

# *An Inquiry into Responsible Business in a Neoliberal Age*

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# Contents

<b>Preface</b>	<b>IIIIV</b>
<b>Acknowledgements</b>	<b>X</b>
<b>Abbreviations</b>	<b>XI</b>
<b>1 Introduction</b>	<b>1</b>
<b>2 Responsible Business: Theories, Approaches &amp; Implementation</b>	<b>6</b>
2.1 The Emergence of Responsible Business and CSR	6
2.2 Defining the Corporation	9
2.3 Legal Business Responsibility	11
2.4 Voluntary Business Responsibility	12
2.4.1 Theories and Approaches in Social Responsibility	12
2.4.2 Theories and Approaches in Environmental Responsibility	21
2.5 Implementation of Voluntary Business Responsibility	23
2.5.1 Guidelines and Principles	24
2.5.2 Initiatives	27
2.5.3 Certificates	30
2.5.4 Memberships	35
2.5.5 Ratings and Indices	37
2.5.6 Guidelines, Principles and Initiatives for the Financial Sector	39
2.6 Chapter Summary	40
2.7 Explaining Differences in CSR Approaches	42
2.8 Critical Analysis	43
2.8.1 Critique of the Theory of CSR	44
2.8.2 Critique of the Implementation of CSR	45
2.8.3 Overall Critique of CSR	48
References	
<b>3 Responsible Business in Practice: Case Studies</b>	<b>57</b>
3.1 Case Study Methodology	57
3.2 Business Activities across the World	59
3.3 Case One: HSBC	62
3.3.1 Corporate Responsibility Strategy	63
3.3.2 Business Reality	66

3.3.2.1 Governance Issues	68
3.3.2.2 Environmental Issues	72
3.3.2.3 Social & Human Rights Issues	77
3.3.3 Communication Analysis	78
3.3.4 Voluntary Commitments & Standards Analysis	79
3.3.5 Case Conclusion	82
3.4 Case Two: JPMorgan	82
3.4.1 Corporate Responsibility Strategy	83
3.4.2 Business Reality	86
3.4.2.1 Governance Issues	87
3.4.2.2 Environmental Issues	92
3.4.2.3 Social & Human Rights Issues	99
3.4.3 Communication Analysis	101
3.4.4 Voluntary Commitments & Standards Analysis	102
3.4.5 Case Conclusion	104
3.5 Case Three: Hewlett Packard	104
3.5.1 Corporate Responsibility Strategy	105
3.5.2 Business Reality	107
3.5.2.1 Governance Issues	109
3.5.2.2 Environmental Issues	109
3.5.2.3 Social & Human Rights Issues	111
3.5.3 Communication Analysis	114
3.5.4 Voluntary Commitments & Standards Analysis	115
3.5.5 Case Conclusion	116
3.6 Case Four: Walmart	117
3.6.1 Corporate Responsibility Strategy	117
3.6.2 Business Reality	119
3.6.2.1 Governance Issues	120
3.6.2.2 Social & Human Rights Issues: Supply Chain	121
3.6.2.3 Social & Human Rights Issues: Walmart Stores	125
3.6.2.4 Environmental Issues	127
3.6.2.5 Other Issues – Product Issues	129
3.6.3 Communication Analysis	130
3.6.4 Voluntary Commitments & Standards Analysis	132

3.6.5 Case Conclusion	133
3.7 Case Five: Chevron	134
3.7.1 Corporate Responsibility Strategy	135
3.7.2 Business Reality	136
3.7.3 Communication Analysis	148
3.7.4 Voluntary Commitments & Standards Analysis	151
3.7.5 Case Conclusion	152
3.8 Case Study Summary	153
References	
<b>4 Corporations &amp; Liability: History, Theories and Application</b>	<b>182</b>
4.1 History	182
4.2 Corporations & Corporate Personality	185
4.2.1 The Corporation as a Legal Person	185
4.2.2 Corporate Personhood: A US Controversy	188
4.3 What is Corporate Liability?	189
4.4 Conceptualising Corporate Personality	191
4.4.1 Fiction Theory	192
4.4.2 Reality Theory	193
4.5 Corporate Liability in Practice	198
4.5.1 Liability Types	199
4.5.2 Examples of Corporate (Criminal) Liability	201
4.5.3 Corporate Criminal Liability at Court	202
4.6 Corporate Criminal Liability in Comparison	204
4.6.1 Corporate Criminal Liability in the US	205
4.6.1.1 The Common Law Model & Respondeat Superior	206
4.6.1.2 US Prosecution in Practice	207
4.6.1.3 Summary	213
4.6.1.4 Critique & Alternatives	214
4.6.2 Corporate Criminal Liability in the European Union	217
4.6.2.1 EU Criminal Law	218
4.6.2.2 EU Policies and Regulations	218
4.6.2.3 Summary	221
4.6.2.4 Corporate Criminal Liability in the Member States	222

4.6.2.5 Summary	227
4.6.3 Corporate Liability in Germany	228
4.6.3.1 Legal Situation	229
4.6.3.2 Recent Developments	232
4.6.3.3 Corporate Criminal Liability in Germany?	233
4.6.3.4 Summary	234
4.6.4 Comparing Corporate Liability in the US and in Germany	234
4.7 Chapter Conclusion	236
References	
<b>5 Global Politics &amp; The Economy: Analysing the Status Quo</b>	<b>246</b>
5.1 CSR, Sustainability and Sustainable Development	246
5.2 Current Legal Practice	252
5.3 International Politics and the Economy	257
5.3.1 The Emergence of Neoliberalism	258
5.3.2 Globalisation	264
5.3.3 Neoliberal Hegemony at Work?	268
5.3.4 State Autonomy under Threat?	272
5.4 What are the Alternatives?	273
5.4.1 Taxing Externalities	274
5.4.2 Closed Loop Approaches	280
5.4.3 Creating Shared Value	281
5.4.4 Inclusive Capitalism	283
5.4.5 Section Summary	284
5.5 The Question of Corporate Power	286
5.5.1 Corporate Tax Dodging	287
5.5.2 Corporate Wealth Grab	290
5.5.3 Corporate Usurpation	294
5.6 Chapter Conclusion	300
References	
<b>6 Conclusion: The Future of Responsible Business</b>	<b>311</b>
References	
<b>Curriculum Vitae</b>	<b>324</b>



## **Preface**

This dissertation concentrates on responsible business in the neoliberal era. The reader is guided from a narrow perspective on responsible business – presented by corporate social responsibility (CSR) concepts and current CSR strategies applied by businesses – to the legal aspects of responsible business and finally to the bigger picture resulting from a closer examination of the prevailing political and economic conditions of our time.

The version at hand presents a revised and updated version of my doctoral dissertation submitted to the department of philosophy at Technische Universität Darmstadt, Germany in November 2014.

After my master thesis on morality and integrity in business submitted in 2008, I was interested in exploring the wider context of responsible business. The initial starting point was the question of human rights infringements by businesses. It was only later, in the course of researching and writing the case studies presented in chapter three that I learnt that most of the violations by businesses actually occur in the area of national legislation. This insight led to a fundamental turn from a focus on human rights to a focus on legal aspects of responsible business conduct.

The new focus on legal aspects further led to complex issues: whether and to what extent a corporation could be perceived as a ‘person’, and how it came about that a corporation could be held liable for violations. These two fundamental questions related to responsible business conduct are addressed in this thesis.

Examining various voluntary and legal measures in the context of responsible business left me somewhat discontent. Neither of these measures appeared to effectively promote responsible ways of doing business, except perhaps at the inception of voluntary business responsibility when this concept definitely presented a significant turn. Now, after 20 years of voluntariness the achievements so far with regard to business responsibility in social and environmental terms are not very convincing in view of stagnating initiatives by businesses. As many CEOs today feel a certain profitability and growth pressure they often pursue business strategies that frequently collide with corporate social responsibility initiatives.

Meanwhile, the landscape of voluntary measures such as principles, guidelines, standards, and certificates has grown intensively. This led to the result that the many options available today potentially create confusion rather than clear guidance and direction among businesses



supposed to implement and apply these guidelines. Customers and consumers on the other hand are confronted with a vast number of different eco and fair trade standards or labels and initiatives and memberships touted by corporations they find more and more difficult to trust.

Another inspiration for this thesis comes from my own professional work experience related to CSR. For more than two years during my PhD I worked for Deutsche Bank AG in Frankfurt at Group Sustainability. This department next to the Corporate Citizenship department (both linked with Deutsche Bank's CSR department) is responsible for environmentally and socially responsible business conduct. So far, my work has equipped me with valuable insights into the actual application of these voluntary measures and the corporate strategy behind it. The empirical research in this thesis was particularly inspired by this working experience. Realising a potential gap between corporate communication on a company's efforts regarding responsible business and its actual business practice inspired me to closely examine five companies' approaches to corporate responsibility.

In brief, this dissertation has been inspired by both theory and practice and aims to provide the reader with a more comprehensive perspective on the importance – but also the limitations of – responsible business today.

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## Abbreviations

AML	Anti-Money Laundering
APP	Asia Pulp & Paper
ATK	Alliant Techsystems
B2C	Business-to-Customer
BEPS	Action Plan on Base Erosion and Profit Shifting
BFR	Brominated flame-retardants
BITs	Bilateral investment treaties
BP	British Petroleum
BSR	Business for Social Responsibility
C2C	Consumer-to-Consumer
C2C	Cradle-to-Cradle
CC	Corporate Citizenship
CCL	Corporate criminal liability
CDP	Carbon Disclosure Project
CEO	Corporate Europe Observatory
CEO	Chief Executive Officer
CERES	Coalition for Environmentally Responsible Economies
CETA	Comprehensive Economic and Trade Agreement
CID	Civil investigative demand
CITES	Convention on International Trade in Endangered Species of Wild Fauna and Flora
CGI	Clinton Global Initiative
CNPC	China National Petroleum Corporation
COP19	19th Conference of the Parties
CSI	Corporate Social Irresponsibility
CSP	Corporate Social Performance
CSR	Corporate Social Responsibility
CVS	Creating Shared Value
DEP	Department of Environmental Protection, Pennsylvania
DJSI	Dow Jones Sustainability Index
DOJ	US Department of Justice
DPA	Deferred-Prosecution Agreement

DRC	Democratic Republic of the Congo
EC	European Commission
ECEP	Effective Compliance and Ethics Program
EHS	Environment, health and safety
EIA	Environmental Investigation Agency
EIA	Environmental Impact Assessment
EICC	Electronic Industry Citizenship Coalition
EMAS	Eco- Management and Audit Scheme
EMS	Environmental Management System
EPA	Environmental Protection Agency
EPP	European Public Prosecution
EPs	Equator Principles
ESHIA	Environmental, Social and Health Impact Assessment
ESG	Environmental, social and governance (criteria)
ETS	Emission trading schemes
EU	European Union
EURIBOR	European Interbank Offered Rate
EU RoHS2	European Union Restriction of Hazardous Substances
FARCD	Forces Armées de la République Démocratique du Congo
FBI	Federal Bureau of Investigation
FCPA	Foreign Corrupt Practices Act
FCPF	Forest Carbon Partnership Facility
FDI	Foreign direct investment
FERC	Federal Energy Regulating Commission
FIP	Forest Investment Programme
FSC	Forest Stewardship Council
FSGO	US Federal Sentencing Guidelines for Organisations
FTA	Foreign Trade Agreements
FOREX	Foreign Exchange
GATT	General Agreement on Tariffs and Trade
GBI	Global Business Initiative
GDP	Gross Domestic Product
GESRM	Global Environment and Social Risk Management
GHG	Greenhouse Gas

GM	Genetically modified
GMLRS	Guided Multiple Launch Rocket System
GRI	Global Reporting Initiative
GSRI	Global Initiative for Sustainability Ratings
HCV	High Conservation Value
HP	Hewlett-Packard
HSBC	Hongkong Shanghai Banking Corporation
ICC	International Chamber of Commerce
ICSID	International Centre for Settlement of Investment Disputes
ICTI	International Council of Toy Industries
IFC	International Finance Corporation
IFOAM	International Federation of Organic Agriculture Movements
IIRC	International Integrated Reporting Council
IMF	International Monetary Fund
ISDS	Investor-State-Dispute-Settlement
ISEAL	International Social and Environmental Accreditation and Labelling Alliance
ISO	International Organization for Standardization
IT	Information Technology
KPIs	Key Performance Indicators
KPMG	Klynveld, Peat, Marwick und Goerdeler
KPO	Karachaganak Petroleum Operating
LEED	Leadership in Energy & Environmental Design
LIBOR	London Interbank Offered Rate
LNG	Liquefied Natural Gas
MBS	Mortgage-backed securities
MDG	UN Millennium Development Goals
MPC	Mining and Processing Congo
MNC	Multi national Company
MNEs	Multinational enterprises
MSC	Marine Stewardship Council
MTH	Mixed tropical hardwood
MTR	Mountaintop Removal
NAFTA	North American Free Trade Agreement

NFC	New Forests Company
NGOs	Non-Governmental-Organisations
NPA	Non-Prosecution Agreement
NPCIL	Nuclear Power Corporation of India Ltd.
NRW	North Rhine-Westphalia
OCC	Comptroller of the Currency
OECD	Organisation of Economic Cooperation and Development
OFR	Operating Financial Review
OLAF	European Anti-Fraud Office
OSHA	Labor's Occupational Safety and Health Administration
OWiG	Ordnungswidrigkeitengesetz
PR	Public Relations
PRI	Principles for Responsible Investment
PVC	Poly Vinyl Chloride, vinyl plastic
PWC	PriceWaterhouseCoopers
RAN	Rainforest Action Network
RBS	Royal Bank of Scotland
REACH	Registration, Evaluation, Authorisation and Restriction of Chemicals
REDD	Reducing Emissions from Deforestation and Forest Degradation
RRI	RepRisk Index
RSPO	Roundtable on Sustainable Palm Oil
SACOM	Students & Scholars Against Corporate Misbehaviour
SDG	UN Sustainable Development Goals
SEC	US Securities and Exchange Commission
SER	Social and environmental responsibility (HP)
SOX	Sarbanes-Oxley Act
SRI	Socially responsible investment
TBL	Triple Bottom Line
TCO	TengizChevroil
TEPCO	Tokyo Electric Power Co. Inc.
TNC	Transnational Company
TPP	Trans-Pacific Partnership
TRIPS	Trade-related Aspects of Intellectual Property
TTIP	Transatlantic Trade and Investment Partnership

UK	United Kingdom
UN	United Nations
UNCITRAL	United Nations Commission on International Trade Law
UNCTC	United Nations Centre on Transnational Corporations
UNDHR	United Nations Declaration of Human Rights
UNEP FI	United Nations Environment Programme Finance Initiative
UNESCO	United Nations Educational, Scientific and Cultural Organization
UNFCCC	United Nations Framework Convention on Climate Change
UN GC	United Nations Global Compact
UN GP	United Nations Guiding Principles on Business and Human Rights
UN REDD	Reducing Emissions from Deforestation and forest Degradation
USA/US	United States
USGBC	U.S. Green Building Council
WCED	World Commission of Environment and Development
WiStG	Wirtschaftsstrafgesetz
WTO	World Trade Organization
WWF	World Wildlife Fund

# Chapter 1

## Introduction

In a multi-step approach this dissertation aims to present a new composition of perspectives on responsible business. At its core, it deals with the current status of responsible business as pursued by companies. Yet, the work at hand goes beyond merely company-related aspects. It also evaluates the effectiveness of voluntary measures and examines the current legal and political frame of doing business regarding its potential of enabling a responsible business practice. Furthermore, alternative ways to realise a more responsible way of doing business are proposed.

Over the next five chapters a more diversified view on responsible business today will be unfolded step-by-step and placed in a wider context of contemporary political and economic conditions. Chapter two starts with introducing voluntary measures or so-called ‘soft law’ measures enabling responsible business. Their efficiency with regard to promoting responsible business is then put to the test by five case studies on corporate behaviour in the third chapter. This is followed by an introduction of legal aspects, particularly ‘hard law’ measures, both in theory and in practice in the fourth chapter. Thereafter, in chapter five, responsible business is placed in the wider context of international politics and the global economy. Chapter six includes an overall conclusion and an outlook on the future of responsible business.

Some remarks are required before the structure of the thesis is expounded in more detail. Throughout this thesis terms like “business”, “company”, “enterprise” and “firm” will be used interchangeably and synonymously for “corporation”. These terms all refer to companies based on a shareholder structure and operating on a global scale. Furthermore, the scope of responsibility described and referred to in this dissertation only applies to a business context and primarily to those ‘corporations’, i.e. multi-national companies. It is defined here as legal responsibility, as well as responsibility towards society and the environment. Such scope of responsibility must not necessarily be derived from a company being perceived as a ‘moral person’ or a concept of morally laden responsibility in general. Rather, it can also be explained by the original purpose of a corporation, which is to serve the public and the common good. This in turn means that the environment also needs to be included, as an intact environment and animal world presents vital conditions for a society’s well being. Of course,



the environment and the animal world themselves deserve consideration and inclusion independently of what serves society but this is a separate issue not to be discussed here.

Coming now to the thesis structure, the subsequent chapter two comprises eight sections and is focused on approaches to business responsibility and related concepts. It aims to provide the reader with all necessary background information regarding the concept of Corporate Social Responsibility (CSR), and its complementing voluntary measures in forms of standards, principles, guidelines and the like. Basically, it deals with how responsible business should be theoretically and practically based on those theories, concepts and voluntary measures introduced in this chapter. This background is vital to better understand the business reality and concomitant controversial incidents presented in the case studies on selected companies in the subsequent chapter.

In detail, the first section of chapter two starts with a brief account on the history of social responsibility in business. The next two sections address fundamental questions such as how a corporation or business is to be defined in this context and what legal forms of business responsibility exist. The fourth section then turns to the conceptual basis of voluntary forms of responsible business, such as CSR and sustainability. Here the most prominent concepts are presented. In the fifth section, voluntary measures to enable responsible business in practice are described. In this section a range of globally acknowledged guidelines, principles, standards, initiatives, certificates and options for membership at certain organisations is described. In addition, specific guidelines for the financial sector are introduced as well as options for ethical investors like ratings and indices based on environmental and social criteria. After a chapter summary in section six, national differences in CSR approaches are discussed in section seven. Illuminating these differences helps the reader to understand why the practice of CSR can vary from country to country and in what ways. Chapter two closes with a critical analysis of the theory and practice of these measures with regard to their efficiency.

The third chapter puts the effectiveness of the voluntary measures described in the second chapter to the test. This chapter aims to draw a more detailed picture of business reality at global companies. Also, it will unmask the corporate rhetoric of responsible business. At the end of the chapter the advantages and shortcomings of voluntary measures and the practice of CSR itself are discussed. The chapter is composed of eight different sections, followed by a case study summary. Case studies on five different global companies, from four different industry sectors, namely finance, technology, retail and oil, provide information on the actual

effectiveness of voluntary measures. The chapter starts by explaining the methodology behind the case studies in the first section. The research for the case studies was undertaken with the help of a business intelligence tool developed by the Swiss company RepRisk. As an introduction to the case studies, the second section outlines controversial business activities around the globe. The five sections thereafter deal with the individual five company cases, which are structured in the following way. An outline of the corporate responsibility strategy of each company provides insights on how the company perceives its business responsibility in social and environmental terms. The strategy, various projects or initiatives and the company's public commitments to internally developed as well as globally acknowledged standards, principles, guidelines or initiatives are described. Thereafter, the publicly communicated approach is contrasted with the actual business reality. Each company was observed over a period of about five years, with its main controversial involvements in all relevant areas (environment, social standards and human rights, governance and compliance with the law) presented in detail. In light of these controversial incidents the company's corporate communication on its efforts and corporate responsibility approach is then analysed. Each case closes with a conclusion. The chapter finishes with an overall summary on the case studies.

The fourth chapter of this book explores the field of corporate liability, and corporate criminal liability in specific in order to expound the legal aspects surrounding the question of responsible business. Only by a reliable legal system including punishment to effectively deter companies from misdemeanours in the future can responsible business be realised. In detail, the chapter is built on six major sections and closes with a chapter conclusion. The first section gives an account on the history of corporations and liability. The second section particularly looks at the legal status of a corporation, i.e. the legal personality of a corporation. It also touches on the question of in how far a corporation can have a personhood similar to a natural person. In connection with the legal status of a corporation, the third section then explains what corporate criminal liability is and under what circumstances it applies. The fourth section then expounds the conceptual background. The latter section explains in more detail how the concept of 'corporate personality', which is tied to liability, evolved and details two approaches to 'corporate personality', namely the 'Fiction Theory' and the 'Reality Theory'. The fifth section focuses on how corporate liability is applied in practice by explaining different types of liability, giving examples of application and explaining how corporate (criminal) liability is applied at courts today. The sixth section then

draws comparisons between the practice of corporate liability in the US, in member states of the EU, and particularly in Germany. It is divided into four subsections with the first three providing an account on the different regimes in the US, the EU and Germany, and the fourth comparing the US approach with the German approach of punishing corporations. As the US legal system presents the most comprehensive corporate criminal liability regime, its specifics and the US prosecution in practice are described in the first section to give an overview of how such a system works in practice. This section is then closed by a critical analysis of the US approach and the discussion of alternatives. The second section describes the practice of corporate criminal liability in the EU. Both the US and the EU represent the major players in international politics and the global economy. Therefore, the various systems implemented in the EU are detailed accordingly. As the EU is structured differently to the US it gives its member states much more autonomy, particularly in the field of criminal law. Hence, legislation in the EU is much more diverse and presents a stark contrast to legislation in that field in the US. Here, approaches at the EU level are outlined, and various EU policies and regulations related to responsible business are described. Then, corporate liability practice in the EU member states is presented, which is classified into four different legal approaches. Thereafter, the regime in Germany is examined in more detail, as Germany is one amongst few other countries in the EU that does not criminally punish companies. The fourth subsection then compares corporate criminal liability as practiced in the US and in Germany. While the US system is based on a common law model allowing for companies to be punished, Germany's statutory law model is based on individual responsibility and imposes only administrative fines on corporations in case of law violations. This comparison is especially interesting, as this comparison brings to light that whether there is a specific approach to criminally punishing corporations or not does not actually make a significant difference when it comes to corporate punishment as such.

After examining 'soft law' and 'hard law' measures, the wider context of responsible business is described in chapter five. As voluntary and legal measures expounded in the previous chapters only present two angles of the discussion surrounding responsible business, chapter five delves deeper into the subject matter by presenting further relevant issues. The aim of this chapter is to provide the reader with a more holistic perspective on responsible business. Therefore, complex issues of the political and economic conditions of our time are discussed, alternative concepts of CSR and sustainability are presented, and controversial aspects of corporate power today are addressed. The chapter comprises five sections followed

by a conclusion. The chapter begins with a brief summary on the shortcomings of both ‘soft law’ and ‘hard law’ measures over the first two sections. The third section then deals with political and economic issues. Here, the emergence of neoliberalism and globalisation is detailed. Then the question of a potential neoliberal hegemony is discussed. In light of current neoliberalism also the question of the extent of state autonomy today is addressed. This section aims to underline that responsible business is not only a matter of legislation and voluntariness; rather, it is embedded in a wider context of global politics and the international economy, significantly influencing the viability of responsible business. The fourth section presents a range of viable alternative concepts to CSR and sustainability and a discussion thereof with regard to their effectiveness. As CSR and sustainability only present two approaches allegedly promoting more responsible business behaviour, it is vital to discuss further concept to complete the picture of options available today. The alternatives discussed here are carbon taxation schemes, closed loop approaches to economy like ‘Circular Economy’, and concrete business initiatives such as ‘Creating Shared Value’ and ‘Inclusive Capitalism’, a very recent concept. While carbon taxation schemes can be only enacted by the state, other approaches like ‘Circular Economy’, ‘Creating Shared Value’ or ‘Inclusive Capitalism’ in particular can also be initiated by the economic players. The fifth section addresses corporate power in more detail over three subsections. This section aims to provide the reader with some critical information on the considerable influence and power global corporations have today. Here, corporate misbehaviour like tax evasion, plundering of resources, and questionable patent rights practice are described over the first two sub-sections. The third sub-section deals with corporate lobbying and other ways by which corporations can exert political influence or even pressure.

Finally, in chapter six, an overall conclusion is drawn, which briefly summarises and links the insights from previous chapters. Eventually, it discusses the meaningfulness and feasibility of the CSR concept and practice.

# Chapter 2

## Responsible Business: Theories, Approaches & Implementation

**Abstract** This chapter aims to provide a comprehensive account on the matter of responsible business taking into account various dimensions. Today, there are manifold ways to conduct business in a socially and environmentally responsible way. First, there are legal requirements, which are compulsory and must be obeyed by corporations. Second, there are various voluntary ways of business responsibility nowadays which go beyond legal requirements. Explanations are numerous as to why these various forms of voluntary business responsibility have developed over time and are still adopted. Hence, this chapter starts with examining the various CSR theories underlying concrete approaches and voluntary measures used in practice. Subsequently, a detailed account is given on these voluntary forms, which often come as standards, guidelines or memberships usually addressing social and environmental concerns in business. As the history of corporate social responsibility (CSR) is extensive, and development and application differ from country to country, there are also differences in national approaches. These are explained after a summary of the CSR theories and measures. Lastly, an in-depth critique reveals where the concept of CSR is still lacking cohesiveness and cogency, shows general shortcomings of CSR approaches and voluntary measures, and offers a general critique on the practice of CSR by corporations today.

### 2.1 The Emergence of Responsible Business and CSR

Most certainly, CSR is not a recent phenomenon. The first forms of employee related philanthropy, which is associated with CSR today, appeared in the US in 1900 already. Until the 1950s, social activities by employers were largely driven by philanthropic ideas such as charities and donations. In the 1950s, Howard R. Bowen particularly highlighted the responsibility of the businessman in his book *Social Responsibilities of the Businessman*. Because large transnational corporations owned by shareholders as we know them today did not really exist at that time, this was merely considered a form of individual responsibility in a business context; the general responsibility (with a social connotation) of the entrepreneur and business owner. A little later, in the 1960s, the idea of business responsibilities beyond legal obligations grew and when Clarence C. Walton published his book *Corporate Social Responsibilities* in 1967 the current term was born.

In the 1970s, there were further developments and new concepts and initiatives appeared on a global level. During that time, two concepts linked to CSR emerged, namely corporate social performance (CSP) and corporate social responsiveness (Carroll 1979; Ackermann 1976). S. Prakash Sethi describes the latter as the most sophisticated approach after social responsibility and social obligations. Corporate social responsiveness presents a corporation's adaption to social needs which is a rather dynamic process and not just proscriptive or prescriptive (Carroll 2009). However, none of these two forms are applied anymore by corporations today.

Besides these new conceptual developments, global initiatives also evolved driven by the Organisation of Economic Cooperation and Development (OECD) and United Nations Centre on Transnational Corporations (UNCTC), which drafted the first codes of conduct. These were meant to set a guiding standard for member countries with regard to the operations of global corporations (Corporatewatch.org). However, the UNCTC code of conduct did not prove very successful as it was principally focused on regulating corporate abuse. After mounting pressure from corporations it was finally withdrawn.

The 1980s was a decade characterised by corporate excess on the one hand and boycotts as counter reactions on the other. Scandals like the Union Carbide Bhopal explosion (India) or insider trading at Wall Street present only two prominent examples (BBC home n.d.; Investopedia.com, 4 History-Making Wall Street Crooks n.d.). At the same time, research on CSR continued unabated in the academic arena and new concepts like the stakeholder theory were developed.

The 1990s were characterised by a further advancement of already existing concepts like corporate social performance or stakeholder theory. Furthermore, concepts like corporate citizenship as well as the idea of "sustainable business" gained foothold during that decade, undoubtedly also spurred by the Brundtland report (Unesco.de 2009)<sup>1</sup> and the 1992 Earth Summit in Rio (Carroll 2009; Corporatewatch.org n.d.). However, the summit did not lead to a significant change in the sense of any mandatory regulations proposed. Quite to the contrary, there was an agreement only on voluntary self-regulation (Mazurkiewicz 2004; Laura 2008). In addition to these new concepts there were numerous developments noticeable in areas other than academia such as the rise of an entire CSR industry, the emergence of

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<sup>1</sup> This report, actually published under the name "Our Common Future", was named after Gro Harlem Brundtland, ex-Prime Minister of Norway and chair of the World Commission on Environment and Development. This report presented the base of the Earth Summit in Rio later in 1992 and intensely promoted the idea of "sustainable development".

more and more Non-Governmental-Organisations (NGOs) and reforms regarding codes of conduct.

At the same time, the 1990s were also characterised by corporate scandals, for example Shell's complicity in the execution of several activists in Nigeria and the deliberate sinking of its Brent Spar platform in the North Sea (Wettstein 2012). While Shell lost its reputation amongst its investors and the public, it successfully restored it later with a PR offensive on its CSR strategy (Spiegel online 1998). This action can be seen as pivotal for allowing an entire industry of CSR consulting to flourish. Soon, major players in the consulting industry like PriceWaterhouseCoopers and KPMG offered their CSR services to corporations (Bendell 2004). But it was not only the CSR consulting industry, which was flourishing by offering assistance on how to implement voluntary guidelines; the 1990s also saw voluntary guidelines, standards and memberships sprouting. These included the United Nations Global Compact (UNGC), ISO standards like 14001, and reporting guidelines for CSR and sustainability reports published by corporations, initiated by the Global Reporting Initiative (GRI) among others ([unglobalcompact.org](http://unglobalcompact.org); [iso.org](http://iso.org); [sa-intl.org](http://sa-intl.org); [globalreporting.org](http://globalreporting.org)).<sup>2</sup> CSR initiatives by corporations spread from sponsoring, donations and employee volunteering via tackling environmental issues to areas like education, health and art (Carroll 2009).

Despite the strides forward in the development of CSR, new scandals at the beginning of the 21<sup>st</sup> century clearly showed the top of the flagpole in terms of CSR and accountability had not yet been reached. The Enron collapse in 2001 together with the Arthur Andersen LLP downfall a short while later led to further developments in accounting standards (Chicago Tribune online 2002). In 2002, the Sarbanes-Oxley Act (SOX), which presents improved mandatory guidelines for financial reports of companies, was introduced in the US (KPMG.com). At the same time, new governance codices were also published in Germany and in the United Kingdom (UK). While the Operating Financial Review (OFR) in the UK can be compared to the SOX, the "Deutsche Governance Codex" goes beyond the scope of SOX and also enforces transparency in terms of remuneration and reporting among other things (DCGK.de 2013). However, the OFR was abolished under Gordon Brown in 2005 (Corporatewatch.org n.d.).

While the first decade of the 21<sup>st</sup> century ended with another scandal, the devastating oil

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<sup>2</sup> The ISO 14001 standard was the first environmental standard developed in 1996. In 1997, GRI followed with its standards on reporting, while standards and principles focused on social issues like SA 8000 and UNGC were founded in 1998 and 1999 respectively.

spill at British Petrol's (BP) platform Deep Horizon in the Gulf of Mexico, merely "loosely defined" steps at the Rio+20 Earth Summit in June 2012 heralded in the second decade (Time.com 2010; Watts and Ford 2012). It now remains to be seen which new developments will emerge in the years to come.

## 2.2 Defining the Corporation

When talking about business responsibility, or alternatively of a corporation's or company's responsibility, it is important to define what this entity actually is. There are different terms often used synonymously: business, company, enterprise or firm (Investorwords.com, Business n.d.; Investorwords.com, Company n.d.; Investorwords.com, Enterprise n.d.; Investorwords.com, Firm n.d.). While these are rather general terms to describe any entity engaged in commercial activities, a 'corporation' is a term clearly defined by law.

In the 17<sup>th</sup> century, a corporation served governmental purposes and was created for specific operations, for example for "the settlement of India and the American colonies" (Monks and Minow 2008, 10). Even later, in the 20<sup>th</sup> century, corporations still served this governmental purpose (at least in the USA), like the United States Synthetic Fuels Corporation, which was established by the US Congress in 1980 to better control the US fuel needs (ibid.). Since the legal entity of a 'corporation' offered certain advantages not available to other forms of enterprises, this advantage was tied to the condition of corporate activities serving public policy and welfare (ibid.).

Today, as Crane and Matten (2007) state, a corporation is the "dominant form of business identity in the modern global economy" (42). In non-legal terms a corporation can be described as "a structure established to allow different parties to contribute capital, expertise, and labor for the maximum benefit of all of them" (Monks and Minow 2008, 9). Coming to legal definitions, according to the Merriam Webster Online Dictionary a corporation is defined as "a body formed and authorized by law to act as a single person although constituted by one or more persons and legally endowed with various rights and duties including the capacity of succession" (Merriam Webster Online Dictionary, Company n.d.). Hence, a corporation can be considered an artificial person created through and before the law (Crane and Matten 2007).



A corporation is a different and distinct entity from its investors, managers, employees and buyers (ibid., Investopedia.com, Corporation n.d.). Furthermore, it is owned by shareholders holding a stock in the corporation. These shareholders can exert influence on the corporation by electing the board of directors, which has two functions: overseeing the corporation and appointing the management (ibid.).

As the corporation exists independently of its shareholders, the shareholders cannot be made responsible for any “debts or damages caused by the corporation” (Crane and Matten 2007, 43). However, as shareholders only have a share in the company, the entity still owns the assets. The corporation, or more precisely its managers and directors, have a fiduciary responsibility towards the shareholders: They are entrusted with a certain investment, which binds them to act in their shareholders’ best interest (ibid.).

In organisational terms a corporation as a legal construct offers at least four advantages, according to Monk and Minow (2008):

- Limited liability
- Transferability and flexibility by investments being based on stocks, which can be easily transferred or released/disbursed
- A legal personality, which is independent of time and space, e.g. a corporation can easily move from one location or even country to another, and it can further exist independently of its original founders, its former managers and so on
- Maximum efficiency through a centralised management, as “the power to determine the company’s overall direction is given to the directors and the power to control its day-to-day operations is given to the managers” (ibid., 12)

Yet, the structure of large companies today is rather dispersed. Companies have their headquarters in one country but various subsidiaries with group affiliation around the globe. These companies are defined as either multinational corporations (MNCs) or transnational corporations (TNCs). Both MNCs and TNCs operate in several countries at the same time; yet, the difference is that MNCs usually have their headquarters in a certain country, while TNCs are not headquartered in any country in particular (Business Dictionary online). The Economic and Social Council of United Nations defines TNCs as follows: “The term “transnational corporation” refers to an economic entity operating in more than one country or a cluster of economic entities operating in two or more countries - whatever their legal form, whether in their home country or country of activity, and whether taken individually or

collectively” (United Nations Economic and Social Council 2003).

### 2.3 Legal Business Responsibility

This chapter exclusively focuses on responsibility used in a legal sense.<sup>3</sup> Since companies are legal persons created by law, these forms of responsibility can be considered as established and uncontested. Therefore, in this section, three types of responsibility are described in more detail: accountability, liability and culpability.

**Accountability** Accountability can be described as a form of responsibility through being accountable for one’s actions and according to the Merriam Webster Dictionary is also “an obligation or willingness to accept responsibility” (Merriam Webster Online Dictionary, Accountability n.d.). Furthermore, someone being considered accountable means he or she is “required or expected to justify actions or decisions” (Oxford Dictionaries online, Accountable n.d.). In a business context, this means a company is required “to account for its activities, to accept responsibility for them, and to disclose the results in a transparent manner” (Business Dictionary online, Accountability n.d.). Practically, accountability also requires companies to disclose relevant information to the public.

**Liability** Liability is a legal term for “responsibility for the consequences of one’s acts or omissions, enforceable by civil remedy (damages) or criminal punishment” (Business Dictionary online, Liability n.d.). This liability can be imposed on any person before the law. Accordingly, natural but also juristic persons, like organisations and corporations, can be held liable. However, it is important to note that before the law there does not necessarily need to be a causal connection between the harm caused or loss occurred and the person declared to be liable for it. This is the case for example with vicarious liability. Also, to establish liability it is not always necessary to prove the act was intended, which is the case with strict liability (Honoré 2010).

**Culpability** Being culpable is defined as “deserving blame” or being “guilty of something wrong” according to the Merriam Webster dictionary (Merriam Webster Online Dictionary, Culpable n.d.). It is the “responsibility for a fault or wrong” (Oxford Dictionaries online,

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<sup>3</sup> The question of whether companies also have a moral responsibility will not be touched upon here. Similarly, whether a corporate personhood of moral nature is required to exercise certain responsibilities will not be discussed, for discussions on the latter see for example Donaldson 1982, French 1979, or Neuhäuser 2011.

Culpability n.d.). Yet, this wrong act does not necessarily involve “any evil intent by the wrongdoer“ and the wrong act in question rather refers to “fault rather than malice or a guilty purpose” (The Free Dictionary, Vicarious Liability n.d.).

## **2.4 Voluntary Business Responsibility**

Voluntary business responsibility includes social and environmental concerns, which are so far not included in the law. Hence, this particular business responsibility can be defined as responsibility going beyond legal requirements or extra-legal responsibility.

It is advocated based on the arguments, among others, that “corporations cause social problems (such as pollution) and hence have responsibility to solve those they have caused and to prevent further social problems arising” and that “all corporate activities have social impacts of one sort or another whether through the provision of products and services, the employment of workers, or some other corporate activity. Hence, corporations cannot escape responsibility for those impacts, whether they are positive, negative or neutral” according to Crane and others (Crane and Matten 2007, 48; Schrader 2003, 75).

In the following two sections an overview is given of current theories and concepts related to voluntary business responsibility. These theories and concepts can be divided into CSR and sustainability approaches. While CSR puts more emphasis on the social dimension but may additionally include environmental concerns, sustainability is principally only focussing on the environmental dimension.

### ***2.4.1 Theories and Approaches in Social Responsibility***

This chapter differentiates between CSR theories and approaches. While the word ‘theories’ is used to emphasise the concept as such and its scientific arguments, ‘approaches’ refers to particular forms of CSR, which are concretely applied in business, such as the stakeholder approach (or stakeholder theory).

Accordingly, first, the more scientific CSR theories are presented, which define the general framework for the later approaches. Then, CSR approaches like corporate social performance, stakeholder theory and corporate citizenship are briefly described.

## **CSR Theories**

Corporate Social Responsibility (CSR) can be considered as the mainstream theory of social responsibilities in business beyond legal requirements. CSR is affiliated to business ethics (Gabler Wirtschaftslexikon online, n.d.) and presents a scientific as well as practical framework comprising various related theories and approaches. It addresses the integration of ethical (sometimes also political), legal and economic responsibilities within a company or corporation and the integration of the corporation itself into society (Rendtorff 2009; Crane and Matten 2007).<sup>4</sup> Regarding its application, it can be said that “[c]orporate social responsibility (CSR) is, regardless of specific labelling, any concept concerning how managers should handle public policy and social issues” and further: “CSR, in broad summary, is the ethical behavior of a company towards society. In particular, this means management acting responsibly in its relationships with other stakeholders who have a legitimate interest in the business – not just the shareholders” as the World Business Council for Sustainable Development (WBCSD) states (Windsor 2006; Watts and Holme 1998). However, the WBCSD also admits that there is “no universally acceptable definition of CSR” (Watts and Holme 1998).

The landscape of CSR theories is quite confusing and descriptions vary as to what kind of responsibilities CSR actually comprises. For example, in his article *Corporate Social Responsibility Theories* Melé refers to several authors each presenting his own theory of CSR: Klonoski, Windsor, and Melé himself.

