

Business and human rights: opinion on the issues associated with the application by France of the United Nations' Guiding Principles

Plenary meeting of 24 October 2013

Summary of CNCDH proposals

The Minister Delegate for European Affairs and the Minister Delegate for Development referred to the CNCDH on 21 February 2013 to request a contribution for the preparation of a French action plan for the application of the ***United Nations Guiding Principles on Business and Human Rights***.

These Guiding Principles adopted by the Human Rights Council in 2011 are based on three pillars:

- the State duty to protect human rights in the event that a third party, notably a business, breaches said human rights within their territory and/or under their jurisdiction;
- the corporate responsibility to respect human rights;
- the victim's right to access to remedy.

In accordance with the referral, the present opinion deals primarily with the first and third pillars and is the result of much long-term global reflection on the part of the Commission on the responsibility of businesses with regard to human rights, with the adoption of an opinion and the publication of two studies on the matter in 2008 and 2009¹.

The present summary highlights some of the major points outlined in the opinion produced by the CNCDH.

I – State duty to protect human rights (§§25-43)

The fulfilment of the State's duty requires the protection of human rights to be taken into account both in France's external policy, including in the negotiation of trade and investment agreements, and in public policy as it relates to aid for businesses.

As a result, the CNCDH, lamenting the lack of consideration given to the risks relating to human rights, recommends that the French action plan:

- envisage the introduction by the COFACE (French Insurance Company for Foreign Trade) of a process designed, on the one hand, to assess the impact on human rights of the actions of the clients it insures, and on the other hand, to inform companies of the risks of violation of human rights in the countries in which they operate. (§§26-28)
- promote respect for human rights among businesses that belong to the State, are controlled by the State or with which the State conducts commercial transactions, notably in the framework of public-private partnerships.
- require State operators (AFD, Proparco, ADETEF, etc.) to conduct extensive impact studies in the field of human rights with the aim of informing and consulting to a greater degree both the players involved and civil society at various stages in the project implementation process. (§§29-32)

¹ CNCDH, *Avis sur la responsabilité des entreprises en matière de droits de l'homme*, 24 April 2008; Studies on the same subject carried out by Olivier Maurel on behalf of the CNCDH, Volume I – Nouveaux enjeux, nouveaux rôles, Volume II – Etat des lieux et perspective d'action publique, La Documentation Française, 2008 and 2009.

- impose a legal obligation of due diligence in the field of human rights on companies with regards to both their own actions and those of their subsidiaries and commercial partners, both in France and abroad.

It is also preferable that human rights form the foundation of extra-financial reporting and that indicators be standardised. (§§33-41) The CNCDH recognises France's efforts in the matter and calls on the government to play a driving role in the adoption of an EU directive relating to extra-financial reporting. The CNCDH, however, recommends that employee representatives and trade unions be more heavily involved in producing the annual management report and that the legibility of said report be improved in order to promote the stakeholders' right to information.

In order to avoid a situation whereby French businesses become complicit in the violation of human rights in certain particularly sensitive areas, increased vigilance on the part of both the State and of businesses should be called for where those areas, sectors and products at risk are concerned. (§§42-43)

II – The efficiency of access to remedy (§§44-88)

The State must first and foremost guarantee the effectiveness of the judicial mechanisms in place. (§§46-70)

One of the principles of French corporate law states that the various companies within a group are legally independent of one another. This principle prevents the parent company from being able to be held responsible for any violation of human rights committed by their subsidiaries, even though, in practice, it is the parent company that controls the subsidiary. Likewise, the reality concerning supply chains prevents French contracting companies from being held responsible with regard to their subcontractors or commercial partners, over whom they often have an influence.

In order to combat the risk of violations of human rights committed by subsidiaries and subcontracting companies abroad going unpunished, the CNCDH recommends that responsibility be escalated to the parent or contracting company, particularly when the associated company is not itself in a position to accept responsibility for its actions. There are a number of legal tools that might be used to facilitate this essential accountability. (§§47-62)

Extending the extraterritorial jurisdiction of both the civil and criminal French jurisdictions would also help ensure that certain violations of human rights committed by subsidiaries of French companies abroad do not go unpunished. (§§63-70)

The State should also endeavour to ensure the effectiveness of non-legal remedy mechanisms. (§§71-88)

In each of the countries that observe the *OECD Guidelines for Multinational Enterprises* there is a National Contact Point (NCP) responsible for promoting and disseminating the guidelines and, where necessary, responding to referrals for failure to respect the latter. The French NCP is experiencing a relative increase in referrals with regard to human rights. The CNCDH would consequently recommend involving independent experts in what it does and establishing a structured and interactive dialogue with players in civil society. Furthermore, the CNCDH is formulating a series of recommendations aimed at improving the accessibility, transparency, visibility and efficiency of the NCP. (§§72-84)

Ultimately, the matter of monitoring the application of the International Labour Organisation's (ILO) conventions is also dealt with by the CNCDH, which believes that whilst existing checks do not result in sanctions in the event of failure to respect said conventions, they do, however, facilitate the establishment of a dialogue with the Member State concerned with the aim of improving the application of the convention in question. Nevertheless, in order to improve the application of the core labour standards, the CNCDH recommends that the government encourage the introduction within the ILO of mechanisms that are more restrictive towards States. It notably supports reflection on the matter of the social cohesion of economic, financial and commercial policies that should lead to an increase in the weighting and authority of the ILO with regards to the institutions incorporated in the multilateral system, as well as the introduction of various forms of social conditionality. (§§85-88)

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| | |
|--|-----------|
| The referral..... | 4 |
| The regulatory framework for business and human rights..... | 5 |
| Voluntary commitments on the part of businesses | 8 |
| <i>I – Reinforcing the State duty to protect human rights.....</i> | <i>8</i> |
| A. Ensuring consistency between public policy regarding aid for businesses and France's obligations in relation to human rights..... | 9 |
| B. The need for the State to set an example to businesses in conjunction with public policy | 10 |
| C. Making due diligence a legal obligation for businesses and consequently introducing a duty of vigilance on the part of the State..... | 11 |
| a. The involvement of employee and union representatives..... | 12 |
| b. Non-exhaustive indicators of extra-financial reporting..... | 12 |
| c. The absence of a sanctioning mechanism..... | 13 |
| D. Developing a reinforced legal framework of activity for French businesses with regards to certain areas, sectors and products at risk..... | 13 |
| <i>II - The need for more efficient access to remedy</i> | <i>14</i> |
| A. Ensuring the effectiveness of national judicial mechanisms | 14 |
| a. Current barriers to victims obtaining access to remedy..... | 14 |
| b. The judicial tools enabling the parent company to be held responsible for its subsidiaries and the contracting company for its subcontractors | 15 |
| c. The necessary extension of extraterritorial powers..... | 18 |
| B. Guaranteeing non-judicial mechanisms | 20 |
| a. National Contact Points (NCPs) | 20 |
| b. Monitoring the application of the ILO Conventions and sanctions..... | 23 |
| <i>APPENDIX 1. United Nations Guiding Principles on Business and Human Rights referred to in the report.....</i> | <i>25</i> |
| <i>APPENDIX 2 List of people heard and consulted by the CNCDH.....</i> | <i>28</i> |

The referral

1. The Minister Delegate for European Affairs and the Minister Delegate for Development referred to the CNCDH on 21 February 2013 to request that it '*submit a series of proposals relating to the preparation of a French action plan for the application of the [United Nations Guiding Principles on Business and Human Rights](#)*'. Said proposals should '*prioritise the issues associated with the actions of businesses operating outside of the national territory*' and focus primarily on the issues raised by the application of the Guiding Principles, as outlined in Chapter I, entitled '*The State duty to protect human rights*', and Chapter III, entitled '*Access to Remedy*'. In response to the referral, the CNCDH set up a working group that went on to hear a great many relevant figures, a list of which is attached. The CNCDH outlines in the present opinion a number of directions that might help guide the production of the national action plan for business and human rights, though this list is by no means exhaustive.
2. The CNCDH has played a pioneering role in the field of corporate responsibility with regards to human rights, with the adoption in 2008 of an opinion containing a large number of recommendations designed to guide the actions taken by the government with regards to both national and international plans relating to the matter². It has also actively contributed within the international and francophone network of national human rights institutions (NHRIs) to making the issue a matter of priority. This was notably demonstrated by the hosting of a seminar on CSR in the French-speaking world held in Rabat in 2008, in conjunction with the International Organisation for the French-Speaking World, and by the adoption of the Edinburgh Declaration on 'Business and Human Rights: the role of NHRIs'³.
3. This new referral is part of the framework of the European Commission's new corporate social responsibility strategy for the 2011-2014 period. The Commission, which already works with businesses and other stakeholders to outline recommendations regarding human rights aimed at businesses in certain professional sectors such as oil and gas, information and communication technologies, and employment and recruitment, intends to publish a report on the Union's priorities regarding the application of the *United Nations Guiding Principles on Business and Human Rights*⁴. In a communication dated 25 October 2011, the Commission requested that European Union Member States submit the following:
 - a national corporate social responsibility (CSR) action plan;
 - a national plan for the application of the *United Nations Guiding Principles on Business and Human Rights*. This plan was initially intended to be submitted to the European Commission by late 2012 but the deadline was postponed to 2013⁵.The two plans can be merged into one should the State in question so wish.
4. In its communication, the European Commission, whilst making the distinction between CSR and human rights, stipulates that '*CSR at least covers human rights, labour and employment practices, [...] environmental issues [...] and combating bribery and corruption.*' In this respect, the CNCDH reiterates the fact that human rights should be considered as the legal foundation on which all social, environmental and economic issues relating to corporate social responsibility are based⁶.
5. Concurrently to the matter being referred to the CNCDH by the two Ministers, the 'national CSR action plan' requested by the European Commission was entrusted to a new entity created by the Prime Minister and linked to him via the Policy Planning Commission, namely the global action platform for the societal responsibility of businesses (and other organisations). This platform will ensure that the diversity of the

² CNCDH, *Avis sur la responsabilité des entreprises en matière de droits de l'homme*, 24 April 2008; Studies on the same subject carried out by Olivier Maurel on behalf of the CNCDH, Volume I – Nouveaux enjeux, nouveaux rôles, Volume II – Etat des lieux et perspective d'action publique, La Documentation Française, 2008 and 2009.

³ This declaration adopted in 2010 is available in the international networks section of the CNCDH website.

⁴ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *A renewed EU strategy 2011-14 for Corporate Social Responsibility*, Brussels, 25 October 2011, COM(2011) 681 final.

⁵ *EU Strategic Framework and Action Plan on Human Rights and Democracy*, Council of the European Union, Luxembourg, 25 June 2012, 11855/12, p.19-20.

