, spearheaded by China and without Europe, directly negotiated a minimal agreement: neither universal (it relies on commitments defined by each State based on their own criteria), nor binding (devoid of control procedures).

Yet falling back on the old *sovereignist model* would hardly be more realistic. Even for major powers, a State alone is powerless against the global reach of climate risk. As for the so-called "*liberal*" model, it relies on the power of private actors, and could thus make multinationals the dominant form of organization<sup>7</sup>: they would rule the world from Davos and their experts would become the true drivers of global governance. Yet it is hard to imagine how market-based horizontal self-regulation alone could ensure the legitimacy and therefore the effectiveness of such governance, with NGOs and other whistleblowers as the only counter-powers. It is time to let go of this "magical conception of the market, which would suggest that problems can be solved simply by an increase in the profits of companies or individuals"<sup>8</sup>.

There are great expectations regarding the Paris Conference, for the issue of climate change probably offers an opportunity to go further and to escape this dead-end, thanks to the exceptional convergence of various actors on the international stage. Thus the practices implemented in relation to climate issues could act as an avant-garde for a future global governance. Without claiming that legal systems alone will be enough to tackle climate change, we think that they can contribute to a real change of direction in global governance. Provided that we are able to elaborate the reference models through some kind of hybridization.

7. J.-P. Robé, *Le Temps du monde de l'entreprise*, Dalloz, 2015. See also S. George, *Les usurpateurs. Comment les entreprises transnationales prennent le pouvoir*, Seuil, 2014.

8. Pape François, *Loué sois-tu*, op. cit.



As regards *States' responsibility*, we call for overcoming the opposition between universalism and sovereignism to embrace a hybrid model, which consists in operationalizing the principle of "common but differentiated responsibilities". It sets out a more flexible universalism, combining a common climate policy and differentiated commitments for the different States. As for *Transnational corporations accountability*, we propose framing the liberal model so as to ensure the enforcement of the common goals against them under a controlling body; in other words, setting up frameworks to articulate soft law and hard law, in line with corporate social responsibility (CSR) and beyond.

We are however fully aware that the success of climate policy will largely depend on the ability to rethink the economic model and to revise some of the practices linked to economic and financial globalization. This leads to the adaptation strategy underlining our second set of proposals.

**2. Economic and financial globalization**, has brought to the fore the contradiction between the concern shown for climate issues, and fierce economic competition that entails rampant exploitation of fossil fuel resources. This can be seen both with States, ever more attached to their national sovereignty, and with companies, guided by the



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objective of short-term maximization of their profits. This schizophrenia probably reflects a deeper structural contradiction – some speak of “schisms of reality” – between democratic societies comprised of individuals driven by a desire for individual and more often material well-being, and ecosystems, where the issues are essentially global. Rather than precluding older models (self-regulated liberal and independent sovereignist), the search for solutions to climate change should encourage their adaptation to the protection of global public goods. We first propose to adapt the liberal model by supporting the broadening of shareholder- or capital-based company governance to include corporate social responsibility (CSR), which explicitly adds the protection of global interests (Commons) to private interest. We then advocate changing the sovereignist model to shift from a “solitary” conception of State sovereignty, centred on the protection of national interests, to a “solidary” sovereignty that includes the protection of the Commons.

Ultimately, while focusing our proposals on States’ and Corporations’ responsibilities, we are conscious of the

pitfalls that have been brought to light through debate, with several sometimes contradictory criticisms. With regard to corporations, some consider that our proposals to increase their accountability, particularly in relation to climate issues, could dissuade them from putting in a large part of the effort required. Others, on the contrary, fear that by taking up such responsibility, transnational corporations would become the main guardians of the global public goods. Such a transfer of power would challenge democracy and legitimacy. As for States, even fully legitimated, some commentators are concerned that we would be poorly realistic in trusting them without any guarantee of effectiveness.

It is true that the right balance between State’s and Corporations’ responsibilities is extremely difficult to achieve. Moreover, it would be still necessary to ensure that global governance does not lead to imperialism. In order to be sure of avoiding these risks, our proposals need to be understood in light of two observations. First, it is necessary to consider the twofold meaning of the French term “*responsabilité*”: responsibility and accountability. Moreover, civil society should be given its rightful place within surveillance and control proceedings either participating to them or triggering them.

9. S. Aykut and A. Dahan, *Gouverner le climat ?*, Paris, Presses de Sciences Po, 2015; see also P. Kemp and L. W. Nielsen, *The Barriers to Climate Awareness*, Danish Ministry for Climate and Energy, 2009.