At the beginning of the 1990s Klonoski grouped his theory of CSR into three categories of corporate social responsibilities. “Fundamentalism” describes the assumption that corporations are only persons in a legal sense and so is only responsible for complying with the law. The second category, “moral personhood”, describes the corporation as a moral person or moral agency and thus capable of bearing responsibilities beyond what is required by law, for example responsibilities towards society and nature, which are often not sufficiently integrated into national or supranational law. The third category is named “social dimension” and comprises a rather political and also ethical approach to corporate responsibilities (Melé 2009).

In contrast, Melé’s conception from 2004 encompasses four categories of CSR: the first

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<sup>4</sup> Also compare the official statement by the European Union with regard to a definition of CSR: “Corporate social responsibility is essentially a concept whereby companies decide voluntarily to contribute to a better society and a cleaner environment.” (Commission of the European Communities 2001); “Corporate social responsibility (CSR) is a concept whereby companies integrate social and environmental concerns in their business operations and in their interaction with their stakeholders on a voluntary basis.” (Commission of the European Communities 2006).

addresses wealth creation and is linked to economics; the second deals with social and political power and is concerned with corporation's responsibilities in the political arena; the third is about integrating social demand, and the last category is about ethics, which is defined here as the relation between business and society (ibid.).

The categories Melé developed are also reflected in Windsor's 2006 conception of corporate social responsibility, which includes three categories. The first is the "ethical conception" which puts business responsibilities in a context of altruistic duties, strong and expansive public policies, corporate self-restraint and strengthened stakeholder rights. The second is the "economic conception", which is comparable to Klonoski's "fundamentalism" assumption. Here, corporations are mainly concerned with wealth creation and fiduciary duties. They are proponents of minimal governmental intervention and only pursue conventional ethical measures (Windsor 2006). The third approach is a "corporate citizenship conception", which can be seen as a political metaphor. It partially overlaps with the first two criteria, which focuses on either general welfare or private wealth respectively (ibid., Melé 2009). Windsor (2006), however, also critically states: "This metaphor competes with both CSR theories and abandons the language of responsibility. The metaphor serves as an escape from the continuing debate between ethical and economic viewpoints on CSR."

## **CSR Approaches**

A prominent starting point for a discussion on the social responsibilities of a business was Milton Friedman's article *The Social Responsibility of Business is to Increase its Profits* published 1970 in *The New York Times*. This approach, which exclusively focuses on fiduciary duties, is also called Shareholder Theory or Shareholder Value Theory. Here, the social responsibility of business is reduced first and foremost to making profits (Melé 2009). While making profits and profit maximisation are considered as good for society per se and are not further challenged (Suchanek und Lin-Hi 2008). And, what is good for society is therefore 'social' the argument goes.

This approach refers to publicly held companies and is based on agency theory, which considers the manager an agent serving the company or rather its investors or shareholders, who are the principal (ibid.; Cragg 2002). Accordingly, in his article Friedman (1970) stresses, "Only people have responsibilities". Thus, the responsibility of managers "is to conduct the business in accordance with their [the corporation's] desires, which generally will be to make as much money as possible while conforming to their basic rules of the society,

both those embodied in law and those embodied in ethical custom” (ibid.). According to Friedman’s view “spending” a corporation’s money on activities beyond core business and law requirements equates to misappropriation (ibid.). The only duties a corporation has are of a fiduciary and legal nature (Melé 2009).

Clarkson observed that Friedman was rhetorically skilful in clearly separating business from society in his writings and in “interpret[ing] social issues and social responsibilities to mean nonbusiness issues and nonbusiness responsibilities” (Clarkson 1995).

However, the Shareholder Theory widely ignores the responsibility for and the costs of negative externalities caused by corporate business activities (Melé 2009). Negative externalities produced by corporate business activities are for example air, water and soil pollution. Oftentimes, these are only partially compensated for by the company if at all and it also depends on domestic political regulations in force like emission trading schemes. Negative externalities not compensated for by corporations are borne by the respective national economy and the society at large.

**Corporate Social Performance** In the same decade as the Shareholder Theory was still popular other approaches emerged, which clearly acknowledged the social responsibilities of business other than making profits.

One of these concepts or approaches developed in the 1970s is corporate social performance (CSP), which also takes into account social needs. Here, the corporation is considered as being responsible for potential social problems caused by businesses and their operations. However, this concept was used synonymously with other concepts like CSR and corporate responsiveness until the end of the 1970s (Wartick and Cochran 1985). It was only at the end of the 1970s that Carroll defined the concept of corporate social performance more precisely (ibid.).

In 1985, Wartick and Cochran further underlined the advantages of the CSP model. They argued in line with Rawls and Donaldson that, firstly, corporations serve the public interest as governments do, and hence their activities must be within the customary boundaries of society. Secondly, a corporation can be considered a moral agency as its actions are based on moral rules and it is said to have the capacity to shape rules and politics (ibid.). At that time, Wartick and Cochran saw CSP as a dynamic model based on three dimensions, “corporate social responsibility, corporate social responsiveness and social issues”, and working on three levels: principles, processes and policies (ibid.).

The principle level is considered a philosophical orientation and represents different corporate social responsibilities (economic, legal, ethical, discretionary), while the process level has an institutional orientation and is linked to corporate social responsiveness and possible reactions. The third level, policies, is connected to the management of social issues and describes an organisational orientation (ibid.). From today's standpoint, this model can be interpreted as integrating or at least considering the expectations of its stakeholders, of which the major one is the public (ibid.).

In 1991, Wood advanced the CSP model by Wartick and Cochran by restructuring its dimensions and levels. Unlike the former concept, the principle level according to Wood (1991) comprises only three corporate social responsibilities: institutional, organisational, and individual. The "institutional principle" refers to the power<sup>5</sup> a corporation holds and the argument goes that with power comes responsibility. The second principle, the "organisational principle" reflects the interdependence of business and society, hence refers to the public responsibility of a corporation (Melé 2009). The last principle, the "individual principle", focuses on the manager, who is considered a moral actor. And, as a manager usually has discretionary competence, it is also in his or her power to produce "socially responsible outcomes" (ibid., 53).

The process level oriented towards corporate social responsiveness is much more developed and precise. Instead of reaction modes like "reactive", "defensive" and so on, this dimension is now defined in terms of concrete measures a corporation needs to implement to act responsibly: "environment assessment", "stakeholder management" and "issues management" (Wartick and Cochran 1985, 767). The former third dimension of "policies" in Wartick and Cochran's approach addressing the management of social issues is replaced by Wood with the dimension "outcomes of corporate behaviour" (Melé 2009, 52). It still has a strong social orientation and focuses on social impacts, programs and policies.

The advanced model by Wood (1991) is not entirely new; several parts of the CSP model developed over years by various authors were simply reassembled, restructured and brought together in one single model. The CSP model is not only a model to be implemented in order to execute social responsibilities; it also serves as an evaluation model of a corporation's social performance (ibid.). Yet, this model is not without critics. As this is one of the earliest

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<sup>5</sup> The definition of power here is not further elaborated by Woods/Melé.

implementation models of social responsibilities in business, according to Melé (2009), it lacks “integration between ethical normative aspects and business activity” (54). Thus, it can be seen as preserving the status quo and not fundamentally changing business behaviour to a principally responsible business conduct. It only gives “a human face to capitalism” (ibid.). Clarkson furthermore refers to difficulties with the definition of so-called ‘social issues’, as the meaning of the word ‘social’ is itself vague (Clarkson 1995). He remarks, “these issues have been identified as typical stakeholder issues rather than as typical social issues” (Clarkson 1995, 103). Therefore, he proposes a stakeholder-oriented framework for the evaluation and analysis of corporate social performance since this approach is still lacking a definition and practically relevant business-related implications (ibid.).

**Stakeholder Approach** The approach can be considered as being superior to CSR activities in corporations, as it offers a clear focus: the stakeholders of a corporation. Thus, it is more specific than concepts of CSR or corporate social responsiveness (Clarkson 1995 ; Melé 2009). In essence, this is about managing various claims of different target groups, the stakeholders. Hence, this approach is much more instructive and accordingly also offers implications for management.

Donaldson and Preston (1995) differentiate four central characteristics or theses to categorise different strands of this theory: descriptive, instrumental, normative and managerial. Some theories can be considered descriptive, as they present “a model describing what the corporation is“ and describe “the corporation as a constellation of cooperative and competitive interests possessing intrinsic value” (ibid., 66). Other approaches to stakeholder theory are by contrast rather instrumental, examining the potential connection between the practice of this theory and corporate performance (ibid.). The third group is based on normative assumptions involving the standpoint that “stakeholders are persons or groups with legitimate interests in procedural and/or substantive aspects of corporate activity” and that their interests have an intrinsic value (ibid., 67). The last group of theories evolving around stakeholder theory involves a managerial focus. Stakeholder management is a practically relevant strand, as it deals with “attitudes, structures, and practices” to be recommended (ibid.).

Beyond these four orientations in stakeholder theory there are also broad and narrow approaches when it comes to defining what a stakeholder actually is. According to broad approaches, a stakeholder can be any human being affected by business operations - for example employees, suppliers, creditors and customers - as well as people in the surrounding



communities where business operations take place (Orts and Strudler 2002). In contrast, the narrow approach only considers those as legitimate stakeholders, who participate in the business concerned. Hence, only employees, creditors and suppliers with a direct business relation or “significant contractual relations” with a corporation, thereby bearing economic risk, are included (ibid., 219-220).

Generally, the underlying concept of this approach remains rather vague, as there are now descriptions such as ‘stakeholder management’, ‘stakeholder approach’ or ‘stakeholder theory’ sometimes offering very “diverse and often contradictory evidence and arguments” (Donaldson and Preston 1995, 66). As seen above, there are strands with quite different orientations. And, as Donaldson and Preston put it, it is a “striking characteristic of the stakeholder literature [...] that diverse theoretical approaches are often combined without acknowledgement” (ibid., 72).

This approach or theory has further substantial deficits. Apart from being vague in general, the stakeholder definition itself lacks clarity particularly in broad approaches (Orts and Strudler 2002). This lack of clarity in turn creates difficulties when it comes to managing, balancing or reconciling various and diverse stakeholder claims (ibid., Melé 2009). Besides, considerations regarding nature or environment are difficult to include as neither nature nor the environment present eligible stakeholders in this theory. Stakeholder theory usually refers to human beings in the first instance, as both nature and the environment do not have any individual needs or wants.<sup>6</sup> Furthermore, how can these various interests be balanced at all? Should all claims be treated equally or should there be partiality based on relevancy for the corporation or proportion of the “stake” in question (Melé 2009)? Moreover, when stakeholders and their claims are in focus, a manager runs the risk of losing his basic objective as he might be too occupied with managing and reconciling a diverse landscape of claims (ibid.). Finally, there is still no evidence available on whether good behaviour towards stakeholders also leads to corresponding economic results (Orts and Strudler 2002; Donaldson and Preston 1995).

**Corporate Citizenship** Corporate Citizenship (CC) is a concept for business responsibility, which emerged in the mid 1990s. There are three different views on how CC can be perceived in comparison to CSR: it is either considered as limited compared to CSR; it is seen as

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<sup>6</sup> This certainly does not imply that nature or the environment has no value to society. However, it is difficult to define nature or the environment as a stakeholder. And, if so, it leads to the problem with broad approaches already described. Also see Orts and Strudler 2002.

synonymous or only as an update; or it appears to present an extended concept of business responsibility beyond the law (Crane and Matten 2007). The last view assigns a political role to corporations not inherent in the CSR concept; hence CC is considered as going beyond CSR (ibid.; Melé 2009; Rendtorff 2009; Schrader 2003).

The difference between CC and CSR is also perceived differently by various authors: some authors consider CC as superior to CSR as it incorporates a political notion, while CSR is only focused on social responsibilities. Others claim that CC is more focused on profit in the sense of a business case, while CSR in contrast gives priority to pursuing moral responsibilities (Melé 2009; Schrader 2003; Windsor 2001). Yet, drawing a clear distinction between the two concepts seems hardly possible (Schrader 2003). In the end, CC can be applied both ways: instrumentally or more ethically (Windsor 2006).

But what is actually involved in the idea of a corporate citizenship? The conceptual basis can be traced back to an Aristotelian notion of a political community. CC views the corporation as a member of the political community with corresponding rights and duties. Essentially, this concept is focused on a corporation's membership in society; consequently it is about taking responsibility and showing engagement towards the community in which it operates (Crane and Matten 2007; Melé 2009; Rendtorff 2009; Schrader 2003). This specific political notion may be also linked to T.H. Marshall's (1950) comprehensive definition of citizenship, which comprises social, civil and political rights (Crane and Matten 2007; Schrader 2003). In contrast to this specific political notion, the conventional notion of citizenship referring to individuals describes the relation between government and its citizens. Basically, the concept of CC takes up this model and applies it to corporations and their relation to society (Melé 2009; Crane and Matten 2007).

Depending on the interpretation of the concept of CC the scope of activities involved can differ. When the political notion is emphasised, which accordingly advocates an embeddedness of business into society, the ideal set of activities is broad, ranging from employee and stakeholder empowerment, transparency, inclusivity and diversity, and long-term thinking and consideration of stakeholder interests to an open attitude of engagement and dialogue (Birch 2001). Further corporate activities relating to CC can be positive lobbying in the sense of fostering the public good in contrast to promoting only corporate good, de-regulation, and regulatory co-responsibility, for example in advancing legal provisions together with the government (ibid.). Voluntary agreements, regulations or initiatives on national and global levels can also be considered as related to that concept (ibid.). However, business reality often differs from this potentially wide scope and CC

activities are often limited to sponsoring or ‘corporate giving’, corporate volunteering, various social activities and charity (Schrader 2003).

The implementation and application of this concept is further associated with enhancing a corporation’s reputation and its financial performance (Windsor 2001). As a corporation is now ‘embedded’ in society, it gains a better standing of, and more acceptance from, society and accordingly a better reputation. Furthermore, these activities serve to secure the “social licence to operate”<sup>7</sup> within society as the corporation is presented as an entity showing engagement towards society (Schrader 2003). In sum, this concept appears to be putting more emphasis on social and ethical dimensions. It also fosters the impression that business is more integrated into society through the notion of citizenship. However, CC remains a vague concept in terms of definitions and scope with a strong focus on mostly philanthropic activities (Melé 2009).

It is also questionable how far the notion of citizenship can be applied to an entity like a corporation at all (ibid.). The original concept of citizenship is tied to a membership in a political community and to political and legal duties towards this community (Pesqueux 2009; Bellamy and Palumbo 2010). Yet, CC draws an analogy between ordinary citizens, their relation to the state and democratic polity in a legal and political sense, and enterprises. According to Windsor (2001), this concept conflates ‘citizen’ with ‘person’: an enterprise is an entity with a personhood created by law but this does not automatically induce any form of citizenship. Besides this, as Pesqueux (2009) points out, the involved legal and political responsibilities or duties are not necessarily of an ethical nature. Still, CC is ethically connoted, as it promotes the idea of a corporation being a good citizen in its community.

To sum it up, the CSR approaches described here can be partially linked to the theories mentioned further above. For example, the classic shareholder theory relates to Klonoski’s assumption of “fundamentalism”, Windsor’s “economic conception” and Melé’s “economics” approach where a corporation is primarily focused on wealth creation, which, according to Friedman (1970), is the only “social” responsibility of a corporation.

The earliest applicable approach concerned with social responsibility beyond wealth creation is corporate social performance. This model can be connected with Klonoski’s

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<sup>7</sup> The “social licence to operate” is different to a legal or regulatory licence. A company can be said to have this “social licence” when its operations also have the surrounding community’s consent (Dashwood 2007; Dashwood 2011).

second assumption of moral personhood of a corporation, according to Melé (2009).

The second approach, stakeholder theory, can be interpreted as referring to Windsor's second approach of an "ethical conception" and Klonoski's third assumption of a "social dimension" of business responsibilities.

The third approach is Corporate Citizenship where a corporation is 'embedded' into society as a 'citizen' among other human citizens with rights and duties. This idea matches with Windsor's "corporate citizenship conception" and is also reflected in Klonoski's third category (Windsor 2006). However, apart from the apparent overlappings described, the following theories and approaches can be certainly connected to other conceptions by other authors as well.

#### ***2.4.2 Theories and Approaches in Environmental Responsibility***

The meaning of sustainability as it is used in an ethical business context today is as blurred as the meaning of CSR. Originally, sustainability was a concept applied in forestry (Crane and Matten 2007). According to Eblinghaus and Stickler this concept can even be traced back to 16<sup>th</sup> century Germany, although it was more frequently used from the middle of the 18<sup>th</sup> century onwards (Eblinghaus and Stickler 1998). The guiding principle behind it is to keep a balance of the trees felled and the trees to grow back or to be planted again. Since the beginning of the 19<sup>th</sup> century, sustainability does not only include economic aspects in terms of optimal yield results, but also ecological ones like soil protection and conservation. Applying this principle today means to refrain from consuming more renewable resources than can be naturally reproduced. Nevertheless, narrowing the concept of sustainability to environmental protection applied in forestry falls short of including other relevant issues of sustainability, for example causes of environmental pollution (ibid.). Originally, problems with industrial emissions and waste were not included, but the scope of sustainability has been broadened over time.

Today, the meaning of sustainability is often focused on the limits of growth and sustainable development. The focus has shifted ever since Dennis L. Meadows first presented his well-known book *The Limits To Growth*, a study for the Club of Rome, in 1972 (ibid.). During that time, the first environmental initiatives were undertaken as people began to realise that there are indeed "ecological limits to growth", particularly after the oil crisis in 1973 (Rendtorff 2009; Handelsblatt online 2013). Mainstream economics would soon clash

with the insight that endless growth and almost limitless resources are only ideas originating from an already bygone era.

Another milestone regarding the development and advancement of the concept of sustainability was the first United Nations conference in 1972, which took place in Stockholm and led to the creation of the UN Development Program. Later, in 1983, the World Commission of Environment and Development (WCED) was established with its well-known publication presented in 1987, *Our Common Future: Sustainable Development in International Politics*, also known as the Brundtland Report. In 1992, the Rio Earth Summit followed, focussing on sustainability and sustainable development (Rendtorff 2009).

In 1994, the sustainability concept was officially extended to also include economic and social dimensions next to the formerly dominant environmental one by the creation of the “triple bottom line”, discussed in more detail below (The Economist online 2009). Various initiatives and activities now count as ‘sustainable’ such as resource-efficient operations like waste and energy management, emission caps and trade schemes, and the production of certified wood and paper.

The UN has also further impelled the idea of sustainable development. The first decade of the 21<sup>st</sup> century was marked by the publication of the UN Millennium Development Goals (MDG), which comprise eight goals focused on education, health, poverty and sustainability amongst others (United Nations, Millennium Goals n.d.). In addition to its Millennium Development Goals, the UN announced the Sustainable Development Goals (SDG) at the Rio+20 Conference in 2012 (United Nations Sustainable Development Knowledge Platform n.d.).

**Triple Bottom Line** John Elkington, founder of the British think tank and consultancy SustainAbility, developed the ‘Triple Bottom Line’ (TBL) in 1994. As mentioned above, this concept is based on three pillars and comprises economic, social and ecological dimensions. Accordingly, Elkington’s concept goes beyond the traditional single bottom line of a corporation’s financial performance (Elkington 1997).

These pillars are expressed in the so-called ‘three P’s’: profit, people<sup>8</sup>, planet<sup>9</sup>. The ‘Triple

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<sup>8</sup> Also described as “the fair and favorable business practices regarding labor and the community in which the

Bottom Line' functions like a balanced scorecard trying to measure a company's performance on each of the three dimensions. However, a fundamental problem is that these three dimensions cannot be measured in exactly the same ways, as they present incommensurable measures, thus the actual comparability is limited. Profits are easily measurable in monetary units but corporate performance reflecting dimensions like people and planet are quite difficult to capture in monetary terms (Elkington 2004, The Economist online 2009).

## **2.5 Implementation of Voluntary Business Responsibility**

The practice of voluntary business responsibility by companies going beyond compliance with legal responsibilities is manifold.

First, there is usually a CSR strategy developed by the company underlying this practice.<sup>10</sup> This CSR strategy is often inspired or based on the contemporary CSR theories mentioned in the previous section, like corporate citizenship or stakeholder theory. For the execution of this strategy there are usually specialised departments, like the CSR or sustainability departments, subordinated to either the corporate communication department or the board directly. The strategies often comprise measures like sponsoring of cultural or sports events, donations for charity or cultural purposes (for example artwork), programmes focused on health or education, and employee volunteering initiatives (for example helping the community) (Suchanek und Lin-Hi 2008).

Second, there are various standards, guidelines or principles a company can additionally adopt. A company can also receive certifications in two different categories: management or process-oriented certification and product certification. Furthermore, there is the option to join initiatives or to become a member in certain organisations.

Today, many companies report on their CSR strategy, projects and achievements once a year in a CSR or sustainability report.

The landscape of all these options for standards, guidelines and so on available today is vast. Apart from rather general guidelines applicable to every company there are also

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company conducts its business" (Investopedia.com, Triple Bottom Line n.d.)

<sup>9</sup> Also described as "the use of sustainable environmental practices and the reduction of environment impact" (ibid.)

<sup>10</sup> For an example please see DB.com, Strategy n.d.

industry-specific standards and memberships. This section aims to give an overview of some of these measures. However, this overview cannot be considered exhaustive as the landscape of guidelines is constantly changing.

Naturally, as there are so many measures available today, the particular scope of focus of each of those varies respectively. For example, some of these measures are particularly focused on the integration of either social (like human rights or employment-related aspects) or environmental concerns, while others are more comprehensive including both dimensions and additionally governance or legal aspects.

### ***2.5.1 Guidelines and Principles***

This section introduces the most common guidelines, principles and standards available for business. Among those are the MNE Declaration proposed by the International Labour Organisation, which focus on social issues like work conditions; the OECD Guidelines for Multinational Enterprises, which are very comprehensive, as it covers social, environmental, legal and other dimensions; the UN Global Compact, which is also a comprehensive set of principles; the UN Norms, which never gained official acceptance as these were too much overlapping with the ILO MNE Declaration; the UN Guiding Principles, a later improved version of the UN Norms, which focus on social issues like human rights and working conditions, and finally the ISO 26000 Guidance, which again presents a comprehensive and besides very applied guidance, as it is also oriented towards measuring performance.

**International Labour Organization (ILO) MNE Declaration** The International Labour Organization was founded in 1919, after the First World War. Being located in Geneva it aims for more social justice in employment and is active in 185 countries today (International Labour Organization, Origins and History n.d.). The labour standards developed by the ILO have been maintained but also further advanced since 1919 (International Labour Organization, Introduction to International Labour Standards n.d.). The labour standards are addressed to governments, employers and employees and present “basic principles and rights at work” (International Labour Organization, Conventions and Recommendations n.d.). These principles and rights come either in the form of a legally binding convention for ratifying member states or as recommendations.

The ILO has also developed guidelines addressing corporations directly, like its latest MNE Declaration (4<sup>th</sup> edition, 2006), also called the ‘Tripartite declaration of principles concerning

multinational enterprises and social policy’ (International Labour Organization 2006). In contrast to the regular ILO standards, the MNE Declaration consists of non-binding recommendations and is chiefly seen as the “ILO’s key tool for promoting labour standards and principles in the corporate world.” (International Labour Organization, *Multinational Enterprises (MULTI)* n.d.).

**OECD Guidelines for Multinational Enterprises** In 1947, the Organisation for Economic Co-Operation and Development (OECD) was founded in Paris (OECD.org, *Organisation for European Economic Co-operation* n.d.). The organisation is active in 40 countries and has 34 members of which 24<sup>11</sup> are also members of the EU.<sup>12</sup> All OECD legal instruments like its decisions; recommendations and international agreements are primarily addressed to its member countries, and their respective governments for later implementation. They have legally binding force for its members (OECD.org, *OECD Legal Instruments* n.d.).

In 2011, the OECD issued specific guidelines for multinational enterprises (MNEs): “The Guidelines are recommendations jointly addressed by governments to multinational enterprises. They provide principles and standards of good practice consistent with applicable laws and internationally recognised standards.” (OECD.org, *OECD Guidelines for Multinational Enterprises 2011*, 17). They can be considered as extending the law; nonetheless, they are neither a substitute for domestic law nor are they legally binding or legally enforceable as opposed to other OECD measures. Adherence to these guidelines by corporations is entirely voluntary (ibid.).

**United Nations Global Compact** In 2000, the United Nations Global Compact (UNGC) was launched by UN Secretary-General Kofi Annan and presents a “strategic policy initiative for businesses” (United Nations Non-Government Liaison Office n.d.; United Nations Global Compact, *Overview of the UN Global Compact* n.d.). The UNGC is amongst the most widely recognised and acknowledged standards worldwide. Its network-based structure meanwhile includes 7,000 companies from 145 countries (United Nations Global Compact, *UN Global Compact Participants* n.d.).

The UNGC is built on 10 principles covering the following business-relevant areas: human

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<sup>11</sup> However, it is worth noting that only ten member countries are non-EU members: Australia, Canada, Chile, Iceland, Israel, Japan, Korea, Mexico, New Zealand and the United States (Europe.eu, *EU member countries* n.d.).

<sup>12</sup> A membership with Russia is in negotiation, while further close relations are maintained with China, Indonesia and India, as well as with Brazil and South Africa (OECD.org, *History* n.d.; OECD.org, *Members and Partners* n.d.).



rights, labour, environment, and anti-corruption. The principles are drawn together from already established conventions and declarations, such as the following:

- The Universal Declaration of Human Rights
- The International Labour Organization's Declaration on Fundamental Principles and Rights at Work (ILO)
- The Rio Declaration on Environment and Development
- The United Nations Convention Against Corruption

The UN GC, however, is not performance-oriented hence a company's activities in terms of a successful implementation of the ten principles are neither monitored nor measured or evaluated. All that is required is an annual "Communication on Progress" by the company "which is shared openly and publicly and is available for peer review and stakeholder comment" (United Nations Global Compact, Frequently Asked Questions n.d.). If a company does not communicate its progress within a certain deadline and also does not do so by the following year, the company is expelled from the UN GC. This exclusion can be also made public (United Nations Global Compact, Integrity Measures n.d.). Apart from exclusion, however, there are no other sanctions; the basic idea is that the mandatory report on progress, which comes with membership, should generally promote more ethical business behaviour and foster transparency.

**UN Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights** The 'UN Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights', hereafter 'the norms', were approved by the United Nations Sub-Commission on the Promotion and Protection of Human Rights in 2003. However, the UN Commission on Human Rights did not approve 'the norms' in 2004. The UN Commission cast doubt on the reasonableness of this set of norms as its scope overlaps with other existing norms such as the ILO standards for multinational enterprises. Thus, 'the norms' have not yet become an officially acknowledged standard. In fact, they were never put into practice.<sup>13</sup> The majority of MNEs are also said to favour the voluntary UN GC over 'the norms' in terms of human rights

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<sup>13</sup> This is not the first UN standard which did not prove successful. As mentioned in the introduction above, the United Nations Centre of Transnational Corporations (UNCTC), a programme established in 1974, could not enforce its code of conduct for corporations permanently. It was considered too rigid and was discontinued in 1992 in favour of voluntary measures (United Nations Conference on Trade and Development 2002; Corporatewatch.org n.d.).

protections (Moder 2005).

**UN Guiding Principles on Business and Human Rights** After ‘the norms’ were rejected and consequently never put into practice, John Ruggie, UN Special Representative, formulated the “UN ‘Protect, Respect and Remedy’ Framework and Guiding Principles”, which were approved in 2008 (Business-humanrights.org n.d.). Ruggie’s framework and principles then served as a basis for the latest guidelines for corporations approved by the UN in 2011. These present the implementation of Ruggie’s ‘Protect, Respect and Remedy’ framework (ibid.). The UNGP comprise foundational and operational principles. Businesses are compelled to respect human rights by referring to the internationally recognised International Bill of Human Rights and the ILO Fundamental Principles and Rights at Work (UN Documents, A/RES/3/217 1948; International Labour Organisation, Declaration on Fundamental Principles and Rights at Work 1948). However, these guidelines do not present legally binding standards for corporations (United Nations Human Rights 2001). The guidelines clearly state that it is in the responsibility of the state to prevent human rights abuses. Hence, it is required to take “appropriate steps to prevent, investigate, punish and redress such abuse through effective policies, legislation, regulations and adjudication” (ibid., 3).

**ISO 26000 – Guidance** The ISO 26000:2010 provides guidance for social responsibility. With the application of ISO 26000:2010 “an organization take[s] into consideration societal, environmental, legal, cultural, political and organizational diversity” (Iso.org, ISO 26000:2010 n.d.). In essence, it concentrates on theoretical aspects like concepts, definitions and characteristics of social responsibility; operationally it focuses on practices, principles and stakeholder engagement, and further on the implementation, integration and measurement of socially responsible behaviour, and the communication thereof (ibid.). Unlike other ISO systems the 26000:2010 only provides guidelines. It is not a regular ISO management system standard based on requirements which allow for a certification, nor is it an internationally or officially approved guideline, standard or recommendation (Iso.org, ISO 26000 n.d.).<sup>14</sup>

### **2.5.2 Initiatives**

There are various kinds of initiatives companies can participate in. The difference between

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<sup>14</sup> However, the ISO 26000 guidance is not without critics, see e.g. Wood 2011.

initiatives and guidelines or principles is that initiatives primarily emphasise participation as opposed to following or implementing guidelines and principles. For example, the Carbon Disclosure Project and the Global Reporting Initiative encourage companies to disclose particular information. The Integrated Reporting initiative on the other hand motivates companies to apply new way of reporting their sustainability and CSR related information.

Unlike memberships, participating in initiatives usually involves no member fee but could include voluntary contributions, which is the case with GRI. Yet, through this voluntary contribution GRI also provides the benefit of being part of a larger global network, which includes various forms of collaboration (Cepcresources.org, Global Reporting Initiative n.d.).

The last initiative is of a different nature and focused on the environment, the UN REDD programme.

**Carbon Disclosure Project (CDP)** The CDP was launched in 2000 and is based in London, UK (World Wildlife Fund 2009; Climatepartner.com n.d.). According to its website, CDP “is an international, not-for-profit organization providing the only global system for companies and cities to measure, disclose, manage and share vital environmental information.”(Carbon Disclosure Project, About CDP n.d.). The CDP works closely together with institutional investors<sup>15</sup> who seek to “reduce the long-term risks arising from environmental externalities” to “protect their long-term investments” through information collected and made available by the CDP (ibid.).

Companies can engage with the CDP by participating in four programmes covering the following areas: climate change, forest, water, and supply chain. Participating in the CDP programmes and answering questionnaires offers several advantages to companies such as transparency on consumption and emissions, in order to identify opportunities for reductions. Furthermore, it they are able to demonstrate innovation and leadership, and communicate consumption and emissions transparently to shareholders and the public, thereby improving their reputation (Carbon Disclosure Project, Climate Change Program n.d.).

**Global Reporting Initiative (GRI)** In 1997, GRI was founded in Boston. It is an initiative developed by the Coalition for Environmentally Responsible Economies (CERES) with the aim to establish an accountability mechanism for the CERES principles.

In 2000, the first reporting framework was made public. One year later, GRI was officially

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<sup>15</sup> In 2013 more than 722 institutional investors backed the CDP investor initiatives (Carbon Disclosure Project n.d.).

separated from CERES and became an independent institution. Its secretariat is based in Amsterdam, Netherlands. It has strategic partnerships with the UN Environment Programme, the UN Global Compact, the OECD and ISO (Global Reporting Initiative n.d.).

In May 2013, GRI released the fourth generation of its reporting framework, G4, which also includes reporting and sector guidelines (ibid.). The framework is applicable to any organisation. A company creating a sustainability report following the G4 framework needs to include the following three dimensions:

- Economic (including economic performance, market presence and other criteria)
- Environmental (including the coverage of materials, energy and water consumption, emissions, waste, and biodiversity among other criteria)
- Social (includes sub-categories on labour practice, human rights, society (anti-corruption measures, transparency on anti-competitive behaviour, grievance mechanisms etc.), and product responsibility)<sup>16</sup>

CSR and sustainability reports by companies are then assessed and classified according to the level of transparency reached in the report, and correspondingly the number of indicators covered.

**Integrated Reporting (IR)** Integrated Reporting (IR) is a programme developed by the International Integrated Reporting Council (IIRC), formerly known as the International Integrated Reporting Committee, founded in 2010 (Iasplus.com n.d.). The council represents “a global coalition of regulators, investors, companies, standard setters, the accounting profession and NGOs” (The International Integrated Reporting Council n.d.).

IR aims to combine reporting on various dimensions, not only financial ones, hence promoting an integration of all relevant information into one report.<sup>17</sup> It is not simply a summary of different reports put together, like a sustainability report combined with a financial report, but rather aims to connect all this information making it possible to reveal the relations between various factors or indicators.

**UN REDD Programme** Carbon offset or carbon neutrality is another option for companies to improve their sustainability performance. Most of the business operations today involve

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<sup>16</sup> For detailed information on dimensions and criteria see Global Reporting Initiative, G4 Sustainability Reporting Guidelines 2013.

<sup>17</sup> Usually, these two topics Sustainability/CSR and financial performance are published in separate reports: the sustainability or CSR report and the annual report (The International Integrated Reporting Council 2013).

GHG or carbon emissions. Depending on the industry, these can be higher or lower. Energy-intensive industries are, for example, cement, paper, glass and petroleum among others (The European Cement Association n.d.). The amount of GHG emitted to the atmosphere is called the carbon footprint (United States Environmental Protection Agency n.d.). In order to reduce that footprint, companies can buy so-called carbon credits to either offset their emissions entirely and to be “carbon neutral” or to just be compliant<sup>18</sup> with certain emission caps (Businessdictionary.com, carbon offset n.d.). These credits can be purchased from various companies, which are engaged in a number of projects.

One more recent initiative in this field is the UN REDD (Reducing Emissions from Deforestation and Forest Degradation) programme initiated in 2008 (Un-redd.org, About UN REDD Programme n.d.). The UN REDD programme is focused on curbing deforestation and forest degradation by creating “financial value for the carbon stored in forests, offering incentives for developing countries to reduce emissions from forested lands and invest in low-carbon paths to sustainable development” (Un-redd.org, About REDD+ n.d.). The REDD+ is a concrete solution mitigating climate change and includes “conservation, sustainable management of forests and enhancement of forest carbon stocks” (ibid.). Currently, there are three initiatives supporting REDD+: the UN REDD programme, the Forest Carbon Partnership Facility (FCPF), and the Forest Investment Programme (FIP), which is hosted by the World Bank (ibid.).

### ***2.5.3 Certificates***

The certification landscape is expanding. Today, companies have various ways of acquiring certificates. Firstly, there are certificates available for different areas, for example those with a special focus on working conditions or the environment. Secondly, there are agencies, which certify entire processes within a company or single products. Certified companies underline their social and environmental engagement and commitment by receiving an official certification by these usually trustworthy and globally recognised associations. These certification processes always involve costs, as an officially recognised audit is necessary to

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<sup>18</sup> For example, energy-intensive industries, like mining, manufacturing or cement can engage in carbon trading schemes to buy leftover carbon credits from industries with low-energy profiles. These are then used to comply with emissions caps and avoid fines imposed by a certain country (Ecolife.com n.d.).

confirm the findings. A selection of these current certificates is presented below.

## Product Certifications

The following section describes the most prominent product certifications. Used in retail, these product certificates also help the customer to distinguish between conventionally produced products and products, which are ethically produced or responsibly sourced. However, there are differences regarding the scope of the certifications listed here. While Fairtrade focuses on fair working conditions, MSC and FSC focus on responsible sourcing, while only UTZ combines both.

**Fairtrade** Fairtrade International, originally a Dutch initiative, is a global organisation founded in 1998 to promote better working conditions for farmers and workers by securing better deals for them. The organisation comprises a broader system of producer networks, 25 individual Fairtrade organisations and an affiliated certification agency called FLO-CERT (Fairtrade International, Producer Networks n.d.; Fairtrade International, Who we are n.d.).

The Fairtrade certification is a product-based certificate. Here, a badge or label is put on the products to facilitate the identification of those produced under fair conditions (Fairtrade International, History of Fairtrade n.d.). The scope of products, which can be certified, ranges from food, via tea and coffee, to timber and gold (Fairtrade International, Standards for Small Producer Organizations n.d.). In order to get certified an “initial on-site inspection” is necessary (<sup>1</sup> Fairtrade International, Certifying Fairtrade n.d.). For large producer, the organisation FLO-CERT hands out a so-called ‘group certification’ implying that not every single site has been inspected but random checks at representative samples were conducted. Audits can take four days to several weeks, depending on the size of the production site. Audit costs are calculated based on a daily rate. After the initial inspections further inspections are conducted on an annual basis (ibid.).

**FSC** The Forest Stewardship Council (FSC) aims to promote responsible forest management. Initially, it was established as a legal entity in Mexico in 1994 but later moved its office to Bonn, Germany in 2003. The FSC developed a “non-governmental, independent and international forest certification scheme” based on Section II of the Agenda 21, produced by the Rio Earth Summit in 1992 (Ic.fsc.org, FSC Certification n.d.; United Nations Sustainable Development, Agenda 21 1992).

The scheme comprises various principles, which were first published in 1994 with revisions

in between until the latest version was approved in 2012. This scheme allows forest managers and owners to receive a certification but it can also be applied to the chain of custody, thereby including manufacturers, processors and traders (Ic.fsc.org, FSC Certification n.d.).

In addition to the principles, there are regional and national standards developed by the FSC to take into account specific conditions and contexts of application (ibid.). Forests are assessed on an annual basis by accredited certification bodies. Issued certificates are valid for a period of five years (Ic.fsc.org, 3 Steps Towards FSC Certification n.d.). Successfully certified producers are allowed to use the FSC label on their products to increase customer awareness and assurance (Ic.fsc.org, FSC Trademark Support n.d.). Audits and certification involve additional costs.

**MSC** The Marine Stewardship Council (MSC) is a non-profit organisation based in London, UK. It was founded in 1997 by the World Wildlife Fund (WWF) and the company Unilever (World Wildlife Fund, Der Marine Stewardship Council (MSC) n.d.).

The MSC standard is a certification scheme for fisheries applying sustainable fishing methods and offering sustainable seafood. Principles and criteria for certification were established in 2002 and advanced in 2010. External third parties certify participating fisheries. The certification is valid over five years with follow-up checks at least once a year (Marine Stewardship Council n.d.). Similar to other product certification schemes, a label is put on the product if successfully certified to increase transparency and customer awareness.

**UTZ** UTZ was initiated in 1999 with a first local office in Guatemala City. Its name is derived from the word “Utz Kapeh” in the Mayan language Quiché and means “good coffee” (Utzcertified.org, The story of UTZ n.d.).

It is a certificate focused specifically on the sustainable production of tea, coffee and cacao, but its scope goes beyond fair prices and good working conditions, as it is also concerned with the environment and better farming practices (Utzcertified.org, Here’s how UTZ works n.d.).

The certification system of UTZ is based on a ‘code of conduct’ for each of the three products, which covers economic, environmental and social criteria<sup>19</sup> and was developed based on a multi-stakeholder approach (Utzcertified.org, Standards & Certification n.d.). The adoption of the UTZ standard by producers and supply chain actors is monitored and

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<sup>19</sup> Criteria certified are e.g. “good agricultural practices” and health and safety issues as well as workers rights, “natural resources and biodiversity”, “social responsibilities“ which implies transparent management structures, education and emergency health care (Utzcertified.org, UTZ CERTIFIED Good Inside Code of Conduct 2009).

evaluated. It serves two purposes: first, to record outcomes and impacts; second, improvement based on this information (Utzcertified.org, Monitoring & Evaluation n.d.).

