

Department of History and Political Science

Ph. D. in Political Theory
Cycle XXII

**On Corporate Social Responsibility
and Human Rights:
a Transnational Perspective**

Ph. D. Thesis
by
Martina Fattorini

Thesis Advisor:

Professor Sebastiano Maffettone

External Thesis Advisor:

Professor Gustavo Visentini

Rome, April 2010

CHAPTER I

1. The freedom of enterprise in Italy. New perspectives.

- 1.1. Introduction.....p. 6
- 1.2. The article 41 of the Constitution..... p. 7
- 1.3. The freedom of enterprise according to the first paragraph of article 41..... p. 11
 - 1.3.1. The essential requirement legitimizing the freedom of enterprise.....p. 13
 - 1.3.1.1. Profit as indicator of collective wealth..... p. 13
 - 1.3.1.2. The enterprise beyond the profit. A different view.....p. 16
 - 1.3.2. The social utility. The second paragraph of article 41.....p. 19
 - 1.3.2.1. The Constitutional Court Case-Law.....p. 20
- 1.4. The new debate on the limits that could be put on the freedom of enterprise. The company as an institution based upon the right of ownership and consequences.....p. 24
- 1.5. Italy and the social responsibility of enterprises.....p. 29

CHAPTER II

2. The globalized utility: steps towards Corporate Social Responsibility.

- 2.1. Enterprise and globalization..... p. 32
- 2.2. Human rights and ‘global’ enterprise..... p. 35
- 2.3. The Universal Declaration of Human Rights. A thumbnail presentation of the ‘Green Paper on corporate social responsibility’..... p. 37
 - 2.3.1. The ILO Tripartite Declaration concerning multinational enterprises and social policy..... p. 40
 - 2.3.2. The OECD Guidelines for Multinational Enterprises..... p. 46
 - 2.3.3. The UN Global Compact..... p. 50
- 2.4. The EU initiatives concerning ‘enterprises and human rights’..... p. 52
 - 2.4.1. The EU Green Paper on Corporate Social Responsibility: perspectives and limits..... p. 57
 - 2.4.2. The EU Communication on Corporate Social Responsibility (CSR): a comparison with the Green Paper..... p. 60

CHAPTER III

3. The inadequacy of the voluntary approach to Corporate Social Responsibility (CSR).

- 3.1. The freedom of enterprise and the institutions supporting it all over the world: WTO, IMF and WB..... p. 65
 - 3.1.1. Criticisms to the WTO. The authoritative opinion of Joseph Stiglitz.....p. 68
- 3.2. Why the voluntary approach is inadequate. The function of the law.....p. 71
- 3.3. The UN norms on the responsibility of transnational companies and enterprises with reference to human rights..... p. 73
- 3.4. The National initiatives. In particular The United States.....p. 76
 - 3.4.1. The United States and the ATCA..... p. 77
 - 3.4.1.1. Doe Vs Exxon Mobil and Wiwa Vs Shell..... p. 81
 - 3.4.1.2. The case Doe Vs Unocal and the complicity between enterprise and government p. 84
 - 3.4.1.3. The case Aguinda Vs Texaco and the right to environment.....p. 88
 - 3.4.2. The cases Saipan and Nike: the advertising law. The consumers' 'power'p. 89

Conclusions.....p. 93

Bibliography..... p. 98

Sitography.....p. 108

Main explored Database p. 109

CHAPTER I

The freedom of enterprise in Italy. New perspectives.

Summary: 1.1. Introduction; 1.2. The article 41 of the Constitution; 1.3. The freedom of enterprise according to the first paragraph of article 41; 1.3.1. The essential requirement legitimizing the freedom of enterprise; 1.3.1.1. Profit as indicator of collective wealth; 1.3.1.2. The enterprise beyond the profit. A different view; 1.3.2. The social utility. The second paragraph of article 41; 1.3.2.1. Constitutional Court Case-Law; 1.4. The new debate on the limits that could be put on the freedom of enterprise. The company as an institution based upon the right of ownership and consequences; 1.5. Italy and the social responsibility of enterprises.

1.1. Introduction.

In Italy the freedom of enterprise has been recognized in 1948 with the article 41 of the Constitution which provides for and also legitimizes its eventual limitations.

The analysis of art. 41 Const. and the debate over its interpretation are valid starting points to understand how the relation between the freedom of enterprise and the limits put on its exercise has undergone a great development¹.

On one side, this freedom has gained ground behind pro-European pressures and market operators, on the other side the debate has partly moved towards the ends of a private enterprise, that is whether ends other than profit may be reached.²

¹ Baldassare, *Le trasformazioni dell'impresa di fronte alla costituzione*, in Democrazia e diritto, 1977, 1, pp. 15-48.

² Oppo, *Diritto dell'impresa e morale sociale*, in Rivista diritto civile, 1, 1992, p. 15ss.

Italy's gradual shifting to models characterized by less government control is, indeed, counterbalanced by a new question related to enterprises which will be dealt with in this work: whether they have any responsibility towards the people with whom and the environment where they carry out their activity and which limitations can be put to their work³. These new questions, widely dealt with in chapter two and three of this work, are not restricted to the national contest but interest the European and the world markets as well.⁴ At present, indeed, there are no binding rules, in Italy and in most parts of the world, which establish the social responsibility of enterprises, but the need for these rules increases hand in hand with the development of the global economy. This work aims at showing how such binding rules are more needed than the *soft-law* approach adopted so far.

1.2. The article 41 of the Constitution.

The first paragraph of art. 41 of the Constitution provides that: "The private economic enterprise is free", but the second paragraph establishes that "it may not be carried out against the common good or in a way that

³ Flick, *Globalizzazione dei mercati e globalizzazione della giustizia*, on Rivista trimestrale di diritto penale dell'economia, 2000, 3, p. 591-605.

⁴ Fitoussi, *La democrazia e il mercato*, Feltrinelli, 2004.

may harm public security, liberty, or human dignity”. Further on, the third paragraph states that “the law determines appropriate norms and controls so that public and private economic activities may be directed and coordinated towards social ends.”⁵.

Art. 43 of the Constitution provides that “to the end of the general good, the law may reserve establishment or transfer, by expropriation with compensation, to the state, public bodies, or workers or consumer communities, specific enterprises or categories of enterprises of primary common interest for essential public services or energy sources, or act as monopolies in the preeminent public interest”⁶.

In the draft Constitution two different regulations focused on the exercise of economic activities, these regulations were later modified and included in the principle statements contained in the article 41 in force.

They were:

- a. Art. 37, literally stating that: “Any private or public economic activity must aim at providing the necessary means to meet the individual needs and ensure the collective wealth. The law determines appropriate norms and controls so that public and private economic activities may be directed and coordinated towards social ends”.

⁵ Article 41 Italian Constitution.

⁶ Article 43 Italian Constitution.

b. Art. 39 which established that: “The private economic enterprise is free. It may not be carried out against the common good or in a way that may harm public security, liberty, or human dignity”.

These provisions give evidence that the free private enterprise was only negatively limited by art. 39, as far as social utility, security and human dignity are concerned; a negative limit perfectly compatible with the acknowledgment of an actual individual right, considering that the freedom of an economic enterprise may not imply the sacrifice of another one nor it may imply freedom of running an anti-social activity⁷.

On the other hand, art. 37 provides that any economic activity (and not only private enterprises) must supply the necessary means to meet the individual needs and ensure the collective wealth, therefore it does not allow the State to directly intervene in private enterprises but simply to coordinate, by means of adequate rules and controls, the economic activities characterized by social ends.

Article 41 of the Constitution in force provides for a greater intervention of the State. Yet, the combination of both provisions assimilates the State positive intervention in the economic activity in general to the negative limitation put on the freedom of enterprise. The law must not just issue

⁷ Saja, in www.cortecostituzionale.it, on 02/02/2010.

regulations and provide controls⁸ aimed at coordinating economic activities, but it should set appropriate planning and controls so that public and private economic activities may be directed and coordinated towards social ends.⁹

The interpretation of such provision, however, is and has not been unambiguous. The legal science has been divided on the following questions: firstly on the definition of the nature and of the meaning of freedom and of its limitations; secondly on the relation between freedom and its limitations mainly in relation to the “general principles” established by the second and third paragraph of the same article¹⁰.

In order to analyze the *ratio* of this provision it is necessary to study the key principles it establishes: the freedom of enterprise (first paragraph) and social utility (second paragraph).

⁸ Esposito, *I tre commi dell'articolo 41 della Costituzione*, in *Giurisprudenza costituzionale*, 1962, p. 35.

⁹ Nowadays the direct intervention of the State in the economic activities is quite frequent, the State entrepreneurial function has been widely recognized and private and public enterprises coexist in the same economic system sometimes operating alone or in association with others in a regime of free economic enterprise and free competition. This provision is clearly stated in the article 8 of the law n. 287 of October the 10th, 1990 where it is provided that the antitrust rules applies “to both private and public undertakings and to those in which the State is the majority shareholder”.

Anyway the private enterprise is sometimes limited by a series of constraints such as the need of administrative authorizations or by the need to legally or administratively set the minimum and maximum price, or the control of importations and exportations and of the capital market; Giannini Massimo Severo, quoted.

¹⁰ Gazzola, Pellicelli, *The corporate responsibility report between private interest and collective welfare*, vol.1, no. 1, 2009.

1.3. The freedom of enterprise according to the first paragraph of article 41.

The freedom of enterprise guaranteed by art. 41 of the Constitution allows the private entrepreneur to use any natural and human resource: he/she may organize his/her activity according to his/her needs in the respect of the limitations provided by the law. This provision implies that the economic activity is carried out within a market with no competition limitations; competition should therefore be guaranteed by public authorities.¹¹

Shifting from a liberalist economic system based upon a full entrepreneurial freedom to a blended economic system with a greater public participation, the State role in private enterprises has gained importance. Specific constitutional regulations (artt. 41-47) on this subject establish, indeed, that public authorities must guarantee¹² the correct running and development of the whole economic system.

At the same time, the increased participation of the State in the economic activities does not imply their shifting from private to public. As a matter of fact, an entrepreneur works autonomously and for his/her own interests, whereas the public authority may only try to influence his/her

¹¹ Ferri, *Concorrenza*, in *Enciclopedia del diritto*, Milano, 1961, p.532.

¹² Esposito, quoted, p. 33. "According to what provided by the Constitution, it is evident that the freedom of enterprise can be adequately exercised only within the limits imposed by the public authority; on the other hand, the public authority allows the entrepreneur to exploit certain facilities to exercise his/her own activity."

entrepreneurial strategies and give economic incentives¹³ to entrepreneurs adopting those kind of decisions.

In the light of these considerations we can unlikely interpret the provisions of art. 41 paragraph 2 of the Constitution (where it provides that economic activities in contrast with social utility are forbidden) as prescriptive regulations constantly binding the private economic enterprise to the fulfillment of remarkable social ends. A different interpretation would contrast with the *ratio* of such provision called for by the constituent who has, instead, reckoned that a good economic trend is the result of free private enterprises confronting in a market of free and fair competitiveness.¹⁴

Any person is therefore safeguarded in his/her right to undertake an economic activity¹⁵. In this respect, the first paragraph of the regulation quoted above, guarantees both the right to economic undertaking and the right to carry out entrepreneurial activities. In this regard it should not be forgotten that a sharp distinction was made, in the past, between the first and the second paragraph, referred to the economic undertaking, and the

¹³ Various public supports are provided to private economic activities which therefore take on a certain importance in the state production system. These forms of support were, however, already tolerated during the liberalist period. Bilancia, www.lauriana.com on the 5th of February 2010.

¹⁴ According to this prevailing interpretation, the provision of art. 41 here quoted forbids any to carry out activity which damages social utility rather than prescribing that an economic activity can only be carried out as long as it aims at a social end. Bilancia, www.lauriana.com consulted on the 5th of February 2010.

¹⁵ Galgano, *La libertà di iniziativa economica privata nel sistema delle libertà costituzionali*, in *Trattato di diritto commerciale e di diritto pubblico dell'economia*, 1972, p. 512.

third paragraph, referred to the activity, even in the light of their original separation in the draft Constitution. This distinction has, now, lost its relevance for the interpretation of this article since both provisions fall under the general idea of “freedom of enterprise” (see sentence of the Constitutional Court of 2001 quoted on page 22).

1.3.1. The essential requirement legitimizing the freedom of enterprise.

It is widely accepted that social utility (par. 1.3.2.) may limit the potential development of the freedom of enterprise; conversely less widely accepted are the way and the conditions such limitations may be enforced¹⁶. Two different opinions exist at this regard. The difference stands in a different principle taken as the legitimizing requirement of the freedom of enterprise within our legal system.

1.3.1.1. Profit as indicator of collective wealth.

Part of the Academia tends to legitimize the freedom of enterprise in the light of the individual profit and considers the production of the profit itself as an essential condition for the social utility to be satisfied. Profit

¹⁶ Baldassarre, quoted on p.5.

contributes to the economic development and gains importance because it satisfies collective needs; the freedom of enterprise is, therefore, constitutionally guaranteed as long as it produces wealth and does not contrast with social utility¹⁷.

In the light of the Constitutional regulations, these Authors believe that it is reasonable to think that the economic relations should not be governed by the particular interests of the parties involved but rather by the common economic interest¹⁸ (e.g. the social utility) to be met through more efficient production processes and a stronger economic system in general. Therefore the achievement of the collective wealth allows or hinders the development of certain activities and thus it implies the need to control, limit and direct the various entrepreneurial activities.

The interpretation of these Authors is based upon articles 4 and 41 of the Constitution. They believe, indeed, that art. 41 allows the free private economic enterprise and at the same time limits any economic activity by forcing them to comply with the general principles reported in the second

¹⁷ Thus, the exercise of one's own right is somehow limited by the relevance of other rights which should be reduced. However the interests of the holder of the right always prevail. See Giocoli, Nacci, *I limiti sociali della iniziativa economica privata*, in Rassegna diritto pubblico, 1958, II, p. 474.

¹⁸ As regards the way the economic activity should be carried out, there are many limitations to the entrepreneurial activity such as the duty to avoid illicit behaviors or to act in compliance with the law. Beretta, *La "Costituzione economica": genesi e principi*, in Il politico, 1988, pp. 379-418.

paragraph of art. 4 of the Constitution¹⁹, which provides that any citizen must contribute, with his/her own activity, to the society's material and spiritual development²⁰.

In the light of a combined interpretation of both articles these authors believe that the constituent's idea of social function substantiates in the exercise of a right which contributes to satisfy a general need²¹ but without implying a subordination of the private interest to the general one²².

On the other hand, the definition of a private economic enterprise as a freedom rather than satisfaction of a social function does not contrast with what is provided for in the second paragraph of art. 41, that "a private economic enterprise may not be carried out against the common good or in a way that may harm public security, liberty, or human dignity". These ideas must be considered as particular limitations rather than essential requirements of the freedom of enterprise.

¹⁹ "Every citizen has the duty to carry out, according his/her own possibilities and his/her choices, an activity or a function which contributes to the society's material or spiritual development."

²⁰ "According to these regulations it is licit to believe that the economic relations should be regulated according to the common interest of the efficiency and of the economic character of the production system." Giocoli, Nacci, quoted, p. 480.

²¹ The entrepreneur aims at profit, thus he/she implements a social function since he/she contributes to the creation of the national economic patrimony which affects the constituent's interest towards the collective wealth. Giannini, *Sull'azione dei pubblici poteri nel campo dell'economia*, in *Rivista diritto commerciale*, 1959, I, p. 321.

²² These Authors believe that the social utility is the primary end of the Constitutional activity in the field of economic relations and that this represents a limitation to economic freedom. This limitation, however, does not reduce the individual's right to freedom, as a matter of fact the entrepreneurial activity cannot be considered only a means to satisfy a collective interest and it can be limited only in extremely exceptional situations. See Giannini, quoted.

1.3.1.2. The enterprise beyond the profit. A different view.

It is useful to present a completely different view which harshly criticizes the above reported opinion and defines as “anachronistic and legally unjustified the prevailing opinion in this field that the freedom of enterprise in our system keeps on being considered as an individual right”²³.

The previously reported opinion is based upon the idea that it is unreal to deny the freedom of enterprise in an economic system characterized by a more or less wide freedom of exchange. The opposite view²⁴ is, instead, based upon the idea that “a freedom guaranteed by the Constitution, in technical terms, is not a fundamental right for its own nature, because a great gap exists between the two ideas”²⁵.

The supporters of this theory confirm that a lot of consequences may derive from considering freedom as a personal right such as the impossibility to submit it to the constitutional review, the impossibility to take it away from its natural holder or to impose limitations to its content or a greater limitation of the government control, which never could be too discretionary, and so on.