**PART I**

**PROPOSALS  
ON CLIMATE  
CHANGE**

# 1. Implementing the principle of common but differentiated responsibilities

Mireille Delmas-Marty

The Principle of Common But Differentiated Responsibilities (PCDR) is one of the key elements to the success of the future Paris agreement. Clearly, when it comes to climate issues – and probably many other areas of global governance – it would be neither *fair*, nor *acceptable*, nor *sustainable* to impose the same objectives on all Countries of the World without taking into consideration their history and their present situation. There would also be little point in establishing commitments that are not binding on all States Parties. That is why it is necessary to implement the PCDR Principle for the post-Kyoto period by articulating it to common goals, to comparable national contributions and to differentiation criteria.

## 1 – Broadening Common Goals

**Background** – The protection of future generations and more generally of the planet’s ecosystem, calls for a principle of anticipation to inform the notion of sustainable development. Mitigating climate change has become a global goal. In particular, this quantitative goal involves gradually reducing emissions to reach “carbon neutrality”. The goal of limiting average global warming to 2°C compared to the preindustrial era was adopted in 2009 (Copenhagen Summit), and then integrated into climate agreements (2010 Cancún Conference). But the 2°C threshold is merely an estimate, and societies’ adaptation to climate change is also a crucial objective,



even if it is harder to implement because it is qualitative and partly depends on national practices. The geographic and economic variables of adaptation also need to be taken into account. At the 2014 Lima Conference (COP 20), developed countries made significant concessions on this point, as they decided that this Paris agreement would treat mitigation and adaptation in a “balanced manner”. The decision also committed developed countries to providing and mobilizing greater financial support for ambitious policies.

**Proposal n°1 – *Considering the adaptation of societies to climate change as a common goal involving the responsibility of all the States Parties.***

States’ efforts to achieve common goals need however to be evaluated, which means that national contributions are determined according to a common framework.

## 2 – Establishing a Common Framework for National Contributions

**Background** – To ensure that all Parties embrace an ambitious and inclusive approach to the process of negotiating an agreement on the post-2020 period, the term “commitment” has been replaced with “contribution”. Intended Nationally Determined Contributions (INDCs) are the “vehicle” through which States will convey their choices for the pos-2020 period. The process of “national” determination respects the sovereignties most affected by the issue of climate change, which has afforded some trust between States.

In December 2013, the Warsaw Conference (COP 19) asked the Lima Conference to specify the information that States should provide in their respective contributions. This was crucial: the more the information is structured, the more national contributions will be comparable, and potentially usable for an aggregated evaluation against the 2°C objective. But the draft annex, which had been

negotiated for several months, was dropped in Lima to adopt instead a very vague document, stipulating a few elements for reference purposes only (“reference year”; “timeframe and/or implementation period”; etc.). Admittedly, States must explain how their contributions are fair and ambitious in view of the national context, and how they contribute to reaching the common objectives. But without a common framework it will be difficult to measure the overall level of ambition and potentially to drive States to raise their reduction objectives.

**Proposal n°2** – *Establishing a common framework for national contributions defining the scope (mitigation and adaptation), the level of ambition and the methodological procedures to record emissions (schedule, reference year, etc.).*

### 3 – Defining Criteria for Differentiation

**Background** – The binary division of the world envisaged in the Kyoto Protocol (industrialized/non-industrialized countries), which has in fact been dropped, no longer reflects reality. In terms of wealth produced, emerging countries (BRICS) are catching up with industrialized countries, while developing countries remain far behind yet account for the bulk of the demographic leap. The situation moreover remains extremely fluid. The Paris agreement will therefore have to be flexible enough to capture this complexity and sufficiently robust to adapt to its developments. To this end, an in-depth analysis of national contributions should provide quite a detailed and precise inventory of the criteria chosen by States. Without claiming that our proposals can be a substitute for this inventory, we present two principles of differentiation that should limit anticipation in time and space.

Differentiation in time is retrospective, and relates to the ecological debt that present generations have inherited from previous ones. This principle of “historicization” informs the notion of fair differentiation and requires that industrialized States effectively finance the Green Climate Fund.