Apart from the label, which allow for an identification of products produced under UTZ standards, these products are also traceable to their origin online (Utzcertified.org, Trade and Traceability n.d.).

### ***Management or Process Certification***

Management or process certification is different to product certification. First, there is the particular standard, a management system, which needs to be implemented by the company. In a second step, this management system then gets certified by the respective organisation offering this standard. Here, the most prominent ones are mentioned, like EMAS, a specifically European standard; ISO 1400, the international “companion” of the EMAS and its precursor. Both are standards which focus on the environment. The third standard mentioned here is the SA 8000, also established by the International Organization for Standardization (ISO), which in contrast enables systematic social accountability.

**EMAS** The initiative is based on a EU regulation first enacted in 2001 and renewed in 2009. Normally, EU regulations have a binding character but EMAS is a voluntary initiative, officially called a regulation “on the voluntary participation by organisations in a Community eco-management and audit scheme (EMAS)” (EUR-Lex, Regulation (EC) No 1221/2009).

Basically, EMAS is based on the ISO 14001 standard but goes further. External actors<sup>20</sup> are responsible for ensuring quality and supervision of the EMAS system.

Organisations applying EMAS develop individual, environmentally sustainable objectives and communicate their performance on an annual basis. Today, more than 14.000 organisations are already registered EU-wide (European Commission, EMAS n.d.).

**ISO 14000 Standard** The ISO 14001:2004 and ISO 14004:2004 are management system standards with an environmental focus developed by the International Organization for Standardization (ISO). The organisation was founded in 1947 and is based in Switzerland (Iso.org, About ISO n.d.).

The ISO 14001:2004 standard is based on a framework to guide a company to achieve an

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<sup>20</sup> Certification in Germany is conducted by the officially accredited German EMAS Advisory Board, “a legal committee established under § 21 Environmental Audit Act (Umweltauditgesetz - UAG) at the Federal Ministry for the Environment, Nature Conservation and Nuclear Safety (BMU).” (Umweltgutachter Ausschuss n.d.).



effective environmental management. The framework enables companies to develop and implement appropriate objectives and policies with regard to environmental criteria, which can be measured, controlled and therefore influenced by the company itself (Iso.org, ISO 14001:2004 n.d.). For further improvement in terms of environmental effectivity and efficiency, waste, energy and material consumption is measured. According to ISO this management systems leads to “lower distribution costs” and an “improved corporate image among regulators, customers and the public” (Iso.org, ISO14000 n.d.). The management system standard is applicable to any organisation regardless of size or sector. Apart from a self-assessment, the environmental management system (EMS) allows for external assurance and certification/registration processes, where an external third party or organisation affirms the findings.<sup>21</sup>

The 14001:2004 standard is the most popular one. However, there are three more standards belonging to that family: 14004:2004, a guidance for 14001:2004, 14006:2011, which is focused on eco design and 14064:2006, which is focused on greenhouse gas emissions (Iso.org, ISO 14001:2004 n.d.; Iso.org, ISO 14006:2011 n.d.; Iso.org, ISO 14064-1:2006 n.d.).

These standards “can be used by any organization, whatever the size, activities or products, wherever located, and whether it operates in the private, public or non-profit sector” in theory (Wood 2012, 88). However, in reality, ISO standards are predominantly implemented by large corporations, as some standards require technology, monitoring and other processes often not available to smaller companies, particularly not in developing countries, as it is simply too costly (ibid.).

**Social Accountability SA 8000** Social Accountability International (SAI), a non-governmental and multi-stakeholder organisation, developed the Social Accountability Standard SA 8000 in 1997, which is “based on conventions of the ILO, UN and national law” (Sa-intl.org, About SAI n.d.). The latest version was published in 2008. Today, there are now over 3,000 facilities across 65 countries certified, covering 65 industrial sectors and more than 1.8m workers (Sa-intl.org, Social Accountability International - SA8000 n.d.).

Principally, this certification is focused on social issues and certification processes can be applied to any business. It is process-based and not product-based, meaning processes within

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<sup>21</sup> It is worth mentioning here, that ISO itself is not engaged in any certification or confirmation processes. It is an organisation, which only develops standards. Certification and confirmation achieved by external organisations involve additional costs (Iso.org, Certification n.d.; Iso.org, R ISO14001:2004 n.d.).

a business are certified, not a particular product. The certification process is third-party audited, while audits are conducted on a semi-annual basis, and sometimes also unannounced. The certification is valid over three years (ibid.). However, this certification also involves costs. Companies are charged based on duration, or audit days, with daily rates ranging from USD 500 to 1,500 (ibid.).

### **Other Certificates**

Next to product and management system certificates, there are also other certificates available. The one described here, LEED, presents an internationally acknowledged standard for green buildings, that is, environmentally friendly and energy efficient.

***LEED – Building Certification*** The LEED framework was founded in March 2000 by the U.S. Green Building Council (USGBC).<sup>22</sup> The Leadership in Energy & Environmental Design (LEED) is “a framework for identifying and implementing practical and measurable green building design, construction, operations and maintenance solutions” (USGBC.com, About LEED n.d.). It is a certification scheme, which can be applied to all building types and is the globally recognised symbol for green buildings today. There are four categories of certification, depending on the level of excellence achieved: certified, silver, gold and platinum.

#### ***2.5.4 Memberships***

Membership in globally recognised organisations is also an option for companies to signal their commitment to a responsible business practice. In addition, these networks offer the possibility for collaboration with other companies. Often, they also provide platforms for advanced training and specific knowledge exchange helping companies to achieve their CSR or sustainability goals or to learn more on how to increase their performance in these areas.

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<sup>22</sup> The USGBC was founded in 1993 by Rick Fedrizzi, David Gottfried and Mike Italiano with the aim of promoting “sustainability in the building and construction industry” (see USGBC.com, USGBC History n.d.).

This section gives an overview on the most popular memberships options. Still, it is noteworthy that these memberships always involve a certain fee, except for the WWF Climate Savers (Ceres.org, Become a Ceres Member n.d.; ISEAL Alliance, ISEAL Member Fee Schedule 2014; Global Business Initiative on Human Rights, FAQ n.d.).

**CERES** After the Exxon Valdez spill in 1989 CERES was founded and published its CERES Principles directly thereafter. CERES works closely together with leading businesses and investors, but also with public interest groups, policy makers and other agents to develop and advance sustainable solutions (Ceres.org, What we do n.d.).

The principles are “a ten-point code of corporate environmental conduct to be publicly endorsed by companies as an environmental mission statement or ethic” (Ceres.org, The Ceres Principles). This code of conduct also required period reports by participating companies.

In 2010, CERES renewed this code of conduct by publishing ‘The Ceres Roadmap for Sustainability’, which is much more comprehensive and does not only cover environmental issues; it also takes into account governance-related aspects, stakeholder management and performance. Unlike the principles, the roadmap is much more focused on strategic aspects of environmental management for example by aiming to identify risks and opportunities in business operations (ibid., Ceres.org, The Ceres Roadmap for Sustainability n.d.).

To become a member certain membership requirements must be met. The membership at CERES also involves an annual fee ranging from USD 2,000 to 40,000 (Ceres.org, Become a Ceres Company n.d.). Currently, the CERES network has around 70 members from more than 20 different industries. A third of its member are also among the Fortune 500 companies.

**Global Business Initiative on Human Rights (GBI)** In 2009, the GBI was initiated by Mary Robinson, President of Ireland and former UN High Commissioner of Human Rights. This initiative is substantially tied to the UN Guiding Principles for Business and Human Rights (United Nations Human Rights 2001). The initiative is active on two levels. First, the current 18 GBI companies<sup>23</sup> engage in dialogue and exchange to share “practices, challenges and innovations with peers focused on respecting human rights” (Global Business Initiative on Human Rights n.d.). Second, GBI aims to raise awareness for human rights issues and aims to expand globally, particularly to developing and emerging markets

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<sup>23</sup> Today the GBI network includes companies from 13 different industrial sectors and spans from Western Europe and North America to companies headquartered in Asia (India, Malaysia, Singapore), North Africa (Egypt) and Latin America (Brazil). (Global Business Initiative on Human Rights, About n.d.).

**ISEAL Alliance** Founded in 2002, the International Social and Environmental Accreditation and Labelling Alliance (ISEAL Alliance) based in London, UK, is the “global membership association for sustainability standards” (ISEAL Alliance, About Us n.d.; ISEAL Alliance, Our History n.d.). The ISEAL alliance “is the global leader in defining and communicating what good practice looks like for sustainability standards” (ISEAL Alliance, About Us n.d.). ISEAL represents product certifications like Fairtrade, UTZ, FSC or MSC, which are already well known to many consumers.

**WWF Climate Savers** Climate Savers is a global platform initiated by the World Wildlife Fund (WWF). It brings together business and industry to increase and foster engagement with regard to climate and energy (WWF.com, Climate Savers n.d.). Member companies are primarily bound by two commitments: becoming leaders in terms of reducing green house gases (GHG) and influencing “market or policy developments by promoting their vision, solutions and achievements” (ibid.).<sup>24</sup> However, WWF also clearly points out the benefits that come with this membership, such as enhanced brand reputation, improved business performance, and risk management, which creates the impression of Climate Savers being primarily a marketing tool (WWF.com, Leadership benefits of the Climate Savers programme n.d.).

### ***2.5.5 Ratings and Indices***

Ratings and Indices provide information on a company’s CSR or sustainability performance. The difference between ratings and indices is that the former measures and assesses the performance, while the latter ranks it. As indices present a ranking of ratings so to say, these indices also rely on information of CSR and sustainability performance by rating companies.

### **CSR and Sustainability Ratings**

Ethical considerations were integrated in investment decisions for the first time in 1989, with the UK being the pioneering country (Eiris.org, Key facts & Statistics n.d.). Integrating ethical as well as social and environmental considerations allows investors to assess their

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<sup>24</sup> The author finds this commitment somewhat ambivalent and controversial, as it might lead to partisan lobbying, which must not necessarily achieve positive results in the end (WWF.com, Climate Savers n.d.).

investment decisions beyond criteria merely reflecting economic performance. As nowadays a corporation's reputation is no more solely tied to its economic performance but also to its performance in other areas, for example the fulfilling of societal expectations, these ratings can present a useful and valuable basis for investment decisions.

As seen already, the portfolio of measures available for fostering a more responsible business conduct is growing. The same is true of CSR and sustainability ratings. Today, there are various agencies spread all over the world assessing a company's performance based on the extent of social and environmental criteria fulfilled. Yet, as the rating scene grows, the scope of these ratings often overlaps. CERES has already realised this issue and aims to harmonise rating standards through its new Global Initiative for Sustainability Ratings (GSRI). The most prominent players in this field are EIRIS, Inrate, MSCI, Oekom Research, RobecoSAM (formerly SAM), Sustainalytics and CDP. While the last rating is exclusively focused on environmental criteria, the other ratings also apply social and governance criteria when assessing a company's performance.<sup>25</sup>

### **CSR and Sustainability Indices**

Today, there exist various stock indices, which measure companies according to their ESG or sustainability performance. Yet, only few of these indices also integrate economic criteria, one example being the DJSI. As with CSR and sustainability ratings, these indices are said to help investors making better-informed investment decisions based on a broader information basis going beyond merely economic criteria. However, the methods applied in these indices vary.

Three approaches can be identified. In the first approach the top 10, 20 or 25 per cent of a kind of basis index<sup>26</sup> are included in the sustainability or ESG indices based on their sustainability or ESG performance. In the second approach, a "best-in-class"<sup>27</sup> principle is

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<sup>25</sup> However, there is also a specific German rating developed by the "Rat für nachhaltige Entwicklung", the "Deutscher Nachhaltigkeitskodex" (DNK) ([Deutscher-nachhaltigkeitskodex.de](http://Deutscher-nachhaltigkeitskodex.de) n.d.).

<sup>26</sup> STOXX for example uses this approach for its sustainability indices: The STOXX Global ESG Leaders is based on the STOXX Global 1800 Index, where only the top 25 per cent are included. The other STOXX Sustainability Indices are based on the STOXX Europe 600 Index ([Nachhaltigkeit.info](http://Nachhaltigkeit.info) STOXX Sustainability Indices n.d.).

<sup>27</sup> This principle is applied for example by the DJSI, MSCI and the FTSE4GOOD. Here, only the best companies in terms of sustainability performance amongst 2,500 other companies of all industries worldwide are included. The companies captured in these indices present the top performers of their respective industry ([Nachhaltigkeit.info](http://Nachhaltigkeit.info), Best-in-Class-Konzept n.d.).

applied. In the third approach the index is restricted to a certain number of companies only, where the number can range between 20, 40 or 80<sup>28</sup>. Some indices, like the DJSI, only capture the sustainability performance of global companies, and not of mid or small-sized companies. While some indices are based on a positive-negative criteria approach, and therefore also use exclusionary criteria, others work on a positive-criteria approach only. Finally, some indices exclude certain industries, like arms, tobacco, alcohol, gambling etc. *ex ante*.

The most important sustainability or ESG indices are currently

- Dow Jones Sustainability Index (DJSI) founded in 1999
- MSCI World ESG Index series
- FTSE4Good Index series
- STOXX Global ESG Leaders (via Deutsche Börse only, Stox.com, Licencees n.d.) founded in 2011
- STOXX Sustainability Indices (via Deutsche Börse only, *ibid.*) founded in 2001
- Hang Seng Corporate Sustainability Index, for Hong Kong companies only

### ***2.5.6 Guidelines, Principles and Initiatives for the Financial Sector***

As already mentioned above, there are both general and specific measures to promote responsible business behaviour. There are undoubtedly industry-specific measures for almost every business sector. Yet, the financial sector has distinct requirements different from any other sector like for example anti-money laundering measures or specific guidelines, which help a bank to assess social and environmental risks when providing credits or loans.

As in the subsequent chapter on business reality two cases on financial institutions are presented, this section here accordingly focuses on measures for this sector.

**Wolfsberg Anti-Money Laundering Principles (AML)** The Wolfsberg Group, created by the major global financial institutes<sup>29</sup>, has developed anti-money-laundering and anti-corruption principles. Its name is derived from a meeting of all eleven financial institutes

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<sup>28</sup> This approach is applied for example by the DJSI for specific regions (DJSI World 80, DJSI Asia Pacific 40, DJSI Europe 40, DJSI Korea 20 etc.) and by STOXX (EURO STOXX Sustainability 40, STOXX Europe Sustainability 40) (Dow Jones Sustainability Indices n.d.; Stox.com STOXX Europe Sustainability Indices n.d.).

<sup>29</sup> These are Banco Santander, Bank of Tokyo-Mitsubishi, Barclays, Citigroup, Credit Suisse, Deutsche Bank, Goldman Sachs, HSBC, JP Morgan Chase, Société Générale, and the UBS.

together with representatives from Transparency International and Professor Mark Pieth (University of Basel) at Château Wolfsberg in Switzerland in 2000. Since 2002, the group has published several statements and principles related to anti-money laundering and anti-corruption measures, financing of terrorism and due diligence (Wolfsberg-principles.com n.d.). The latest publication was released in 2011 and presents an anti-corruption guidance (Wolfsberg-principles.com 2011).

**Principles for Responsible Investment (PRI)** Supported by the UN and initiated by the UN-Secretary General Kofi Annan, these principles were launched in 2006 (Unpri.org, History n.d.). These principles were the result of a joint process of a group of 20 of the world's largest institutional investors from 12 different countries and 70 experts "from the investment industry, intergovernmental organisations and civil society" (ibid.). The initiative aims to "understand the implications of sustainability for investors and support signatories to incorporate these issues into their investment decision making and ownership practices" (Unpri.org, About the PRI Initiative n.d.).

The initiative currently has 1,226 signatories from three categories: 180 professional service partners, 270 asset owners and 776 investment managers from all over the world (Unpri.org, Signatories to the Principles for Responsible Investment n.d.).

**United Nations Environment Programme Finance Initiative (UNEP FI)** The UNEP FI was launched in Geneva, Switzerland, in the context of the Earth Summit in Rio in 1992. Currently, over 200 members from public and private institutions from banking, insurance and investment have signed the commitment (Unpri.org, About n.d.).

To participate in the initiative, companies are required to sign the commitment, to get involved with the network and its activities by sharing and exchanging experience, to communicate annually on progress, and to pay an annual membership fee (Unpri.org, Member Obligations n.d.). The commitment includes the following three key areas: commitment and sustainable development, sustainability management, and public awareness and communication.<sup>30</sup>

**Equator Principles** The Equator Principles (EPs) were developed in 2003 to cover environmental and social issues in financing and credit lending. So far 80 institutions around the world have adopted the EPs. The principles are in line with standards by the World Bank

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<sup>30</sup> For a detailed overview on the UNEP Statement of Commitment please see Unepfi.org n.d.

and IFC requirements (Equator-principles.com 2003). The latest version of Equator Principles came into effect in June 2013, with a transition period until December 2013 for companies to adapt to the new requirements. For any new mandate after 1<sup>st</sup> January 2014, the new EPs apply (Equator-principles.com 2013).

## 2.6 Chapter Summary

This chapter aimed to provide an overview on the broad and sometimes scattered landscape of approaches to business responsibility. First, business responsibility needs to be distinguished into two categories: legal and voluntary. While fulfilling legal responsibilities is mandatory, the scope of voluntary responsibilities pursued is flexible and optional. Second, various concepts have evolved over time with regard to voluntary business responsibility of which four have been presented in this chapter.

The classical view on business responsibility, which is exclusively shareholder oriented and advocated by the likes of Milton Friedman can be considered as out-dated and superseded. The CSP model is also no more relevant today. The two forms primarily applied today are the stakeholder theory developed in the 1980s and corporate citizenship from the 1990s. Stakeholder theory expands the classical company-centred perspective by including not only all (relevant) groups, which have a stake in the company such as employees, suppliers, contractors, and customers, but also society in general. Nonetheless, the scope of stakeholders actually included and considered by the company when pursuing business can vary from narrow where only stakeholders with a direct relation to the company, like employees, suppliers and contractors are considered, to broad where customers, the local community or society in general are also included.

Corporate citizenship on the other hand aims to integrate business into society. The concept suggests an embeddedness of business in society by attributing to a business the notion of citizenship originating from political theory. Under this approach, the company is considered as having the same rights and duties as normal citizens. However, the practice of both concepts is not without obstacles.

In stakeholder theory, though management and practice oriented, it remains open as to how to actually balance and prioritise the often diverging and contradicting stakeholder interests.



The concept of corporate citizenship on the other hand seems to be often reduced in practice to merely philanthropic activities.

Apart from CSR approaches, there is also the approach to make business and its operations more sustainable. Sustainability as a business strategy is focused on the environment, for example saving resources and reducing waste. In practice, sustainability and CSR strategies are often combined, as a sustainability concept supplements the rather societal or social focus of contemporary CSR approaches.<sup>31</sup>

When a CSR strategy is put into practice it is usually complemented by various voluntary measures. Today, there exist a potpourri of measures, ranging from globally or industry acknowledged principles and guidelines, over initiatives and certificates to memberships. However, as already mentioned above, these measures often overlap regarding their objectives or scopes covered.

In the case of guidelines and principles, both the OECD guidelines and the UN Global Compact have a comprehensive scope and cover social as well as environmental aspects. Whereas the OECD guidelines are also focused on governance and legal aspects (e.g. bribery, competition and taxation issues) the UN Global Compact only takes corruption into account. The ILO Tripartite Declaration and the UN framework by Ruggie are both primarily focused on social issues addressing health and safety matters and working conditions. Other measures like Initiatives, e.g. GRI, IR or CDP are basically aimed at fostering more transparency and accountability among companies.

There are also plenty of options for memberships in various organisations. These usually provide networks for exchange and collaboration but they also often involve membership fees.

Certificates are available based on products or entire processes and these also vary in scope. Process-based certifications evaluate either conditions related to employees (e.g. SA 8000) or the environment (e.g. ISO 14001), while the scope of product certifications ranges from including primarily environmental aspects (e.g. MSC, FSC), to social aspects (e.g. FairTrade) to a comprehensive scope (e.g. UTZ) including management aspects, practices and more.

While these CSR strategies are used by companies around the world, the actual customary

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<sup>31</sup> See for an example the responsibility approach by Deutsche Bank, Germany: DB.com, Strategy n.d.

scope of CSR strategies in practice can vary from country to country.

## 2.7 Explaining Differences in CSR Approaches

When discussing CSR approaches or responsible business conduct in general on a global level, differences with regard to implementation inevitably come to light. Often it is quite difficult to assess and compare the levels of intensity of CSR activities between different countries for example between the US and Germany, or rather between the US and the European Union in general.

It is a fact too often overlooked that the specific CSR approaches pursued by companies in a particular country are also tied to the scope of domestic laws and regulations already in place. As Donaldson points out: “The concept of a corporation is not separable from the systems of incorporation and regulation that instantiate it” (Donaldson 2009, 543). And as Moon and Vogel (2009) state, the variation of CSR approaches pursued by companies globally is due to the different relations of society to government within these countries. Essentially, this means that companies usually adopt CSR measures, which are not already (sufficiently) covered by domestic law. As CSR is a voluntary action by companies, it fills the gap where a government rather inactive. Therefore, depending on the activity of a government to formulate acts and regulations in social and environmental fields, the scope of CSR approaches can vary.

A comparison of the CSR scopes of companies in the US and the EU shows very clearly that these are indeed tied to the extent and power of government actions and political attitudes in general. Unlike the US, the European Union is much more active in regulation. Areas like health insurance, wages, pensions or employee protection are either regulated by the European Union and imposed on its member states or directly regulated on a national basis (Moon and Vogel 2009; Aguilera and Williams 2009). Accordingly, these matters are often considered as legal requirements or responsibilities, whereas in the US these issues are often handled “through the creation of incentives to employers to provide social benefits through negative tax expenditures” (Donaldson 2009, 545; Aguilera and Williams 2009; Crane and Matten 2007). Furthermore, as higher education in the US is not publicly financed, many companies put it on their CSR agenda as a kind of “individual and business philanthropy”, whereas companies in Germany show business philanthropy by sponsoring sport or culture-

related projects (Moon and Vogel 2009, 306).<sup>32</sup> Accordingly, while in the US businesses can be said to define the boundaries of CSR by filling the gap caused by governmental inactivity, the EU is comparably strong in regulating areas like health, employment and education either directly at the EU level or by regulations imposed on its member countries.

These different developments can be traced back to a more general phenomenon: history and political orientation. While the European Union is said to have a Catholic and Lutheran Protestantism heritage, which emphasises a collective approach and a deeper embeddedness of business into society, the US are very much characterised by their Calvinist-protestant heritage underlining an individualist approach which emphasises individual responsibility (Crane and Matten 2007; Donaldson 2009). Furthermore, the EU is based on social democratic traditions, unlike the US where libertarian traditions are upheld, which underline individual liberty and economic freedom (Aguilera and Williams 2009; Donaldson 2009).

## **2.8 Critical Analysis**

The following section offers a critical analysis of the various CSR approaches and measures described in the previous sections and is divided into three sections. The first and second sections critically analyse the cogency of the concepts and effectiveness of the measures described in detail above. In the third section, the bigger picture is delineated by examining how this practice is generally embedded in society.

### ***2.8.1 Critique of the Theory of CSR***

The cogency of the general idea or theory of CSR as such needs to be challenged. Van Oosterhout et al (2009) for example does not consider the notion of CSR as helpful at all, as it is not quite clear what CSR actually is. While in practice, CSR can be defined as business responsibility with corresponding strategies and measures<sup>33</sup>, in theory CSR only seems to be an umbrella term to which concepts can be subordinated but which does not have a clear definition of its own. Moreover, concepts are usually derived from a normative perspective on business responsibility but not from an “attempt to explain actual business behaviour”

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<sup>32</sup> A prominent example for business philanthropy is the agenda by Deutsche Bank (DB.com, Tackling key social challenges n.d.).

<sup>33</sup> See for an example: Lexikon der Nachhaltigkeit 2013

(Oosterhout et al 2009, 201). Hence, concepts are often too idealistic and optimistic, not taking into account the real conditions. A striking example for too much normativity, insufficient realism and insight into business reality is that all these concepts assume a company's law-abidance as given. Wettstein (2010) for instance proposes "a shift from negative to positive obligations" as it is not enough that corporations "do no harm" (275). Yet, that companies, particularly corporations, are not causing harm when conducting their business is far from reality. This level has not yet been reached. Thus, the proposed shift must be considered as too idealistic and not corresponding to the real circumstances where more fundamental things like law-abidance are still at issue.

Others like Milton Friedman likewise assumed that companies pursuing their business are "conforming to the basic rules of the society, both those embodied in law and those embodied in ethical custom" (Friedman 1970; Van Oosterhout et al 2009). Rendtorff (2009) also speaks of legal responsibilities, e.g. adhering to the law, by implementing internal compliance programmes in his book *Responsibility, Ethics and Legitimacy of Corporations*. However, the business reality presented in the next chapter cannot confirm these claims and assumptions.

Therefore, while some authors take compliance with the law for granted and develop quite idealistic perspectives for a responsible business conduct, other authors create the impression that compliance is not mandatory but merely an option to avoid fines. Here, socially responsible behaviour is simply equated with law-abidance. The authors then link law-abidance to an enhanced cash flow, as this is not further reduced by the sum of imposed fines (Mackey et al. 2009). According to them, many companies conduct their business based on the calculation of potential fine versus profit, and speculate on not being caught for infringements. Moreover, even if companies are caught, often the prospect of profits still compensates for the fines resulting from infringement, as fines were either already included in the calculation in the first place, or eventually lead to a zero-sum situation in the worst case (ibid.).

Finally, as long as there is still the attempt to justify CSR concepts based on a prospect of increased financial performance, the intrinsic value of socially and environmentally responsible business behaviour remains opaque. The so-called business case for CSR, where socially responsible practices are expressed in "pure financial terms" only creates a dichotomy (Kurucz et al 2009, 98). Socially and environmentally responsible business practice is then viewed separate from and only in addition to the "regular" business practice. As the practice of CSR cannot be irrefutably linked to an increased financial performance up

until today an argumentation based on a business case lacks conclusiveness.

### ***2.8.2 Critique of the Implementation of CSR***

Over more than 20 years of voluntary business responsibility practice many measures have evolved to complement and extend a company's CSR or sustainability strategy. The measures described above represent only an extract and the list cannot be considered exhaustive. Only the most established guidelines, principles, certificates and so on are described.

Generally, while all these measures can be said to have a positive effect by promoting more responsibility among companies, they often lack enforceability or depth. Moreover, due to the multiplicity of measures available today the landscape becomes increasingly difficult to navigate and the scope often overlaps with regard to the content covered. Finally, even if companies are excluded from these associations, e.g. due to abusing guidelines, it is still questionable as to how far this is communicated publicly by the association or discovered by the press and revealed to the public. And whether an exclusion made public really impacts the society with respect to their individual buying decisions and so on is another open question. Moreover, a company excluded will most certainly find another association or initiative to join.

These points, plus other points of criticism, will be presented in more detail below by examining and describing the deficiencies of some measures more closely.

One example of these deficiencies is that the OECD guidelines for multinational companies are not legally binding, and can therefore be considered as rather "toothless". Clapham states, "there is still no procedure for legally enforcing any sort of finding against a multinational enterprise [...]" (Clapham 2006, 202). The guidelines do not replace national law, nor do they have the capacity to override national law. They are only "supplementary principles and standards of behaviour of a non-legal character" (ibid., 204). In case of infringements or conflicts, the identities of the companies involved are not revealed and results from OECD complaint procedures are not enforceable (ibid.). However, Clapham also mentions positive points: through the OECD mechanisms a better protection of human rights among multinationals could be achieved, and "most companies enter into the process and respond to the complaints" (ibid., 208, 211).

The ILO measures show similar deficiencies regarding their effectiveness. While member countries of the ILO are legally obligated to implement the treaties, on a business level where the Tripartite Declaration is applied measures for enforcement are neither feasible nor envisaged. Accordingly, the dispute mechanism or procedure is not aimed at clarifying or solving disputes over national law or international treaties (International Labour Organisation 2006; Clapham 2006). Also, like the OECD, the ILO keeps the names of companies involved in conflicts secret in their surveys and these surveys do not reveal any details on particular failures (Clapham 2006). Finally, grievance procedures or compensation for the people affected by negative consequences of business operations are rather insufficient as these are only available as recommendations, which do not have a binding character (International Labour Organization 1967; Clapham 2006).

Many international companies today boast of being a member of the UNGC, another voluntary measure. Yet, the UNGC is also toothless and lacks legally binding standards as well as enforcement mechanisms. Furthermore, the requirements for a company to join the UNGC are rather low. As this is only a voluntary initiative, merely a supporting letter by the CEO is required (Clapham 2006).

A principal issue with all of these guidelines (OECD, ILO, UNGC) is also that in terms of intolerable working conditions, for example at so-called special economic zones, the concerned governments of these countries often consider these issues as rather related to foreign trade policy and not as labour rights issues (ibid.).

There are further deficiencies with these measures also in relation to reporting initiatives, process certifications and indices. For example, the GRI certainly fosters transparency among and comparability of companies by engaging them in publishing corporate data regarding governance, social and environmental aspects, and following a certain standard involving so called Key Performance Indicators (KPIs) (Global Reporting Initiative, GRI Sustainability Reporting Guidelines G3.1 n.d.). The assurance mechanism GRI offers also serves to increase trust and reputation, thereby enhancing a company's credibility (Owen and O'Dwyer 2009). Still, CSR or sustainability reports published by companies often resemble advertising brochures showing glossy photos and professionally written texts. The content is presented rather one-sidedly by discussing key concerns and emphasising the efforts made by business towards more responsibility while frequently concealing severe issues (ibid.). Furthermore, aiming at more stakeholder accountability merely by increased transparency does not provide affected stakeholders with a real voice in any way nor does it change the prevalent power

relations (ibid.).

With regard to certification processes, critics refer to the lack of reliability when it comes to audit mechanisms. Concerning the mechanisms of the SA 8000 in particular, Rasche (2010) states, “there is no guarantee that accreditation bodies will not start competing for clients through softening their interpretation of the standard” and “necessary flexibility of SA 8000’s rules can thus be misused by accreditation bodies” (285). Certifications are usually valid over a certain period of time, for example three years in the case of SA 8000, and include follow-up visits. However, these visits are often announced, therefore this cannot be considered a sufficient and stringent oversight (Kuhn and Deetz 2009).

Another critical issue of these certifications in general is that they are usually tied to a certain cultural context, despite claiming to be based on “universal rules”. Yet, in a different cultural context, e.g. non-Western, it may be necessary to interpret these rules differently (Rasche 2010). Therefore, there is a discrepancy between the “universal rules” claimed and the actual universal applicability. Rasche explains with regard to the asserted universality of these rules that valuation standards are not always self-evident. For example, by which criteria exactly are adequate housing or working conditions characterised? (ibid.). What is considered as “adequate” in India, in China, in the US? Are there perhaps different perceptions? Hence, certification processes like SA 8000 always involve an interpretation of the guidelines to some extent. And these interpretations in turn are influenced by culture and individual perception. This creates ambiguity in a way. On the other hand, no mechanism can ever provide so many rules as to fit every condition and circumstance as in the end it would be a vast body of rules, which are no more applicable.

Finally, the effectiveness of indices to enable better-informed investment decisions is to be contested. Indices classify certain business activities as socially or environmentally responsible. However, some indices like the DJSI for instance, include only high performers in terms of sales volume, which are generally presented by large companies. Small and middle-sized enterprises, regardless of how successfully they perform in social and environment-related categories, are often not included (Van Oosterhout et al 2009). Hence, many indices depict only a snippet of the entire picture. Van Oosterhout also criticises that companies from certain sectors, like alcohol, tobacco, gambling etc. are excluded in the first place, which he considers as “overly moralistic” (ibid., 206). According to him, the refinement mechanism then applied to the pool of included companies remains opaque, while mechanisms in general suffer from under-inclusiveness or category lumping (ibid.).

To briefly sum up, all these approaches to CSR and sustainability in practice often enough create the impression of being selective rather than systematic. Furthermore, implementation is frequently driven by regulations externally imposed on companies as opposed to internally introduced innovations and initiatives (Kuhn and Deetz 2009). Lastly, many of these initiatives are aimed at the public by the endeavour of evoking positive associations of a brand or company based on a public commitment to voluntary standards (ibid.).

### ***2.8.3 Overall Critique of CSR***

Looking back, the emergence of CSR can be said to have led to a general improvement over the last decades by increasing the awareness towards the need of a more responsible business conduct. CSR has institutionalised business responsibility beyond legal responsibilities. Its conceptual creation has led to the development of various related concepts as well as applicable strategies and corresponding measures. And though its practice definitely has its merits, the question must be scrutinised and discussed as to whether the emergence of CSR is only contributing to maintaining the status quo and actually inhibiting substantial innovation.

While it is difficult to reconstruct the real intention behind companies implementing CSR strategies and adopting particular measures, legitimation or “the licence to operate” (in the social sense) can be considered as being one of the main reasons. Furthermore, implementation of CSR or sustainability strategies amongst an increased number of companies also creates institutional isomorphic pressure urging other companies to keep up with these standards. Hence, putting a strategy into practice is basically a means for obtaining legitimacy within society: “in order to become seen as legitimate, organizations must adopt certain structural, strategic, or symbolic features which signal their dedication to the ‘rationalized myths’ of the larger social system in which they operate” (Van Oosterhout et al. 2009, 212).

Certainly, companies are still free to resist these pressures and to not implement any CSR strategies but this approach only leads to reduced acceptance and popularity within a more and more critical society today, creates the impression of lagging behind, and leads to the risk of losing social legitimacy entirely (ibid.). Therefore, companies disposing of strategies and



certain measures are not necessarily truly concerned about an ethical and responsible business conduct. Alternative plausible explanations are also concerns regarding legitimisation, acceptance and prospective profitability (ibid.). Strategies implemented due to economic aspects and concerns of legitimation also triggered by isomorphic pressures are only instrumental forms of CSR. Accordingly, when it comes to business reality these instrumental efforts are nothing more than lip service, as they are often enough sacrificed in favour of profits (Jones 2009).

The institution of CSR together with the development of corresponding measures, like guidelines and principles gives companies an important orientation towards the definition and requirements of responsible business conduct. Adhering to these principles and guidelines has positive side effects such as fewer fines<sup>34</sup> or increased reputation. Yet, as companies have made themselves quite comfortable with this situation of voluntarism they have considerable interest in preserving this condition. If voluntary measures become more legally institutionalised the risk for companies of being sued will probably dramatically increase. And, as trials usually involve financial costs and loss of reputation, a stronger governmental regulation presents a significant threat to companies (Clapham 2006).

To summarise, CSR has its merits but also its downsides. The institutionalisation of business responsibility addressing social and environmental concerns has led to improvements. However, the concept of CSR does not contribute to a holistic approach to an all-encompassing responsible business conduct. Instead, it creates a dichotomy between “regular” business responsibilities and business responsibilities, which are related to social or environmental concerns. While more voluntarism and less governmental regulation plays into the hands of companies, this practice leaves the impression of only obscuring deeper contradictions and inhibiting a more fundamental and progressive change (Kuhn and Deetz 2009, Jones 2009). Both CSR and sustainability approaches fall short of inducing fundamental change as these allow businesses to go on as usual. Even worse, the application of these approaches or strategies in the corporate world further supports the legitimacy of business, as now companies can boast of taking responsibility (Hanlon 2009).

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<sup>34</sup> As these guidelines and principles are in accordance with the national law and sometimes even going beyond law requirements, a voluntary adherence yields reduced or fewer fines for participating companies.

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# Chapter 3

## Responsible Business in Practice: Case Studies

**Abstract** In this chapter, actual business practices are examined by analysing the corporate activities of five particular companies over several years. Apparently, companies' assertions regarding their business behaviour communicated in their annual sustainability, corporate (social) responsibility or (global) citizenship reports often diverge significantly from reality. To illustrate this gap between theory and practice this chapter is based on a media analysis, which was conducted with the help of a database provided by RepRisk AG, Switzerland. This database captures negative media as presented in newspaper articles, NGO-reports and other statements amongst others. While a single press article in many cases only shows the tip of the iceberg, the whole story usually develops over several years before it is fully unfolded. Hence, uncovered scandals are never only snapshots of dubious operations. Each scandal tells a story about a single incident, which is often embedded in a bigger picture of even more incidents occurring over time, leaving an impression of systematic unjust practices. After explaining the methodology of this case study in the first section, more background information on business activities globally is provided in a subsequent section. Then each of the five company cases is presented in detail, which includes information on the respective CSR or sustainability report, information on the particular CSR and sustainability strategy, a contrasting account of the business reality of each company and an analysis of their latest communication in light of these incidents. Each case closes with a summary and conclusion.

### 3.1 Case Study Methodology

By giving detailed examples of various controversial involvements and examining in how far the respective commitments by these companies were directly and/or indirectly (by way of complicity) infringed, this chapter aims to demonstrate that these companies are still frequently involved in socio-environmental abuse despite their public commitments (Wettstein 2010; Wettstein 2012).

The five companies selected for the case study are amongst the top companies worldwide based on their revenue according to annual Global Fortune 500 ranking by the Fortune magazine. A high revenue can be seen as an indicator for a company's global scope of business activities, which often includes global operations with regard to resource



exploitation, like energy companies looking worldwide for new resources, or in terms of production, as it is the case with retail stores or IT companies. The latter implies complex supply chains due to companies' ambitions to produce as cheaply as possible, choosing their sourcing countries accordingly. This strategy implies a long or widespread supply chain, including the production of particular items in one country to be later assembled together with other items from different sources in another country.

In order to show that they are also committed to global standards no matter where they operate on the globe, these companies often follow particular guidelines, have adopted specific principles or management systems or hold certain memberships, as described in the previous chapter. Therefore, it is interesting to examine whether these companies genuinely represent what they want the public to believe.

The companies selected are from various industry sectors to ensure a diversified reflection. Yet, it is important not only to point out particular incidents but also to examine a certain period of time in order to demonstrate that these are not isolated incidents.

Two companies are from the finance sector, yet from different regions; HSBC (Hong Kong Shanghai Banking Corporation), a UK based institution and JPMorgan Chase & Co. from the US. However, their profiles are different in terms of violations, which is partially due to different regulations or conventions in Europe and the United States. Illustrating violations in the financial sector is particularly interesting in light of the preceding global financial crisis.

The technology and production sector is presented by the US IT-company Hewlett-Packard (HP), which commands over a long and complex supply chain. Similarly, the largest retailer Walmart also sources its goods from long and complex supply chains, and presents a popular example of poor working conditions outside and within the US.

The last study deals with Chevron, one of the biggest companies in the oil and gas sector behind Royal Dutch Shell (Shell) and Exxon Mobil. As already described above, operations in this sector often yield negative impacts on the environment. Chevron can be considered as exemplary for the entire sector in terms of environmental violations though there might be even worse offenders.

