

ECONOMIC GLOBALISATION
AND HUMAN RIGHTS

Edited by

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CAMBRIDGE
UNIVERSITY PRESS

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CAMBRIDGE UNIVERSITY PRESS
Cambridge, New York, Melbourne, Madrid, Cape Town, Singapore,
São Paulo, Delhi, Dubai, Tokyo, Mexico City

Cambridge University Press
The Edinburgh Building, Cambridge CB2 8RU, UK

Published in the United States of America by Cambridge University Press, New York

www.cambridge.org

Information on this title: www.cambridge.org/9780521187633

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First published 2007

Reprinted 2008

First paperback edition 2010

A catalogue record for this publication is available from the British Library

ISBN 978-0-521-87886-9 Hardback
ISBN 978-0-521-18763-3 Paperback

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Human Rights, Arbitration, and Corporate Social Responsibility in the Law of International Trade

FABRIZIO MARRELLA¹

Introduction

In the traditional legal discourse, the responsibility for ensuring that Transnational Corporations (hereinafter TNCs) respect human rights, as should any other business entity, is a matter for territorial State action at the domestic level and under international law. Today, economic globalisation regulation demands a multi-faceted and multi-layered network of rules that tend to be increasingly complex and sophisticated. Two extreme approaches dominate the literature on the matter: *le droit de l'hommeisme*² and total self-regulation of markets. The purpose of this chapter is to focus on the relationships between human rights, arbitration, and corporate social responsibility. The discussion centres on international commercial contracts, and not labour law issues, or the World Trade Organization (WTO), as they are addressed elsewhere in this book;³ instead, the chapter engages with models of international responsibility for human rights violations by TNCs, which are also identified in this volume.⁴ Beyond models of international responsibility of the territorial State – be it the host or the home State of a TNC, of international liability of corporate directors and of TNCs, there are also emerging issues of responsibility for violations of

human rights in the transnational arbitral process and, last but not least, in the field of corporate social responsibility.

An invisible red line seems to connect human rights protection, international arbitration and corporate social responsibility. Human rights issues are more and more important in arbitration, and they are the driving force underlying corporate social responsibility. In the law of international trade, it is not domestic courts but arbitration tribunals which are the most common *fora* for dispute resolution. Hence, first of all, the question of relevance of human rights issues in the transnational arbitration process must be addressed.

The second level of analysis concerns the assumption of human rights concerns directly by TNCs through self-regulation. At a global level, human rights protection is not uniform, due to the different ratifications of the main human rights conventions, and to the different obligations or enforcement mechanisms provided by each intergovernmental legal instrument. Furthermore, the most important actors in economic globalisation are TNCs, and therefore it becomes crucial to analyse human rights issues at the TNC level. Under the auspices of many Governments and inter-governmental organisations, TNCs have developed Codes of Conduct regulating corporate social responsibility, which are intended, *inter alia*, as a response to public opinion criticism vis-à-vis TNCs, especially after recent scandals.⁵ Introducing rules of corporate social responsibility has become, for certain firms, a moral need; for others, a marketing tool, providing better performance in sales, better access to financing and better corporate identity for workers. However, the same considerations lead to another conclusion. Since arbitration is the 'ordinary' means of dispute resolution in international trade, businesses may start litigation *inter se* for alleged human rights violations. They may even ask the arbitration tribunal to apply Codes of Conduct, including those of corporate social responsibility, to decide a case.

In conclusion, there is a potential development of human rights issues in international arbitration. As a result, and unexpectedly, arbitration may turn out to be a new and unusual forum for human rights litigation. Arbitral case law, in its turn, may contribute to shaping the scope of corporate social responsibility and, finally, to the application of human rights standards in the law of international trade.

⁵ See C. K. Prahalad, Allen Hammond, Michael E. Porter, Harvey C. Fruehauf (eds.), *Harvard Business Review on Corporate Responsibility* (Boston: Harvard Business School Publishing, 2003), pp. 66 *et seq.*

¹ The author wishes to express his gratitude to Prof. John Ruggie of Harvard University, Special Representative of the United Nations Secretary-General on the issue of human rights and business, for his comments on an earlier draft of this chapter.

² See A. Pellet, 'La mise en oeuvre des normes relatives aux droits de l'homme', in CEDIN (H. Thierry and E. Decaux), *Droit international et droits de l'homme. La pratique juridique française dans le domaine de la protection internationale des droits de l'homme* (Paris: Montchrestien, 1990) p. 126, as well as by the same author 'Droits de l'hommeisme et droit international', in http://www.droits-fondamentaux.org/article.php3?id_article=27 (accessed: 18 April 2006).

³ See contributions by Benedek and Perulli in this volume.

⁴ See contribution by Francioni in this volume.

The development of human rights issues in international commercial arbitration

It appears that human rights and international commercial arbitration are far distant from each other; international human rights conventions do not specifically contemplate commercial arbitration and, conversely, relevant treaties for international commercial arbitration do not mention human rights. They have historically evolved in isolation from each other. However, on examining them more closely, what is seen is rather, the progressive 'clash of two transnational juridical phenomena'.⁶ International human rights treaties bind Governments to secure to everyone within their jurisdiction fundamental rights and freedoms. According to one author:

The arrival of human rights on the international scene is, indeed, a remarkable event because it is a subversive theory . . . Today the human rights doctrine forces States to give account of how they treat their nationals, administer justice, run prisons and so on. Potentially, therefore, it can subvert their domestic order and, consequently, the traditional configuration of the international community as well.⁷

Arbitration is the main dispute resolution method practiced in international business transactions. It may take place in any country, in any language and with arbitrators of any nationality. With this flexibility, it is generally perceived by TNCs as a neutral kind of 'a-national' justice offering no undue advantage to any party. It is commonly estimated that about eighty per cent of arbitral awards are spontaneously enforced by businesses, a result radically different from the outcome of multi-State litigation in domestic courts and international circulation of foreign judgments. In this sense, it may be said that transnational arbitration is a legal process that *per se* does not pertain *in toto* to any domestic legal system.⁸ It has even been suggested by courts in

⁶ See A. Jakšić, *Arbitration and Human Rights* (Frankfurt am Main: Lang, 2002), pp. 17 *et seq.*

⁷ A. Cassese, *International Law*, 2nd ed. (Oxford: Oxford University Press, 2005), p. 349.

⁸ See, amongst many other works, A. Redfern and M. Hunter, *Law and Practice of International Commercial Arbitration*, 4th ed. (London: Sweet & Maxwell, 2004); J. D. Lew, L. A. Mistelis, and S. M. Kroll, *Comparative International Commercial Arbitration* (The Hague: Kluwer Law International, 2003); E. Gaillard and J. Savage (eds.), *Fouchard, Gaillard, Goldman on International Commercial Arbitration* (The Hague: Kluwer Law International, 2004). Reference here is to be made to the debate on the modern *lex mercatoria*, on which see F. Marrella, *La nuova lex mercatoria. Principi Unidroit ed usi dei contratti del commercio internazionale* (Padova: CEDAM, 2003).

France⁹ and the USA¹⁰ that it would be helpful to remove judicial control from the seat of the arbitration in order to concentrate them (and only if need be) in the country of enforcement.¹¹

Further, in contrast with State judicial systems, arbitration offers the parties the unique opportunity to designate persons of their choice as private judges; and finally, in case of non-compliance, arbitral awards enjoy much greater international recognition than judgments of national courts. Presently, 137 countries¹² have ratified the 1958 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, known as the 'New York Convention',¹³ which greatly facilitates enforcement of arbitral awards by domestic courts in all States which are party to the treaty.¹⁴

States that recognise international commercial arbitration as a good method for resolving disputes are, in general, prepared to give their assistance to the arbitral process. Indeed, in many cases they are bound to

⁹ Cour de Cassation, 10 July 1997, *Omission de Traitement et de Valorisation v. Hilmarton*, reported in *Yearbook of Commercial Arbitration* 22 (1997), 696-701, approving enforcement of an award that had been set aside in Switzerland.

¹⁰ US District Court, District of Columbia, 31 July 1996, *Chromalloy Aerospace Services Inc. v. The Arab Republic of Egypt* reported in *Yearbook of Commercial Arbitration* 22 (1997), pp. 1001-1012, declaring enforceable in the United States an award that had been set aside in Egypt.

¹¹ See, e.g., P. Fouchard, 'La portée internationale de l'annulation de la sentence arbitrale dans son pays d'origine', *Revue de l'arbitrage* (1997), 329, particularly at 351-352.

¹² As of 18 September 2006.

¹³ United Nations Convention on Recognition and Enforcement of Foreign Arbitral Awards, (New York, 10 June 1958) (1959) 4739 UNTS 330.

¹⁴ In addition to the NYC which is the main international treaty and to which reference shall be made throughout this essay, there are a number of established multilateral treaties which provide for enforcement of awards. The principal global multilateral treaties are: the Geneva Protocol on Arbitration Clauses, 1923 (27 LNTS 157); the Geneva Convention on the Enforcement of Foreign Awards, 1927 (92 LNTS 301); the Washington Convention on the Settlement of Investment Disputes between States and Nationals of Other States, 1965 (575 U.N.T.S. 159, available at <http://www.worldbank.org/icsid/basicdoc-archiv/9.htm> (accessed: 18 April 2006)). Regional multilateral conventions are: the European Convention on International Commercial Arbitration, 1961 (484 U.N.T.S. 364); the Panama Inter-American Convention on International Commercial Arbitration, 1975 (available at <http://www.sice.oas.org/dispute/comarb/iacac/iaca2e.asp>, accessed: 18 April 2006); The Amman Arab Convention on Commercial Arbitration, 1987 (<http://www.jurisint.org/pub/01/en/155.htm>, accessed: 18 April 2006); the OHADA Treaty on Harmonisation of Business Law in Africa, 1993 (available at <http://www.jurisint.org/pub/ohada/text/text.01.en.html>, accessed: 18 April 2006). Bilateral treaties, may also be appropriate instruments for the recognition and enforcement of arbitral awards. They have been frequently used for such a purpose in the past. At the present time however, these matters are primarily governed by the NYC.

do so by international treaties to which they are parties; however, it is generally recognised that, in return, each national state is entitled to exercise a degree of control over the arbitral process. Such a control is usually exercised on a territorial basis, both over arbitration conducted in the territory of the State concerned and over awards brought into the territory for the purpose of recognition and enforcement.

When crossing international commercial arbitration with human rights regulation, reference should also be made to international judicial bodies capable of deciding contentious cases by way of binding decisions. Despite an extensive framework of international legal instruments and bodies, international judicial mechanisms for human rights enforcement can be found only at the regional level with reference to the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, hereinafter ECHR)¹⁵ or, to a lesser extent, the 1969 American Convention on Human Rights¹⁶ as well as the 1981 African Charter on Human and People's Rights.¹⁷

With reference to ECHR case law two legal principles can be drawn.¹⁸ First of all, the ECHR only creates obligations for Governments who are Contracting Parties to it, and for their courts. Since an arbitral tribunal is not recognised as a 'court' it follows that if the operation of an arbitral tribunal contravenes the ECHR or the 1966 International Covenant on Civil

and Political Rights (hereinafter ICCPR),¹⁹ no Government can be held *per se* directly responsible.²⁰ However, and this constitutes the second maxim of law, when hearing cases connected with an arbitration (whether in assisting the arbitration, or reviewing or enforcing an award), domestic courts of Contracting States must comply with the Convention's fundamental guarantees. In other words, whenever arbitration establishes a *contact* with domestic courts they will certainly be bound to enforce applicable international human rights law.²¹ A different solution would lead to international responsibility of the forum State. Human rights, then, in such a context, become paradoxically a factor of re-territorialisation of arbitration.

It is possible, therefore, to expand upon human rights issues concerning arbitration in the following contexts: (1) the arbitration agreement; (2) arbitral proceedings including determination of applicable law to the merits of disputes; (3) mandatory rules and public policy.

Human rights and arbitration agreements

When one of the parties contests the validity of an arbitration agreement, and wishes to initiate proceedings before a given domestic court, it will often seize a court that has jurisdiction on the merits under its domestic

¹⁵ GA Resolution 2200 A (XXI), 21 UN GAOR Supp. (Mo.16) at 52, UN Doc. A/6316 (1966), 999 UNTS 171.

²⁰ On the domestic level this conclusion has been confirmed, (although outside the jurisdiction of ECHR discussed above) by the US Second Circuit in the case of *National Broadcasting Company, Inc. v. Bear Stearns & Co., Inc.*, No. 98-7468 (26 January 1999). The Court held that 28 USC sect. 1782, which authorises US courts to provide judicial assistance to foreign courts and tribunals by ordering testimony or the production of evidence does not apply to private commercial arbitration because such a panel does not constitute a 'foreign or international tribunal' under sect. 1782. In interpreting the statute, the Court stated that the term 'foreign or international tribunal' did not clearly include or exclude private commercial arbitrations. The Court noted that a broader reading of section 1782, permitting discovery of evidence from third parties, would conflict with sect. 7 of the Federal Arbitration Act which reflects the traditional contractual limitations on discovery in arbitration. 'The popularity of arbitration rests in considerable part on its asserted efficiency and cost-effectiveness-characteristics said to be at odds with full-scale litigation in the courts, and especially at odds with the broad-ranging discovery made possible by the Federal Rules of Civil Procedure . . . Opening the door to the type of discovery sought by NBC in this case likely would undermine one of the significant advantages of arbitration, and thus arguably conflict with the strong federal policy favouring arbitration as an alternative means of dispute resolution.'

²¹ See generally: H. Yu, 'Total Separation of International Commercial Arbitration and National Court Regime', *Journal of International Arbitration* 2 (1998), 145-66; M. Storme and F. de Ly (eds.), *The Place of Arbitration* (Gent: Mys & Breesch Uitgevers, 1992).

¹⁵ European Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950, Rome, (1955); ETS no. 5, 213 UNTS 221, as subsequently amended.

¹⁶ American Convention on Human Rights of 22 November 1969, S. José, (1979), 1144 UNTS 144. Despite its inter-American vocation, this treaty has only been signed but not ratified by the USA.

¹⁷ African Charter on Human Rights and the People's Rights of 27 June 1981, Nairobi, (1988) 1520 UNTS 217, (1982) 21 ILM 58. The Asian continent remains without an international regional system of human rights protection.

