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Corporate Social Responsibility (CSR) in the Ohada Law

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Abstract

CSR refers primarily to a framework idea according to which a corporation is encouraged, if not obliged, to go beyond the speculative and economic goals that benefit its members only, in order to integrate, into its decision-making process, other more holistic considerations of an ethical, social and environmental nature for the benefit of all stakeholders. CSR is a key concept that attempts to reconcile economic objectives with social, ethical and environmental considerations, with the particularity of questioning interactions between a corporation and its societal, ethical and ecological environment.

This paper has a modest, but not uninteresting, objective. First, it offers an exploratory study that sets out markers for a more exhaustive analysis of the potential for CSR in the field of law in the Ohada zone. Our study is intended to be both theoretical and pragmatic: it asks questions and suggests topics for review from a normative standpoint largely inspired by socio-economic analysis. One of the interesting features of our approach is to consider, comprehensively, a complex notion that reflects several different concerns and is crossed by various conceptual frameworks that must be re-read in an "enlightened" manner, to see how it could potentially be made operational as part of Ohada law. This previously unexplored approach could lead, in time, to the establishment of a transnational committee on CSR in the Ohada zone.

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Introduction

Globalization has led to an increase in private economic power—but of multinational corporations rather than individuals. These corporations operate planet-wide, crossing geo-political boundaries, and it is generally recognized that their ultimate economic goal is speculation, defined as the search for and maximization of profit. The role traditionally assigned to their officers is to promote the interest of member-investors, whether shareholders or partners (Friedman, 1962, 1970). This economic view of the corporate goal has been strongly mitigated, over the last fifty years, by the emerging concept of corporate social responsibility (CSR). CSRfirst attracted interest in the managerial literature (e.g., Gendron & Girard, 2013; Haynes, Murray & Dillard, 2012; Benn & Bolton, 2011; Trébulle & Uzan, 2011) before being taken into consideration in other fields of learning such as, in particular and quite recently, the law.

In simple but necessarily approximate terms, CSR refers primarily to a framework idea according to which a corporation is encouraged, if not obliged, to go beyond the speculative and economic goals that benefit its members only, in order to integrate, into its decision-making process, other more holistic considerations of an ethical, social and environmental nature for the benefit of all stakeholders.

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This previously unexplored approach could lead, in time, to the establishment of a transnational committee on CSR in the Ohada zone.

The CSR concept emerged in the United States in a defined context before gradually spreading to the rest of the world. From the outset, it has generated considerable controversyabout the role played by corporations within society and the role of the law in promoting, supervising and sanctioning violations of CSRpractices (**1**). Our examination will allow us, in the second part, to highlight the possibilities for receiving CSR into Ohada law (**2**), taking into account its specific objectives and dynamics.

1. CSR, a Socio-Economic Melting-Pot

The objective of this section is to attempt to circumscribe the controversial notion of CSR which, by its very nature, constitutes a melting-pot, a combination of several apparently contradictory or antinomic requirements. However, the essential quality of CSR is to attempt to strike a balance between the economic, social and environmental concerns connected with the life of a corporation. First, it is essential to emphasise the origins of a concept that may appear fuzzy or elusive on several levels. This study of the genesis and appearance of CSR will highlight the ambiguity of this North American concept (1.1.) and its progressive, planet-wide distribution (1.2.), while also emphasizing its contingency.

1.1. Ambiguity of the Concept

Although CSRis characterized, from a theoretical point of view, by its *additional* attribute (Lister, 2011, p. 3) in the sense that it implies that a corporation, in its relationship with society, goes beyond merely economic concerns to take into account social or environmental requirements, it still retains a degree of terminological ambiguity since CSR may designate a concept, a corporate practice, or simply a question about the relationship between a corporation and the society in which it pursues its economic activities. Similarly, CSR can be triggered by various means, whether legal or voluntary, and may stem from or be initiated by private-sector players, their officers, or the public authorities, an aspect that raises the key question of the role played by the State.

To attempt to dissipate and attenuate the difficulties defining and enriching CSR, it is fundamentally important to go back to its American origin and European re-interpretation (1.1.1.) before considering the various conceptions and controversies with which it has been associated over the years. The goal of this historical and notional exercise is, ultimately, to determine which conception of CSR is best able to meet the needs of the countries making up the Ohada zone.

1.1.1 American Origin and European Re-Interpretation

"The idea, which emerged in the form of business practices during the 19th century, was transformed into a doctrine during the 20th century and was eventually theorized as a concept in the 1950s. At the turn of the 21st century, stimulated by the new ideology of sustainable development, the concept spread to the rest of the world."(Pasquero, 2013, part. I, p.1). This description by Professor Pasquero outlines the development of CSR, which was initially developed by the US business community as a business practice, before the concept was shaped by doctrinal systematization in the mid-20th century and then propagated around the world.

Although CSRis sometimes presented as a new phenomenon, a historical review of the concept takes us back to mid-20th century North America. In the literature, the paternity of the CSR concept is assigned to Howard R. Bowen, following the publication of his influential book *Social Responsibilities of the Businessman* (1953), which laid the first conceptual foundations for the idea in the mid-1950s.

This historical work, which paradoxically has not been widely analysed (Acquier&Gond, 2007; Acquier, Gond&Pasquero, 2011), sets out CSR principles that, up to the present day, have influenced the entire research field.

Bowen was writing against a background of post-war reconstruction, a period marked by a struggle between the supporters of F.D. Roosevelt's "New Deal", who were in the minority, and the adepts of pure capitalism. The CSR framework proposed by Bowen is based on two precepts: first, that a firm's decisions should align with values that are commonly accepted in a given society and, second, that this alignment should result from a decision made by the firm in a legal and institutional framework.