These case studies were created with the help of RepRisk, a commercial provider of ESG-business intelligence, which describes itself as “a leading business intelligence provider specialized in dynamic ESG risk analytics and metrics.” (Reprisk.com, About us n.d.). RepRisk has created a tool providing an overview of a company's reputation along with a

database of newspaper and other articles going back as far as 2006. The RepRisk Index (RRI) “quantifies reputational risk exposure related to ESG issues” and thereby “facilitates an initial assessment of the ESG and reputational risks associated with financing, investing, or conducting business with a particular company” (Reprisk.com, Risk Metrics n.d.). Accordingly, it serves companies to assess their own reputational risk and to get an overview of their stakeholder’s opinions. The reputation ranking, which is based on articles published by third parties, captures criticism in 15 different languages and particularly emphasises new criticism on projects or companies (Reprisk.com, Research Approach n.d.). For example a company is potentially at the peak of its bad reputation when a new project or business operation has been intensively, i.e. frequently, criticised in public.

RepRisk’s tool classifies articles by making use of a certain methodology: each article is classified according to particular criteria covered in the text. The scope comprises a total of 28 criteria or issues linked to the ESG-dimensions (environmental, social, governance), like pollution, waste and climate change issues, human rights infringements, or tax evasion and bribery (Reprisk.com, Scope n.d.). All articles are classified accordingly but an article can have several classifications at the same time, for example human rights abuses, violation of national legislation, and impacts on communities.

This chapter drew the basic criticism primarily from the database; while in a second step the internal links provided by RepRisk were then looked up on the web and manually checked regarding their relevance and credibility. Based on the articles already provided by RepRisk further research was conducted to find additional articles linked to the same issue to present a more detailed picture.

### **3.2 Business Activities across the World**

In order to have a more far-reaching picture of business activities across the world, and to understand the complexity of large businesses today, country profiles and some of the most harming projects are presented in brief. So, before turning to the business activities of specific companies, it is first explained what actually motivates companies in general to conduct their business in these countries and what are the consequences with regard to people and the environment when doing business there.

Projects which negatively impact the environment and communities are numerous and

located all over the world, particularly in regions with either natural resources or cheap labour. A closer look at the business activities of the most profitable companies worldwide reveals a north-south divergence. While all these companies are usually located in the wealthier northern hemisphere their operations are often in developing or transition countries such as in Africa, Indonesia, India and South America.

In Africa, countries like Angola, Cameroon, Nigeria, Sudan and Uganda provide an ideal basis for oil exploration, while the Congo, Ghana, Mozambique, Zambia and Zimbabwe command rich deposits in precious metals, thus generating a huge profitable sector for mining activities.

In Asia, the dominating business sectors are mining and utilities. Bangladesh, India, Indonesia, Papua New Guinea and the Philippines are rich in metals. The Philippines also have oil resources, while Malaysia offers business options to the hydropower sector and India to the nuclear power sector. Bangladesh on the other hand is a popular country for international companies to produce retail goods on low costs.

In South America, mining, oil and utilities industries (such as nuclear power and hydropower) are equally distributed over Argentina, Brazil, Bolivia, Chile, Colombia, Ecuador, El Salvador, Mexico and Peru. Furthermore the workforces in Argentina, Brazil, Colombia and El Salvador offer low-cost manufacturing and production of household goods, food and beverages.

Countries in the Middle East, like Jordan, Iran and Iraq, are specialised in the aerospace and defence sector. In addition, these countries possess considerable natural oil and gas resources. Furthermore, Kazakhstan is attractive to global players as it provides oil, gas and metal deposits, while Jordan is attractive as a manufacturing country for personal and household goods as well as other retail goods.

Operations in all these different sectors mentioned above are prone to inducing certain kinds of violations. Environmental violations frequently occur in the oil and gas sector, no matter whether the operations are conducted in a transition or developing country, or in a developed country such as the US. As oil is becoming scarcer, difficulties increase because riskier operations are necessary to extract what is still left. Nowadays, offshore operations combined with deep water sea drilling or hydraulic fracturing operations frequently cause oil spills or even explosions, thereby polluting sea, land and air with oil and emissions. Gas is now considered as an alternative energy resource but also here risky operations are the order of the day since these resources are hidden in deeper layers of the earth. The utilities sector

which includes nuclear and hydropower plants is also prone to environment-harming impacts. These plants are considered harmful in various ways: nuclear plants can cause environmental damages due to released heating water, thereby increasing the temperature and negatively affecting the marine fauna; hydropower plants, such as the Belo Monte dam or the HidroAysén, cause huge environmental damages and possibly force communities to leave their homelands due to their massive construction. The mining sector is particularly harmful to the environment since it involves methods like mountain top removal. Here it is not only the method to tap new resources which is harmful but also the operation of mines: not only do these produce a lot of waste rock, toxic materials outcropped by mining operations can also contaminate land and rivers.

In short, the oil, gas and mining sectors, which are dependent on tapping deposits of natural resources, and the utilities sector, which usually involves large constructions, all present a huge risk to nature's intactness. In contrast, business in the manufacturing sector with regard to personal, household or retail goods is often linked to human rights violations. Here, it is the human's very integrity and dignity, which is exposed to violations. Production sites in China are well-known examples, but workforces in places like Bangladesh, Cambodia, India and Indonesia, Jordan, Bolivia, Brazil and El Salvador also suffer from poor working conditions, health and safety issues, and the prohibition of unions and freedom of association. In sum, everywhere in the world where large retailers such as Walmart and Carrefour or producers like Nestlé or Apple have built up their complex supply chains, employees potentially suffer under these conditions, in particular in countries with low labour-costs and low or almost no non-wage labour costs.

Despite all efforts for more sustainable and responsible business operations communicated publicly and in particular by large multi national companies (MNC) there is still a vast number of projects around the world which are considered as harming the environment and surrounding communities. Amongst the most harming projects involving MNCs are the explosion at the Deepwater Horizon Platform in the Gulf of Mexico operated by British Petroleum (BP), which probably caused the largest oil spill for years to come in April 2010, and the Fukushima Daiichi Nuclear Power Station located in Japan and run by Tokyo Electric Power Co. Inc. (TEPCO), which caused widespread nuclear contamination due to damage after a tsunami caused by an earthquake in March 2011 (Robertson and Krauss 2010). The incident in Fukushima involved for example Areva, a French nuclear company, General

Electric, a US company which provided supply, the British and Australian mining companies Rio Tinto and BHP Billiton which supplied uranium, and German financial institutions like Deutsche Bank and West LB which provided TEPCO with investments or credits (McMahon 2011, Zeller 2011, Conservation Council of Western Australia online 2011, Sallet 2011).

Apart from the projects named above other controversial projects are for example huge infrastructure projects like the hydropower dams HidroAysén (project started in 2006) in Patagonia, Chile and Belo Monte (project started in 2007) in Brazil or nuclear power plants like Jaitapur in India. The HidroAysén is being built by Chilean Colbun SA and Spanish Endesa SA, both owned by ENEL SpA, an Italian company (Peakoil.com 2006). The project receives financial support from the Spanish banking institution Banco Santander amongst others (BankTrack 2016c). The controversial Belo Monte Dam is being built under Eletrobras' auspices, a state power company, and financed by the Brazilian mining company Vale SA, which holds shares in the project and the banking institution Banco do Brasil (Colitt 2008; Leahy 2011; BankTrack 2016a). The Jaitapur Nuclear Power Plant (project started in 2009) in Konkan, India, is still in its planning phase and should be ready to operate by 2020 (Hindustan Times online 2009). Yet, the project can be considered as highly controversial in terms of negative impacts on environment and communities (Bajaj 2011). Here, French Areva is providing the reactors for the project, while the finance might come later from the financial institutions, British HSBC, USA-based JPMorgan Chase, and the French institutions BNP Paribas and Société Générale (BankTrack 2016d).

These projects have all caused or are going to cause negative impacts on the environment and surrounding communities through their devastating effects on the environment and the animal world. Furthermore, all these projects involve MNCs, which are commonly bound to initiatives like the Equator Principles, the UN Global Compact or other voluntary and globally acknowledged principles and which never grow tired of publicly reaffirming their progress regarding reducing the risks and harming effects of their business operations.

### **3.3 Case One: HSBC**

Today, HSBC (short for Hong Kong Shanghai Banking Corporation) is one of the leading and systemic banks worldwide with its headquarters located in London, UK and offices around the globe. The Asia Pacific region together with the United States, Europe and Americas are at the core of HSBC's business. HSBC employs over 260,000 people

worldwide.

On the most recent Fortune Global 500 list HSBC counts among the 25 most profitable companies, with an annual profit of over USD 13 billion (Fortune.com 2016). However, in terms of revenue, the actual measure of the Fortune Global 500 list, HSBC is constantly losing since 2009 at least, in the fiscal year 2015 only occupying #81 anymore.<sup>35</sup>

### ***3.3.1 Corporate Responsibility Strategy***

**Communication** Over the past 5 years of this study, HSBC's communication approach on sustainability matters sustainability and CSR has changed. While in the beginning, this study drew on HSBC's reports issued for the fiscal years 2009 to 2012, their communication strategy has shifted to mostly web-based information with regard to their sustainability efforts.<sup>36</sup> Comprehensive sustainability reporting based on an annual basis belongs to the past and now only a couple of pages are included on that matter in their new so-called *Strategic Report*. In light of this new approach it seems as if sustainability eventually received more recognition being now considered from a more strategic perspective within the company. This new approach started for the fiscal year 2013 and was first published in May 2014.

**Commitments** In 2005, the bank started to make its operations carbon neutral, making HSBC a forerunner in this field (BBC News 2004). This initiative of buying carbon credits, thereby offsetting the company's emissions did not last for too long. Already in 2012 this initiative was discontinued (HSBC.com 2012).

In 2007 the company started the HSBC Climate Partnership, a five-year environmental programme to push forward a low carbon economy, which lasted until 2013 (ibid.; The Climate Group n.d.). Furthermore, the company sees new business opportunities created by climate change itself such as new energy efficient products, services and buildings or in the field of finance particularly the Green Bond<sup>37</sup> market (HSBC.com, Climate Business n.d.).

In 2010, the company received several awards for its sustainable business behaviour

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<sup>35</sup> From formerly being #21 in terms of revenue in 2009, HSBC's revenues gradually went downwards to #39 in 2010, #46 in 2011, #53 in 2012, #60 in 2013, to #77 in 2014 and #81 in the fiscal year 2015 (cp. Fortune.com 2010; Fortune.com 2011; Fortune.com 2012; Fortune.com 2013; Fortune.com 2014; Fortune.com 2015; Fortune.com 2016).

<sup>36</sup> HSBC's archive of Sustainability reports only goes back to the financial year 2012 (HSBC.com 2013, cp. HSBC.com, Reports and Documentation n.d.). For reports from the fiscal years 2010 and 2011 see HSBC.com 2011, HSBC.com 2012b.

<sup>37</sup> Green Bonds were issued to particularly finance climate and environmental related projects.

(HSBC.com 2012). In 2012, HSBC launched its five-year Water Programme together with Earthwatch, Wateraid and WWF, which is a follow-up in HSBC's previous Climate Partnership. This programme is aimed at charities to run and manage local water programs (HSBC.com, Water Programme n.d.).

Today, HSBC's approach to sustainable business is based on three areas (HSBC.com, Sustainability n.d.): Finance, Operations and Communities. The "Finance" sections focuses on Climate Business and Sustainability Risk stemming from credit lending to potentially environmentally controversial projects (HSBC.com, Finance n.d.). The section on "Operations" describes HSBC's efforts to reduce its consumption of environmental resources, like energy, paper, water and the like, which are directly linked with cost savings (HSBC.com, Operations n.d.; HSBC.com, Simpler, better, faster n.d.). Lastly, the section on "Community" deals with HSBC's more philanthropic part of its strategy and includes employee volunteering, its spending on the Water Programme, and donations made to other programmes such as education (HSBC.com, Communities n.d.).

**Voluntary Commitments to External & Internal Standards** When it comes to business, decisions made at HSBC are guided by certain globally acknowledged policies and principles. The following international commitments are adopted by HSBC:

- Equator Principles (HSBC.com, Finance n.d.)
- LEED (some of HSBC office buildings have been certified (Green Building Information Gateway n.d.)
- GRI (HSBC.com 2012, HSBC.com 2013b)<sup>38</sup>
- ILO Declaration on Fundamental Principles and Rights at Work (HSBC.com, Supplier Code of Conduct n.d.)
- Global Sullivan Principles (HSBC.com 2012, HSBC.com 2013b)
- OECD Guidelines for Multinational Enterprises
- UN Declaration of Human Rights (ibid.)
- UN Global Compact (ibid.)
- UN Principles for Responsible Investment
- UN Principles for Sustainable Insurance

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<sup>38</sup> After 2013 it seems HSBC has stopped to prepare its content according to the GRI guidelines, as the bank switched to *Strategic Reports*.

- Wolfsberg Principles (HSBC.com, Global Standards n.d.)
- ISO 14001 (implemented in Hong Kong only, HSBC.com.hk n.d.)
- HSBC Sector Policies (HSBC.com, Finance n.d.)

**Sustainability Risk Strategy** In every region, HSBC has sustainability risk manager. In 2011, the bank launched a new e-learning tool particularly for its employees responsible for assessing HSBC's sustainability risk (HSBC.com 2012). This training continues until today (HSBC.com, Finance). Furthermore, since 2015, Sustainability Risk is now included in the overall Group Risk department, which further confirms the shift in strategy already visible from HSBC's new reporting strategy described further above.

When it comes to assessing the risk, HSBC's draws on the Equator Principles for project finance and its internally developed Sector Policies, which are applied when doing business with "sensitive sectors" (ibid.):

- Agricultural Commodities Policy
- Chemicals Industry Policy
- Defence Equipment Sector Policy
- Energy Sector Policy
- Forestry Policy
- Freshwater Infrastructure Policy
- Mining and Metals Sector Policy
- World Heritage Sites and Ramsar Wetlands Policy

Projects in these sectors bear the risk of being particularly harmful to the environment and communities. Therefore, lending and other financial activities need to be analysed according to these policies prior to collaborate with companies from these sectors, as otherwise the bank runs the risk of damaging its reputation.

In its former reports HSBC also disclosed the degree of compliance with regard to its clients and the banks' own sector policies. According to the report for the fiscal year 2011, about 95% of HSBC's clients were compliant (another 2% were even considered leaders) with the sector policies, while roughly 2% were near-compliant, and less than 1% non-compliant (HSBC.com 2012). In another sustainability report issued in 2013 for the fiscal year 2012, 96% of the clients were considered compliant, 2% leaders, again roughly 2% near-compliant and less than 1% non-compliant. So, basically, the numbers remained almost the same (HSBC.com 2013c).



However, HSBC's commitment has its limitations: the Equator Principles, which were adopted by HSBC in 2004, only become effective in the case of project finance (and corporate loans in the latest version, Equator Principles 2013) and only if the project value exceeds USD 10 million. Furthermore, certain ecologically damaging industries such as power plants based on coal are still financed as long as they are not among the most polluting ones.

### **3.3.2 Business Reality**

When it comes to controversies in the finance sector it is, except for violation of legislation, most of the times “only” due to complicity. In the case of human rights and environmental abuses, it is in most of the cases about the bank's clients operating their business in a questionable way. Yet, the bank is complicit, as it is lending money to these controversial companies by providing credits, loans, project finance and the like. Consequentially, the bank is said to have a lever when it comes to the extent of negative impact caused by its clients. The bank could as well refuse these transactions due to ethical concerns; reputational concerns or financial concerns related to potentially imposed fines. However, in light of the subsequent study it appears, as if neither of these concerns plays a major role when it comes to decision-making at this bank and many major banks too.

When looking at HSBC's business behaviour reflected by the press and public, a different impression arises than communicated in the annual sustainability reports. In the period from 2007 to 2016, there were 892 negative news articles and other press releases totally in relation with HSBC (see figure 3.1). Over the past five years, most of these articles, roughly 70% were due to governance issues, while social issues make around 20%, and environmental issues are covered in roughly 10% of the press releases. Yet, at least with regard to environmental and social issues there seems to be a decline in controversial cases with currently only 17% (social) and 5% (environmental) of media coverage being related to these issues in mid 2016. On the other hand, governance issues are on a constant high (over 70% and more) since 2014.

### HSBC Holdings PLC (HSBC)

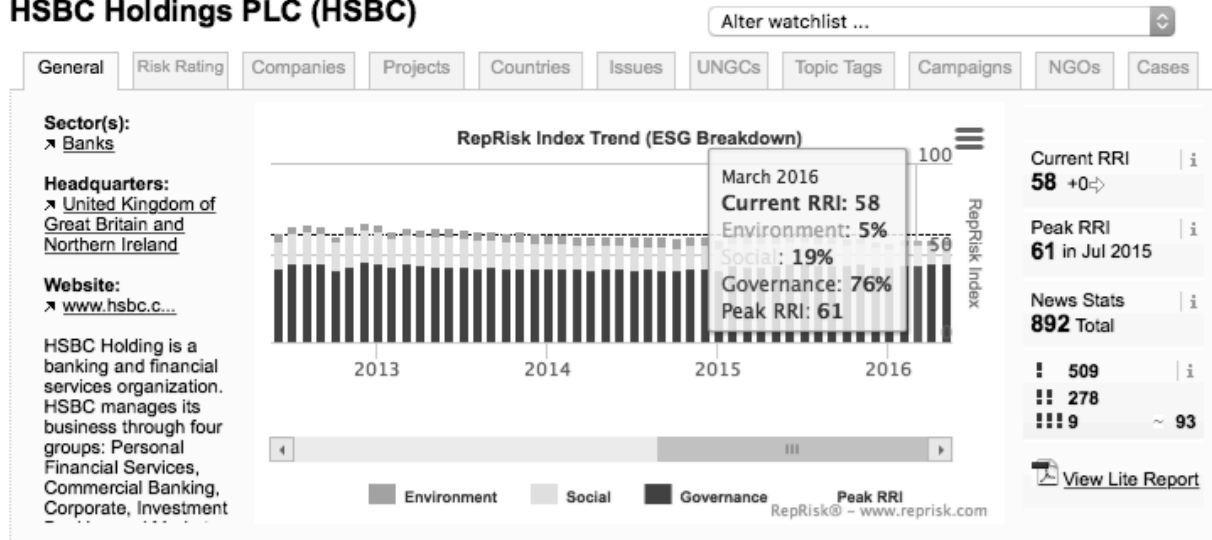


Figure 3.2, HSBC Overview (RepRisk 2016)

A closer observation of HSBC’s reputational profile, as presented on RepRisk, reveals these five categories as being the most dominating ones, besides violation of national legislation, which is also always linked with the first three categories mentioned, and oftentimes also with the fourth one, controversial products and services (see figure 3.2).

- Corruption, bribery, extortion and money laundering
- Fraud
- Tax Evasion
- Controversial products and services
- Human Rights abuses and corporate complicity

### HSBC Holdings PLC (HSBC)

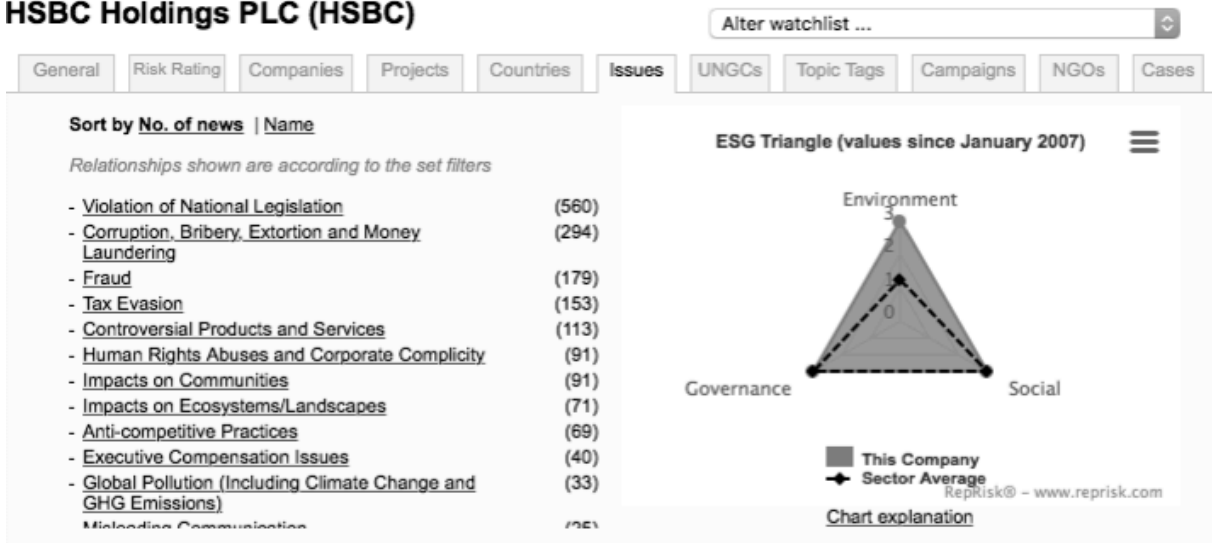


Figure 3.2, HSBC Issues (RepRisk 2016)

### 3.3.2.1 Governance Issues

HSBC's record in terms of governance issues, primarily those of violation of national legislation shows a range of offences. Over the past years, the bank has been involved in several cases of money laundering, tax evasion, market manipulation of various kinds, executive bonuses issues, as well as controversial products.

#### *Violation of National Legislation*

**Money Laundering in Angola, Africa** In 2010, the company was accused of money laundering in Angola, Africa (Slater 2010). According to an inquiry by the US senate, HSBC facilitated the money transfers of African political leaders and even actively supported them by offering off-shore accounts at the Bahamas to avoid a freezing of their assets ordered by the British court. HSBC is said to have cut ties with African banks after the discovery of money laundering in summer 2010. This case of money laundering in connection with bank accounts of political leaders is not the only one: HSBC has also indirectly supported the Tunisian regime under Ben Ali, Nigerian officials (before 2005), and more recently the Libyan regime (Wallace 2011; Rubenfeld 2010; Peston 2011).

**Money Laundering in Mexico** Another case of money laundering linked to drug dealers in Mexico became public in 2010. In June 2010, Bloomberg online reported that HSBC was under investigation by the Mexican Finance Ministry in connection with a money-laundering scandal at Wachovia, as "Mexican drug dealers used shell companies to open accounts at London-based HSBC Holdings Plc." (Smith 2010). Later, in October 2010, HSBC's US unit agreed under a cease-and-desist order from the Office of the Comptroller of the Currency (OCC) "to strengthen a compliance program that federal bank regulators said was ineffective and created "significant potential" for money laundering and terrorist financing." (Voreacos and Menon 2010). Yet, the OCC failed to enforce any actions against HSBC at that time. Hence, the Permanent Subcommittee on Investigations took over and started its own thorough investigation. Only then did it come to light that over several years, HSBC's affiliate in Mexico has been involved in money-laundering activities by Mexican drug dealers and others: "HSBC's lax anti-money laundering policies allowed Mexican drug money, Iranian terrorist money, and even suspicious Russian money to enter the US and gain access to US dollar liquidity over the last couple of years" (Fontevicchia 2012). Furthermore, HSBC "provided US dollar financing and services to banks in Saudi Arabia and Bangladesh that

were tied to terrorist organizations” (ibid.): The bank is said to have transferred an amount of around USD 7 billion from its Mexican branch to its US affiliates between 2007 and 2008 (ibid.). Moreover, HSBC moved even more money from its US affiliate across borders to countries being sanctioned by the US, such as Burma, Libya and Cuba (Treanor 2012a).

In 2016, the families of several Americans murdered by the Mexican drug cartel, filed a lawsuit against HSBC. They accuse HSBC of ““continuous and systematic material support” to Mexico’s Sinaloa, Juárez, and Los Zetas cartels by laundering billions of dollars’ (Estevez 2016).

HSBC has also been accused of circumventing US rules and lax anti-money-laundering (AML) measures. Furthermore, the US Senate spoke of “a "pervasively polluted" culture” regarding HSBC’s corporate culture (Slater and Scuffham 2012). The bank had to pay USD 1.9 billion in fines but was not criminally prosecuted by the US. Instead, a deferred-prosecution-agreement (DPA) was settled over a period of 5 years requiring the company to install “an independent monitor to assess reformed internal controls” (Treanor 2012a), and restricting top executives’ bonuses amongst other conditions.

**Complicity in Tax Evasion** In 2011, the press released information that HSBC actively supported tax evasion in Europe with its branches in Switzerland and Luxembourg. Clients from Spain, France and Germany tried to avoid income taxes by opening accounts in Switzerland and Luxembourg (Leyendecker 2011). The scandal around tax evasion continued and between 2013 and 2015 there was substantial proof of HSBC Switzerland helping Belgian, French, and Argentinian clients evading taxes (Fontanella-Khan 2013; Dalton 2014; Davet and L’Homme 2014; Bronstein 2015; Plunkett 2014; Dellacroix 2014; Garside 2015; Beniwal 2016).

Regarding tax evasion in Europe HSBC was not the only company under fire; the Swiss bank UBS was intensively entangled in this issue as well as fraudulent activities (Leyendecker 2011; Bronner 2010).

Moreover, in 2011 and 2012 HSBC was also accused of enabling tax evasion in the United States by helping Indians living in the US transferring their money to HSBC’s branches in Switzerland (Simonian 2012, BBC News 2011b).

**Fraud – Ponzi Scheme and Issues in Taiwan** The bank is also involved in fraud. In May 2010, press releases reporting the scandal around Bernard Madoff’s Ponzi scheme<sup>39</sup> also mentioned HSBC’s participation in this case together with JPMorgan, another financial institution based in the US (Efrati and Bryan-Low 2010). Victims of the Ponzi scheme are numerous and spread across the globe. They had invested in Madoff’s firm, which later was unmasked as a Ponzi scheme. HSBC acted as a custodian for Madoff’s funds and failed to properly monitor them. Madoff himself said that HSBC had access to his records, but certain things had been overlooked (Harrington 2012). It seems HSBC tolerated the fraud while benefiting from the profits it produced.

Another incident is HSBC’s fraudulent practice with PEMGroup affecting clients in Taiwan and the US. In 2010, HSBC acted as a cash custodian for PEMGroup, a private equity company in the US. A fraud-affected investor, Robert Mosier, tried to claim back an amount of USD 1.9 million in fees originally paid to HSBC, as the bank allegedly helped PEMGroup to “create and send false accounting reports that reassured investors their money was secure” (Maremont 2010). Later, Taiwanese investors also sued HSBC for concealing the real performance of PEMGroup and giving them inaccurate information (Pettersson 2010).

**Market Manipulation – EURIBOR** The EURIBOR is an acronym for European Interbank Offered Rate, a benchmark interest rate between financial institutions for unsecured credits, particularly EURO-bonds in EURO currency (Finanzen.net n.d.). The EURIBOR is the equivalent of the LIBOR (London Interbank Offered Rate) on the European interbank market. In connection with the LIBOR scandal (2005 to 2009) manipulations with regard to EURIBOR (2005 to 2008) have also been discovered in involving the following financial institutions: HSBC and ICAP based in the UK, Crédit Agricole from France and JPMorgan from the US (Binham and Barker 2013). In July 2012, HSBC came under scrutiny and in December 2013 the bank still refused to settle allegations (ibid., Russell and Peakcock 2012; Sebag and White 2013). Meanwhile, in January 2014, HSBC suspended two foreign exchange traders due to increased pressure (Slater and Hutchinson 2014). In May 2014, HSBC was officially accused by the European Commission of fixing the EURIBOR, along with other

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<sup>39</sup> “A Ponzi scheme is an investment fraud that involves the payment of purported returns to existing investors from funds contributed by new investors. Ponzi scheme organizers often solicit new investors by promising to invest funds in opportunities claimed to generate high returns with little or no risk. In many Ponzi schemes, the fraudsters focus on attracting new money to make promised payments to earlier-stage investors and to use for personal expenses, instead of engaging in any legitimate investment activity.” (cp. US Securities and Exchange Commission n.d.)

banks by with other banks. However, by that time HSBC still tried to fight against any charges to be potentially imposed (BBC News 2014). In June 2015 there was the latest update on that case, where HSBC and the other banks were supposed to meet with antitrust officials from the European Union (Sebag 2015).

Yet, the alleged EURIBOR manipulation was not the only case of manipulation the HSBC is said to be involved in. In 2013, both the European Commission as well as the US Department of Justice started to investigate potential antitrust violations in the CDS (Credit Default Swap) market. HSBC was also accused along with other major banks of manipulating the CDS market (Alloway 2013).

A range of other potential involvements in manipulation scandals followed in 2014 for alleged fixing of precious metal prices and 2015 for rate manipulation. In 2014, HSBC and other banks were sued by AIS Capital Management for allegedly fixing the London benchmark gold price (Freeman 2014) and in the same year by some jeweller in New York for also manipulating palladium and platinum prices (Iosebashvili 2014). In 2015, the series of alleged manipulation continued with civil settlements in the US regarding the Forex (short for Foreign Exchange Rates) manipulation, and investigations into the manipulation of the Brazilian Real (Albanese 2015, Lewis 2015).

### *Other Governance Issues*

Besides the violation of national legislation, there were other controversial cases like excessive bonus payments in 2014, the scandal around mis-sold loan interest swap rates to small UK businesses in 2013 and mis-sold credit and debit card insurances to individual clients in 2012, which continued until 2015.

**Executive Compensation Issues** In 2014, the five highest managers at HSBC received each GBP 5.8 million, which was also stated in HSBC's annual report of the fiscal year 2014. According to the newspaper the Independent, this is 219 times higher than the average salary in the UK (Moore 2014). The story of excessive bonus payments continued with Stuart Gulliver, HSBC's executive chef, having received an annual salary of more than GBP 7 million in winter 2015 (Chersterns 2015).

**Product Mis-selling** In 2012, HSBC was charged along other British banks with a fine of GBP 1.1 billion for mis-selling payment protection insurances (PPIs) to its customers between 1990 and 2010 (Treanor 2012b). These charges further increased until 2015 with the four

major banks in UK being charged with GBP 33 billion in total, expecting even more financial punishment for non-transparency on commissions related to selling PPIs (Salmon 2015).

In 2013, the British Financial Services Authority started investigating into small UK business having been mis-sold complex interest rate structures, such as interest swap rates by HSBC in 2001 (Inman 2013).

### 3.3.2.2 Environmental Issues

Complicity in damaging the environment and therewith causing negative impacts also on communities is an on-going issue at HSBC. Around the globe, the company invests in questionable projects with harmful effects on nature and people.

**Energy Sector – Hydropower in Chile** HSBC holds or manages shares of various companies directly involved as operator or constructor in questionable energy projects and thereby invests in ecologically-damaging operations. Since 2008, Endesa from Spain together with Colbún from Chile (both owned by Enel Italy) have been planning to build the HidroAysén. The HidroAysén is a hydropower project of a total of five dams to be built in Patagonia. *The Ecologist* says: “The dams will displace families, disrupt livelihoods and spoil tourism by flooding ranching and agricultural lands”. Furthermore, “a 2,450km transmission line for the project would cut a 12-metre wide corridor through rainforests and communities that support a high degree of biodiversity” (Gass 2011). In 2008, HSBC contributed to this project by financing Colbún with GBP 17.7 million as a part of a GBP 244.5 million syndicated loan and Endesa with GBP 14.2 million according to *The Ecologist* (ibid.). However, according to the NGO BankTrack, this project is still not fully funded. As Endesa withdrew from this project in 2014 the future of this mega dam in Patagonia remains uncertain (BankTrack 2016c).

**Energy Sector – Gas in Myanmar** Another energy project financed by HSBC is located in Myanmar. The Shwe pipeline at the Bay of Bengal was initiated by the Korean company Daewoo International to which HSBC gave a corporate loan in 2009, including a consortium of four companies from India and South Korea. China National Petroleum Corporation (CNPC) is the operator and pumps the gas through the pipelines to China, where its subsidiary PetroChina is responsible for distribution. Since 2009, HSBC has been managing shares of CNPC with a value of GBP 162 million (Gass 2011).

There was no environmental assessment prior to putting the pipeline into operation, though

it “runs through many delicate ecological areas” (ibid.). Hence, conflicts between local communities and the companies involved arose and a protection of the site by the Burmese military became necessary. This in turn led to accusations against the military of sexual assault, forcing habitants to relocate and confiscating their land. Further companies involved are the Royal Bank of Scotland (RBS) and Barclays both located in the United Kingdom.

Yet, according to an article by HSBC’s Economic Intelligence Unit in 2013, Myanmar is about to change its energy policies to have a greater focus on domestic energy supply. It is not quite clear today, in how far HSBC is still involved in this project.

**Energy Sector – Nuclear Power in India** A third and very controversial energy project initiated in 2011 is the Jaitapur Nuclear Power Plant in India. HSBC considered to getting involved in this project. The planned power plant is a joint venture between the Nuclear Power Corporation of India and the French company Areva that will provide reactors. The Indian government officially mentioned HSBC as well as BNP Paribas and Société Générale from France as potentially providing finance (BankTrack 2016d). The plant is to be built in an area close to the coast where seismic activity is high. Yet, a first risk assessment did not include the possible event of tsunamis. In the aftermath of Fukushima these projects are considered extremely hazardous. Furthermore, the area for the Jaitapur plant was acquired through forced land acquisition where many local farmers were compelled to leave their crops behind (Bajaj 2011). More than 2000 families together with a rich biodiversity in the area of Madban will be negatively impacted by the project due to radioactive contamination (Epsocial 2011).

A second environmental impact assessment (EIA) report released by the end of 2011 also underlines the lack of consensus regarding the plant’s exposure to seismic events. Though Jaitapur is said to be in the seismic activity zone 3 which appears to be low, the EIA adds “since Jaitapur lies in the same compressional stress regime that has been responsible for generating both the Latur and the Koyna earthquakes measuring 6.3 and 6.4 respectively on the Richter scale in the past five decades, it can be argued that a similar sized earthquake could possibly occur directly beneath the power plant” (ibid., Greenpeace 2011, Greenpeace 2012c).

Since 2011, however, this project is put on hold due to the Fukushima incident in the same year (Haverkamp and Beranek 2016).

**Energy Sector – Coal Sourcing in Australia** The latest environmentally destructive project to be described here was supported in May 2013. At that time, HSBC provided a corporate



loan of AUS 385.5 million to a coal and gas project located at Galilee Basin, Queensland, Australia (BankTrack 2016b). The Galilee Basin is a subterranean site located on the mainland in Queensland close to the Great Barrier Reef, a UNESCO world heritage site (cp. UNESCO World Heritage Centre n.d.). It covers a distance stretching from Townsville to Rockhampton with a length of approximately 700km. This and other projects at the coastline of the Great Barrier Reef threaten the pristine nature and wildlife due to extraction procedures involving environmental destruction, traffic, pollution and emissions and other negative impacts (BankTrack 2016b).

Linked to the sourcing of coal at Galilee Basin is the expansion of activities at Abbot Point directly at the coastline of the Great Barrier Reef. The facilities there are used for coal export. The expansion involves enlarging the previously-existing coal terminal. Communities around Abbot Point are concerned, as the dredge spoil is said to be dumped only 40km away from the reef. The estimated amount of spoil dumped equals the amount carried by 150,000 dump trucks (McCarthy 2013). However, in December 2013, construction was approved but with stricter environmental regulations, e.g. limits on the amount of spoil dumped (ABC News 2013). Only a little later, the mines at the Galilee Basin were also approved despite serious environmental issues not yet solved (Lauder 2013, White 2013, Readfern 2014; Queensland Government n.d.). In December 2015, the Australian Government approved the expansion of the coal port. However, the project is still not fully funded yet (Vincent and Louvel 2016).

**Mining – Coal mining in Colombia** Another questionable project to be presented here is the Cerrejón coalmine in La Guajira, Colombia. This mine belongs to the largest coalmines on the globe. Since 2009, HSBC is involved in this project with a volume of GBP 3.133 billion (World Development Movement 2013). Next to issued bonds of GBP 2.6 billion, this sum includes corporate loans of GBP 369 million to the companies owning the mine, namely Anglo American, BHP Billiton and Xstrata (Ross n.d.).

Since it's founding in 1976 the mine has been steadily expanded. As a result of this expansion, the life of indigenous communities nearby has been disrupted; their villages have been destroyed. Furthermore, the environment is negatively impacted as habitats have been damaged and local rivers polluted. The coal dust also has negative effects on the health of local people and workers who are significantly exposed to various kinds of cancer (Ross n.d.). Moreover, workers are exploited at the coalmine. They suffer from forced and cheap labour, as well as overly long shifts and generally bad working conditions (Scrivener 2016). The

project was supposed to be further expanded, involving the rerouting of a local river. However, in 2012 the managing companies announced they would refrain from rerouting Rancheria river (ibid.).

**Mining – Gold mining in Indonesia** Mining and gold mining in particular, is controversial since it causes negative impacts on environment and surrounding communities. HSBC is involved in a mining project in Indonesia by holding and managing shares of the company behind this project: the Toka Tindung mine, close to Manado in North Sulawesi, planned in 2006 and constructed by Archipelago Resources based in Australia. In 2010, HSBC managed shares or bonds of Archipelago Resources worth USD 200.000 (BankTrack 2015).

The mine was expected to have devastating effects on its natural surroundings: “As Toka Tindung is located in a densely populated area it directly endangers the villages in its immediate surroundings with contamination. A possible overspill of fine tailings mud presents a real danger to the bay of Rinondoran, which is the heart of the local fishing industry. North Sulawesi's main economic pillars are tourism, fishery and agriculture. All three are viable sectors which will suffer severe damage if Toka Tindung starts operating” (Watchindonesia.org 2010). It is highly likely that Toka Tindung will have devastating effects on its environment, which is important to tourism, fishery and agriculture. In a document from Greenpeace regarding Rapu Rapu mine at the Philippines various risks are stated, such as collapses of the tailings dam or waste rock dump caused by heavy rain (Greenpeace 2006). The NGO minesandcommunities.org claims with respect to Toka Tindung: “Villages in the immediate vicinity are at risk to be buried in mud floods when the storage facility overflows during the rainy season” which had already happened before, in May 2007 (MAC: Mines and Communities 2010). Furthermore, it is stated that “[i]f Toka Tindung should enter production, the mixture of cyanide and acids released into the ground water system is feared to harm the ecosystem that hosts more than 224 birds species [...]” (ibid.).

The Indonesian Environment Ministry rejected the waste disposal plans for Toka Tindung. As a consequence the governor of the province did not grant a permit (Regenwald.org 2007). However, the mine could progress through corruption, eluding sanctions and intimidating the local people (Watchindonesia.org 2008). In 2010, the mine project came to a halt based on accusations that the initial environmental assessment had been manipulated. Moreover, Archipelago Resources had not had sufficient funds required for completing the project (BankTrack 2015).

**Deforestation – Paper and Palm Oil in Indonesia** Since HSBC is a financial institution and

not a retailer, the question might come up as to how a bank can be involved in controversial palm oil production and deforestation. HSBC is again not involved directly but through investments. In the past, HSBC invested in Sinar Mas, an Indonesian conglomerate with subsidiaries called PT Smart and Asia Pulp & Paper (APP) (Greenpeace 2010). These are said to be responsible for the deforestation of rainforests and destruction of wetlands in Indonesia (Sinarmas.com n.d., Greenpeace 2012a, Greenpeace 2010, Greenpeace 2009a, Ramsar.org n.d., Cites.org n.d.). Thus, HSBC is also indirectly responsible for this environmental abuse and thereby also contributes to climate change. Yet, after enough pressure by the NGO Greenpeace in May 2010, HSBC dropped its Sinar Mas shares (Maung 2010).

However, HSBC's engagement with the controversial paper and palm oil sector continued, despite having a specific sector policy for forestry in place since 2004 (HSBC.com, Forestry and Agricultural Commodities n.d.).