¹⁸ Of course, the European Commission of Human Rights no longer exists since the entry into force of Protocol No. 11, European Convention of Human Rights on Procedural Reform. However, the decisions rendered by the Commission may still have persuasive authority. See generally R. Blackburn and J. Polakiewicz, *Fundamental Rights in Europe: the European Convention on Human Rights and its Member States, 1950-2000* (New York: Oxford University Press, 2001); O. Jacot-Guillarmod, 'La nouvelle cour européenne des droits de l'homme dans la perspective du juge national', in C. Zanghi, *La Convenzione europea dei diritti dell'uomo: 50 anni d'esperienza gli attori e i protagonisti della convenzione: il passato e l'avvenire* (Torino: Giappichelli, 2002), pp. 283-326; C. Ovey and R. A. White, *Jacobs and White, The European Convention of Human Rights*, 3rd ed. (Oxford: OUP, 2002); F. Sudre, *Droit européen et international des droits de l'homme*, 6th ed. (Paris: PUR, 2003), pp. 88 et seq.

rules or according to any applicable conventions. Article II of the New York Convention provides in this respect that 'the court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed'.²² Human rights issues may arise at this level in the same way as any other question involving validity of the arbitration agreement. Within the Council of Europe's territorial jurisdiction, the ECHR may be invoked.

It seems clear that, as long as parties have freely agreed to arbitrate, the European Court of Human Rights (hereinafter ECtHR) will 'stay out of the fight'. The argument is that if the parties have freely consented to arbitration, they have, ipso facto, waived their rights before domestic courts according to Article 6(1) of the ECHR, which provides that:

In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgement shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

The history of the Convention shows that it was intended to introduce international State responsibility for the operation of its court system; it was not meant to apply to private justice.²³ The wording of Article 6 makes reference to a 'tribunal established by law'. It does not refer to an arbitral tribunal even though it is established by agreement between the parties and derives its binding force from law.²⁴

The doctrine of contractual waiver has been established by the European Commission of Human Rights (hereinafter EComHR) since its first decision touching arbitration matters, *X v. Federal Republic of*

²² Above, fn. 13.

²³ C. Jarrosson, 'L'arbitrage et la Convention européenne des droits de l'homme', *Revue de l'arbitrage* (1989), 577 *et seq.*

²⁴ O. Jacot-Guillarmod, 'L'arbitrage privé face à l'article 6 §1 de la Convention européenne des droits de l'homme', in F. Matscher and H. Petzold (eds.), *Protecting Human Rights: the European Dimension: Studies in Honour of Gérard J. Wiarda* (Cologne: Heymanns, 1988), p. 291.

Germany,²⁵ and has been developed by the Strasbourg Court, ECtHR, in *Deweert v. Belgium*, where it clearly stated that:

In the Contracting States' domestic legal system, a waiver of this kind is frequently encountered both in civil matters, notably in the shape of arbitration clauses in contracts... the waiver which has undeniable advantages for the individual concerned as well as for the administration of justice, does not in principle offend against the Convention.²⁶

The same point was made in *Axelsson v. Sweden* where the EComHR notes that insofar as arbitration is based on agreement between the parties to the dispute, it is a natural consequence of their right to regulate their mutual relations as they see fit. From a more general perspective, arbitration procedures can also be said to pursue the legitimate aim of encouraging non-judicial settlement and of relieving the courts of excessive burden of cases.²⁷ Consequently, in this respect, no violation of Article 6 of the ECHR, was found.

But in a subsequent case, *Bramelid and Malmström v. Sweden*, some corporation rules of Swedish law were challenged.²⁸ In this case, minority shareholders of a Swedish company asked the EComHR to evaluate the compatibility with the ECHR of Swedish rules imposing arbitration to

²⁵ *Yearbook HR* 5 (1962), 88.

²⁶ 2 *EurHR Rep* (1980), 439, at 460. The European Commission, in *Nördström-Janzon and Nördström-Lehtinen v. the Netherlands* (Application 28101/95 (1996) 87 A EurCommHR, Dec. & Rep. 112) dismissing the application, noted: '... in the first place that the proceedings of which the applicants complain are arbitration proceedings. In the present case the arbitration was based on a joint-venture agreement and a subsequent Deed of Settlement concluded between the parties concerned. The arbitration was thus based on a voluntary agreement according to which disputes between the parties should not be settled by the ordinary courts but under a special arbitration system. Consequently, there was a renunciation by the parties of a procedure before the ordinary courts satisfying all the guarantees of Article 6 of the Convention... the Commission notes that in the present case it has not been alleged that the arbitration was concluded under duress'. Confirming the Article 6 (1) waiver doctrine are other European Commission cases: *R. v. Switzerland*, 51 Eur. Comm. H.R. Dec. & Rep. 85, 93 (1987); *Jakob Boss Söhne KG v. Federal Republic of Germany*, 2 December 1991, Appl. No. 18479/91, Decision of 2 December 1991, Ref. 1060; *Hedland v. Sweden*, Appl. No. 24118/94, Decision of 9 April 1997, 94 Eur. Comm. H. R. Dec. & Rep. (1997); and the European Court case, *Suovaniemi et al. v. Finland*, 23 February 1999, Appl. N.31576/96, Ref. 5131. See also for a partial critique of this approach, D. Wedam-Lukic, 'Arbitration and Article 6 of the European Convention on Human Rights', *Arbitration* 64 (1998) 516.

²⁷ App. N. 12213/86, (1990) 86 Eur. Comm. H.R. Dec. & Rep. 99.

²⁸ App. N. 8588-8589/79 (1982) 29 Eur. Comm. H.R. Dec. & Rep. 64. Compare the decision by the ECtHR in *Lithgow and others v. United Kingdom*, 8 July 1986, A102 8 Eur. Comm. H.R. Dec. & Rep. 329.

evaluate minority shares in case of total acquisition. According to Swedish law, whenever a company owned ninety percent of shares of another company, then it could purchase the remaining ten percent for a value that in case of dispute should be decided by arbitration. In this case, the EComHR upheld the case by correctly distinguishing between *voluntary* and *mandatory* arbitration.

If the only dispute resolution system available in a country for certain matters defined by statute law is arbitration, there is no true agreement to arbitrate and then, being mandatory arbitration, it must follow all requirements set out in human rights treaties.²⁹ That also means the resulting award may be challenged before the ECtHR. Mandatory arbitration may in fact turn into an instrument of oppression or reduction of the freedoms that the ECHR seeks to endow and protect; hence, full transfer of judicial function to arbitrators by a nation State amounts to transfer to arbitral bodies of the obligation to respect international human rights law.

Conversely, under the 'waiver doctrine', human rights bodies have often upheld *voluntary* international commercial arbitration clauses and proceedings.

In 1994, the ECHR decided a case in which a corporation, Stran Greek Refineries, challenged the Greek Government. The latter claimed that it had terminated by statute both a construction contract of a refinery together with the arbitration clause contained in it, despite an award having already been made on the basis of the arbitration clause.³⁰ The Strasbourg Court held that the unilateral termination of a contract does not pre-empt effect or validity of certain essential clauses of the contract, such as the arbitration clause, thus making a contribution to the recognition of the principle of the autonomy of an arbitration agreement from a human rights perspective. Finally, the same Court concluded that there was an interference even with the applicants' right of property as guaranteed by Article 1 of Protocol No. 1.³¹ This led to the conclusion that:

²⁹ But no clear-cut distinction has so far been made between voluntary and mandatory arbitration: see S. Adam, 'Arbitration, Alternative Dispute Resolution Generally and the European Convention on Human Rights: An Anglo-Centric View', *Journal of International Arbitration* 21 (2004), 413–438.

³⁰ *Stran Greek Refineries et al. v. Greece*, Dec. 9, 1994, A 301-B, 19 Eur. Comm. HR, Dec. 8 Rep. 293. See also the commentary by Ali Bencheheb, in *Revue de l'Arbitrage* (1996), 181; as well as observations by P. Tavernier, *Journal de Droit International* 122 (1995), 796.

³¹ Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms, Paris 20 March 1952, ETS No. 9, available at (http://www.hrmi.org/EN/issues.php?language=en&cat_ID=0&target_ID=121), accessed: 18 April 2006).

... it was impossible for the applicants to secure enforcement of an arbitration award having final effect and under which the State was required to pay them specified sums in respect of expenditure that they had incurred in seeking to fulfil their contractual obligations or even for them to take further action to recover the sums in question through the courts. In conclusion, there was an interference with the applicants' property right.

Thus, the European Court of Human Rights ruled against the Greek Government, upholding the validity and enforcement of the arbitral award.

Human rights and arbitration proceedings

The ECHR and, to a lesser extent, the ICCPR are often relied upon by parties contesting the conduct of certain arbitrations. Although relevant guarantees may be found in most contemporary arbitration laws, it is nevertheless useful for them to be formally set out in the ECHR. Under the most rigorous view, since arbitrators are *not* State courts and human rights instruments are binding on those States (and their apparatus) having accepted to be bound by them, it follows that, *per se*, those rules are not directly applicable to arbitration proceedings. Along the same lines, in the well known *Cubic* case, the French *Cour de Cassation* dismissed an Article 6(1) ECHR plea in relation to an arbitration proceeding considering that: '*la Convention (CEDH) qui ne concerne que les Etats et les juridictions étatiques est sans application en matière [d'arbitrage]*'.³²

In truth, if an arbitration is concluded without soliciting the intervention of a State court – which is what happens in the great majority of cases – then human rights conventions are, *per se*, inapplicable, save in a case in which arbitrators recognise a violation of transnational public policy. However, in those cases in which domestic courts, be that of the seat of the arbitration or that of *exequatur* country (or countries), are asked to step into the arbitration process, then the scenario changes. It would be unreasonable to argue that the territorial State where arbitration is conducted will lend its support to arbitral tribunals operating within its jurisdiction without claiming some degree of control over the conduct of those arbitral tribunals to ensure that certain minimum

³² Cour de Cassation, Civ. (1^{re} ch.), *Cubic Defense Systems v. Chambre de Commerce Internationale*, 20 February 2001, *Revue Critique de Droit International Privé* 91 (2002), 124; *Revue de l'Arbitrage*, (2001), 511 with obs. by T. Clay.

standards of justice are met, particularly in procedural matters.³³ A *fortiori*, all States bound by the ECHR are obliged to guarantee everyone's fundamental right to a fair trial, regardless of the legal nature of proceedings.³⁴ As a result, arbitrators and arbitral institutions should take the greatest care in treating such issues because the destiny of their award is at stake.

Sensitive areas of arbitration proceedings include a right to due process, a right to independent and impartial arbitrators, a right to help with translation and legal costs, a right to have the case brought speedily, and without undue delay, and a right to an effective remedy. These issues will now be considered in turn.

Due process

The right of a party to due process is not only a right protected by human rights instruments such as Article 6(1) of the ECHR, Article 8(1) of the ACHR and Article 14 of the ICCPR, but it is also protected by most domestic arbitration laws³⁵ and by Article V(1)(b) of the New York Convention. Although the courts are not allowed to interfere *ex officio* in arbitrations, the arbitrators are not given *carte blanche* for the conduct of the proceedings; they have to respect the agreement of the parties on procedure and the principle of due process. States called upon to recognise and enforce the award will refuse to do it because certain basic standards have not been observed in the making of the award.³⁶

³³ See M. Kerr, 'Arbitration and the Courts: the UNCITRAL Model Law', *JCIQ* 34 (1984), 1-24.

³⁴ R. Briner and F. von Schlabrendoff, 'Article 6 of the European Convention on Human Rights and its Bearing upon International Arbitration', in R. Briner, L. Y. Fortier, K. P. Berger and J. Bredow (eds.), *Law of International Business and Dispute Settlement in the 21st Century: Liber Amicorum Karl-Heinz Böckstiegel* (Cologne: Heymanns, 2001), pp. 89 *et seq.* See also *ALI/UNIDROIT Principles of Transnational Civil Procedure* (Cambridge: Cambridge University Press, 2006).

³⁵ See for example Article 18 of the United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration (1985) (for an updated list of countries following the Model Law see <http://www.uncitral.org> (accessed: 1 March 2006)); the English Arbitration Act of 1996, sect. 33(1)(a); Swiss Code on Private International Law, Article 182(3).

³⁶ For a list of such standards, see, e.g., R. de Gouttes, 'L'enchevêtrement des normes internationales relatives au procès équitable: comment les concilier?', in Université Robert Schumann de Strasbourg/Cour De Cassation (eds.), *Les nouveaux développements du procès équitable au sens de la Convention européenne des droits de l'homme* (Brussels: Bruylant, 1996), pp. 141-144. Cf. Jarrisson, 'L'arbitrage et la Convention européenne des droits de l'homme', 573; J.-H. Moitry, 'Right to a Fair Trial and the European

In a decision rendered in 1991, the EComHR went further, holding that a State which recognises an award as a basis for enforcement proceedings must institute a control mechanism to ensure that the arbitration proceedings have been carried out in conformity with fundamental rights and in particular with the right to be heard.³⁷ Therefore, even if Article 6 of the ECHR has no direct impact on the proceedings before the arbitral tribunal, it does exercise a certain influence, since the courts deciding on enforcement of awards must ascertain compliance with fundamental rights.³⁸ The right to a fair hearing is an expression of the very values which are protected by due process and similar concepts in arbitration. The implementation of the right to a fair hearing, with the necessary adjustments, may thus offer valuable guidance to arbitrators.

The application of the principle of equality to the constitution of the arbitral tribunal was examined by French Courts in the complex *Duto* case, where three parties were involved. A consortium agreement between three companies - BKMI, Siemens and Dutco - for the construction of a cement factory included an arbitration clause, stipulating that disputes arising out of the agreement would be submitted to an arbitral tribunal comprising three arbitrators appointed in accordance with the International Chamber of Commerce (ICC) Arbitration Rules. Dutco commenced proceedings against its two partners and nominated an arbitrator. The ICC Court of Arbitration ordered BKMI and Siemens to jointly nominate one arbitrator, and it appointed the third arbitrator itself. However, BKMI and Siemens had differing interests at stake and they therefore challenged the Court's order. The arbitral tribunal nevertheless considered itself to be validly constituted and, consequently, an application to set aside its award was brought before the Paris Court of Appeals. The two defendants argued, *inter alia*, that as a result of the principle of equality they could not be deprived of their right to each appoint one trusted arbitrator and thus to participate equally in the constitution of the arbitral tribunal. The Court of Appeals rejected their claim, holding that

Convention on Human Rights - Some Remarks on the *République de Guinée* Case', *Journal of International Arbitration* (1989), 115. See also the decisions of the EComHR, 4 March 1987, *ASA Bulletin* (1990), 251, and 11 July 1989, *ASA Bulletin* (1990), 262, which examine the position of the Swiss courts in their review of the duration of the arbitral proceedings. See *Société X v. Société O*, ATF 128 III 50 (2001).