Bowen's ideas were not entirely new, but drew support from the work of institutionalists on business governance (Dodd, 1932; Berle, 1931, 1932) and the discourse of corporate managers of the period who had set up new practices that resembled philanthropy but reflected the business's anchoring in the community (Abrams, 1952; Randall, 1952, as cited in Igalens&Benraiss, 2005). Already, during the 1930s, Berleand Dodd had disagreed on the objectives that should guide decisions by business administrators, the former giving precedence to shareholder benefit (1931, 1932) and the latter to stakeholder interests (1932).

To understand Bowen's work, it is necessary to consider not only Protestant ethics but also the economic model of Keynesianism, according to which markets left to regulate themselves do not always achieve optimal economic efficiency. For this reason, his conception of CSR is based on voluntary actions by a business in a defined legal and institutional framework. Two eloquent passages from Bowen illustrate the influences guiding him in his definition of CSR. First, he believed that businessmen should attempt to align their decisions with the societal environment, in the sense that they should be accountable to society for their actions:

The term *social responsibilities of businessmen* will be used frequently. It refers to the obligations of businessmen to pursue those policies, to make those decisions, or to follow those lines of action which are desirable in terms of the objectives and values of our society. […] It is assumed […] that as servants of society, they must not disregard socially accepted values or place their own values above those of society. (1953, p. 6,as cited in Acquier & Gond, 2005, p.14)

According to Bowen, the separation of ownership from management, the dispersion of shareholders and the professionalization of management were all conditions conducive to a re-examination of shareholder interest as the sole goal pursued by the managers of big business. On this point he follows in the wake of Dodd, whose work is mentioned above. Developing the ideas defined by Bowen, Heald stated in 1970 that the social legitimacy of big business is a challenge and that its characteristics provide fertile ground for the dissemination of CSR.

This overview of the development of CSR sheds some useful light on the contemporary conception of CSR and allows us to view the practices associated with it in a more nuanced way. This approach is necessary because, over the last ten years, CSR "has re-emerged as an open, multi-form concept that is still under construction." (Acquier & Gond, 2007, p. 6).

1.1.2. Controversy and Polymorphous Definitions

CSR may take several forms, which should come as no surprise since it is a general, or meta-, concept that is by its very nature vague and indeterminate and can only receive a precise definition in connection with a business or group of businesses in a specific field of activity. The most that can be said is that the way in which CSR is applied is not uniform and that any attempt to provide a definition faces a range of major conceptual difficulties.

Even today, CSR is a highly controversial subject, with at least three competing research focuses. The researchers Capron and Petit have revealed the "three stages of CSR" (2011)[3], echoing Michel Doucin who explains that the concept "did not drop from the sky."(2011, pp. 31-39).

The first research focus is based on utilitarian ethics. It first appeared in the United States in the 1970s, and was designed to respond to "the crisis in the Fordian model" by proposing a "utilitarian strategy"(Capron & Petit, 2011, para. 19). Several sub-currents are associated with this conception, including the "marketing" of "social aspects" through the application of a cost/benefit calculation, since the business's interest in behaving in a socially responsible way is rewarded economically.

From this viewpoint, CSR practices are guided solely by the business's economic goals. As a result, CSR is dangerous and fundamentally subversive, since "the social responsibility of business is to increase its profits" (Friedman, 1970). This is the line followed by the partisans of Adam Smith, who believe that the invisible hand of the economy must guide a business's actions and that it is a poor allocation of resources for a business to play a role designed for the State. As a result, a business is accountable only to its shareholders. This approach does not appear to be sufficiently nuanced, given the current context that continually demonstrates the social and environmental limits of the globalization of economic trade.

The second research focus is diametrically opposed and based on the business ethics inherited from the "paternalism" of Bowen and his successors.[4]

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[3]Michel Capron is also co-author with F. Quairel - Lanoizelée of the book: *La responsabilité sociale d'entreprise* (2010).

[4]"The "ethical" conception is inherited from the business paternalism of the 19th century. Based on moral and religious values, it emerged in the United States in the 1950s. It relies on the personal ethics of the business director: the enterprise is considered as a "moral being" that must do "good", in other

It takes as its starting-point a belief in a business's social benevolence and the fact that it should make its decisions on the basis not of a single-minded pursuit of economic profit but rather to improve human wellbeing in a given society. This approach can be traced back to the philosophy of Kant, according to which benevolence must be intrinsic to the act itself. From this standpoint, the establishment of CSR practices by a business must be disinterested and must not target an economic reward. This is an ethically and morally interesting position that is unfortunately unrealistic and does not provide the best theoretical foundation for a broader dissemination of CSR in the business world of today.

The third research focus on CSR strikes a balance between the first two. This is the "stakeholder approach", which suggests that businesses should establish CSR practices for the benefit of all stakeholders, whether shareholders, workers, or the supporters of environmental protection and social development, and should include consideration for human rights. In this sense, CSR appears to be a contingent concept under which a business has to base its decisions on economic, social and environmental values simultaneously, with the end result of contrib uting to a healthier form of economic growth that is sustainable over time. The stakeholder approach is the one that appears to us to be the most nuanced and to offer the most promise for guiding the implementation of CSR in an economic space such as OHADA.

This conception, based on "sustainability" in order to reconcile businesses with society (Capron & Petit, 2011, para. 30), emerged in the 1990s thanks, in particular, to the work of Karl Polanyi (1983).

1.2. Worldwide Dissemination and Contingency of the CSR Concept

Has the interaction between CSR and sustainable development led to the creation of a stronger theoretical framework for CSR, if a theoretical framework is indeed possible? The answer to this question requires a more nuanced analysis (1.2.1).In addition, what should we think of voluntary CSR standards? The section immediately following (1.2.2) deals with the question of CSR, law and non-law.

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words obey biblical precepts, first by managing its property responsibly in a way that respects the universal destination of property (by not infringing on the rights of others) and, second, by taking on the duty of assisting the deprived (principle of charity)"(Capron & Petit, 2011, para. 12).

1.2.1. The Interaction with Sustainable Development: a Conceptual Enrichment?

As set out above, the traditional approaches to CSR do not refer to or claim any connection with sustainable development. The "coupling" of CSR with sustainable developmentis widely mentioned in the literature, even though it can only really be traced back ten years and does not represent a conception of CSR that is "universally shared" (Quairel& Capron, 2013).