⁶ See International Organisation of the French-Speaking World, *Les droits de l'Homme au cœur de la responsabilité sociale des entreprises (RSE)*, p.6.

players that operate in the field of CSR, namely businesses, parliamentarians, unions and other associations, is reflected in its operations. It must also ensure that it has access to specific expertise in the field of human rights. In this respect, it would appear essential for the CNCDH, given its pluralistic composition and its experience in the matter⁷, to be involved in such initiatives in order to maintain a degree of synergy between the two approaches required by the European Commission. The platform will need to formulate a series of recommendations for the adoption of a national action plan relating to corporate responsibility that will enable the government to make clear commitments and to ensure that they are fulfilled over the course of several years.

The global action platform for the societal responsibility of businesses should involve both the CNCDH and other relevant associations operating in the field of human rights. This platform should formulate a series of recommendations that would enable the government to draw up a national global action plan on business and human rights by the end of 2013.

In the event that these conditions are not met, the CNCDH recommends that the government draw up a special plan for the implementation of the United Nations Guiding Principles on Business and Human Rights within the time frames specified by the European Commission.

6. The current context is a reminder of the importance of strengthening a binding system with regards to business and human rights. Indeed, the tragic collapse of the Rana Plaza building in Bangladesh in April 2013 sparked a strong reaction on the part of both governments and players in civil society. The accident illustrated the pitfalls and weaknesses in corporate social responsibility whilst demonstrating the need for a more systematic, more global application of existing standards. The Rana Plaza tragedy served as a reminder to us all of the need for social responsibility⁸. Minister for Foreign Trade Nicole Bricq even went as far as to declare that there would be 'a pre- and a post-Rana Plaza age'⁹.

The regulatory framework for business and human rights

7. In order to safeguard human rights and ensure that they are enforced, the States themselves are the primary debtors of international obligations relating to human rights. This is a triple obligation in that they are required to respect, protect and enforce human rights for all persons, both individuals and legal entities, under their jurisdiction.
 - **Respecting** human rights requires the State to refrain from taking any step that might directly or indirectly hinder the exercising of a right.
 - **Protecting** human rights involves ensuring that no such right is either hindered or flouted by any third party.
 - **Enforcing** human rights requires the State to take the appropriate measures to ensure that such rights are fully implemented; it must put in place the appropriate policies or specific programmes to guarantee access and ensure the effective exercising of the rights in question.
8. The States themselves must ensure that they are in a position to anticipate and suppress any breach of human rights committed by an individual or indeed by any public or private institution or entity, and in particular any transnational company, under their jurisdiction.
9. Transnational companies, which, in some cases, can be more powerful than the States, have long conducted their activities in the context of a weak rule of law in many parts of the world and in something of a legal grey area with regard to their responsibilities in the field of human rights. Those activities that do, however, breach human rights can be brought before national judges, even though the increase in the number of shields,

⁷ *Ibid.*

⁸ A *sui generis* agreement relating to the safety conditions of factories in Bangladesh was recently signed under the auspices of the ILO between trade union confederations (IndustriALL Global Union and Uni Global Union) and forty-eight multinational companies, including a number of French organisations. The agreement is interesting in that local workers and organisations have a central role to play in its implementation and in that it is accompanied by a legal obligation for signatory brands to fulfil their commitments.

⁹ The Minister for Trade has also referred to the OECD Investment Committee and the French NCP with a view to identifying the due diligence measures that need to be implemented following the incident and invited her counterparts in other OECD member countries to do the same.

between parent companies and subsidiaries, makes it difficult to achieve any real transparency or effective responsibility.

10. The United Nations Guiding Principles reiterate the fact that businesses must respect '**internationally recognized human rights**'. The CNCDH considers this to relate notably to '*those expressed in the International Bill of Human Rights and the principles concerning fundamental rights set out in the International Labour Organization's Declaration on Fundamental Principles and Rights at Work.*' ([Guiding Principle n°12](#)). The boundary between a conventional law, considered to be restrictive because the States, who are the ones most heavily affected by public international law, subscribe to it, and a 'soft law', aimed at private stakeholders, is not as watertight as it might appear to be¹⁰. International human rights treaties may impose obligations on both individuals and businesses. Furthermore, by incorporating their international obligations into domestic law, the States can give them a more general scope, under the jurisdiction of the national judge.
11. **The drafting of a special convention on the responsibility of businesses with regards to human rights** had been considered in 2003 by the United Nations Sub-Commission on the Promotion and Protection of Human Rights, which had adopted a series of standards relating to the matter¹¹. Although this project eventually failed to come to fruition, the discipline and systematic nature of its analysis, along with the universal scope of its ambition, represented a major step towards the drafting of the United Nations Guiding Principles in 2011¹². More recently, the Council of Europe, whilst highlighting the benefits of exploring ways and means of increasing the role of businesses in respecting and promoting human rights, has claimed that a new convention or additional protocol to the European Convention on Human Rights would not be the most suitable solution¹³. A political declaration and a guide to good practice in this field are currently in the process of being drafted¹⁴.
12. Since it was created, the **International Labour Organisation (ILO)** has compiled a corpus of standards comprising **189 conventions covering all issues relating to employment**. Eight of these standards are considered fundamental since they relate to fundamental employment principles and rights, including the right to organise and effective recognition of the right of collective bargaining, elimination of any form of forced or compulsory labour, effective abolition of child labour and elimination of employment and professional discrimination¹⁵. These are now widely considered to be part of the corpus of human rights.
13. 1998 saw the tripartite constituents of the organisation, namely governments, employers and workers, adopt a **Declaration on Fundamental Principles and Rights at Work** stating that all Member States had an obligation arising from the very fact of membership of the organisation '*to respect, to promote and to realize, in good faith*', the fundamental rights which are the subject of said conventions, even if they had not ratified them. The process adopted for the purposes of monitoring the implementation of the declaration has meant that these fundamental conventions have now been ratified by over 80% of ILO Member States.
14. These fundamental principles and rights at work were included in 2000 in the **Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy of 1977**. The aforementioned text, whilst non-binding, '*is intended to encourage multinational enterprises to contribute in a positive way to*

¹⁰ See notably CNCDH, *La responsabilité des entreprises en matière de droits de l'homme*, Volume I, Chapter 3, p.85 and on.

¹¹ Sub-Commission on the Promotion and Protection of Human Rights, *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*, E/CN.4/Sub.2/2003/12/Rev.2, 26 August 2003.

¹² CNCDH, *La responsabilité des entreprises en matière de droits de l'homme*, Volume I, p.101, 2008.

¹³ Response from the Committee of Ministers adopted on 6 July 2011 based on Recommendation 1936 (2010) of the Parliamentary Assembly on 'Human Rights and Business'.

¹⁴ The Committee of Ministers has entrusted the Steering Committee for Human Rights (CDDH), by means of a [ruling dated 30 January 2013](#), with the task of producing a political declaration in support of the United Nations Guiding Principles, as well as a soft-law instrument, which might include a guide to good practice, responding to the shortcomings in the implementation of the United Nations Guiding Principles at European level, including the issue of access to justice for victims of violations of human rights on the part of businesses.

¹⁵ Convention n°87 on Freedom of Association and Protection of the Right to Organise, 1948; Convention n°98 on the Right to Organise and Collective Bargaining, 1949; Convention n°29 on Forced Labour, 1930; Convention n°105 on the Abolition of Forced Labour, 1957; Convention n°138 on the Minimum Age, 1973; Convention n°182 on the Worst Forms of Child Labour, 1999; Convention n°100 on Equal Remuneration, 1951; Convention n°111 on Discrimination (Employment and Occupation), 1958.

*economic and social progress*¹⁶. The Declaration amended in 2006 reasserts the principles outlined in the 1977 declaration and expands upon them by encouraging enterprises to '*resolve the difficulties to which their various operations may give rise*'.

15. More generally in the field of human rights, other standards aimed at businesses and States have been developed, notably by intergovernmental bodies such as the UN and the OECD. Although not directly binding (soft law), they do represent the cornerstones of an international regulatory framework relating to corporate responsibility in the field of human rights.
16. One of the primary texts aimed at businesses is the United Nations **Global Compact** (2000). This voluntary initiative is the work of the then-Secretary-General of the United Nations Mr Kofi Annan and comprises nine principles relating to the environment, working conditions and human rights. A tenth principle relating to the fight against corruption was added to the Compact in 2004. The *modus operandi* of the initiative involves businesses voluntarily subscribing to the principles and producing regular reports (communication on progress made) which are made public by means of the Global Compact website¹⁷.
17. The regulatory framework gained new impetus in 2011 with the adoption of the **United Nations Guiding Principles on Business and Human Rights**. Unanimously adopted by the Human Rights Council, these Guiding Principles are intended to anticipate and remedy 'negative effects' on human rights as a result of businesses' activities and are the fruit of six years' worth of consultation conducted by Professor John Ruggie over the course of his two consecutive terms (2005-2011) involving governments, businesses, civil society and investors from around the world. The Principles provide a practical response to the 'Protect, Respect and Remedy' conceptual framework of reference outlined by John Ruggie in 2008. This framework, which is built around three cornerstones, is based on a number of additional responsibilities, such as the State duty to protect individuals from any third parties, and businesses in particular, that might breach their human rights, the role attributed to businesses which are required to respect human rights, and the need for both States and businesses to provide appropriate and efficient access to remedy (both judicial and non-judicial) in the event of violation.
18. Whilst these Guiding Principles are not legally binding, they do represent an international standard to which everyone must adhere. Indeed, just two years after they were adopted, they are already very widespread in economic spheres, and States are also required to implement them by means of their respective legislations. The Guiding Principles can be considered a common point of reference and various major international organisations and institutions, such as the Organisation for Economic Co-operation and Development (OECD), the European Union (EU) and the International Organisation for Standardisation (ISO), have recognised these Principles as a foundation on which to base their own policies and standards relating to business and human rights.
19. Following the adoption of these principles, the United Nations Human Rights Council created a working group of five independent experts to deal with the issue of human rights and transnational companies and other businesses, as well as an annual Forum on Business and Human Rights designed to examine the changes and challenges associated with implementing the Guiding Principles¹⁸.
20. The Organisation for Economic Co-operation and Development (OECD) also has a corpus of recommendations aimed at multinational enterprises with the aim of encouraging them to behave responsibly. The **OECD Guidelines for Multinational Enterprises** are designed to be implemented throughout those States subscribing to the principles (45 to date) but also apply extra-territorially (with regards to an enterprise's international operations).
21. These Guidelines, which were revised in 2011 following a series of consultations, now incorporate the issue of human rights, with reference to the United Nations Guiding Principles. The OECD Guidelines consist of two parts: the first comprising the Guidelines themselves, together with comments, and the second relating to

¹⁶ Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy (Administrative Board of the International Labour Office of November 1977 and November 2000).