³⁷ *Association Jacob Boss Söhne KG v. Germany*, No. 18479/91.

³⁸ The courts may also have to review the enforceability of the arbitration agreement, i.e., the validity of the waiver: *X v. The Federal Republic of Germany* n. 1197/61, *Yearbook of the ECHR* 5 (1962), 88 at 96.

there had been no violation of the principle of equality in the constitution of the arbitral tribunal as the arbitration clause could have been construed as requiring two of the parties to choose a single arbitrator between them. The *Cour de Cassation* reversed such a decision and annulled the award, holding that 'the principle of the equality of the parties in the designation of the arbitrators is a matter which concerns public policy',³⁹ an approach consistent with due process requirements imposed by ECHR.

Another area of operation of Article 6 of the ECHR has been identified in the *Stran Refineries* case by the ECtHR where it stated that '[t]he principle of the rule of law and the notion of fair trial enshrined in Article 6 [of the ECHR] preclude any interference by the legislature with the administration of justice designed to influence the judicial determination of the dispute'.⁴⁰ This principle offers further possibilities of application in mixed arbitration proceedings. The State, State-owned entity, and even intergovernmental organisation's agreement to submit disputes to arbitration would be meaningless if it could be circumvented by that party simply refusing to participate in the constitution of the arbitral tribunal and then relying on its immunity from jurisdiction to ensure that such refusal could not be overcome by action before the appropriate court. This was the solution reached by the Paris Tribunal of First Instance, and later by the Paris Court of Appeals, in a case concerning the United Nations Educational, Scientific and Cultural Organisation (UNESCO). Faced with UNESCO's refusal to participate in the constitution of an arbitral tribunal despite a valid arbitration agreement, the President of the Paris Tribunal of First Instance held that 'in entering into an arbitration clause, UNESCO waived its immunity from jurisdiction and necessarily agreed to allow the implementation of the method of dispute resolution set forth in the contract'.⁴¹ This decision was upheld by the Paris Court of Appeals, stating in very clear terms that:

[T]he immunity from jurisdiction on which UNESCO seeks to rely does not allow it to free itself from the *pacta sunt servanda* principle by refusing to nominate an arbitrator in compliance with the arbitration in the contract between it [and the claimant in the arbitration] on the grounds of the absence of a dispute as to the performance of the contract at issue, a

³⁹ *Cour de Cassation*, 7 January 1992, *Siemens AG/BKMI Industrieanlagen GmbH v. Dito Construction Company*, *Yearbook of Commercial Arbitration* 17 (1993), 140.

⁴⁰ *Stran Greek Refineries and Stratis Andreadis v. Greece*, above, fn. 30, para. 49 (emphasis added).

⁴¹ TGI, Paris, 20 October 1997, *Boulois v. UNESCO*, *Revue de l'Arbitrage*, (1997), 575, and C. Jarrosson's note at pp. 577-582.

question which is to be decided by the arbitrators alone; in addition, to allow [UNESCO's] objection would inevitably prevent [the claimant] from submitting the dispute to a judicial authority. This would be contrary to public policy in that it constitutes a denial of justice and a violation of the provisions of Article 6-1 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, and should therefore lead the court - which is involved in this case only in support of the arbitration - to accept the claimant's request [to have the arbitral tribunal constituted with the assistance of the courts].⁴²

It should however be pointed out that the Swiss Federal Tribunal did not reach the same conclusion with regard to the European Organisation for Nuclear Research (CERN); the court denied a party access to the Swiss courts where that party sought to bring an action against an award made in an arbitration against CERN.⁴³

Right to independent and impartial arbitration

Most domestic arbitration statutory rules in the world provide some measures by which arbitrators shall act fairly, independently and impartially, so that each of the parties can present its case. There are mechanisms for recourse to State courts to prevent arbitrators from acting unfairly or with bias or even committing serious procedural irregularities. An award may thus be challenged before the courts of the *situs arbitri* (site of the arbitration) or of the *exequatur* State (or, possibly, States) and each one of them will apply due process requirements of the *lex fori*.⁴⁴ The requirement of independence and impartiality recalls the language used in various human rights instruments such as Article 10 of the Universal Declaration of Human Rights (UDHR),⁴⁵ Article 6(1) of the ECHR, Article 14(1) of the ICCPR, or Article 47 of the Charter of Fundamental Rights of the European Union.⁴⁶

⁴² *Cour d'Appel*, 19 June 1998, *UNESCO v. Boulois*, No. 97/26549, *Revue de l'Arbitrage* (1999), 343 with a note by C. Jarrosson at 345-349.

⁴³ Swiss Fed. Trib., 21 December 1992, *Groupeement Fougerolle v. CERN*, *Revue de l'Arbitrage* (1994), 175, and P. Glavinis' note at p. 180.

⁴⁴ J.-F. Poudret and S. Besson, *Droit comparé de l'arbitrage international* (Zurich: Schulthess/Paris: L.G.D.J./Brussels: Bruylant, 2002), p. 509.

⁴⁵ UDHR, adopted on 10 December 1948, GA res. 217A (III), UN Doc. A/810 at 71 (1948).

⁴⁶ Charter of Fundamental Rights of the European Union, *Official Journal of the European Communities*, No. C 364/1, 18 December 2000.

Arbitration regulations also reflect those concepts albeit with some adaptation.⁴⁷ Once again it is important to state the maxim of law according to which arbitrators do not have a forum and are not at all the clone of domestic courts. Thus, 'legal transplants' of human rights rules (and case law applying those rules) in different instruments does not mean coincidence of application. It only means convergence of rules applicable to State courts and transnational arbitration towards human rights values. However, since each set of rules maintains its own sphere of application, the 'convergence factor' may have some impact only on the interpretation of law.

The typical sanction for violation of arbitration institutional regulations rules on impartiality or independence is the removal of arbitrators. This is an important factor of the globalisation of procedural human rights rules, since arbitral regulations are applied throughout the world, in a space much wider than, for example, the territorial jurisdiction of the ECHR. Article 15 of the ICC Arbitration Rules requires that the arbitrator must act 'fairly and impartially and ensure that each party has a reasonable opportunity to present its case'.⁴⁸ The arbitrator should also be independent, i.e. not have had a personal, social or financial relationship with one of the parties which is reasonably liable to lead to bias or creates a reasonable apprehension of bias. Thus the existence of a prior relationship with one of the parties is a ground for challenge and removal of an arbitrator when it gives rise to reasonable doubts about his impartiality. By impartiality is generally meant a state of mind of the arbitrator, whilst partiality is a predisposition towards one of the parties as to the outcome of the disputed issue.⁴⁹ On the other hand, it is perfectly legitimate, even from a human rights perspective, that a party-appointed arbitrator ensures that the evidence and the arguments advanced by the appointing party are fully considered by the arbitral tribunal; this is simply a matter of fully implementing the fair hearing principle.

⁴⁷ See, for example, Article 15(1) UNCITRAL Regulations; 16(1) American Arbitration Association International Arbitration regulations; 14(1), Vienna International Arbitration Rules. Conversely, the 'mirror effect' makes the same arbitration rules difficult to amend by parties. See P. Fouchard, 'Rapport final sur le statut de l'arbitre: un rapport de la Commission de l'arbitrage international de la CCI', *ICC International Court of Arbitration Bulletin* 7 (1996), 28 et seq.; Lew, Mistelis and Kröll, *Comparative International Commercial Arbitration*, p. 258.

⁴⁸ Y. Derains, E. A. Schwartz, *A Guide to the New ICC Rules of Arbitration* (The Hague: Kluwer Law International, 1998), pp. 214 et seq.

⁴⁹ G. Petrochilos, *Procedural law in international arbitration* (Oxford: OUP, 2004), pp. 131 et seq.

If the legal nature of the independence, impartiality and neutrality requirements of arbitrators is structurally different from rules binding on domestic courts but closer to those of international tribunals,⁵⁰ nonetheless these requirements may be seen as vague. In the absence of a worldwide intergovernmental convention on arbitrators' duties, it seems that private codifications of such duties might play a significant role in this regard. Here we are confronted, in the procedural sphere, with a phenomenon of the generation of Codes of Conduct taking place side by side with those of corporate social responsibility in transnational businesses.⁵¹ In this respect the *International Bar Association Guidelines on Conflict of Interest in International Arbitration* (2004)⁵² as well as the *American Arbitration Association's Code of Ethics for Arbitrators in Commercial Disputes* (2004)⁵³ may provide objective and well accepted standards to ascertain concretely whether or not an arbitrator has failed to be impartial, independent or neutral.

The same reasoning leads to another important issue. If requirements of fairness and impartiality of arbitrators includes necessarily disclosure of all relevant facts, they may also include the inclination of the arbitrator towards specific human rights NGOs or political circles which may be involved in the case at stake. One example of this, perhaps at the far edge and controversial, was an ICC case⁵⁴ where a challenge was raised against the chairman of an arbitral tribunal during the course of an arbitration, on the basis that the chairman had been an active critic of the human rights situation under the former régime in the country of the challenging party. In the event, the ICC International Court of Arbitration rejected the challenge. But it may well have been preferable for the arbitrator to have disclosed these facts before confirmation so that any comments could have been received and considered prior to the commencement of the arbitration. Such is exactly the purpose of having the prospective arbitrator examine the situation through 'the eyes of the

⁵⁰ G. Guillaume, 'De l'indépendance des membres de la Cour internationale de Justice', in B. Boutros-Ghali *amicorum discipulorumque liber: paix, développement, démocratie* (Brussels: Bruylant, 1998), vol. 1, pp. 475–487. See in this respect Article 167 of EC Treaty; Article 21.3 of ECHR et 4 of ECHR Statute.

⁵¹ See below, the section on 'Corporate social responsibility 'from above' and 'from below': towards contractualised human rights?'

⁵² The publication can be found at: <http://www.ibanet.org/images/downloads/InternationalArbitrationGuidelines.pdf> (accessed: 18 April 2006).

⁵³ <http://www.adr.org/sp.asp?id=21958> (accessed: 18 April 2006).

⁵⁴ Reported by S. Bond, 'The Selection of ICC Arbitrators and the Requirement of Independence', *Arbitration International* 4 (1988), 300–310.

parties', the applicable code of ethics and in the light of human rights principles.

Such issues have been partially addressed by human rights bodies, on a regional scale, in *Nördstrom-Janzon and Nördstrom-Lethinen v. the Netherlands*.⁵⁵ In this case, originating from a private arbitration between a Finnish party and a Dutch company, the former claimed a violation of due process based on the allegation that one of the three arbitrators appointed by the Netherlands Arbitrage Instituut was not independent and impartial. However, the EComHR, recalling the waiver doctrine, dismissed the application since both Dutch arbitration law and the courts' decisions were consistent with Article 6 general requirements.⁵⁶

Language and procedural costs

Even the language of arbitration proceedings, with possible consequent translation costs, may become a crucial factor when evaluating a violation of due process. If, before the domestic courts, *lingua fori* is the dominant rule, in transnational arbitration the language used is one of the procedural variables. The point is illustrated by a case decided by the Austrian Supreme Court on 4 December 1994. In an arbitration taking place in Vienna, a disagreement arose between the parties regarding the language in which the proceedings would be carried out. The defendant obtained an injunction regarding the language in which the proceedings would be conducted, obtaining a finding that they be conducted in German (mainly) or in English. The arbitral tribunal appealed against the injunction, and the Vienna Court of Appeal (*Oberlandesgericht Wien*) set aside the injunction on the grounds that the provisions on arbitration of the Code of Civil Procedure (CCP) did not provide for such intervention. This decision was in turn appealed to the Austrian Supreme Court, which established that the instances in which the courts may interfere in arbitral proceedings should be strictly limited to those provided in the provisions on arbitration in the Code of Civil Procedure. It added that:

An injunction may be issued in case of an imminent breach of a right guaranteed by the European Convention on Human Rights, provided that the conditions enumerated in Article 381 at 2 of the Implementing Act (*Exekutionsordnung*) are met: the injunction must appear to be necessary

⁵⁵ Above, fn. 26.

⁵⁶ Similar conclusions have been reached by the ECtHR, 23 February 1999, *Suovaniemi et al. v. Finland*, quoted above fn. 26.

for the prevention of imminent acts of violence or the avoidance of an imminent irreversible damage. It has not even been alleged by the claimant that such dangers were imminent.⁵⁷

This decision must be read in light of the 'pro-arbitration policy', leaving the arbitrators to decide procedural issues, including language, within the limits of exceptional situations of a manifest violation of fundamental rights, and is a balanced solution which respects both the nature of arbitration, and the need for human rights protection by domestic courts. In essence and from a Law & Economics perspective, it can be said that procedural choices by arbitrators must be cost-effective. The due process principle, then, may be seen as security given to each one of the parties *vis-à-vis* procedural decisions creating an imbalance in costs for one of the parties.

Speed of arbitration, 'reasonable delay' and effective remedy

Arbitrators must complete their functions within the legal or contractual deadlines that they have been given. This rule is universally accepted, but is now rarely expressed in the form of an explicit obligation imposed upon the arbitrators. In any case, by accepting their functions the arbitrators also undertake to perform them diligently. Again, this rule is universally recognised, although it is seldom expressed as such. It mirrors the 'reasonable time' requirement found in international conventions and declarations concerning the protection of human rights in court proceedings,⁵⁸ in a 1987 decision, the EComHR confirmed this reading.⁵⁹

A party in a Swiss arbitration, having exhausted all national remedies, filed a complaint before the Commission alleging that the arbitrators had failed to render an award 'within a reasonable time'. The Commission held that parties could validly waive the guarantees of Article 6 of the ECHR by agreeing to arbitration, and that a State could not be charged with the actions of arbitrators, 'unless and to the extent' that its courts had become involved.⁶⁰ In the case at hand, the courts had performed

⁵⁷ Austrian Supreme Court, 4 December 1994, 4 Ob 1542/94, in *Yearbook of Commercial Arbitration* 22 (1997), 263-265.