In November 2012, a report by the NGO Global Witness on deforestation issues at HSBC referred to by the *Economist* (2012) reported that HSBC had failed completely in terms of compliance with its own forest sector policies: "In all, Global Witness identified six loans, totalling \$25m, made by HSBC to non-compliant Sarawak loggers since the bank introduced its forest policy. HSBC said in 2004 that it would stop doing business with clients that failed to make a reasonable effort to comply by 2009". Global Witness particularly referred to ties maintained with the still not certified Ta Ann Holdings and WTK Holdings, two controversial forestry companies, which pursue intensive logging practices, also affecting rainforest areas and orang-utan habitats (ibid.). As a consequence of these accusations by Global Witness, the bank then assigned PriceWaterhouseCoopers to assess its activities and still insisted on the reliability of its sustainable practice of only giving loans to companies, which pass the HSBC sustainability screening (Lang 2013).

In November 2013, another press release by the Environmental Investigation Agency (EIA) referred to another controversial business relation, namely to Bumitama Agri, a client of HSBC supposed member of the RSPO. HSBC provided a loan to Bumitama Agri worth EUR 42.59 million (Friends of the Earth Europe 2015). Same as the other two HSBC clients above, Bumitama Agri is accused of clearing rainforest areas, which accelerates the extinction of the orang-utans in this area. Their report *Banking on Extinction* criticises HSBC's sole reliance on the Roundtable on Sustainable Palm Oil (RSPO)<sup>40</sup> as an external third party in terms of compliance (Environmental Investigation Agency 2013a). This initiative is said to lack

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<sup>40</sup> Walmart also relies on the RSPO (cp. Walmart, Walmart Policies and Guidelines, n.d.)

“credible mechanisms to ensure its members protect High Conservation Value (HCV) forests, and even when such violations are brought to its attention its measures are insufficient to either compensate for the damage or serve as a disincentive”, according to Jago Wadley, a campaigner for the EIA (Environmental Investigation Agency 2013b).

In another report by Global Witness in 2015, HSBC is mentioned in connection with Golden Agri-Resources (GAR), a palm oil plantation company from Singapore, which is a subsidiary of Sinar Mas mentioned above (BankTrack 2016g). HSBC is said to hold shares in GAR, again despite their policies, and despite knowing that this is an environmentally destructive company (Global Witness 2015).

### 3.3.2.3 Social & Human Rights Issues

The following examples show HSBC’s complicity in human rights abuses by violating principles 1 and 2 of the UN Global Compact, which are derived from the Universal Declaration of Human Rights (UN Global Compact n.d.; UN n.d.).

**Investment in Cluster Munitions** Even worse is HSBC’s investment in cluster bombs. The production of cluster bombs was finally banned in December 2008. In Oslo, a delegation of 94 countries came together to sign the “Convention on Cluster Munitions”, which strictly prohibits any use, production, or stockpiling of cluster munitions. Nevertheless, HSBC still invested in or gave loans to companies like Textron or L-3 Communications in the United States. While L-3 Communications terminated at least its production of inhumane weapons in 2009, Textron still seems to be producing its “Sensor Fuzed Weapon” which can be classified as cluster bomb (Textron Defense Systems n.d., Military Analysis Network 2012, IKV Pax Christi 2011). According to HSBC’s voluntary disclosure of cluster munitions investments, the bank renewed a loan to L-3 Communications in October 2009. This investment in particular, however, is no more that controversial, as L-3 has terminated its cluster bomb production in 2009. Yet, the fact that beyond this investment HSBC also owned shares and bonds of Textron and Textron Financial in 2008 and 2009 still makes the company complicit in human rights infringements (BankTrack 2010). In 2012, HSBC confirmed that it had terminated all financial connections to producers of cluster bombs (IKV Pax Christi 2013).

**Land grabbing in Uganda and Nigeria** According to Oxfam, more than 20,000 Ugandans in Mubende and Kiboga had to leave their homes and land in September 2011 to make way for New Forests Company (NFC) (Oxfam America 2011). The British timber company is

planning to “plant trees, to earn carbon credits and ultimately to sell the timber”, driving thousands of people into poverty with its project (Vidal 2011). HSBC and the European Investment Bank among others are investing in NFC and can be therefore considered as also complicit in the mentioned human rights abuses.

Another case of land grabbing is related to HSBC’s ties with Wilmar International, an agribusiness company from Singapore. In 2013, HSBC was accused along with other European banks of fuelling land grabbing in Uganda (Euractiv 2013). From 2010 to 2013, HSBC allegedly supported Wilmar International with several loans worth more than EUR 900 million total (ibid.; Van Gelder et al. 2015). Further, in 2015, Wilmar International was accused of further land grabbing in Nigeria (Colwell 2015).

### ***3.3.3 Communication Analysis***

HSBC’s Sustainability Report 2011 was externally assured by PriceWaterhouseCoopers (PWC). Yet, this report is merely oriented towards the report guidelines established by the Global Reporting Initiative (GRI) but does not fully implement these (HSBC.com 2012). In the reporting year, HSBC had updated its energy sector policies, and was reflecting on the public debate on safety in the nuclear sector following the Fukushima disaster (ibid.). Yet, with regard to money laundering and tax evasion the company was still convinced of its good and trustworthy practice: “Every day, HSBC contributes considerable time and resources to monitoring millions of transactions of all kinds” (ibid., 14). Compared to incidents which happened in 2010 like money laundering in Africa and Mexico, and the fraud scandal around Bernard Madoff, this statement does not correspond with business reality. In the report, HSBC furthermore responds to concerns regarding their forestry customers and refers to the now accomplished FSC certification of their clients, which turned out of being rather ignored in reality (ibid.). However, palm oil issues are not mentioned, and according to latest reports HSBC’s efforts in this field are still insufficient.

A later report covering HSBC’s operations in 2012 comprises 40 pages and is again externally assured by PWC (HSBC.com 2013c). Almost exemplary, HSBC directly responds to recent incidents, like various cases of money laundering and the Euribor manipulation scandal. As Group Chairman Douglas Flint admits there were “serious failings both in the application of our standards and in our ability to identify, and so prevent, misuse and abuse of

the financial system through our networks” (ibid., 2013, 3).

Following these scandals, the company has developed new Global Standards to prevent financial crime in the future and states three key objectives: strengthening capabilities to combat financial crime, simplifying monitoring and enforcement standards, and consistently applying the values (HSBC.com 2013a; HSBC.com 2013c). However, sustainability issues discussed in the report only refer to company internal aspects like paper consumption or carbon emissions but do not include reflections with regard to improvements in lending or financing practices (HSBC.com 2013a).

In another sustainability report in 2013 there appeared to be no critical reflection on controversial cases. In the later Strategic Report of 2014 there was at least some reference with regard to the tax evasion scandal of HSBC’s Swiss branch and the foreign exchange market manipulations (cp. HSBC.com 2015). Yet, since the bank made the shift from conventional annual sustainability reporting to a more strategic reporting, there will not be any details on their sustainability efforts communicated in the future, except for on its website.

### ***3.3.4 Voluntary Commitments & Standards Analysis***

A detailed examination of these financial involvements, to put it mildly, now draws quite a different picture of HSBC’s business practice. For example, when it comes to money laundering, it seems that HSBC does not always act in accordance with its own statements. In one of its Sustainability reports the company states “[w]e have clear policies and procedures in place to prevent money laundering, bribery and corruption in all the jurisdictions where the bank operates, both to protect our reputation and to facilitate the effective running of local economies” (HSBC.com 2011, 5). Furthermore, HSBC is one of the founders of the Wolfsberg Group, which published certain principles to prevent money laundering. One of the documents dealing with anti-money-laundering measures states: “Financial institutions should have appropriate processes in place that allow for the identification of unusual transactions, patterns and activity” (Wolfsberg Group 2009, 2). HSBC surely had guidelines in place (see HSBC.com, Global Standards n.d.) but apparently there was a lack of monitoring and enforcement.

A founding member unable to comply with its own codex, though voluntarily imposed, creates a shady impression. Moreover, it is not only about non-accordance to one’s own

principles, even worse, it is also about violation of legislation, which is clearly a crime.

Apart from money laundering, tax evasion and fraud, which usually fall under the violation of national legislation, HSBC seems to follow a dubious investment strategy not quite in accordance with its other public statements. These investments, however questionable they may be, do not necessarily present a violation under national legislation. Depending on the particular country where a project is located, environmental or particularly human rights abuses are not indictable. And, in the case of a bank all these involvements are related to complicity only anyway. That means the bank is never directly involved but only through its lending practices. However, involvement in these projects can seriously damage HSBC's reputation since it presents an offence in terms of external guidance by various voluntary principles and guidelines the bank is committed to and its internal standards such as sector policies.

From the record of incidents above it becomes clear that the energy sector is of great importance to HSBC.

The issue particularly with the Equator Principles (EPs) is that only project finance is covered, not corporate loans. These are only covered by the EP III version effective from January 2014 onwards. Consequentially, HSBC's financial support in the form of corporate loans to the consortium of the HidroAysén in Chile, the Cerrejón mine in Colombia, to the coal project in Australia or to Bumitama Agri were all not included in the EPs by that time. Furthermore, managing shares or bonds of controversial companies is not reflected in the EPs until today (cp. Equator Principles 2013).

HSBC's investments in palm oil sourcing companies such as Sinar Mas, Bumitama Agri and others are against HSBC's own forest sector policy (cp. HSBC.com, Finance n.d.), since HSBC in fact rejects investments in "operations in wetlands on the Ramsar List". It is clear that through its operations particularly Sinar Mas' subsidiary PTsmart is destructing the fragile peat lands of the Ramsar protected Danau Sentarum National Park in West Kalimantan (West Borneo) (Greenpeace 2009a).

In sum, HSBC's complicity in environmental abuses is going against its own sector policies and also in parts against the UN PRI, particularly Principle 1, which is about incorporating ESG issues in investment decisions in general, and Principle 3, which implies that the entities a bank invests in also need to disclose their ESG issues, as most these companies do not

report according to any standards (cp. UN Principles of Responsible Investment n.d.). In addition, it is worth mentioning that HSBC's investment strategy does not appear to have changed "to the good". In its last sustainability report for the fiscal year 2013, published in 2014, an increase in investment volume compared to 2012 and 2011 can be stated. This is particularly true for the mining and metals, and power sectors (cp. HSBC.com 2014).

A last comment should be made about HSBC's complicity in human rights abuses. Again HSBC states that it refrains from any involvement in this sector: "HSBC does not provide financial services to customers – including holding companies - which manufacture or sell anti-personnel mines or cluster bombs. We do not provide financial services for transactions involving such weapons." (HSBC.com 2010). After the ban of cluster munitions in 2008, HSBC was still financially supporting both L-3-Communications and Textron. While L-3-Communications removed cluster munitions from its inventory at least one year after the ban, Textron seems to still be producing inhumane weapons as is suggested by the product description which appears on their website. Not reflecting this ban immediately with regard to investment decisions goes against the UN Declaration of Human Rights, particularly Article 3 and 5 (cp. UN n.d.). Accordingly it also goes against the Principles 1 and 2 of the UN Global Compact, and in addition against the OECD Guidelines, which also include a section on Human Rights (UN Global Compact n.d.; OECD.org 2011).

In addition, HSBC's investment into Wilmar International, which is associated with land grabbing practices, also violates the UN Declaration of Human Rights, namely Article 13 and 17, as well as the UN Global Compact Principles and the OECD Guidelines already mentioned above (cp. *ibid.*).

### ***3.3.5 Case Conclusion***

In conclusion, the HSBC case reveals various deficiencies. First, voluntary commitments and internal policies and standards have been ignored. HSBC is clearly violating its own sector policies regarding defence and forestry. Mining apparently presents a difficult issue where caution is demanded regarding investments. When it comes to compliance, HSBC at least openly admits its deficits in its Sustainability Report (HSBC.com 2011), where non-compliance with forestry sector policies is stated as almost 7 per cent in 2009 and almost 3



per cent in 2010.<sup>41</sup> On the other hand, in the case of compliance with its energy sector policies, HSBC states zero cases of non-compliance and a rate of around 5 per cent in the category ‘nearly-compliant’. Yet, hazardous projects like HidroAysén and the Cerrejón mine are likely to fall under this category. Second, despite national regulations and law actually prohibiting certain activities, and despite allegedly installed internal preventive measures, these projects were nevertheless pursued. Finally, the current level of internal monitoring and oversight has proved to be insufficient.

In brief, it appears as if HSBC has overestimated its capacities, as well as capabilities to fulfil so many voluntary external and internal guidelines and principles. However, at least the company comments on recent incidents where it violated national legislation. This shows it is responding to and taking into account public concerns. Yet, generally and not further surprisingly, the past sustainability reports simply promulgate the positive impacts of HSBC’s operations. Yet, since the shift in sustainability communication, HSBC is no more reporting on their sustainable and philanthropic activities in details anymore.

### **3.4 Case Two: JPMorgan Chase & Co.**

JPMorgan Chase & Co. (henceforth JPMorgan) is a financial institution of long heritage located in the city of New York in the United States. JPMorgan Chase & Co. is a conglomeration of various other companies acquired over time. The company’s history presents a story of mergers and acquisitions going back to the 19<sup>th</sup> century. Today, JPMorgan is among the leading financial institutions. The company operates in more than 60 countries with more than 240,000 employees worldwide (Fortune.com 2015). JPMorgan’s business today covers a wide range of services, such as financial services for consumers, small businesses, commercial banking and investment banking, as well as asset management and private equity. Before 2012, JPMorgan belonged to the top 50 companies in terms of revenue according to the Global Fortune 500 list (Fortune.com 2011). However, when it comes to profits JPMorgan with more than USD 21 billion in annual profits is still among the ten most profitable companies globally in 2015 (Fortune.com 2016)

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<sup>41</sup> There is no information available regarding non-compliance with defense sector policies.

### ***3.4.1 Corporate Responsibility Strategy***

**Communication** JPMorgan's corporate responsibility communication is based on four pillars, namely its initiatives, its philanthropic strategy, its engagement within the communities the company is operating and environmental sustainability (JPMorganchase.com, Our Initiatives n.d.; JPMorganchase.com, Global Philanthropy n.d.; JPMorganchase.com, Community Development Banking n.d.; JPMorganchase.com, Environmental Sustainability n.d.).

JPMorgan is committed to various initiatives, such as promoting financial capability or the Global Cities Initiative (JPMorganchase.com, Financial Capability n.d.; JPMorganchase.com, Global Cities Initiative n.d.). Its philanthropic strategy includes employee engagement and volunteering in the local communities, promoting affordable housing projects or specific skills training (JPMorganchase.com, Global Philanthropy n.d.). JPMorgan's approach to community development is particularly focused on banking and includes construction financing and credit enhancement for low- and moderate income communities (JPMorganchase.com, Community Development Banking n.d.). The last pillar, environmental sustainability, is focused on sustainability in JPMorgan's business and operations (JPMorganchase.com, Environmental Sustainability n.d.). With regard to its business, the company seeks to manage its environmental and social risks, invests into conservation and promotes sustainable finance (JPMorganchase.com, Sustainability Through Business n.d.). In its operations, the company fosters sustainability by reducing energy consumption and GHG emissions, which also includes using renewable energy. Furthermore, regarding its company buildings JPMorgan seeks a LEED certification, which proves that a building is environmental friendly. Lastly, the company tries to maximise its use of sustainable paper (JPMorganchase.com, Sustainability in our Operations n.d.).

The company's communication on responsibility furthermore includes an annual reporting on these matters with the latest report published in 2015 for the fiscal year 2014. On about 48 pages, this report reflects the four pillars communicated on the website but puts emphasis on five particular topics like building communities, increasing economic competitiveness, promoting skills, supporting small businesses and a global expansion of financial capability (JPMorganchase.com 2015). The report also includes a GRI table, but neither its GRI level (self-declared with B), nor the report as such were externally assured by professional companies (ibid.).

**Commitments** JPMorgan's commitment to initiatives is quite extensive. JPMorgan has initiated nine internal initiatives, such as promotion financial capability as mentioned above; the global cities initiative together with the Brookings Institution; investments into communities in Detroit; special programs for military veterans; skill training programs; social finance, which means attracting and actively channelling private sector capital towards innovative solutions; "Technology for Social Good" initiative, which means JPMorgan employees using their technological and professional skills to help non-profit and other social sector companies; supporting small businesses, and lastly JPMorgan's fellowship initiative in three US cities to help young men of colour (JPMorganchase.com, Our Initiatives n.d.).

With regard to environmental initiatives, JPMorgan also supported Conservation International's Carbon Fund with USD 1 million to develop carbon forests ready to offset carbon emissions in the past. The Carbon Fund was linked to the Reducing Emissions from Deforestation and Forest Degradation (REDD) scheme by the United Nations (Conservation International, Carbon Fund n.d.).<sup>42</sup> After this project, JPMorgan started investing in NatureVest belonging to The Nature Conservancy, in 2014 (JPMorganchase.com, Sustainability Through Business n.d.). NatureVest is about structured investment products related to the conservation of nature (Naturevesttnc.org n.d.). JPMorgan further aims to offset its GHG emissions and seeks a LEED certification for its buildings (JPMorganchase.com, Sustainability in our Operations n.d.).

**Voluntary Commitments to External & Internal Standards** In addition to the initiatives and other commitments mentioned above, JPMorgan also adopted globally acknowledged external standards and has developed specific internal standards as a guidance for decisions in the financial business (JPMorganchase.com, Memberships and Commitments n.d.; JPMorganchase.com, Human Rights n.d.; JPMorganchase.com, Sustainability in our Operations n.d.; JPMorganchase.com 2014a):

- UN Declaration of Human Rights
- UNEP FI
- UN PRI

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<sup>42</sup> "Reducing Emissions from Deforestation and Forest Degradation (REDD) is an effort to create a financial value for the carbon stored in forests, offering incentives for developing countries to reduce emissions from forested lands and invest in low-carbon paths to sustainable development. "REDD+" goes beyond deforestation and forest degradation, and includes the role of conservation, sustainable management of forests and enhancement of forest carbon stocks." (cp. UN-REDD Programme, About REDD+ n.d.)

- Wolfsberg Principles
- Equator Principles
- Carbon Principles
- Green Bond Principles
- CDP
- Extractive Industries Transparency Initiative
- GRI
- LEED
- Member of CERES
- Member of the World Business Council on Sustainable Development (WBCSD)
- Member of C2ES's Business Environmental Leadership Council (BELC) in the US
- Code of Conduct
- Environmental and Social Policy Framework

**Sustainability Risk Strategy** Beyond the commitments listed above, JPMorgan has internally developed policies in place to manage socio-environmental risks arising from lending practices and other transactions. JPMorgan's Environmental and Social Policy Framework includes an 'Environmental and Social Risk Policy' (E&S Risk Policy) (JPMorganchase.com 2014a), which is based on the EPs (cp. Equator Principles 2013) and on the IFC's Performance Standards (cp. Ifc.org n.d.), but is broader in scope. Transactions linked to the following financing possibilities are all subject to JPMorgan's 'Global Environmental and Social Risk Management' irrespective of the amount involved: project finance transactions including advisory and principal investments; bilateral and syndicated loans including project-related corporate loans and bridge loans as defined under the EPs; equity security offerings; debt security offerings; private placements, and advisory assignments. Furthermore, JPMorgan clearly states what the company refuses to finance. Transactions related to forced labour or child labour; transactions affecting UNESCO World Heritage Sites, and transactions linked to illegal logging.

Activities in particular sectors require a 'tailored approach' according to JPMorgan, like oil and gas including hydraulic fracturing, oil sands development, and operations in the arctic; electric power including coal-fired power generation and large hydroelectric plants; so called soft commodities like palm oil and timber; and mining practices like Mountaintop Removal (MTR).

### 3.4.2 Business Reality

Real business practice at JPMorgan, however, looks different to its statements in the company's Corporate Responsibility report or on the website described in more detail above. According to the RepRisk data basis, 1035 negative news entries accumulated between 2005 and 2016 from various media sources and of diverse topics associated with controversial business practices at JPMorgan (see figure 3.3).

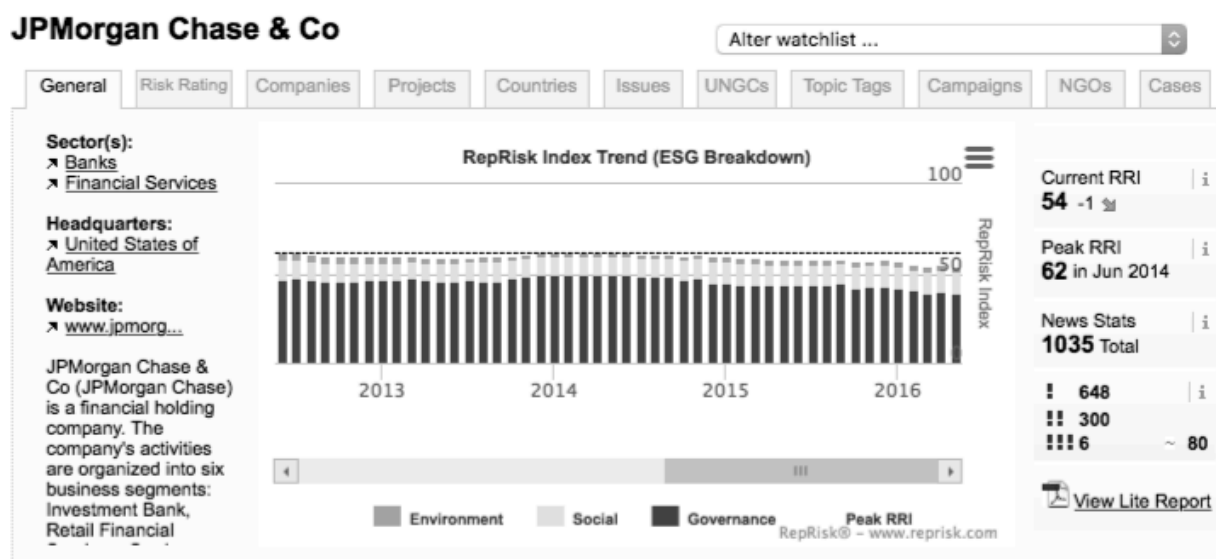


Figure 3.3, JPMorgan Overview (RepRisk 2016)

And similarly to the HSBC profile above, also negative media on JPMorgan is predominantly related to governance issues:

- Violation of national legislation
- Fraud
- Controversial products and services
- Corruption, bribery, extortion and money-laundering
- Anti-competitive practices (see all figure 3.4)

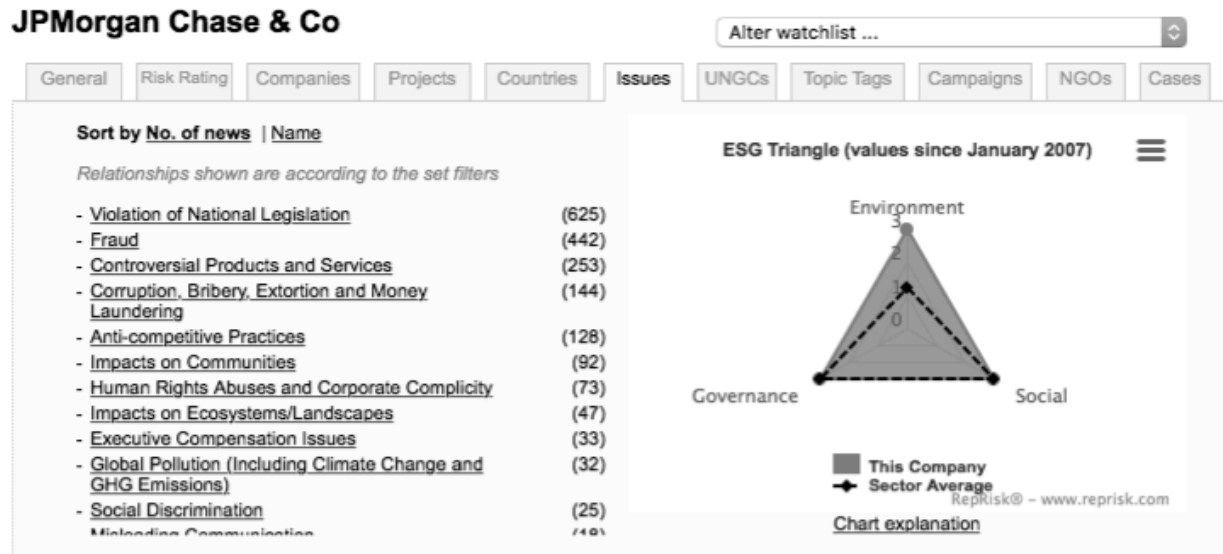


Figure 3.4, JPMorgan Issues (RepRisk 2016)

### 3.4.2.1 Governance Issues

#### *Violation of National Legislation*

JPMorgan is involved in various cases of violation of national legislation. This section explains in more detail cases related to money-laundering; fraud, as in trading of risky mortgage-backed securities, which led to the global financial crisis, various kinds of manipulations and other cases of controversial business practices violating national legislation.

**Money Laundering – Ponzi Scheme** As already mentioned in section 3.3, both JPMorgan and HSBC were involved in Bernard Madoff’s Ponzi scheme, revealing a second scandal at JPMorgan in addition to illegal foreclosure. In October 2010, JPMorgan was first mentioned in connection with money laundering regarding Madoff’s Ponzi scheme. While HSBC was primarily accused of fraud, JPMorgan was further accused of money laundering, helping Madoff with illegal money transfers between United Kingdom and the United States (McCool and Keating 2009). In this scandal, JPMorgan together with the Bank of New York and the accounting firm KPMG were considered as “primary players necessary to accomplish the fraud” since the suspicious money transfers were either not detected at all or more possibly simply tolerated for own benefits (ibid.). In January 2014, the Madoff case was finally settled with JPMorgan paying USD 1.7 billion, the highest forfeiture ever imposed on a bank (Vardi 2014). However, after the Madoff affair there followed another Ponzi scheme scandal, namely the Petters’ Ponzi scheme.

In February 2014 the *Courthouse News Services* reported that several banks were accused of being involved in this scheme, amongst those again JPMorgan (McCue 2014). With an amount of USD 3.7 billion, Thomas Petters' Ponzi scheme is said to be the largest in US history so far. Hedge funds claimed they lost USD 177 million through Petters' scheme. Petters was already convicted in December 2009 with a 50-year sentence (ibid.). Only one month later, in March 2014, *Fortune* magazine reported on a second scandal by the Canadian William Wise (Fortune.com 2014b). Wise, who was running this fraudulent scheme from 2004 to 2009, already pleaded guilty in 2012 (ibid.).

**Fraud – Mortgage-Backed-Securities (MBS)** In October 2010, at a time when JPMorgan was probably still occupied with the aftermath of its involvement in Bernard Madoff's Ponzi Scheme, the mortgage securities scandal in the United States began to spread further, with JPMorgan's activities under scrutiny (Timiraos 2010). In November 2010, JPMorgan was officially accused and faced a lawsuit over its controversial mortgage practices (Spicer and Halls 2010). Mortgage-backed securities (MBS) are of a high risk since they do not present ordinary mortgages between a bank and a private debtor (Investopedia.com, Mortgage-Backed-Security, n.d.). Instead mortgages are sold by the bank to a so-called secondary market. This market, in contrast to the primary market which exists between private debtor and bank, is between the bank and some other institution, be it investors of hedge funds, pension funds or other, who buy these now bundled MBS with either a high risk or low risk profile.

The real problem with traded MBS occurred only later, caused by "interest-only" mortgages or "subprime mortgages" given to private debtors (About.com 2016b). This mortgage or loan only required a monthly payback of the interest itself in comparison to conventional mortgages "in which part of each month's payment goes towards the principal and part goes towards interest" and was given to debtors with an insufficient credit history (About.com 2015b). This made it doubtful that the loan could ever be paid back, especially if the debtor got into financial trouble. These risky mortgages found their way into the bundles together with conventional ones (created by computer programs), and the riskier MBS bundles were in especially high demand. The return of these investments was high as long as private debtors could still cover their interests. Suddenly, house prices began to decline and mortgages went up due to a housing bubble caused by so many house-purchases based on credits (BBC News 2007). Now the downward spiral began: the MBS bundles lost their value

within quite a short period with banks and investors losing their money too (Amadeo 2015). First, there was a breakdown in the primary market between bank and debtor due to default on behalf of the debtor and this spilled into the secondary market between bank and investor.

In the light of the emergence of a global financial crisis, MBS are considered as controversial products violating national legislation. In this context, JPMorgan has been accused of trading controversial products, insufficient disclosure of information, and misleading communication regarding the risk of the traded MBS which led many investors to buy the virtually toxic loans (BBR 2011).

In a settlement with the US Department of Justice in November 2013, JPMorgan agreed to pay a landmark fine of USD 13 billion (Barret and Fitzpatrick 2013). However, this trial was followed by further civil lawsuits. Right in the same month, JPMorgan also agreed to pay another USD 4.5 billion to a group of investors (Silver-Greenberg 2013). A class-action lawsuit then followed in July 2015, initiated by pension funds, where JPMorgan agreed to pay another USD 388 million (Hurtado 2015). In November 2015, criminal investigations against JPMorgan were expanded by the US Department of Justice, including a particular focus on particular employees most possibly involved (Viswanatha et al. 2015).

**Market Manipulation – Benchmark Interest Rates** The LIBOR is an acronym for the London Interbank Offered Rate, a benchmark interest rate for five other currencies: Swiss Franc, Euro, Pound Sterling, Japanese Yen and US Dollar. It is determined each day by eleven to eighteen contributor banks (Investopedia.com, Libor n.d.). The LIBOR is a lending rate for unsecured funds between financial institutions on the London interbank market (Council on Foreign Relations 2015; Binham and Barker 2013). In the LIBOR scandal, these rates were manipulated by some if not even all of these institutions during 2005 and 2009. The banks allegedly involved are Barclays, ICAP and the Royal Bank of Scotland all based in the UK, Rabobank from the Netherlands, Deutsche Bank from Germany, UBS from Switzerland, Société Générale headquartered in France and the US financial institutions JPMorgan and Citibank (ibid.).

From 2005 to 2009, the LIBOR was manipulated involving collusive behaviour to leverage profit rates. Manipulation of the LIBOR has a huge impact as “[m]any banks worldwide use Libor as a base rate for setting interest rates on consumer and corporate loans” (Council on Foreign Relations 2015). Accordingly, when LIBOR “rises, rates and payments on loans often increase; likewise, they fall when Libor goes down” (ibid.). Allegedly, traders asked bank employees to submit an interest rate benefiting their interests instead of submitting the actual



rate the particular bank would pay in order to borrow money from other institutes (ibid.). With this procedure traders generated huge profits for the banking corporations involved.

In 2013, a settlement in the LIBOR manipulation case required JPMorgan to pay USD 108 million but the bank still insisted on not being involved in the EURIBOR scandal (Douglas 2013). Another six banks have already been fined by the European Commission a total of EUR 1.7 billion in the case of rigging the EURIBOR (Treanor 2013). In 2015, JPMorgan along with other banks, which refused to settle the EURIBOR case so far, met with the EU authorities (Sebag 2015). However, by mid 2016 the case was still not settled.

Already back in 2013, the London School of Economics estimates the overall costs linked to the manipulation of interest rates to be GBP 100 billion while according to MSCI Research this number has risen by another GBP 30 billion (Treanor 2013).

**Market Manipulation – Foreign Exchange Markets** In 2013 investigations into banks having also manipulated the FOREX took off. The *Wall Street Journal* reported in November 2013, that several banks and amongst those also JPMorgan, have already placed several of its leaders on a leave (Enrich and Martin 2013). Investigations continued in 2014, while a lawsuit was initiated in the beginning of 2015 (Glazer 2014; Stempel 2015). A settlement with the US Department of Justice involving several banks was reached in May 2015, when the banks agreed to pay criminal fines amounting to more than USD 2.5 billion in total. JPMorgan, which was involved in the manipulation from 2010 to 2013 agreed to pay USD 550 million to settle the case (United States Department of Justice 2015).

Another civil trial followed by Canadian lawyers initiating a class-action lawsuit in the second half of 2015 against the biggest banks of the world (Melnitzer 2015).

Yet, LIBOR, possibly EURIBOR and FOREX were not the only market manipulations regarding currency exchange rates. In the second half of 2014, JPMorgan was fined USD 92 million by the EU regulators for manipulating Swiss franc derivatives (Fairless 2014). According to an article by *Bloomberg* in September 2015, a case of rigging the US Treasury market was discovered, which was already going on for years, with the US Department of Justice now investigating (Leising and Scaggs 2015). Allegedly 69 per cent of Treasury market trades were manipulated during 2009 and 2015 (ibid.).

**Market Manipulation – Energy Trades** In July 2013, JPMorgan was charged a civil penalty of USD 410 million for its dubious energy trading practices. During 2010 and 2012, JPMorgan manipulated power markets in the US thereby unduly boosting its profits at the costs of customers in California and the Midwest (Kopecki 2013). In connection to this case,

new investigations have been opened trying to uncover whether JPMorgan deliberately obstructed investigations by the Federal Energy Regulating Commission (FERC). This latter case is the eighth investigation JPMorgan faced in 2013 (ibid.; Martens 2013; Flitter 2013).

#### Insufficient risk monitoring and management – The London Whale

In the first quarter of 2012, puzzlement emerged among hedge funds and investors due to “unusual movements in some credit markets” (Zuckerman and Burne 2012). Suddenly, within only three months JPMorgan’s credit portfolio increased from about USD 50 billion to USD 157 billion (Hurtado 2013). Related to this Bruno Michel Iksil, a trader also called ‘The London Whale’ at JPMorgan’s London branch first appeared in the press. Iksil’s vast trading activities at that time did not appear suspicious either to the bank itself or to the press (Zuckerman and Burne 2012). While first losses were detected in March 2012, the situation only changed fundamentally in May 2012, as losses increased further and were estimated at USD 2 billion, and totalled USD 5 billion in the same month (Wall Street Journal 2012). By June 2012, JPMorgan CEO Jamie Dimon admitted being already aware of trading losses. Later in 2013, JPMorgan had to face charges resulting from a civil lawsuit initiated by US and UK regulators, amounting to USD 920 million due to insufficient oversight and risk management of trading operations (Isidore and O’Toole 2013). So far, neither Iksil nor his colleagues have been charged. Iksil himself is cooperating with authorities. Due to this scandal, JPMorgan had to face additional legal costs of USD 7.2 billion (Hurtado 2013). In 2015, in a class-action lawsuit by a group of investors based on misleading information JPMorgan agreed to pay USD 150 million (McLannahan 2015). A JPMorgan executive responsible for the eventual loss of USD 6 billion in the course of the London Whale debacle was fined in 2016 with more than USD 1 million (Strasburg 2016).

**Further Violations of National Legislation** In 2014 and 2015 also happened various other violations of national legislation, which at least shall be mentioned here briefly.

In 2014, JPMorgan was accused of cheating in the Shale Gas industry, by being involved in so called “sweetheart deals”, which are favourable deals only benefiting particular clients as *Bloomberg* reported in November (Fisk and Calkins 2014).

In May 2015 French prosecutors launched a probe against JPMorgan, accusing the bank of complicity in tax fraud (Bisserbe 2015). Allegedly, JPMorgan helped top executives at French Wendel Investissement to deferring tax payments on pocketed share via its US banking unit (ibid.).

Then, in November 2015, the bank settled an agreement over “illegal and abusive debt-

collection practices” in California, paying a fine of USD 50 million (Koren 2015). The year ended with the bank being fined another HKD 30 million (about USD 3.8 million) by the Hong Kong market regulators for “regulatory breaches in short selling and dark pool trades” in December 2015 (Yiu 2015).

#### *Other Governance Issues*

In this category issues are mentioned which also present governance issues but do not necessarily fall under any violation of national legislation. However, these issues also put JPMorgan under reputational risk due to their controversial potential.

**Executive Compensation Issues** Excessive executive payment has been a recurrent issue at JPMorgan since 2008. Despite the financial crisis, excessive executive payments were arranged (Bowers 2008). Though JPMorgan did not go into bankruptcy, the company nevertheless suffered a profit loss of more than 60 per cent and needed state support (Guerrera and Rappeport 2009). Hence, the question arose as to how these payments could be justified. The issue came up again in December 2009. Though a pay-out cap of USD 500,000 was meant to be set by Barack Obama, only modest measures were actually initiated, thereby tolerating the increasing inequality (Clark 2009). In news articles of 2010 and 2011, JPMorgan was again mentioned in connection with other financial institutions, which gained financial support by the state through bail-out and were then paying excessive bonuses to executives despite negative performance and state support (Nichols 2011).

#### **3.4.2.2 Environmental Issues**

##### *Complicity in Environmental Abuse*

On its record, JPMorgan also has some investments into environmental projects with harmful consequences for both community and the environment.

**Energy Sector – Hydropower in Ethiopia and Brazil** The Gilgel Gibe hydropower project is located in Ethiopia, Africa. The project comprises a series of dams already built, and planned to be built on the Omo River with Gilgel Gibe III dam potentially the most controversial. Regarding its size, this project is comparable to the controversial Belo-Monte dams in Brazil, in which JPMorgan is involved since 2002 (Burkhardt 2011).

JPMorgan’s embroilment in Gilgel Gibe III started in 2008, when the company planned to

provide a loan to the project of USD 400 million (Kifle 2008). Since then, various NGOs like International Rivers or Bankwatch have commented on the devastating effects of the project and called for withdrawal of financial support. The quarrel is still on-going with no solutions in sight. In 2010, *The Guardian* stated, “The Gibe III dam on the Omo River in Ethiopia threatens about 200,000 people from eight tribes in the Lower Omo valley. The dam will disrupt the annual flood the tribes rely on, destroying their livelihoods and leaving them vulnerable to famine. On the other side of the border in Kenya, 300,000 people who live on the banks of Lake Turkana will also be affected.” (Vidal 2010). Since the life of indigenous people will be deeply interrupted by the dam and probably force them to leave or live in famine, the Ethiopian government plans to turn the area into sugar plantations. In the *Huffington Post*, Peter Bosshard from International Rivers states: “Growing thirsty crops such as sugar cane and cotton for the world market does not make sense in a region that is scarce in water and prone to hunger and resource conflicts. The dam and the associated land grabs will turn the Gibe III hydropower project into a social and environmental disaster” (Bosshard 2011).

One year later, in 2011, Ethiopia announced it would go ahead with hydropower projects by building the Grand Millennium dam on the Nile River despite all the negative effects already anticipated for Gilgel Gibe III (National Geographic 2011). At the same time, Gibe III was fuelling land grabs and new negative effects were unveiled.

In fact, Gilgel Gibe III is presenting a controversial project with negative impacts on the surrounding environment and communities. However, it is to say that JPMorgan eventually refrained from financing this project most probably due to the unfolding of the financial crisis at that time.

However, evidently the bank is involved in the Belo Monte dam at Xingu River in Brazil, which presents the largest dam project ever built. The project, which was launched in 2002, originally involved five dams. Now, the project includes the construction of only two dams, which, however, does not diminish controversial potential of Belo Monte in any way.

Generally, the structure is very complex, involving two huge artificial channels to stream the Xingu River in ways so to provide enough water capacity for Belo Monte to turn into electricity. Yet, the dam would only operate at peak capacity few months a year, which renders the project generally inefficient in the light of the high costs involved (BankTrack 2016a).

If Belo Monte is built as planned it will affect many surrounding indigenous communities, disrupting not only their trade and production, but also even worse the entire way of life. Belo

Monte is said to force about 19,000 people to leave their homes. Small-scale agriculture and fishery by both indigenous and non-indigenous communities will be hardly possible due to the enormously decreased water level. In order to find an alternative job paying their living costs these people must move to the city, competing there with more than 100,000 expected migrants for low-wage jobs at the construction site (ibid.).