In space, present generations have a certain right to development that needs to be recognized, and which

varies depending on the national context. Not only economic (notion of “acceptable economic cost”), but also social and cultural (fighting forms of exclusion), geographic (certain countries’ vulnerability) and even technological (danger presented by certain practices). This “contextualization” principle, which highlights the evolving nature of differentiation, informs the notion of acceptable differentiation.

“Historicizing” and “contextualizing” States’ commitments does not however mean giving up on all common responsibility. As with human rights, it means leaving room for a “national margin of appreciation”.

**Proposal n°3** – *Defining two principles to ensure that differentiation is both fair with regard to the “ecological” debt inherited from the past (historicization principle) and acceptable in light of each State’s current national context (contextualization principle). These principles should determine the national margin in States’ commitments to common objectives for the future.*

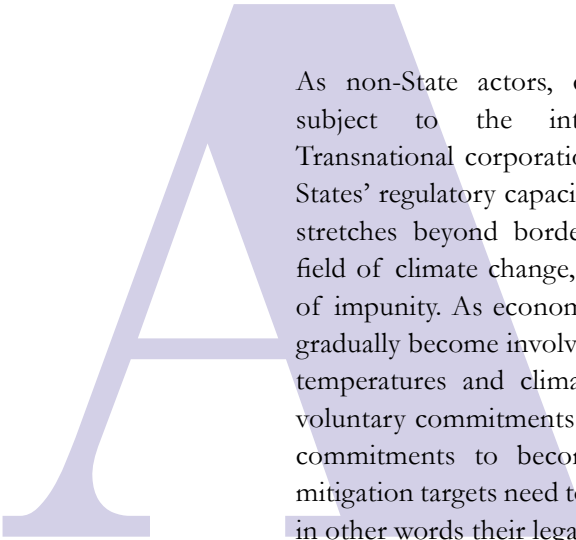
If the Paris agreement is built on common goals and if national contributions, based on a common framework, are comparable and can be evaluated using the differentiation criteria set out above, States’ commitment could become binding. This is a necessary condition to ensure the future agreement’s effectiveness.

In order to achieve this objective, the agreement will also have to provide for an efficient control mechanism. This could take several forms. The simplest would consist in adopting the Kyoto compliance mechanism. However the implementation of this mechanism had perverse effects (particularly Canada’s withdrawal). Hence the value of proposals combining conflict resolution mechanisms, to make States accountable, and informal vigilance mechanisms based on the compliance model intended for companies in the OECD Guiding Principles<sup>1</sup>.

1. S. Maljean-Dubois, “Les métamorphoses de la responsabilité des États dans le champ de l’environnement”, in C. Bréchnignac, G. de Broglie and M. Delmas-Marty (eds), *L’Environnement et ses métamorphoses*, Hermann, forthcoming, 2015. .

## 2. Enforcing Mitigation Targets against Corporations

Luca d'Ambrosio



As non-State actors, corporations are not directly subject to the international climate regime. Transnational corporations, in particular, transcend all States' regulatory capacities; by definition, their activity stretches beyond borders. The result is that, in the field of climate change, corporations enjoy some kind of impunity. As economic actors they have admittedly gradually become involved in the struggle against rising temperatures and climate change, especially through voluntary commitments (self-regulation). But for these commitments to become effective, greenhouse gas mitigation targets need to be opposable to corporations, in other words their legal obligation to implement them needs to be recognized. It is furthermore necessary to put in place a third-party organization to monitor and control this implementation and possibly to sanction any breaches – in other words, to ensure the justiciability of greenhouse gas emission mitigation targets.

#### 4 – Ensuring Follow-up and Control of Self-regulation

**Background** – Corporations' climate commitments materialize essentially through self-regulation. In other words, corporations determine themselves the greenhouse gas emission mitigation targets they wish to reach. This is the case of corporate social responsibility (CSR) norms, technical standards, carbon offsetting and industry agreements, such as the agreements signed by airlines and international maritime transport companies. Environmental agreements are another system used by corporations to aim greenhouse gas emission mitigation. Since they are negotiated “under the threat of legal or



regulatory action”, such agreements fall somewhere between self-regulation and co-regulation<sup>1</sup>.

These initiatives certainly deserve attention, as they can overcome deadlocks in international climate governance whilst revealing the potentialities of its “multi-actor” dimension. Moreover, with regards to transnational corporations, they can encourage other corporations to follow suit. However the proliferation of self-regulation could lead to a real privatization of norms; it can prove to be largely inefficient, insofar as corporations themselves set the benchmarks and modalities of verification.