²³ Gialanella, *La sfida dei diritti fondamentali e l'utopia di una nuova democrazia del pubblico*, in *Questione giustizia*, 2001, 2, pp. 253-272. Baldassarre, quoted p. 28.

²⁴ Oppo, quoted, 20, p. 19.

²⁵ Salvi, in *Gestione dell'economia e pluralismo sociale*, in *democrazia e diritto*, 1976, p. 324.

These and other regulations cannot be applied to the private enterprise because they would contrast with other institutions specifically provided for by the Constitution in this field²⁶. As a matter of fact, the idea of the freedom of enterprise as a personal right contrasts with the principles of an antitrust planning (not merely approximate) and policy (art. 41 Cost.), as well as with the right of expropriation and the right to reserve establishment or transfer specific enterprises (art. 43 Const.)²⁷.

Always according to this view, this definition of freedom of enterprise is not compatible with article 43 because a fundamental right is inalienable and can be exercised by its holder alone. This definition is also not compatible with art.41 since as an ‘expression of the human freedom’, a personal right cannot be forced toward ends different from the holder’s ones but it can only be limited if it appears to contrast with its logical foundation. Therefore, according to these Authors, an enterprise is constitutionally guaranteed not only because it contributes, with its profit, to the development of national economy (thus profit is not the only principle legitimizing its exercise as the Authors examined in §3.1.1. claim), but also because they acknowledge that this is a complex institution where many interests converge²⁸. That is why many

²⁶ Foglia, *Libertà d'impresa e programmazione nella prospettiva di uno statuto d'impresa*, in *Diritto del lavoro*, 1981, 2, pp. 157-162.

²⁷ Baldassarre, quoted p. 30.

²⁸ Oppo, quoted p.20.

differences are made in the Constitution according to the type of relation existing with the general interest. For example large freedom and favor is granted to productive units with little market power, such as handicraft activities or small-sized firms by arts. 45 and 44, controls and planning are provided especially for those activities with more socially relevant ends (art. 41) and art. 43 grants even power to particular forms of public supervising and of public expropriation of enterprises with 'preeminent public interest'.

A statement by a famous scholar gives evidence of the new way of looking at business organizations: "[...]in the Constitution the enterprise is no more considered as an "empty space" for an individual to be used according his/her self-centered will and needs, but it's a more complex reality with particular functions, which may (and must) be governed by even antagonistic interests"²⁹. Briefly speaking, according to this theory the production of profit does not always coincide with the collective wealth nor it is sufficient improve it³⁰.

²⁹ Cavazzuti, *Capitale monopolistico, impresa e istituzioni*, Bologna, 1974, p. 62 ss.

³⁰ Berle e Means, *Società per azioni e proprietà privata*, Torino 1966, p. 366.

1.3.2. Social utility. The second paragraph of article 41.

The controversial interpretation of the application of the second paragraph of article 41 rises from the unclear definition of social utility. As yardstick of any economic activity, this latter is, indeed, quite indefinite. The variable relation between the limits established in the second paragraph of article 41 and the freedom of enterprise provided for in the first paragraph makes it necessary to disambiguate the notion of social utility.

At this regard, different definitions have been supplied. It has been identified with “a greater wealth for the greater possible number of people” or with “the need to reach the highest employment levels”, or with “the collective economic wealth”³¹. All these definitions, however, do not provide an exhaustive explanation of the notion of social utility whose meaning changes each time according to the situation it refers to³².

In order to better understand the relation between freedom of enterprise and the limitations of social utility it should be considered that the limitations imposed by paragraph 2 of art. 41 are justified by the

³¹ Baldassarre, quoted, pp. 32-34.

³² The notion of social utility, in relation to any other form of freedom protected by the Constitution can be defined in negative terms as everything which does not violate those forms of freedom. The provision presented in the first part of paragraph 2 of art. 41 represents a form of priority protection for other constitutional values as a guarantee of collective wealth. The constituent has put these values before the freedom of economic enterprise in order to prevent that they were denied for the sole benefit of production. See Oppo, quoted p. 33.

constitutional forecast of a mixed and multi-organized economic model with legislative tools aimed at granting a regular market trend in a multifaceted reality³³.

Therefore, despite being strictly connected to the acknowledgment of other fundamental private rights³⁴ (e.g. the private property protected according to art. 42 of the Constitution), the economic freedom is restricted by different constitutional limitations which have contributed, with the support of a wide case-law, to affirm the constitutional legitimacy of the systems of control of entrepreneurial activities, organized according to the positive law. The aim of these systems is to grant social utility by protecting the other rights provided for by the Constitution.

1.3.2.1. Constitutional Court Case-Law.

The notion of utility has always been explained describing what it is not.

Also because if we wanted to describe it in positive terms an absolutely

³³ According to the debate over the notion of freedom of private enterprise, the limitations that can be put to the economic activity (so that it does not contrast with social utility) and over the system of public controls, the use of legal and administrative means aimed at complying with the social utility not only is allowed but is also necessary. See Cocozza, *La programmazione negoziata e il nuovo impulso al regionalismo economico*, in *Le istituzioni del federalismo*, 1999, 2, pp. 259-281.

³⁴ According to this background, it is not groundless to think that the economic freedom is a complex notion where many forms of freedom are included. As a prerequisite of the economic freedom and correspond to the freedom to use any material and human resource and the freedom to organize the production activities according to quantity and quality standards.

“right” solution would not exist. Therefore a compromise shall be found in the “most appropriate” definition according to the historical period. In order to understand the notion of social utility it is important to analyze the position of the Constitutional Court. In particular, with the sentence n.190 of the 14th of June 2001, the Court declared unjustified the question of the legitimacy of art.23, paragraph 4 regional law Veneto n. 19/1998, where it provides that, in the absence of a specific regulation on aquaculture, the exportation of the excavations debris is not allowed when building new plants³⁵.

First of all, among the two definitions of private economic enterprise suggested by the dominant literature, one distinguishes between the starting stage of the production process and its actual development (the activity), the other considers the economic activity unambiguously as a whole in compliance with art. 41 of the Constitution. This latter is the definition preferred by the Court (see p. 12). Indeed, the Supreme Court extend the guarantees provided for the private economic enterprise to the development of the economic activity itself.³⁶

Furthermore, according to the Court the notion the environmental protection purposes can be considered included in the definition and

³⁵ Morrone, *Libertà d'impresa nell'ottica del controllo sull'utilità sociale*, Giurisprudenza costituzionale, 2001, 3, pp. 1471-1478; Perlingieri, *Sull'attività della Corte Costituzionale*, in Diritto e giurisprudenza, pp. 487-490, 4, 1976.

³⁶ Morrone, quoted.

goals of social utility in its broader sense, but at the same time it does not supply a clear definition of social utility and of the limitations put to the freedom of enterprise.³⁷ This is not due to a scientific gap but rather to formal reasons relating to the logic of the constitutional provision and, above all, to the fact that “the art. 41 Const., with reference to the limitations provided, enforces the *interpositio legislatoris*, and leaves a great discretionary power to the law”. As regards the social utility, in particular, Authors have called it the “blank regulation”, that as such theoretically allows all the State interventions granted by the second paragraph of art. 3 of the Constitution that can be connected with a process of social, economic and political renewal. In the process of evaluating the legitimacy of laws affecting economic undertakings, the Constitutional Court has formulated a definition of social utility each time different according to the needs of society in a given period and without neglecting that the notion of production constantly gets new connotations within the economic science.

The Court has always recognized that the art. 41 Const. “legitimizes the enactment of regulations protecting the social wealth and limiting the private enterprise”³⁸ and that “the limitations put on this law do not contrast with the private autonomy and the private enterprise, for the

³⁷ Perlingieri, quoted.

³⁸ Corte Cost. ord. n. 6 of January the 14th, 1982, in Giurisprudenza Costituzionale, 1982, p.18.

benefit of social utility and in order not to harm public security, liberty, or human dignity”.³⁹

In many pronouncements the Court has affirmed that the freedom of economic enterprise cannot aim at the fulfillment of social utility⁴⁰. At this regard the sentence n. 548 of 1990 establishes that: “the law regulation of the economic enterprise is compatible with the second paragraph of art.41 of the Constitution as long as it is aimed at the fulfillment of a social end, besides safeguarding primary human values (whose respect is the utmost limitation of any economic activity)[...]. It is important that the identification of the social utility is not arbitrary and that the legislator does not apply inappropriate measures to reach that goal. Moreover the law intervention should not influence the entrepreneurial choices exclusively towards social ends thus limiting its scope and organization”.⁴¹

In the constitutional case-law, the relation between the freedom of economic enterprise and its limitations, therefore, becomes “the relation between limitations⁴²” where the appropriateness of prescriptive regulations (according to art.3 of the Constitution), which may

³⁹ Corte Cost. 30 Ottobre 1975, n. 237, in Foro italiano, 1976, p. 12.

⁴⁰ Perlingieri, quoted, p. 490.

⁴¹ Corte Cost. 19 dicembre 1990 n. 548, in Consiglio di Stato, 1990, p. 1784.

⁴² Perlingieri, quoted, p. 488.

legitimately restrict the economic enterprise, is evaluated according to the social end⁴³.

Thus the right to economic enterprise, in particular the right to start and develop an enterprise, may be included in that group of rights where the individual has a functional position within a particular economic framework designed by the Constitution.

This right may be restricted when specific public needs occur, but in its turn it is a limitation itself for the legal reserve given to the State by art. 41 paragraph 3 of the Constitution, in order to prevent discretionary limitations of the legislator to the free economic enterprise which would deny the primary right to freedom guaranteed by the first paragraph of the same article.

1.4. The new debate on the limits that could be put on the freedom of enterprise. The company as an institution based upon the right of ownership and consequences.

Thanks to the work of the legal science, and mainly to the Constitutional Court case-law, the article 41 has found its application within our system.

⁴³ It seems therefore that the protection of the entrepreneur's personal interests is connected to the protection of the general interest. Consequently the law will guarantee the satisfaction of

The legal debate over the relation between the freedom of economic enterprise and its limitations, though still existing, is no more of current interest.

If considered within the national contest this debate has a particular meaning, though.⁴⁴ If considered outside the national borders where the entrepreneurial activity is characterized by a great “mobility” and many limitations, the debate has, instead, taken on a different connotation⁴⁵.

Nowadays a great attention is addressed to the corporate social responsibility (n.d.r. English acronym: CSR) that is what it should do in order not to harm “the security, liberty, or human dignity” of the “stakeholders”⁴⁶ particularly abroad, though not only.

It is not easy to draw an outline of this responsibility because of the lack of a supranational law supervising the society’s behavior, establishing its obligations and sanctioning their eventual violation.

In the last few years some international organizations have tried to fill this gap by encouraging the enterprises’ self-regulation. To date, there are only volunteer measures, therefore the social responsibility of an enterprise is not an obligation. The resulting consequences will be

the entrepreneurial goals in accordance with the general interests as well. See Perlingieri quoted, p. 489.

⁴⁴ Buttarelli, on www.privacy.it, 28/01/2010.

⁴⁵ Massera, *Oltre lo Stato: Italia ed Europa tra locale e globale*, in *Rivista trimestrale di diritto pubblico*, 2001, 1, pp. 1-19.

⁴⁶ The Stakeholders are the holders of an interest, “stake”, within an enterprise and are submitted to its activity: suppliers, workers and so on.

analyzed in the second chapter, here we limit to say that this approach has not revealed adequate and efforts are being made to define as mandatory those regulations which are, at present, entrusted to the individual common sense. In Italy, like in many other countries, volunteerism has not matched with the fundamental principles of company.

The freedom of enterprise is, indeed, strictly connected to the right to ownership: the shareholders own their shares and do not understand why they should pursue an end other than their own interests⁴⁷.

In the mind of a shareholder/owner there's no room for any goal other than profit.

The shareholders' protection would be more effective if they were involved in the enterprise's decision-making process, they should , therefore, take part to the board of directors.

The supporters of this theory report, indeed, that these persons are inevitably exposed to the enterprise risk and, since they do not have any contractual protection, they should, at least, be granted some rights within the enterprise's management.⁴⁸

⁴⁷ Spada, *Gli "Scritti giuridici" di Giorgio Oppo: Diritto dell'impresa*, in Rivista di diritto civile, 1992, 6, pp. 551-557.

⁴⁸ Diamantopoulou, *Responsabilità sociale d'impresa: dal principio alla pratica*, relation presented in January 2002.

However, a double contradiction would rise if enterprises had obligations towards third parties or the stakeholders were granted rights within the enterprise. Firstly, the function of the enterprise itself, and its constitutional character, would be altered. Secondly the shareholders would be forced to put their resources at the disposal of third parties, thus altering the nature of the right to ownership (one of the fundamental principles of this right is, indeed, the *ius utendi*, that is the right to use it in any way, but within the limits provided for by the law).

Furthermore, the shareholders give the directors a task they have to carefully fulfill, otherwise they may be legally sanctioned. Many contradictory situations would occur if managers were to take into account the interests of third parties. First of all, they would break their contractual obligations and their responsibility would decrease due to their overextended discretionary power. On the other hand, if managers do not take into account the stakeholders' interests any law won't punish this violation or authorize the injured people to take legal measures⁴⁹.

Only the enterprise, in the person of the majority of the shareholders, has the right to sue, even though the prerequisite for an eventual legal measure is the enterprise itself being damaged because the interests of third parties have been neglected. Conversely, no legal action can be

⁴⁹ Marchesini, *L'impresa etica e le sue sfide*, Milano, 2003.

undertaken if the damage only affects the third parties without affecting the enterprise itself.

In order to protect the stakeholders, managers can only carefully monitor the enterprise productivity which may be affected, in the long term, by a series of factors such as the environment where the activity is carried out or the relationship with all the people involved in the activity. This is, however, a secondary and eventual hypothesis, the only alternative for the chief executive officer (CEO) is to declare the conflict of interests. The CEO has the duty to inform the shareholders that he cannot take certain decisions that would damage the third parties because they contrast with his/her moral principles, though they legally are the best means to rise the company's profit.

It is evident, however, that a person running an economic activity where many people are involved, inside and outside, his moral behavior cannot remain a private and personal question. The personal moral behaviour cannot justify the choices made within an economic enterprise. Even though it is not state-owned, an economic enterprise works for the general interest, its activity affects the collective wealth therefore it has a social responsibility anyway⁵⁰.

⁵⁰ Fitoussi, quoted.

It is evident therefore, that only the legislator, which operates for the general interest, may safeguard the stakeholders' interests. The only solution is that the political authorities set a series of rules regulating the enterprises' behavior without affecting their creativity and their activity aimed at producing wealth.⁵¹

1.5. Italy and CSR.

In Italy there isn't any law regulating the enterprises' behavior abroad. Moreover the debate over this subject has started considerably late compared to the United States or Northern Europe⁵².

During the XIII legislature a heated debate was started over the social responsibility of enterprises. It started from the question of child labour. In 1998 both the Senate Assembly and the Chamber Commission X for the Production Activities approved two laws which force the Italian Government to introduce a "social clause" in the WTO agreements as well as a moral quality trademark. In the same year another debate was started over various bills presented by the representatives of the majority and of the opposition.⁵³

⁵¹ Oppo, quoted.

⁵² Sacco - Vanin - Zamagni, *The Economics of Human Relationships*, in Kolm - Ythier (eds.), Handbook on the Economics of Giving, Reciprocity and Altruism, North-Holland, Amsterdam, 2006

⁵³ Marchesini, quoted.

In June 1999 the Senate approved a bill which was the result of a combination of many other laws and of long discussions held within the Commission X. According to this law an enterprise had to self-certificate that its products (or some of them) had not been made by exploiting child labour in any production stage “submitted to their direct control”; this self-certification would have granted the immediate issue of a quality trademark that the enterprise could have exploited for its promotion. For enterprises submitted to independent systems of control, registration would have been automatic. A Surveillance Committee was also set up in order to control trademarks and the authenticity of self-certifications. Anyway, the Chamber did not approve this bill thus it did not become a law.

The aim of this law would have been to encourage enterprises to take on a socially responsible behavior and to work with suppliers who did not exploit child labour, thus consumers could have chosen their products according to their “ethical” characteristics.

At present, in Italy and in the rest of the world there are no binding regulations as regards the enterprises’ social responsibility but the need for these rules increases hand in hand with the development of the global economy⁵⁴.

⁵⁴ MASSERA, quoted, p. 12.

The need to limit the power of the enterprises, above all the multinational ones, will be discussed in the next chapter. Various international initiatives, all characterized by a voluntary connotation, have been undertaken which are worth analyzing because of their worldwide importance. The Italian enterprises are involved in these projects but their freedom of action is limited by the so-called *soft-law* or non-binding rules.