The Belo Monte dam, which is presented as a renewable energy project reducing carbon emissions actually involves 2.5 times more emissions than a plant based on fossil fuel even after 20 years due to emissions arising from decomposing vegetation in Amazon's reservoirs (ibid.).

JPMorgan is holding shares of 8.65% in Eletrobras Group (Russau 2013), which in turn holds 15% of shares directly in the Belo Monte project, and another almost 25% of shares via its subsidiaries Companhia Hidro Elétrica do São Francisco and Centrais Elétricas do Norte do Brasil S/A (Eletronorte). In brief, Eletrobras owns almost 40% of Belo Monte (ibid.).

**Energy Sector – Oil in the US** Another case of complicity in environmental destruction is JPMorgan's involvement in the Keystone XL Pipeline project in the US. From 2007 to 2010 JPMorgan has been an underwriter or manager of share and bonds of a value of around USD 2,08 billion (BankTrack 2016f). The purpose of this pipeline project is to transport Canadian tar sands over Steele City, Nebraska to refineries at the Gulf of Mexico. The extraction of tar sands in general is already considered as highly controversial, as it involves more GHG emissions (17%) than alternatives of oil production (Plumer 2014). For that purpose a pipeline of 875 miles length is built from Morgan, located at the US-Canada border in Montana, to Steele City in Nebraska, US. Further segments of the pipeline connecting Steele City with Houston and Port Arthur in Texas are already in place (United States Department of State Bureau of Oceans and International Environmental and Scientific Affairs 2014). However, reports on several protests 2012 and 2013 (Candice 2012, Wilkey 2013;) reveal the controversial nature of this project initiated in 2010 (Fisher 2010).

Only recently, in January 2014, the latest statement by the United States Department of State Bureau of Oceans and International Environmental and Scientific Affairs regarding an assessment of environmental impacts has been published. It states, that alternatives are even more environmentally damaging. Further, a severe negative impact on the environment cannot be assessed (Eilperin and Mufson 2014). Yet, a very confusing detail with regard to purpose and impact of the project is that "The report concludes that crude extracted from the oil sands results in 17 per cent more greenhouse gas emissions than the average barrel of

crude used in the United States but only 2 per cent to 10 per cent more than the heavy crude it would likely replace at Gulf Coast refineries“, according to the *Washington Post* (Eilperin and Mufson 2014, United States Department of State Bureau of Oceans and International Environmental and Scientific Affairs 2014). Construction of the pipeline has come to a halt only recently in February 2014 (Ross 2014).

**Energy Sector – Shale Gas in the US** JPMorgan is also investing in the shale gas sector, having a huge number of clients in the fracking industry, making the bank number two at least as a financier of the oil and gas business (Gunther 2013). Back in 2012, JPMorgan was even awarded with the Energy Risk Award for its “impressive deal flow and its extensive work with the shale gas producers“ (Financial Risk Management and News Analysis 2012).

In June 2014, the Multinational Observatory reported that JPMorgan is supporting the shale gas industry with EUR 5.8 billion (about USD 6.6 billion), which primarily go to Chevron, Shell and Total (Pettitjean 2014). According to an update by *Deutsche Welle* in May 2016, JPMorgans’s investment volume has extremely increased over the past two years, from USD 9.7 billion in the first quarter 2016 to USD 21.2 billion only a couple of months later, an increase of astonishing 45 per cent (Wenkel 2016). Interestingly, JPMorgan does not only seem to be to top financier of this industry, it also created a voluntary “framework to assess risk around hydraulic fracturing of shale gas” for its clients, in cooperation with Nature Conservancy<sup>43</sup> (Gunther 2013, Klein 2015).

**Coal Mining – Mountaintop Removal in the US** Mountaintop removal (MTR) is applied in the mining sector, in particular in coal mining. The description “mountaintop removal” may not sound too harmful but it implies “valley fill coal mining” which is indeed an ecologically damaging practice. The practice of MTR inevitably produces a lot of waste rock, so called “overburden”, which needs to be put somewhere. Hence, the valleys are literally flooded by the waste. Above all, prior to dumping the waste into the valley a forest clear-cut is required (Earth Justice n.d.). By the end of 2009, JPMorgan had been accused by NGO Rainforest Action Network (RAN) of investing in mountain top removal practices (Rainforest Action Network 2009). A RAN report published in 2011 disclosed the companies financing MTR (Rainforest Action Network 2011). In 2009, JPMorgan was still investing in three companies but at least reduced its financial support to only one single company in 2010

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<sup>43</sup> On its website JPMorgan stated its cooperation with NatureVest, as a part of its sustainability strategy aimed at natural conservation. NatureVest, as stated further above, belongs to Nature Conservancy.

(ibid.).

JPMorgan appears to still be actively engaged in financing mountaintop removal practices as the latest report by the Rainforest Action Network from 2013 confirms. The report states that in 2012 the company was involved, with USD 2.17 billion in loan or underwriting transactions. According to the report, JPMorgan together with the Bank of America and Citigroup appear to belong to the worst companies contributing to environmental destruction. However, the report also admits that though JPMorgan has still a high exposure, financial support has decreased since 2010 (Rainforest Action Network 2013).

In 2008 and from 2010 to 2013 at least, JPMorgan was intensively supporting the MTR and coal-power industry in the USA, and was therefore attacked by NGOs, like RAN, Friends of the Earth or BankTrack. The bank was engaged with various companies applying the practice of MTR, amongst those were Massey (2008), Arch Coal and Alpha Natural Resources.<sup>44</sup> Massey had frequently violated the Clean Water Act and agreed to a settlement of USD 20 million to be paid to the Environmental Protection Agency (Kroll 2010). Arch Coal and Alpha Natural Resources are the largest companies in the MTR-industry (RAN 2013). However, according to a RAN report in 2014, JPMorgan increasingly reduced its investments in the MTR sector (Rainforest Action Network 2014). Unfortunately, the company then put a focus on the coal power industry with a volume of USD 2.1 billion in 2013, making JPMorgan the fifth largest provider of finance in the coal power business (ibid.).

**Coal Mining – Other** Yet, JPMorgan's relations to the MTR and coal power sector in the US are not the only ones with regarding to financing coal. Abroad, JPMorgan invests into Coal India and Bumi Resources.

Coal India, one of the largest coal minders globally, is well known for its environmentally destructive business practices, as Greenpeace states: "This company's business model is devastating: destroys forests and endangered wildlife, uproot ancient tribal cultures, forcibly displace those who refuse to move, replace aforementioned forests/ cultures with an industrial wasteland. Above all, don't let respect for human rights or the environment come in the way." (Fernandes 2013).

The Bumi Resources' PT Kaltim Prima coalmine in Indonesia on the other hand is linked to socio-environmental destruction by discharging untreated wastewater, thereby contaminating surrounding rivers. Furthermore, wetlands, agricultural soil and forests have been destroyed

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<sup>44</sup> In 2012, JPMorgan was further supporting Arcelor Mittal, Alpha Natural Resources, Cliffs Natural Resources and TECO Energy (cp. Rainforest Action Network 2013, Rainfordest Action Network 2012).

by the mining operations. Like Deutsche Bank, JPMorgan allegedly is a key underwriter (BankTrack 2016e).

**Metals Mining – Gold and Copper Mining in Indonesia and India** JPMorgan is also a significant investor of G-Resources, which operates the Martabe Gold Mine in Indonesia (Winn 2010). Martabe is considered to be the most successful mining project in Indonesia. However, this project is controversial, as wastewater will be dumped into a nearby river, which is providing surrounding farming communities with water. Therefore, despite of all community development programs, the surrounding communities are negatively impacted by these mining operations, which simply cannot be compensated by the G-Resources' programs (Bland 2013).

In the field of metals mining, JPMorgan is further supporting the UK-based company Vedanta and Hong Kong-based company G-Resources. Vedanta is most active in India; see for example its controversial Bauxite Mine in the Nyamgiri Hills of Orissa or its aluminium refinery also in the province of Orissa. Vedanta's latest project is the Konkola Mine, a copper mine in Zambia, which is like all the other Vedanta projects linked to environmental destruction and social devastation (Foilvedanta 2014).

**Deforestation – Pulp Mill in Tasmania** Like HSBC, JPMorgan is also involved in controversial projects by investing in companies operating pulp mills therewith increasingly contributing to deforestation. One such mill will make use of Tasmanian native forests. The whole operation is considered as very resource-intensive in terms of water and wood (Manning 2009b). The Bay Bell pulp mill in Tasmania was planned by the Australian company Gunns and received project finance by JPMorgan and Credit Suisse among others. The original investor, ANZ bank Australia, later refrained from financing this project due to environmental concerns (Manning 2009a). Since Gunns then went into liquidation in 2013 (Milmann 2013). It can be assumed that JPMorgan dropped the project some time between 2008 and 2012.

#### *Other Environmental Issues*

In this category environmental issues are presented, which are not connected to environmental abuse but still bear some risk potential with regard to the company's reputation or authenticity of its sustainability strategy.

**REDD – Reducing Emissions from Deforestation and Forest Degradation** JPMorgan's



foundation, the JPMorgan Chase Foundation, had a corporate partnership with Conservation International and supported the development of their REDD+<sup>45</sup> projects by donating USD 2 million (Conservation International, JPMorgan Chase Foundation n.d.). Conservation International is a group founded in 1987 that aims to preserve the environment while seeing conservation as harmony between nature and people (Conservation International, About Us n.d.). The group has a wide scope of activities, from climate-protection and nature preservation to human culture to human health (Conservation International, Mission n.d.). The idea behind REDD is that governments, forest owners or companies should be encouraged to preserve the forests through rewards (cp. Conservation International 2010).

There is nothing wrong with this program regarding its underlying idea. However, even the best idea can be transformed in reality to a practice with negative impacts. As the NGO REDD Monitor states, rewards are not actually paid for keeping the forests but rather for refraining from cutting these down (Redd-monitor.org n.d.). This is an important detail, because it can also mean cutting down trees in some area and “replacing” them by industrial tree plantations in another area. This approach still keeps a certain carbon balance. Yet, the methodological problem, which occurs here, is the difficulty in the actual measurement of the carbon stored in the forests and soils which is “prone to large errors” (ibid.).

Finally, the entire idea of reducing carbon emissions becomes even more controversial by enabling a trade of so called “carbon credits” derived from these forests. A voluntary market has developed for buying and selling these credits without yet the existence of a trading framework (Bretton Woods Project 2009). Now, the risk lies in companies buying these credits in order to offset their carbon record, instead of investing into genuine emission-reducing technologies (Businessgreen.com n.d.).<sup>46</sup> Greenpeace estimates that trading with REDD certificates will reduce and slow down investments in developed countries into new and efficient technologies. Carbon-intensive technologies and infrastructures will persist even longer which results in increased costs to fight climate change (Greenpeace 2009b).

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<sup>45</sup> While the original REDD-program was initiated by the United Nations in 2008, the REDD+ program was officially launched in 2011 based on a COP16 (COP16 refers to the 16<sup>th</sup> Conference Of the parties, in Mexico from 29<sup>th</sup> November to 10<sup>th</sup> December 2010, cp. COP 16, CMP6 2010) agreement. This new project goes beyond the scope of REDD by including conservation of the forests through sustainable management (cp. UN REDD Programme, COP 16 n.d.; Conservation International, REDD+ n.d.)

<sup>46</sup> HSBC for example formerly mentioned on its website the company wants to carbon-neutrality in business. This does not necessarily mean that HSBC is also interested in developing new processes which are carbon-reduced and more efficient (cp. The Guardian 2010). However, meanwhile HSBC has shelved its ambitions for carbon-neutral operations and declared it will no longer be carbon-neutral from 2012 onwards.

REDD projects are also located in countries prone to corruption. The U-4 Anti-Corruption Resource Centre states: “In many developing countries, the forestry sector faces corruption risks in the form of state looting, elite capture, theft and fraud. By facilitating illegal logging, deforestation and forest degradation, corrupt practices can critically undermine the success of climate mitigation schemes. In addition, specific governance challenges may be associated with emerging forest development practices and carbon trading schemes. These include inappropriate validation and verification, misappropriation of carbon rights, double counting and fraudulent trade of carbon credits” (U4 Anti-Corruption Resource Centre 2010).

### 3.4.2.3 Social & Human Rights Issues

In the following two paragraphs JPMorgan’s complicity in human rights abuses will be illustrated.

**Investment in Cluster Munitions** As with HSBC, JPMorgan is likewise involved in financing inhumane cluster munitions. JPMorgan invests in Textron, Lockheed Martin and Alliant Techsystems all based in the United States. In April 2009, Textron issued shares of USD 217.4 million with JPMorgan underwriting USD 77.9 million. At the same time, Textron also issued bonds to the value of \$540 million. Here, JPMorgan underwrote a value of USD 221.5 million (BankTrack 2011).

Another investment of JPMorgan’s is made into Alliant Techsystems (ATK). According to the NGOs Netwerk Vlaanderen and IKV Pax Christi, in 2010 ATK produced the rocket motor for Textron’s Sensor Fuzed Weapon (SFW) (IKV Pax Christi 2011). Today, there is longer any information on ATK’s website concerning the rocket motor. In 2010, JPMorgan provided ATK with a loan and owned or managed ATK bonds (ibid.).

Lockheed Martin used to produce a series of defence weapons related to cluster munitions. The latest product was a “Guided Multiple Launch Rocket System” (GMLRS) of the type M30, equipped with a warhead to be armed with cluster munitions. In 2012, M30 is no longer available at Lockheed’s website. Instead, there is a GMLRS, equipped only with a “unitary warhead”, containing “a single explosive charge rather than cluster sub munitions” (Lockheed Martin n.d.; Citizendum.org n.d.). In November 2009, Lockheed Martin issued bonds with a total value of USD 1.5 billion in ten-year-bonds and thirty-year-bonds. JPMorgan made a contribution of USD 250 million to a syndicate comprising twelve banks involved in investments into Lockheed Martin (BankTrack 2011).

The latest report by IKV Pax Christi from December 2013 shows that JPMorgan is still working together with clients who produce cluster munitions. By September 2012, the bank was still managing 2 per cent of outstanding bonds at Alliant Techsystems with a value of USD 9.8 million (IKV PAX Christi 2013). Until December 2013, there were still 22 financial institutions from six countries already having signed the convention but still doing business with companies producing cluster munitions.<sup>47</sup>

**Complicity in Genocide in Darfur, Sudan** JPMorgan allegedly invests in PetroChina, an affiliated company of China National Petroleum Company (CNPC). Both companies operate oil fields close to Khartoum, Sudan. In addition, PetroChina exports crude oil from Sudan for further refinery in China. This is a critical issue since PetroChina is an US-listed company on the stock exchange and the US put a ban on doing business with Sudan in 1997 (South Sudanese News Agency 2010). The Chinese companies also provide funds to the Sudanese government and are therefore complicit in financing the genocide in Darfur: “With a majority of Sudan’s oil revenue funnelled into its military, oil ventures in Sudan are the chief source of financial support for the Sudanese government’s genocidal policy in Darfur” (United Human Rights Council n.d.; Investors Against Genocide 2007). JPMorgan holds shares of PetroChina and increased its number of shares in September 2011.<sup>48</sup> By May 2013, there was evidence that JPMorgan had still invested USD 2 billion in PetroChina, according to Investors Against Genocide. While PetroChina is widely recognised to be involved in the genocide in Sudan, JPMorgan’s CEO Jamie Dimon still claims, “he doesn’t know the specifics of PetroChina” (Investors Against Genocide 2013).

**Forced Displacement in India due to Investments in POSCO** JPMorgan is also complicit in human rights infringements as the bank invests in a steel plant located in Odisha, India. The steel plant is owned by POSCO, a South-Korean multinational corporation (The International Network for Economic, Social and Cultural Rights (ESCR) 2013). In October 2012, a complaint was filed against POSCO by the Indian civil society organisation Lok Shakti Abhiyan together with supporters from South Korea, Norway and the Netherlands. The company was accused of violating the OECD Guidelines for Multinationals (Abhiyan 2012). One year later, in October 2013, independent experts from the United Nations called on Indian authorities to stop the construction of the plant (UN News Centre 2013). The steel

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<sup>47</sup> According to the Cluster Munitions Coalition these are Canada, France, Germany, Japan, Switzerland and the United Kingdom (cp. Cluster Munitions Coalition 2013)

<sup>48</sup> JPMorgan was still listed in CNPC’s latest report of 2013 (cp. Petrochina.com 2013)

plant is said to be so massive that it “threatens to displace more than 22,000 people in Jagatsinghpur District and disrupt the livelihoods of thousands more in the surrounding area” (ibid.). This project also involves the destruction of more than 16,000 hectares, primarily impacting forests (Tran 2013).

**Landgrabbing due to Investments in Palm Oil Producer** The palm oil industry is associated with high risks of human rights infringements particularly through land grabbing. Companies like IOI Corporation from Malaysia or Singaporean company Wilmar International are well-known for its abusive practices.

Wilmar International is accused of land grabbing, illegal logging and deforestation. Here, particularly the issue of land grabbing falls into the sphere of human rights infringements, as people are forced to leave their homes and without any compensation. Wilmar is entangled in various conflicts, as it is frequently violating national and international laws and regulations, is not conducting environmental and social impact assessments, and does not engage with relevant stakeholders such as project-affected communities (Friends of the Earth US 2015).

IOI Corporations on the other hand is a Malayan conglomerate and one of the major players in the palm oil business. BankTrack revealed human rights infringements at IOI in February 2016, which are linked to forced labour, no freedom of association and no adequate, humane, living standards (BankTrack 2016h).

### ***3.4.3 Communication Analysis***

A major part of JPMorgan’s reports of course deals with the company’s numerous initiatives, like community engagement, skills training, support of small businesses and making more people financially capable (JPMorganchase.com 2015).

Yet, a positive aspect about JPMorgan’s Corporate Responsibility reports is that these indeed include critical reflections on past failures. Whether these reflections merely serve the purpose to regaining trust and restoring reputation again or whether these are to be considered a truthful reflection cannot be answered here. However, this reflective approach at least goes beyond the usual one-sided perspective of these reports only depicting the best and most positive stories. For example, in its 2011 report JPMorgan critically reflected on its controversial MTR practice and said to enhance it’s due diligence process with regard to this practice (JPMorganchase.com 2012). In 2013 then, the company finally reduced its financial involvement (Rainforest Action Network 2014). In another example of 2012, Jamie Dimon,

the CEO of JPMorgan, referred to the London Whale scandal (JPMorganchase.com 2013a).

In a later report of 2014, Jamie Dimon states, “we should acknowledge that and continue to work to fix the problems in the financial system” and “Our firm has undertaken a massive effort to strengthen our control environment and continue to strengthen our corporate culture as well”, thereby referring to JPMorgan’s “How we do business” report published by the end of 2014 (JPMorganchase.com 2015, 2; JPMorganchase.com 2014b). Accordingly, from the reporting it seems JPMorgan is definitely acknowledging its problems, also its problematic corporate culture, and aims to fix it.

While JPMorgan’s new Business Principles (also including a “commitment to integrity, fairness and responsibility”, JPMorganchase.com 2014b, 10) launched in 2014 and its “How we do Business” report published by the end of 2014 looked quite promising regarding a change in corporate culture, it remains to be seen whether JPMorgan’s employees will definitely act with more responsibility and integrity. In light of so many cases of money-laundering (Madoff Ponzi scheme, Petters’ Ponzi scheme), manipulation (LIBOR, FOREX, Swiss Franc, US Treasury) and tax fraud (France), to only name a few examples over the past three years from 2012 to 2016, JPMorgan is aiming high.

#### ***3.4.4 Voluntary Commitments & Standards Analysis***

Since the end of 2014, JPMorgan is aiming for a better corporate culture, namely a culture of integrity and responsibility due to acknowledged failures in the recent past. And indeed, there are many controversial issues in the past related to the bank’s business practice, which concern the violation of national legislation, Human Rights and environmental abuse.

Violation of national legislation is a frequent and recurring issue at bank. Particularly in the case of money laundering evident in JPMorgan’s involvement in the two Ponzi schemes also violates its commitment to the Wolfsberg Principles.

Complicity in environmental abuse is also manifold. With regard to all the other environmentally controversial projects like the Belo Monte dam, Keystone XL, the Bay Pulp Mill, coal and metals mining, and investments into Wilmar international, since these are all based on holding or underwriting shares, not on project finance or corporate loans, these are neither covered by the EPs, nor by JPMorgan’s E&S policy. If those investments were based on project finance or corporate loans, they would have been all subject to an assessment based on JPMorgan’s internal policy, and in the case of Wilmar International, any transactions

would have been prohibited entirely based on that policy, since this company is involved in illegal logging practice. However, some projects are still not in line with the UN PRI, as these require opting for active ownership and taking responsibility as active owners (Principle 2), and an alignment of investment mandates (Principle 4) (UN Principles of Responsible Investment n.d.). Furthermore, projects like Keystone XL and investments into coal power and coal mining in the US are going against the Carbon Principles, as these require to pushing forward a low-carbon economy (Morganstanley.com n.d.). Though JPMorgan stated in its E&P policy, which was updated in 2013, that investments in coal mining shall be reduced (JPMorganchase.com 2013b), which led to a significant reduction of MTR investments in 2013, there were recent investments into Bumi in 2014.

Regarding human rights infringements, JPMorgan is complicit by supporting cluster munitions producers in the US, financing the genocide in Darfur and investing in the palm oil industry, which spurs land grabbing.

JPMorgan's investments into defence equipment producers such as Textron, Lockheed Martin and Alliant Techsystems are also highly controversial. The United States still has not signed the Convention on Cluster Munitions; hence American producers are not bound to any obligations.<sup>49</sup> However, the US has not used any cluster munitions themselves since 2003 (Online Defense and Acquisition Journal 2010). On the other hand, produced weapons can be easily exported to countries which have also not signed the convention, e.g. to Thailand or Libya.<sup>50</sup> As JPMorgan respects the Declaration of Human Rights, these investments can be considered as clearly running contrary to this commitment. This involvement particularly goes against the articles 1 to 3 and 5 of the UNDHR, as peoples' lives are at risk (United Nations n.d.). The same applies to complicity in the genocide in Sudan. Investments into companies facilitating genocide and human rights abuses abroad are evidently not in accordance with JPMorgan's official statements regarding human rights as guiding principles. Financing absolutely controversial companies like Wilmar International which are known for abusive practices like illegal logging and land grabbing, makes JPMorgan again complicit in Human Rights infringements, particularly affecting the articles 13 and 17 of the UNDHR, as people are threatened to leave their land and are deprived of their freedom of movement

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<sup>49</sup> So far 109 states have joined the Convention on Cluster Munitions (Cluster Munition Coalition, Treaty Status n.d.)

<sup>50</sup> Cluster munitions were still used in 2006 in Iraq (by UK and US armies), Lebanon (by Israeli forces), Israel (by the Hezbollah) and Georgia (by both Russia and Georgia) and in 2011 in Cambodia (by Thailand) and Libya (by Gaddafi's force in Libya) (Cluster Munition Coalition, Use of Cluster Bombs n.d.; Cluster Munition Coalition 2016)

(ibid.).

### ***3.4.5 Case Conclusion***

In conclusion, the examination of JPMorgan demonstrates a similar scope of deficiencies as already seen in the HSBC case. Here, again, voluntary commitments and internal policies and standards have been ignored. Also, the prohibition of certain activities by national law did not present an obstacle in engaging in manipulation and fraudulent activities for example.

Moreover, as seen in the ‘London Whale’ scandal, the kind of incentive system installed at JPMorgan could be seen as highly questionable as still encouraging these kinds of trading practices. To their credit, like HSBC, JPMorgan has also responded to these incidents, at least to the most scandalous ones in the press, which present mostly statutory violations. Yet, generally controversial investments are usually not mentioned or discussed in their reports. However, since JPMorgan is aiming for a change in culture together with increased monitoring and controlling, it remains to be seen what the future will bring. Perhaps then we will see less violations of national legislation at least. For more responsible investment practices it would be advisable to also include the underwriting and holding of shares and bonds into JPMorgan’s E&S Policy, which is currently not reflected. This would also add to the company’s commitment to the UN PRI.

## **3.5 Case Three: Hewlett-Packard**

Hewlett-Packard (henceforth HP) is a global information technology (IT) company. It is one of the world’s largest IT companies with operations in 170 countries and 302,000 employees globally (Fortune.com 2015). Its products portfolio is diverse and comprises anything from computers, such as desktop PCs and laptops, to printers and monitors. HP develops IT solutions for retail as well as for business clients (HP.com, HP Official Site n.d.). From 2009 to 2012 HP was always among the top 50 of the Global Fortune 500 index and also among the top 50 most profitable companies worldwide. In 2013, however, HP’s profits dropped enormously, with currently around USD 5 billion. The company could recover in 2014 and 2015 but does not even belong to the top 100 most profitable companies anymore (Fortune.com 2015). However, in terms of profits HP always lagged behind its biggest competitor Apple (with more than ten times of the profits, around USD 53 billion,

Fortune.com 2015).

### ***3.5.1 Corporate Responsibility Strategy***

**Communication** HP's report reflecting its efforts regarding social and environmental responsibility is named the Global Citizenship Report (changed to the "Living Progress Report" in 2013) and is published annually. In addition to these reports, all information can be also found on HP's website (HP.com, Sustainability n.d.). Recent reports have been officially assured by Ernst & Young (HP.com 2015).

HP considers its reports as its "scorecard" (HP.com 2012, 4), which actually implies a rigorous approach putting the entire company, its commitments and the business reality under scrutiny. Apparently, this claimed "scorecard" approach already differs from other company's approaches, which primarily use these reports to present themselves in the best way possible. In contrast, at HP controversial issues are also included, like conflict minerals (HP.com 2013; HP.com 2014a). Furthermore, the company publishes its audit results both online and in its reports (cp. HP.com, Audit Findings n.d.; HP.com 2015).

HP's approach to communication changed over the years. From the former, Global Citizenship reports putting emphasis on HP as a "citizen" of the larger community to the "Living Progress" report, which rather seems to depict HP as an innovative company, with an integrated approach to society and the environment, thereby pushing forward progress in society. However, all these reports compared to other companies are very voluminous, covering around 140 pages in average.

**Commitment** From the report and the website HP seems to be very engaged when it comes to sustainable business. The company aims at reducing its GHG (greenhouse gas) emissions and overall energy use in operations, as well as with regard to its product portfolio (HP.com, Letter from CEO Dion Weisler n.d.). Furthermore, the company is committed to using power from renewable energy sources, like for example solar power (HP.com, Our Operations n.d.). Product design and processes are also reviewed with help of a life cycle assessment to determine whether improvement is required or not (HP.com 2015). Additionally, HP has programmes in place for hardware re-use and recycling (HP.com, Product Return and Recycling n.d.). HP aims for environmentally responsible ways to manage waste, in particular the disposal of hazardous waste (HP.com, Our Operations n.d.). Finally, materials of



environmental concern are evaluated regarding the potential risk they pose to health and the environment. Here, HP even goes beyond national regulations by applying the strict EU RoHS2<sup>51</sup> on its products globally (HP.com 2015).

HP's business is guided by leadership standards regarding environment, health and safety (EHS) and has a corresponding management system in place. Furthermore, HP's manufacturing operations are certified based on the environmental standard ISO 14001, and ten offices across the world too (HP.com, Our Operations n.d.).

In 2010 HP launched a programme to implement "social and environmental responsibility" (SER) standards to ensure a responsible supply chain, including risk-based supplier assessments, supplier audits and supplier agreements (HP.com, Supplier SER Requirements n.d.). This happened in connection with the "California Transparency in Supply Chain Act" which became effective in 2012 (HP.com, CA Transparency in Supply Chains Act of 2010 n.d.).

HP's Sustainability strategy involves three core areas: Society, Environment and Integrity. While "Society" is primarily focused on HP's supply chain, its employees and philanthropic projects, making up the social dimension (HP.com, Society n.d.), the section "Environment" is concerned about HP's carbon footprint, eco solutions around its product portfolio and particularly environmental issues within the company's supply chain, like the reduction of GHG emissions in the process of manufacturing (HP.com, Environment n.d.). The last section, "Integrity", is about HP's approach to Human Rights, its Corporate Ethics and relations to the government, i.e. transparency on potential political influence, donations and the like, as well as its policies, standards, memberships and affiliations mentioned below in more detail (HP.com, Integrity n.d.).

**Voluntary Commitments to External & Internal Standards** HP is committed to the following voluntary guidelines or standards and internally developed policies:

- GRI (HP.com 2015)
- UN Declaration of Human Rights (henceforth UNDHR) (HP.com, Human Rights n.d.)
- UN Guiding Principles on Business and Human Rights: Implementing the United Nations

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<sup>51</sup> EU RoHS2 is the Restriction of Hazardous Substances issued by the government of the European Union. (cp. European Commission 2014).

‘Protect, Respect and Remedy’ Framework (henceforth UNGP) (ibid.)

Various memberships in organisations/associations and cooperation with NGOs, selection (HP.com, Affiliations and Memberships n.d.)

- Business for Social Responsibility (BSR)
- Carbon Disclosure Project (CDP)
- Clinton Global Initiative (CGI)
- European Recycling Platform (ERP)
- Forest Stewardship Council (FSC)
- The Climate Group
- UN Global Compact
- World Economic Forum
- WWF Climate Changers

Internal policies, selection (HP.com, Policies and Standards n.d.)

- Anti-Corruption Policy
- Supply Chain Standards
- HP Global Human Rights Policy
- HP Sustainability Policy
- Diversity Policies
- Environmental Standards for Recycling
- Environmental Health and Safety Policy (EHS)

### ***3.5.2 Business Reality***

From all the details about HP’s business behaviour described above, it seems HP is a virtually perfect example of extraordinary measures and procedures taken to ensure a responsible conduct. However, as already apparent from previous cases, the reality is always different to the story told.

In the case of HP this means 259 negative news entries between 2009 and 2016 (May), according to the RepRisk data basis (see figure 3.5).

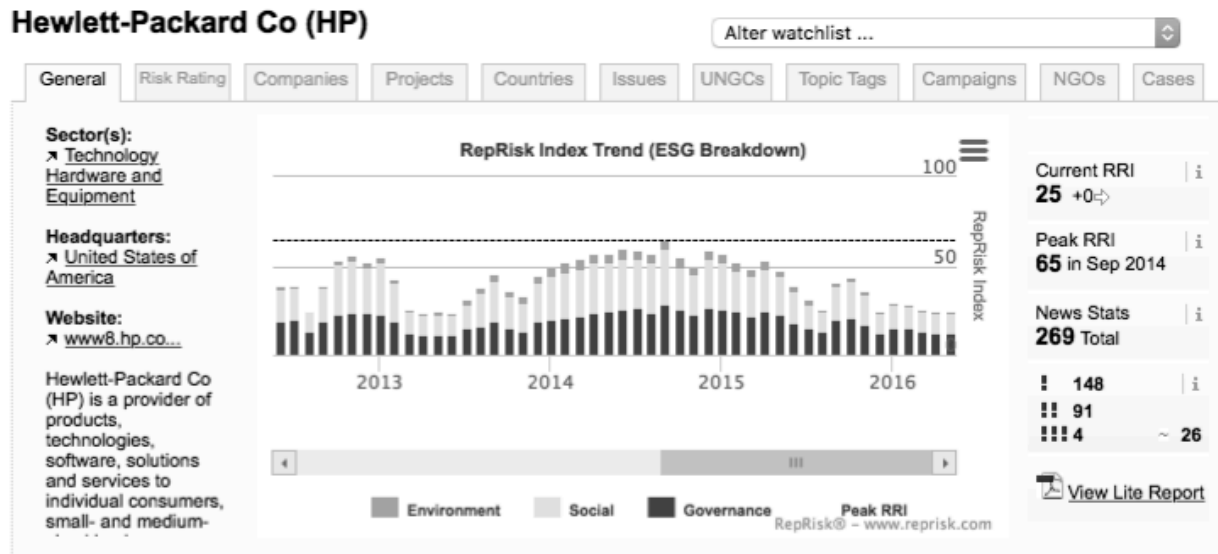


Figure 3.5, HP Overview (RepRisk 2016)

In comparison to the other companies in this case study this number is comparably low. HP's most frequent violations are

- Violation of National Legislation
- Supply Chain Issues
- Human Rights Abuses and Corporate Complicity
- Poor Employment Conditions
- Corruption, Bribery, Extortion and Money Laundering (see figure 3.6)

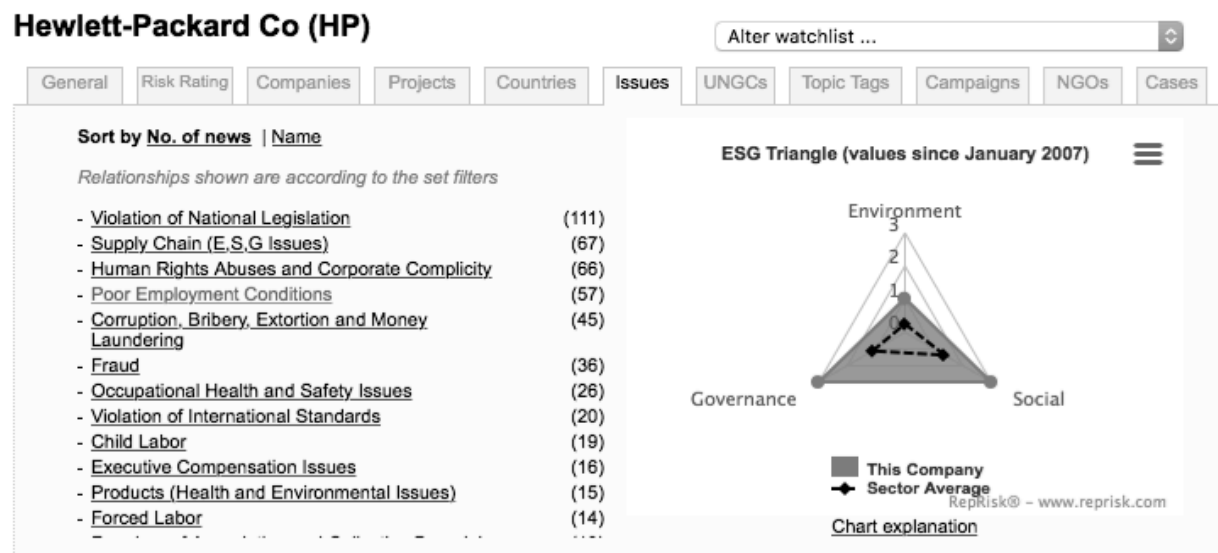


Figure 3.6, HP Issues (RepRisk 2016)

Since HP's business lies in the field of production and technology, the company is especially exposed to risks occurring in the supply chain where issues are often related to

abusive and exploitative behaviour towards employees.

### 3.5.2.1 Governance Issues

In 2010 HP was involved in several lawsuits regarding corruption, bribery and fraud. The company was found guilty of violating the US Foreign Corrupt Practices Act (FCPA) and the False Claim Act.

**Bribery and Corruption** HP, or rather its subsidiary in Germany, was accused of bribing Russian officials. German executives paid bribes of around EUR 8 million to win a contract in Russia worth EUR 35 million “under which the US company sold computer gear, through a German subsidiary, to the office of the prosecutor general of the Russian Federation” (Crawford 2010). The investigation was further expanded to HP’s business in other countries like Austria and Serbia to clarify whether the company was even more deeply involved “in kickbacks or other improper payments to channel partners, or state owned or private entities” (Prasad 2010). In April 2014, HP plead guilty with regard to the Russia case and got sentenced in September the same year, including a criminal fine of USD 108 million for HP and its involved subsidiaries (The United States Department of Justice 2014a, The United States Department of Justice 2014b). As a consequence of this, HP received a 10-year ban by Canadian government regarding its government contracts (McKenna 2014). Another case of bribery was then revealed only shortly thereafter in December 2014, where HP was accused of bribing government officials between 2008 and 2009 in Mexico (Proctor 2014).

**Fraud** Another incident described fraudulent business practices, which occurred in 2004 and which were investigated much later in 2010, whereby HP was accused of giving gifts to schools districts in Houston and Dallas in the United States. These gifts were utilised as a door opener for implementing the educational programme E-rate to fund Internet connections at schools and libraries. The contract for the programme included HP equipment worth USD 17 million to be distributed to participating schools and libraries. Employees at the school districts were bribed with trips and tickets. The investigation was settled in November 2010 with HP paying USD 16.25 million. In addition, HP dismissed the employees involved and terminated the partnerships concerned (Rosenblatt 2010).

### 3.5.2.2 Environmental Issues

HP's business practice does not show too many incidents of environmental abuse.

**Toxic Substances in Products** The first two entries in 2007 and 2009 dealt with toxic substances in HP's products (Greenpeace 2007a, Greenpeace 2007b). In 2009, product issues occurred at HP with regard to substances harmful to health. HP's products contained toxic substances like vinyl plastic (PVC) and Brominated Flame Retardants (BFR). These are particularly harmful when e-waste is burned. PVC is considered as one of the most harmful substances since it emits dioxin, a carcinogen, in the process of burning (The Ecologist, n.d.). These substances are a risk to human health and the environment and should have been eliminated from HP's product line by the end of 2009. However, HP claimed due to a lack of alternatives it was not possible to adhere to its own guideline.

A more recent Greenpeace report from 2014 showed that HP phased out some toxic substances in 2013, such as phthalates, beryllium, and antimony trioxide. But, some issues still remained: PVC, Brominated Flame Retardants (BFRs) and other hazardous substances were not fully phased out by 2014 (Greenpeace 2014).

**Improper E-Waste Disposal** With regard to the disposal of e-waste an article by the Chinese news agency XinHua in 2009 confirms HP's dubious practice in light of US legislation: "Processing e-waste can be tricky and expensive as it contains hazardous substances such as lead, cadmium, mercury and chromium. However, more often than not, e-waste is illegally shipped to developing countries where it is cheaper to recycle. The United States, for example, does not monitor its e-waste exports because it never signed the Basel Convention -- an international ban on the shipment of toxic waste from rich countries to poor ones. However, illegal shipments continue to make their way to Western Africa, India and other countries" (Zhang 2009).

In 2014, Daily Mail then revealed poor e-waste management of global IT companies in India, amongst those HP. The Indian government has authorised particular IT companies setting up e-waste collection centres, which allows them to collect and dispose their e-waste in India. Yet, it appears, as if these companies including HP are not handling their e-waste properly by ensuring that their take-back or recycling systems are working. Accordingly, collecting e-waste from consumers in India for proper recycling does not yet seem to work (Daily Mail 2014a, Manesh et. all 2014).

### 3.5.2.3 Social & Human Rights Issues

As mentioned earlier, due to its business structure and its business as a producer or manufacturer, HP is more exposed to incidents occurring in the supply chain than companies from other sectors. Here, particularly issues surrounding the Chinese supplier Foxconn seem to be almost never-ending. Foxconn is quite a prominent example of unbearable working conditions, among those insufficient health and safety measures, inhumane amounts of extra hours and low wages. However, due to these supply chain conditions HP is complicit in human rights abuses.

**Supplier Issues at Foxconn and other Companies in China** The scandalous news of poor, even inhumane, working conditions of certain manufactures in China was reported around the globe. It is important to mention that working in a factory in China is quite different to working in a factory in the West. Employees are usually accommodated close to the factory in large dormitories with few washing facilities. Food provided by the company is usually in meagre amounts and of low quality. This “all-inclusive” package has further disadvantages: employees can be monitored all the time, they are usually not allowed to leave the factory or to pursue any private activities and over-hours over seven days a week are the norm.