¹⁷ Global Compact website: <http://www.unglobalcompact.org/Languages/french/index.html>

¹⁸ The first United Nations Forum was held on 3-5 December 2012 in Geneva and involved nearly 1,000 participants from 85 countries.

the procedures governing the activities of National Contact Points (NCPs) and to the remit of the OECD Investment Committee in this respect. The NCPs are what give the guidelines their strength and originality in relation to other international instruments; as national bodies designed to provide support for the settlement of disputes, the NCPs are responsible for examining the cases or specific instances referred to them. The OECD Guidelines are not legally binding. In this respect, the procedures adopted by an NCP in response to a request (known as a 'specific circumstance') are designed to assess the extent to which a business is respecting the Guidelines, but there is no complaint as such that would result in a ruling.

22. Furthermore, a number of initiatives on the part of private bodies have also been brought to light. **ISO 26000** (2010) outlines a series of specifications applicable to products and services and identifies the good practices to be adopted in order to increase the efficiency of various sectors of the economy based on seven key themes, including working conditions, the environment, sustainable consumption, fair operating practices (i.e. corruption) and human rights. This framework surpasses the aforementioned texts since it invokes the notion of the business's 'sphere of influence', a notion that exceeds the more restrictive notion of control. Contrary to other ISO standards, ISO 26000 merely specifies a series of guidelines and does not give rise to any form of certification. The International Organisation for Standardisation is currently developing a new ISO for responsible purchasing, supplementing the ISO 26000 standard and granting approval for businesses that respect the OECD Guidelines, which ISO 26000 does not allow for.

The CNCDH underlines that the need for coherence should guide France's foreign policy and recommends, in accordance with [Guiding Principle n°10](#), that the government support and promote the aforementioned instruments within multilateral institutions dealing with economic, commercial and financial issues, including those that are binding, that are designed to ensure that businesses respect human rights.

Voluntary commitments on the part of businesses

23. The regulatory framework relating to corporate responsibility in the field of human rights, outlined above, makes businesses fully responsible for respecting human rights. Whilst this framework does not impose any directly binding legal obligations on businesses, its strength and legitimacy do lie in the consent of businesses which voluntarily decide to subscribe to the framework with regards to their economic activities.
24. The standards specified struck a certain chord with many businesses, including in France. Indeed, French businesses and those operating within France are demonstrating increasing levels of commitment to social responsibility as part of a corpus of standards including fundamental rights. Some businesses have shown their commitment in the form of various programmes and procedures for developing international principles within the business¹⁹. Furthermore, some seven hundred French businesses to date have signed up to the Global Compact, making it one of the largest branches in the world.

I – Reinforcing the State duty to protect human rights

25. France is one of the European countries with the highest number of multinational enterprises, whilst twenty of the fifty companies listed on Euro Stoxx²⁰ are French. As a result of this situation, France has a major responsibility, both within Europe and beyond, with regards to implementing CSR policies aimed at multinationals.

¹⁹ The Initiative for Social Cohesion (ISC), created in 1998, now involves 15 companies and aims to support the direct suppliers they use in developing countries (Bangladesh, China, India, Morocco, Turkey, etc.) with regards to respecting and incorporating universal human rights principles and local social regulations within their production plants. Furthermore, *Entreprises pour les Droits de l'Homme*, a voluntary initiative involving eight multinational enterprises with their head offices in France, primarily aims to practically develop these principles in the framework of their economic activity. The association is developing a guide for assessing the risks associated with human rights for its members.

²⁰ Euro Stoxx is the European stock index. Rather like the CAC 40 in France, the Euro Stoxx 50 groups 50 companies according to their market capitalisation within the Euro zone.

A. Ensuring consistency between public policy regarding aid for businesses and France's obligations in relation to human rights

26. Three of the United Nations Guiding Principles ([Principles n°3, 4 and 8](#)) particularly emphasise the importance of ensuring consistency between state policy relating to businesses and the advocated principles for protecting human rights. The [commentary to Guiding Principle n°8](#) specifies that States must '*support and equip departments and agencies, at both the national and sub-national levels, that shape business practices [...] to be informed of and act in a manner compatible with the Governments' human rights obligations.*' There is, however, one blatant observation to be made, that being that nowhere near enough consideration is given to the risks associated with human rights with regards to public export insurance. Furthermore, public policy regarding aid for businesses, particularly where the Ministry for the Economy and Finance (industry, foreign trade, etc.) and the Ministry for Foreign Affairs (economic diplomacy) are concerned, needs to be consistent with the principles for protecting human rights.
27. The COFACE (French Insurance Company for Foreign Trade), a body specialising in export insurance and privatised nearly twenty years ago, now belongs to the Natixis Group and continues to manage a number of guarantees designed to support French export operations - notably marketing insurance, exporter risk insurance, credit insurance for medium and long-term financed exports and investment guarantee - on behalf of the State. Upon examination of the various 'country diagnoses' performed by the Agency for the purposes of insuring exports and securing direct investment abroad, it is enlightening to note that the status of human rights and the potential associated risk are never taken into account beyond the issue of corruption and the calculation of the corruption perception index (CPI). It would therefore be advisable to establish an assessment process that examines the proven or potential impact on human rights of the actions of the clients the COFACE insures. This assessment should incorporate a stage relating to the identification and prevention of the risk of any violation of human rights, as well as a monitoring and control procedure. The information gathered in the framework of such assessments should be transmitted to the French companies concerned in order to raise their awareness of the risk of any violation of human rights that they are likely to commit in certain countries with evident shortfalls in the rule of law.

The CNCDH recommends the adoption of measures designed to enable the COFACE and its clients to introduce a due diligence process with regards to human rights²¹. The COFACE's policies and procedures regarding due diligence should be made public, along with the projects they insure.

It would also be desirable for the information and assessment process adopted with regards to the impact on human rights of operations insured by the COFACE to also fall within the jurisdiction of the Ministry for Foreign Affairs and/or the Ministry for the Economy and Finance, the departments of which are able to provide an analysis for each country with regards to respecting human rights, based notably on the '*information for travellers*' that they produce. It might also involve the independent expertise of NGOs.

The annual report on the activities of the COFACE submitted by France to the European Commission (in accordance with Regulation (EU) 1233/2011) should be discussed at the National Assembly and/or at the Senate and should be the subject of consultations with civil society.

28. Furthermore, as underlined by the Minister for Foreign Trade, international trade is governed by a number of international agreements that should result in the introduction of clauses that attribute responsibility for respecting and enforcing fundamental rights and social standards to the States. In addition, the Minister has vowed to ensure that an in-depth study of their social impact is carried out prior to any negotiations pertaining to new international free trade agreements²².

²¹ The terms and conditions of a due diligence process are outlined in [Guiding Principles 17 to 21](#). The commentary to Guiding Principle n°4 states that '*Given these risks, States should encourage and, where appropriate, require human rights due diligence by the agencies themselves and by those business enterprises or projects receiving their support.*'

²² Speech by the Minister for Foreign Trade to the National Contact Points, 25 June 2013, Paris.

The CNCDH is asking for negotiations pertaining to international trade agreements and social investment agreements to be accompanied by the appropriate human rights-related impact studies and, where necessary, for these studies to result in the introduction of contractual clauses dedicated to the matter.

Community-wide consideration should be given to the notion of ensuring that new trade agreements (between the United States and the EU, for example) incorporate a social element.

B. The need for the State to set an example to businesses in conjunction with public policy

29. The State is required to set an example both to the public enterprises that belong to it or are controlled by it ([Guiding Principle n°4](#)) and to the companies with which it performs commercial transactions ([Guiding Principle n°6](#)).

The CNCDH underlines the fact that, in its opinion of April 2008, it recommended that the government ensure that the public purchasing policy adopted by the State and territorial authorities be respectful of human rights.

30. With regards to infrastructures and major projects, public-private partnerships (PPPs), also known as partnership agreements, are one of the methods of financing favoured by the French State and territorial authorities when it comes to public procurement. From an operational perspective, PPPs differ from public contracts in that they are seen to represent an alliance between public and private entities that join forces for the purposes of achieving a collective objective. This is an administrative contract that enables the public entity to go into partnership with a private entity for the purposes of funding works, including the design, construction, maintenance and operation thereof and, where applicable, the management of all public services. The private partner is more than simply the executor of the public contract, as the holder of a public procurement contract would be. This type of agreement is widely promoted in the framework of development aid policies and consequently represents an instrument for international cooperation.

31. The *Agence Française de Développement* (French Development Agency, AFD) is the pivotal operator in the French public development aid system. As a French organisation with both the status of public institution of industrial and commercial nature and that of financial institution, the AFD, with the help of its subsidiary, Proparco, finances economic and social development projects in a number of developing countries. To this end, its actions with regards to PPP funding can take various forms, including technical support, subsidies and/or loans awarded by the AFD to the beneficiary State, and loans and/or equity investment in Proparco for the private partner.

32. According to the AFD, the CSR policy adopted by project sponsors is always examined. Projects are consequently classified as A, B or C according to the environmental and social risk they represent, A indicating a low level of risk and C a high level of risk. It would appear, however, that certain major projects that have given rise to serious doubts with regards to their respect for the fundamental rights of the populations concerned may not have been sufficiently analysed in terms of the social and environmental risk they represent.

The CNCDH recommends that representatives of civil society and users of those services that are likely to be the subject of public-private partnerships (PPPs) be given a more central role as part of an approach designed to protect and promote the most vulnerable of populations. Indeed, in order for PPPs to be useful for development purposes, it is essential that all stakeholders, including the State, community representatives and users, be kept informed and consulted at all stages of the PPP creation process.

Furthermore, in accordance with Guiding Principles [n°4](#) and [n°6](#), the French state should, by means of its development aid network (the AFD, PROPARGO, the Ministry for the Economy and Finance, the ADETEF, etc.), fulfil its obligation to protect by imposing a series of specifications that include exhaustive impact studies regarding human rights.

In order to remedy the potential impact on human rights of a project supported by the AFD, the CNCDH

recommends that a system be put in place whereby any stakeholder can officially communicate any alerts, questions, recommendations and requests relating to projects and their impact to the AFD at any stage in the development and implementation processes.

C. Making due diligence a legal obligation for businesses and consequently introducing a duty of vigilance on the part of the State

33. [Guiding Principle n°17](#) sanctions an obligation of due diligence on the part of companies with the aim of preventing any negative effects that their operations might have. This obligation also extends to subsidiaries and commercial partners of multinational enterprises in the value chain (suppliers), helping to identify their repercussions on human rights, anticipate them and limit their impact ([Guiding Principle n°15](#)). This obligation involves carrying out human rights impact studies, notably by means of consultation with the populations concerned. In the event of failure on the part of the company to fulfil its obligation, however, the State will, *in fine*, be indirectly held responsible as part of its duty of vigilance.

The CNCDH recommends that the government propose legally imposing on companies a duty of due diligence with regards to human rights.