Taking a middle line, CSR requires businesses to take non-economic interests, one of which is the environment, into account. Some authors note that "there exists […] in addition to CSR, stakeholders' social (and environmental) responsibility (SSR)", federated by the reference to sustainable development (Depret, 2009). The stakeholders in question are the state and local authorities, commercial public services, the main influence groups[5]and businesses. Future generations and biodiversity are also taken into account (Doucin, 2011, p. 37).At this point, it is not surprising to see the notion of CSR associated with sustainable development, especially since the 1991 Rio Conference on Environment and Development (United Nations General Assembly, 1992),which marked an important change in the way in which States, businesses and individuals must now consider the relationship between economic activities and the environment.

However, history has shown that weak sustainability has become the consensus position. When the World Commission on Environment and Development stated that we must now turn to a form of "development that meets the needs of the present without compromising the ability of future generations to meet their own needs", it did not rank the economic, environmental and social objectives that stakeholders should pursue to achieve this goal.[6]It would be possible to think, at first, that the "blanket" concept of sustainable development (Vaillancourt, 2005, p. 25; Beckerman, 1995) cannot provide a structural foundation for CSR.

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[5]This refers to international organizations and NGOs, consumer organizations and union organizations.

[6]The concept of sustainable development is intrinsically anthropocentric. However, sustainability, as originally envisaged by Hans Von Carlowitz, and three hundred years later by the drafters of the 1982 *Earth Charter*, primarily targeted the *sustainability of the natural world*, on the basis that humankind is an integral part of this natural environment. This concept of *Strong Sustainability* has gradually lost ground to the concept of *Weak Sustainability* promoted by the Brundtland Report, leading to a consensus in the principles of the 1992 *Rio Declaration on Environment and Development*.

However, when we consider that both the strong and weak conceptions of sustainable developmentare based on the underlying principle of integration, we can only conclude that the concept can still be used to guide CSR practices. According to the principle of integration, the economy, in particular through trade, and the environment must provide *mutual reinforcement* for each other. This is the objective set out in the preamble to the Marrakech Agreement establishing the World Trade Organization (WTO), which mentions that one of the goals pursued by the WTO is sustainable development. From this viewpoint, sustainable developmentcan serve as a "conceptual matrix"[7] or "meta-principle exercising a form of interstitial normativity"(Lowe, 1999, pp. 29-31) for governmental and non-governmental decision-makers.

In addition, one of the "key issues in the coupling of CSR and sustainable developmentis the political role attributed to big business in international regulation in the absence of any true worldwide governance and international business law." (Quairel& Capron, 2013, p. 125) In this way, the conceptual framework for sustainable development helps harden the theoretical foundation and provides more legitimacy for the concept of CSR and a broader dissemination of CSR practices. Furthermore, sustainable developmentalso benefits from CSR, since in the absence of any international law governing business activities, the operationalization of the concept of sustainable developmentrequires companies to take greater responsibility through voluntary practices that comply with standards generated by private-sector normalization.

The United Nations has become involved in activities to promote CSR through the Commission on Sustainable Development, which was established under the supervision of the UN Economic and Social Council to follow up on the 1992 Rio Conference. In 1997, the General Assembly of the United Nations addressed the drafting of a program of work for the Commission on Sustainable Development with input from "business and industry groups on the elaboration, promotion and sharing of sustainable development practices and the promotion of corporate responsibility and accountability." (United Nations General Assembly, p. 33)

[7]The twenty-seven principles of the *Rio Declaration* can be seen as the various facets of the "shared reference framework" for sustainable development.

1.2.2. The Interaction between CSR and the Law: Legal Meanders and "Textures"[8]

Today, it is generally recognized that the interaction between CSR and the law involves a degree of complexity[9]and poses a series of challenges for legal normativity, which it places in a "new wrapper". CSR, as originally conceived, creates a "new normative space" in which *hard law* cohabits with *soft law* in an interpenetrating mix that creates links of supervision, dependency or autonomy. Because of this, normative networks take the place of the legal pyramid, and the continuum of the interaction between CSR and the law can range from encouragement, through incitation to constraint. Encouragement and incitation are generally voluntary and involve no sanctions, taking the form of "soft law" which has no obligatory effect and where application is not enforced through constraint. If constraint is introduced, the norms have an obligatory aspect and take the traditional form of binding regulations.

Even today, the entrepreneurial practices and norms associated with CSR, widely used and imitated by competing businesses in the same sector, often produce—fortunately or unfortunately, depending on the spectator's point of view—a form of law that is as soft as *soft law* when it ventures, through percolation, into the territory of *hard law*. For jurists, the lack of positive law is destabilizing, but it is less so once a few ways have been found to allow CSR to interpenetrate the law.

In fact, CSR and the law can maintain a close relationship, with several variations placed along a continuum.

In the first variation, the law is used to formally structure CSR practices. The areas where CSR applies are all, without exception, subject to obligations specified by government regulation. In this approach, legislation compels businesses to adopt socially-responsible practices.

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[8] In its decision *Gabíkovo-Nagymaros Project (Hungary/Slovakia)*, the ICJ, after referring to the "new norms and standards" developed in response to the relation between economic activity and environmental protection, stated that "This need to reconcile economic development with protection of the environment is aptly expressed in the concept
of sustainable development." (para. 140).

[9] The relation between CSR and the rule of law is extremely complex, since in addition to the proximity and dialogue targeted, it may also result from a demarcation and even a marginalization of the rule of law. On this matter, refer to Isabelle Daugareith (2013).

This is the case, for example, for the well-known "*comply or explain*" rule applicable to company governance, which requires companies to act transparently and makes them accountable for the social and environmental impact of their practices through *reporting*.[10] In this way, they become socially accountable.