⁵⁸ See the *IBA Rules of Ethics for International Arbitrators*. See also Article 6(1) of the ECHR.

⁵⁹ *R. v. Switzerland*, No. 10881/84, 51 DR 83 (1987).

⁶⁰ Strangely enough, after having held, in this case, that Article 6 did not apply to arbitration (Supreme Court decision *R. v. A* of 22 July 1986, ATF 112 Ia 166), the Swiss Supreme Court in later cases held to the contrary (decision *X v. Y* AG of 30 April 1991, ATF 117 Ia 166; decision *Hitachi Ltd v. SMS Schlobermann Siemens AG* of 30 June 1994, *ASA Bulletin*,

their control function within a proper time period. Consequently, whatever the duration of the arbitration, the complaint was ill-founded. But the principle stays and should be considered as a *caveat* for arbitrators. The same reasoning leads one to conclude that domestic courts should provide the parties with an 'effective remedy' in the light of Article 13 of the ECHR; that is, the possibility of referring a case to the national courts before making an application to the ECtHR on the basis of Article 34 of the Convention.⁶¹ Hence a statutory rule (and even a contractual clause) of domestic arbitration law blocking any recourse against arbitration awards would be against Article 34 ECHR.

Human rights and *lex contractus*

The principle of 'party autonomy' is the cornerstone of the modern movement towards the liberalisation and globalisation of international trade and investment.⁶² In international contracts it is a reasonable expectation of the parties – and that expectation is generally protected by applicable arbitration law – that their intentions reflected in their contract (including the choice of the applicable law) should, in principle, be respected by arbitrators. In the global market place the parties' legitimate intentions should be determinative, otherwise international trade and commerce may not prosper. One writer has noted that '[t]he zenith of party freedom is arbitration'.⁶³ Party freedom with regard to arbitration extends to all its various aspects: choice of arbitration, arbitral forum, applicable substantive law, *lex arbitri*, etc. The parties can choose the applicable law either expressly or implicitly.⁶⁴

(1997), 99 and *Revue Suisse de Droit International* (1997), 587; *Société X v. Société O*, ATF 128 III 50 (2001). See also the decisions of the EComHR, 4 March 1987, *ASA Bulletin* (1990), 251, and 11 July 1989, *ASA Bulletin*, (1990), 262, which examine the position of the Swiss courts in their review of the duration of the arbitral proceedings.

⁶¹ Article 34 states 'The Court may receive applications from any person, non-governmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the protocols thereto. The High Contracting Parties undertake not to hinder in any way the effective exercise of this right.'

⁶² See, for example, L. Brillmayer, 'Rights, Fairness, and Choice of Law', 98 *Yale LJ* (1989), 1277–1319; E. Jayme, 'Identité culturelle et intégration: le droit international privé post-moderne', 251 *Recueil des Cours* (1995–1) 9, 147 *et seq.*

⁶³ P. J. Borchers, 'The Internationalization of Contractual Conflicts Law', 28 *Vanderbilt Journal of Transnational Law* (1995), 421, at 439.

⁶⁴ See P. Nygh, *Autonomy in International Contracts* (Oxford: Clarendon Press, 1999).

It is clear that human rights are part of the *lex contractus* and therefore human rights are part of the law applicable to the merits of the dispute; if then the applicable law is Swiss, Italian or English, it will certainly include the human rights rules in force in each legal system. Moreover, if the applicable law is *lex mercatoria* (and/or the Unidroit Principles of International Commercial Contracts⁶⁵) it will be subject to the limitation of truly international or transnational public policy. Further, the arbitrator may have to take into account the mandatory rules or public policies of the *situs arbitri* or of the place of enforcement of the award.⁶⁶

Human rights in the selection of international mandatory rules and in public policy

It may also be argued that Article 7(1) of the EC Convention on the Law Applicable to Contractual Obligations (the Rome Convention of 1980)⁶⁷ can be interpreted in light of the human rights justification of certain governmental measures. In fact, according to that Article:

When applying under this Convention the law of a country, effect may be given to the mandatory rules of the law of another country with which the situation has a close connection, if and in so far as, under the law of the latter country, those rules must be applied whatever the law applicable to the contract. In considering whether to give effect to these mandatory rules, regard shall be had to their nature and purpose and to the consequences of their application or non-application.⁶⁸

Thus, the reference to the consequences of application or non-application of mandatory rules should be weighed by a social engineer

⁶⁵ See <http://www.unidroit.org/english/principles/contracts/principles2004/blackletter2004.pdf> (accessed: 18 April 2006).

⁶⁶ See P. Mayer, 'Mandatory Rules of Law in International Arbitration', 2 *Arbitration International* (1986), 75; N. Voser, 'Mandatory rules of law as a limitation on the law applicable in international commercial arbitration', *The American Review of International Arbitration* 7 (1996), 319–357; M. Blessing, 'Mandatory rules of law versus party autonomy in international arbitration', *Journal of International Arbitration* 14 (1997), 23–46; Lews, Mistelis and Kröll, *Comparative International Commercial Arbitration*, paras. 17–27 *et seq.*

⁶⁷ Available at http://europa.eu.int/eur-lex/lex/LexUriServ/site/en/2005/lc_334/c_33420051230en00010027.pdf and see also the Proposal for a Regulation of the European Parliament on the law applicable to contractual obligations Com (2005) 650 final of 15 December 2005, available at http://europa.eu.int/eur-lex/lex/LexUriServ/site/en/com/2005/com2005_0650en01.pdf (both accessed: 18 April 2006).

⁶⁸ *Ibid.*, Article 7(1).

such as the arbitrator, *inter alia*, in light of human rights considerations.⁶⁹

Legislation and executive regulation imposing certain economic sanctions on particular countries because of human rights abuses (such as apartheid regimes) would limit discretionary choices to arbitrators (and courts⁷⁰). Hence, in the famous case of *Regazzoni v. K.C. Sethia Ltd.*,⁷¹ the House of Lords applied the Indian boycott of the Republic of South Africa to a contract governed by English law, acknowledging the foundation of the Indian overriding statute, *inter alia*, on human rights concerns. Conversely, unilateral sanctions such as boycotting for racial or religious reasons may not be applied on the basis of Article 7(1) because this would contravene fundamental human rights principles.⁷²

Last but not least, it should be underlined that domestic courts are entitled to check that the award does not offend public policy. In the transnational arbitral process several 'public policies' are at stake, firstly, that of the State in which the arbitration is located, then the public policy of the State or the States in which recognition and/or enforcement are sought. Undoubtedly, human rights pertain both to international⁷³ and to transnational public policy and they operate both for substantive and procedural issues.⁷⁴

⁶⁹ B. Goldman, 'Les conflits de lois dans l'arbitrage international de droit privé', *Revue des Cours* 109 (1968/II), 347 *et seq.*; P. Kahn, 'Les réactions des milieux économiques', in P. Kahn and C. Kessedjian (eds.), *L'illégalité dans le commerce international* (Paris: Litec, 1996), pp. 477 *et seq.* (p. 493); J. Dolinger, 'World Public Policy: Real International Public Policy in the Conflict of Laws', *Texas ILJ* 17 (1982), 167 *et seq.* at pp. 175–176.

⁷⁰ See L. Picchio Forlatti, 'Critères de rattachement et règles d'applicabilité. À l'heure de la protection des Droits de l'homme en Europe', *Rivista di diritto internazionale privato e processuale* 4 (2005), 32 *et seq.*

⁷¹ Court of Appeal, 26 April 1956 [1956] 2 All ER 487; House of Lords, 21 October 1957 [1957] 3 All ER 286.

⁷² See ICC Awards Nos. 2977, 2978 and 3033 (1978), in *Yearbook of Commercial Arbitration* (1981), 133 *et seq.*; ICC Award No. 3881 (1984), *Journal de Droit International* (1986), 1096.

⁷³ Here, reference should be made to international-domestic public policy: Italian *Corte di Cassazione*, 8 January 1981, n.189, in *Rivista di diritto internazionale privato e processuale*, (1981), 787 *et seq.*; defines international public policy as 'a body of universal principles shared by nations of similar civilisations, aiming at the protection of fundamental human rights, often embodied in international declarations or conventions'. Later see *Corte di Appello di Milano*, 4 December 1992, *Allsop Automatic Inc. v. Tecnosci s.n.c.*, *Yearbook of Commercial Arbitration* 22 (1997), 725, para. 4.

⁷⁴ Amongst a vast literature see B. Goldman, 'La protection internationale des droits de l'homme et l'ordre public international dans le fonctionnement de la règle de conflits de lois', in *Mélanges René Cassin*, (Paris: Pedone, 1969) vol. I, pp. 449 *et seq.*; P. Hammié, 'Droits fondamentaux et ordre public', *Revue critique de Droit International Privé* (1997),

After thorough study by its International Commercial Arbitration Committee, the International Law Association (ILA) adopted, in April 2002, a *Resolution on Public Policy as a Bar to Enforcement of International Arbitral Awards*, including recommendations to domestic courts.⁷⁵ In Recommendation 1(d) it is noted that:

'The international public policy of any State includes: i) fundamental principles, pertaining to justice and morality, that the State wishes to protect even when it is not directly concerned; ii) rules designed to serve the essential political, social or economic interest of the State, these being known as 'lois de police' or 'public policy rules'; and iii) the duty of the State to respect its obligations towards other States or international organisations'.

Examples of a substantive 'fundamental principle' have been identified in the principle of good faith,⁷⁶ and in the prohibition of abuse of rights (especially in civil law countries).⁷⁷ Other quoted examples include the prohibition of uncompensated expropriation⁷⁸ and the prohibition against discrimination.⁷⁹ Further activities to be considered as against public policy (*ordre public*) are piracy, terrorism, genocide, slavery, smuggling, drug trafficking and paedophilia.⁸⁰ The arms trade is not considered *per se* against human rights or public policy, since most of the trade is run through State-controlled agencies. Other examples may include trade in human body parts, and contracts which may not adequately observe environmental protection rules.⁸¹

As to procedural public policy – a notion partially overlapping with the requirements prescribed in Article V.1(b) of the 1958 New York Convention – suffice it to say that the due process requirement is so fundamental and pervasive that it has been considered to be part of both international and transnational public policy.⁸² Though there is a

1 *et seq.*; F. Galgano and F. Marrella, *Diritto del commercio internazionale* (Padua: CEDAM, 2004), p. 563 *et seq.*; J. Beguin and M. Menjucq, *Traité de droit du commerce international* (Paris: Litec, 2005), p. 738.

⁷⁵ Res. 2/2002, adopted at the 70th ILA Conference held in New Delhi, India, 2–6 April 2002.

⁷⁶ See the Interim Report of the ILA International Commercial Arbitration Committee on the topic of public policy as a ground for refusing recognition and enforcement of international arbitral awards at p. 20, available at <http://www.ila-hq.org/pdf/Int%20Commercial%20Arbitration/ComArbitration.pdf> (accessed: 18 April 2006).

⁷⁷ *Ibid.*, ⁷⁸ *Ibid.*, ⁷⁹ *Ibid.*, ⁸⁰ *Ibid.* at p. 22.

⁸¹ *Ibid.* at p. 17.

⁸² P. Lalive, 'Transnational (or Truly International) Public Policy and International Arbitration', in P. Sanders (ed.), *Comparative Arbitration Practice and Public Policy in Arbitration*, ICCA Congress Series (The Hague: Kluwer Law International, 1986), pp. 299 *et seq.*; B. Oppetit, 'Le refus d'exécution d'une sentence arbitrale étrangère dans le cadre de la Convention de New York', *Revue de l'arbitrage* (1971), 104; other authors

consensus on the core principles, the exact confines of due process may fluctuate from one legal system to the other. Examples of breaches of procedural public policy have been identified, for instance where the making of the award was induced or affected by fraud or corruption,⁸³ and where there was a breach of the rules of natural justice, and the parties were on an unequal footing in the appointment of the tribunal.⁸⁴ It may also be a breach of procedural public policy to enforce an award that is inconsistent with a court decision or arbitral award that has *res judicata* effect in the enforcement forum.⁸⁵

A consensus as to what constitutes a fundamental principle of procedural or substantive public policy might be evidenced by international instruments, for example UDHR.⁸⁶ Hence, it has been suggested that such a fundamental principle should be of universal application, albeit of very restricted scope, comprising: fundamental rules of natural law; principles of universal justice; *jus cogens* in public international law.⁸⁷ There appears to be little support amongst State courts at the present time for the application of this concept since the *lex fori* characterisation of public policy remains the common and most rooted approach. Nonetheless, the ECHR may influence deeply the way in which domestic courts control arbitration through public policy. As stated by the Strasbourg Court in the *Loizidou v. Turkey* case,⁸⁸ a concept of European public policy (*ordre public européen*) has emerged, which means that no enforcement of a foreign judgment is possible if such a judgment violates Article 6; a conclusion that might easily be applied also to arbitral awards.⁸⁹

speak of principles fundamental to all systems of justice, universally recognised principles and the like (see in particular Redfern and Hunter, *Law and practice of international commercial arbitration*, pp. 541 *et seq.*).

⁸³ See the Interim Report of the ILA International Commercial Arbitration Committee on the topic of public policy as a ground for refusing recognition and enforcement of international arbitral awards at p. 24, available at <http://www.ila-hq.org/pdf/Int%20Commercial%20Arbitration/ComArbitration.pdf> (accessed: 18 April 2006).

⁸⁴ *Ibid.* at pp. 25–26. ⁸⁵ *Ibid.* at p. 29.

⁸⁶ See T. Treves, *Diritto internazionale. Problemi fondamentali* (Milano: Giuffrè, 2005), p. 193. ⁸⁷ ILA, *Final report on public policy*, above, fn. 75.

⁸⁸ 20 Eur. Comm. HR, Dec. & Rep. 99.

⁸⁹ See on this respect *Pellegrini v. Italy*, *Revue Trimestrielle de Droits de l'Homme*, 2002, 463. See also, on the European Community level, ECJ, 28 March 2000, *Krombach et Bamberski*, C-7/98, Rec., 2000-I, 1435, with reference to the notion of public policy, ex Article 27.1 of the Brussels Convention of 27 September 1968.