CHAPTER II

The globalized utility: the first steps towards corporate social responsibility

Summary: 2.1. Enterprise and globalization; 2.2. Human rights and 'global' enterprise; 2.3. The Universal Declaration of Human Rights. A thumbnail presentation of the 'Green Paper' on Corporate Social Responsibility; 2.3.1. The ILO Tripartite Declaration concerning multinational enterprises and social policy; 2.3.2. The OECD Guidelines for Multinational Enterprises; 2.3.3. The UN Global Compact; 2.4. The EU initiatives concerning 'enterprises and human rights'; 2.4.1. The EU Green Paper: perspectives and limits; 2.4.2. The EU Communication on CSR: a comparison with the Green Paper.

2.1. Enterprise and globalization.

“The actual duty of an enterprise is to make the highest profits (obviously in an open, fair and competitive market) thereby producing wealth and jobs for everybody in the most efficient way [...] enterprises only have one social responsibility: to improve their own profits”⁵⁵.

The message that the Author⁵⁶ intended to convey is extremely clear: the ethic and social legitimacy of running an enterprise is to maximize profits in the respect of the free market regulations. The meaning of this statement is equally clear: profit is an indicator of efficiency, therefore to maximize profit means to efficiently exploit scanty resources and to, ultimately, work for and improve the common good (that is by creating

⁵⁵ Friedman, *Capitalism and freedom*, Chicago, Chicago Univ. Press. , 1962, p.133.

⁵⁶ Milton Friedman, together with George Stigler founded the famous School of Chicago; at the beginning of the '70s he won the Nobel Prize for economy.

‘wealth and jobs for everybody’). Under these circumstances economic and social values will naturally coincide.

Nowadays, nobody would believe that what reported above is true. As a matter of fact the creation of profit is, always, a necessary condition though it does not legitimize an enterprise with respect to civil society. In Italy as in the rest of the western world, this is the reflection of a contemporary phenomenon affecting our economy and the commercial law⁵⁷ as well: globalization.

A lot has already been written about this phenomenon, therefore it is difficult or even impossible to attempt any further definition. In this work the notion of globalization and global market has a ‘neutral’ connotation, that is a phenomenon representing at the same time diversity and plurality.⁵⁸

Globalization⁵⁹ describes “a process by which any national border or barrier is broken, and a flexible and fast communication, trade,

⁵⁷ Friedman, *Verso una sociologia del diritto transnazionale* in *Sociologia del diritto*, 1993:1 (April), p. 39-60: “Some law sectors address more than others towards what we call transcendence.”, the Author means globalization, “This is particularly true for some aspects of commercial law. Trade, more than any other sector, overcomes national borders: international affairs have a desperate need of a common regulation and of a common system of legal expectations.”

⁵⁸ Flick, *Globalizzazione e diritti umani*, in *ius*, 2000, p. 171-185; Ferrari, *Luci ed ombre del diritto globale*, *Rivista trimestrale di diritto e procedura civile*, 2003: 2 (June), p. 643-649.

⁵⁹ Stiglitz comments that: “It’s not a question of good or bad globalization: globalization is a positive force that has brought several advantages to some people, but for the way it has been handled millions of people have not received any benefit and many others are in a worse situation than before”. And he adds “I think globalization, that is the breaking of barriers for free trade and a better integration among national economies, has all the potential to improve everybody’s wealth, in particular the one of poor people”. In *Globalization and its Discontents*, 2002.

production and distribution of goods characterizes the economy of contemporary society”⁶⁰.

This phenomenon has not been a sudden and unexpected revolution of our way of thinking. It is worth to report the influential opinion of Francesco Galgano in order to understand how it has fitted into our reality: “The most important changes are not the ones that produce a great stir but those which silently, slowly and constantly develop, like globalization is doing in the economic world”⁶¹.

Globalization is not the product of a conflict between national powers, because the protagonist of globalization are multinational enterprises rather than Nations. This is confirmed by some data that the Author retrieved from *The Economist*: Shell oil company’s foreign assets account for 67,8% of the total capital and its foreign employment rate is 77,9%; Volkswagen’s foreign assets account for 84,8% and its employment rate is 44%; the foreign assets of Nestlè account for 86,9% and its employment rate is 97%.⁶²

Globalization does not exclusively refer to international trade which has always existed for the exchange of raw materials and the exportation of

⁶⁰ Urrata, su www.acton.org il 10/09/2009.

⁶¹ Galgano, *Il volto giuridico della globalizzazione*, in *Quaderni Costituzionali*, 2001, 3 (December), p. 626-628.

⁶² Galgano, quoted. The author adds: “Nowadays the world market can be dominated without the support of a big military or political power. Multinational enterprises can do without both: they have themselves the strength to conquer the whole world.”

manufactured goods. In the so-called “global economy”, production and distribution as well, are carried within an international framework.

2.2 Human rights and ‘global enterprises’.

One of the most remarkable consequences of modern globalization is, therefore, the deconstruction of the production activity and more precisely the delocalization of enterprises. The notion of global enterprise refers, indeed, to its localization outside its home country. We should remember that about 20% of the GDP of industrialized countries may be delocalized abroad⁶³, considering that producing abroad is undoubtedly easier.

A metaphor by Peter Drucker proves this point: “The enterprises at the time of Ford were like Egypt pyramids, deeply rooted in their territory where they developed not only economic but also social and cultural relations. Today enterprises are like desert tents that may be put up everyday in a different place.”

It is almost evident that, in the globalization market, enterprises are no more directly connected to their territory whereas, in the past, the consequences of an entrepreneur misconduct, within his/her community,

⁶³ Vaccà, “Prospettive ed evoluzione delle imprese transnazionali”, in *Economia e politica industriale*, n. 109:2001 (March), p. 6-18.

would have affected the market where his/her products were sold⁶⁴ and he/she would have been therefore considered completely accountable for that.

Enterprises' reference markets are now global and the production of profit does not necessarily correspond to the production of a widespread wealth, thus "the traditional view, legitimizing an enterprise, according to which the production of profit was itself a source of social wealth is not seen as such anymore"⁶⁵(see chapter 1 par. 1.3.1.1.).

Investors and shareholders are no more bound to their territory, but can buy and sell everywhere: investors' mobility has considerably increased the gap between economic power and social commitment as never before.

Capitals, work, technologies and other resources are more and more exploited in the areas where enterprises have concentrated their investments or they are drawn away on an economic basis. It is as if corporate capitals were gaining more freedom: they haven't any responsibility towards their territory, nor they mind about the eventual consequences of a different policy of investment⁶⁶. An increasing number of enterprises are addressing their activity abroad where they are

⁶⁴ Sacconi, *Un contratto sociale per l'impresa*, in *Etica e professioni*, 2002: 4, p. 33-40.

⁶⁵ Zamagni, *Nelle mani del "consumatore-cittadino"*, in *Etica e professioni*, 2002:4, p. 9-16.

⁶⁶ Di Nardi, *L'impresa fra socialità ed efficienza*, in *Rivista di politica economica*, 1978:3, 1978.

not submitted to their own national regulations. This may affect internal political decisions as well as the human rights of millions of people.⁶⁷

2.3. The Universal Declaration of Human Rights. A thumbnail presentation of the “Green Paper” on Corporate Social Responsibility.

As to human rights, there exists a series of settled international regulations dating back to more than half a century ago: the United Nations Charter of 1945 and in particular the Universal Declaration of Human Rights of 1948⁶⁸. They establish a series of important obligations for the protection of such rights. Even though it is addressed to the States, the Universal Declaration asks “every social institution” to respect, foster and guarantee human rights, thus setting the basis for duties to be applied not only to Nations but also to private enterprises or other private institutions. This declaration has gained importance year by year and has been a reference point for decades. The text of this document is quite generic, but it’s a valid starting point to actually set these rights.

⁶⁷ Gialanella, *La sfida dei diritti fondamentali e l’utopia di una nuova democrazia del pubblico*, in *Questione Giustizia*, 2001:2 (April), p. 253- 272.

⁶⁸ Adopted by the UN General Assembly on the 10th of December 1948.

Other International Treaties and sectorial agreements followed which further increased the number and types of obligations established by the Universal Declaration of Human Rights.

Among the first there is the International Covenant on Civil and Political Rights of 1966 and the Convention on the Rights of the Child of 1989; among the regional Treaties on internationally recognized standards on human rights that enterprises must comply with there is the European Convention for the Protection of Human Rights of 1950, the Charter of Fundamental Rights of the European Union of 1961 and the Arab Charter on Human Rights of 1994⁶⁹.

These regulations and standards have been widely accepted so that enterprises had, inevitably, to face the question of their responsibility towards the holders of those rights. An enterprise's activity may, of course, ensure jobs and wealth for millions of people, but it can likewise have negative consequences for human rights. For instance, the way an entrepreneurial activity is carried out may harm workers and the environment and enterprises may, also, be complicit of abuses carried out by the government or by repressive political authorities.

In the light of this we can understand why the European Commission has approved in July 2001 the "Green Paper" on corporate social

⁶⁹ Di Turi, <http://www.business-humanrights.org> consulted on the 10th of February 2010.

responsibility, where it set the guidelines to rapidly establish a sort of code of conduct for European enterprises. This code should have foster a fair relationship between enterprises and societies thus improving a balanced development of both. The Green Paper defines CSR as: “the voluntary integration of the social and ecological concerns of the enterprises and organizations in their commercial operations and in their relationship with the concerned stakeholder parts”. Besides providing the respect of laws and social norms of behavior, the CSR also includes human and social capitals.

The Green Paper was preceded by a resolution adopted at the Lisbon Summit in the spring 2000. It was signed by the European Heads of State and Government who declared that the promotion and spread of CSR would have contributed to a more dynamic, competitive and united Europe.

An analysis of the relationship between global enterprises and human rights cannot ignore the phenomenon of corporate social responsibility and the Green Paper (which will be dealt with in par. 2.4.1.), and at the same time it would not be complete if it didn't consider what has worldwide preceded, inspired and promoted the European action towards the issue of relation between enterprises and human rights. Among the acts that preceded the publication of the Green Paper there is

undoubtedly the ILO Tripartite Declaration, the OECD Guidelines and the UN Global Compact.

2.3.1. The ILO Tripartite Declaration on Principles concerning Multinational Enterprises and Social Policy.

The scope of human rights protection within the International Organizations and within each national system is getting wider. It includes the so-called civil liberties, political, economic, social and cultural rights, minority rights, the right to peace (in the Italian system a great importance is given to articles 10 and 11 of the Constitution), the right to environment (arts. 9 and 32 of the Italian Constitution), the right to personal development and the right to population development⁷⁰, the right to the common heritage of mankind⁷¹, the right to privacy and the right to informatics freedom⁷².

If we look at the job market, in particular, we get a clear idea of how a worldwide market could be a threat for men: besides being underpaid,

⁷⁰ In this regard the resolution of the UN General Assembly of the 4th of December 1986, www.amnesty.it, consulted on the 5th of March 2010.

⁷¹ Or the right to a common spatial, maritime, natural and cultural heritage: a UNESCO Convention of the 23rd of November 1972 which commits the 'international community' to the preservation of such heritage, www.amnesty.it consulted on the 5th of March 2010.

⁷² Cassese, *I diritti Umani nel mondo contemporaneo*, Laterza, 1998: "Human rights represent a universe of ideologies and regulations spreading towards a precise end: to increase the safeguard of human dignity."

men's jobs, may get close to exploitation or even to forced labour or slavery. That's probably why, workers represent a high-risk category and have first raised the need of a corporate social responsibility.

In many States, and in Italy as well, most of the laws needed to guarantee the workers' rights have been issued during the last two centuries, and are now very complicated. Few laws, instead, exist on the protection of workers of foreign enterprises and the reason is simple: for a long time nations and enterprises, have not felt responsible for what happened outside the national borders.

The lack of standards of behavior for those enterprises working in developing countries, where there are no adequate laws or where abuses are legitimized by the governments themselves, is a risk for workers and at the same time reduces the possibility of employment for those who are submitted to more severe laws and claim the respect of particular standards. For instance, the great mobility of manufacturing enterprises has increased the world competition and at the same it has reduced, in many nations, the respect for human rights, wages, working time and conditions⁷³.

The questions related to the activity of multinational enterprises are, therefore, strictly connected to work and social policy, that's why in the

⁷³ Pallanch, *Le promesse tradite della globalizzazione. Intervista a Joseph Stiglitz*, in Lo Straniero, n. 38-39, august-september 2003.

setting of international guidelines, the ILO has been involved limitedly to its sphere of influence.

The International Labour Organization⁷⁴ (ILO) was founded in 1919 further to the Industrial Revolution, in order to counter the risks it would have implied for workers. In 1967 the International Institute for Labour Studies organized a Conference on transnational industrial relations followed, in 1971, by the decision of the ILO Board of Directors to organize a technical meeting on the relationship between multinational enterprises and social policy.

In a resolution adopted in June 1972, the International Labour Conference agreed with the decision of the Board of Directors and claimed for concrete actions to be taken by the ILO.

A tripartite meeting of experts was held between October and November on the “Relationship between Multinational Enterprises and Social Policy in order to analyze and suggest, to the Board of Directors, appropriate ILO actions in this field”. A meeting was reconvened in May 1976 by the Board of Directors. Experts and representatives of governments, workers and entrepreneurs took part to both meetings.

⁷⁴ The International Labour Organization is one of the oldest international organization. It was founded in 1919 as part of the Treaty of Versailles, in order to find a solution to unequal work relations between nations. The ILO is a tripartite organization composed by employers, trade unions and governments of 172 states, www.ilo.org consulted on the 20th of November 2009.

The drafting of a tripartite declaration of principles concerning multinational enterprises and social policy emerged as the most important action that had to be taken. Its guidelines established that the Tripartite Declaration was not compulsory, and should have involved any multinational enterprise regardless of its managerial system and should have been addressed to governments, employers and workers⁷⁵.

During the first months of 1977, a restricted work team was set up during an advisory meeting in order to draw the draft principles.

The advisory meeting was reconvened in May 1977 to examine the text written by the team. The final text which was agreed upon in that occasion was, then, submitted to the Board of Directors in November 1977.

The Board of Directors' ratification of the text gave birth to the Tripartite Declaration of Principles on Multinational Enterprises and established the ILO Social Policy.

The Board of Directors of the International Labour Office updated the Tripartite Declaration in November 2000. It contains suggestions in the fields of politics, employment, education, work, life and industrial relations' conditions, aimed at encouraging multinational enterprises to effectively contribute to the economic and social development of the

⁷⁵ Gaja, *Organizzazione internazionale del lavoro*, in *Enciclopedia del diritto*, Milano, 1981, p. 345.

countries they work in, as well as to reduce and solve any difficulty caused by their activity⁷⁶.

The Tripartite Declaration is the only voluntary means in the field of corporate social responsibility agreed upon by governments, entrepreneurs' organizations (including multinational enterprises) and trade unions.

In 2000 the fundamental labour principles and rights were included in the text of the Tripartite Declaration. The introduction to the Declaration specifies that this latter was the result of the strong need to set norms regulating the conduct of multinational enterprises and to define the conditions of their relationships with their hosting countries, even more in the case of developing countries. It also confirms that the provisions of the Tripartite Declaration are founded on the clauses of a series of international conventions and recommendations on labour which the social parties are strongly invited to apply.

In 1998 the ILO Declaration on Fundamental Principles and Rights at Work was adopted⁷⁷. The value of this document with respect to the

⁷⁶ www.ilo.org: ILO Tripartite Declaration on multinational enterprises and social policy, consulted on the 10th of November 2009.

⁷⁷ The Declaration on Fundamental Principles and Rights at Work was adopted by the International Labour Conference. The Declaration contains the main norms which the 175 members of the Organization must comply with even though they have or have not ratified any other specific Convention. The most interesting points of the Declaration are: a) The freedom of association and the effective recognition of the right to collective bargaining; b) The elimination of all forms of forced or compulsory labour; c) The effective abolition of child labour; d) The elimination of discrimination in respect of employment and occupation, www.ilo.org, consulted on the 15th of November 2009.

principles contained in the Tripartite Declaration is confirmed in its introduction, and the text of 1998 reinforces the effectiveness of the latter.⁷⁸

The introduction and the whole Declaration widely recognize that the protagonists of ‘globalization’⁷⁹ are enterprises which now have a strong power that they can either use positively or not.

The Declaration does not provide a legal definition of multinational enterprise because “it is not considered necessary for the purposes of the Declaration”, but it is later specified that “multinational enterprises include public capital enterprises, private enterprises and mixed capital enterprises which own or control production, distribution, services outside their home country”.⁸⁰

When contrasts arise in the application of the Declaration, the parties may ask the International Labour Office how to interpret specific provisions, following a procedure established in 1981. Support and suggestions may be asked to the International Labour Office as regards the submission of requests.