The first incident in a row of events was documented in February 2009. The company concerned was the Taiwanese-owned Meitai Plastics & Electronics in China, providing HP and other IT companies with keyboards and printer cases. According to an investigation by NGO Institute for Global Labour and Human Rights the around 2,000 employees there were working under prison-like conditions with no breaks, excessive over-hours and without decent pay. Furthermore, the freedom of association was denied and space for privacy not given (Institute for Global Labour and Human Rights 2009).

Around one year later, in April 2010, the same NGO published another report on sweatshop conditions in China. This time the company KYE systems Corp., which assembles computer mice for different American IT companies, came under considerable scrutiny. The accusations are similar to those in the Meitai case: excessive over-hours, disproportionate pay and no privacy. Moreover, there were cases of child abuse since KYE was also employing teenagers (Institute for Global Labour and Human Rights 2010a).

Only two months later, the Institute for Global Labour and Human Rights issued another report about the Jabil factory, which produces circuit boards in the city of Guangzhou, China. While the Jabil factories headquarter is actually located in Florida, US, the company runs 18 of its total 31 factories in China. The issue here again was prison-like and inhumane working

conditions (Institute for Global Labour and Human Rights 2010b). According to the report, Jabil's factories in China were managed with quite different standards than those in its home country.

The real scandal in this context occurred in May 2010, when 13 employees of Foxconn Technology Group<sup>52</sup> in Shenzhen, China, committed or attempted suicide by jumping off Foxconn buildings' rooftops. These incidents reflected the helplessness of some employees in terms of coping with prison-like and military-style conditions, while others simply quit. Those who did quit left the company in a completely demoralised condition after being there for only a few months (Barboza 2010; Branigan 2010). However, Foxconn has not only treated its employees in China in an inhumane and quite intolerable way; the *Sydney Morning Herald* reported almost the same poor conditions at Foxconn's subsidiary Foxteq in Australia in November 2010 (Bibby and Moses 2010). The story did not end here.

In January 2012, employees at Foxconn in China again threatened to commit suicide if the company did not improve working conditions (Coonan 2012). It also seems as if the Chinese mentality has changed: employees are no longer willing to endure inhumane conditions for money. Despite an improvement, though slow, of the conditions at Foxconn, employees' expectations are rising even faster since they have become aware of their rights and have the means to put an end to intolerable conditions (Barboza 2012). However, suicides at Foxconn factories continued until 2014 according to *Sueddeutsche Zeitung* (Grzanna 2014).

The suicide series at Foxconn was further accompanied by incidents of insufficient work safety. For example, at Hon Hai's / Foxconn's plant in Chengdu, where three workers died due to inflamed combustible dust (Poon et. al 2011).

Later, in 2012 China Labor Watch revealed child work at Foxconn's Yantei factory, where the company employed children between 14 and 16 years during summer, sent by a Chinese school. However, even if those were sent it was Foxconn's responsibility to make sure, these students are actually old enough but IDs were not checked (China Labor Watch, 15 October 2012). In 2014, child labour at Foxconn was reported again by the Wall Street Journal; this time at Foxconn's factories in Chongqing. Again, these were sent by the schools but without having any say in this (Dou, 24 September 2014). The *New York Times* reported, besides child labour there were also issues of improper waste disposal at Foxconn (Barboza and Duhigg 2012).

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<sup>52</sup> Foxconn Technology Group is owned by Hon Hai Precision Industry Co. Ltd., which is in Taiwanese hands.

In 2013, working conditions at Foxconn apparently had not changed and a large fight broke out with several people injured (Mozur 2013).

Foxconn presents only the peak in terms of negative incidents within a supply chain. There were several other incidents in 2011 at Micro-Star International (MSI) and Hi-P in China. The first incident again involved excessive over-hours in combination with low wages and generally poor employment conditions. Furthermore, discrimination against male and older workers and mandatory Hepatitis B and pregnancy testing severely affected workers' freedom (China Labor Watch 2011a). In the latter incident, at Hi-P, workers were forced to relocate from Shanghai to Suzhou and in case of non-compliance were simply fired. The workers were not compensated in either case (China Labor Watch 2011b). And more recently, forced labour at factories in Malaysia was reported by the *Daily Mail UK* in December 2014, also mentioning HP (Daily Mail UK 2014).

**Conflict Minerals** According to a report by NGO Global Witness in 2009 and a news article in 2010 (Redfern 2010), HP was involved in sourcing minerals for its products from conflict-stricken Democratic Republic of the Congo (DRC), Africa. The mines concerned are located in the eastern part of the country, in North and South Kivu. These areas are rich in minerals like tin ore, gold, columbite-tantalite (the extracted tantalum is used later in electronic goods), wolframite (the extracted tungsten is used in heavy industries) and pyrochlore (the extracted niobium is used later in steel production).

The mines are controlled by armed groups and the Congolese national army (FARCD). Controlling the mines plays a large role in terms of the conflicts in the DRC since these are the key source of money: “[A]s the profits from this trade became increasingly important to their survival, some of the armed groups switched their attention and resources to further developing these activities” (Globalwitness.org 2009, 16). The local people are exploited by the FARCD to generate more and more wealth by being forced to give a certain share when digging out the precious minerals. Workers regularly suffer from being intimidated, beaten or even tortured.

Any military member who has a say in the DRC gets his share of minerals some way or another: either by “owning” a part of mine or by having installed military checkpoints where civilians and mine-owners are forced to hand over a share of their own minerals or are illegally taxed (Globalwitness.org 2009). Cases, in which military members are enriching themselves at the expense of the local people, are various and numerous. The gains are



usually shared along the entire hierarchical system, even reaching military officials in Kinshasa.

The Bisie mine in North Kivu is particularly concerned. It is the largest mine for cassiterite, tin ore, where 10,000 to 15,000 men, women and even children work, according to 2008 estimates. The minerals need to be transported by sheer manpower to an improvised airfield since the roads are in bad condition. The extracted goods are then transported and distributed by airplane. The 85<sup>th</sup> brigade, which does not officially belong to the FARCD, controls the Bisie mine and gives a share to the rest of the military in the DRC. This practice is acknowledged by all participating parties, as it serves the benefit of all within the established hierarchical system (Globalwitness.org 2009). Normal companies, such as the Mining and Processing Congo (MPC), belonging to the South African company Kivu Resources, are unable to become established due to intimidation, threats and an illegal levying of taxes (ibid.). So even though there were any regular companies trying to officially source minerals from Bisie mine or any other mine in the DRC, a conflict with the army and exploitation of the local people would be inevitable.

**Child Labour** Not only conflict minerals are a problem but also metals or minerals sourced based on child labour. Though HP still seems to have the most rigorous sourcing policies when it comes to its suppliers compared to Apple and others, even this company cannot confirm with certainty that definitely no child labour was involved in the case of mining gold in Africa (Johanisson 2013). Furthermore, cases were reported only recently in 2016 on child labour and cobalt mining in the DRC. Cobalt sourced in the DRC is bought by various Chinese companies and then sold to suppliers of Global IT companies. Cobalt is used in lithium-ion batteries (Mlot 2016, Amnesty International 2016).

### ***3.5.3 Communication Analysis***

All HP Global Citizenship and Living Progress reports were externally assured by Ernst & Young. In its reporting as well as on the website, HP is stating company values and approaches comparable to other companies' standards with regard to corporate ethics and corporate responsibility. However, the three core dimensions of HP, namely Society, Environment and Integrity do not appear to be always fully reflected in HP's operations. For example, "Society" also includes the supply chain, yet, there were still frequent issues of forced labour and bad working conditions (for example in 2014, and furthermore child labour

in 2014 and 2016) even recently. So, by no means these issues can be considered as solved. Rather they generally seem to be quite a recurring phenomenon in manufacturing today. The dimension of “Environment”, particularly when it comes to e-waste and toxic substances, is also not fully integrated. There were for example still e-waste problems in 2014 linked to HP’s business in India. At last, “Integrity”, specifically in the form of respecting Human Rights but also including the UNGC and the UNGPs, were still frequently infringed due to supply chain issues in China and Africa.

### ***3.5.4 Voluntary Commitments & Standards Analysis***

A more concrete analysis of HP’s commitments to internal and external standards reveals the following shortcomings:

HP’s involvement into fraud, bribery and corruption, besides being clear cases of violation of national violation, are also against the company’s internal policies, namely its Anti-Corruption policy, and further its Corporate Ethics standards (HP.com, Corporate Ethics n.d.). In 2012, HP communicated that both bribery and corruption were undermining their very foundation of business and stated further in the Global Citizenship Report: “We will never trade our integrity for a business opportunity.” (HP.com 2011, 136). Evidently, this is precisely what had happened in the years 2000 to 2006. It remains to be seen whether this will happen again but at least HP has certain policies against corruption and bribery in place.

Problems in HP’s supply chain are linked to infringements of its commitment to the UNGC, the UNGPs and the UNDHR.

Solving recurring supply chain issues is of great importance now and in the future. Of course, poor working conditions and child labour at Foxconn in China did not only affect HP but the entire industry. Though HP put its SER (social and environmental responsibility) programme in place as early as in 2000 and claims that vendors and suppliers are monitored, these intolerable circumstances occurred only recently (HP.com, About supply chain responsibility n.d.). These incidents make it clear that supplier’s compliance with the programme must be even more rigorously monitored. Allegedly, HP’s response to the Foxconn incidents involved a tighter relationship with the supplier by regular meetings, traditional audits, and surveys among the employees to improve current conditions. However, as poor working conditions seem to prevail, HP may consider a different approach.

With regard to poor working conditions and child labour in the supply chain and therewith-linked Human Rights infringements, HP specifically violated articles 1, 2, 19, 20, 23, and 24 of the UNDHR, the UNGC Principles 1 to 4 and the UNGPs b, as well as Foundational principles 11 to 15 (UN n.d.; UN Global Compact n.d.; UN Human Rights OHC n.d.).

Another issue of human rights infringements occurred in connection with conflict minerals sourced from Africa.<sup>53</sup> Here, HP cannot absolve itself from using conflict minerals— the DRC is responsible for almost one fifth of the global tantalum production, which is used in electronics— but HP aims for conflict-free sources in the DRC. Two initiatives were started by HP to achieve this commitment: the Electronic Industry Citizenship Coalition (EICC) and the Global e-Sustainability Initiative (GeSI) (cp. eiccoalition.org n.d., Global e-Sustainability Initiative n.d.).

The former, EICC, developed and validated conflict-free smelters while the latter in cooperation with the secretariat of the United Nations Framework Convention on Climate Change (UNFCCC) developed a supplier survey tool.

With regard to sourcing conflict minerals the UNGC principles 1 to 5 were violated, and in connection with it the articles 1 to 5 of the UNDHR, as well as the UNGPs as stated above (UN n.d.; UN Global Compact n.d.; UN Human Rights OHC n.d.).

The last issue, namely product issues, appeared to be solved already in 2010, when HP removed PVC and brominated flame-retardants from its product portfolio (HP.com 2014b; HP.com, Eco declarations n.d.). However, a Greenpeace report in 2014 did not confirm that HP's products were completely free from toxic substances.

### ***3.5.5 Case Conclusion***

In conclusion, the business reality of HP as revealed in this study is not as worse as compared to the other cases of this study. Apparently, it is inevitable that certain supply chain issues are coming up, especially in a business tied to a long supply chain. HP at least communicated clearly and frankly about what had gone wrong in the cases of Foxconn and conflict minerals and set up measures to improve the prevailing conditions. Still, it is in the company's responsibility to make sure there is effective monitoring and enforcement of its

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<sup>53</sup> This issue along with the Foxconn issue are critically reflected by the company through detailed public reports on their website (HP.com, About supply chain responsibility n.d.; HP.com, Conflict Minerals n.d.).

internal policies and commitments within its supply chain. If this monitoring and enforcement are not giving, HP is guilty of complicity in Human Rights infringements and is going against its various own commitments linked to respecting Human Rights.

Though HP did not always act in accordance with its own time-bound commitments, the company at least eventually fulfilled its commitments, albeit later than initially communicated.

### **3.6 Case Four: Walmart**

Walmart is a retail chain, which was founded in the 1960's by Sam Walton in the United States. Walmart soon became one of the biggest retail chains in the US. Today, Walmart operates more than 11,530 stores in 28 countries worldwide (Walmart.com 2016). The company employs around 2.2 million people (Fortune.com 2015). From 2009 to 2015, Walmart was always among the top 3 companies with the highest revenue worldwide. In 2014 and 2015 Walmart was taking the lead at the Global Fortune 500, occupying the first rank with regard to its annual revenue. In terms of profits Walmart is #14 globally with more than USD 16 billion in revenues (Fortune.com 2015).

#### ***3.6.1 Corporate Responsibility Strategy***

**Communication** Walmart's latest report on issues of corporate responsibility was published in 2016. The company named its reports "Global Responsibility Report" to underline its global efforts in terms of responsible business behaviour. The scope is comparable to those reports of other companies already mentioned in previous chapters. Over more than 150 pages Walmart explains its strategy, commitments and efforts, which are basically built on four pillars: economic opportunity, sustainability, community and governance (Walmart.com 2016).

Economic opportunity refers to promotion economic mobility aimed at Walmart's supply chain workers and adjacent sector workers. Furthermore, through specific initiatives Walmart fosters diversity, the empowerment of women and local ways of manufacturing for instance. Sustainability aims at reducing waste, energy consumption, other natural sources consumption and emissions. It also aims at providing customers with healthy, affordable food and transparency with regard to product safety, i.e. the use of chemicals or antibiotics (ibid.). The

section on community has a more philanthropic dimension, which means that Walmart is engaged in disaster relief, for example by providing goods. Furthermore it is about company engagement through employee volunteering and investment into local communities where Walmart is operating. The last section on governance is about compliance, Walmart's culture of ethics, integrity and global learning, its anti-corruption and anti-trust programs, and transparency with regard to its political engagement amongst other things (ibid.).

**Commitment** In terms of sustainability and wider corporate responsibility, the Walmart strategy includes a wide range of initiatives and programmes.

With regard to environmental sustainability, Walmart aims at reducing emissions and energy consumptions both in its operations and supply chain. For example, Walmart is constantly expanding solar power at its sites. According to the report Walmart currently has 467 onsite renewable energy projects, making Walmart the largest user of renewable onsite energy. The company claims 25 per cent of its energy come from renewable sources (Walmart.com 2016). Furthermore, waste shall be reduced to zero in Walmart's operations, recycling shall be improved and product packaging reduced. In addition, healthy and sustainable but at the same time affordable food is an important mission for the company and food safety plays an important role. Therefore, responsible sourcing practices throughout the company's supply chain and compliance regarding environmental, health and safety issues are vital (ibid.).

Regarding social aspects Walmart promotes the empowerment of women at farms and in factories by offering them trainings giving them necessary employment skills. Also, since Walmart is a MNE, diversity plays a large role. Therefore, the company tries to foster a culture of inclusion. Walmart furthermore focuses on local manufacturing and small businesses to allow for more diversity in the supply chain and at the same time helping small businesses and the US manufacturing sector to grow (ibid.).

**Voluntary Commitments to External & Internal Standards** Walmart's voluntary commitment to internationally recognised guidelines, principles and so on is very limited. Walmart mostly refers to collaborations and its own programmes (Walmart.com, Collaboration, n.d.). Very saliently, Walmart primarily appears to rely on internally developed standards (cp.Walmart.com 2016).

- Cooperating with ILO: Better Work Programme
- Cooperation with Alliance for Bangladesh Worker Safety

- CDP
- Ethical Trading Initiative (ETI)
- GRI
- Responsible Sourcing program
- Standards for suppliers

### 3.6.2 Business Reality

Unfortunately, the business reality of Walmart presented in the news is not as impressive as publicly stated both in the recent and previous reports<sup>54</sup> or on Walmart's website. Today, Walmart is well known for its poor working conditions not only within the company's supply chain but also in its numerous subsidiaries around the globe. Since 2007 there were in total 959 negative news linked to Walmart's business (see figure 3.7). This is by far the highest number in this study.

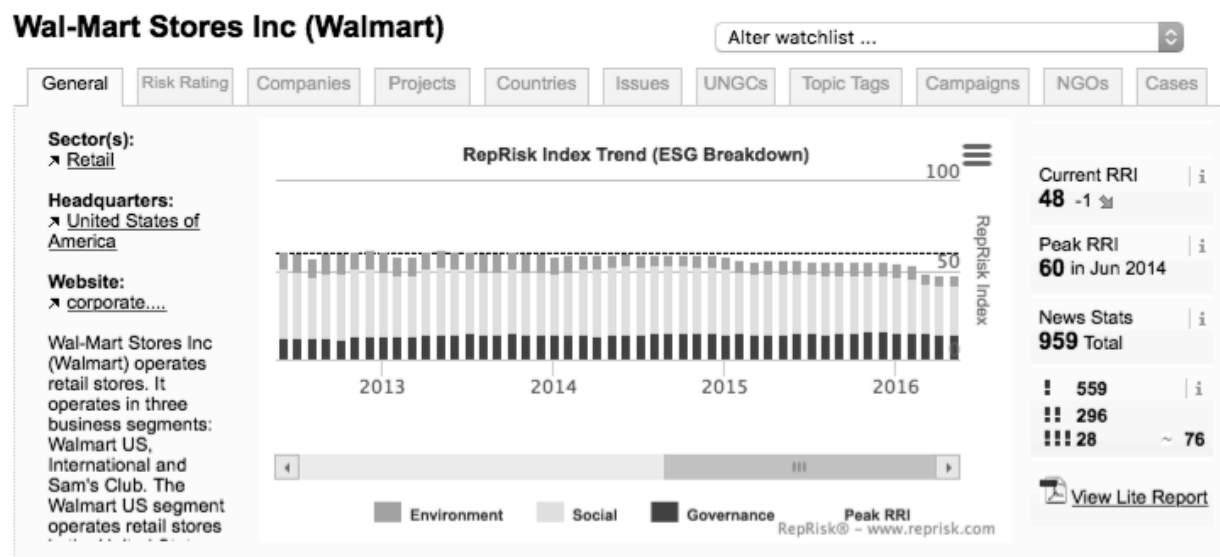


Figure 3.7, Walmart Overview (RepRisk 2016)

The news were mostly related to

- Environmental, social, governance issues within the supply chain
- Poor employment conditions

<sup>54</sup> From the sheer number of pages it becomes apparent how much Walmart invests into these annual Global Responsibility reports. Preparing such a comprehensive and detailed report costs time and money. Usually, these are prepared and designed by professional media agencies today, picking the right pictures and making up the overall story of such a report.

- Violation of national legislation
- Occupational health and safety issues
- Human rights abuses and corporate complicity (see all figure 3.8)

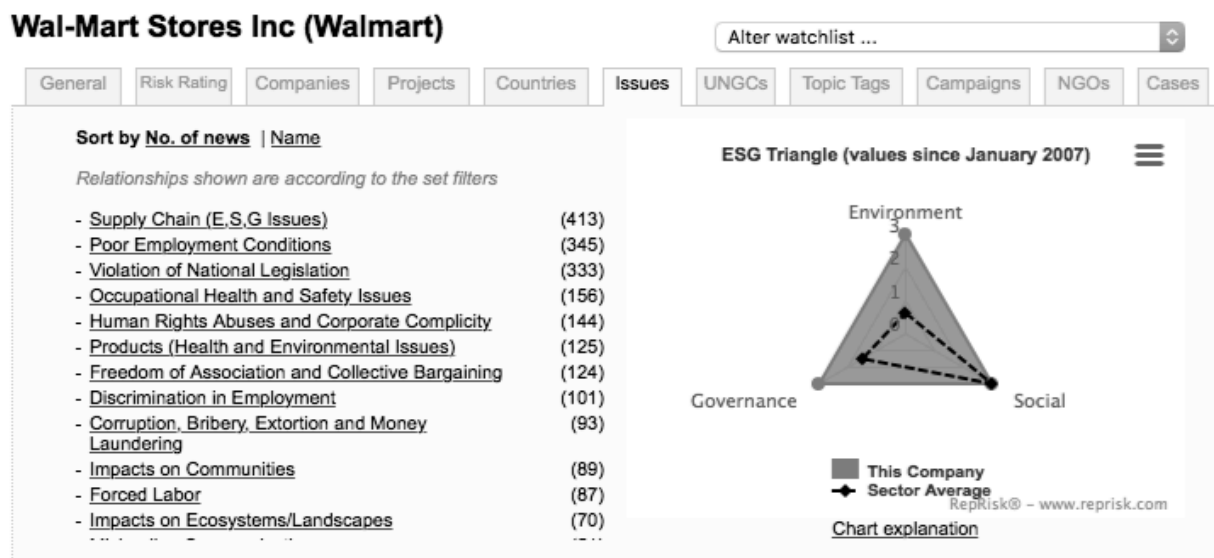


Figure 3.8, Walmart Issues (RepRisk 2016)

### 3.6.2.1 Governance Issues

The various incidents below show that Walmart does not always adhere to domestic law.

**Bribery in Mexico** In 2012, Walmart’s widespread bribery in Mexico was uncovered. Walmart’s aggressive and fast expansion in Mexico evidently involved bribes totalling \$24 million (Barstow 2012). Since 2003, Walmart’s branch in Mexico has been paying “hefty “contributions” and “donations” directly to governments all over Mexico” which is even recorded in Walmart’s own database (ibid.). Yet, these bribes were concealed from Walmart’s headquarters in Betonville, Arkansas, USA. While Walmart started its own investigations these came to a halt in 2006, as the New York Times revealed in April 2012 (ibid.). Incited by this discovery, the New York Time started own investigations with the result that “Wal-Mart de Mexico was not the reluctant victim of a corrupt culture that insisted on bribes as the cost of doing business. Nor did it pay bribes merely to speed up routine approvals. Rather, Wal-Mart de Mexico was an aggressive and creative corrupter, offering large payoffs to get what the law otherwise prohibited” (Barstow 2012). By April 2013, costs linked to the bribery scandal including costs for internal investigations amounted to at least USD 230 million; by December 2013 the sum was estimated to be well above USD 300 million (Friedman 2013; Viswanatha 2013). In 2014 *Bloomberg* reported that the costs for investigation into the

Mexican bribery case accumulated to USD 439 million alone over the past two years. Yet, further costs related to the FCPA probe and compliance were estimated with another USD 200 million to 240 million (Voreacos and Dudley 2014).

**Price Fixing in Chile** In 2016, an anti-trust case was filed against Walmart for price fixing in the chicken industry, which happened between 2008 and 2011 and involved Latin America's third biggest retailer Cencosud, local Walmart units, and Chile's SMU SA (Thomson 2016).

**Environmental Crime in the US** In May 2013, Walmart pled guilty to violating various US acts relating to environmental protection, such as the Clean Water Act. There is clear evidence that the company illegally improperly disposed hazardous waste, like detergents, paints aerosols and even pesticides. The settlement involved years of investigation by the FBI and EPA (Environmental Protection Agency) starting in 2003. Walmart claims it now has proper waste management programmes in place as well as other precautionary measures. Altogether, Walmart has been involved in six cases in California and Missouri amounting to a total fine of USD 110 million (Harrington 2013, Glass, Lewis & Co 2013).

### 3.6.2.2 Social & Human Rights Issues – Walmart's Supply Chain

Sweatshop conditions and human rights infringements within Walmart's supply chain are not a new issue but have rather been persistent over years. Therefore, in this paragraph only a few cases can be discussed in detail; in particular the employment conditions at Walmart's supplier in China, Bangladesh and Jordan, and conditions at a shrimp farm in Thailand are highlighted.

**Electronic and Toy Manufacturers in China** The NGO China Labor Watch published its first record on poor employment conditions in connection with products made for Walmart in 2005 (China Labor Watch 2005). However, incidents may have occurred before this time but were not revealed to the public. Poor employment conditions in terms of excessive over hours and low wages at Walmart's suppliers in China still prevail today. In its reports, China Labor Watch mentions Walmart's inability to implement its standards at local factories. Moreover, audits were considered as insufficient while the pricing structure was regarded as virtually inducing unsustainable business practice and employment conditions (Agence France Presse 2009). Furthermore insufficient safety standards at Elec-Tech, a supplier for home appliances, lead to diseases and work-related accidents in 2010 (China Labour Bulletin 2010).



Another publication in 2011 by Students & Scholars Against Corporate Misbehaviour (SACOM), a NGO located in Hong Kong, unveils unbearable employment conditions at toy manufacturers in China. The Sturdy Products factory in Shenzhen, belonging to Winson Plastic Manufactory Limited in Hong Kong, produces plastic toys for Mattel and Disney which are sold by Walmart among others. Since 2006 the company has been monitored by ICTI CARE. In analogy to the Foxconn suicides, a Sturdy Products employee also committed suicide by jumping off a factory building in 2011 due to intolerable employment conditions. Hence, SACOM claims that despite 5 years of monitoring no visible improvement could be ascertained (SACOM 2011).

A delicate detail of this report is the fact that The International Council of Toy Industries (ICTI) tolerates these inhuman conditions rather than strives to change them (ICTI, What is ICTI?, n.d.). ICTI has initiated its CARE (Caring, Awareness, Responsible, Ethical) programme to ensure “safe and humane workplace environments for toy factory workers worldwide” (ICTI, What is ICTI CARE?, n.d.). Its objectives are in short “to promote ethical manufacturing, in the form of fair labor treatment, as well as employee health and safety, in the toy industry supply chain, worldwide” (ICTI CARE Foundation n.d.). The initiative is particularly focused on factories in Hong Kong and Macau in China since these provide the market with about 80 per cent of all toys totally produced. The CARE programme is described as consistently monitoring the factories’ compliance with its issued “Code of Business Practices” (ICTI, Code of Business Practice n.d.). It is important to mention that this offered service is free of charge to the global brands or retailers. The costs for audits are imposed on the local factories.

However, though companies are ICTI CARE certified, incidents of poor working conditions occur since the entire mechanism behind does not promise much change. In cases of non-compliance with the compulsory ICTI code, the brands and retailers are shielded from taking any responsibility since they can always rely on having monitoring systems installed by referring to ICTI and its CARE programme. Furthermore, ICTI is not accountable to the public; hence findings of labour rights violations are not publicly disclosed and evaluations of the actual working conditions in companies’ supply chains or the industry are not released. SACOM accuses ICTI of not aiming for a structural change by encouraging the toy companies to raise their unit prices (SACOM 2011).

**Garment Factories in Bangladesh** Bangladesh is a popular country for sourcing garments. Big brands and retailers such as Walmart, H&M or Marks & Spencer get their apparel from Bangladesh. Workers in Bangladesh face the same poor working conditions mentioned above including low wages, health and safety issues, and excessive over hours. For example, a fire at a Bangladeshi factory in December 2010 killed 27 workers and injured another 100 workers (Alam 2010). Furthermore, in July 2010, workers who were protesting for a higher minimum wage in Bangladesh were arrested. The protest was more violent than the ones before because workers regarded the latest official increase in terms of a minimum wage as inadequate. Bangladesh is the low-cost alternative to China, and Bangladeshi factories fear they will no longer be competitive if minimum wages are further increased, though the envisaged salary by labour groups of 5,000 taka equals only USD 72 while Chinese workers usually receive between USD 117 and USD 147 a month (Bajaj and Manik 2010). The Clean Clothes Campaign claims the Bangladeshi government is “scapegoating peaceful worker advocates rather than addressing the true underlying cause of such turmoil: the country’s abysmal working conditions” (ibid.). The accusations regarding Walmart and its toleration of inhumane working conditions continued until 2011.

When the Rana Plaza building collapsed in April 2013, worker health and safety in Bangladesh hit another bottom, when 1,134 people died (Cleanclothes.org n.d.). Only half a year earlier, in November 2012, more than 100 workers were killed in a fire at the Tazreen fashion building (Bajaj 2012). However, as stated in an article by *Bloomberg*, Walmart claimed Tazreen fashion was no more an authorised supplier (Devnath and Dudley 2012). Yet, an article later in *The New York Times* challenged this statement by Walmart, as there were clear indicators for Tazreen fashion being a supplier of Walmart at least until July 2012. Furthermore, the author claims that Walmart even blocked necessary safety improvements, as these were perceived as too costly and not feasible (Greenhouse 2012).

That Walmart is indeed blocking necessary improvements with regard to workers’ safety is confirmed by another article in *The Guardian* in 2013. While it is reported that H&M, Marks and Spencer, Primark and Zara amongst others signed up to legally binding agreements regarding worker safety at factories in Bangladesh, Walmart refused to do so. Instead, the company “has created its own agreement, which it claims goes beyond the current accord that was drafted by labour groups and campaigners”, which of course is not legally binding

(Neville 2013). In both cases, the Rana Plaza incident and the fire at Tazreen fashion, Walmart claims these suppliers were not authorised (ibid.). Furthermore, Walmart did not engage in any compensation for the victims of the Rana Plaza incident (BBC News 2013).

**Garment Factories in Jordan** Not very different to the general working conditions encountered in China or Bangladesh but even more alarming are those in Jordan. In 2011 and 2013, the company Classic Fashion Apparel Industry was confronted with the accusation of sexual abuse and even rape of female employees. One of the factory's managers was incriminated by a 26-year-old female employee who informed the Jordanian police. The prevalent conditions at the factory in Jordan were humiliating: workers were frequently beaten, extremely underpaid and had to work excessive over hours. Sometimes, passports were confiscated and female workers threatened with deportation. The Institute for Global Labour and Human Rights estimates that since 2007 about 300 women have been victims of sexual abuse and rape by managers of Classic Fashion Apparel (Jamal 2011, Institute for Global Labour and Human Rights 2013, Halaby 2011).

Disappointingly, Walmart and other US brands sourcing from the garment factory, such as Hanes, Macy's or Target, stayed silent despite public commitments on ethical sourcing. A request by the Institute for Global Labour and Human Rights after the incidents addressing the sourcing companies revealed: "All of the companies refused to say whether they are continuing to do business with the Jordan factory, or whether their worksite monitoring efforts need to be bolstered. None of the companies indicated they would request changes in management" (Ross 2011). Jordan companies employ many guest labourers from poor Asian countries such as Bangladesh, Sri Lanka, India and Nepal. These guest workers are extremely exposed to exploitation and abuse since the free trade agreement in terms of workers' rights between Jordan and the United States does not include non-native workers (ibid.; Bustillo 2011a). However, in 2013 under US President Obama, the Free Trade Agreement between the US and Jordan was renewed, including a new "Implementation Plan", requiring the Jordanian government to address issues like the discrimination of unions, sexual harassment, gender discrimination particularly in relation with migrant workers (Institute for Global Labour and Human Rights 2013).

In 2011, Walmart was facing further issues of poor employment conditions in South America, like in Bolivia, Brazil, Argentina and recurring issues in El Salvador in 2015 (Ayala 2015; Mundo Gremial 2011; Folha de Sao Paulo 2011; Global Labour and Human Rights

2011; Institute for Global Labour and Human Rights 2014; Fair Jewellery Action 2011). Furthermore there are within Walmart's supply chain Cambodia and evidence of human trafficking related to Walmart's supply chain in Bahrain (Moeun 2014).

**Shrimp Farms in Thailand** In 2012 and 2013, there were human rights issues with regard to working conditions at shrimp farms in Thailand. The first case refers to Phatthana, a seafood company based in Bangkok with farms in Thailand's province Songkhla in the south. According to Human Rights Watch, Walmart sourced its shrimps from Phatthana. Phatthana facilities primarily employ migrant workers from Myanmar and Cambodia. At Phatthana, workers suffer under extremely poor working conditions and ultra-low wages. Workers stated that toilet facilities were insufficient; breaks were too short to even use these facilities, and the low wages did not pay for enough food. In April 2012, Walmart claimed to be investigating but later denied altogether that it was sourcing from this company (Sifton 2012).

A second case refers to Walmart's shrimp supplier Narong Seafood, located in Samutsakorn, Thailand. While Naron Seafood is a long-time supplier and certified by the Global Aquaculture Alliance, there are evidently serious deficiencies regarding wages, work permits, and the employment of underage workers. Like the case above, this company also primarily employs migrant workers. Moreover child labour has been detected. This latest case of human rights infringements at certified facilities clearly casts doubt on the effectivity of audit and certification schemes (International Labor Rights Forum 2013).

The slavery conditions linked with human trafficking at shrimp farms in Thailand apparently prevailed until 2016 according to news articles by *The Guardian* and *CNBC* over the past years (Davey 2014, Booth 2016).

### 3.6.2.3 Social & Human Rights Issues – Walmart Stores

Poor working conditions are not only characteristic of Walmart's supply chain; these circumstances seem to be interspersed throughout Walmart's business operations whether they may take place abroad or at the company's home base in the US. There, Walmart has also been confronted with accusations of gender and racial discrimination as well as issues regarding wage and working hours.

**Racial and Gender Discrimination in the US** In April 2011, Walmart settled a lawsuit for USD 440,000 where the company was accused of racial discrimination. Mexican female employees at Sam's Club, a Walmart subsidiary, claimed to be victims of harassment based

on their ethnicity. They were humiliated by a Mexican-American colleague (Bustillo 2011b). In 2011, Walmart also faced a class-action lawsuit. This case involving more than 1.5 million former and current Walmart employees would have been the “biggest civil rights class action in US history” (Mann 2011). Female employees at Walmart claimed there was a sex bias regarding promotion and pay. Male employees were preferentially promoted and were paid a higher salary for the same work. However, one month later in July 2011, the US Supreme Court made the decision to reject the class-action lawsuit. The court pointed out that victims should be grouped more individually, e.g. according to the stores they worked in or the specific region, since their individual cases did not have much in common (Herbst 2011, Bravin and Zimmerman 2011). In October 2011, a group of women from California and Texas continued the lawsuit against Walmart regarding gender discrimination (Levine and Gupta 2011).

**Poor Working Conditions in the US** In 2011, Walmart lost a case, which originally started in 2006. Here, former and current employees alleged Walmart of depriving employees of obligatory meal and rest breaks. Walmart was officially charged with violating state laws in terms of wage and working hours by the court of Pennsylvania and had to pay USD 187.6 million in compensation to the 187,000 workers concerned (Lu 2011).

Also in 2011, employees at Walmart’s warehouses operated by Schneider Logistics in California sued the contractor based on abusive working conditions, for example unbearably hot temperatures, and delayed payments (Jamieson 2011). Another warehouse scandal was reported in February 2012. Employees at a huge warehouse in Elwood, Illinois were informed at short notice on the 29<sup>th</sup> of December that they would lose their jobs immediately. Here again, it was Schneider Logistics operating the warehouse and abruptly cancelling a contract with a temp agency. The company was sued of violating state law, which requires a 60-day advance notice. Furthermore, the company was sued for wage theft since the employees claimed they were not paid in full (Greenhalgh 2012).

In 2013, Schneider Logistics was accused of repeatedly threatening and punishing its warehouse workers for unionising (Eidelson 2013). In a class-action lawsuit in the following year, Schneider Logistics was convicted of the unbearable working conditions named above and agreed to pay USD 21 million in order to settle the lawsuit (Romell 2014).

Another case of violation of workplace safety and health standards happened in February 2012, at Walmart’s stores in Rochester, New York. The US Department of Labor’s

Occupational Safety and Health Administration (OSHA) alleged Walmart was responsible for 24 serious violations. The proposed fine is around USD 365,000. This does not represent an isolated incident but rather a row of incidents with similar hazards in nine other locations within New York, and at Walmart locations in eight other states. The accusations included among other things: “obstructed exit routes, [...], no training for employees using personal protective equipment, a lack of eye and face protection, and a lack of information and training on hazardous chemicals in the workplace” (United States Department of Labor 2012).

#### 3.6.2.4 Environmental Issues

Apart from human rights issues and violation of national legislation, Walmart is also complicit in environmental abuse. Unsustainable mining practices within the supply chain and unsustainable paper sourcing are the main topics here.

**Deforestation – Issues with Paper and Palm Oil Products** Like Hewlett-Packard, Walmart also sources its paper from Asian Pulp & Paper (APP), which is then sold at Walmart stores in China. However, while Hewlett-Packard was only mentioned once in a Greenpeace report in 2010, Walmart is again repeatedly mentioned in the latest report from 2012 (Greenpeace 2010a, Greenpeace 2012a). Up until 2012, there has been no hint that Walmart terminated its business with APP.

Paper sourced from APP, a subsidiary of the Indonesian company Sinar Mas<sup>55</sup>, is unsustainable and a threat to plant life and wildlife. The wood used for APP’s products is partially obtained from CITES and Ramsar protected areas and contains so called mixed tropical hardwood (MTH) including ramin wood.<sup>56</sup> Ramin wood includes up to 30 different tree species of which fifteen are classified as vulnerable. The main species grows in peat swamps in Borneo and Sumatra. Ramin, as well as the swamp’s inhabitants like the Sumatran tiger and the Borneo orangutan, are species protected by national CITES agreement, which implies that trade is either heavily regulated or banned. Furthermore, the ramin species is officially protected by Indonesian national law (Greenpeace 2012a, 5). Greenpeace states: “The heavy dependence of the pulp sector on rainforest logs from the clearance of ramin

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<sup>55</sup> Sinar Mas group is a conglomerate and its business involves forestry, agribusiness, mining, pulp and paper. Asian Pulp & Paper represents Sinar Mas’ pulp and paper division while Sinarmas Forestry (SMF) represents the logging and plantation division of the group (Greenpeace 2012a, 2)

<sup>56</sup> “Ramin is the common trade name given to a number of light-coloured tropical hardwood tree species native to areas of South East Asia, principally Indonesia and Malaysia.” (Greenpeace 2012a, 5)

habitat creates the risk that ramin trees are being illegally logged along with other rainforest species, getting mixed up in the pulpwood supply chain and subsequently entering into international trade.” (Greenpeace 2012a, 8).

Despite public commitments by APP and Sinar Mas to zero tolerance in terms of illegally logged wood, MTH finds its way into paper products through the clearance of natural woods (in contrast to timber plantations). The wood coming from pulp mills entering Sinar Mas’ or APP’s production has not been adequately and strictly monitored. This business practice can be considered as violating Indonesian national law and the CITES agreement.<sup>57</sup>

**Unsustainable Mining** In March 2011, Walmart was accused of a green washing campaign by selling the product “Love, Earth” jewellery. This jewellery by Aurafin, a jewellery manufacturer based in Florida, United States, was advertised as “Jewelry made from responsible source and traced to its origins” (ICMM 2013). It presented a novelty on the market since traceable jewellery had not been available previously. In 2008, Walmart together with Aurafin launched its individual “Love, Earth” jewellery collection. However, the products are not as sustainable and responsibly sourced as publicly stated. Not only do the workers at the factories in Bolivia suffer from poor employment conditions such as constant intimidation, low wages, and insufficient health protection, the slogan “responsible sourcing” is also debunked by a closer look on the actual sources. Though the material is sourced from mines in Utah or Nevada in the United States to ensure at least “the most basic environmental and worker standards”, the mining operation in general is no more sustainable than in other regions of the world (Friedman-Rudovsky 2011). The US mines are considered as polluting the environment and contaminating groundwater with cyanide. The mines meet federal guidelines but these still “allow for “unacceptable amounts” of the dangerous substance to be released” (ibid.). Even the “International Cyanide Management Code”, which is subscribed to by companies voluntarily, is of no help since it was developed by the industry itself and the monitoring process is not considered fully reliable. It is worth mentioning that Walmart officially supports the “Golden Rules” of the “No Dirty Gold” Campaign since 2006, which prohibit inadequately dumping waste and contaminating water among other points (Earthworks, Retailers Who Support The Golden Rules n.d.; Earthworks, The Gold Star List n.d.).