Corporate social responsibility 'from above' and 'from below': towards contractualised human rights?

So far, the role of human rights in a typical transnational business dispute resolution environment, such as that of arbitration, has been highlighted; now it is time to take into consideration a peculiar form of transnational and non-governmental rule-making process: the case of Codes of Conduct embodying corporate social responsibility on human rights. The most important actors of economic globalisation are not Governments but corporations. Annual budgets of TNCs indicate that they represent almost half of the top one hundred world economic powers. Recent corporate scandals,⁹⁰ have shown that TNCs are borderless: each TNC is a single economic unity operating simultaneously in all countries where its branches are located. In the aftermath of those corporate scandals there has been concern inside the business community of systemic failures that would threaten the very essence of the free enterprise philosophy. Corporate social responsibility is at the core of these issues and it is sometimes referred to as 'responsible business conduct' and 'corporate citizenship', or more generally 'business ethics'. Corporate social responsibility thus ultimately adds a new dimension to human rights protection since it applies to activities carried out in each State where TNCs operate.

According to the 2001 European Commission Green Paper, corporate social responsibility is 'a concept whereby companies integrate social and environmental concerns in their business operations and in their interaction with their stakeholders on a voluntary basis'.⁹¹ This broad concept, however, should be broken down into two very different sets of instruments: a) Codes of Conduct produced at the inter-governmental or even governmental level (that which I call 'corporate social responsibility from above') and b) Codes of Conduct produced directly by the business community or single TNC (i.e. 'corporate social responsibility from below').

⁹⁰ L. E. Mitchell, *Corporate Irresponsibility. America's Newest Export* (New Haven: Yale University Press, 2001), pp. 19 *et seq.*

⁹¹ COM(2001) 366 final. Compare the report by the International Council on Human Rights Policy, *Beyond Voluntarism: Human rights and the developing international legal obligations of companies*, Geneva, 2004, available at http://www.cleanclothes.org/ftp/beyond_voluntarism.pdf (accessed: 1 February 2006).

Corporate social responsibility 'from above': Codes of Conduct of inter-governmental or governmental origin

Global level

There have been many attempts to regulate TNC activities via Codes of Conduct issued by intergovernmental organisations (IGOs) and Governments. Stronger forms of regulation have been frequently advocated in specialised literature, especially during the 1970s, with a reborn impetus nowadays, in the age of economic globalisation.⁹² Significantly enough, the UN Conference on Trade and Development (UNCTAD) had charged a group of eminent persons with the task of studying the role (and possible form of regulation) of multinational corporations in world trade.⁹³ Accordingly, a UN Commission and a UN Centre on Transnational Corporations were set up in New York in 1974.⁹⁴ As a result a Draft Code of Conduct for Transnational Corporations⁹⁵ was produced, covering many different issues such as labour, consumers, women, the environment, corruption, and restrictive business practices. The first generation of Codes of Conduct culminated in the 1977 International Labour Organisation (ILO) Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy.⁹⁶ Although its rules were conceived in the light of political claims coming from developing countries for a New International Economic Order (NIEO),⁹⁶ it nonetheless touched

⁹² See: M. Virally, 'Les codes de conduite, pour quoi faire?', in J. Tousscoz (ed.), *Transferts de technologie, sociétés transnationales et nouvel ordre international* (Paris: PUF, 1978); H. W. Baade, 'The legal effect of Codes of Conduct for multinational enterprises', in N. Horn (ed.), *Legal Problems of Codes of Conduct for Multinational Enterprises* (Antwerp/Boston: Kluwer-Deventer, 1980), p. 390; P. Sanders, 'Codes of Conduct and sources of law', in P. Fouchard, A. Lyon-Caen and P. Kahn (eds.), *Le droit des relations économiques internationales: Etudes offertes à Berthold Goldman* (Paris: Lites, 1982), p. 281; S.A. Metaxas, *Entreprises transnationales et codes de conduite* (Zurich: Schulthess Verlag, 1988); A. Fatouros, 'Les principes directeurs de l'OCDE à l'intention des entreprises multinationales: perspectives actuelles et possibilités futures', in C. Dominici, R. Fatry and C. Reymond, *Etudes de droit international en l'honneur de Pierre Lalive* (Basel: Helbing & Lichtenhahn, 1993), p. 421. See also R. Mares, *Business and Human Rights: A Compilation of Documents* (Boston: Martinus Nijhoff, 2004).

⁹³ J. Braithwaite, P. Drahos, *Global Business Regulation* (Cambridge: CUP, 2000), p. 192.

⁹⁴ U.N. Code of Conduct on Transnational Corporations, 23 I.L.M. 626 (1984). See also A. Giardina and G. L. Tosato, *Diritto del commercio internazionale. Testi di base e note introduttive* (Milan: Giuffrè, 1995), pp. 427 et seq., and comments of A. Di Biase.

⁹⁵ ILO, *Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy*, 17 ILM (1978) 422.

⁹⁶ See in particular the Declaration and Programme of Action on the Establishment of a New International Economic Order proclaimed by the General Assembly in its resolution

on some human rights of workers: employment promotion; freedom of association; collective bargaining; equality of opportunities and of treatment; security of employment; and safety and health issues. Implementation of this instrument has, however, been voluntary and, in practice, it is hard to find recorded cases of full implementation by businesses or even by courts. On 26 August 2003 and along the same 'soft law' line, the Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights have been adopted.⁹⁷ Their effectiveness in application, as well as that of the 1998 ILO Declaration on Fundamental Principles and Rights at Work,⁹⁸ will be verified in the years to come.

A new philosophy of governance has been advanced by the UN Secretary-General in Davos in January 1999. Kofi Annan has directly addressed the transnational business community in order to identify a set of universally agreed values and principles in the areas of human rights, labour standards and environmental protection called the 'Global Compact for the 21st Century'.⁹⁹ Relevant (business) NGOs such as the International Chamber of Commerce have welcomed Annan's challenge, and various initiatives are underway between the UN, ICC, and other business organisations. Similarly, the UN Conference on Environment and Development (UNCED), which was held in Rio de Janeiro in June 1992, developed twenty-seven 'Rio Principles', the Rio Declaration on Environment and Development,¹⁰⁰ in which sustainable development is linked to environmental protection and a new global partnership involving 'new levels of cooperation among States, key sectors of societies and people'.¹⁰¹ Those principles have been re-affirmed in the Johannesburg Summit.¹⁰²

3201 (S-VI) and 3202 (S-VI) of 1 May 1974, UN Doc. A/9548 (1974), reprinted in 13 I.L.M. 715 (1974); the Charter of Economic Rights and Duties of States adopted by the General Assembly in its resolution 3281 (XXIX) of 12 December 1974, 29 U.N. GAOR Supp. (No. 31) at 51, UN Doc. A/9946 (1974), reprinted in 14 I.L.M. 251 (1975).

⁹⁷ E/CN.4/Sub.2/2003/12/Rev.2. Approved 13 August 2003, by the UN Sub-Commission on the Promotion and Protection of Human Rights resolution 2003/16, UN Doc. E/CN.4/Sub.2/2003/L.11 at 52 (2003).

⁹⁸ <http://www.ilo.org/public/english/standards/decl/declaration/text/index.html> (accessed: 26 December 2005).

⁹⁹ See <http://www.unglobalcompact.org> (accessed: 18 April 2006).

¹⁰⁰ See <http://www.unep.org/Documents/multilingual/Default.asp?DocumentID=788>

ArticleID=1163 (accessed: 18 April 2006).

¹⁰¹ *Ibid.*, Principle <http://www.unep.org/Documents/Multilingual/Default.asp?DocumentID=788&ArticleID=1163> (accessed: 26 December 2005). See I. Bantekas, 'Corporate Social Responsibility in International Law', *Boston University International Law Journal* 22 (2004), 309 at 318. ¹⁰² <http://www.johannesburgsummit.org> (accessed: 18 April 2006).

Regional level

At a regional level, the Organisation for Economic Co-operation and Development (OECD) Guidelines for Multinational Enterprises¹⁰³ have been developed and reviewed as an Annex to the Declaration on International Investment and Multinational Enterprises (2000).¹⁰⁴ However, its rules, recalling the UDHR, are recommendations to comply with local laws, safeguarding consumer interests, abolition of child labour, fighting bribery, environmental protection. Its implementation mechanism is based on national contact points charged with promoting the Guidelines and handling enquiries, as is general in OECD practice.

On the European Union level, after the European Business Declaration against Social Exclusion¹⁰⁵ and the 2000 Lisbon European Council Summit,¹⁰⁶ extensive consultation has led to the 2001 Corporate Social Responsibility Green Paper to which reference has already been made.¹⁰⁷ Once again, it is recommended to TNC's to adopt a Code of Conduct embodying corporate social responsibility, and taking into account international instruments such as ILO conventions, OECD guidelines, the UN 'Global Compact', etc., and to adopt compliance mechanisms. In practice, no 'hard law' rules have been created, and the issue of corporate social responsibility enforcement is left to TNC's discretion, or to voluntary mechanisms.

Concluding remarks: codes 'from above' as benchmarks

The common feature of the international instruments recalled above, is that they are created by intergovernmental organisations and they are directed at business entities. In my view, these codes, embodying 'corporate social responsibility from above', have no direct binding legal effect on corporations and are similar to academic exercises. It is extremely hard to find any legal basis for allowing IGOs to regulate the activity of TNCs outside specific empowerment by member States. IGOs' Codes of Conduct are merely recommendations addressed to corporations which – paradoxically – are neither members of the IGOs nor are generally recognised as subjects of (public) international law.

¹⁰³ 40 ILM 237 (2001).

¹⁰⁴ DAFNE/IME/WPG(2000)9.

¹⁰⁵ http://www.cseurope.org/aboutus/socialexclusion_page393.aspx (accessed: 18 April 2006).

¹⁰⁶ http://www.cseurope.org/whatwedo/printpage/CSREuropeandtheEU_page410.aspx (accessed: 18 April 2006).

¹⁰⁷ Above, fn. 92.

The real question then becomes the following: are codes elaborated by IGOs completely useless? My answer is no. I believe that such IGO-generated Codes of Conduct have a unique and very important value as external benchmarks for business-generated codes. Once the adoption of a Code of Conduct embodying corporate social responsibility becomes a need for a business it is necessary to know what the content of such a code should be. It is for an individual company or industry sector to decide what the most useful benchmark codes are and to develop their own understanding of how business principles relate to external codes/guidelines, the framework of UN values and societal expectations. However, IGO-generated Codes of Conduct identify concretely generally accepted uniform human rights rules in the international arena to which any business should adapt. For the same reason, it can even be argued that if during transnational litigation a TNC proves that a certain action has been taken in conformity with a given IGO's code of conduct, it may be presumed that such an act is lawful; a result which runs in parallel with the one reached when evaluating State acts in conformity with a recommendation by an IGO.¹⁰⁸ From this perspective, one should recall the importance that Model Laws prepared by IGOs have for States.¹⁰⁹ Model Laws are not treaties and they are not binding international unilateral acts of IGOs. Rather they are generated at IGO level to pinpoint a set of rules of universal acceptance. For this very reason some Model Laws have been quite successful in addressing issues that, probably, would have had a different destiny if left to diplomatic negotiations.¹¹⁰ Therefore, it is not hard to see a similar role for IGOs: that of drafting model rules of corporate social responsibility, which are commended to responsible businesses and their NGOs.

Corporate social responsibility 'from below': generated at business community level

Corporate social responsibility 'from below' consists of all Codes of Conduct generated directly at business community level. There are two

¹⁰⁸ See in this respect B. Conforti, *International Law and the Role of Domestic Legal Systems* (Dordrecht: Martinus Nijhoff, 1993), pp. 108–109, as well as B. Conforti, 'Le rôle de l'accord dans le système des Nations Unies', *Recueil des cours* 142 (1974/II), 262–265.

¹⁰⁹ 'Model Laws' are generally considered as another example of soft law.

¹¹⁰ See, e.g., UNCITRAL Model Law on International Commercial Arbitration, (1985), 24 ILM 1302, 1314 (1985); at <http://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/ml-arb-e.pdf> (accessed: 16 February 2005).

aspects of this phenomenon: unilateral and collective codes of conduct. Perhaps the starting point of the development of unilateral business Codes of Conduct may be traced back to the so-called 'Sullivan Principles'. In 1977, the Reverend Leon Sullivan launched a set of basic principles designed to persuade US companies with investments in South Africa to adopt voluntary Codes of Conduct designed to bypass the apartheid regime and, therefore, going beyond the normative standard provided by local law. The principles included non-segregation of races, providing equal and fair employment practices, and affirmative action. These rules were restated as the 'Global Sullivan Principles for Corporate Social Responsibility' in 1999 in order to 'encourage companies to support economic, social and political justice wherever they do business'.¹¹¹ A company wishing to be associated with these Principles is expected to provide information, support for universal human rights, equal opportunities, respect for freedom of association, given levels of employee compensation, training, health and safety, sustainable development, fair competition and to work in partnership to improve quality of life. Compliance has to be assessed by independent auditors, demonstrating corporate commitment to such rules. The Principles aim to be applicable to companies of any size, operating in any part of the world, and have been endorsed and implemented by a number of business councils, campaigning NGOs, local authorities, companies, and representative organisations. To date, 189 companies have signed up to them.¹¹²

Unilateral codes of conduct

In the 1990s, after various scandals,¹¹³ a new wave of Codes of Conduct was instituted, leading some important TNCs to formulate their own unilateral codes, on their own initiative. An interesting analysis of the content of such codes has been offered by OECD and the World Bank Group and, whilst it cannot be examined in detail here,¹¹⁴ what emerges

¹¹¹ See <http://www.thesullivanfoundation.org/gsp/default.asp>, (accessed: 18 April 2006).

¹¹² See however critical view by D. Pink, 'The Valdez Principles: Is What's Good for America Good for General Motors?', *Yale Law & Policy Review* (1990), 180 at 189.