While the basic principles of the future Tripartite Declaration were being defined, the Organization for Economic Cooperation and Development

⁷⁸ Di Turi, *Globalizzazione dell'economia e diritti fondamentali in materia di lavoro*, in *Rivista di diritto internazionale*, 2000:1 (March), p. 113-131.

⁷⁹ “considering the prevailing role of multinational enterprises in the process of economic and social globalization [...]”, Di Turi, quoted.

⁸⁰ www.ilo.org, ILO official website, consulted the 28th of November 2009.

(OECD)⁸¹ was negotiating and finally agreed upon the guidelines for multinational enterprises in 1976.

The OECD is used as a government platform to discuss and take decisions on economic and social policies. The instruments used by the OECD and the ILO are similar, compatible and complementary. The Tripartite Declaration contains far more recommendations on labour issues, whereas the Guidelines are more generic and focus on the enterprises' activity.

2.3.2. The OECD Guidelines for Multinational Enterprises.

In 1975 the OECD founded the Committee on International Investment and Multinational Enterprises (CIME) with the aim to study the possibility to set some codes for responsible business conduct for multinational enterprises. The first guidelines for multinational enterprises were adopted in 1976 and their main objective was to ensure that the activity of these enterprises was in harmony with government

⁸¹ The Organization for Economic Cooperation and Development is composed by 30 members, including the United States, Canada and Australia as well as most of the countries of western Europe, www.oecd.org, consulted on the 18th of December 2009.

policies of the OECD member States⁸². These guidelines have been revised several times and in 1991 a chapter on environment was added⁸³. The OECD Guidelines on Multinational Enterprises⁸⁴, revised for the last time in June 2000, are an important instrument that governments can use to protect and recognize human and workers' rights; they refer to general policies, information rights, employment, industrial relations and environment.

The Guidelines are first of all addressed to the enterprises of the adhering countries (the OECD 30 member States, as well as Argentina, Brazil, Chile, Estonia, Israel, Latvia, Lithuania and Slovenia) but they are applied to the economic activities of the rest of the world.

The Guidelines are legally non-binding, but adhering governments must complement them with implementation procedures as provided in the document itself. In particular they must set up effective National Contact Points within a government office and enterprises cannot choose among the guidelines provisions nor they can provide their own interpretation.

Their application is not submitted to the enterprises' will because they

⁸² OECD Guidelines for multinational enterprises, *Global instruments for corporate responsibility*, OECD, Annual Report, 2001.

⁸³ On www.oecd.org, Official Website OCSE, on 18th of December 2009.

⁸⁴ The *Guidelines* are part of the OECD Declaration on International Investment and Multinational Enterprises. They are addressed towards investments and include the National Treatment for Foreign-controlled Enterprises as well as the measures taken to avoid or reduce the enforcement of contradictory regulations. It also calls for transparency with reference to the provision on incentives and disincentives. OECD Guidelines for multinational enterprises, *Global instruments for corporate responsibility*, OECD, Annual Report, 2001.

have been previously approved by governments and a specific procedure has been established to solve specific problems⁸⁵.

The adhering governments, as already said, are obliged to set up National Contact Points (NCPs) to undertake promotional activities, handle inquiries and contribute to the solution of problems which may arise.

There are tripartite NCPs (government, representatives of workers and of enterprises), but usually governments have the whole responsibility.

If an enterprise infringes the guidelines with its activity, member States, employers, enterprises organizations, trade unions and other interested parties have the right to inform NCPs which, then, take on the responsibility to solve the problem.

NCPs may decide whether to open a discussion with the interested parties, to reconcile or to mediate. If the parties do not reach any agreement for the solution of the problem, NCPs are usually requested a declaration on the case in point. These institutions may also provide recommendations on the application of the guidelines in a specific situation, even though they are not legally binding.

Even though the Guidelines are not legally binding, the measures taken by NCPs are public thus they can have an impact and an effect on an

⁸⁵ The Guidelines highlights what governments reckon to be an enterprise responsible business conduct. Thus, adhering governments expect enterprises to respect the guidelines provisions in the activity abroad, www.oecd.org, consulted on the 18th of December 2009.

enterprise conduct⁸⁶. After consulting the interested parties the decision of NCPs can either be made public or remain confidential.

Formally, almost all countries have set up their NCPs, but not all have established their running procedures.

As we have already said, various instruments and measures regulate the responsible business conduct of multinational enterprises. The Guidelines and the ILO Tripartite Declaration are based upon universal norms, drawn together with trade unionists and entrepreneurs, which assign a specific role to governments. In order to get a global idea on this subject a UN initiative should not be ignored: the Global Compact. All these three initiatives are the starting and reference point for the EU “Green Paper” which represents the most important, if not the only, source for corporate social responsibility, obviously only on a voluntary basis.

⁸⁶ The procedural guidance, which is contained in the last paragraph of the file with the OECD Guidelines, establishes that every NCP should guarantee the highest transparency of its operations, anyway privacy may be extremely important in certain situations (for example in those countries where workers and trade unions are always at risk). However, the parties may make public remarks but not give information or opinions expressed by the other party during the procedure, unless it has been given permission. On www.oecd.org, 18/12/2009.

2.3.3. The UN Global Compact

On the 31st of January 1999 the UN Secretary Kofi Annan⁸⁷ submitted the Global Compact proposal at the World Economic Forum because of an increasing concern on the social and environmental effects of globalization. This initiative aimed at defining and implementing responsible business conduct and at setting international principles for enterprises conduct within a framework of universal standards.

The Global Compact is not a code, but an instrument for the promotion of global dialogue, it is therefore a declaration of moral acceptance of the principles contained in the document. This Charter is based upon nine principles divided in three areas: fundamental norms on labour, fundamental norms on human rights and fundamental norms on environment. The principles provide that:

- 1) Businesses should support and respect the protection of internationally proclaimed human rights within their sphere of influence;
- 2) Businesses should make sure they are not complicit in human rights abuses;

⁸⁷ "Let us choose to write the power of markets with the strengths of universal ideals...let us choose to reconcile the creative forces of private entrepreneurship with the needs of the disadvantaged and the requirements of future generations." On www.unglobalcompact.org, consulted on the 28th of May 2009.

- 3) Businesses should uphold the freedom of association and the effective recognition of the right to collective bargaining;
- 4) Businesses should uphold the elimination of all forms of forced and compulsory labour;
- 5) Businesses should uphold the effective abolition of child labour;
- 6) Businesses should uphold the elimination of discrimination in respect of employment and occupation;
- 7) Businesses should support a precautionary approach to environmental challenges;
- 8) Businesses should undertake initiatives to promote greater environmental responsibility;
- 9) Businesses should encourage the development and diffusion of environmentally friendly technologies⁸⁸.

The role of the Global Compact is, to some extent, different from the function of the ILO Tripartite Declaration and the OECD Guidelines, but it is compatible with all these instruments even though, as an instrument of promotion, it is far less binding than the others. If an enterprise wants to adhere, it shall only send a letter to the Secretary General where it commits itself to respect the nine principles, to pay the annual fee and to periodically publish a report on its implementation of the principles.

⁸⁸ www.globalcompact.org, consulted on the 9th of December 2009.

Hundreds of enterprises have adhered to the Global Compact but, actually most of them have not changed their conduct.

Enron is a striking example. In its report of 2000, on social responsibility it stated that: “our conduct principles are respect, in the sense that we want to foster mutual respect between communities and stakeholders who are affected by our operations: we treat others as we would like to be treated ourselves...”.

2.4. The EU initiatives concerning ‘enterprise and human rights’

The EU debate on corporate social responsibility started around the ‘90s in particular with the White Paper⁸⁹ of the then-President of the Commission Jacques Delors, “Growth, competitiveness and employment– The Challenges and ways forward into the XXI century”.⁹⁰ This document tries to tackle the problem of unemployment by introducing the notion of solidarity and collective responsibility, besides economy and individual responsibility. In particular, the White Paper suggests to counter the social dumping of Asian countries by helping

⁸⁹ “The White Paper talks to citizens about their worries, unemployment, the future of their children ...it is a matter of will, ...it is an optimistic message of will associated to the pessimism of the reason or clarity of mind ...if Europe starts dealing with unemployment it will take on a more human aspect” Jacques Delors.

⁹⁰ Cincera, www.fabricaethica.it, consulted on the 30th of September 2009.

them to create their own standards of labour and environmental protection.⁹¹

At the end of the decade the debate became more general in terms and a structural solution was suggested to solve the problem. In January 1998, the European Parliament, finally, voted for a resolution which promoted the responsibility of European multinational enterprises and invited the Union to adopt a code of conduct for the European enterprises operating in developing countries. This represented an evolutionary approach to this problem, based upon a complementary relation between self-regulation and binding norms. The resolution introduced by the member of parliament Richard Howitt upholds voluntary codes of conduct⁹², but at the same time it explicitly reports that these codes must not replace nor ignore any international regulation. Furthermore, they must refer to the existing International documents such as the Universal Declaration of Human Rights, the ILO Tripartite Declaration of Principles and many others.

However, the European Parliament resolutions are not binding for member States, therefore, the provisions of this resolution may be easily circumvented. The first annual audience on the conduct of multinational

⁹¹ "Social dumping should not be fought by undermining the system of social protection in Europe or ignoring rights abroad. (...) The community may, instead, contribute to spread forms of social protection abroad through cooperation and legal advice. (...) A nation's wealth is more and more based upon the building and exploitation of knowledge ..."

⁹² See below note 107.

enterprises focused on the complaints against Adidas and Nestlè and was held in November 2000. Even though they were invited to the meeting, both companies refused and sent their auditors⁹³. The audience was organized by the President of the Development Committee of the European Parliament who concluded that voluntary commitments are not enough if companies have to implement social standards.

Thus the Commission suggested to set up the Institute for Ethical Production and Consumption in Europe (IEPCE) which in the two years that followed organized a series of round tables and conferences about social responsibility which, unfortunately, ended in two years time.

The appeal to European enterprises was repeated during the EU Council held in Lisbon in March 2000 in order for the European economy to become more competitive and dynamic and for employment and social union to improve in both quality and quantity.

In July 2001, the Commission action finally adopted the Green Paper 'Promoting a European Framework for corporate social responsibility', followed, in 2002, by the Communication, 'Corporate Social

⁹³ "The President of the Development Committee of the European Parliament introduces the subject, and reminds that the question of the role of international enterprises in developing countries has been studied by the Commission for many years, thereby drawing the Howitt report. The aim of this session is to identify valid example of good practice in corporate social responsibility as well as to identify those sectors which will need further attention in the future. The President informs that the delegates of Nestlè and Adidas/Salomon had been invited but refused to accept", European Parliament, verbal process of the meeting held on the 20, 21 and 22 of November 2000, Brussels.

Responsibility: a business contribution to sustainable development’ and in 2006, by the Communication ‘Implementing the partnership for growth and jobs: making Europe a pole of excellence on corporate social responsibility’.

The Council Resolution on CSR of the 6th of February 2003 finally invited the Commission to intensify its efforts in actively engaging the people potentially interested in this issue and to design a European strategy on CSR. On the other hand the Resolution invited member States to foster a dialogue with social partners as well as to integrate CSR within national policies.⁹⁴ Behind these documents there’s a recent and increased worry about CSR in many member States followed by several administrative and legal initiatives.

Before analyzing the European perspectives of such initiatives it is necessary to say that there is no common and univocal understanding of the concept of corporate social responsibility. Paragraph 2.1. of this chapter reported the pragmatic statement by Milton Friedman who maintains that the social responsibility of an enterprise is to increase profits with the only obligation to comply with the laws in force.⁹⁵

⁹⁴ Council Resolution of the 6th of February 2003 on corporate social responsibility OJEU., C39, of the 18th of February 2003.

⁹⁵ “There is one and only one responsibility of business: to use its resources and engage in activities designed to increase its profits.” Friedman, *Capitalism and Freedom*, quoted.

Completely different is the opinion of those⁹⁶ who believe that a capitalist enterprise, besides being responsible towards its shareholders, has further responsibilities, that is why this category is, to some extent, opposed to the so-called 'stakeholders', (see also paragraph 1.4.)⁹⁷. These latter include all those submitted to the enterprise's direct or indirect influence and are, somehow, interested in its activity. According to this view the basic principle of this kind of responsibility is that the enterprise must give account of its actions to all those who support its activity, in a way or another: suppliers, customers, community, environment, workers, as well as its shareholders. That is why those supporting this view talk of "partial" difference between shareholders and stakeholders, because this gap exists only for a limited period. They believe, indeed, that only a socially responsible enterprise can develop a long-term successful and profitable business.

The Green Paper defines corporate social responsibility as the voluntary integration of social and environmental concerns in enterprises' business

⁹⁶ "The concept of responsibility must refer to all business levels and to all the chain of production: it should, therefore, concern suppliers, customers, sub-suppliers, licensee, consumers; its application should be agreed together with partners, workers, communities, local organizations, authorities; it should take into account the contributions provided at different levels by different people/institutions (UNO, OECD, ILO, national and international trade unions, associations, non-governmental organizations), in order to gradually improve the life and working conditions of millions of people all over the world who are involved in the production of goods and services for European enterprises." Piras, on www.amnesty.it the 25th October 2009.

⁹⁷ Viviani, *La vera forza degli "Stakeholders"*, in *Etica per le professioni*, 4, 2003, p. 25-32.

operations and in their interaction with their stakeholders⁹⁸. Being socially responsible means not only fulfilling the applicable legal obligations, but also going beyond compliance and investing more into human capital, environment and relations with stakeholders.⁹⁹

2.4.1. The Green Paper on CSR: perspectives and limitations.

The EU action on CSR has reached its effective realization with the publication of the Green Paper which represents a way “to launch a wide debate on how the European Union could promote corporate social responsibility on a European and International level and, in particular, on how to make the most of existing experiences, to encourage the development of innovative practices, to bring greater transparency and to increase reliability in evaluating and validating the various initiatives undertaken in Europe.”¹⁰⁰

Among the reasons that may encourage enterprises to adopt a responsible business conduct the most important are: social criteria influencing

⁹⁸ “The most widely accepted definition distinguishes between four types of corporate responsibility: the economic responsibility of making profits; the legal responsibility to comply with the laws of the society where it carries out its activity; the ethical responsibility of a morally acceptable behavior for the community; the discretionary responsibility to address some resources to social, educational, leisure and cultural initiatives.”, Ministry of Labour and Social Policies, Project CSR-SC. The Italian contribution to the campaign for the implementation of CSR in Europe, Rome .

⁹⁹ The Green Paper, 21.

¹⁰⁰ The Green Paper, 7.

individuals' investments as well as the increasing worries about environmental deterioration caused by economic activities and the effects of means of communications and modern technologies on business activities. Enterprises are becoming aware of the potential economic value of social responsibility, so much that scholars have talked about 'a direct impact on productivity'. Of course, profit and efficiency must always be the companies' main objectives, but the defence of particular rights may be a priority as well.

The Green Paper confirms the voluntary nature of CSR even because enterprises generally dislike binding norms in this sector.

The business world recognizes the importance of norms regulating particular fields such as labour security and exploitation¹⁰¹, nonetheless it agrees on the Commission's flexible approach and refuses any prescriptive norm for at least three reasons. First of all because regulations would interfere with the voluntary and progressive nature of enterprises¹⁰²; secondly because corporate social responsibility is not univocal for any sector; finally because there's a wide gap in the business culture of the different countries and in the national laws of EU member States.

¹⁰¹ The Green Paper, 6.

¹⁰² The Green Paper, 9.

Worth of notice is the limited space left to the debate on human rights in the Green Paper. A more specific reference to this issue and a better definition of these rights would have strengthened the debate on this subject, considering that the European Union has always been committed to the respect and promotion of these rights¹⁰³.

In the Green Paper only a limited and generic reference is made to the defence of human rights. Indeed, the paragraph¹⁰⁴ where they are dealt with makes a specific reference to the workers' rights and no mention is made of any adequate international instrument adopted in this regard. There are, indeed, mentioned the ILO Declaration on Labour Fundamental Rights and the OECD Directive Principles for multinational enterprises, but more relevant documents have been ignored such as the ILO Declaration on Principles concerning Multinational Enterprises and the OECD Guidelines for Multinational Enterprises (v. par. 2.3.2.).

It would have been advisable, instead, to indicate which human rights are relevant for enterprises; which form of complicity they may be involved in when any of these rights is violated; which form of relation exists

¹⁰³ "The Union is founded on the principles of freedom, democracy, respect for human rights, for fundamental freedoms and the rule of law. The serious and persistent breach of these rights by a member State may lead to the suspension of rights of a Member State": art. 6, par. 1 of the Treaty of the European Union.