The CNCDH recommends that a duty of vigilance on the part of the State in which the company's head office and its primary branches are based be imposed in order to guarantee the company's international obligations. The State may then be held responsible in the event that it fails to fulfil its duty of vigilance with regards to companies.

34. The State would notably fulfil its duty of vigilance by carefully monitoring the management reports published by companies in accordance with their reporting obligations²³. Article 116 of the so-called NRE ('New Economic Regulations') Law n°2001-420 of 15 May 2001 introduced an obligation to provide social and environmental information - a reporting obligation - for companies listed on the stock exchange. Such companies must now include in their management reports information on how the social and environmental repercussions of their operations are taken into account²⁴. This obligation was extended by the so-called 'Grenelle II' Law n°2010-788 of 12 July 2010 to companies exceeding a turnover and a workforce size stipulated by decree of the Council of State, irrespective of whether or not they are listed on the stock exchange. Where such companies produce consolidated accounts, they must provide this information for the parent company, its subsidiaries and all of the companies under its control²⁵. Said information must be verified by an 'independent third party', as stipulated in Article 225 of the 'Grenelle II' Law.
35. Whilst the CNCDH is pleased with these developments, it has identified a number of obstacles with regards to the effectiveness of this reporting obligation.

The CNCDH recommends making the company's management report more legible with the aim of encouraging the provision of social and environmental information to the public, in accordance with the principles for determining the content and quality of the 'sustainable development' report (included in the management report) as recommended by the Global Reporting Initiative.

The CNCDH recommends that the parent company be subject to an obligation to report on its activities, as well as those of its subsidiaries both in France and abroad.

²³ As Olivier Maurel explains, "It is as guarantor of general interest that the State has a duty to recognise and monitor the responsibility of companies with regards to human rights. In order to achieve this, the State can, of course, initiate and indeed encourage voluntary approaches, but if companies do not play their part, it is in fine the State that fails in its 'duty to protect' through lack of having imprudently believed in the virtues of goodwill alone", in *Construire la responsabilité des entreprises en matière de droits de l'homme : quelle voie entre confiance et justice ?* Olivier Maurel – Edinburgh, 8 October 2010.

²⁴ This is a document supporting the presentation of annual accounts at the General Meeting of Shareholders.

²⁵ The notion of control relates to Article L.233-1 of the Commercial Code, that is an equity share of over 50%, and affects limited liability companies whose securities are taken into consideration in negotiations in a regulated market or whose balance sheet total or turnover and workforce size exceed the thresholds set by decree of the Council of State. The same provisions apply to mutual insurance companies (Art. L.322-26-2-2 of the Insurance Code), unions and mutualist federations (Art. L.114-17h of the Insurance Code), credit establishments, investment firms and financial companies (Art. L.511-35 of the Monetary and Financial Code) and agricultural cooperatives (Art. L.524-2-1 of the Rural and Maritime Fishing Code), as do certain thresholds.

At European level, the CNCDH recommends that France continue to play a driving role in the adoption of a European directive on extra-financial reporting that is currently being negotiated. In this respect, France must defend clear and didactic reporting that gives all interested parties, including those persons and authorities affected, a clear understanding of the risks presented by the company's activities, as well as the measures taken to reduce them.

a. The involvement of employee and union representatives

36. First and foremost, as highlighted by the Economic, Social and Environmental Council (CESE) in its report of 26 June 2013²⁶, the banking and financial regulation Law n°2010-1249 of 22 October 2010 withdrew several provisions that might have allowed employee and union representatives to be consulted with regards to producing the management report. Their involvement is nevertheless beneficial since the unions can contribute to an internal assessment of the company even before an independent third party is called in.

The CNCDH recommends that employee and union representatives be kept informed and consulted and be able to express their opinions when it comes to producing a company's management report. Such involvement would indeed serve to improve the credibility of such reports.

With this in mind, the CNCDH recommends that each company be obliged to indicate whether there is in fact any form of union or employee representation within each of its entities and subsidiaries.

37. Furthermore, the CNCDH has noted that many companies are now engaging in consultation with stakeholders and civil society organisations regarding their reports and their 'sustainable development' priorities, including the 'human rights' aspect. Indeed, such initiatives enable a dialogue between all of the parties affected, either directly or indirectly, by the company's activities to be established.

b. Non-exhaustive indicators of extra-financial reporting

38. Despite the fact that the 2010 Law was claimed to be an improvement on the NRE Law, we are witnessing a decline in the extra-financial reporting obligation on the part of companies. First and foremost, whilst environmental reporting, particularly where protecting diversity and fighting climate change are concerned, has been stepped up, the implementing decree of Article 225 of the 'Grenelle II' Law, published on 24 April 2012, withdraws certain social reporting obligations outlined in the implementing decree of the NRE Law²⁷. Furthermore, whilst the issue of human rights is now taken into account in reporting activities, which is indeed a significant improvement, it would still appear to be a *subsidiary* issue with regards to information relating to social commitments to sustainable development, under the sub-heading e) *Other actions undertaken to promote human rights*.

39. Moreover, the implementing decree of April 2012 differentiates between listed and unlisted companies²⁸. Part I of Article R225-105-1 of the Commercial Code now stipulates all of the social, environmental and societal information that all companies concerned must circulate in the form of indicators, whilst Part II of the article lists the information relating only to listed companies, with actions undertaken to promote human rights being included in this category. Such a distinction would not appear to be relevant given the fact that many companies not listed on the stock exchange conduct activities that might affect human rights.

The CNCDH recommends introducing the notion of respect for human rights as a foundation for social, environmental and societal reporting and not as a subsidiary issue with regards to information relating to social commitments to sustainable development. This issue should also be dealt with at European Union level.

²⁶ Economic, Social and Environmental Council (CESE), *La RSE : une voie pour la transition économique, sociale et environnementale*, 26 June 2013. In this report, the CESE emphasises 'the importance of consolidating dialogue between companies and stakeholders and of recognising new rights to information on the part of staff representative institutions'.

²⁷ This is notably the case with regards to distinguishing between permanent and fixed-term contracts, aspects relating to safeguarding employment and the indication of the criteria used to determine the remuneration of executives.

²⁸ A draft decree aimed at eliminating this distinction is in the process of being developed.

The CNCDH believes that listed and unlisted companies should be subject to the same obligations with regards to human rights reporting and is carefully monitoring the progress of the draft decree aimed at eliminating this distinction.

The CNCDH is not opposed to the existence of several lists of indicators. It does, however, recommend that such lists be better adapted to the situation in which companies find themselves in order to ensure that the latter effectively demonstrate that they are fulfilling their obligations.

c. The absence of a sanctioning mechanism

40. Article 225 of Law n°2010-788 of 12 July 2010, the so-called Grenelle II Law, provides that an independent third party be responsible for monitoring the extra-financial information provided by certain companies. Indeed, a decree dated 13 May 2013 stipulates the terms governing the monitoring of information by independent third parties. This independent third party, certified by COFRAC or another accredited body, should be aware of the company's approach to sustainable development and societal commitments and ensure the quality of the process by which the company gathers information.
41. Article L.238-1 of the Commercial Code provides that '*interested parties*' can ask that the President of the Commercial Court order, subject to a running penalty, the directors of the company to provide the missing information. This system is not, however, open to stakeholders outside of the company. Article L.483-1 of the Employment Code also provides that any hindrance to the operation of the Works Council shall be punishable by one year's imprisonment and/or a fine of €3,750. This provision might also include failure to convey information to employee-elected representatives. This sanction is nevertheless somewhat difficult to impose since it requires proof to be provided that the hindrance was intentional.

The CNCDH recommends including stakeholders outside of the company in the term '*interested parties*' used in Article L.238-1 of the Commercial Code so as to enable such persons to ask the judge hearing applications for interim relief to order the company to provide any information it might not have provided in its 'sustainable development' report.

This provision should also be considered in the framework of the discussions under way within the European Union.

D. Developing a reinforced legal framework of activity for French businesses with regards to certain areas, sectors and products at risk

42. French businesses may become complicit in the violation of human rights by means of commercial transactions or relations in certain sensitive sectors and/or areas. This notably relates to supply chains of minerals from conflict-affected and high-risk areas, businesses operating in particularly sensitive sectors (textiles, mining, oil, cocoa, etc.) and areas at risk (which could be established by the authorities with the aim of informing companies of the situation regarding human rights). This would, of course, be the case of Burma/Myanmar, where human rights-friendly investment is made difficult by problems relating to property, the repression of unions and defenders of human rights, and endemic corruption²⁹. The trade in goods produced by Israeli colonies established in occupied Palestinian territory is another example of an area at risk³⁰.

The CNCDH recommends imposing an increased duty of vigilance on the part of both the State and businesses with regards to those areas and products at risk.

²⁹ In this respect, the American authorities have already introduced a specific reporting obligation where Burma is concerned, whilst the European Parliament, in a resolution adopted in May 2013, called for greater transparency with regards to European investments in Burma and for their CSR undertakings to be monitored.

³⁰ See in particular the *Report of the independent international fact-finding mission to investigate the implications of the Israeli settlements on the civil, political, economic, social and cultural rights of the Palestinian people throughout the Occupied Palestinian Territory, including East Jerusalem*, A/HRC/22/63, 7 February 2013.

43. Furthermore, French businesses operating in the field of information and communication technologies have recently been accused of complicity in the violation of human rights in authoritarian states (Libya, Syria, Bahrain, etc.) for having provided surveillance tools that were used primarily to fuel the repression of political opponents³¹. Exports of such technologies, including those to countries known for their repressive regimes, however, are not necessarily subject to prior authorisation from the French authorities.

The CNCDH recommends that the government strive to adapt the national and European legal framework in order to ensure that technological hardware and services that might enable cellular and Internet data to be intercepted are subject to specific export control procedures aimed at prohibiting them in the event that there is a substantial risk that they might be used to commit or facilitate a serious violation of human rights.

II - The need for more efficient access to remedy

44. The third pillar of the United Nations Guiding Principles relates to efficient access to remedy for victims of violations of human rights committed by businesses, in both judicial and extra-judicial terms. The following three types of grievance mechanism have been identified:
- **State-based judicial mechanisms** ([Guiding Principle n°26](#))
 - **State-based non-judicial mechanisms** ([Guiding Principle n°27](#), such as the OECD's NCPs, for example)
 - **non-State-based non-judicial mechanisms** ([Guiding Principle n°28](#), such as mechanisms administered by a business either individually or with stakeholders, or by a professional association or a multi-party group, for example).
45. It should be borne in mind that such remedies are not to be considered on the same level. The need for justice and transparency and to behave in an exemplary nature implies making plenty of allowance for judicial remedies with the aim of combating impunity, even though multinational companies all too often prefer confidential arrangements, limiting themselves to compensating weak-willed victims until justice is eventually done. Likewise, consideration must be given to the criminal liability of legal persons, both within the national framework and on an international scale, in order to fill a key void in the work of John Ruggie.