¹¹³ See for an overview L. E. Mitchell, *Corporate Irresponsibility. America's Newest Export* (New Haven: Yale University Press, 2001), pp. 19 *et seq.*

¹¹⁴ OECD, *Making Corporate Codes of Conduct Work: Management Control Systems and Corporate Responsibility*, Paris, no. 2001/3; OECD, *Codes of Corporate Conduct: expanded review of their contents*, Working Papers on International Investment, no. 6, Paris, 2001 (<http://www.oecd.org/dataoecd/45/29/1922806.pdf>); World Bank Group, *Company Codes of Conduct and International Standards: An Analytical Comparison*,

from such a study is that, at the very least, TNCs offer a basic statement which is a signal to the market – about the company and what it does in the form of a top-level statement from the CEO or equivalent. Then, one may find some commentary about the policies and values of the business, a review of the company's stakeholder engagement, and an analysis of what are the key environmental and social issues for the company, with a commentary on how the company is responding, typically including data showing performance in each of these areas; topics commonly treated are employment and labour relations; human rights, the environment; consumer protection and fighting corruption.

Levi Strauss, for example, indicated that it will favour business partners sharing their commitment 'to contribute to improving community conditions' and added significantly that it 'may withdraw production from [any factory that violates these standards] or require that a contractor implement a corrective action plan within a specified time period'.¹¹⁵

Moreover, some corporations (i.e. Unilever, Danone and Nestlé) are developing websites where they publish updated information on how they comply with corporate social responsibility obligations.¹¹⁶

Collective codes of conduct

Apart from individual corporations unilaterally developing their own Codes of Conduct, business organisations have become more and more active in producing what I have called 'collective codes of conduct'.¹¹⁷ In this case the compilation of rules of corporate social responsibility is done directly by the business associations, of which companies are members. Examples of such codes are, from the ICC, its Business Charter for Sustainable Development;¹¹⁸ Rules of Conduct on Extortion and Bribery in International Business Transactions,¹¹⁹ and various marketing and

Washington, 2003 (<http://info.worldbank.org/etools/docs/library/114195/Company%20Codes%20of%20Conduct%20and%20International%20Standards%20-%20Part%201%20-%20202003.pdf>) (last accessed: 18 April 2006).

¹¹⁵ Reported by R. Steinhardt, 'Corporate Responsibility and the International Law of Human Rights: The New Lex mercatoria', in P. Alston (ed.), *Non-State Actors and Human Rights* (Oxford: OUP, 2005), p. 183.

¹¹⁶ See, for example, <http://www.unilever.com/environment/society/socialreporting/overview> (last accessed: 26 December 2005). ¹¹⁷ Marrella, *La nuova lex mercatoria*, 783.

¹¹⁸ See <http://www.iccwbo.org/home/environment/charter.asp> (last accessed: 18 April 2006).

¹¹⁹ See <http://www.iccwbo.org/it904/index.html#cookies> = no (last accessed: 18 April 2006).

advertising codes;¹²⁰ and, from elsewhere, for example, the 'Responsible Care' programme of the chemical industry.¹²¹

Typical clauses address issues such as child labour, forced labour, health and safety, freedom of association, freedom from discrimination, disciplinary practices, work hours, and compensation. These rules are derived from principles expressed in the UDHR, and the UN Convention on the Rights of the Child,¹²² and in relevant ILO Conventions, such as Nos. 29 and 105 on forced labour;¹²³ No. 87 on freedom of association;¹²⁴ No. 100 on equal remuneration;¹²⁵ No. 111 on employment discrimination;¹²⁶ No. 138 on workers' minimum age.¹²⁷

The fact that such Codes of Conduct are directly framed by business associations (the 'business NGOs'), and then recommended to their own corporate members, endows such instruments with peculiar legal meaning. First, codes may become binding if adopted by competent governing bodies of each association and imposed on all its business members, including any new member asking for accession. Corporate social responsibility codes, then, not only become new 'rules of the game' for the market, they acquire legal strength similar to the one observed in advertising codes.¹²⁸ Secondly, since these kind of corporate social responsibility codes are drafted directly by business associations, new forms of cross-fertilisation become possible with NGOs active in the human rights field, and with inter-governmental organisations.¹²⁹

¹²⁰ See, for example, the ICC international advertising code (1997) (<http://www.iccwbo.org/policy/marketing/id905/index.html>) as well as the ICC International Code of Sales Promotion; ICC International Code of Practice on Direct Marketing; ICC Code on Environmental Advertising; ICC Code on Sponsorship; ICC/ESOMAR International Code of Marketing and Social Research Practice, all available at <http://www.iccwbo.org/policy/marketing/> (last accessed: 18 April 2006).

¹²¹ See <http://www.icca-chem.org/> (last accessed: 18 April 2006).

¹²² See <http://www.unhcr.ch/html/menus3/b/k2c2c.htm> (last accessed: 18 April 2006).

¹²³ Forced Labour Convention, 10 June 1930, 39 UNTS 55; Abolition of Forced Labour Convention, 25 June 1957, 320 UNTS 291.

¹²⁴ Freedom of Association and Protection of the Right to Organize Convention, 9 July 1948, 68 UNTS 17.

¹²⁵ Equal Remuneration Convention, 29 June 1951, 165 UNTS 304.

¹²⁶ Discrimination (Employment and Occupation) Convention, 25 June 1958, 363 UNTS 51.

¹²⁷ Minimum Age Convention, 26 June 1973. See the text in <http://www.ilo.org/ilolex/english/convdisp1.htm> (last accessed: 26 December 2005).

¹²⁸ Self-regulation codes for the advertising industry in certain countries, e.g. Italy, have typically also included compulsory arbitral dispute resolution mechanisms.

¹²⁹ For an example see the Global Reporting Initiative at <http://www.globalreporting.org/> (last accessed: 26 December 2005).

At the very minimum, codes embodying corporate social responsibility from above' will provide a widely accepted benchmark for codes realising 'corporate social responsibility from below'. It is in the interest of TNCs, and their business NGOs to follow principles and rules having wide international acceptance.

Taking corporate social responsibility seriously: market-based enforcement

The issue of the applicability and concrete application of TNCs' Codes of Conduct has been the subject of wide debate since the creation of first generation' codes in the 1970s.¹³⁰ For most authors, the term 'corporate social responsibility' corresponds to vague statements with no legal value. The common denominator in these approaches is an assumption that most, if not all, entrepreneurs (and TNCs) are potential criminals and/or responsible for most human rights abuses occurring in the world. As a result they see liabilities of TNCs everywhere, and wonder why no specific repressive action is taken by Governments or even international courts. The debate on this point reflects the one between liberal and Marxist approaches to political economy. According to the majority view of human rights academics, the idea that corporations voluntarily give up to profitable opportunities in order to respect human rights without some governmental constraints simply seems absurd.¹³¹ On the opposite side, there are other authors inspired by Milton Friedman and the 'Chicago School' of economics, according to whom the social responsibility of business entities is only to maximize profits for the benefit of their stakeholders.¹³² On balance, I think that a good reading of Adam Smith is most enlightening for the debate on corporate social responsibility. According to Smith,

¹³⁰ See the contribution by F. Francioni, in this volume.

¹³¹ For an account of such a debate see, *inter multos*, M. Addo (ed.), *Human Rights Standards and the Responsibility of Transnational Corporations* (The Hague: Kluwer, 1999); P. Spiro, 'Globalization, International Law and the Academy', 32 *New York University Journal of International Law & Politics* 567 (2000); C. Mc Crudden, 'Human Rights Codes for Transnational Corporations: the Sullivan and Mac Bride Principles', in D. Shelton, *Commitment and Compliance* (Oxford: OUP, 2000), pp. 418–448; J. Dine, *Companies, International Trade and Human Rights* (Cambridge: CUP, 2005) and especially R. Mullerat, D. Brennan (eds.), *Corporate Social Responsibility: The Corporate Governance of the 21st Century*, (The Hague: Kluwer, 2005).

¹³² See M. Friedman, 'The Social Responsibility of Business is to Increase its Profits', *The New York Times Magazine*, 13 September 1970. His view on corporate social responsibility had been expressed in M. Friedman, *Capitalism and Democracy*, (Chicago: Chicago

every individual necessarily labours to render the annual revenue of the society as great as he can. He generally, indeed, neither intends to promote the public interest, nor knows how much he is promoting it. By preferring the support of domestic to that of foreign industry, he intends only his own security; and by directing that industry in such a manner as its produce may be of the greatest value, he intends only his own gain, and he is in this, as in many other cases, led by an invisible hand to promote an end which was no part of his intention. Nor is it always the worse for the society that it was no part of it. By pursuing his own interest he frequently promotes that of the society more effectually than when he really intends to promote it. I have never known much good done by those who affected to trade for the public good. It is not from the benevolence of the butcher, the brewer, or the baker, that we expect our dinner, but from their regard to their own interest. We address ourselves, not to their humanity but to their self-love, and never talk to them of our necessities but of their advantages.¹³³

Thus, in order to identify the degree of 'voluntary compliance' by TNCs to Codes of Conduct, it is crucial to recognise the driving market forces behind corporate social responsibility, which can be sketched out as the following:

- a) Corporate social responsibility contributes to creating and maintaining a competitive advantage.¹³⁴
- b) Consumers will pay an extra price for goods produced under 'fair trade' standards.
- c) Corporate social responsibility protects from boycott actions (mainly by consumers).
- d) Corporate social responsibility guarantees strong relationships with stakeholders.
- e) Corporate social responsibility creates a better, safer and more stimulating work environment.
- f) Corporate social responsibility improves business management motivation.

University Press, 1962). See also David Henderson, *Misguided Virtue. False Notions of Corporate Social Responsibility* (London: Institute of Economic Affairs, 2001), pp. 17–18. C. Crook (ed.), 'The Good Company: A Sceptical Look at Corporate Social Responsibility', *The Economist*, 20 January 2005 (374) 8410.

¹³³ Adam Smith, *An Inquiry Into the Nature and Causes of the Wealth of Nations* (London 1776).

¹³⁴ See Ghauri and Cateora, *International Marketing*, 2nd ed. (London: McGraw-Hill Professional, 2006), 463–481.

- g) Corporate social responsibility makes access to funding easier ('socially responsible investment').
- h) Corporate social responsibility allows companies to benefit from fiscal advantages and administrative facilitation.
- i) Corporate social responsibility contributes to increasing shareholder value in the markets where ethical indexes are adopted. Major stock markets have developed specific indicators such as the Dow Jones Sustainability Indexes,¹³⁵ Domini 400 Social Index,¹³⁶ etc.

All in all, corporate social responsibility reduces 'enterprise global risk'.¹³⁷ This is the crucial factor in the mind of business entrepreneurs. Market sanction mechanisms, after all, are a particular kind of legal sanctions, although one should properly speak of non-governmental sanctions of variable intensity operating 'in the shadow of law'.

In order to increase external communication of compliance with corporate social responsibility codes of conduct, certification programmes have been established by independent auditors. The Worldwide Responsible Apparel Production Certification Program (WRAP),¹³⁸ the SA8000¹³⁹ and ISO 14000¹⁴⁰ Certification Schemes, and the Kimberly Process Certification Scheme¹⁴¹ are examples of non-governmental human rights implementation control mechanisms through external auditing.

Finally, one should not underestimate the pressure from above, that is by regulators at governmental and intergovernmental level. Without a serious turn on enforcing corporate social responsibility rules by business operators themselves, there will certainly be tougher sanctions 'from above', both by increasing civil and criminal liabilities, and by strengthening the

¹³⁵ <http://www.sustainability-index.com> (last accessed: 18 April 2006).

¹³⁶ http://www.domini.com/Social-Screening/creation_maintenance.doc_cvt.htm (last accessed: 18 April 2006).

¹³⁷ See *Harvard Business Review on Corporate Responsibility* (Boston: Harvard Business School Publishing, 2003), ICC Business in Society: making a positive and responsible contribution (7 May 2002) accessible at <http://www.iccwbo.org/policy/society/id1188/index.html>, as well as the vast literature on 'cause related' marketing. See also S. Melkko, *Marketing Human Rights*, European Master's Degree in Human Rights and Democratisation published dissertations (Venice: Marsilio, 2005), pp. 444 *et seq.*; and generally R. Liubicic, 'Corporate Codes of Conduct and Product Labelling Schemes: The Limits and Possibilities of Promoting International Labor Rights Standards through Private Initiatives', *Law and Policy in International Business*, 30 (1998), 111.

¹³⁸ <http://www.wrapapparel.org> (last accessed: 18 April 2006).

¹³⁹ See <http://www.sa-intl.org> (last accessed: 26 December 2005).

¹⁴⁰ See <http://www.iso.ch> (last accessed: 26 December 2005).

¹⁴¹ <http://www.kimberlyprocess.com:8080/site/?name=kpcs> (last accessed: 18 April 2006).

courts' inquisitorial powers. For instance, in July 2003, in the aftermath of the Enron and Worldcom scandals, the UK Government has announced changes in company law. Among these changes, all large companies must publish every year an Operating and Financial Review including sections on 'policies and performance on environmental, community, societal, ethical and reputational issues, including compliance with relevant laws and regulations'.¹⁴² In this context, the Companies Audit Investigation and Community Enterprise Bill has been passed in the House of Commons with the aim of restoring confidence in companies and financial markets, as well as promoting social enterprise.¹⁴³

In conclusion, there are a number of relevant factors contributing to giving 'teeth' to corporate social responsibility rules in the interest of many stakeholders, including business operators. Hence, when evaluating economic behaviour in complex areas such as corporate social responsibility, the analysis should devolve from common discussions on the 'good heart' of corporate executives which is, *per se*, legally irrelevant. Rather, all of the factors evidenced above lead one to foresee a development of corporate social responsibility business-to-business litigation in international commercial arbitration in the near future.

The 'spin-off' from corporate social responsibility into arbitration

The fact that corporate social responsibility Codes of Conduct are 'voluntary' does not necessarily mean that they are deprived of legal effects,¹⁴⁴

¹⁴² See <http://www.dti.gov.uk> (last accessed: 26 December 2005). Similar rules may also be found in the French *Nouvelle régulations économiques* of 15 May 2001 (Article 116); in the Italian *Codice di Autodisciplina* (July 2003) of the Italian Stock Market; in the German *Regierungskommission Deutscher Corporate Governance Kodex*, Berlin, 21 May 2003 and in the USA, the Sarbanes-Oxley Act of 2002 (<http://www.sarbanes-oxley.com>, last accessed 26 December 2005). Here it should be remarked that the debate on corporate social responsibility links with the one on corporate governance.

¹⁴³ See http://www.dti.gov.uk/cld/companies_audit_etc_bill (last accessed: 26 December 2005).