**Proposal n° 4 – Monitoring and controlling the mitigation targets voluntarily adopted by corporations. This aim can be achieved either by transposing to climate matters National Contact Points receiving complaints from civil society actors (NGOs, trade unions, etc.). Or by extending to the field of climate change the “OECD guidelines for multinational enterprises”.**

However, the OECD guidelines practice shows that the consequences of reporting a breach are limited, even if the impact on corporations’ reputation should not be underestimated. Hence, the need to articulate international self-regulation with national or regional regulation on greenhouse gas emission mitigation targets. In other words, to combine incentive and deterrent measures designed to reduce greenhouse gas emissions.

## 5 – Regulating Mitigation Targets through a combination of incentive and deterrent measures

**Background** – The regulation of greenhouse gas emission mitigation targets involves either capping emissions or setting a sufficiently deterrent carbon cost to stop corporations from using the atmosphere as a “greenhouse gas dumping ground”<sup>2</sup>.

The option of capping emissions was chosen by the European Union in 2011 to reduce CO<sub>2</sub> emissions from light vehicles. It was also chosen by the Obama

1. Sandrine Maljean-Dubois and Apolline Roger (eds.), *L'Implication des entreprises dans les politiques climatiques. Entre corégulation et autorégulation*, Paris, La Documentation Française, 2011, pp. 11-12.

2. See Antoine Frérot’s comments, in A. Supiot and M. Delmas-Marty (eds.), *Prendre la responsabilité au sérieux*, op. cit.

Administration in 2015 to reduce CO<sub>2</sub> emissions from coal plants. However these are exceptions; economic orthodoxy is more inclined towards setting a carbon price. The question then is what mechanism could be used to determine a global carbon price likely to efficiently integrate the cost of greenhouse gas emissions into corporations’ calculations. Given the difficulties surrounding the institution of a global CO<sub>2</sub> emission trading system<sup>3</sup>, it seems possible to provide for a “tax”, based on a twofold principle of “polluters pay” and “depolluters are supported”<sup>4</sup>. Set at a significant amount, this carbon tax should serve to offset the benefits that emitting companies enjoy and, through the Green Climate Fund, it could contribute to financing a “decarbonized” production system<sup>5</sup>. Furthermore, short of securing a universal agreement, this tax could also be introduced at regional level – for example on a European scale – provided that a parallel tax on products imported by non-signatory countries is also applied<sup>6</sup>.

Financial incentives to reduce greenhouse gas emissions may however not be sufficiently deterrent on their own. They would probably need supporting measures to penalize companies in breach of the agreements and, where relevant, to charge them for the damaging effects that climate change is likely to have on the balance of ecosystems and on the life of entire populations. In civil law, for example, the notion of “market share liability” would allow for companies’ reparations for climate damage to be made proportional to their market share. In criminal law, the introduction of ecocide as an international crime would make it possible to punish those responsible for such severe damage<sup>7</sup>.

3. See Roger Guesnerie, “Le ‘dictateur bienveillant’ et le climat”, *Lemonde.fr*, 23.6.2015. Furthermore, given failures of the European quota exchange market, which contributed to the carbon price crash, there is doubt as to whether this type of mechanism could really incentivize corporations to reduce their greenhouse gas emissions.

4. Antoine Frérot, in A. Supiot and M. Delmas-Marty (eds.), *Prendre la responsabilité au sérieux*, op. cit. .

5. Janis Sarra suggests making the carbon tax partially retroactive. See the contribution “Assumer notre responsabilité financière en matière de changement climatique”, in A. Supiot and M. Delmas-Marty (eds.), *Prendre la responsabilité au sérieux*, op. cit.

6. A. Frérot, op. cit. Voir aussi l’Appel d’économistes sous le titre « Pour un accord climatique amiteux et crédible à Paris ».

7. For a list of the acts in question, see L. Neyret (eds.), *Des écocrimmes à l’écocide*, Bruylant, 2015.

**Proposition n°5** – *Supporting economic incentives by measures to penalize corporations that do not uphold mitigation targets. This should involve sufficiently dissuasive financial penalties. Moreover, accountability mechanisms should be tailored to the diffuse and transnational nature of climate damage.*

Clearly, this perspective – which would lead to introducing a real corporate “climate liability” – is highly dependent on the will of States. This raises the question of whether or not corporation climate liability could be accelerated by mobilizing human rights law and in particular the theory of “positive obligations”.