A. Ensuring the effectiveness of national judicial mechanisms

46. The United Nations Guiding Principles on Business and Human Rights, and more specifically [Guiding Principle n°26](#), call upon States to ensure the effectiveness of internal judicial mechanisms by reducing the number of barriers (*'legal, practical and other'*) to victims obtaining access to remedy.

a. Current barriers to victims obtaining access to remedy

47. A group of companies has no legal existence of its own within either international or French law. Each entity in the group acquires its legal personality in the country in which it is registered. It is nevertheless common, in practice, for a parent company to control the activities of its foreign subsidiaries, and the economic reality shows that the profits generated by subsidiaries are often directed back to the parent company. In the event of a subsidiary committing a violation of human rights, however, it is currently impossible for one to be held responsible for the activities of the other in accordance with the principle of corporate independence (Article 1842 of the Civil Code), despite the fact that the directions may have been issued by the parent company.
48. This independence of legal personality has repercussions on the victim's ability to obtain effective access to remedy. Indeed, victims of foreign subsidiaries of French companies may not initiate legal proceedings in France against the parent company, even though the subsidiary is not itself in a position to accept financial responsibility for the consequences of its prejudicial actions. There is therefore a clear legal barrier to accessing remedy in France since some petitioners may be denied justice as a result of shortcomings in the local legal system in question. As the situation currently stands, in order to be able to take legal action against a parent company for reprehensible actions on the part of one of its subsidiaries, victims of abuse

³¹ A complaint for complicity in torture in Libya was consequently filed in France against French company Amesys.

must provide proof of the parent company's control over its subsidiary³² or prove its complicity in the case of an infringement committed abroad by one of its subsidiaries³³. In the latter scenario, a definitive ruling must have been returned in the country in which the main infringement was committed in order to take legal action against the accomplice, i.e. the parent company, in France³⁴.

In order to bring French law into line with [Guiding Principle n°26](#), the CNCDH recommends allowing parent companies to actually be held responsible for acts committed by their foreign subsidiaries.

b. The judicial tools enabling the parent company to be held responsible for its subsidiaries and the contracting company for its subcontractors

49. It is essential that we consider ways of eradicating the theoretical legal separation between parent companies and subsidiaries³⁵. In order to do so, it is important to encourage increased responsibility on the part of the parent company, particularly where the subsidiary or associated company in question is not in a position to take responsibility for its own actions. There are a number of legal tools that might be of use in this case:

- ***An exception to the principle of companies being legally independent***

50. Ever since **Law n° 2010-788 of 12 July 2010 relating to a national environmental commitment in the form of the 'Grenelle 2' Law**, parent companies have been responsible for the liabilities of their subsidiaries in terms of environmental responsibility. This new development follows a ruling by the Commercial Chamber of the Court of Cassation on 19 April 2005 in the case of 'Métal Europe', in which a subsidiary was held responsible for having contaminated a town. The subsidiary had been put into compulsory liquidation and was on its way out, with no means of paying its creditors. Indeed, corporate law stated that the various companies within a group were legally independent of one another. This principle represents an obstacle to parent companies being held responsible for the liabilities of their subsidiaries and, likewise, to the funds held by one subsidiary being used to finance the activities of the group as a whole. The 2010 Law represents a step forward in that it identifies an exception to the principle of the companies within a group being legally independent. This step forward is nevertheless a limited one since the exception to the principle of legal independence requires certain conditions to be met (insolvent subsidiary operating a classified facility, and therefore restricted to the French context) and notably applies only to the environmental liabilities of the subsidiary in question. Whether it will be possible to implement a general movement towards raising the legal curtain between parent companies and subsidiaries in fields other than that of classified facilities, competition law and collective procedures in the future therefore remains to be seen.

The CNCDH recommends that consideration be given to the possibility of extending the exception to the principle of legal independence of companies, which is currently limited to environmental issues, to the field of human rights.

- ***The introduction of vicarious liability on the part of the parent company for the actions of its subsidiaries***

51. As is the case in the parent-child relationship, this notion of vicarious liability would be based on Article 1384

³² Proving such control is a very complex matter. Only two recent judgements concluded that a parent company actually had control over its subsidiary in the case of Total (Court of Cassation, *Erika*, 25 September 2012).

³³ Article 113-5 of the Criminal Code: '*French criminal law is applicable to any person who, within the territory of the French Republic, is found guilty as an accomplice to a crime or misdemeanour committed abroad if the crime or misdemeanour is punishable both by French law and the foreign law, and if it has been established by a final ruling of the foreign court.*'

³⁴ This situation very rarely arises in countries with low levels of governance, as demonstrated by 'the Rougier case', in which French forestry company Rougier was charged with the complicity of its Cameroon-based subsidiary in the destruction of property belonging to other parties, uttering, fraud and bribery of an official on the grounds of Article 113-5 of the Criminal Code. The charge was dropped because the plaintiffs did not claim that it was impossible for the Cameroonian courts to convict the main perpetrator.

³⁵ Recent case law has tended to agree with the removal of the legal separation between parent company and subsidiaries. Indeed, one recent ruling by the *Tribunal aux Affaires Sociales* ('Court of Social Affairs', TASS) of Melun on 11 May 2012 held parent company Areva, as co-employer, responsible in relation to the illness of a French employee employed by its Niger subsidiary.

of the Civil Code. The parent company would then become responsible for any damage caused by the actions of its subsidiary, for which it would be answerable by means of the introduction of this notion of dependency. **The Catala Project**, a preliminary plan for the reform of the law of obligations submitted to the Keeper of the Seals on 22 September 2005, provided for the introduction of a new Article 1360 of the Civil Code, according to which, '*whoever controls the economic activity or assets of a dependent professional is held responsible, even if acting on his own account, when the victim establishes that the harmful event is linked to the exercise of control. This is particularly the case with parent companies for damage caused by their subsidiaries, or with licensors for damage caused by their licencees*'. **The Terré report**³⁶ on civil liability, published in 2011, meanwhile, suggests that the parent company be subject to an obligation to monitor its subsidiary and that failure to fulfil this obligation would represent misconduct.

Vicarious liability is an example of something that could be used in civil law to hold the parent company responsible in the event of any violation of human rights committed by its subsidiaries.

- **Recognition of a duty of vigilance on the part of companies with regards to the entities with which they maintain commercial relations**

52. In accordance with the United Nations Guiding Principles which provide that businesses may have an adverse impact on human rights '*either through their own activities or as a result of their business relationships with other parties*', a duty of vigilance on the part of parent or contracting companies with regard to their subsidiaries and commercial partners could be introduced.

53. It might, for example, be worth considering the possibility of drawing inspiration from the duty to protect and remedy that has been introduced from Article 84 of the Grenelle II Law to **Article L.233-5-1 of the Commercial Code** and which relates to Articles L.162-1 and following of the Environmental Code, in order to extend it beyond the environmental sphere. In accordance with this Article L.233-5-1, '*a company holding more than half of the capital of another company [...] undertakes to bear responsibility [...] for all or part of the obligations to protect and remedy on the part of the latter*'.

54. The recognition of such a duty of vigilance on the part of businesses should nevertheless call for a degree of caution in order to ensure that it does not automatically result in the parent or contracting company being held responsible and that it does not, then, become counter-productive.

Drawing inspiration from the duty to protect and remedy in the environmental sphere, the CNCDDH recommends that a duty of vigilance on the part of the parent company with regards to its subsidiaries be legally imposed with the aim of preventing any violations of human rights that might occur over the course of its activities³⁷.

It should also be possible to hold a contracting party responsible for acts committed by its subcontractors, where it is proven that the relationship with the commercial partner is likely to influence them to operate in a way that is more human rights-friendly.

- **Attribution of responsibility by means of voluntary commitments: codes of conduct**

55. The code of conduct is a voluntary commitment on the part of businesses, associations and other entities that outlines a series of standards and principles that are intended to govern the way in which businesses conduct themselves in the market.

56. Individual or collective codes may, for example, be regulatory acts in the field of private law that may be legally binding, such as rules of procedure, or even contractual acts that are attached to the employment contract, for example. They are nevertheless more often than not communication tools conveying the image of a business that takes its social and environmental responsibilities seriously, as a result of which the legal force of such codes of conduct is limited in the following respects:

³⁶ Terré, F. (dir.), *Pour une réforme du droit de la responsabilité civile*, Dalloz, 'Thèmes et commentaires' coll., 2011.

³⁷ A parliamentary bill to this effect is expected to be submitted in autumn 2013.

- They are generally written using often very broad and neutral semantics in order to **avoid imposing any legal obligation on the part of the company in question.**
 - Codes of conducts are unilateral standards, as opposed to negotiated standards, and are sometimes contractualised in the form of supply agreements, but are more often than not self-regulated. They therefore represent a series of voluntary commitments on the part of private stakeholders who are not bound by any particular legislation when it comes to sanctioning failure to fulfil such obligations since there is **no effective monitoring mechanism that makes it possible to verify that the commitments made are being fulfilled and no sanctions in place**, with the exception of certain cases of false advertising.
57. Some businesses do, in fact, provide for the existence of such monitoring mechanisms but these are generally internal and therefore not accessible to the public, meaning that the management maintains control over the implementation of such mechanisms. NGOs and unions are campaigning for businesses to introduce more independent monitoring mechanisms.
58. Various avenues for legally attributing responsibility to businesses based on commitments made in the form of codes of conduct, notably through the *unilateral commitment*³⁸ theory, have been put forward. In order to be classed as a unilateral commitment, however, the commitment has to be firm and relate to a specific action. One of the difficulties relating to codes of conduct lies in the generally vague commitment that is expressed in texts and which can therefore give rise to doubts surrounding the judge's decision to reclassify such an act as a unilateral commitment.
59. **French courts have differing interpretations of the binding power to be given to voluntary commitments on the part of a business.**
60. The Court of Cassation ruled, in the Erika ruling of 25 September 2012, that Total were both criminally and civilly liable. In this particular case, the Court of Cassation characterised the criminal and civil liability of the French company on the basis of a shortcoming, referring to the internal monitoring regulations that the company had voluntarily put in place and not with regard to essential regulatory provisions³⁹.
61. Conversely, in a recent ruling returned by the Court of Appeal of Versailles in the so-called 'Jerusalem tramway' case⁴⁰, the Court ruled that the claimant could not invoke the code of ethics or membership of the United Nations Global Compact for the purposes of incriminating the company. The ruling underlines the fact that *'codes of ethics express values that companies wish to see applied by their staff in the framework of their activities within the company. As 'frameworks of reference', they contain only recommendations and rules of conduct without imposing any obligations or commitments towards third parties that may require such obligations and commitments to be fulfilled.'*
- **Attribution of responsibility by means of international framework agreements**
62. International framework agreements⁴¹ (IFAs) are instruments negotiated generally between a multinational enterprise and a global trade union federation for the purposes of implementing the fundamental standards of the ILO. Most such agreements provide for mechanisms designed to monitor their application which include the involvement of the unions. Such measures can include circulation to all of the group's employees, the development of training programmes and national union and international union federation missions aimed at monitoring the implementation of the agreement in the field, etc. They are not, however, the only factor that make IFAs restrictive. Indeed, whilst they cannot be considered collective agreements,

³⁸ Act whereby a person indicates the intention to be personally bound by the mere expression of their own will, with a view to establishing an obligation on their part.