¹⁴⁴ See in this respect G. Farjat, 'Réflexions sur les codes de conduites privés', in Fouchard, Lyon-Caen and Kahn (eds.), *Le droit des relations économiques internationales, Etudes offertes à B. Goldman*, p. 47, observing that (61 *et seq.*) Codes of Conduct may be the source of trade usages so that progressive transformation into private customary rules eventually enrich the bulk of transnational public policy; R. B. Ferguson, 'The legal status of non-statutory codes of practice', *Journal of Business Law* (1988), 12 *et seq.*; F. Osman, 'Avis, directives, codes de bonne conduite, recommandation, éthique, etc. : réflexions sur la dégradation des sources privées du droit', *Revue Trimestrielle de Droit Civil* 1995, 509 *et seq.*; G. Farjat, 'Nouvelles réflexions sur les codes de conduite privés', in J. Clam and Gilles Martin (eds.), *Les transformations de la régulation juridique*, (Paris: LGDJ, 1998), p. 151. And

which may derive, *inter alia*, from applicable contract law. Freedom of action is a fundamental liberty. However, it is a freedom subject to limits: two of them being 'good faith', and 'good morals'. Let us consider two basic situations: one in which a Code of Conduct is only mentioned during the formation of a contract, without specific reference in the final contract; and another one in which the code is part of the agreement.

In most legal systems, good faith requirements must be generally present in the formation of the contract, in its interpretation, and in the performance stage. There is an immense literature,¹⁴⁵ as well as case law,¹⁴⁶ on good faith (and fair dealing) requirements in contract law but, in essence, it amounts to re-balancing individual interests with the 'rules of the game'. In this sense, reference is made not to the state of mind of single contractors (the concept of *subjective* good faith) but to *objective* rules of behaviour.¹⁴⁷

Good faith must be present in the course of negotiation of a contract, meaning that each party must act honestly and sincerely when making, rejecting, or accepting offers. Hence, individual Codes of Conduct may be analysed as unilateral statements by TNCs directed at present or potential contractors. The *voluntary* nature of such statements does not mean that Codes of Conduct are always without legal force, as is often believed, under the general label of 'soft law'. Such a conclusion amounts only to finding

especially P. Kahn, 'Les réactions de milieux économiques' in P. Kahn and C. Kessedjian (eds.), *L'illécite dans le commerce international*, (Litec: Paris, 1996), pp. 477 *et seq.* (esp. 491).

¹⁴⁵ See, amongst a huge literature, P. Atiyah, *The Rise and Fall of Freedom of Contract* (Oxford: OUP, 1985) as well as Nygh, *Autonomy in International Contracts*, R. Zimmermann and S. Whittaker, *Good Faith in European Contract Law*, available at <http://assets.cambridge.org/0521771900/sample/0521771900bws00.pdf> (last accessed: 26 December 2005); U. Magnus, 'Remarks on Good Faith: The United Nations Convention on Contracts for the International Sale of Goods and the International Institute for the Unification of Private Law, Principles of International Commercial Contracts', *Pace International Law Review* 10 (1998), 89–95.

¹⁴⁶ See e.g. M. Hesselink, 'The Concept of Good Faith', in Hartkamp et al., *Towards a European Civil Code*, 3rd ed. (The Hague: Kluwer, 2004), pp. 471–498.

¹⁴⁷ Examples of these requirements may be found in national law; *ex multis* in Articles 1175, 1337, 1338, 1366, and 1375 of the Italian Civil Code, and in those codes which have followed the model of § 242 BGB (in full) [in force up to 31 December 1999], that is *Leistung nach Treu und Glauben*, i.e. performance according to good faith, according to which: 'Der Schuldner ist verpflichtet, die Leistung so zu bewirken, wie Treu und Glauben mit Rücksicht auf die Verkehrssitte es erfordern.' ['The debtor is bound to effect performance according to the requirements of good faith, giving consideration to common usage']. Similar requirements are included in the Unidroit Principles for international commercial contracts (2004). See in particular Article 1(7): 'Each party must act in accordance with good faith and fair dealing in international trade. The parties may not exclude or limit this duty.' (<http://www.unidroit.org/english/principles/contracts/principles2004/blackletter2004.pdf>, last accessed: 18 April 2006).

that individual Codes of Conduct are statements not supported by the will of its author to make them binding. However, it is equally clear that the same conclusion may be discarded by the doctrine of legitimate expectations which is particularly important in international business law.¹⁴⁸ According to this doctrine, a unilateral statement becomes binding if and insofar as it has determined a legitimate expectation (or expectation interest) on the other contractor that it is a *serious* statement. In other words, individual codes of conduct, as any other unilateral statement, become legally binding if the other party proves that without fault he or she has considered such declaration as serious. Thus an expectation that the code will be applied may be formed and protected under the applicable law. As a consequence, one of the parties may terminate a contract and even claim damages if it proves that the information on the enforcement of the Code of Conduct was considered essential to determine its consent to be bound.

Business parties may go further and declare that a specific Code of Conduct is incorporated into their contract. In this case, there can be no doubt that 'soft law' provisions of the code are transformed into legally enforceable contract clauses. Thus, gross violations of the corporate social responsibility Code of Conduct may lead to termination of the contract. An example of such a situation may be found in the 1998 Code of Labour Practices for the Apparel Industry including Sportswear,¹⁴⁹ where it is stated that:

[C]ontractors, subcontractors and suppliers must as part of their agreement with the company agree to terminate any contract or agreement for the supply or production of goods by any contractor, subcontractor or supplier that they engage not fully observing the code or they must seek and receive approval from the company to institute a procedure with fixed time limits to rectify a situation where the code is not being fully observed.

Where there is repeated failure to observe or to ensure observance of the code by a particular contractor, subcontractor, supplier or licensee, the agreement should be terminated.¹⁵⁰

¹⁴⁸ See E. Gaillard, 'L'interdiction de se contredire au détriment d'autrui comme principe général de droit du commerce international', *Revue de l'Arbitrage* (1985), 241. This doctrine is today embodied in the 2004 Unidroit Principles of international commercial contracts, Article 1(8), on 'Inconsistent behaviour' according to which: 'A party cannot act inconsistently with an understanding it has caused the other party to have and upon which that other party reasonably has acted in reliance to its detriment'.

¹⁴⁹ Clean Clothes Campaign, Code of Labour Practices for the Apparel Industry including Sportswear, February 1998, reproduced in R. Mares, *Business and Human Rights: A Compilation of Documents* (Boston: Martinus Nijhoff, 2004), pp. 167-178.
¹⁵⁰ *Ibid.* at 174.

Then, since human rights thereby acquire a contractual dimension, they become binding for TNCs in all countries where they operate, even in the territory of nation States which are not parties to specific Human Rights treaties.

Further, two corporations may enter into litigation because one of them has cancelled a transnational contract arguing that non-performance of corporate social responsibility Code of Conduct rules is a breach of the contract. Since the most important method for transnational business dispute resolution is arbitration, the door for B2B human rights litigation before arbitration tribunals is then opened.¹⁵¹ Moreover, the same argument holds even whether the law applicable to the merits is *lex mercatoria* and/or the Unidroit Principles of international commercial contracts. Specialised literature has ascertained that business (collective) Codes of Conduct pertain to *lex mercatoria*.¹⁵² Hence, a choice of *lex mercatoria* as the law applicable to the merits of a dispute brings with itself a legal basis to provide for the application of relevant collective Codes of Conduct.

Also on the matter of interpretation of contracts, Codes of Conduct may be taken into account within the meaning of Article 8(1) of the 1980 UN Convention on the International Sale of Goods (CISG),¹⁵³ which states that: 'For the purposes of this Convention statements made by and other conduct of a party are to be interpreted according to his intent where the other party knew or could not have been unaware what that intent was'.¹⁵⁴

¹⁵¹ Two remarkable (although controversial) cases evidencing such a trend may be found in ICC award No. 5617 (1989), *Journal de droit international*, 1994 at 1041 (contract of sales of human glands obtained from cadavers for production of drugs); ICC award No. 3493 (1983) in 23 ILM 1048 (1984) ('Pyramids Arbitration': International Construction Contract in the Area of Egyptian Pyramids).

¹⁵² See Farjat, 'Réflexions sur les codes de conduite privés'; P. Sanders, 'Codes of Conduct and Sources of Law'; and Marrella, *La nuova lex mercatoria. Principi Unidroit ed usi dei contratti del commercio internazionale*, p. 915.

¹⁵³ <http://www.uncitral.org/pdf/english/texts/sales/cisg/CISG.pdf> (last accessed: 18 April 2006).

¹⁵⁴ Article 8 of the CISG offers, further, the following rules: 'If the preceding paragraph is not applicable, statements made by and other conduct of a party are to be interpreted according to the understanding that a reasonable person of the same kind as the other party would have had in the same circumstances. (3) In determining the intent of a party or the understanding a reasonable person would have had, due consideration is to be given to all relevant circumstances of the case including the negotiations, usages and any subsequent conduct of the parties have established between themselves, usages and any subsequent conduct of the parties'. See the comment by A. Junge in P. Schlechtriem (ed.), *Commentary on the UN Convention on the International Sale of Goods (CISG)* (Oxford: OUP, 1998), pp. 69-80.

Conversely, no reference to human rights issues or corporate social responsibility can be found in the 2004 revised version of the *Unidroit Principles of International Commercial Contracts*. However, when the *Unidroit Principles* are applicable, they contain rules on contract interpretation such as Article 4(2), on interpretation of statements and other conduct, providing a solution converging with the one offered by the CISG:

The statements and other conduct of a party shall be interpreted according to that party's intention if the other party knew or could not have been unaware of that intention.

If the preceding paragraph is not applicable, such statements and other conduct shall be interpreted according to the meaning that a reasonable person of the same kind as the other party would give to it in the same circumstances.

Another argument for legal effectiveness of corporate social responsibility is that a violation of human rights rules embodied in a code may amount to unfair competition or deceptive advertising under the applicable law. An example can be found in the litigation against Nike in the USA, where the California Supreme Court rejected claims by Nike's lawyers that the First Amendment immunised the company from being sued for an allegedly deceptive public relations campaign. As a result, Nike agreed to pay US\$ 1.5 million to settle the case as quickly as possible.¹⁵⁵

Last but not least, collective Codes of Conduct may serve as a test used by arbitrators to detect a violation of transnational public policy.

The downside of this approach is that the victim (or victims) of human rights abuses is typically not a party to the kind of disputes we are discussing. Privity of contract and arbitrators' jurisdiction in such cases do not involve third parties such as victims or NGOs. However, victims of human rights abuses may be heard as witnesses in arbitral proceedings since the breach of the contract is caused by an allegation of such abuses by one of the TNCs parties to the business dispute.¹⁵⁶ Also, relevant NGOs' reports may be used to prove widespread and gross human rights violations by one of the parties to the contract whose performance is challenged. Here, we face a potential area of development of *amicus*

¹⁵⁵ *Kasky v. Nike Inc.*, 119 Cal. Rptr. 2d 296 (Cal. 2002), cert. granted, 123 S.Ct. 817 (2003), cert. dismissed, 123 S.Ct. 2554 (2003), 539 U.S. 2003. See <http://reclaimdemocracy.org/nike/index.html> (last accessed: 25 December 2005).

¹⁵⁶ This perspective leaves room open for future discussion on specific matters of international investment arbitration.

curiae briefs, similarly to what has already happened in the field of international investment arbitration.¹⁵⁷

Conclusion

Since arbitration proceedings deal ultimately with civil rights, from the standpoint of domestic courts awards shall conform with the requirements of fair trial, reasonable time, and independent/impartial tribunal standards, according to applicable human rights treaties. Challenges to awards before domestic courts, on the same grounds, are possible, irrespective of rules to the contrary (be they of international, national, or contractual origin) since they would trigger the international responsibility of the territorial State for human rights violations.

The present trend in corporate social responsibility involves translating certain human rights rules and principles into Codes of Conduct, and making these codes binding by contract. We are faced, then, with a new phenomenon: the 'contractualisation' of human rights. In a world divided into States having different levels of human rights protection given by different treaties and applicable laws, human rights 'contractualisation' may have the effect of promoting uniformity. In fact, highly globalised TNCs may establish, via their transnational contracts, a network of 'contractualised' human rights that may set even higher standards than those provided by the local law of a given country. And since corporate social responsibility translates into a system of contractual clauses whose violation may lead to termination of a transnational contract, it follows that arbitration may become a new and unexpected forum for litigating human rights issues in a business-to-business context. Of course one should not expect too much from contractualised human rights protection since any contract may or may not be terminated for reasons of commercial convenience, which may not coincide with human rights values. Also the means to resolve transnational business disputes (i.e. mediation and other ADR techniques, also including awards by consent in arbitration) are not specifically conceived to serve human rights purposes, but rather to end potential or actual disputes quickly and concretely: time is money, and litigation is expensive in terms of both time and money!

¹⁵⁷ See, for example, ICSID case No. ARB/03/19, *Agua Argentinas S.A., Suez, Sociedad General de Aguas de Barcelona, S.A., and Vivendi S.A. v. The Argentine Republic*, Order in response to a petition for transparency and participation as *amicus curiae* of 19 May 2005. See, as well, the new rule 37 of ICSID Arbitration Rules, as amended and effective April 10, 2006.

Nonetheless, since both Governments and intergovernmental organisations have so far failed altogether to produce a worldwide binding treaty 'with teeth' for global human rights protection, corporate social responsibility initiatives should be welcomed, for the time being. Summing up all legal instruments existing at inter-governmental and governmental level aimed at protecting human rights with corporate social responsibility, it is indisputable that the total result is an increase in the global level of protection of such rights.