## 6 – Recognizing the Impact of Climate Change on Human Rights

**Background** – As repeatedly explained by the United Nations High Commissioner for Human Rights, climate change can have direct consequences on the effective enjoyment of fundamental rights (for example the threat that extreme weather phenomena could present to the right to life). But it can also have indirect or gradual consequences (for example overloaded health systems and situations of vulnerability resulting from climate-change-induced migration).

Yet in pursuance of the “environmental jurisprudence” developed by human rights courts (European and Inter-American Courts), States have the positive obligation to adopt all necessary measures likely to prevent the violation of the rights set out in the Conventions (right to life, right to respect for private and family life, right to an effective remedy). This applies whether the violation



results from the action of public actors or – and this is of interest for our proposal – private actors. Thus the “horizontal” effect of human rights could indirectly contribute to reinforcing corporate accountability.

When it comes to applying these principles to climate issues, however, international human rights protection bodies are highly cautious. In 2006 the Inter-American Commission dismissed a first petition against the United States by the *Inuit Circumpolar Conference*. In 2013, a new complaint was submitted to the Commission, this time by the *Arctic Athabaskan Council*, which filed a new petition against Canada due to the acceleration of Arctic icecap melting. This phenomenon was claimed to translate into the violation of multiple rights of indigenous peoples, such as the right to transmit their own culture to future generations, access to traditional food, the right to property and the right to health.



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Choosing to link climate change to human rights could also trigger action by national courts. In 2005, for example, the Federal Supreme Court of Nigeria prohibited the oil company *Royal Dutch Shell* from practising “gas flaring”. According to the Nigerian judges, combusting the gas produced through oil extraction causes greenhouse gas emissions and other discharges into the atmosphere, which are likely to infringe on local populations’ right to life and to dignity. In 2015, a Court in The Hague highlighted the State’s obligation to adopt the necessary measures to protect its citizens from the imminent danger caused by climate change, now established by the IPCC.

**Proposal n° 6** – *Recognizing States’ positive obligation to let corporations respect the fundamental rights of individuals and indigenous peoples that may be violated by climate change.*

**PART 2**

**PROPOSALS  
ON ECONOMIC  
AND FINANCIAL  
GLOBALISATION**

# 3. Enhancing Transnational Corporations accountability according to economic power and «societal» impact

Kathia Martin-Chenut

The multiplication of the actors of globalization calls for a redistribution of responsibilities; yet it often leads to the dilution of those responsibilities. Remedying corporate irresponsibility involves the modulation of corporations' responsibilities according to their "societal" impact. It means that corporations' responsibilities should be based on the impact of their activities' on the social, health and environmental fields and, more generally, on the field of human rights. This requires the reinforcement of transnational corporations' obligations relating to fundamental rights, through the adoption of a binding international instrument to complement existing soft law international standards. Parent and principal companies' accountability also needs to be extended. Finally, the mission and the notion of corporation should be revised to take societal issues into consideration.

## 7 – Supporting the Adoption of a Legally Binding Instrument around Fundamental Rights

**Background** – Back in the 1970s, corporations' involvement in serious human rights violations in countries like Chili and South Africa prompted a few initiatives at the United Nations (Working Group to establish a Code of Conduct on Transnational Corporations, and Special Rapporteur on the question of "Adverse consequences for the enjoyment of human rights of the political, economic and other forms of assistance given to colonial and racist regimes in Southern Africa"), followed by the OECD (1976 OECD Guidelines for Multinational Enterprises) and the ILO (1977 Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy). But no legally binding document

was adopted. Instead, the United Nations' response until now has leaned towards "soft law", to develop "corporate social responsibility" (CSR), particularly with the adoption of the United Nations Global Compact in 2000, and the Human Rights Council's adoption of the Guiding Principles on Business and Human Rights in 2011.

Despite the failure of the Draft Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises, drawn up in 2003 by the former UN Sub-Commission on the Promotion and Protection of Human Rights, on 25 June 2014 the UN Human Rights Council adopted a resolution to create an intergovernmental working group to develop a legally binding international instrument. Without any doubt, this will be a complex and arduous process, given the conditions of the adoption of the Resolution in 2014. However, active and constructive participation in the work by States, particularly France, could contribute to a favourable outcome and greater corporate responsibility. Given the lack of competent international jurisdiction to judge corporations, and the obstacles often faced by domestic courts, particular attention should be paid to the control mechanisms of this future instrument (quasi-jurisdictional or jurisdictional).