³⁹ Daoud, E. and Lecorre, C., *Arrêt Erika, marée verte sur la responsabilité civile et pénale des compagnies pétrolières*, in Lamy Droit pénal des affaires, n°122, November 2012.

⁴⁰ Court of Appeal of Versailles, *Association France Palestine Solidarité (AFPS) against Alstom Transport SA*, 22 March 2013, 11/05331.

⁴¹ The movement towards negotiating international framework agreements began in the mid-90s, although a number of agreements did exist prior to this time. The term 'international framework agreement' was adopted by the International Union Federations (IUFs) comprising the *Global Unions* group to distinguish between global agreements resulting from negotiation and codes of conduct developed unilaterally within many multinational enterprises, cf. http://clerse.univ-lille1.fr/IMG/pdf/axe_3_ngaha_gissinger.pdf and <http://www.rse-et-ped.info/le-mouvement-de-negociation-daccords-cadres-internationaux-se-developpe/>

IFAs are not without legal value. It would therefore be wise for States to actively promote IFAs among companies since such agreements are a means of ensuring that the company respects the same standards in all of the countries in which it operates and demonstrating their commitment to respecting these standards⁴².

The CNCDH is calling for the government to encourage companies to negotiate international framework agreements comprising specific stipulations with regards to the monitoring and implementation of such agreements. Such agreements are indeed a means of ensuring that the company respects the same standards in all of the countries in which it operates.

The CNCDH recommends extending collective action, to matters relating to the environment and health in particular. It is also essential that any French or foreign individual or legal entity residing in France or abroad be able to get involved in any collective action initiated against a French company.

c. The necessary extension of extraterritorial powers

63. Extraterritoriality is a *'situation in which the powers of a State (whether legislative, executive or jurisdictional) govern legal relationships based outside of the territory of said State'*⁴³. This is a solution often put forward to meet the need for accountability on the part of parent companies for the activities of their subsidiaries. The Maastricht Principles on Extraterritorial Obligations of States specify that the State's duty to protect implies an obligation to regulate the activities of businesses based within its jurisdiction, including those operating outside of the country, in order to ensure that they uphold human rights at all locations in which they operate⁴⁴.
64. **The extraterritorial jurisdiction of French judges in criminal cases** against French businesses is currently limited. Whilst territorial jurisdiction (offence committed by a French or foreign individual or legal entity within France or fact constituting an offence committed within the territory⁴⁵) is relatively straightforward, the same cannot be said of extraterritorial jurisdiction. When the perpetrator of the offence is French⁴⁶ or the victim is French⁴⁷, for example, repressive jurisdiction in matters of tort can only be exercised at the request of the public prosecutor's office and, furthermore, requires a complaint to be lodged by the victim or their beneficiaries or an official denunciation by the authority of the country in which the facts were committed⁴⁸. Furthermore, personality jurisdiction is particularly difficult to implement since, on the one hand, active personality jurisdiction assumes the dual criminality of the crime committed by a French citizen abroad and, on the other hand, passive personality jurisdiction applies only to crimes where the victim is French and which are punishable by imprisonment under French law.
65. In certain cases, the judge may also exercise the protective principle or their universal jurisdiction, in which case no distinction is made between French and foreign nationals. The protective principle, however, is only valid for offences specifically referred to either in Article 113-10 of the Criminal Code or in other provisions⁴⁹, whilst universal jurisdiction is based on the implementation of international conventions⁵⁰. However, there are no international conventions that relate specifically to the field of corporate responsibility regarding human rights.

⁴² Only 77 international framework agreements have been signed to date, with only 20 of these being outside of Europe.

⁴³ Jean Salmon (dir.), *Dictionnaire de droit international public*, Bruylant/Agence Universitaire de la Francophonie, Brussels, 2001, p.491.

⁴⁴ *Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights*, 29 February 2012, drafted by a panel of experts.

⁴⁵ Article 113-2 of the Criminal Code (territorial jurisdiction).

⁴⁶ Article 113-6, paragraphs 1 and 2 of the Criminal Code (active personality jurisdiction).

⁴⁷ Article 113-7 of the Criminal Code (passive personality jurisdiction).

⁴⁸ Article 113-8 of the Criminal Code.

⁴⁹ Article 113-10: violations of the fundamental interests of the nation (treason and espionage, attacks on Republican institutions, the integrity of the national territory or national defence, etc.), forgery and counterfeiting of State seals or of coins serving as legal tender, or any crime or misdemeanour against French diplomatic or consular agents or premises committed outside the territory of the French Republic. The protective principle can incorporate jurisdiction relating to offences committed aboard or against French vessels or aircraft, irrespective of their location (Art.113-3 and 113-4 of the Criminal Code), offences relating to establishments or equipment belonging to the French armed forces (Art.L121§7 of the Code of Military Justice), the forgery or counterfeiting of foreign currencies or securities issued by a foreign state (Art.442-1 of the Criminal Code), etc.

⁵⁰ See Articles 689 and following of the Code of Criminal Procedure.

66. Extending this extraterritoriality could improve access to remedy for victims. A number of criticisms have nevertheless been expressed in opposition to the extension of extraterritoriality in French law.
67. The first of these relates to the legal impossibility of incorporating such a notion into current law. There are, however, various exceptions to the principle of territorial jurisdiction in a number of fields of law, including employment law, environmental law, fiscal law and competition law. Furthermore, there is no legal obstacle to the recognition of extraterritoriality other than a lack of political will. It is certainly not a case of holding the parent company responsible in the place of the subsidiary but rather one of holding the parent company responsible for having failed to fulfil its obligation (duty of vigilance) with regards to its subsidiary, an obligation that is recommended by the CNCDH but that does not yet exist in French law.
68. The second criticism of such a system concerns the risk of the shareholders of a French parent company being held directly responsible for damages caused by a foreign subsidiary. Indeed, such attribution of accountability to shareholders is likely, according to its critics, to create an economic and industrial desert in France, with companies no longer wishing to establish their head offices in the country. As far as many experts and stakeholders are concerned, however, this argument is inadmissible. Firstly, there are a number of reasons, notably socio-economic, cultural and even commercial, for which a parent company would not wish to relocate its head office. Furthermore, the movement towards holding parent companies in France to account is not an isolated one. Certain States have indeed extended extraterritoriality in certain fields without causing companies to desert their territories. The United States Congress, for example, adopted the Sarbanes-Oxley or SOX Act in 2002, requiring companies to introduce internal monitoring systems designed to prevent fraud, the use of incorrect financial information and loss of data. This Act applies to companies listed in the United States, as well as their subsidiaries. As a result, foreign subsidiaries of companies listed in the United States are also covered by the Act and must comply with the corresponding requirements. A number of similar laws have been adopted with the aim of fighting corruption. *The UK Bribery Act* in the United Kingdom and the *US Foreign Corrupt Practices Act (FCPA)* in the United States, for example, recognise the jurisdiction of the national courts with regards to acts of corruption committed outside of their national territory.
69. **Extraterritoriality in civil matters is recognised in French civil law** in accordance with the conditions imposed by the rules of private international law, the sources of which are international, European and French. There are a number of rules of conflicts of jurisdiction, which help determine the competent national court(s), and rules of conflicts of law, which help determine the law applicable to the core of the dispute, the rules of procedure relating to the *lex fori* or '*law of the forum*'.
70. Rules of conflicts of law are often a hindrance to companies being held to account in a transnational context since they can lead the internationally competent judge to apply a law that differs from their own and one that can prove less respectful of human rights. It should, however, be borne in mind that the judge having jurisdiction may apply their overriding rules, or imperative provisions, rather than the foreign law and, in the event that they do apply the foreign law, may discard those provisions thereof that are clearly incompatible with the public policy of the *law of the forum*.

With regards to criminal matters, the CNCDH recommends that the competent authorities consider the issue of extending the extraterritorial jurisdiction of French criminal courts. French courts should be able to consider themselves competent with regards to certain offences committed abroad by French companies without being subject to the dual criminality requirement.

With regards to civil matters, the CNCDH recommends that the government extend the notion of extraterritoriality to the parent company in the case of violations of human rights committed by a foreign subsidiary.

The CNCDH believes it would be desirable for subsidiary jurisdiction based on the denial of justice to be granted in civil matters in the event that the State competent for recognising detrimental acts on the part of the subsidiary is deemed unable or does not want to initiate and see through to their conclusion legal

proceedings⁵¹.

The CNCDH recommends that France extend this consideration of the possibility of attributing greater responsibility in civil and criminal matters to businesses for their international activity in the framework of the discussions currently under way within the European Union.

B. Guaranteeing non-judicial mechanisms

71. In accordance with [Guiding Principle n°27](#), States 'should provide effective and appropriate non-judicial grievance mechanisms, alongside judicial mechanisms'. In order to be effective, such non-judicial mechanisms should comply with certain criteria outlined in [Principle n°31](#). We will distinguish here between two non-judicial mechanisms, these being NCPs and the ILO and in particular its Committee on Freedom of Association, designed to protect freedom of association.

a. National Contact Points (NCPs)

72. The OECD Guidelines, revised in May 2011, contain a number of recommendations regarding multinational enterprises and put in place a series of National Contact Points (NCPs), these being non-judicial bodies with two primary purposes. First and foremost, they are designed to promote the Guidelines by encouraging their implementation within their respective countries and informing potential investors looking to invest in the country of their content. The NCPs are also intended to monitor the implementation of the Guidelines and are therefore responsible for providing a mediation platform in the event of a private company committing a violation of human rights. Furthermore, the NCPs are designed to deal with queries regarding the obligation for multinational enterprises to behave in a way that complies with the OECD Guidelines and are responsible for reaching a consensual resolution of the issue in question among the parties involved. The NCP is not, however, required to return a verdict on any potential violation on the part of the company of the OECD Guidelines.

73. Parallel procedures enabling both a State-based judicial remedy to be implemented and an NCP to be involved are now permitted. The 2011 revision of the principles helped erase the doubt that existed with regards to this possibility.

• Observing the OECD Guidelines

74. Forty-five countries have signed up to the OECD Guidelines to date, ten of which are non-OECD members, whilst only twenty-eight Council of Europe Member States have decided to adopt them.

The CNCDH would ask that France promote universal adoption of the OECD Guidelines for multinational enterprises with the primary aim of improving the access to remedy available to victims.