¹⁰⁴ The Green Paper 2.2 The external dimension of corporate social responsibility and in particular 2.2.3. Human rights.

between multinational enterprises and development rights, social, economic and cultural rights and so on.

A further limitation of the notion of corporate social responsibility suggested in the Green Paper is that human rights have not been precisely defined as a set of norms enacted by international legal instruments. There is a reference only to *soft-law* instruments and codes of responsible business conduct and no mention is made of the EU obligation to respect human rights.

Moreover, any reference to the role of human rights within the European regulatory framework is quite general or incomplete. For example, the Charter of fundamental rights is mentioned in the introduction, but no reference is made to any of its articles. Even the article 6 of the European Union Treaty has been left out where it is reported that the Union is “founded on the principles of freedom, democracy and the rule of law which are common to all member States”.

2.4.2. The EU Communication on CSR: a comparison with the Green Paper.

After six years from the publication of the Green Paper and further to an interesting debate which involved entrepreneurial associations, trade unions, non-governmental organizations and academic experts all over

Europe a Communication on CSR was adopted. This is the European Commission's most recent document on CSR.

The notion of corporate social responsibility reported in the Communication is similar to the one reported in the Green Paper and the main functions of an enterprises are specified to be “the creation of value through the production of goods and services that society demands, thereby generating profit for its owners and shareholders as well as welfare for society, particularly through an ongoing process of job creation”¹⁰⁵.

The paragraph on enterprise policies, then, specifies that: “only competitive and profitable enterprises are able to make a long-term contribution to sustainable development by generating wealth and jobs without compromising the social and environmental needs of society. In fact, only profitable firms are sustainable and have better chance to adopt/develop responsible practices.”¹⁰⁶

In short, it seems as if the spread of corporate social responsibility, encouraged by the Green Paper, is limited by this document.

The Communication emphasis is on profitability and competitiveness as fundamental conditions for corporate social responsibility, while

¹⁰⁵ Communication, 3.

¹⁰⁶ Communication, 7.2.

adequate attention is not paid to the possible contribution that CSR may represent to improve competitiveness and profits.

The implementation of Corporate Social Responsibility may also have extra costs and, in this sense, any kind of incentive or financial support would have been a good instrument of promotion of this system. Thus, it is evident that everything is left to a possible imitation of competing enterprises and to the promotion of transparency in the application of CSR.

It would have been advisable to consider the relationship between corporate social responsibility and European business law which has been completely neglected. Indeed, despite the lack of a European common code on corporate governance, the development of European business law may provide positive hints for the development of CSR.

The Communication confirms the EU approach outlined in the 'Communication on the Promotion of core labour standards and the improvement of social governance in the context of globalization'¹⁰⁷. This fostered a bilateral dialogue with developing countries and provided for commercial incentives, within the general system of tariff choice, for those countries where minimum social standards are met¹⁰⁸.

¹⁰⁷ Communication of the Commission to the Council, the European Parliament and to the Economic and Social Committee: 'Promotion of labour fundamental norms and improvement of social governance in the framework of globalization, 2001.

¹⁰⁸ See above.

The EU Communication provides, also, for the suspension of further incentives to a State that has constantly and repeatedly violated one of the rights defended by the ILO Declaration on fundamental principles and labour rights of 1998.

The last part of the Communication that has been analyzed refers to external relations and is the only one that explicitly mentions multinational enterprises. Just a vague reference is made to eventual EU actions because any indication to specific practical measure is provided, except for the main goal.

The Communication, just as the Green Paper, does not pay a great attention to human rights. The EU role in fostering corporate social responsibility seems to be only based on *soft-law* instruments, such as the OECD Guidelines for Enterprises which provides that multinational companies must respect human rights, even though it is confirmed that this is a non-binding norm to be applied on a voluntary basis.

The Communication recommends the European Union to take further measures so as to improve the control over the application of the Guidelines in the hosting countries of multinational enterprises, for example by establishing that their respect is the binding condition to get public funds or to tender for a contract. The Commission aims at pooling all actions on corporate social responsibility and at fostering its transparency through codes of conduct, social labels and socially

responsible investments. Despite their voluntary nature, these are the most widespread instruments adopted for the promotion and respect of corporate social responsibility¹⁰⁹.

Though certainly positive in their attempt to create a new and systematic enterprise culture, the voluntary approach EU Green Paper and the Communication is similar to the international initiatives analyzed in the first paragraphs of this chapter and criticisms have risen from trade unions, consumer associations, NGOs and academic organizations. This approach is also justified by the need to avoid tight and expensive bureaucratic costs, as well as by the enterprises' reluctance to take on socially responsible behaviors and to comply with eventual prescriptive norms.

¹⁰⁹ There are varied and various initiatives in this sector, therefore it is difficult to classify them. Roughly speaking there may be three groups. 1) codes of conduct: this expression defines a set of rules that an enterprise commits itself to respect and to promote human rights with its suppliers. Most of the times the rules are defined by the enterprise itself, often without consulting any trade union. There's no control over the respect of these rules. Generally a code of conduct does not imply that indication on the products is supplied. At present there are thousands of different codes of conduct, nearly all multinational enterprises have their own; 2) social marks: in the case the code of conduct is established by an external institution that even set the rules for its implementation. By accepting the code an enterprise may put a logo on the label of its products. Generally the owner of the mark only, occasionally, controls its correct application and only relies on the enterprises declarations; 3) social certification: the owner of the mark may also define a system of control and complaint acceptance. Controls are often carried out by external independent companies chosen and paid by the enterprise that need this certification. In most cases the certification grants the right to put a mark on the enterprise's products or to use it for advertising purposes.

In the last years various systems of mark and certification have been created with different aims and applications. Some of them are multisectorial, they can be applied to all or many industrial sectors. In the '90s there were the codes known as AccountAbility 1000 or AccountAbility 8000 issued by the Council of Economic Priorities or the Ethical Trading Initiative (UK) and created by involved people. Other codes or systems of certification are specific of only one sector or focus on one aspect, such as the Rug Mark which certifies that no child labour has been exploited for the production of carpets in India, Nepal and Pakistan, www.codesofconduct.org consulted on the 20th of June 2009.

CHAPTER III

The inadequacy of the voluntary approach to Corporate Social Responsibility (RSI).

Summary: 3.1. The freedom of enterprise and the institutions supporting it all over the world: WTO, IMF and WB; 3.1.1. Criticisms to the WTO. The authoritative opinion of Joseph Stiglitz; 3.2. Why the voluntary approach is inadequate. The function of the law; 3.3. The UN norms on the responsibility of transnational companies and enterprises with reference to human rights; 3.4. The National initiatives. In particular the United States; 3.4.1. The United States and the ATCA; 3.4.1.1. Doe Vs Exxon Mobil and Wiwa Vs Shell; 3.4.1.2. The case Doe Vs Unocal and the complicity between enterprise and government; 3.4.1.3. The case Aguinda Vs Texaco and the right to environment; 3.4.2. The cases Saipan and Nike: the advertising law. The consumers' 'power'.

3.1. The freedom of enterprise and the institutions supporting it all over the world: WTO, IMF and WB.

Formally speaking there are many and well-grounded reasons underlying the enterprises' choice for a *soft-law* system of control of social responsibility. They can be easily explained through the opinion of Carlo Sangalli who stated that: "Italy should distinguish itself for its voluntary approach to CSR. Being socially responsible should not be an obligation but rather a further opportunity for an enterprise to pursue its aim of competitiveness."¹¹⁰

¹¹⁰Interview to Carlo Sangalli, President of Unioncamere in 2004 'Outlining a flexible and personalized approach to CSR, an opportunity of growth for enterprises', www.progettocr-sc.it consulted on the 20th of September 2009.

This opposition towards a regulation framework that would provide standards and norms for CSR can be explained by referring to an International organization in particular, the WTO, and consequently to two important international institutions: the IMF and the World Bank¹¹¹. The WTO¹¹² (World Trade Organization) was set up in 1995 following the GATT¹¹³ (General Agreement on Tariffs and Trade), founded at the end of the Second World War, and is composed by 153 member States¹¹⁴ which are responsible for 90% of the world market. The WTO main goal is to liberalize and strengthen the international market so that it may contribute to the economic growth, the development and the wealth of the people all over the world. This organization coordinates a series of agreements aimed at removing tariffs, aids and any other barrier opposed to free trade and is informed of any dispute regarding global trade.¹¹⁵ The WTO¹¹⁶ influences National sectorial regulations in strategic fields, whereas the IMF (International Monetary Fund) and the World Bank,

¹¹¹ The IMF and the World Bank were founded in 1944 during the Second World War after the Conference of Bretton Woods which had been held to fund the reconstruction of Europe and to save the world from future depressions. Cfr. www.wto.org consulted the 3rd of September 2009.

¹¹² www.wto.org the 3rd of September 2009.

¹¹³ The GATT was a temporary agreement on specific subjects, which was never ratified by Parliaments nor it included any indication for the setting up of an organization; the WTO, instead, is an international organization and its agreements are permanent. Cfr. www.wto.org

¹¹⁴ In July 2008.

¹¹⁵ www.corriere.it consulted on the 19th of March 2008.

¹¹⁶ The WTO is administered by governments that must also implement the norms they have approved, unlike the IMF and the World Bank. Stiglitz, quoted, p. 11-15.

directly participate in the States' economic policies in order to encourage free trade¹¹⁷.

The IMF was actually founded to aid the economies of those countries that less contributed to the global market stability and this required the collaboration of all the protagonists of the economic world. The same is true for the World Bank which was set up to hand out funds for the reconstruction and the economic revival of those countries ravaged by the Second World War¹¹⁸.

¹¹⁷ Ferrarese, *Le istituzioni della globalizzazione*, Bologna, 2000, p. 120.

¹¹⁸ The WTO is strikingly influential. During the negotiations of the Uruguay Round (1986-1994) which led to the creation of the WTO, some governments suggested to add a clause which would have directly linked the labour and environmental protection standards to the standards of the international trade. This proposal was strongly rejected by the governments of developing countries because they thought it was a form of protectionism that would have deprived them of the commercial benefits deriving from their offer of low-cost labour. Obviously, entrepreneurs refused to accept this proposal that was then officially overruled because it was said that minimum labour standards were more adequately met through the ILO. This is certainly true, but it is likewise true that the WTO has one of the most efficient instruments to solve eventual controversies rising between States and the same instrument may be used even to get a higher control over human rights.

A State may, indeed, resort to a judging authority, the Dispute Settlement Body (DSB) composed by delegates of the WTO member States, in order to settle any controversy risen with another State. If negotiations fail, the DSB gathers a group of 3 to 5 experts in international trade appointed together with the interested parties.

This group has the same function as a Court: it hears the parties, it examines written and verbal memorials, it may consult experts in particular sectors such as representatives of non-governmental organizations and so on. If one of the parties doesn't accept the decision of this Court it may resort to a sort of "second degree", that is it can appeal to a Body that has the same functions as a first instance Court. It is composed by lawyers and economists and complies with the principles of international law and with the WTO norms according to the various international and national agreements.

If a State doesn't come into line with the decision taken within due time and doesn't change its attitudes or regulations contrasting with the WTO principles, the State that has been damaged by this unregretful conduct is authorized to enforce commercial sanctions to the State at fault until it doesn't conform to the above mentioned regulations. The aim of this system of settling controversies is to balance the opportunity of trade between the WTO member States.

These States must comply with some basic rules of free trade, such as they have to grant equal treatment to their trade partners regardless of which one is the most favorite, and they must equally trade important or less important products of their country, though there are important exceptions to these rules. If necessary, the States may apply restrictive measures to reach one of the ten objectives listed in the article XX of the WTO Agreement, for example, to safeguard

3.1.1 Criticisms to the WTO. The authoritative opinion of Joseph Stiglitz.

There's a widespread opinion among trade unionists, politicians, experts and opinion makers in this field that the underlying objectives of these organizations have not been reached but they have rather been got around with the only aim to liberalize the market.

There is not a sort of "innate disease" in the liberalization of the market, but those who criticize the voluntary approach to corporate social responsibility do not even accept the WTO policies. They believe, indeed, that free market does not necessarily bring benefits to the population and its advantages are not equally distributed. They argue that restrictions are sometimes necessary in order to prevent human rights violation and they fear that the combination 'free market – voluntariness' may legitimize any kind of human rights abuse¹¹⁹.

public ethics (art. XX point a), to safeguard the life and health of men, animals and plants (art. XX point b), to prevent the total exhaustion of natural resources (art. XX point g). These exceptions seem to prove the free trade potentially negative impact and could lead the WTO to rebalance this form of economy with respect to human rights. The expression "if necessary apply restrictive measures" has always been interpreted in a very restrictive way though, the WTO Court of appeal has recently provided a broader interpretation with regards to environment. In an interview Stiglitz says: "The WTO Court of appeal, with its sentence for the case 'United States vs Thailand', has set a precedent that may be potentially applied to change regulations in the field of trade." <http://www.business-humanrights.org>, consulted on the 15th of September 2009; Stiglitz, *Globalism's Discontents*, in *American Prospect*, 2002.

¹¹⁹ De Fiore, *I diritti inviolabili dell'uomo tra crisi della sovranità ed uso della forza*, in *Politica del diritto*, 2000: 2, p. 225-264.

An authoritative and exhaustive criticism has been made by Joseph Stiglitz, Nobel Prize for economy in 2001¹²⁰. In his most famous books *Globalization and its Discontents*¹²¹ and *The roaring nineties*¹²² and in various interviews and articles, Stiglitz criticizes the approach that those three institutions have had towards developing countries. These international organizations set out a series of economic measures that those countries should take in order to get financial supports: capitals' market liberalization, massive privatization, cut of public spending, reduction of barriers to importations and exportations. Besides establishing the necessary requirements to get the funds they also set the conditions and times to get them. Stiglitz ensures that the economic stability of a troubled country would be seriously jeopardized if this latter is forced to change its national pension scheme within 60 days. Quite often a request of fast adjustment implies the privatization of services that should, instead, remain public, such as social security¹²³.

¹²⁰ Joseph Stiglitz is famous for his criticisms towards globalization and the role of international organizations such as the IMF, the World Bank and the WTO. During his career Stiglitz has been counselor for economic affairs of the then US President Clinton, from 1993 to 1997 and has been chief economist of the World Bank from 1997 to 2000. He has become a great expert in economic policies particularly with regards to globalization, integration and development. Stiglitz, quoted.

¹²¹ Stiglitz, quoted.

¹²² Stiglitz, *The Roaring Nineties, seeds of destruction*, London, 2003.

¹²³ This happened in Argentina, for example. Joseph Stiglitz in his book '*Globalization and its discontents*' tells that when a crisis arrived, the IMF imposed outdated and inadequate "standard" solutions, without considering the effects that these policies would have had on the countries that had to adopt them. Stiglitz, quoted.

Besides denouncing the implementation of inadequate (because undifferentiated) policies, the Author accuses these institutions to preserve the specific interests of industrialized countries: “Let’s take agriculture, for example, which is the main source of income in southern countries. Western countries have fostered trade liberalization for their export products, thus forcing poor countries to break their trade barriers, even though they have finally kept them up thanks to their farm products subsidies. Developing countries have, therefore, been prevented to export their own products with the consequent cut in the income deriving from exportations which they strongly need instead.”¹²⁴

Stiglitz’s criticisms¹²⁵ to the IMF, the World Bank and to the WTO is also justified by these institutions’ lack of a democratic legitimation¹²⁶, the Author himself points out that: “these institutions are dominated by

¹²⁴ Stiglitz provides some striking examples: in the United States the subsidies for the cotton production (4 billions per year) even exceed the actual total value of production (3,5 billions per year), Stiglitz, quoted.

¹²⁵ In 2002 the pressures of environmentalist movements forced the US administration to rise a commercial controversy within the WTO against Thailand. They denounced the particular conditions of Thai shrimps fishing which they claimed would threaten the life of sea turtles due to the use of tight-mesh nets. The judges of the WTO Court of Appeal overturned a previous sentence of the Committee for the solution of commercial controversies that had dismissed the US petition and Thailand, finally, had to change its fishing habits in order to safeguard turtles’ health. Stiglitz comments on this sentence with the following words: “this sentence could have huge consequences if we consider that the traditional principle at the basis of any international commercial agreement was to define illegitimate any restriction to production activities. For the first time, in the case ‘United States vs Thailand’ it has been possible to criticize the production process of a good because of its environmental impact. This principle should be applied in various directions but its possible applications are still ignored by the most. According to this principle the commercial restriction on the importation of a good according to its production process may be legitimized.” Stiglitz, *Globalism’s Discontents*, in *American Prospect*, 2002.