**Proposal n°7 – Supporting the Human Rights Council's initiative to regulate transnational corporations' activities under international human rights law.**

This initiative should not however hinder the development of CSR soft law or of self-regulation promoting best practices. On the contrary, these different initiatives complement one another and can foster a culture of responsibility – provided, that is, that those who are accountable can be identified.

## **8 – Reinforcing parent and principal companies' responsibility**

**Background** – Transnational corporations reticular organization facilitates irresponsibility. It is therefore



necessary to be able to get past the shield of the legal personality, particularly by drawing on notions from international CSR standards, such as the notion of sphere of influence or due diligence. This would make actors exerting power at any level answerable for the impacts of their decisions.

Duty of diligence or of vigilance is enshrined in Principle no. 17 of the UN Guiding Principles. This non-binding document, which spreads responsibility across three main areas, "protect, respect and remedy", primarily requires corporations to refrain from violating human rights. But positive obligations derive from this negative obligation, particularly due diligence: the duty to prevent and avoid the negative impacts of activities that may violate human rights, including those linked to environmental damage.

Despite the criticisms levelled at the UN Guiding Principles, their adoption process had the merit of keeping the theme of corporate responsibility on the UN



agenda for about six years and of raising awareness in many institutions, including outside the United Nations. For instance, in addition to adopting the ISO 26000, the OECD inserted a section specifically on human rights into its Guidelines for Multinational Enterprises; the International Finance Corporation (IFC) integrated references to human rights in its Performance Standards; and at European level, both the Council of Europe (work of the Steering Committee for Human Rights) and the European Union adhered to the UN principles and are working towards their application in the respective member States. While interactions between different normative spaces have ultimately afforded these principles a certain normative power, their application remains uncertain.

Strengthening responsibility and accountability therefore requires either developments in jurisprudence (by establishing novel hierarchical relationships), or legal reforms to translate international standards into domestic

law and thereby “harden” CSR. This was namely the case of the system initiated in France at the end of 2013, with a private bill on parent and principal companies’ duty of vigilance. This first document (subsequently supplemented with three other private bills along the same lines) was rejected by the *Commission des lois* on 21 January for economic reasons, and was replaced with a new, admittedly more “toned down” bill. If this bill is passed, France could however find itself at the head of a European movement for multinationals’ obligation of vigilance, just as it was for the disclosure of non-financial information.

**Proposition n°8** – *Establishing parent and principal companies’ duty of vigilance across the whole value chain. This objective could be reached by articulating self-regulation with regulation, and soft law with hard law, from different normative spaces (global, regional and national). It also involves ensuring victims’ access to justice (individually and especially collectively).*



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## 9 – Integrating “Societal” issues into the Corporate Purpose

**Background** – To offset the perverse effects of financial capitalism and of the economic argument that a corporation’s purpose is profit maximization, this proposal revises the mission and the very notion of the corporation, particularly by integrating societal issues into the corporate purpose or even the corporate interest.

This could materialize in different ways, such as the “société à objet social étendu” conceptualized at the Collège des Bernardins<sup>1</sup>. It could involve either legal reforms (for example revisiting the notion of commercial corporation), or developments in jurisprudence. Draft proposals to extend the definition of the corporate

interest to encompass societal issues have been drawn up by the NGO Sherpa in France, for example, and in the Attali Report on the “positive economy”. They were integrated into a first version of the draft bill “for growth, activity and equal economic opportunity” (the “Macron bill”), but were ultimately excluded. In other parts of the world, particularly in Brazil, the evolving nature of case precedence has led to the assertion, for example, that the “social function of the corporation” derives from the social function of property and of the contract. This does of course require steering clear of a rhetorical masquerade, which ultimately would only encourage the State to quit.

It goes without saying that private economic actors should never be given greater responsibilities at the expense of the responsibilities of States, which bear primary responsibility for the protection of human rights.

1. This work proposes a new form of corporation in French law (*société à objet social étendu*, SOSE), to introduce a concrete link between the corporation’s mission and governance, drawing inspiration from a US model (the Benefit Corporation and the Flexible Purpose Corporation). See B. Roger (ed.), *Entreprise : formes de la propriété et responsabilités sociales*, Paris, Collège des Bernardins/Lethielleux, 2012; J.-Ph Robé, “Pour en finir avec Milton Friedman”, in A. Lyon-Caen and Q. Urban (ed.), *La Crise de l’entreprise et de sa représentation*, Paris, Dalloz, 2012, pp. 11-32; O. Favereau, “La fin de l’entreprise privée”, in A. Supiot (ed.), *L’Entreprise dans un monde sans frontières*, op. cit., pp. 305-320; B. Segrestin, B. Roger, S. Vernac (ed.), *L’Entreprise : point aveugle du savoir*, Colloque de Cerisy, Éditions Sciences humaines, 2014.