• A composition designed to ensure the independence and expertise of the NCP

75. According to the OECD Guidelines, NCPs can take various forms of organisation, some being dependent upon the government, or an interministerial body, whilst others enjoy greater independence from the administration.

76. The French NCP, for its part, is a tripartite organisation comprising unions, businesses and representatives of the administration, with the Directorate-General of the French Treasury serving as its secretariat and chair.

⁵¹ This notion of inability or lack of desire on the part of the State already exists, with regards to criminal matters, in the Statute of the International Criminal Court as an exception to the principle of complementarity. Furthermore, with regards to European Union law, the regulation of 18 December 2008 pertaining to maintenance obligations also provides for exceptional jurisdiction, or *forum necessitatis*, to be granted when no European Union Member State is considered competent in accordance with the other criteria outlined by the regulation and when no procedure can be 'reasonably' instigated or implemented or when a procedure proves impossible in a third-party State to which the situation is closely linked.

77. The French NCP does not include any NGOs. Indeed, NGOs themselves are not unanimously in favour of being incorporated into the NCP but appear to be more concerned with ensuring independence when it comes to decision-making. It would therefore appear more appropriate to establish a closer connection between NGOs and the operation of the NCP than to directly incorporate them into it. This involvement could, for example, take the form of a consultation process involving the exchange of information with those NGOs that wish to be involved in such a way. An initial meeting involving all stakeholders was held in June 2013, although there appears to be a need to establish a more structured, participatory dialogue.

The CNCDH recommends promoting active participation on the part of all of the ministries concerned in order to improve the efficiency and coherence of the administration's expertise with regards to the running of the NCP, thus reiterating its 2008 recommendation that 'State representation should be multidisciplinary'.

The CNCDH recommends establishing a structured participatory dialogue with the NCP that would involve civil society players.

In order to guarantee a certain level of expertise on the part of the NCP in all of the fields targeted by the OECD Guidelines without affecting the decision-making process, the CNCDH recommends involving independent experts in what it does. The CNCDH wishes to be considered a centre of expertise with regards to the French NCP, owing notably to its long-standing commitment to the issue of corporate responsibility for matters relating to human rights.

- ***Still limited visibility and accessibility***

78. Matters can be referred to the NCP by players as varied as unions, NGOs, ministries, rival companies and even individuals and the NCP can also refer matters to itself. The possibilities of matters being referred to the NCP are all the greater since it exercises a form of extraterritorial jurisdiction. Indeed, it is possible to refer a matter to the NCP as a result of actions on the part of a company whose head office is located in the same country as the NCP, but also when the actions are the doing of its foreign subsidiary. As a result, even where a company's behaviour has not itself had negative repercussions in any of the fields targeted by the Guidelines, the company may nevertheless be deemed responsible if said repercussions are directly linked to its activity, products or services in virtue of a business relationship⁵². This should not, however, be interpreted as a transfer of responsibility from the entity at the root of a negative repercussion to a company with which it has a business relationship but is rather intended to give victims the option of extra-judicial remedy.

79. Nineteen referrals have been registered since it was introduced in France in 2001. A total of ten rulings have been published, six of which have been since June 2012. The CNCDH has therefore observed a rise in power of the NCP.

80. Greater visibility and accessibility on the part of the NCP remains a key objective for the CNCDH. In this respect, whilst applauding the creation of a website featuring communiqués and reports published by the French NCP, the CNCDH believes that the latter could increase its visibility and assert its truly neutral position were it not incorporated into the website of the Directorate-General of the Treasury.

The CNCDH recommends that the government provide the NCP with the additional means required for it to fulfil its obligation of visibility and accessibility. Reiterating its 2008 recommendations, the CNCDH believes that the obligation of visibility on the part of NCPs requires, at the very least, the provision of sufficient means of communication. This includes having its own website comprising all practical information on how to refer a matter to the NCP and enabling users to track each stage of the procedure.

With regards to the accessibility of the procedure, the CNCDH believes that the NCP should be in a

⁵² It was considered that owning even a small percentage of a company constituted a business relationship that could result in the investor being held responsible in the case of a Norwegian investment fund owning 0.8% of an Indian steel company.

position to cover the travel expenses incurred by foreign plaintiffs in order to attend the hearing since the procedure cannot be influenced by the financial power of either party.

- ***The nature and effectiveness of the procedure***

81. The NCP is a non-judicial mechanism primarily intended not to sanction businesses, but to prevent them from committing further violations of human rights in the future. In this respect, the NCP comes under regularly criticism as a result of the somewhat lenient nature of the recommendations it makes. The CNCDDH nevertheless believes that the primary role of the NCP is to establish a dialogue between the parties concerned.
82. The methods adopted by NCPs vary significantly from one State to another. Indeed, whilst some NCPs resort solely to mediation, others are keen to investigate, at the risk of penalising the company. The French NCP may resort to an investigation in the event that mediation fails or is rejected by the parties. Unions believe that it might sometimes be useful to be able to establish the facts in the field, since the statements made by the victims and by the company can sometimes vary greatly. Increasing investigative resources would help prevent situations in which a company is funding the NCP's journey so that it can establish the facts *in situ*, which can result in it being suspected of a lack of independence and impartiality.
83. The CNCDDH is pleased with the 2012 review of the French NCP's rules of procedure, which represents the monitoring of the decisions taken by the NCP and its recommendations. Companies must now be accountable to the NCP on an annual basis until the objectives have been achieved. Nevertheless, the CNCDDH is calling for a gradual reinforcement of such monitoring practices, notably by considering the possibility of public reminders for businesses that do not comply with the terms of the agreements and resolutions or recommendations of the NCP.

The CNCDDH believes that the role of the NCP, the purpose of which is not to sanction businesses but to implement a mediation process, should be promoted. Without misrepresenting this role, it recommends that the NCP consider the benefits to the parties concerned of recognising, where applicable, any violation of human rights on the part of the company.

The CNCDDH also believes that the NCP should be provided with sufficient means to enable it to carry out the necessary investigations where the latter are required for the purposes of establishing the facts, as it had previously recommended in its 2008 opinion.

- ***Transparency in cases brought before NCPs***

84. Whilst the adversarial principle is, on the whole, observed by the NCP, a number of cases in which the transparency of the process could have been improved have also been observed. In particular, any documents received are not circulated to all of the parties concerned.

In accordance with [Guiding Principle n°31](#), the CNCDDH recommends greater transparency with regards to referrals to the NCP. The list of cases referred to the NCP, along with an indicative schedule for their processing, should be made publicly available. In the event of priority being given to certain cases, the parties should be informed of this reasoned decision.

The decision made by the NCP, which is public, must be explicit with regards to the information held by the NCP, in accordance with the principle of confidentiality.

In order to improve coordination between NCPs which might be approached to deal with similar cases, the OECD should improve the exchange of information and facilitate cooperation between NCPs ⁵³.

⁵³ There is, in fact, an OCED database of the various decisions made by NCPs which can be accessed at the following address: <http://mneguidelines.oecd.org/database/>

b. Monitoring the application of the ILO Conventions and sanctions

85. The ILO carries out periodical checks aimed at ensuring that conventions are being correctly implemented by the States that have ratified them. In order to do so, the International Labour Office compiles questionnaires and sends them to all of the States that have subscribed to a particular convention. The **Committee of Experts on the Application of Conventions** then examines the responses to the questionnaire and determines whether the State in question is correctly applying the convention. The State is then invited to respond to the observations made and may be required to explain itself before the **Committee on the Application of Standards**, a permanent tripartite committee of the annual International Labour Conference. This procedure helps establish an actual dialogue between the Organisation and the Member States. In the most worrying cases, the Commission expresses its concerns in writing in the form of a special paragraph in its report submitted to the plenary meeting of the Conference. This process as a whole constitutes the 'standard monitoring system'. However, neither the Committee of Experts nor the Standards Committee of the International Conference makes any enforceable decision, as a court would do, and there is no other sanction in the event of failure to observe the ILO conventions.
86. The principle of freedom of association, introduced by Convention n°87, along with the right of collective bargaining, outlined by Convention n°98, are nevertheless subject to a specific monitoring procedure. The **Committee on Freedom of Association**, which was set up in 1951, is in fact responsible for examining complaints relating to violations of the principles of freedom of association, even if the State in question does not subscribe to the associated conventions. This body, comprising State, employer and employee representatives, assesses the admissibility of the complaints it receives and, where appropriate, establishes a dialogue with the country in question. Should it conclude that the country is ignorant of the standards relating to freedom of association or of the right of collective bargaining, the Committee on Freedom of Association prepares a report and formulates a series of recommendations on how best to remedy the situation. The government is then asked to demonstrate that these recommendations are being implemented. Forty-two complaints relating to France, for example, have been filed since the Committee was established.
87. With regards to the other basic ILO conventions, other mechanisms (grievance or complaint) before the Administrative Board or the International Labour Conference, relating to all of the ILO Conventions, have been introduced within the ILO Constitution.
88. Generally-speaking, however, the CNCDH believes there to be a significant difference in the way the World Trade Organisation (WTO) deals with investment and competition law protection and the matter of respecting employment standards and human rights. Indeed, whilst failure to observe competition law and the rules imposed by WTO agreements results in sanctions being imposed on the States in question, violations of employment law or human rights very often go unpunished.

The CNCDH recommends that the government ensure that basic employment standards are being implemented in France and support their universal application by encouraging the introduction, within the ILO, of mechanisms that are more restrictive towards States.

The CNCDH notably supports reflection on the matter of the social cohesion of economic, financial and commercial policies that should lead to an increase in the weighting and authority of the ILO with regards to the institutions incorporated in the multilateral system, and the introduction of various forms of social conditionality. One of the avenues it might take could involve a 'preliminary issue'-type mechanism to be put to the ILO at the time decisions relating to other spheres, and which might affect social conditions, are made.

In accordance with the conclusions adopted by the International Labour Conference in June 2012 and reiterated in June 2013⁵⁴, the CNCDH recommends that the government organise an annual national

⁵⁴ Conclusions adopted in the framework of International Labour Conference discussion on the 'Framework for action for the effective and universal respect, promotion and enforcement of fundamental principles and rights at work 2012-2016' (101st session of the ILC, June 2012) on 'social dialogue' (102nd session of the ILC, June 2013): *'Member State governments are encouraged to take measures to ensure the coordination and coherence of the positions they take with regards to the ILO and those that they adopt in other instances regarding*

conference on social coherence, to involve representatives from the ministries responsible for both external policy in the economic and commercial fields and for French delegations within the corresponding multilateral institutions, in addition to representatives of the Ministry for Employment and social representatives (employer organisations and trade union confederations), in the framework of the tripartite consultations provided for by ILO Convention n°144.

Unanimously adopted

fundamental principles and rights at work. Such efforts might, where appropriate, include mechanisms for effective consultation between the ministries concerned and with social partners¹.