Bibliography

- Adam, S., 'Arbitration, Alternative Dispute Resolution generally and the European Convention on Human Rights: An Anglo-centric view', *Journal of International Arbitration* 21 (2004), 413–438
- Atiyah, P., *The Rise and Fall of Freedom of Contract* (Oxford: OUP, 1985)
- Baade, H.W., 'The Legal Effect of Codes of Conduct for Multinational Enterprises', in Horn, N. (ed.), *Legal Problems of Codes of Conduct for Multinational Enterprises* (Antwerp/Boston: Kluwer-Deventer, 1980), pp. 390–430, also in *German Yearbook of International Law* 22 (1979), 11–52
- Bantekas, I., 'Corporate Social Responsibility in International Law', *Boston University International Law Journal* 22 (2004), 309–347
- Beguin, J. and Menjuq, M., *Traité de droit du commerce international* (Paris: Litec, 2005)
- Blackburn, R. and Polakiewicz, J., *Fundamental Rights in Europe: The European Convention on Human Rights and its Member States, 1950–2000* (New York: Oxford University Press, 2001)
- Blessing, M., 'Mandatory Rules of Law Versus Party Autonomy in International Arbitration', *Journal of International Arbitration* 14 (1997), 23–40
- Bond, S., 'The Selection of ICC Arbitrators and the Requirement of Independence', *Arbitration International* 4 (1988), 300–310
- Borchers, P. J., 'The Internationalization of Contractual Conflicts Law', *Vanderbilt Journal of Transnational Law* 28 (1995), 421–443
- Braithwaite, J., Drahos, P., *Global Business Regulation* (Cambridge: CUP, 2000)
- Brimmayer, L., 'Rights, Fairness, and Choice of Law', *Yale Law Journal* 98 (1989), 1277–1319
- Briner, R. and von Schlabrendoff, F., 'Article 6 of the European Convention on Human Rights and its Bearing upon International Arbitration', in Briner, R., Fortier, L. Y., Berger, K. P. and Bredow, J. (eds.), *Law of International Business and Dispute Settlement in the 21st Century: Liber Amicorum Karl-Heinz Böckstiegel* (Cologne: Heymanns, 2001), pp. 89–100
- Cassese, A., *International Law*, 2nd ed. (Oxford: Oxford University Press, 2005)

- Conforti, B., 'Le rôle de l'accord dans le système des Nations Unies', *Recueil des cours*, vol. 142, 1974/II, 203–288
- International Law and the Role of Domestic Legal Systems* (Dordrecht: Martinus Nijhoff, 1993)
- Cook, C. (ed.), 'The Good Company. A Sceptical Look at Corporate Social Responsibility', *The Economist*, vol. 374 nr. 8410, 22 January 2005
- De Gouttes, Régis, 'L'enchevêtrement des normes internationales relatives au procès équitable: comment les concilier?', in Université Robert Schumann de Strasbourg and Cour De Cassation (eds.), *Les nouveaux développements du procès équitable au sens de la Convention européenne des droits de l'homme* (Brussels: Bruylant, 1996), pp. 141–185
- Derauns, Y. and Schwartz E. A., *A Guide to the New ICC Rules of Arbitration* (The Hague: Kluwer Law International, 1998)
- Dollinger, J., 'World Public Policy: Real International Public Policy in the Conflict of Laws', *Texas International Law Journal* 17 (1982), 167–193
- Farjat, G., 'Réflexions sur les codes de conduites privés', in Fouchard, P., Lyon-Caen, A. and Kahn, P. (eds.), *Le droit des relations économiques internationales. Etudes offertes à Berthold Goldman* (Paris: Litec, 1982), pp. 47–67
- 'Nouvelles réflexions sur les codes de conduite privés', in Clam, J. and Martin, G. (eds.), *Les transformations de la régulation juridique* (Paris: LGDJ, 1998), pp. 151–178
- Fatouros, A., 'Les principes directeurs de l'OCDE à l'intention des entreprises multinationales: perspectives actuelles et possibilités futures', in Dominicé, C., Patry, R. and Reymond, C., *Etudes de droit international en l'honneur de Pierre Lalive* (Basel: Helbing & Lichtenhahn, 1993), pp. 231–260
- Ferguson, R. B., 'The Legal Status of Non-statutory Codes of Practice', in *Journal of Business Law* (1988), 12–19
- Fouchard, P., 'Rapport final sur le statut de l'arbitre. Un rapport de la Commission de l'arbitrage international de la CCI', *ICC International Court of Arbitration Bulletin* 7 (1996), 28–38
- 'La portée internationale de l'annulation de la sentence arbitrale dans son pays d'origine', *Revue de l'Arbitrage* (1997), 329–352
- Friedman, M., *Capitalism and Democracy* (Chicago: Chicago University Press, 1962)
- 'The Social Responsibility of Business is to Increase its Profits', in *The New York Times Magazine*, 13 September 1970
- Gaillard, E., 'L'interdiction de se contredire au détriment d'autrui comme principe général de droit du commerce international', *Revue de l'Arbitrage* (1985), 241–274
- Gaillard, E. and Savage, J. (eds.), *Fouchard, Gaillard, Goldman on International Commercial Arbitration* (The Hague: Kluwer Law International, 2004)
- Galgano, F. and Marrella, F., *Diritto del commercio internazionale* (Padua: CEDAM, 2004)

- Ghauri, P. and Cateora, P., *International Marketing*, 2nd ed. (London: McGraw-Hill Professional, 2006)
- Giardina, A. and Tosato, G. L., *Diritto del commercio internazionale. Testi di base e note introduttive* (Milan: Giuffrè, 1995)
- Gilbert, G., 'De l'indépendance des membres de la Cour internationale de Justice', in *Boutros Boutros-Ghali amicorum discipulorumque liber: paix, développement, démocratie* (Bruxelles: Bruylant, 1998), vol. 1, pp. 475-487
- Goldman, B., 'Les conflits de lois dans l'arbitrage international de droit privé', *Recueil des Cours* 109 (1968/II), 347-485
- 'La protection internationale des droits de l'homme et l'ordre public international dans le fonctionnement de la règle de conflits de lois', in K. Vasak (ed.), *Mélanges René Cassin*, vol. 1, (Paris: Pedone 1969), pp. 449-482.
- Hammje, P., 'Droits fondamentaux et ordre public', *Revue Critique de Droit International Privé* (1997), 1-31
- Hartkamp, Hesselink, Hondius, Du Perron, Veldman, *Towards a European Civil Code*, 3rd ed. (The Hague: Kluwer, 2004).
- Henderson, D., *Misguided Virtue: False Notions of Corporate Social Responsibility* (London: Institute of Economic Affairs, 2001)
- Jacot-Guillarmod, O., 'L'arbitrage privé face à l'article 6 §1 de la Convention européenne des droits de l'homme', in Matscher, F., and Petzold, H. (eds.), *Protecting Human Rights: the European Dimension: Studies in Honour of Gérard J. Wiarda* (Cologne: Heymanns, 1988), pp. 100-130
- 'La nouvelle Cour européenne des droits de l'homme dans la perspective du juge national', in Zanghì, C., *La Convenzione europea dei diritti dell'uomo: 50 anni d'esperienza gli attori e i protagonisti della Convenzione: il passato e l'avvenire* (Torino: Giappichelli, 2002), pp. 283-326
- Jaksic, A., *Arbitration and Human Rights* (Frankfurt am Main: Lang, 2002)
- Jarrosson, C., 'L'arbitrage et la Convention européenne des droits de l'homme', *Revue de l'Arbitrage* (1989), 573-607
- Jayne, E., 'Identité culturelle et intégration: le droit international privé postmoderne', *Recueil des Cours* 251 (1995-I), 9-267
- Junge, A., in Schlechtriem, P. (ed.), *Commentary on the UN Convention on the International Sale of Goods (CISG)* (Oxford: OUP, 1998), pp. 69-80
- Kahn, P., 'Les réactions des milieux économiques', in Kahn, P. and Kessedjian, C. (eds.), *L'illicite dans le commerce international* (Paris: Litec, 1996), pp. 477-494
- Kerr, M., 'Arbitration and the Courts: the UNCITRAL Model Law', *ICLQ* 34 (1984), 1-24
- Lalive, P., 'Transnational (or Truly International) Public Policy and International Arbitration', in P. Sanders (ed.), *Comparative Arbitration Practice and Public Policy in Arbitration*, ICCA Congress Series (The Hague: Kluwer, 1986), pp. 258-318

- Jew, J. D., Mistelis, L. A. and Kröll, S. M., *Comparative International Commercial Arbitration* (The Hague: Kluwer Law International, 2003)
- Jubicic, R., 'Corporate Codes of Conduct and Product Labelling Schemes: The Limits and Possibilities of Promoting International Labor Rights Standards through Private Initiatives', in *Law & Policy of International Business* 30 (1998), 111-158
- Magnus, U., 'Remarks on Good Faith: The United Nations Convention on Contracts for the International Sale of Goods and the International Institute for the Unification of Private Law, Principles of International Commercial Contracts', *Pace International Law Review*, 10 (1998), 89-95
- Mares, R., *Business and Human Rights. A Compilation of Documents* (Boston: Martinus Nijhoff, 2004)
- Marrella, F., *La nuova lex mercatoria. Principi Unidroit ed usi dei contratti del commercio internazionale* (Padova: CEDAM, 2003)
- 'Autonomia privata e contratti internazionali', in G. Sicchiero (ed.), *Autonomia privata e Diritto europeo* (Padova: CEDAM, 2005), pp. 217-264
- Mayer, P., 'Mandatory Rules of Law in International Arbitration', *Arbitration International* (1986) 2, 274-293
- Melkko, S., 'Marketing Human Rights' in EIUC, *European Master's Degree in Human Rights and Democratisation published dissertations* (Venice: Marsilio, 2005)
- Metaxas, Spyro A., *Entreprises transnationales et codes de conduite* (Zurich: Schultheiss Verlag, 1988)
- Mitchell L. E., *Corporate Irresponsibility: America's Newest Export*, (New Haven: Yale University Press, 2001)
- Moitry J.-H., 'Right to a Fair Trial and the European Convention on Human Rights - Some Remarks on the République de Guinée Case', *Journal of International Arbitration* (1989), 115-122
- Nygh, P., *Autonomy in International Contracts* (Oxford: Clarendon Press, 1999)
- Oppetit, B., 'Le refus d'exécution d'une sentence arbitrale étrangère dans le cadre de la Convention de New York', *Revue de l'Arbitrage* (1971), 97-107
- Osman, F., 'Avis, directives, codes de bonne conduite, recommandation, éthique, etc.: réflexions sur la dégradation des sources privées du droit', *Revue Trimestrielle de Droit Civil*, 1995, 509-539
- Ovey, C. and White, R. A., *Jacobs and White, The European Convention of Human Rights*, 3rd ed. (Oxford: OUP, 2002)
- Petrochilos, G., *Procedural Law in International Arbitration* (Oxford: OUP, 2004)
- Picchio Forlati, L., 'Critères de rattachement et règles d'applicabilité. A l'heure de la protection des Droits de l'homme en Europe', *Rivista di diritto internazionale privato e processuale*, 4 (2005), 1-32
- Pink, D., 'The Valdez Principles: Is What's Good for America Good for General Motors?', *Yale Law & Policy Review* (1990), 180-190

- Poudret J.-F. and Besson, S., *Droit Comparé de l'Arbitrage International*. (Zürich: Schulthess/Paris: L.G.D.J./Bruxelles: Bruylant, 2002)
- Prahalad, C. K., Hammond, A., Porter, M. E. and Fruehauf, H. C. (eds.), *Harvard Business Review on Corporate Responsibility* (Boston: Harvard Business School Publishing, 2003)
- Redfern, A. and Hunter, M., *Law and Practice of International Commercial Arbitration*, 4th ed. (London: Sweet & Maxwell, 2004)
- Sanders, P., 'Codes of Conduct and Sources of Law', in P. Fouchard, A. Lyon-Caen and P. Kahn (eds.), *Le droit des relations économiques internationales: Etudes offertes à Berthold Goldman*, (Paris: Litec, 1982), pp. 281–295
- Smith, A., *An Inquiry Into the Nature and Causes of the Wealth of Nations* (London, 1776)
- Steinhardt, R., 'Corporate Responsibility and the International Law of Human Rights: The New *lex mercatoria*', in Alston, P. (ed.), *Non-State Actors and Human Rights*, (Oxford: OUP, 2005), pp.177–226
- Storme, M. and De Ly, P. (eds.), *The Place of Arbitration* (Gent: Mys & Breesch Uitgevers, 1992)
- Sudre, F., *Droit européen et international des droits de l'homme*, 6th ed. (Paris: PUF, 2003)
- Treves, T., *Diritto internazionale. Problemi fondamentali* (Milano: Giuffrè, 2005)
- Virally, M., 'Les codes de conduite, pour quoi faire?' in Toussoz, J. (ed.), *Transferts de technologie, sociétés transnationales et nouvel ordre international* (Paris: PUF, 1978)
- Voser, N., 'Mandatory Rules of Law as a Limitation on the Law Applicable in International Commercial Arbitration', *The American Review of International Arbitration* 7 (1996), 319–357
- Yu, H., 'Total Separation of International Commercial Arbitration and National Court Regimes', *Journal of International Arbitration* 2 (1998), 145–166
- Zimmermann, R. and Whittaker, S. 'Good Faith in European Contract Law', available at <http://assets.cambridge.org/052177/1900/sample/0521771900-wsc00.pdf>

General Conclusions

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Human rights and the new economic realities

The phenomenon of economic globalisation, which is complemented by other forms of globalisation (e.g. cultural globalisation or legal globalisation), has created new opportunities for international economic affairs, but also new challenges for human rights. While the world has become smaller and more integrated since the end of World War II,¹ the acceleration of the movement of people, capital and information and the decreasing costs of transportation and communication have not, in most cases, resulted in a reduction of the inequality of living conditions. They have, nonetheless, generated a broader sense of economic, political and moral interdependence at all levels of governance and in civil society. Today, more than ever, the systems of human rights protection need to deal with new international realities characterised by, *inter alia*, the reduction of borders, the facilitation of trade and investment, increased international interconnectedness and interdependence, the growing importance of non-state actors (transnational corporations, NGOs), but also inter-governmental organisations (IGOs) like WTO and International Financial Institutions (IFIs), and – foremost – the changing role of the State.

The developments described in the contributions of this volume, summarised under the multifaceted term 'economic globalisation', have contributed to a global interdependence that is enhanced by and is responsible for a re-definition of the functions of the State. While there is

¹ Today, with reference to the classical axis of international economic analysis (East-West; North-South), we face a new wave of economic globalisation from the South. China and India are the new 'globalisers' on the scene. After China's entry into the WTO in December 2001, economic entities located mainly in South East Asia (Japan, Korea and Taiwan), in the EU and Latin America have been amongst the beneficiaries of the booming of Chinese economic activity. On the other hand, countries like Argentina and Brazil, whose mining and agri-business companies are world cost leaders have been the main sellers of copper, oil, iron and soy beans.