**Proposition n°9 – Integrating societal issues into corporate purpose/interest.** *This objective could be reached through legal reform, such as that envisaged by Article 1833 of the Civil Code in France. It could also be attained through case precedent, particularly by recognizing the corporation’s social function.*



# 4. integrating social and environmental protection into international economic law

Caroline Devaux

International economic law has remained largely autonomous of social and environmental concerns, which it treats as externalities, either interpreting them in utilitarian terms or ignoring them. Yet these concerns are not necessarily incompatible with international trade. The purpose of foreign investments, just like trade, was originally to give poor countries the means to develop. In fact, this development objective is written into most trade treaty preambles. However international economic law gradually withdrew over time to the point of appearing as an isolated discipline, focused solely on the pursuit of free trade.

Developing international social policy means putting an end to the paradoxical, if not schizophrenic behaviour of States, which have universally consecrated human rights while putting off transposing them into their trade relations. Repositioning States in this way involves reintegrating social and environmental concerns both into the rules of the World Trade Organization (WTO) and into international foreign investment law, two crucial disciplines for economic actors, though grounded on different rationales.

## 10 – Reinforcing the “Societal” Clause in International Trade Agreements

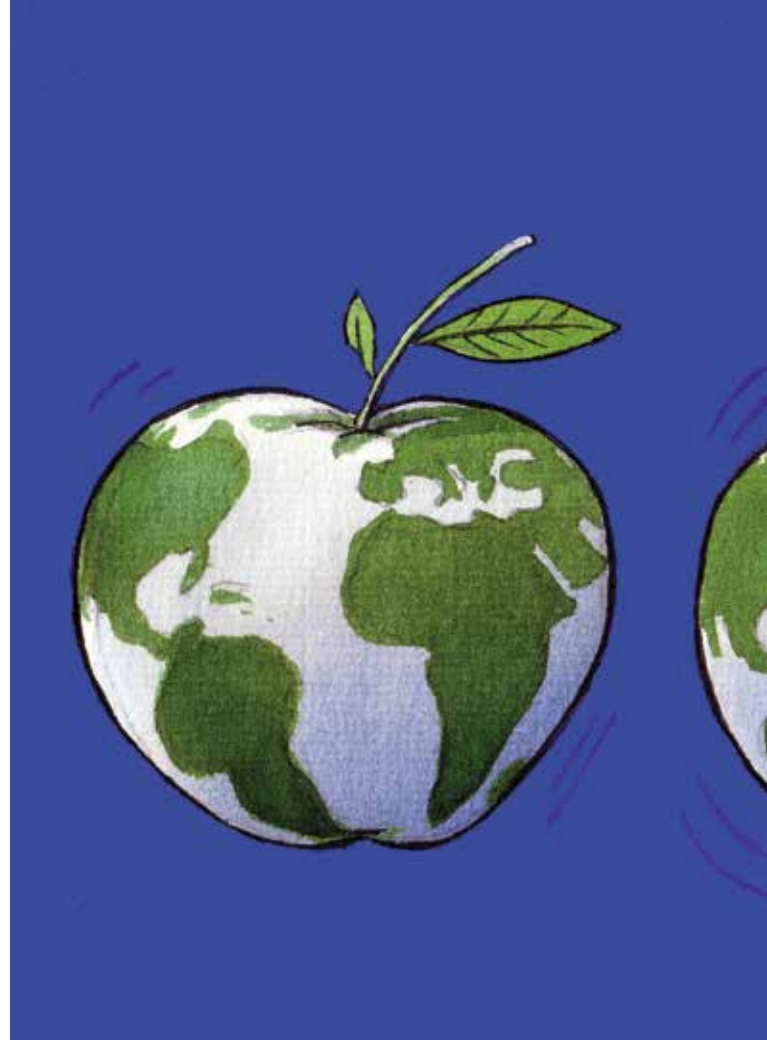
**Background** - Integrating social and environmental concerns into international economic law can be possible only if WTO law and international human rights law enjoy mutual recognition. The WTO must recognize the international human rights commitments made by States. This does not mean that it should now rule on social and environmental issues through its conflict resolution system. Instead, WTO objectives need to be consistent with social and environmental concerns, which are currently no more than exceptions to the free market and are restrictively interpreted by WTO case law.