The second way in which the links between CSR and the law becomes manifest is through the indirect interpenetration of CSR with the law, without any formal upstream legal rules governing CSR practices. This category includes public calls for tenders, which incorporate CSR practices by reference as requirements for the validity of the tender. Another example is offered by environmental management systems (EMSs) (Halley & Boiral, 2008; Ruihua & Bansal, 2003, p. 1050; Boiral, 2007), developed in the 1970s in the wake of the first environmental legislation. The best-known are the Responsible Management program and the ISO 14001 standard. Repeated EMS auditing helps prevent violations of the law and makes investors, shareholders, lenders, insurers, lease-givers and other partners of the business aware of the level of environmental compliance of its activities (Halley &Boiral, 2008, p. 655). The threat of penal or civil legal proceedings also plays a role in the motivation of businesses to set up a properly documented EMS. The documentation of environmental and social actions is at the core of the internal management system and can help the business if it has to plead due diligence in legal proceedings for a violation of an environmental law. The documentation, and its periodic verification, can be used to show that the business and its directors have acted diligently and have not been negligent (Saxe, 1997, p. 80; Halley, 1999, p. 637; Swaigen, 1992, p. 132-137; Boy, 1998, pp. 186-190; Farjat, 1998, pp. 161-164). This is another example of a CSR practice introduced into the field of law. What would result from the interaction between CSR and the law in the Ohada zone? This is the focus of the second part of this paper.

2. The Incorporation of CSR in Ohada Law: One Interaction, Two Ideas

Now that the notion of CSR has been placed in its historical and conceptual context, this part of the paper will look at how, in practical terms, CSR could be incorporated into normative law in the Ohada zone. Two questions of a prospective nature arise immediately.

[10] On this matter, refer to Sarbanes-OxleyAct (2002), French law known as Grenelle II (2010) and article L. 225-37 of the French *Code de commerce*.

First, *on what normative basis* could the CSR idea be incorporated into Ohada law? Second, *how* and using what normative instrument? To answer the first question we need to scrutinize the normative and teleological foundations for Ohada law while thinking about how to incorporate CSR (2.1.); whereas the solution to the second question will probably come from a review of possible receptacles (2.2.). It goes without saying that all the potential solutions scattered throughout this part must take into account the objectives, specific features and dynamics of Ohada law.

2.1. The Idea of CSR in Ohada Law: Foundations and Receptiveness

By its construction[11]and nature[12], Ohada law is an innovative model that is not based, in a normative manner, on economic integration, but instead creates a legal and judicial zone. The Port Louis Treaty[13]established, in an unprecedented and original way, a legal and judicial zone within which various non-exhaustive matters belonging in principle to the field of business law were standardized[14]

Across various states in Sub-Saharan Africa[15], these states, while belonging to this new legal and judicial zone, also remain members of various regional and community organizations.

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[11]Article 1 of the Ohada Treaty states that its objective is the harmonisation of business laws in the Contracting States by the adoption of common rules described in Article 5 as "Uniform Acts". The Uniform Acts passed to date related to (1) commercial law, (2) commercial companies and economic interest groups, (3) securities, (4) simplified recovery procedures and measures of execution, (5) collective proceedings for wiping off debts, (6) arbitration, (7) the organization and harmonization of undertakings' accounting systems, (8) contracts for transportation by road, and (9) cooperative societies.

[12]Ohada does not establish either a customs union or a common market within the meaning of WTO law; it is an original organization for legal integration of the 3rd type, an "inter-state organization that is a source of inter-state law". On this matter, refer to *Droit, liberté, paix, développement. Mélanges MadjidBenchikh*. (Doumbé-Bile, 2011).

[13]Ohada was created by the *Treaty on the Harmonization of Business Law in Africa*(1997) *J.O. OHADA, 4*, p. 1, signed at Port Louis (Mauritius) on October 17, 1993, which came into force in 1995. It was revised by the Treaty of Quebec in Canada dated October 17, 2008, which came into force on March 21, 2010.

[14] Although the Port Louis Treaty mentions the idea of harmonization, it has been shown that the process is one of standardization rather than harmonization. On the distinction between the degrees of legal integration resulting from harmonization, unification and standardization, see Antoine Jammeaud (1998).

[15]Ohada is currently composed of seventeen (17) states mainly in French-speaking Africa (Benin, Burkina-Faso, Cameroun, Congo Brazzaville, Côte-d'Ivoire, Gabon, Guinea-Bissau, Equatorial Guinea, Mali, Niger, Central African Republic, Chad, Togo, Comoros). The Democratic Republic of Congo is the last state to have joined Ohada, on July 13, 2012.

2.1.1. Economic aims of Ohada Law

It is commonly accepted that the main objective of Ohada is economic in nature, since it is intended to encourage economic development in member countries by stimulating foreign investment through the creation of a secure legal and judicial zone. As a result, the aims of Ohada law can be considered as a triptych: (1) to establish legal and judicial security; (2) to enhance attractiveness; and (3) to ensure economic development. A statement by one of the "founding fathers" of Ohada, the late Honourable Kéba M'baye, reveals much about the key economic objective underlying Ohada law: "Ohada is a legal tool designed and created by Africa to serve the cause of economic integration and growth." (2012, p. 9). This teleological and economic goal for Ohada law is confirmed by the doctrine and almost unanimously accepted (Xerexhe, 1999). As a tool for economic development, Ohada aims to "regain investor trust and secure legal relationships to ensure sustainable growth." (Diakhate, 2003)

2.1.2. The Receptiveness of Ohada Law to the Social Dimension

When joining the aims of Ohada with the objectives of CSR, one question needs to be asked: will a normative framework that enables the promotion of CSR also increase legal security and economic attractiveness in the Ohada zone, while helping to make businesses more innovative and more competitive? In our view, the answer can only be affirmative, for three reasons. First, the incorporation of CSR into Ohada law will at last open it up to the possibility of social teleology, which is indispensable at the dawn of a new century; second, the momentum appears appropriate, since it coincides with a pause to take stock of the situation in several Ohada projects; last, the international context of which Ohada is a part, and from which it could avoid being excluded, makes this receptiveness necessary.