¹²⁶ Baldassarre, *Globalizzazione contro democrazia*, Roma-Bari, 2002, p. 50 and fol.

wealthier industrialized countries as well as by these latter's commercial and financial interests and this, obviously, affects the institutions' policies. The choices made by the Presidents of these institutions represents the main problem of the institutions themselves and has, often contributed, to their malfunctioning"¹²⁷.

3.2. Why the voluntary approach is not adequate. The function of the law.

The inadequacy of the voluntary approach is almost self-evident because, if the free market was the best instrument for the safeguard of human rights, the number of abuses committed by multinational enterprises would, at least, be reduced¹²⁸ now, whereas in many parts of the world the result is completely different¹²⁹.

By definition, voluntary initiatives may be only applied if they are accepted by the counterpart and a company may adopt a code of conduct because it actually approves its principles or because it wants to improve its reputation or both. Unfortunately, even if an enterprise actually shares such principles it may decide not to respect them when they contrast with

¹²⁷ www.italy.peacelink.org consulted on the 19th of March 2010.

¹²⁸ Mazzarelli, *I diritti umani tra consumo e commercio globale*, in *I diritti dell'uomo: cronache e battaglie*, 1999: 2, p. 30-34.

¹²⁹ Stiglitz, *"Ethics, Market and Government failure, and Globalization"*, Washington, 2000.

stronger commercial interests. This happens quite often because the respect of human rights is not always the best commercial strategy considering that capitals are handled by managers in the interest of partners which, in most cases, consists in the production of profits.

The law has, among others, the function to balance power and obligations by establishing rights and duties. The human rights international law was developed after the Second World War in order to protect people from State abuses¹³⁰.

First of all it sets a few rights which belong to people just for their nature of human beings, secondly it compels the States to safeguard these rights. At the time when this law was passed there was a great attention towards the State because this was considered to have, compared to other institutions, the greatest effects on people's lives. Now, instead, as we explained in chapter I, big enterprises, in particular multinationals, are taking this role. At the beginning, human rights laws were adopted to counterbalance the State power¹³¹, while now these laws should limit the power of private enterprises because their activity strongly affects the lives of millions of people all over the world¹³². Moreover, besides any debate over the best and more effective approach, a "legal" system of

¹³⁰ Stiglitz, *Globalization and its Discontents*, Norton, 2002.

¹³¹ Sen, *Globalizzazione e libertà*, Milano, 2002, p.28 and fol.

¹³² Cfr. *'La dimensione sociale della mondializzazione'*, document submitted by the International Confederation of Free Trade Unions at the first meeting of the ILO World Commission for the social dimension of globalization (Geneve, 25/26 March 2002).

corporate social responsibility is strongly needed today because the victims may take their claims to a court and possibly be refunded or get indemnities. And the fact that during the trial, the conduct of a multinational enterprise may be judged illegal, is a deterrent in particular if the proceedings have an international scope.

3.3. The UN norms on the responsibility of transnational companies and enterprises with reference to human rights.

The lack of adequate international instruments (see chapter II), encouraged some States to set specific regulations for enterprises operating abroad. Meanwhile, various associations and trade unions have tried to adopt in this area laws that they had applied to different fields.

Before analyzing the national initiatives, a further international proposal should be reported so as not to leave anything out: the *UN Human Rights norms on the social responsibility of transnational enterprises*¹³³.

They need to be briefly presented because they offer a different attitude compared to the EU Green Paper and to the international initiatives

¹³³ *"The UN Human Rights Norm for business: towards legal accountability"*, in Amnesty International Publications, London, 2004, p. 5.

reported in chapter 2, even though they developed in the same framework¹³⁴.

The “Norms” were adopted by the UN Sub-Commission¹³⁵ on the Promotion and Protection of Human Rights, after a careful study of previous initiatives, of various voluntary codes of conduct adopted by each enterprise and after consulting and gathering the testimonies of entrepreneurs, trade unions and human rights organizations.

In 1997 the Sub-Commission suggested to study the connection between multinational enterprises and human rights; in 1998 a Working Group was set up to study the labour procedures and the activities of multinational enterprises and in 1999 a draft Code of Conduct for enterprises was drawn up. After four years of activity, the Working Group sent the draft Norms to the Sub-Commission that unanimously approved them on the 13th of August 2003¹³⁶.

The Norms are based on the principle that the States have the main responsibility to protect human rights, but enterprises as institutions of society are equally responsible and forced to foster, respect and protect human rights in their sphere of influence¹³⁷. These norms include several

¹³⁴ Mazzarelli, quoted.

¹³⁵ The Sub-Commission is composed by a group of UN independent experts who are elected by the UN Commission on Human Rights which supervises the work of the Sub-Commission. Mazzarelli, quoted.

¹³⁶ “*The UN Human Rights Norm for business: towards legal accountability*”, quoted., p. 5, 6.

¹³⁷ Jenkins, *Corporate Codes of conduct: self regulation in a global economy, business and society programme*, 2001 UN Research Institute in Social Development.

obligations for enterprises so that they respect a series of standards which safeguard human rights with a reference also to labour and to the right to environment. It seems as if this initiative is not different from the other ones, but actually it has many innovative aspects. First of all the norms are not restricted by any clause which establishes their non restrictive nature, instead the ILO Tripartite Declaration and the OECD Guidelines for multinational enterprises constantly highlight the voluntary nature of their provisions. Furthermore these principles adopt already existing international rules and standards. They are adjusted to the context where enterprises carry out their activity and refer to a wide range of international procedures. A “safeguard clause” is also included to guarantee that the Norms do not invalidate existing international obligations¹³⁸. Another distinguishing feature is that they are directly addressed to any kind of enterprise and not only to multinational enterprises. A series of external controls and auditing are also suggested and States are invited to spread the Norms and to include them in their systems. A comparison with the principles of another UN initiative, the Global Compact, highlights that the Norms are far more detailed and also less generic and more effective because of their reference to already

¹³⁸ “*The UN Human Rights Norm for business: towards legal accountability*”, op. cit., p. 6 and fol.

existing regulations .¹³⁹ During a Conference, David Weissbrodt¹⁴⁰, UN advisor and President of the UN Sub-Commission on the Promotion and Protection of Human Rights until 2002, pointed out that one of the distinguishing features of these Norms is that: “they are directly addressed to enterprises without the States’ intermediation that was, often, an alibi used by enterprises to protect themselves, since they presumed that they only had to comply with local laws even though these latter were in contrast with the international human rights minimum standards”¹⁴¹.

There’s still a debate over the function that these Norms will have, but their formulation is, undoubtedly, adequate to be approved by the States. The choice for binding standards is the case in point but this is still having many oppositions¹⁴².

3.4. The National initiatives. In particular the United States.

According to the above outlined framework, there aren’t any general or binding criteria, at present, that the enterprises may or should comply

¹³⁹ “The draft Norms have encouraged many educational efforts and we are eager to see how these efforts may positively contribute to the Global Compact”, The Global Compact Office.

¹⁴⁰ David Weissbrodt visited Italy during the first week of March 2004 and presented the contents and the inspiring principles of the Un Human Rights Norms for enterprises. He talked, among others, at the LUISS Guido Carli University where I had the pleasure to listen to him.

¹⁴¹ “*The UN Human Rights Norm for business: towards legal accountability*”, quoted., p. 8.

¹⁴² “*The UN Human Rights Norm for business: towards legal accountability*”, quoted., p. 12.

with. In this situation the national law is considered a temporary instrument while an international or supranational law is issued.

The art. 2 of the Brussels Convention on Jurisdiction, which is applied to all EU companies, provides that an enterprise may only be sued in the State where its main branch is based. Nonetheless, the identity of big enterprises is sometimes intentionally confused by disconnecting the main enterprise from its local minor branches so that they can avoid being sued.

In most cases the national law cannot be applied because these are international institutions; on the contrary the international laws that are made by and for the States, often are not applied to multinational companies. Charges are, indeed, usually not denied and the defence only focuses on technical aspects such as the question of jurisdiction. It is useful to analyze the US and UK reaction to the question of the effective protection of human rights and of the function of CSR.

3.4.1. The United States and the ATCA.

The United States have the largest number of trials on corporate responsibility for the violation of human rights abroad. This is because specific laws have been used in the course of the years to sanction the conduct of enterprises outside their home countries.

In this regard, the most important legal act is the Alien Tort Claim Act¹⁴³ (ATCA) issued by the US Congress in 1789 which provides that: “The district courts shall have original jurisdiction of any civil action by an alien for a tort only committed in violation of the law of nations or a treaty of the United States”¹⁴⁴.

This norm was originally designed to allow a person living in the United States to seek redress for a piracy damage. Now, it allows a controversy between two foreigners to be settled in the American courts, even though it originated abroad.¹⁴⁵ This law has not been applied for almost two centuries, until 1980 when the Court of Appeal of the Second Circuit adopted it in the case “*Filartiga vs Pena Irala*”¹⁴⁶ and condemned a police officer to make good the damage to the family of a Paraguayan fellow-citizen. He died after being arrested for the tortures that the officer inflicted him. In particular this sentence reported that: “Anybody should undergo physical tortures which is one of the universal principles adopted by all nations. Therefore, according to the civil responsibility,

¹⁴³ “Judiciary Act of 1789” today codified as amended in chapter 28 of US Code, paragraph 1350. At the beginning its aim was to protect the international reputation of the new born nation allowing citizens of another State to use American Courts for any violation of the international law.

¹⁴⁴ Trad. “I Tribunali di distretto avranno giurisdizione originale su ogni azione civile da parte di uno straniero per un danno commesso in violazione della legge delle nazioni o di un trattato degli Stati Uniti”.

¹⁴⁵ Parisi, *I crimini di guerra fra giurisdizioni nazionali e corti penali internazionali*, in *Rivista internazionale dei diritti dell'uomo*, 2001:14, p. 62-63.

¹⁴⁶ Sentence of the 30th of June 1980, full text in Federal Reporter, second series, vol. 630, 876 (II Circuit, 1980).

the person inflicting a torture is – like a pirate towards the trader he has bossed around – *hostis humani generis*: enemy of all mankind”.¹⁴⁷

This law, when applied for the breach of the international law, may be a modern instrument to solve any controversy risen for the compensation of summary executions, forced labour, crimes against humanity and other violations. To start the trial it is only necessary that the respondent is in the US territory and that he/she has been personally served with the summons. Before reporting the practical cases where this law has been invoked, it is necessary to make two statements.

First of all the ATCA provides that there’s a civil responsibility when a person has been damaged by the illicit conduct of another according to the international law. Consequently during the trial the plaintiffs must prove that a specific norm of the international law has been violated and that an illegal damage has been caused by such violation.

Secondly, the American law, with regards to responsibility does not distinguish between natural persons and legal ones. The first paragraph of Chapter 1 of the U.S.C.¹⁴⁸ rules that: “the words ‘person’ and ‘whoever’ include corporations, companies, associations, firms,

¹⁴⁷ Parisi, op. cit., p. 62-63.

¹⁴⁸ United States Code gathers all American legal acts divided according to the subject.

partnerships, societies, and joint stock companies, as well as individuals”¹⁴⁹.

In the light of this, the American Courts that have to apply the ATCA claim that a multinational company may be responsible for the violation of the international law in two cases: if, in its activity, it has the complicity of public officers who breach the norms of the international law referred to the States, or if its conduct breaches the norms of the international law referred to individuals, even though it is not a public activity¹⁵⁰.

Some topical important cases brought to the US Courts may be useful to understand the efficacy of this instrument: the case of the Shell oil company (which collaborated to the murder of Ken Saro Wiwa and other Ogoni activists); the case of Unocal (which was complicit in the application of forced labour in Burma); the case of Texaco (which is charged with the destruction of the Ecuadorian rain forest) and the case of Exxon Mobil (which collaborated, together with paramilitary troops, to the repression of trade unionists).

¹⁴⁹ Fontanella, *Corruzione e superamento del principio “societas delinquere non potest” nel quadro internazionale*, in *Diritto commerciale internazionale*, 2000:4.

¹⁵⁰ Sacharoff, *Multinationals in Host Countries: can they be held liable under the Alien Tort Claims Act for Human Rights Violations?*, Brooklyn, 1998:23.

In these cases the plaintiff must somehow prove that the company had the complicity¹⁵¹ of a government which is subject to these norms; this is referred to as “joint action” with the State government where the enterprise carries on its activity.

3.4.1.1. Doe Vs Exxon Mobil and Wiwa Vs Shell.

With regards to the case “Doe Vs Exxon Mobil”, the petrochemical multinational was sued at the Court of the District of Columbia because it had employed a part of the Indonesian army to protect its gas extraction plant seated in the province of Aceh where a rebellion was taking place at that moment. The plaintiffs alleged that Exxon’s security forces committed a series of abuses (tortures, sexual assaults, murders and summary executions) with the complicity and support of the Exxon

¹⁵¹ In most cases a company doesn’t directly commit an abuse but rather it is the complicit of the government or of armed groups. The concept of “complicity” is not codified, therefore it is not easy to identify a situation of complicity. The situations where it is often found are: a) When a company actively take part to the abuse, by collaborating with the culprits. This happened, for instance, in South Africa under apartheid, when some companies called the police to end, with the violence, some trade unions’ meetings; b) An enterprise may be part of a joint venture with the government of a State and at the same time be perfectly aware that this government will certainly commit some abuses to comply with the agreed commitments. In these cases there may be a causal relationship if the enterprise has made a perfectly legal bargain with that government, despite being aware of what could have happened; c) If an enterprise benefits from the opportunities or the environment created further to the violation of human rights, even though it does not actively and directly take part to the abuse. The Global Compact specifies that: if an enterprise benefits from an abuse committed by an authority, the complicity is, then, self-evident; d) If an enterprise does not react before a violation of human rights. This form of complicity is the most difficult to be demonstrated because it represents an omissive conduct. Cfr. Ramasastry, *Corporate Complicity. An examination of forced labour cases and their impact on the liability of multinational corporations*, in Berkeley JIL, vol. 20, 200.

Mobil. The company defended itself by pleading not guilty of that murders and violence because the civil war had been going on for many years and thousands of people had died and, furthermore, the plaintiff would have appealed to a US Court to sue the Indonesian Government abuses towards its own citizens. The demandant, a group of citizens from Aceh, used false names, John and Jane Doe, for fear of reprisals by the army which was regularly paid by the company itself. This latter, indeed, transferred every month a sum of money to the government in return for the troops. The District Court resorted to the US Department of State to have a non-binding opinion on this case: it claimed that the US interference in the Indonesian internal affairs would have negatively influenced the US diplomatic relations, including those against terrorism, and the economic and military ones¹⁵². The proceeding, due to several motions raised, is still pending since 2005.

“Wiwa Vs Shell” is a similar case¹⁵³. The Dutch multinational oil company Shell, like Exxon Mobil, was alleged to use the army of its hosting country, Nigeria, as a private security force for the protection of oil plants. The family of Ken Saro Wiwa sued the company at the New York district Court.

¹⁵² www.globalpolicy.org consulted on the 7th of September 2009.

¹⁵³ www.globalpolicy.org consulted on the 30th of October 2009.

Ken Saro was a journalist who was executed, together with other 7seven activists, by the Nigerian government in 1995 because he wanted to defend the Niger Delta ecosystem and the Ogoni population from the risks posed by the oil plants. The Shell was sued for its complicity with the Nigerian government in these extrajudicial executions and also for its collaboration in other forms of abuses (tortures, inhuman and degrading behaviors). The lawyers of the Shell based their defense on the US Court lack of competence. The Court, instead, confirmed its competence and claimed the ATCA could be applied.¹⁵⁴

After years of trial, The Shell finally accepted in June 2009, to settle the case giving 15,5 million dollars to compensate the Ogoni people for the lawsuits they had filed for the victims and the summary executions carried out during the revolts of the '90s.

The cases were: *Wiwa et al. vs Royal Dutch Shell*; *Wiwa et al. vs Anderson* and *Wiwa vs Shell Petroleum Development Company of Nigeria Limited* at the U.S. District Court for the Southern District of New York (Manhattan). Five million dollars of the Shell damages were deposited in a fund for the Ogoni population, the rest was divided between damages to the families of the victims, lawyers' fees and taxes. The lawsuits against Shell have been started according to the 1789 U.S.

¹⁵⁴ www.law.suffolk.edu consulted on the 18th of November 2009.

Statute and the Alien Tort Claims Act, which, as said, allows non US citizens to sue in Us Courts for human rights violations committed abroad. In this proceeding, damages have explicitly been given for the capture, torture and murder of those who protested against the pollution of the Niger Delta and of its waters due to the nearby oil plants. The Ogoni population, headed by Ken Saro-Wiwa whose works brought their sufferings to the international attention, peacefully fought for a more equal redistribution of Nigerian oil wealth and against the environmental damages caused by multinational companies. This case of a corporation charged of human rights violation in a US Court represents an important precedent for the future.