**Proposition n°10** – *Including into all components of WTO the “societal” clause providing “legal bridges” between disciplines. This clause would enshrine social and environmental concerns as legitimate interests protected by the WTO.*

## 11 – Replacing the State at the heart of Trade conflict resolution system

**Background** - Reintegrating social and environmental concerns into international economic law also involves re-centring investment conflict resolution around States. Arbitration between States and investors currently does not sufficiently take into account the protection of social and environmental concerns, which are restrictively interpreted by arbitration courts. For example, in a 2003 Tecmed case, in order to determine whether the Mexican authorities’ refusal to renew a landfill’s operating license for environmental reasons constituted an indirect expropriation, the arbitration court declared that the host government’s intention was less important than the effects of its measure on foreign investment. The court therefore ruled that the Mexican authorities’ decision constituted an excessive cost for the investor, and sentenced Mexico to pay Tecmed over 5.5 million US dollars in compensation.

More recently, in litigation involving the multinationals Suez and Vivendi Universal in Argentina, the arbitral tribunal was asked to rule explicitly on the links between international investment law and human rights, particularly



the right to water. The Argentinian government had cancelled a water service privatization contract signed with Suez, particularly due to the poor quality of the water distributed to local populations. The arbitration court ruled that the Argentinian government had to honour its obligations both to investors and relating to human rights, and should therefore have found a means of reconciling these two sets of obligations. It consequently sentenced Argentina to paying the applicant 380 million Euros for cancelling the contract (decision of 9 April 2015). In this context, a wave of renationalization of public services, particularly water services, is currently underway. In Jakarta for example, where Suez has had a water service privatization contract since 1997, the constitutional court has just ruled the privatization of water unconstitutional, thus leading to the immediate cancellation of the contract with Suez, without compensation<sup>1</sup>.

Although investment arbitration generally prioritizes investors, we should nevertheless mention the new Brazilian model’s innovative measures with an investment treaty which, in case of conflict, provides for arbitration between States only (Brazil-Mozambique Agreement

1. Indonesian constitutional court, decision of 20 February 2015 repealing the law no. 7/2004 on water resources. Also see the decision of the Central Jakarta District Court on 24 March 2015, which revokes the water privatization contract signed with Suez.



Dessin © Selçuk Demirel

signed on 30 March, Brazil-Angola Agreement signed on 1st April, and Brazil-Mexico Agreement signed on 26 May 2015, on investment cooperation and facilitation). Without going so far, improvements could be made to take the general interest into account more adequately.

**Proposal n°11** – *Encouraging in the field of foreign investment the Host States to refer all human rights breaches by foreign investors to the arbitration courts, so as to reduce or even strip investors of their right to protection. States should also increase domestic courts' control in cases of request for recognition and execution of arbitration sentences on their territory, even if this is contrary to the needs of effective arbitration. Finally, the State of origin, which urged its nationals to invest abroad, should be encouraged to try them in its own domestic courts in case of human rights violation on the host State's territory (this procedure could in turn serve as a means of defence for the host State before the arbitration court).*

## 12 – Designing Monitoring and Control Mechanisms for Trade Agreements

**Background** – Lastly, reintegrating social and environmental concerns into trade agreements involves

setting up control mechanisms to monitor these agreements' effects on local populations. The control mechanisms designed in the framework of the free trade agreements between Canada, the United States and Mexico (Commission for Environmental Cooperation in the framework of the North American Agreement on Environmental Cooperation, in effect since 1994) and of the World Bank agreements (Inspection Panel created in 1993) were the first steps towards such reintegration. They provide constant monitoring of the trade agreements' societal impact and offer civil society the means to participate in controlling each Member State's compliance with its social and environmental obligations. The EU-Columbia/Peru free trade agreement also provides for a sub-committee on trade and sustainable development to implement the agreement's sustainable development objectives (Article 280), and for national points of contact (Article 281) and dialogue with civil society (Article 282). But considerable progress is still needed.

**Proposition n°12** – *Providing for monitoring mechanisms in trade agreements in partnership with civil society. These mechanisms should guarantee the control of trade agreements on local populations, without replacing a litigation procedure for social and environmental conflict resolution.*