To begin with, the development of legal norms on the integration of social and environmental concerns into economic activities is essential if Ohada law is to strengthen the growing level of trust in the economies of its member countries. This appears to be necessary in order to respond to the needs of *modernity* and *adaptability* subscribed to and emphasized in the Port Louis Treaty (Treaty on the harmonisation of business law in Africa, 1993, Preamble para. 1, 4 and art. 2) to ensure receptiveness and the effectiveness of the Ohada rules (Gatsi, 2006; Kodo, 2010).

The incorporation of CSR into Ohada lawmay make a major contribution to its modernity and adaptability, in particular if a conception of CSR based on the stakeholder theory is adopted.

According to the stakeholder theory (Freeman, 1984), a business must consider a range of interests in its decision-making process including, in a holistic way, all stakeholders such as shareholders, workers, the State, local communities, consumers and, in short, all citizens. The interests protected will go beyond economic and speculative interests to include social and environmental aims such as protection for the environment, social development and human rights, which will help make economic growth sustainable over time.

The stakeholder approach appears to us to be the most nuanced and the most suitable to guide the establishment of CSR in a zone such as the Ohada zone, by seeking convergence between the interests of all stakeholders, among which are social wellbeing and the environment. This reflects the contingency of the notion of CSR previously referred to in the first part of this paper. Contingency does not need to be discussed here and it is admitted that to better reflect the specific features of the economies of developing countries such as the Ohada nations, characterized by increasing vulnerability, CSR must focus more on primary needs (food, water supply, basic social services, etc.), the strengthening of group and individual work relationships, protection for the socio-cultural and ecological environment, the fight against corruption and consideration for the specific needs and aspirations of local communities.

Secondly, the *momentum*, which coincides with a phase of stagnation (Pougoué&Elongo, 2008) or in-depth reflection (Toé, 2008, p. 32) about Ohada projects and plans[16], may offer an opportunity for opening up the law in this legal and judicial zone to take account of a key social dimension that until now has been somewhat neglected. This period of reflection concerning certain Ohada projects can be put to good use to include a review of the aims of Ohada law and a later receptiveness to guidelines that include social, environmental and human rights aspects—especially since the Treaty that established Ohada offers membership to any

[16]Several Uniform Actprojectslaunched in recentyears are currently on hold, such as the *Projet d'acte uniforme relatif au droit du travail*, *au droit des contrats*, *au droit de la consommation* etc.

member State of the African Union,[17]even one that has not signed the treaty. Membership is also open to any State that is not a member of the African Union, as specified in the first paragraph of Article 53 of the constituting Treaty setting out Ohada's pan-African vocation.

Third, an examination of the international context shows that the CSR concept has been mentioned, since the start of the 2000s, as one that can contribute to economic and social development. Sustainable developmentis founded, in fact, on the principle of integration and therefore on the necessity, for international organizations, regional organizations such as Ohada, States and businesses, of incorporating social and environmental concerns when making economic decisions. Based on the principle of integration, the economy, the environment and social development must *strengthen each other*. This is the objective set out in the preamble to the *Agreement Establishing the World Trade Organization* (WTO), which mentions that sustainable development is one of the goals pursued by the WTO Agreement. The mutual reinforcement of development and the environment provides extra motivation to incorporate CSRwithin the Ohada zone. The conceptual framework for sustainable developmentis another factor legitimizing the CSR concept and a broad dissemination of its practices.

In June 2000, the OECDalso noted the link between CSRand sustainable developmentwhen it adopted the *OECD Guidelines for Multinational Enterprises*, updated in 2011.

The Guidelines were preceded by the *OECD Declaration on International Investment and Multinational Enterprises*.[18] The OECD Guidelines for Multinational Enterprises are the most complete document existing today on the subject of corporate responsibility. The 43 members governments—representing all regions of the world and 85% of direct foreign investment—made a commitment to encourage enterprises operating in their territory to comply with a set of widely recognized principles and standards, wherever their activities are conducted, designed to ensure responsible behaviour.

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[17] Formerly known as the OAU: Organisation of African Unity, created on May 25, 1963 in Addis Abéba, Ethiopia. It later became the African Union.

[18]The Declaration was adopted by the governments of the OECD member countries on June 21, 1976. It was revised in 1979, 1984, 1991, 2000 and 2011. (http://www.oecd.org/fr/daf/inv/politiques-investissement/declarationdelocde.htm). The Declaration include guidelines : *National Treatment instrument*, *Conflicting requirements* and *International investment incentives and disincentive.*

The European Commission, in turn, formally recognized the link between CSR and the implementation of sustainable development in a 2002 publication, preceded by a green paper (July 2001) called "Promoting a European framework for Corporate Social Responsibility", in which it defines CSR as "a concept whereby companies integrate social and environmental concerns in their business operations and in their interaction with their stakeholders on a voluntary basis."In July 2001, the European Commission tabled its green paper, "Promoting a European framework for Corporate Social Responsibility". It was intended, first, to launch a debate on the concept of corporate social responsibility (CSR) and, second, to explore ways to build a partnership for the development of a new European framework for the promotion of corporate social responsibility. As we noted above, the Green Paper defined CSR as "a concept whereby companies integrate social and environmental concerns in their business operations and in their interaction with their stakeholders on a voluntary basis," since they are increasingly aware that responsible behaviour leads to sustainable commercial success. CSR also involves the socially responsible management of change within an enterprise. This result is achieved when the enterprise makes an effort to strike a balanced, generally acceptable compromise between the requirements and needs of all the stakeholders. If enterprises can manage change in a socially responsible way, they will have a positive impact at the macro-economic level.

Last, more recently, in 2012, in the *Final Report of the United Nations Conference on Sustainable Development, Rio+20*, entitled "The Future We Want", the United Nations declared its support for "national regulatory and policy frameworks that enable business and industry to advance sustainable development initiatives, taking into account the importance of corporate social responsibility" (par. 46 of the Report). In other words, the United Nations explicitly encourages regional organizations such as OHADA to introduce the necessary institutional and legal mechanisms to promote the emergence and adoption of CSR practices by enterprises.