For the purpose of this dissertation it is important to analyze also two more cases: the case “Doe Vs Unocal” and the case “Aguinda Vs Texaco¹⁵⁵”.

3.4.1.2. The case Doe Vs Unocal and the complicity between enterprise and government.

Unocal together with Total S.A. acquired the rights for the extraction, transportation and sale of natural gas in Thailand. All these activities

¹⁵⁵ www.amnesty.org, consulted on 5th of December 2009

were called "the Project" which also included a Burmese company (the Myanmar Oil and Gas Enterprise) and an institution controlled by the Thai Government. Total S.A. was responsible for the selection of workers, the organization of shifts and the calculation of salaries. The companies involved in the project were offered a military force to protect their activities, even though there were no guerrillas around and it is proven that, at least since 1995, companies accepted this 'security service' in exchange of food and dollars.

In September 1996 four inhabitants of this region, the Federation of Burmese Trade Unions and the exiled Burmese government sue the Unocal and 'the Project' at the Court of California Central District. In October, other 14 indigenous people sued the Unocal, the Total, the Myanmar Oil, the Burmese army, the Unocal President and its chief executive officer. In both cases the claimant declared that they had been submitted to forced labour for the Project and reported that summary executions, sexual assaults, tortures and illegal expropriations of lands and homes had been carried by the troops. These barbarities were denounced according to the ATCA and other American laws. On the 31st of August 2000 the Court completely dismissed both claims because the plaintiff could not prove that Unocal had taken part to the enforcement of forced labour nor that it controlled the Burmese troops. This implies that if these charges had been proved the Court would have condemned

Unocal for its complicity with the government. On the 18th of September 2002 the Court of Appeal overturned the decision of the District Court. This time the judge gathered enough evidence to establish that the delocalized companies Unocal Pipeline Corp. and Unocal Offshore Co. were Unocal's *alter ego* both because they were run by Unocal's officers and because they had not the necessary capitals to be really independent¹⁵⁶. Furthermore, even though no connection was found between the controlling and the controlled organizations, there were evidence enough to prove the Unocal direct involvement in the abuses and its association with the Burmese government. The salaries paid by Unocal to the army offered by the government were considered a form of complicity for the crimes committed. The Court reckoned that summary executions, rape and tortures may be considered as *delicta juris gentium* only if these are committed by State officers, but this is not the case. It is, nonetheless, possible to rule on these violations because they somehow relate to forced labour, which is considered as a modern form of slavery, thus the ATCA may be applied. Unocal may be judged responsible for these abuses, and therefore forced to damages, if its executive bodies have included these violations within the crime of forced labours¹⁵⁷.

¹⁵⁶ www.labourcommission.org consulted on the 18th of December 2009.

¹⁵⁷ Parisi, quoted, p. 62.

This case is extremely relevant for this work because for the first time a District Court has recognized that a company may be judged responsible of breaking the customary international law with the complicity of the government where it carries out its activity, while for other violations, such as forced labour, its charges may be independent from any other institution.

June 11, 2002 marked a setting day in the case against Unocal when the lawsuit survived Unocal's motion for summary judgment. The decision of the Superior Court of California made the case against Unocal one of the firsts in U.S. history in which a corporation will stand trial for human rights abuses committed abroad.

In that decision, Judge Victoria Chaney held that the case against Unocal should go to trial because there were material issues of fact with respect to whether Unocal is responsible for human rights violations. In particular, the Court found evidence that would allow a jury to find that Unocal's joint venture hired the military and that Unocal is therefore vicariously liable for the military's human rights abuses, and to conclude that Unocal breached California Constitutional and statutory law in its operations.

In March of 2005, Unocal agreed to compensate the plaintiffs in a historic settlement that ended the lawsuit.

3.4.1.3. The case Aguinda Vs Texaco and the right to environment.

It is also interesting to analyze the case Aguinda Vs Texaco to see how the violation of other kinds of rights is handled. This controversy shows that among the rights that can be protected by resorting to the ATCA, there is the right to a environment¹⁵⁸. In this lawsuit, a group of citizens of the Oriente Region in Ecuador claimed damages for the personal harms caused by Texaco polluting agents, such as spontaneous abortions, cancer deaths, infections and poisonings¹⁵⁹.

There have been long debates over the possible autonomous nature of the right to a safe environment, supported by a common awareness that an enterprise is likely to endanger the place where it carries out its activity¹⁶⁰. The right to a safe environment was recognized for the first time in 1972: the first principle of the Declaration¹⁶¹ of the UN Conference on Human Environment establishes that a man has the fundamental right to freedom, equality and adequate conditions of life, in

¹⁵⁸ www.europapress.es consulted on 13th of March 2010.

¹⁵⁹ www.sfgate.com consulted on the 5th February 2010; www.motherjones.com consulted on the 12th of February 2010; www.cnn.com consulted on the 7th of February 2010.

¹⁶⁰ Minoia, Scansetti, Perrotta, Silvano, "Amianto nelle raffinerie di petrolio e tumori pleuropolomonari", Pavia, 1997.

¹⁶¹ Mazzealli, quoted

an environment of a quality that permits a life of dignity and well-being¹⁶².

The point is whether a right to environment can be identified and defined. Generally, it is easily recognizable when an environmental damage endangers the right to life, health and to an healthy environment.

The ATCA law cases show that there may also be a right to a healthy environment *per se*, that is not connected to other fundamental human rights, if the environmental damage is: “extended, persistent and serious”¹⁶³ or “deprives a population of their own means of subsistence”¹⁶⁴.

3.4.2. The cases Saipan and Nike: the advertising laws. The consumers’ ‘power’.

The case Saipan vs Nike¹⁶⁵ is an example of the nations’ efforts to legitimize the claim for damages against an enterprise’s socially irresponsible conduct.

¹⁶² Declaration of United Nations Conference on the Human Environment, Stockholm, 1972. Principle 1 of the Declaration states: “Man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being”.

¹⁶³ Geneve Convention of 1948.

¹⁶⁴ 1966 UN Agreements on civil and political rights and on economic, social and cultural rights.

¹⁶⁵ Clean Clothes Campaign (2002) Towards regulation: different Strategies towards public regulation, www.cleanclothes.org, consulted on the 12th of October 2009.

Nike multinational company was charged with deceiving its customers through false advertising. This company had focused its advertising campaign on social sensitivity by guaranteeing the respect of all labour standards to the workers responsible for the creation of its products. There were evidence, instead, that Nike's workers in Asian factories were underpaid and lived in unhealthy conditions. The company was sued in San Francisco by a consumers' association that charged it with the violation of Californian Business and Professions Code. In February 1999 a judge dismissed the case because he/she accepted Nike's defence based on its right to freedom of expression. In May 2002 the California Supreme Court overturned this decision and established that Nike's statements were to be considered a form of advertising and therefore they were not protected by the laws on freedom of expression.

The enterprises in Saipan¹⁶⁶ were accused of keeping their workers in inhumane conditions, of underpaying them and of violating age limits as well as daily and weekly working time limits. The Island of Saipan is subject to the American law and may use the label "Made in U.S.A.", but it is exempt from some American laws, such as those ruling on minimum salary in order to promote local economic development, that is why many companies have set their head office there. In January 1999 a

¹⁶⁶ Saipan is a small Island which is part of Northern Mariana Islands

lawsuit was filed to the California State Court by four human and labour rights associations on behalf of more than 50000 workers from China, the Philippines, Bangladesh and Thailand¹⁶⁷. The trial was started against 18 designer labels companies with their production activity in Saipan and, in November 1999 a file was open for each defendant under the Californian law. The enterprises' representatives defended their companies by claiming that Californian consumers could not suffer any legal damage if they got false information on the working conditions underlying the production of the advertised products. At the end of the trial the Court ruled that workers would receive damages and future monitoring of the enterprises were provided as well as the introduction of a code of conduct.

Besides being an example of how the violation of corporate social responsibility may be sanctioned with indirect instruments, these two cases show how the consumers' role has changed in the course of the years. From passive receivers of products they are becoming more critical. Nike's shares have plunged in a few months because of the consumers associations' declarations and also because of a smart boycott

¹⁶⁷ Kenyon, www.nosweat.org.uk consulted on the 27th of February 2010 and www.cleanclothes.org consulted on the 13th of January 2010.

campaign. This shows, also, the consumers' ability to interact and affect the activity of an enterprise¹⁶⁸.

This statement is particularly relevant for this work and leads to two important consequences. First of all, the consumer's need to interact with the market offer and to expect that the production process is carried out in line with ethical principles¹⁶⁹ confirms the strong need for laws ruling over the actual respect of specific standards and provide sanctions for any eventual breach. Secondly, as long as a voluntary approach prevails, enterprises will indirectly be forced to adopt and respect a code of conduct for fear of damaging their reputation and consequently lose profits. Unfortunately, this mechanism of so-called "indirect coercion" is not always valid because some companies have the possibility to keep some aspects of their production process secret and because consumers, despite their determination, can hardly organize anything that could compensate the lack of regulations.

¹⁶⁸ Gesualdi, www.greenplanet.it consulted on the 15th of February 2010.

¹⁶⁹ 80% of European consumers says they are favourable to promote the development of socially-committed enterprises and 72% of interviewed Italian consumers said they would be favourable to pay a higher price if they were guaranteed that enterprises submitted themselves to a social certification or were committed in social initiatives.

CONCLUSIONS

“Freedom of enterprise and human rights”, it seems quite a generic and, therefore incomprehensible, association of concepts.

The first concept, the freedom of starting and carrying on an enterprise, rises two considerations. First of all, this freedom like all existing forms of freedom is limited by human security, freedom and dignity. Then, it should be contextualized in the present historical period. Enterprises, like desert tents, are characterized by a greater mobility with respect to their home countries. There’s a new trend to break trade barriers for a unique free and “globalized” market. This is the main target of international organizations as well, such as the World Bank, the International Monetary Fund, and the World Trade Organization.

But this situation has a risk in itself.

Under an economic perspective the delocalization of an enterprise is a good way of improving the company’s efficiency by exploiting the goods, facilities and labour of the States where these latter are less expensive. When the hosting State is a developing country, with inadequate regulations and safeguard standards, it is more likely that fundamental human rights are not respected. We learn from experience

that companies may even become unspoken complicit of abuses committed by governments and armed forces. Thus, they can produce what in the western world is absolutely forbidden in a place where the same things are instead absolutely legal, and yet those products will precisely be sold in western countries.

The production of goods and services has always implied and still implies the use of labour and the relationship with one or more communities. Since individuals are not goods, the respect of human rights should, therefore, go along with the economic growth.

This situation and the lack of a supranational law fostered an opposite trend: a regulation on corporate social responsibility was adopted to rise enterprises' awareness of their responsibilities.

The Green Paper of 2001 on corporate social responsibility defines CSR as the “voluntary integration of social and environmental concerns in an enterprise's trading activities and in its relationships with the interested parties”.

Several international initiatives contribute to the development and implementation of CSR such as: the ILO Tripartite Declaration, the OECD Guidelines and the UN Global Compact.

They all share the voluntary approach and support the adoption of certifications, social marks and codes of conduct. These initiatives made people aware of the problem and caught the attention of both consumers

and entrepreneurs, nonetheless they didn't succeed in meeting the ends they were created for.

The CSR was adopted to solve an internal problem of corporate activities. It not only affects the enterprises' owners or officers but also their stakeholders who are subjected to the companies' activity though without any formal contract they could eventually rely on in case of violation.

Three are the main criticisms to the voluntary approach:

- 1) Corporate activity is strictly connected to the right to ownership.

Executive officers handle the interests of the shareholders who have entrusted them with their own responsibilities. If they used their power to make decisions that would safeguard people outside the company they would betray their mandate and would be responsible for the enterprise's partners themselves. These latter should be granted by the shareholders with a greater managerial discretion which would imply two perverted consequences: a dangerous inferior responsibility for executive officers and the permission to use what they own for the benefit of others. Even in this situation, stakeholders could not protect their rights because of the lack of a specific law.

- 2) In most cases the implementation of ethical codes or social mark certifications are not controlled by external authorities and

therefore the respect of standards cannot be proved. And even if an external organization monitors their effective implementation it is not possible to sanction any eventual violation.

- 3) Thirdly, with the voluntary approach companies' are entrusted with a task which would otherwise belong to political bodies. Shareholders or executive officers should compensate the lack of a law through self-regulation. They should compensate this legal gap according to their ethical principles.

The need of a law is, thus, self-evident.

The UN Norms on the responsibility of transnational companies and of other enterprises with regards to human rights are quite revolutionary though they are related to the principles of the Universal Declaration of Human Rights of 1948.

The lack of a supranational regulation have forced many countries to find different ways to safeguard the stakeholders' interests. The most relevant in this sense is the Alien Tort Claim Act (ATCA) adopted in the United States. It was passed a decade ago and is still applied to regulate this constantly developing market. This act allows international rights to be defended in a US Court though they have been violated abroad.

In Italy, the need of a law limiting the freedom of enterprise is supported by the principles contained in the art.41 of the Constitution.

Thus the following conclusions may be drawn: the voluntary approach is preferred because it is considered more appropriate for the right to enterprise and for such a rapidly evolving market, considering that a “standardizing” law is threatening today’s business creativity. But, will is not enough; for this reason the tendency of making coercive years-old public order flexible principles is now increasing. This trend is implemented to rebalance a situation which seems impossible to settle.

The freedom of enterprise ends where the respect of human security, dignity and freedom begins within a Nation and outside. This is a conquest of the past but, today it strongly needs to be uphold.

Bibliography

Abratt, Nel, Higgs, *An examination of the ethical beliefs of managers using selected scenarios in a cross-cultural environment*, *Journal of Business Ethics*, 1992.

Antoci – Sacco – Vanin, Il rischio dell'impoverimento sociale nelle economie avanzate, in Sacco - Zamagni (a cura di), *Complessità relazionale e comportamento economico*, Bologna, Il Mulino, 2002.

---- Zarri, Coexistence of Strategies and Culturally Specific Common Knowledge: an evolutionary analysis, *Journal of Bioeconomics*, 2004.

---- Vanin, Social Capital Accumulation and the Evolution of Social Participation, *Journal of Socio-Economics*, 2006.

Archibugi, *Can Democracy Be Exported?*, 2006.

Arnett, *The psychology of globalization*, in *American Psychologist*, 2002.

Baldassarre, *Le trasformazioni dell'impresa di fronte alla costituzione*, in *Democrazia e diritto*, 1977.

---- *Globalizzazione contro democrazia*, Roma-Bari, 2002.

Bauman, *Le sfide dell'etica*, Milano, 1996.

---- *Dentro la globalizzazione. Le conseguenze sulle persone*, Roma-Bari, 2002.

Beck, *What is globalization?*, Cambridge: Polity Press, 2000.

---- 'The terrorist threat. World risk society revisited', in *Theory, Culture & Society*, 2002.

---- *Cosmopolitan Vision*, Cambridge: Polity Press, 2006.

Bearle, *For whom Corporate Managers are Trustees: A note*, in *Harvard Law Review*, 1932.

---- *The 20th century capitalistic revolution*, New York, Harcourt-Brace, 1954.

---- *Power without Property*, London, 1960.

---- Means G.C. (1932), *The modern corporation and private property*, New York, Macmillan. In Italian Baerle e Means, *Società per azioni e proprietà privata*, Torino 1966.

Beda, Bodo, *La responsabilità sociale d'impresa*, il Sole 24 Ore, 2004.

Beretta, *La "Costituzione economica": genesi e principi*, in Il politico, 1988.

Beyer, Nino, *Ethics and Cultures in International business*, Business, Journal of Management Inquiry, 1999.

Borzi, *La parabola Enron*, Milano, 2002.

Bruno, *Profili del diritto societario inglese alla luce delle riforme*, in Rivista delle società, 2004.

Buller, Kohls, Anderson, *A model for addressing cross-cultural ethical conflicts*; Business and Society, Vol 36, No 2, 1997.

Buzan, *From international to world society?* Cambridge: Cambridge University Press, 2004.

Cassese, *I diritti Umani nel mondo contemporaneo*, Laterza, 1998.

Cavaliere, *Aspetti sociali dell'informazione economica*, in Rivista italiana di Ragioneria e di Economia Aziendale, Milano, 1988.

Cavazzuti, *Capitale monopolistico, impresa e istituzioni*, Bologna 1974.

Chernilo, *A social theory of the nation-state: The political forms of modernity beyond methodological nationalism*, London: Routledge, 2007.

---- *Methodological nationalism and the domestic analogy: Classical resources for their critique* in the Cambridge Review of International Affairs, 2009.

Cocozza, *La programmazione negoziata e il nuovo impulso al regionalismo economico*, in Le istituzioni del federalismo, 1999.