APPENDIX 1

United Nations Guiding Principles on Business and Human Rights referred to in the report

Guiding Principle n°3: General State regulatory and policy functions

'In meeting their duty to protect, States should:

- a) Enforce laws that are aimed at, or have the effect of, requiring business enterprises to respect human rights, and periodically to assess the adequacy of such laws and address any gaps;*
- b) Ensure that other laws and policies governing the creation and ongoing operation of business enterprises, such as corporate law, do not constrain but enable business respect for human rights;*
- c) Provide effective guidance to business enterprises on how to respect human rights throughout their operations;*
- d) Encourage, and where appropriate require, business enterprises to communicate how they address their human rights impacts.'*

Guiding Principle n°4: The State-business nexus

'States should take additional steps to protect against human rights abuses by business enterprises that are owned or controlled by the State, or that receive substantial support and services from State agencies such as export credit agencies and official investment insurance or guarantee agencies, including, where appropriate, by requiring human rights due diligence.'

Guiding Principle n°8: Ensuring policy coherence

'States should ensure that governmental departments, agencies and other State-based institutions that shape business practices are aware of and observe the State's human rights obligations when fulfilling their respective mandates, including by providing them with relevant information, training and supports.'

Commentary to Guiding Principle n°8:

'There is no inevitable tension between States' human rights obligations and the laws and policies they put in place that shape business practices. However, at times, States have to make difficult balancing decisions to reconcile different societal needs. To achieve the appropriate balance, States need to take a broad approach to managing the business and human rights agenda, aimed at ensuring both vertical and horizontal domestic policy coherence.'

Vertical policy coherence entails States having the necessary policies, laws and processes to implement their international human rights law obligations. Horizontal policy coherence means supporting and equipping departments and agencies, at both the national and sub-national levels, that shape business practices – including those responsible for corporate law and securities regulation, investment, export credit and insurance, trade and labour – to be informed of and act in a manner compatible with the Governments' human rights obligations.'

Guiding Principle n°6:

'States should promote respect for human rights by business enterprises with which they conduct commercial transactions.'

Guiding Principle n°10:

'States, when acting as members of multilateral institutions that deal with business-related issues, should:

- a) Seek to ensure that those institutions neither restrain the ability of their member States to meet their duty to protect nor hinder business enterprises from respecting human rights;*
- b) Encourage those institutions, within their respective mandates and capacities, to promote business respect for human rights and, where requested, to help States meet their duty to protect against human rights abuse by business enterprises, including through technical assistance, capacity-building and awareness-raising;*
- c) Draw on these Guiding Principles to promote shared understanding and advance international cooperation in the management of business and human rights challenges.'*

Guiding Principle n°12:

'The responsibility of business enterprises to respect human rights refers to internationally recognized human rights – understood, at a minimum, as those expressed in the International Bill of Human Rights and the principles concerning fundamental rights set out in the International Labour Organization's Declaration on Fundamental Principles and Rights at Work.'

Guiding Principle n°15:

'In order to meet their responsibility to respect human rights, business enterprises should have in place policies and processes appropriate to their size and circumstances, including:

- a) A policy commitment to meet their responsibility to respect human rights;*
- b) A human rights due-diligence process to identify, prevent, mitigate and account for how they address their impacts on human rights;*
- c) Processes to enable the remediation of any adverse human rights impacts they cause or to which they contribute.'*

Guiding Principle n°17: Human rights due diligence:

'In order to identify, prevent, mitigate and account for how they address their adverse human rights impacts, business enterprises should carry out human rights due diligence. The process should include assessing actual and potential human rights impacts, integrating and acting upon the findings, tracking responses, and communicating how impacts are addressed. Human rights due diligence:

- a) Should cover adverse human rights impacts that the business enterprise may cause or contribute to through its own activities, or which may be directly linked to its operations, products or services by its business relationships;*
- b) Will vary in complexity with the size of the business enterprise, the risk of severe human rights impacts, and the nature and context of its operations;*
- c) Should be ongoing, recognizing that the human rights risks may change over time as the business enterprise's operations and operating context evolve.'*

Guiding Principle n°18:

'In order to gauge human rights risks, business enterprises should identify and assess any actual or potential adverse human rights impacts with which they may be involved either through their own activities or as a result of their business relationships. This process should:

- a) Draw on internal and/or independent external human rights expertise;*
- b) Involve meaningful consultation with potentially affected groups and other relevant stakeholders, as appropriate to the size of the business enterprise and the nature and context of the operation.'*

Guiding Principle n°19:

'In order to prevent and mitigate adverse human rights impacts, business enterprises should integrate the findings from their impact assessments across relevant internal functions and processes, and take appropriate action.

a) Effective integration requires that:

- i) Responsibility for addressing such impacts is assigned to the appropriate level and function within the business enterprise;*
- ii) Internal decision-making, budget allocations and oversight processes enable effective responses to such impacts.*

Appropriate action will vary according to:

- i) Whether the business enterprise causes or contributes to an adverse impact, or whether it is involved solely because the impact is directly linked to its operations, products or services by a business relationship;*
- ii) The extent of its leverage in addressing the adverse impact.'*

Guiding Principle n°20:

'In order to verify whether adverse human rights impacts are being addressed, business enterprises should track the effectiveness of their response. Tracking should:

- a) Be based on appropriate qualitative and quantitative indicators;*
- b) Draw on feedback from both internal and external sources, including affected stakeholders.'*

Guiding Principle n°21:

'In order to account for how they address their human rights impacts, business enterprises should be prepared to communicate this externally, particularly when concerns are raised by or on behalf of affected stakeholders. Business enterprises whose operations or operating contexts pose risks of severe human rights impacts should report formally on how they address them. In all instances, communications should:

- a) Be of a form and frequency that reflect an enterprise's human rights impacts and that are accessible to its intended audiences;*
- b) Provide information that is sufficient to evaluate the adequacy of an enterprise's response to the particular human rights impact involved;*
- c) In turn not pose risks to affected stakeholders, personnel or to legitimate requirements of commercial confidentiality.'*

Guiding Principle n°26: State-based judicial mechanisms:

'States should take appropriate steps to ensure the effectiveness of domestic judicial mechanisms when addressing business-related human rights abuses, including considering ways to reduce legal, practical and other relevant barriers that could lead to a denial of access to remedy.'

Guiding Principle n°27: State-based non-judicial grievance mechanisms:

'States should provide effective and appropriate non-judicial grievance mechanisms, alongside judicial mechanisms, as part of a comprehensive State-based system for the remedy of business-related human rights abuse.'

Guiding Principle n°28: Non-State-based grievance mechanisms:

'States should consider ways to facilitate access to effective non-State-based grievance mechanisms dealing with business-related human rights harms.'

Guiding Principle n°31: Effectiveness criteria for non-judicial grievance mechanisms:

'In order to ensure their effectiveness, non-judicial grievance mechanisms, both State-based and non-State-based, should be:

- a) Legitimate: enabling trust from the stakeholder groups for whose use they are intended, and being accountable for the fair conduct of grievance processes;*
- b) Accessible: being known to all stakeholder groups for whose use they are intended, and providing adequate assistance for those who may face particular barriers to access;*
- c) Predictable: providing a clear and known procedure with an indicative timeframe for each stage, and clarity on the types of process and outcome available and means of monitoring implementation;*
- d) Equitable: seeking to ensure that aggrieved parties have reasonable access to sources of information, advice and expertise necessary to engage in a grievance process on fair, informed and respectful terms;*
- e) Transparent: keeping parties to a grievance informed about its progress, and providing sufficient information about the mechanism's performance to build confidence in its effectiveness and meet any public interest at stake;*
- f) Rights-compatible: ensuring that outcomes and remedies accord with internationally recognized human rights;*
- g) A source of continuous learning: drawing on relevant measures to identify lessons for improving the mechanism and preventing future grievances and harms.*

Operational-level mechanisms should also be:

- h) Based on engagement and dialogue: consulting the stakeholder groups for whose use they are intended on their design and performance, and focusing on dialogue as the means to address and resolve grievances.'*

APPENDIX 2

List of people heard and consulted by the CNCDH

- François Beaujolin, President of the *Fondation pour les Droits de l'Homme au Travail*
- Marie-Caroline Caillet, researcher, member of the Sherpa network
- Tatiana Campos-Rocha, CSR policy officer at Sanofi-Aventis and representative of *Entreprises pour les Droits de l'homme*
- Michel Capron, Professor Emeritus in Management Science at the Paris 8-Saint Denis University, researcher at the Institute of Research Management of the Paris-Est Créteil University and associate at the Chair of Social Responsibility and Sustainable Development at the University of Quebec in Montreal
- Nicolas Cuzacq, Senior Lecturer in private law at Paris Est-Créteil University, specialising in management and economics
- Emmanuel Daoud, Associate Lawyer at VIGO, specialist in criminal law and member of the FIDH Legal Action Group
- Thierry Dedieu, representative of the PCN trade union body
- Bruno Dondero, Associate Professor in the Faculties of Law and Professor of Private Law at the Sorbonne Law School (Paris 1 University)
- Michel Doucin, former ambassador for CSR in France
- Kirstin Drew, representative of the Trade Union Advisory Committee to the OCDE (TUAC)
- François Fatoux, General Delegate of the ORSE
- Françoise Guichard, Head of Sustainable Development at GDF SUEZ and representative of *Entreprises pour les Droits de l'homme*
- Paul Hundinger, President of the French NCP
- Pauline Kienlen, Advocacy Officer at the Sherpa Globalisation and Human Rights division
- Robert Kissous, *Association France Palestine Solidarité*
- Sophia Lakhdar, Director of Sherpa
- Olivier Loubière, Compliance Officer at the AREVA group and representative of *Entreprises pour les Droits de l'Homme*
- Pierre Lyon-Caen, Member of the Committee of Experts for the application of ILO conventions
- Kathia Martin-Chenut, Research Officer at the CNRS on 'the responsibility of parent companies and instructing parties in relation to subsidiaries and subcontractors'
- Antonio Mangarella, CSR Advocacy Office for CCFD-Terre Solidaire ('Catholic Committee Against Hunger and for Development') and coordinator of the CSR citizens' forum
- Pierre Mazeau, CSR Project Manager at the Department of Sustainable Development at EDF and representative of *Entreprises pour les Droits de l'Homme*
- Olivier Maurel, independent consultant-researcher and university lecturer in corporate responsibility in the field of human rights
- Didier Mercier, Special Advisor to the Director General of the AFD
- Catherine Minard, representative of the PCN employers' body
- Emmanuel Montanie, Assistant Head of International Affairs at the MEDEF
- René de Quenaudon, University Professor
- Jean-Noël Roulleau, Head of the Environmental and Social Support division at the French Development Agency (AFD)
- Maylis Souque, Secretary-General of the French NCP
- Bertrand Swiderski, Head of Sustainable Development at the Carrefour Group