2.2. Procedure for the Incorporation of CSR as Part of OHADA Law

How can CSR standards be incorporated into Ohada law? We will attempt to answer this question in this sub-section, where we will show mainly that the current Ohada legal corpus does not need to be rearranged or changed to act as receptacle for a CSR norm.

Following the revision of the constituting Treaty in 2008 in Quebec City, Canada, an opening for a CSR norm within the body of Ohada law can be found in Article 27 (2.2.1.). After that, the content of the norm will have to be determined (2.2.2.).

2.2.1. Opening Provided by Article 27 of the Revised Treaty

The incorporation of CSR provisions into Ohada law could use the opening providing by Article 27 of the Ohada Treaty. The 2008 revision created an opportunity by establishing a Conference of Heads of State and Government to "rule on any matter relating to the Treaty". In our view, given the objective of Ohada which is to organize the harmonization of business law in Africa, this text empowers the new organ, the Conference of Heads of State and Government, to introduce provisions on CSR since they are supplemental to business law, or may simply be included under Article 2 of the Treaty as an "other matter".

The same power to rule on any matter relating to the Treaty also provides an opportunity to establish a specialized CSR body. Proposals to this effect were made during the CEMAC. The creation of a sub-regional CSR rating agency was one of the recommendations made at the workshop held in Congo. In connection with the creation and implementation of a CSR standard for extraction industries, a "CSR policy guide" is appended to the overview of the proceedings of the national workshop held last July in Yaoundé (CEMAC, 2013).

The 2nd "International Forum for Corporate Social Responsibility (CSR) Pioneers and Inclusive Green Growth in Africa" was held in Tunis in 2012. The Tunis proceedings notes, in paragraph 7, that "since the CSR approach is only just emerging worldwide, the construction of a vision of economic, social and environmental responsibility for enterprises in Africa will be more inclusive if it takes into account the specific features of the land, the context, the national legislations, the international references and the related jurisprudence." (Institut Afrique RSE & CONECT, 2012).

2.2.2. Possible Normative Instruments

Since "CSR has emerged as a field conducive to legal innovation in a context of globalization" (Daugareith, 2013), the normative instruments suitable for inclusion in Ohada law should be available. Two hypotheses are possible, and we prefer the second, more ambitious, of the two.

The first hypothesis, which can be considered "non-ambitious", would involve introducing private international CSR norms into Ohada law by including a reference in the legislative text. The second, more ambitious strategy, which we support, would be to adopt a Charter along with CSR Guidelines for the Ohada zone following discussions coordinated by a transnational CSR committee and consultations with stakeholders in the member countries.

The effectsof this legal instrument on Ohada law and the organizations to which it would apply (state-owned corporations, international enterprises) would be based on the values expressed in the Charter by the 17 Ohada member states. The adoption of an Ohada CSR Charter, along with an Ohada CSR strategy and plan of action, would form part of the international commitments made by the Ohada member countries to promote economic development, human rights and environmental protection. It would contribute to the objective of introducing methods to identify the CSR practices that could be used to attract investment to Africa, and to increase the value of economic sectors in order to increase investor and stakeholder confidence. The inclusion of CSR as a component of Ohada law must be discussed and structured in a way that ensures that the Ohada Charter, Strategy and Plan of Action on CSR reflect trends in the various economic sectors, their current and future growth, and current and planned foreign investment in each sector.

A strategy designed to influence public policy, laws, regulations and programs must propose strategic guidelines for the planning and implementation of institutional and other instruments to facilitate the establishment of CSR practices, before the practices are developed by enterprises. CSR, and its ethical, environmental and economic values, could in this way be placed at the heart of the economic development of Ohada member countries.

By seeking to give concrete expression to the objectives of an Ohada Charter on CSR, the Organization must introduce guidelines, upstream, to place the social and environmental responsibility of enterprises not as a constraint on economic development, but rather as a key element in the economic, social and environmental development of the member states that will contribute to the wellbeing of their population. The initiative will help give effect to Article 24 of the *African Charter on Human and Peoples' Rights* by guaranteeing the right of peoples to a satisfactory environment, and the recent *African Charter on Democracy, Elections and Governance* ratified by some Ohada member states. Article 33 of the Charter refers to enterprises and states that "State Parties shall institutionalize good economic and corporate governance through, inter alia: (6) Equitable allocation of the nation's wealth and natural resources; (7) Poverty alleviation; (8) Enabling legislative and regulatory framework for private sector development; (9) Providing a conducive environment for foreign capital inflows".

The wellbeing of African populations requires enterprises to take responsibility for worker health and safety and the need to hire part of the national labour force, and to take into account the services that the environment provides free of charge for the private sector. This would assist the development of several economic sectors in the member countries, such as mining, agriculture and tourism. The implementation of the objectives of a possible *Ohada CSR Charter*, the key guidelines in the *Ohada CSR Strategy* and *Plan of Action* would enhance the sustainability of several economic sectors in this part of the continent. Concern for the wellbeing of workers and the protection of the environment are increasingly important given the growing power of the emerging economies that invest in Africa and that will be able to do so while undertaking to respect human rights, social development in Africa, and the environment, three dimensions that, when they are taken into consideration, help make investments more secure.

In a new approach based on CSR, the efficiency of investments and economic development models and practices must no longer be measured solely in terms of economic effectiveness but also in terms of their ability to satisfy stakeholders by meeting human needs and protecting the environment. Over the last ten years, CSR "has re-emerged as an open, multi-form concept that is still under construction" (Acquier&Gond, 2007) and Ohadacould become a player in this construction project in Africa's business community.

To achieve this, the plan of action accompanying the Ohada CSR Charter and Strategy must target comprehensive, rather than sectoral, goals to ensure that government departments and agencies work to include, as part of their various economic activities, objectives to promote CSR practices by enterprises. These concerns must be reflected in the institutional practices established or modified by Ohada.