Coda, *Etica e impresa: il valore dello sviluppo*, in Rivista dei Dottori commercialisti, 1996.

Cook, Deakin, *Stakeholding and Corporate Governance: Theory and Evidence on Economic Performance*, Cambridge, 1999.

Const. Court, ord. n. 6 of 14 January 1982, in Giurisprudenza Costituzionale, 1982.

Const. Court, 30 October 1975, n. 237, in Foro italiano, 1976.

Const. Court, 19 December 1990 n. 548, in Consiglio di Stato, 1990.

De Fiores, *I diritti inviolabili dell'uomo tra crisi della sovranità ed uso della forza*, in Politica del diritto, 2000.

Declich, *Research on corporate responsibility towards society*, Roma, 2006.

De Ruijter, Van Londen, *Managing diversity in a globalizing world*, FEEM Working Paper 18, 2003.

Di Nardi, *L'impresa fra socialità ed efficienza*, in Rivista di politica economica, 1978.

Di Turi, *Globalizzazione dell'economia e diritti fondamentali in materia di lavoro*, in Rivista di diritto internazionale, 2000.

Diamantopoulou, *Responsabilità sociale d'impresa: dal principio alla pratica*, intervento del gennaio 2002.

Dunfee, Fort, *Corporate Hypergoals, sustainable peace and the adapted firm*, *Vanderbilt Journal of Transnational Law*, 2003.

---- Donaldson, *When Ethics Travel: The Promise and Peril of Global Business Ethics*, *California Management Review*, Vol. 41, No. 4, 1999.

Earley, Mosakowski, *Cultural intelligence*, *Harvard Business Review*, 2004.

Erdal, *Corporate responsibility towards society: a local perspective*, Dublin, 2003.

Esposito, *I tre commi dell'articolo 41 della Costituzione*, in Giurisprudenza costituzionale, 1962.

Ferrarese, *Le istituzioni della globalizzazione*, Il Mulino, Bologna, 2000.

Ferrari, *Luci ed ombre del diritto globale*, Rivista trimestrale di diritto e procedura civile, 2003.

Ferri, *Concorrenza*, in Enciclopedia del diritto, Milano, 1961.

Fitoussi, *La democrazia e il mercato*, Feltrinelli, 2004

Fletcher, "Give if it helps but not if it hurts", in World Hunger and Moral Obligation, 1977.

Flick, *Globalizzazione dei mercati e globalizzazione della giustizia*, in Rivista trimestrale di diritto penale dell'economia, 2000.

---- *Globalizzazione e diritti umani*, in Jus, 2000.

Foglia, *Libertà d'impresa e programmazione nella prospettiva di uno statuto d'impresa*, in Diritto del lavoro, 1981.

Fontanella, *Corruzione e superamento del principio "societas delinquere non potest" nel quadro internazionale*, in Diritto commerciale internazionale, 2000.

Friedman (1970), *The Social Responsibility of Business is to Make Profits*, *New York review*, 13 Settembre, re printed in Hoffman, Frederick (a cura di) *Business ethics*. Mc-Graw Hill, 1995.

---- *Capitalism and freedom*, Chicago, Chicago Univ. Press. , 1962.

---- *Verso una sociologia del diritto transnazionale* in Sociologia del diritto, 1993.

---- *Free to choose*, New York, 1981.

Gabrovec, Mei, *Business ethics e codici etici*, in Rivista dei dottori commercialisti, 1996.

Gaja, *Organizzazione internazionale del lavoro*, in Enciclopedia del diritto, Milano, 1981.

Galgano, *La libertà di iniziativa economica privata nel sistema delle libertà costituzionali*, in Trattato di diritto commerciale e di diritto pubblico dell'economia, 1972.

---- *Il volto giuridico della globalizzazione*, in Quaderni Costituzionali, 2001.

Gavazzoli, Schettini, *Etica, futuro e finanza*, Milano, 2002.

Gazzola, Pellicelli, *The corporate responsibility report between private interest and collective welfare*, vol.1, no. 1, 2009.

Gialanella, *La sfida dei diritti fondamentali e l'utopia di una nuova democrazia del pubblico*, in Questione Giustizia, 2001.

Giannini, *Sull'azione dei pubblici poteri nel campo dell'economia*, in Rivista di diritto commerciale, vol. 57, 1959.

Greenwood, *Community as a stakeholder in corporate social and environmental reporting*, Melbourne, 2001.

Grossmann, Hart, *The Cost and Benefit of Ownership: a Theory of Vertical and Lateral Integration*, in Journal of Political Economy, 1986.

Habermas, *La costellazione postnazionale. Mercato globale, nazioni e democrazia*. Milano, Feltrinelli, 2001.

Hamilton B. J., Knouse B. S., *Multinational enterprises decision principles for dealing with cross cultural ethical conflicts*, in Journal of Business Ethics, 2001.

Harragin, *Relief and an Understanding of Local Knowledge: The Case of Southern Sudan in Culture and Public Action: A Cross-Disciplinary Dialogue on Development Policy*, Stanford University Press, 2004.

Hart, *Norms and the Theory of Firm*, Discussion Paper 5/2001, Harvard Law School, 2001.

Hofstede, *Culture's consequences: International differences in work related values*, Newbury Park, CA, Sage, 1980.

Huntington, *Lo scontro delle civiltà e il nuovo ordine mondiale*, Garzanti, 1996.

Jackson, *Globalizing corporate ethics programs: perils and prospects*, in Journal of Business Ethics, 1997.

Jenkins, *Corporate Codes of conduct: self regulation in a global economy, business and society programme*, 2001 UN Research Institute in Social Development.

---- *Small business champions for corporate social responsibility* in Journal of Business Ethics, 2006.

Jervis, *Individualismo e cooperazione*, Bari, 2002.

Kant, *Toward Perpetual Peace: A Philosophical Sketch*, 1795.

“Judiciary Act of 1789”, Chapter 28 of U.S. Code, paragraph 1350.

Kelly, “*Human rights as foreign policy imperatives*” in The ethics of Assistance: Morality and the Distant Needy, 2004.

Kolk, Von Tulder, *Ethics in international business: multinational approaches to child labour*, in Journal of World Business, 2004.

Kwok Leung et al., *Culture and international business: recent advances and their implications for future research*, Journal of International Business Studies, 36, 2005.

Lanza, *Lo sviluppo sostenibile*, Bologna, 1999.

Lin, *Can values remain constant against fundamental changes? An empirical study of work-related values in Chinese firms*, Submitted to AOM, 2005.

Maffettone, *Etica pubblica*, Il Saggiatore Editore, Milano, 2001.

---- *Ragioni dell'impresa e vincoli morali*, in Filosofia e questioni pubbliche, 2001.

---- *Responsabilità sociale. Sostenibilità, idea vincente*, 2003.

Magatti, Monaci, *L'impresa responsabile*, Torino, 1998.

Maimone, *Organizzazione cosmopolita, comunicazione e relazioni organizzative nei contesti multiculturali: un approccio sociologico*, Aracne, 2005.

Mankelaw, *What motivates small enterprises to participate in corporate social responsibility?* in The Australasian Journal of Business and Social Enquiry, 2006.

Manni, *Responsabilità sociale e informazione esterna. Problemi, esperienze e prospettive del bilancio sociale*, Milano, 1998.

Marchesini, *L'impresa etica e le sue sfide*, Milano, 2003.

Massera, *Oltre lo Stato: Italia ed Europa tra locale e globale*, in Rivista trimestrale di diritto pubblico, 2001.

Maxwell, Reuveny, *Trade and Environment: Theory and Policy in the Context of EU Enlargement and Economic Transition* in <http://www.feem.it/NR/Feem/resources/pdf/Pcatalogue.pdf>

Mazzarelli, *I diritti umani tra consumo e commercio globale*, in I diritti dell'uomo: cronache e battaglie, 1999.

Mill, *Utilitarianism*, 1979.

Minoia, Scansetti, Perrotta, Silvano, *Amianto nelle raffinerie di petrolio e tumori pleuro-polomonari*, Pavia, 1997.

Morrone, *Libertà d'impresa nell'ottica del controllo sull'utilità sociale*, Giurisprudenza costituzionale, 2001.

Nibale, *L'economia e l'etica d'impresa*, Bari, 1991.

Nino, *Diritto come morale applicata*, Giuffrè Editore, 1999.

OECD Guidelines for multinational enterprises, *Global instruments for corporate responsibility*, OECD, Annual Report, 2001.

Ottaviano, Peri, *The economic value of cultural diversity: evidence from US cities*, CEPR Discussion Paper n.4233, 2004.

Oppo, *Diritto dell'impresa e morale sociale*, in Rivista diritto civile, fasc. 1, 1992.

Paine, Deshpandé, Margolis, *Up to code, does your company 's conduct meet word-class standards ?*, Harvard Business Review, 2005.

Parisi, *I crimini di guerra fra giurisdizioni nazionali e corti penali internazionali*, in Rivista internazionale dei diritti dell'uomo, 2001.

Pallanch, *Le promesse tradite della globalizzazione. Intervista a Joseph Stiglitz*, in Lo Straniero, n.38-39, agosto-settembre 2003.

Perlingieri, *Sull'attività della Corte Costituzionale*, in Diritto e giurisprudenza, 1976.

Pintore, *I diritti della democrazia*, Laterza, 2003

Portinaro, *Oltre lo Stato di diritto. Tirannia dei giudici o anarchia degli avvocati?*, Milano: Feltrinelli, 2002.

Putnam, *The Prosperous Community: Social Capital and Public Life*, in The American Prospect, 1993.

---- *Bowling Alone: America's Declining Social Capital*, in Journal Of Democracy, 1995.

Ramasastri, *Corporate Complicity. An examination of forced labour cases and their impact on the liability of multinational corporations*, in Berkeley JIL, vol. 20, 2002.

Rebora, *Comportamento d'impresa e controllo sociale*, Milano, 1981.

Risoluzione del Consiglio (6-2-2003) on Corporate Social Responsibility, in G.U.C.E., C 39, of 18-2-2003.

Rawls, *A Theory of Justice*, 1971.

Sacco - Vanin - Zamagni, *The Economics of Human Relationships*, in Kolm - Ythier (eds.), Handbook on the Economics of Giving, Reciprocity and Altruism, North-Holland, Amsterdam, 2006

---- Viviani, *Scarsità, benessere, libertà nel contesto dell'economia dell'identità*, in Istituzioni e Sviluppo Economico, 2006.

Sacconi, *Etica degli affari, individui, imprese e istituzioni nella prospettiva di un'etica razionale*, Milano, Il Saggiatore, 1991.

---- *Economia etica organizzazione: il contratto sociale dell'impresa*, Roma - Bari, Laterza, 1997.

---- *Un contratto sociale per l'impresa*, in Etica e professioni, 2002.

---- *La responsabilità sociale come governance allargata dell'impresa*, in Rusconi - Dorigatti La responsabilità sociale, Milano, Franco Angeli, 2004.

---- *Guida Critica alla responsabilità sociale d'impresa*, Bancaria Editrice, Roma, 2005.

---- *Introduzione, Le ragioni della Csr nella teoria economica, Csr, verso un modello allargato di corporate governance, Etica degli Affari, Etica e teoria normativa degli stakeholder, Csr, contratto sociale*

dell'impresa e giustizia distributiva, Reputazione ed autoregolazione della Csr, in Sacconi, 2005.

Sacharoff, *Multinationals in Host Countries: can they be held liable under the Alien Tort Claims Act for Human Rights Violations?*, Brooklyn, 1998.

Salvi, in *Gestione dell'economia e pluralismo sociale*, in Democrazia e diritto, 1976.

Schilizer, *Il fondo monetario internazionale*, Bologna, 2000.

Scifo, *Etica e affari*, in L'impresa, 1988.

Sen, *Development as freedom*, New York, 1999.

---- *Etica ed economia*, Roma, 2002.

---- *Globalizzazione e libertà*, Milano, 2002.

---- *La libertà individuale come impegno sociale*, Bari, 2003.

Sentence held on 30 June 1980, whole text on Federal Reporter, serie seconda, vol. 630, 876 (II Circuito, 1980)

Silva, *Qualcosa di nuovo sulla teoria dell'impresa?*, Bologna, 1999.

Sison, Palma – Angeles, *Business ethics in the Philippines*, in Journal of Business Ethics, 1997.

Smeltzer, Jennings, *Why an International Code of Business Ethics Would be Good for Business'*, in Journal of Business Ethics, 1998.

Spada, Gli "Scritti giuridici" di Giorgio Oppo: Diritto dell'impresa, in Rivista di diritto civile, 1992.

Smith P. B. and Bond, M. H., *Social Psychology across cultures*, 1998.

Stiglitz, "Ethics, Market and Government failure, and Globalization", Washington, 2000.

---- *Globalization and its Discontents*, Norton, 2002.

---- *Globalism's Discontents*, in American Prospect, 2002.

---- *The Roaring Nineties, seeds of destruction*, London, 2003.

Vaccà, *Prospettive ed evoluzione delle imprese transnazionali*, in Economia e politica industriale, 2001, fasc. 109 (marzo).

Vercelli, *Responsabilità sociale e sostenibilità dell'impresa*, Notizie di Politeia, Anno XIX- n° 72, 2003.

---- *Sviluppo sostenibile*, in Sacconi L., (a cura di) *Guida Critica alla responsabilità sociale d'impresa*, Roma, Bancaria Editrice, 2005.

---- *L'impresa sostenibile*, in Sacconi L. (a cura di) *Guida Critica alla responsabilità sociale d'impresa*, Roma, Bancaria Editrice, 2005.

Visentini, *Economia mista ed economia di mercato: il caso italiano*, in Rivista di diritto fallimentare, n. 1, 2001.

---- *Note su Etica, Impresa e Diritto Commerciale*, pubblicato su www.archivioceradi.luiss.it, 2002.

---- *L'etica degli affari è strumento di autoregolamentazione?*, *Relazione introduttiva al V Corso di formazione in diritto penale "Economia illegale e mercato finanziario"*, Salerno, Università, 29 ottobre 2004

Viviani, *La vera forza degli "Stakeholders"*, in Etica per le professioni, 2003.

---- *Dire, Dare, Fare, Avere, percorsi e pratiche della responsabilità sociale*, Bologna, Il Mulino, 2006.

Weissbrodt, Marzo 2004, conferenza alla LUISS Guido Carli.

Werhane, *Exporting mental models: global capitalism in the 21st century*, Business Ethics Quarterly, 2000.

Wood, Logsdon, *Business citizenship: from domestic to global level of analysis*, in Business Ethics Quarterly, 2002.

Zamagni, *L'economia delle relazioni umane: verso il superamento dell'individualismo assiologico*, in Sacco, Zamagni (eds) Complessità relazionale e comportamento economico, Il Mulino, Bologna, 2002.

---- *Nelle mani del "consumatore-cittadino"*, in Etica e professioni, 2002.

---- *La responsabilità sociale dell'impresa: presupposti etici e ragioni economiche*, in Notizie di Politeia, 2003.

---- *L'impresa socialmente responsabile nell'epoca della globalizzazione*, in Notizie di Politeia, 2003.

---- *L'ancoraggio etico della responsabilità sociale d'impresa e la critica alla rsi*, in Working Paper, 2004.

---- *Responsabilità sociale delle imprese e Democratic Stakeholding*, in Working Paper, n°28, 2006.

Sitography

Bilancia, in www.lauriana.com, on 05/02/2010.

Buttarelli, in www.privacy.it, on 28/01/2010.

Cincera, in www.fabricaethica.it, on 30/09/2009.

Clean Clothes Campaign Towards regulation: different Strategies towards public regulation, in www.cleanclothes.org, on 13/06/2009.

Di Turi, in <http://www.business-humanrights.org>, on 10/02/2010.

Dichiarazione tripartita dell'OIL sulle imprese multinazionali e la politica sociale, in www.ilo.org, on 10/11/2009.

Gesualdi, in www.greenplanet.it, on 15/06/2009.

Kenyon, in www.nosweat.org.uk, on 13/06/2009.

Piras, in www.amnesty.it, on 13/03/2010

Saja, in www.cortecostituzionale.it, on 02/02/2010.

Sangalli, in www.progettocsr-sc.it, on 20/09/2009.

Schlitzer, facoltà di economia, università di Milano-Bicocca, in www.italy.peacelink.org, on 19/03/2009.

Urrata, in www.acton.org, on 10/09/2009.

Main explored Database

www.cnn.com

www.codesofconduct.org

www.csr-asia.com

www.corriere.it

www.earthrights.org

www.europapress.es

www.frc.org.uk

www.globalpolicy.org

www.labourcommission.org

www.law.suffolk.edu

www.oecd.org

www.unglobalcompact.org