Conclusion

As this summary review has shown, Ohada law, thanks to its openness and malleability, would be able to incorporate and integrate norms based on CSR, given the contingency of a concept characterized as a socio-economic melting-pot. In addition, the review of the origin and evolution of CSR demonstrates its adaptive capacity and its ability to take into account the social, cultural and economic realities of the zone in which it applies. The study of CSR as a notion revealed one of its essential attributes, namely *additionality*.

The interaction betweenOhada lawand a mechanism based on CSRdoes not contradict the worldwide movement towards co-regulation, characterized by cohabitation and coexistence and aimed at a balance between voluntary and restrictive norms and between public and private initiatives that recalls the state imperium. This mixity and hybridization constitute the essence of the postmodern law governing CSR, as attested by this statement by a specialist in the field:

The normativity introduced by supra-national CSR may be seen not as a form of degeneracy of the law but as participation in the evolution of the law, a right in gestation, *in statu nascendi*. It is possible to consider that these new forms of regulation extend the scope of the law.

The international *soft law* on which CSR is currently founded makes it possible to explore a new field for legal regulation, while at the same time expressing the awareness of the international community of the need for legal regulation of the activities of globalized business. (Daugareith, 2013)

Because of this, the normative principles contained in a future Ohada CSR Charter should be based on the legitimate aspirations of the African population with respect to transparency, good economic governance, fair access to basic necessities, water and food, the sustainable management of abundant natural resources, and improved living conditions in local communities, in particular through involvement in the decision-making process and economic activities of multinational enterprises.

References

Abrams, F.W. (1952). Management's Responsibilities in a Complex World.Harvard Business Review, 29, 9-34.

Acquier, A., & Gond, J.P. (2007). Aux sources de la responsabilité sociale de l'entreprise : à la (re)découverte d'un ouvrage fondateur, Social Responsabilities of the Businessman d'Howard Bowen. Finance Contrôle Stratégie, 10(2), 5-35.

Acquier, A., Gond,J.P., &Pasquero, J. (2011). Rediscovering Howard R. Bowen's Legacy. The Unachieved Agenda and Continuing Relevance of Social Responsibilities of the Businessman. Business Society, 50(4), 607-646.

Beckerman, W. (1995). How Would you Like your 'Sustainability', Sir? Weak or Strong?A Reply to my Critics.Environmental Values, 4(2), 169-179.

Benn, S., & Bolton, D. (2011) Key Concepts in Corporate Social Responsibility. London, Thousand Oaks, United Kingdom : SAGE Publications.

Benyekhlef, K. (Ed.). (2008). Une possible histoire de la norme : les normativités émergentes de la mondialisation. Montréal, Québec : Éditions Thémis.

Berle, A.A. (1931). Corporate Powers as Powers in Trust.Harv. L. Rev., 44(7), 1049-1074.

Berle, A.A. (1932). For Whom Are Corporates Managers Trustees: A Note. Harv. L. Rev., 45(8), 1365-1372.

Berns, T. (2007). Si les entreprises ont une âme. In T. Berns& al. (Eds.), Responsabilités des entreprises et corégulation(pp. 51-78). Bruxelles, Belgium :Bruylant.

Boiral, O. (2007). Corporate Greening through ISO 14001: A Rational Myth?Organization Science, 18(1), 127-146.

Bowen, H. R. (1953). Social Responsibilities of the Business Man. New York, NY : Harper &Brothers.

Boy, L. (1998). La valeur juridique de la normalisation. In J. Clam &G. Martin (Eds.), Les transformations de la régulation juridique (p. 183). Paris, France : Librairie générale de droit et de jurisprudence.

Capron, M., &Quairel-Lanoizelée, F. (2010). La responsabilité sociale d'entreprise. Paris, France : La Découverte.

Capron, M., & Petit, P. (2011). Responsabilité sociale des entreprises et diversité des capitalismes. Revue de la régulation, 9(1). Retrievedfrom http://regulation.revues.org/9142

CEMAC. (2013). Projet de création et de mise en œuvre d'un standard RSE pour les industries extractives en zone CEMAC. Retrieved from http://www.cemac.int/sites/default/files/synthe%CC%80se_travaux_atelier_yaounde%CC%81.pdf

Chevallier, J. (1998). Vers un droit post-moderne? Les transformations de la régulation juridique.Revue de droit public,(3), 659-690.

CIHEAM (2012). La diète méditerranéenne pour un développement régional durable. Paris, France : Presses de Sciences Po.

Commission européenne. (2001). Promoting a Europeanframework for Corporate Social Responsibility (COM 366).

Commission européenne. (2002).La responsabilité sociale des entreprises : une contribution des entreprises au développement durable. Luxembourg : Office des publications officielles des Commissions européennes.

Daugareith, I. (2013). Le droit à l'épreuve de la RSE.In C. Gendron & B. Girard (Eds.), Repenser la responsabilité sociale de l'entreprise. L'école de Montréal(Chap. 11). Paris, France : Armand Colin.

Depret, M.-H. & al. (2009).De la responsabilité sociale des acteurs. Marché et organisations,1(8), 13-37.

Depret, M.-H., Le Masne, P., &Merlin Brogniart, C.(2009).Développement Durable et Responsabilité Sociale des Acteurs. L'Harmattan.

Diakhate, M. (2003). Les procédures simplifiées et les voies d'exécution : la difficile gestation d'une législation communautaire.Retrievefrom www.ohada.com.

Dodd, E.M. (1932). For Whom Are Corporate Managers Trustees ?Harv. L. Rev.,45(7), 1145-1163.

Doucin, M. (2011). La responsabilité sociale des entreprises n'est pas un concept tombé du ciel. In F.-G.Trébulle& O.Urzan (Eds.),Responsabilité sociale des entreprises. Regards croisés Droit et Gestion(pp. 31-39). Paris, France : Economica.

Doumbé-Bille, S. (2011). À propos de la nature de l'OHADA.In S. Doumbé-Bille, H. Gherari & R. Kherad (Eds.), Droit, liberté, paix, développement. Mélanges Madjid Benchikh(pp. 423 et s). Paris, France : Pedone.

Farjat, G. (1998). Nouvelles réflexions sur les codes de conduite privée. InJ. Clam & G. Martin (Eds.), Les transformations de la régulation juridique (p. 151). Paris, France : Librairie générale de droit et de jurisprudence.

Freeman, R.E. (1984). Strategic Management : A Stakeholder Approach. Boston, Mass : Pitman.

Friedman, M. (1962). Capitalism and Freedom. Chicago, Ill : University of Chicago Press.

Friedman. M. (1970, September 13). The social responsibility of business is to increase its profits.New York Times Magazine, 32-33.

Gatsi, J. (Ed.).(2006). L'effectivité du droit de l'Ohada. Yaoundé, Cameroon : Presse universitaire d'Afrique.

Gendron, C., & Girard, B. (Eds.). (2013). Repenser la responsabilité sociale de l'entreprise. L'école de Montréal. Paris, France : Armand Colin.

Halley, P. (1999). La vérification environnementale : réflexions sur l'émergence des modes d'autorégulation. C. de D., 40(3), 621-643.

Halley, P., &Boiral, O. (2008). Les systèmes de gestion environnementale au Canada: enjeux et implications pour les politiques publiques de l'environnement. McGill LJ, 53, 649-685;

Haynes, K., Murray, A., & Dillard, J. (2012) Corporate Social Responsibility : A Research Handbook. New York, NY :Routledge.

Igalens, J., &Benraiss, L. (2005, September). Aux fondements de l'auditsocial : Howard R. Bowen et les Églisesprotestantes. Actes de la 23ème Université d'été de l'Audit Social,Lille, France. Retrieved from http://ias2005.free.fr/index.php?option=com_content&task=view&id=21&Itemid=50

Institut Afrique RSE & CONECT. (2012). Manifeste de Tunis. Retrieve From http://www.institut-afrique-rse.com/images/PDF/Manifestedetunis.pdf.

Jammeaud, A. (1998). Unification, uniformisation, harmonisation, de quoi s'agit-il? In F. Osman (Ed.), Vers un code européen de la consommation(pp. 35-55). Bruxelles, Belgium: Bruylant.

Kodo, M.J.V. (2010). L'application des Actes uniformes de l'Ohada. Louvain, Belgium :AcadémiaBruylant.

Lister, J. (2011). Corporate Social Responsibility and the State. International Approaches to Forest Co-Regulation. Vancouver, British Columbia : UBC Press.

Loi n° 2010-788 du 12 juillet 2010 portant engagement national pour l'environnement, 2010, NOR : DEVX0822225

Lowe, V. (1999).Sustainable Development and Unsustainable Arguments.In A. Boyle & D. Freestone (Eds.), International Law and Sustainable Development : Past Achievements and Future Challenges(pp. 29 à 31). Oxford, United Kingdom: Oxford University Press.

Mbaye, K. (2012). Preface. In J. Issa-Sayegh, P.-G. Pougoué& F. M. Sawadogo (Eds.), OHADA: traité et actesuniformescommentés et annotés (4th ed.). France :Juriscope.

Pasquero, J. (2013). La responsabilité sociale de l'entreprise : trajectoire d'une idée. In C. Gendron & B. Girard (Eds.),Repenser la responsabilité sociale de l'entreprise. L'école de Montréal (Part I). Paris, France : Armand Colin.

Polanyi, K. (1983). La grande transformation : aux origines politiques et économiques de notre temps. Paris, France : Gallimard.

Pougoué, P.-G., &Elongo, Y.R.K. (2008). Introduction critique à l'Organisation pour l'harmonisation en Afrique du Droit des Affaires. Presses Universitaires d'Afrique.

Quairel, F., & Capron, M. (2013). Le couplage "responsabilité sociale des entreprises" et "développement durable" : mise en perspective, enjeux et limites. Revue Française de Socio-Économie, 1(11), 125-144. Retrievedfrom http://www.cairn.info/revue-francaise-de-socio-economie-2013-1-page-125.htm

Ruihua, J.J., &Bansal, P. (2003).Seeing the Need for ISO 14001.Journal of Management Studies, 40(4), 1047-1067.

Sarbanes-Oxley Act of 2002, Pub.L. 107–204, 116 Stat. 745

Saxe, D. (1997). Voluntary Compliance: How Can Regulators Make It Work? Environmental Liability, 5, 79.

Swaigen, J. (1992). Regulatory Offences in Canada: Liability & Defences. Toronto, Ontario : Carswell.

Thibierge, C. (Ed.). (2009). La force normative : naissance d'un concept. Paris, France, Bruxelles, Belgium : LGDJ et Bruylant.

Toé, J.Y. (2008). La problématique actuelle de l'harmonisation du droit des affaires par l'OHADA.Revue de droit uniforme,13(1-2), 23-36.

Treaty on the harmonisation of business law in Africa, Oct. 17, 1993, J.O. OHADA, 4.

Trébulle, F.-G., & Uzan, O. (Eds.). (2011)Responsabilité sociale des entreprises. Regards croisés droit et gestion. Paris, France : Economica.

United Nations General Assembly. (1992). Rapport de la Conférence des Nations Unies sur l'environnement et le développement : Déclaration de Rio sur l'environnement et le développement (A/CONF.151/26 vol. I).

United Nations General Assembly. (1997). Recueil des résolutions et décisions du « Sommet planète Terre + 5 (19e session, supp. 2, A/S/19/33). Retrieved from http://www.un.org/fr/documents/view_doc.asp?symbol=A/S-19/33

Vaillancourt, J. (2005). Penser et concrétiser, le développement durable. Écodécision, 15, p. 24-29.

Xerexhe, E. (1999). L'intégration juridique comme facteur d'intégration régionale.Revue burkinabé de droit, 39-40, 21.