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<sup>57</sup> Greenpeace investigated that the MTH found in paper products comes from one of APP’s pulp mills in Indonesia, the Indah Kiat Perawang mill. Since Sinarmas Forestry (SMF) is claimed to be the one exclusive supplier of pulpwood the MTH must have come from SMF (Greenpeace 2012a, 9)

**Animal Cruelty in the US** In 2012 Mercy for Animals discovered “extreme animal cruelty” at Walmart’s pork suppliers. Pigs were confined to “filthy, metal gestation crates so small they are unable to even turn around or lie down comfortably for nearly their entire lives”, furthermore pigs were suffering from large wounds without any veterinarian care, and workers were abusing piglets (Mercy for Animals 2012). According to the report, gestation crates are considered so cruel that they have been banned in nine states already.

**Water Pollution in Indonesia and Mexico** According to Greenpeace reports in 2012 and 2013, Walmart along with other global brands and retail chains is responsible for water pollution related to textiles production in Indonesia and Mexico (Greenpeace 2012b, Greenpeace 2013). However, similar to the Tazreen fashion and Rana Plaza incidents in Bangladesh, Walmart again refuses to confirm on these business relations and claims suppliers were not authorised to manufacture for Walmart (ibid.).

### 3.6.2.5 Other Issues – Product Issues

Product issues at Walmart present not only a serious threat to the health of customers and manufacturers but also reputational risks.

**Contaminated Jewellery** In 2010, there was a scandal regarding cadmium-contaminated children’s jewellery sold at Walmart among other stores. The products were produced in China and contained 80 to 90 per cent cadmium, which is thought to cause cancer. The producer in China stated cadmium was used because it was cheap and as long as a company will not pay more, a better raw material cannot be manufactured. Chinese producers in this sector care mostly for profits and since production costs need to be aligned with the profits aimed at, customers’ health is jeopardised by using harmful materials (Weidenhamer 2010, CBC News 2010). Walmart removed all products cited by the Associated Press from its stores across the United States.

**Contaminated Food** Another scandal arose at the end of 2011, where Walmart was entangled in a food scandal. The company was sourcing cantaloupes from Jensen Farms, which were contaminated with listeria bacteria. These can cause nausea and vomiting, fever and intense headaches (Armour 2011). In total, 30 Americans had died from a listeria infection by January 2012 and another 146 were considered as infected. Surprisingly, only one month prior to these incidents Jensen Farm was certified by an independent auditor as having ““superior” safety practices”” while an investigation report in January 2012 stated that



Jensen farms lacked “new processing equipment”, did not follow US guidelines which required washing the fruits in chlorinated water, and had unsanitary practices (ibid.).

### **3.6.3 Communication Analysis**

Walmart’s latest 2016 report comprises more than 140 pages and has a GRI table integrated (Walmart.com 2016). However, none of Walmart’s reports are externally assured (ibid., p.105).

From an analysis of Walmart’s recent sustainability reporting on both website and annual report (ibid.) it seems in reality Walmart cannot keep up with all its claims, neither with regard to social aspects nor to environmental aspects.

First, the actual circumstances of frequent cases of discrimination are going against Walmart’s commitments regarding respect and diversity, namely “supporting the safety and dignity of workers everywhere” together with its culture of inclusion (ibid., 20, 109). Workers within Walmart’s supply chain are exposed to intolerable working conditions, while employees in Walmart stores are faced with racial and gender discrimination. Furthermore, values like fairness and transparency proposed by Walmart’s established Global Ethics Office are most of the time not apparent in the company’s business practices (Walmartethics.com n.d.).

Second, Walmart states it offers competitive wages and good jobs (ibid.). The question here is competitive wages from whose perspective? It is probably from a retail industry perspective since these rather low wages keep the discount retail system running and ensures that Walmart can keep up with its competitors. Or as Al Norman at Huffington Post cynically claims: “The company's justification for this massive exploitation of workers is that it helps 99% of consumers to buy cheap foreign-made goods. Wal-Mart's future depends on the premise that the typical lower middle class consumer's belief in economic justice is no deeper than the dimensions of his or her own shopping cart.” (Norman 2011). Decent jobs imply adequate working conditions and wages. Walmart’s commitment towards its employees is generally quite limited. Unions in and outside the United States are forcefully opposed.

Third, Walmart is going against its own campaign of supporting the US manufacturing industry by “Buy American”, a campaign started in 2013. As the *International Business Times* reported in 2014, Shirts produced for Walmart’s staff came from Jordan. It is precisely this country, where textile workers are suffering the most (Galucci 2014).

Fourth, with regard to its use of renewable energy and being a leader in this field, it needs to be stated that even though Walmart has now installed renewable energy onsite at more than 400 sites, this is less than 10 per cent of its more than 5.000 stores in the US (Walmart.com, Our Locations n.d.). Or, as Stacy Mitchell from Grist claims: “At its current pace of converting to renewables, it would take Walmart about 300 years to get to 100 percent clean power” (Mitchell 2011). In an article from 2013, Mitchell further adds that Walmart’s competitors Kohl’s and Staples are already ahead by using 100 per cent renewable energy (Mitchell 2013). She alleges that Walmart simply does not want to invest money on a scale that really matters due to an insufficient return on investment Walmart claims (ibid.). Another article in the *International Business Times* from 2014 states that Walmart is “falling short on a number of its well-publicized sustainability goals” and therewith confirms Mitchell’s claim from 2013. The newer article alleges, Walmart is only using 3 per cent renewable power, while 40 per cent are coming from coal (Gallucci 2014). This statement is also supported by Walmart’s own report, where the company states that actually only 6 per cent of its electricity use and 5 per cent of its energy use at its buildings come from its own “Walmart-driven renewable energy projects”, while 19 per cent and 15 per cent respectively are renewable energy sourced from the grid and the remaining 75 per cent and 20 per cent are energy from non-renewables (Walmart.com 2016, 61).

In sum, it is characteristic for Walmart’s reports to not (critically) reflect on negative news by the media related to its business practices.<sup>58</sup>

Rather, Walmart’s annual Global Responsibility reports seem to follow a particular “mantra”: presenting as many positive details on as many pages as possible, together with appealing photos and colourful graphics. It is very obvious from the volume of the report that Walmart puts a lot of effort into its sustainability communication; rather than into the actual sustainability of its operations.

Moreover and certainly not reflected in any of the reports is that Walmart’s business as such is not very sustainable. First, the buildings are not sustainable as they together with the

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<sup>58</sup> For example, in its report for the fiscal year 2011 no reference were made to incidents in the same year, such as the “Love, Earth” jewellery case, issues of product safety, or the poor working conditions at Chinese factories. Incidents of poor working conditions in Jordan were also not discussed. Here, Walmart only refers to the “Better Work Program” it has installed. In its 2012 report again only the positive things are highlighted. Regarding working conditions in China, Walmart refers to the monitoring operated by ICTI CARE. Though Walmart devotes several pages to describing its efforts in China, again no reference is made to incidents of poor working conditions there (Walmart.com 2011; Walmart.com 2012).

huge parking lots consume a lot of land, which is usually virgin land and not redeveloped “grey fields” having been in use before (Benfield 2012). Also, as already mentioned above, Walmart’s efforts in terms of renewable energies are by far not as innovative as they may sound from the report. In fact, Walmart is actually lagging behind other retail chains like Kohl’s or Whole Foods, according to the *Huffington Post* (Sheppard 2013). Also, though Walmart claims to be focussed on reducing its GHG emissions, the numbers in the report tell a different story: 20.6 metric tonnes in 2010, and 20.8 metric tonnes in 2011, compared to 18.9 metric tonnes in 2005 and 19.3 metric tonnes in 2006. This overall increase is most probably due to Walmart’s aggressive expansion strategy. Yet, if measured as “GHG emissions per retail area” GHG emissions appear to be decreasing (Walmart.com 2013, 56). This is an idle and futile calculation. The *Huffington Post* states further “that Walmart’s emissions are high enough for it to qualify as one of the biggest polluters in the U.S., with more annual emissions than corporations such as Shell Oil Company, Dow Chemical and CONSOL Energy.” (Sheppard 2013).

In contrast to Walmart’s efforts described, there seems to be no fundamental change with regard to wages and working conditions in sight as huge retail chains continue to obstruct already only slight increases in minimum wages and refuse to acknowledge that “their demand for the lowest possible price and extremely tight delivery schedules may have been a significant contributing factor toward lower wages and hazardous working conditions” (Sethi 2013). It seems Walmart does not strive for an open discussion or more transparency. Quite to the contrary, there is the ever-repeating mantra of Walmart’s efforts, improvements, innovations and great culture apparent in the company’s reports.

#### ***3.6.4 Voluntary Commitments & Standards Analysis***

Walmart only has a few commitments to external and globally acknowledged standards or initiatives. These are namely its cooperation with the ILO through the Better Work programme, its Responsible Sourcing program, its membership at the Ethical Trading Initiative, its supplier standards, and its reflection of the GRI guidelines in its reporting, as well as its communication of emissions to the CDP. Compared to other cases shown in this study, however, the number of commitments to external worldwide-acknowledged standards is actually non-existent. Hence, the following analysis is rather short.

In the light of all these incidents there is only one possible conclusion to make: Walmart does not meet its voluntary (often not globally recognised but rather internally developed) commitments. For example, Walmart cooperates with the ILO in form of the Better Work initiative. Yet, this initiative is not without criticism. The program was initiated with the purpose to protect labour laws and the right to unionise in order to give the workers opportunities to pushing for higher wages (Arnold 2013). But since this initiative is lacking enforcement the question arises whether this ILO approach rather serves the big brands instead of empowering the workers (ibid.). Furthermore, Walmart highlights its Responsible Sourcing program, which should respect and protect the worker's dignity. Yet, in light of still on-going slavery at Thai shrimp farms, despite Walmart's alleged initiative against human trafficking in the South-East Asian seafood supply chain since 2014 the complete implementation of this program and the success of this initiative must be clearly challenged (Walmart.com 2016). The same is basically true for the Ethical Trading Initiative, since Walmart apparently still has many social issues within its supply chain.

Furthermore, in light of all these incidents in Walmart's supply chain it seems its standards for suppliers are clearly lacking enforcement. This may be also due to the problem of often unauthorised sub-contracting, as claimed by Walmart with regard to the Rana Plaza and Tazreen fashion incidents (Lahiri and Passariello 2013). However, this seems to give big retailers the excuse for not taking any responsibility for these incidents. Therefore, it must be still in the responsibility of a retail company, to make sure the supply chain is properly monitored. In this case, sector-wide agreements, which Walmart refused to sign, could help.

In addition, Walmart also participates in two transparency initiatives, namely the GRI and the CDP. However, with regard to the GRI none of Walmart's reports are externally assured by a professional company, such as PwC or Ernst & Young, while the CDP basically indicates the status of emissions, including a ranking for each sector. But this participation does not imply a clear environmentally responsible dimension of Walmart's business, since CDP aims at transparency, yet, it does not provide guidelines or standards for improvements.

### ***3.6.5 Case Conclusion***

In conclusion, Walmart is not committed to any internationally acknowledged principles or standards, for example the UNGC, the UNDHR in general or the OECD guidelines. Perhaps this is quite deliberately so, as Walmart then simply cannot be accused of ignoring or

violating its official commitments. In fact, it is conspicuous that Walmart primarily refers to own internally developed standards, audit procedures and initiatives. Consequentially, the Walmart system entirely lacks any comparability to other official certification standards such as the SA8000, the ISO 14001 or other acknowledged standards, so the actual level of quality and accuracy cannot be determined. Also, particularly in countries exposed to high levels of corruption, results from audits are often not reliable (Sethi 2013). In the light of the incidents described, Walmart's system of monitoring and oversight has proved to be not sufficient enough; if it had been human rights infringements at suppliers and corruption by employees could not have happened. Yet, despite this clear insufficiency Walmart still holds on to its internal standards and refuses to sign any sector-wide agreements of other textile buyers and producers like H&M, Zara or others.

National legislation has also been violated many times, foremost in terms of labour standards and health and safety regulations. An interesting detail regarding Walmart's law violations is that, according to Prakash Sethi (2013), Walmart apparently has a high budget for compliance issues: USD 1 billion was spent on damages to employees at its US branches since 2005, another USD 35 million on lawyers and investigations in the Mexico bribery case, and something between USD 1 and 2 billion for FCPA infringements. In contrast, it is interesting to discover how much effort Walmart has put into its annual Global Responsibility reports comprising a quite striking number of pages. In these reports, incidents are not really commented on; instead, efforts are constantly emphasised next to Walmart's ambitions aims. These reports rather resemble advertising brochures presenting an overstatedly rosy picture of the Walmart business.

### **3.7 Case Five: Chevron Corporation**

The origins of Chevron, the fourth largest oil company of the world behind Exxon Mobil, Royal Dutch Shell and British Petrol can be traced back to the black gold rush starting in the second half of the 19<sup>th</sup> century (Chevron.com, History n.d.). The Chevron Corporation as we know it today was established in 2006 and employs 64,700 people (Fortune.com 2015, *ibid.*) and another 4,000 at service stations. Today, more than 75 per cent of Chevron's oil volume exploited comes from outside the United States (Chevron.com, Leadership n.d.).

Between 2009 and 2016, Chevron was always among the top 20 of the Global Fortune 500

but oftentimes not within the top 10 (Fortune.com 2015). In terms of revenue, Chevron has been outstripped by the major oil companies like Royal Dutch Shell, Exxon Mobil, and BP. Furthermore, two Chinese oil companies, namely Sinopec and China National Petroleum, are now dominating the top 5. However, regarding Chevron's profits of more than USD 19 billion the company is #13 in the fiscal year 2015 (ibid.).

### ***3.7.1 Corporate Responsibility Strategy***

**Communication** Chevron's communication is based on four pillars: "creating prosperity", "people", "environment" and "climate change" (Chevron.com, Corporate Responsibility n.d.). Chevron aims at creating prosperity in three respects: economic development, health and education (Chevron.com, Creating Prosperity n.d.). Chevron states, in the course of its operations it creates a positive economic impact on its surrounding communities "by purchasing local goods and services, creating jobs, and generating revenue" (Chevron.com 2015a, 1). The company is member of several partnerships that offer programs on workforce development and education amongst other things (ibid.). Chevron furthermore invests in health programs of its partner organisation to support its local communities, for example education regarding HIV/AIDS in Africa.

According to Chevron, which claims to be a "human energy" company, people play a very important role. Therefore, the company is very concerned about its employees' health and safety and invests into the professional development of its workforce (Chevron.com, People n.d.).

Chevron's environmental approach rests on four aims: including environmental concerns in decision-making, reducing the company's environmental footprint, operating responsibly to ensure safety, and stewarding its former sites so that these can be reused (Chevron.com, Environment n.d.). Linked to its environmental concerns, Chevron also recognises the negative impacts of climate change. Accordingly, the company manages its GHG emissions and GHG issues are taken into consideration when it comes to strategy, business planning and the like. Lastly, the company strives for more energy efficiency to reduce its carbon emissions and is currently also approaching the sector of renewable energy (Chevron.com, Climate Change n.d.).

The company's most recent Corporate Responsibility report was published in 2015 for the

fiscal year 2014. The report basically mirrors Chevron's approach as presented on its website and depicts only the highlights of the fiscal year 2014. For example, Chevron reports on its operations and workforce safety, on protecting the environment, or its engagement in local communities thereby adding to social progress. Chevron's report does not reflect the GRI guidelines; instead it fulfils the industry-specific guidelines developed by IPIECA (the global oil and gas industry association for environmental and social issues), API (the American Petroleum Institute), and OGP (the International Association of Oil & Gas Producers) (Chevron.com, Industry-Specific Reporting n.d.).

**Voluntary Commitments to External & Internal Standards** Chevron's commitment to internationally recognised standards and principles is comparably limited. The company is committed to (Chevron.com, Human Rights n.d.; Chevron.com 2014)

- UN Guiding Principles on Business and Human Rights
- UN Declaration of Human Rights
- ILO Declaration of Fundamental Principles at Work
- Voluntary Principles on Security and Human Rights
- Participation in the CDP

And has further internally developed the following policies (Chevron.com, Human Rights n.d.; Chevron.com, Environment n.d.; Chevron.com 2015b):

- Human Rights policy (adopted in 2009)
- Environmental, Social and Health Impact Assessment (ESHIA)
- Chevron Business Conduct and Ethics Code

### ***3.7.2 Business Reality***

Chevron's has a long record in terms of environmental abuse and human rights infringements. Around one fourth of these incidents are also connected to violation of national legislation. Since 2004, Chevron has accumulated more than 961 negative news entries related to its business (see figure 3.9).

### Chevron Corp (Chevron)

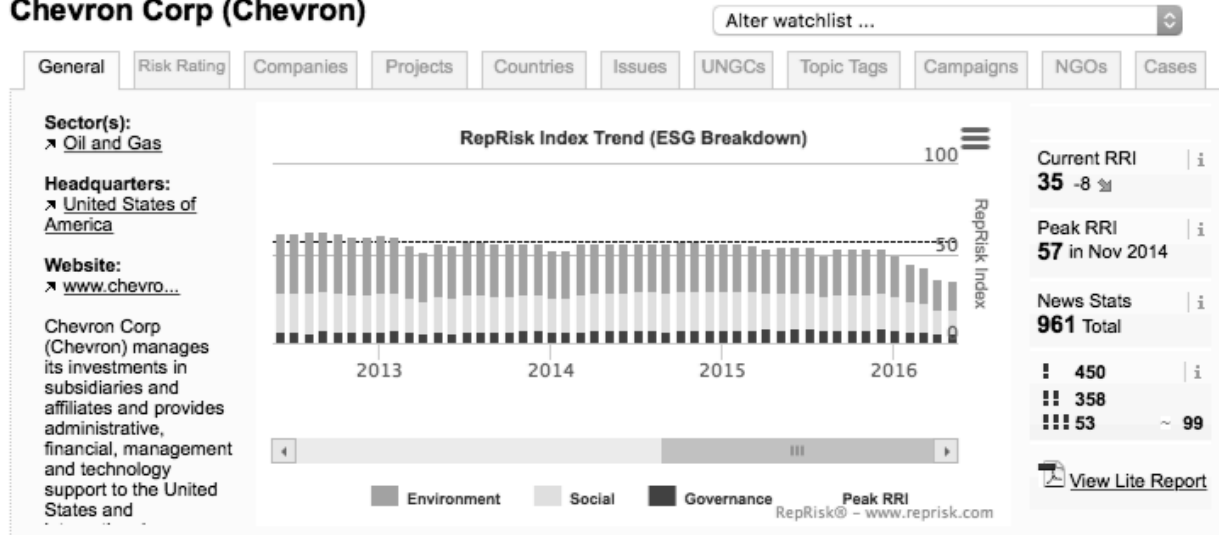


Figure 3.9, Chevron Overview (RepRisk 2016)

Most of these are linked to

- Impacts on ecosystems and landscapes
- Local pollution
- Impacts on communities
- Violation of national legislation
- Human Rights Abuses and corporate complicity (see all figure 3.10)

### Chevron Corp (Chevron)

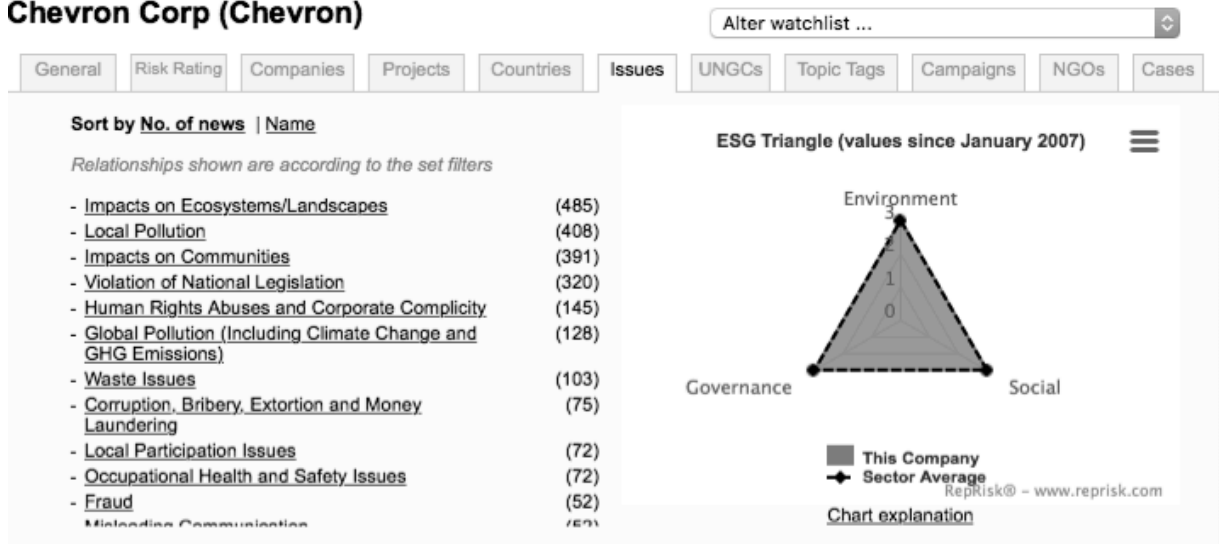


Figure 3.10, Chevron Issues (RepRisk 2016)

An exhausting examination cannot be conducted here. Accordingly, the following section only illuminates the latest incidents in the news between 2009 and 2016. Unlike previous cases, this case is structured into country-specific sections.



## **Ecuador, 1972 – 2012**

The enormous environmental pollution in the Amazonas was actually caused by Texpet, a Texaco subsidiary, operating in the area from 1972 to 1992. Texpet was accused of dumping about 18 million gallons (equivalent to 68 billion litres) of oil into the surrounding land during its operations in Ecuador. Moreover, Texpet<sup>59</sup> left behind more than 1,000 waste pits, some of them leaking and contaminating the ground water or, when flooded by heavy rains, running into rivers and streams (Lohan 2011). “Citing scientific studies, the plaintiffs claim that toxic chemicals from Texaco’s waste pits, including benzene, which is known to induce leukaemia, have leached for decades into soil, groundwater and streams. A report last year by Richard Cabrera, a geologist and court-appointed expert, estimated that 1,400 people in this jungle region — perhaps more — had died of cancer because of oil contamination” (Romero and Krauss 2009).

In 2006, plaintiffs in Ecuador claimed a compensation of USD 6.1 billion against Chevron. Chevron, which merged with Texaco in 2001, denied any further responsibilities since the company had already invested USD 40 million in a clean-up based on an agreement reached in 1998 (Soto 2006). The sum further increased to USD 27 billion in 2009. As the sum was rising, Chevron tried lobbying in the United States to terminate the trade agreement with Ecuador, putting the country under increased economic pressure with the potential outlook of losing more than 300,000 jobs (Romero and Krauss 2009b). At the same time Chevron revealed a potential on-going bribery scheme in Ecuador involving political officials, allegedly awarding them with USD 3 million related to clean up contracts to be received if the penalty of USD 27 billion could be inflicted on Chevron (Romero and Krauss 2009a, Krauss 2009). By September 2010, the sum had risen to its peak then ranging from USD 40 billion to USD 113 billion (Alvaro 2010). A year later, in 2011, the final sum had been settled, resulting in a fine of USD 18 billion (Anderson 2011). And again, this fine was further reduced in 2012 to USD 9.5 billion, imposed by Ecuador’s National Court of Justice as the *Wall Street Journal*

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<sup>59</sup> Texpet was not the only oil company operating in the area concerned, but operated as a consortium with Petroecuador, a national oil company in Ecuador being the majority partner. After the clean up later in the 1990s, Texpet handed over the area entirely to Petroecuador, a company with poor records in terms of sustainable business operations. According to public statements on Texaco’s website, Petroecuador was solely and fully responsible from that date onwards. Texaco claims Petroecuador has never fulfilled its obligations and responsibilities. It remains to be seen whether Petroecuador has been only scapegoated by Texaco to avoid further liabilities or whether Petroecuador is really trying to bypass its responsibilities (Texaco.com n.d.; Romero and Krauss 2009).

stated (Alvaro and Gilbert 2013). However, in 2014 a ruling by Judge Kaplan at the court of Manhattan in New York “declared the Ecuadorean judgment null and void” (Zaitchik 2014). The ruling was based on the argument that principal lawyer Steven R. Donziger engaged in fraud and criminal conduct by allegedly ghost-writing environmental reports used at the Ecuadorian trials (Krauss 2014). However, Kaplan did not dispute the actual fact of environmental pollution caused by Texaco (ibid.). Since the Ecuadorian verdict could not be enforced in the US anymore based on Judge Kaplan’s ruling, Donziger then turned to Canadian courts in 2014, as Chevron also has subsidiaries there (Noronha 2014). In 2015, Canada’s Supreme Court ruled “Ecuadorian villagers can seek to enforce an Ecuadorian legal judgment in Canada for \$9.5 billion against Chevron Corporation” (Nelson 2015).

In 2015, the International Court of Justice in La Hague, France, ruled that the Ecuadorian verdict including the fine of USD 9.5 billion should be upheld, as it profits particularly the Ecuadorian indigenous people who suffered the most from this environmental pollution (TeleSur 2015). Finally, by the end of 2015, Chevron refrained from further fighting against the Ecuadorian verdict after revealing that its star witness was only bought by Chevron: “Chevron’s star witness, Alberto Guerra, admitted under oath earlier this year that he lied about key evidence and testified falsely in a U.S. federal court [note: refers to the Manhattan court trial] after being coached for 53 days by company lawyers.” (Amazon Defence Coalition 2016).

### **Africa since 1998**

Incidents in Nigeria had already occurred prior to 2009: human rights abuses at the end of the 1990’s, where Chevron fought protesters with the help of the military (Earthrights International 2007); discriminatory practices regarding employment of indigenes in 2007 (Naku 2007); protests at Chevron’s facility due to wage and safety issues (Swartz 2008); an oil spillage in October 2006 impacting communities and the environment (Arubi 2007); and gas flaring in 2008 (Faby 2008) to name only a few.

**Oil Spill in Angola** Another oil spill in Africa caused by Chevron occurred off the shore of Cabinda, Angola, in 2010 (McClelland 2010). Also, the Chad-Cameroon pipeline<sup>60</sup> operated

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<sup>60</sup> The World Bank originally gave financial support to the project, but withdrew in 2008 due to a dispute with the local government. A part of the oil revenues was supposed to go to the poor for health and educational purposes and to aid local communities. The World Bank said Chad did not fulfill its agreements in this respect (Wroughton 2008).

by Chevron, Esso and Petronas, and financed by the International Finance Corporation (ifc.org n.d.), a member of the World Bank group, can be considered as highly controversial due to human rights infringements and environmental abuses. Despite public commitments, the project failed to benefit the local communities, instead depriving them of agriculture and livestock through pollution. Moreover, since the pipeline needs to be protected by security forces, people can no longer move around freely because a curfew has been imposed (Hough 2001).

**Oil Rig Explosion in Nigeria** These kinds of incidents continue to this day as the latest incident in the Niger Delta in 2012 shows. Only a few days after the Royal Dutch Shell oil spill 75km offshore, considered as the worst oil spill in 13 years, Chevron's offshore oilrig exploded and killed two people in January 2012. The explosion led to a fire, which burned for another 46 days. According to the NGO Friends of the Earth, the marine fauna is already affected by contamination (Hinshaw 2012). At the beginning of 2014, the company was sued by leaders of the Niger Delta communities at California's federal court. The lawsuit involves compensation and damages of USD 5 billion (Amamdi 2014).

### **Myanmar since 2005**

The project concerned is the Yadana project off the Burmese shore, located at the Bay of Bengal, and its pipeline to Thailand. The project was started in 1992 when the French company Total signed the contract with the Burmese junta. Unocal, an American oil company, joined one year later. Chevron acquired Unocal in 2005. Since Myanmar is under dictatorship, contracts with the Burmese military are considered as supporting the regime. During construction the area around the pipeline was heavily protected by Burmese military who also intimidated villagers. These villagers suffered under forced labour and were exposed to rape and torture (Earthrights International n.d.). In 2009, Chevron denied being involved in any human rights abuses in Myanmar and instead claimed its investments would benefit the people (Wall Street Journal 2009).

By making investments in the Burmese regime Chevron is also complicit in money laundering as Simon Billenness, a shareholder activist, explains: "The payments that Chevron makes to the military regime are booked under the regime's exchange rate of six kyat to a dollar, when in reality in the marketplace it's several hundred to a dollar. What that means is

that it helps the regime launder the money. The regime can channel over 95% of those payments wherever they want” (Kropp 2011). The latest report on this issue was published in December 2011 (ibid.; Le Monde 2010).

### **Australia since 2006**

Chevron’s operations in Australia comprise various projects among these the Browse project and the Gorgon project, both for natural gas exploitation, located in

Western Australia (Chevron.com, Australia n.d.). These projects all bear the risk of negatively impacting Australia’s marine fauna and local communities on the mainland.

**Offshore Gas at Browse Basin** The Browse project refers to the exploitation of offshore gas resources in a basin located in the west Kimberley region. It will be jointly operated by Chevron (17.5 percent share, Chevrонаustralia.com, 20 August 2012), Woodside Petroleum, Royal Dutch Shell, British Petrol and BHP Billiton. The land acquisition process by which the grounds for the project had been acquired was considered as invalid by the Western Australian Supreme Court in 2011. Aboriginal people accused the joint venture of compulsory acquisition (Kelly 2010; Lawson 2011). The 19 million hectare area of the west Kimberleys was put on the National Heritage List to protect its aboriginal inhabitants and its natural and historic values (Australian Government n.d.). Now, the preservation of environment and aboriginal communities is at stake or as Martin Pritchard, director of the NGO Environs Kimberley, describes his concerns: “[T]his is not a popular project; it would be a huge blow to the existing economic base of the Kimberley – tourism based on the natural and cultural environment. This development would change the Kimberley forever and be the foot in the door to industrialise the rest of the Kimberley” (Wilderness Society 2011). Furthermore, the water at Kimberley coast could be contaminated by zinc, nickel and arsenic released into the water in high concentrations caused by dredging operations (Prior 2012). A final investment was then postponed to the first half of 2013 (Klinger 2012). Yet, in 2014, the future of this liquefied natural gas (LNG) project by Woodside Petroleum in the Kimberleys in cooperation with other companies from the oil sector, such as Chevron, is still undetermined. A report from 2013 states that the approval for the gas hub located in the Kimberleys, an area of pristine nature, was unlawful. The Western Australia government has now obtained the land, which implies new approval procedures need to be initiated if the project is to be pursued any further (Santhebennur 2013).

**Natural Gas in Gorgon Area** The Gorgon project refers to natural gas exploitation in the Greater Gorgon Area, 130km offshore from the Western Australian coast. The project will be operated by Chevron with joint venture partners Exxon Mobil, Royal Dutch Shell and Petro China. It also includes a plant on Barrow Island to process the gas (Chevroustralia.com, Our Businesses n.d.). Despite being a Class A Australian nature reserve, Chevron has been present there since 1967. In mid-2009, the Gorgon project was officially approved based on evident efforts made by the joint venture partners in terms of sustainable operations. To further protect the environment, the project is bound to strict environmental conditions. However, the Green party in Australia believe the operation will still degrade the island's nature (Kerr 2009). Later, in 2010, the WWF confirmed that sea turtles have been already affected by Chevron's dredging operations (WWF.org 2010; Helman 2011).

Moreover, northwest Australia is frequently threatened by tropical cyclones, potentially endangering Chevron's operations (Hurricane Research Division n.d.). In the season 2010 to 2011 the area was affected by at least 4 strong tropical storms, starting with Bianca in January 2011, followed by Carlos and Dianne in February 2011 and Errol in April 2011 (Australiaseverweather.com n.d.). In 2014, Chevron has put the expansion of its Gorgon (LNG) project on hold as costs are increasing. Total costs for a three-train facility need to be estimated first (Validakis 2013).

In connection with its business in Australia, Chevron was accused of profit-shifting in 2015. According to *The Guardian* the Australian tax office (ATO) alleged, "Chevron used a series of loans and related party payments to reduce its tax bill by up to USD 258m. The landmark test case, still before the federal court, alleges Chevron benefited from the tax-free interest on intercompany loans from a US-based entity in the tax haven state of Delaware" (Taylor 2015). By the end of 2015, Chevron lost the case and had to pay back USD 300 million in taxes (Khadem and Danckert 2015).

### **Kazakhstan since 2007**

Chevron is Kazakhstan's largest foreign investor and operates Tengiz Oilfield. Chevron started its business in Kazakhstan in 1993 by founding a joint venture named TengizChevroil (TCO) together with Exxon Mobil and LUKoil. In 2007, news reports revealed the company's operation could not be considered as environmentally safe though Chevron claimed to be in line with national standards. At issue was a large amount of sulphur in the extracted oil, which needed to be separated from the crude. Due to this procedure the company had accumulated

vast stocks of sulphur but were lax in depositing it (Nurshayeva 2007). In the same year, TCO faced a fine of USD 307 million for violating national legislation at the Tengiz Oil field (Gordeyeva 2010). In 2008, the same fine was imposed on another consortium, named Karachaganak Petroleum Operating BV (KPO), consisting of BG, ENI, LUKoil and Chevron, operating at Karachaganak oil and gas (ibid.). The consortium was accused of illegal waste dumping. Surrounding communities had been affected by toxic emissions from the field (Blua 2010). The fine which was eventually imposed upon the consortium by the Kazakh court in 2010 was only USD 21 million (Neftegaz.ru 2010).

Chevron had to face even more fines in 2010. An environmental fine of USD 1.4 million was imposed for “unauthorized burning off of natural gas into the atmosphere” (Toktogulov and Herron 2010), while a second fine of USD 1.4 billion followed for “drilling 41 wells below the agreed depth of 5,100 meters from 2002 to 2010” (ibid.) which led to increased oil exploitation. At the beginning of 2012 TCO was fined again for excessive gas flaring and pollution of the atmosphere in 2010. The company must pay KZT 1.1 billion (about USD 7.45 million<sup>61</sup>) and another KZT 33.3 million (about USD 226,000) on top of state duties (Oilru.com 2012). Regarding the situation in Kazakhstan, Crude Accountability considers Chevron’s corporate responsibility as going “no further than its interest in corporate profits” (Crudeaccountability.org 2013). Together with its joint venture partners, Chevron is squeezing the oil out of Kazakhstan’s soil leaving behind “large-scale environmental pollution, poverty and lawlessness” (ibid.).

### **Indonesia since 2010**

Chevron’s activities in Indonesia range from oil and gas exploitation to geothermal projects. The area of concern here is again the sustainability of Chevron’s oil exploration. In October 2010, a Chevron oil pipeline exploded in Riau province, Sumatra, injuring two children. Residents nearby were evacuated since their houses had been covered in crude oil after the explosion (Jakarta Globe 2010; Kamis 2010).

In 2012, Chevron was accused of bribery in connection with its bioremediation project. This project was necessary to restore the soil, which has been contaminated by Chevron’s drilling operations. Two companies were mandated by Chevron to clean up the area in the period from 2003 to 2011 on a cost recovery basis paid by the state-owned regulator

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<sup>61</sup> Based on currency exchange rate of 10.04.2012 provided by Google: 1 Tenge = USD 0,006773

BPMigas. According to reports, Chevron received the entire amount of USD 23.4 million but not much progress has been made on the area concerned so far. Five employees of Chevron charged with the project now have come under suspicion as having pocketed the money themselves (Chen 2012; Prakoso 2012). The defendants were banned from leaving the country in March 2012. It remains to be seen how far BPMigas itself is involved in this scandal (Fadillah 2012; Prakoso 2012).

By the beginning of 2014, the executive of Chevron Pacific Indonesia had still pled not guilty with regards to the graft case against Chevron related to a bioremediation project (Jakarta Globe 2013). So far, three employees have been jailed (Yang, 2013). News reports from November 2013 state that Chevron's contract for its operations at Siak block in Riau will not be extended. Instead, the state-owned oil and gas company PT Pertamina will take over operations at Siak block (Cahyafitri 2013a, Cahyafitri 2013b). However, the company is still engaged in oil drilling activities with a total of 90 fields in Sumatra and further projects off the coast of Kalimantan (Chevronindonesia.com, Sumatra Operations n.d.; Chevronindonesia.com, Kalimantan Operations n.d.).

### **United States since 2010**

Even "at home", and despite heavier regulations, it seems Chevron's operations are not necessarily more sustainable. The total list of environmental abuses in the United States is too long, so only a few recent cases can be discussed here.

**Baytown Complex in Texas** In 2010, Chevron was sued by environmental groups because of massive air pollution in Texas emitted by its Baytown Complex also called Cedar Bayou Plant, an oil refinery and chemical plant. The air pollutants are allegedly toxic, containing benzene and hydrogen chloride. The plaintiffs claim "equipment breakdowns, malfunctions, and other non-routine incidents at the Baytown Complex since 2005 have resulted in the release of more than eight million pounds of pollutants into the surrounding air, frequently in violation of legal limits" (Terra Daily 2010). This lawsuit represents only one in a series where refineries in Texas were accused of air pollution beyond legal limits (Levebvre 2010).

**San Joaquin Valley & Richmond Refinery in California** In 2011 Chevron was branded of being one of the worst of polluters in the San Joaquin Valley based on its emissions in 2009 (Maccioli 2011). In the same year the company had to face fines of USD 170,000 for improper monitoring and reporting of its gasses over a period of 27 days at its Richmond

refinery. However, a later analysis showed the gas amounts not reported were on a normal level (CBS SF Bay Area 2011). Another issue was brought up in September 2011. Here, a USD 24.5 million settlement with Chevron and its service stations was proposed in California. Chevron was accused of not properly inspecting and monitoring its underground storage tanks at 650 gas stations in the state. As well as the settlement a compliance programme for its storage tanks was required to be implemented (Sahagun 2011).

In 2013, Chevron was also sued for a fire at its Richmond refinery that occurred in August 2012. Chevron was accused of ignoring safety warnings with regard to a pipeline which was not working properly and which caused a serious fire at its refinery. A report claims, “officials placed profits and executive pay over public safety when the company failed to properly check and repair a corroded pipe” (Wilkey 2013). The fire affected 15,000 people requiring a hospital visit. Chevron was fined USD 963,000 by the state Division of Occupational Safety and Health in August 2013 (Murphy 2013). In 2014, another fire due to flaring occurred at Chevron’s Richmond refinery according to *Russia Today* (Russia Today 2014).

Furthermore related to Chevron’s operations in California is a lawsuit brought against the company and others in 2015 based on the injection of wastewater into aquifers even in times of drought, thereby contaminating the already scarce freshwater (Baker 2015).

**Marcellus Shale in Pennsylvania** Chevron’s hydraulic fracturing<sup>62</sup> operations at Marcellus Shale Deposit in Pennsylvania are highly controversial in terms of negative impacts on communities and the environment (Griswold 2011). To enter the shale gas and oil sector Chevron has only recently acquired Atlas Energy Inc. (Ordonez 2012; Chevron.com 2010). However, Atlas’ own record in terms of sustainability is not the best: incidents include two oil spills and a pit leak in 2007, and a blow out and another pit leak in 2008 (The Times Tribune online 2010; State Impact, Atlas Resources Llc n.d.). In 2010, Atlas Resources was fined when an open wastewater pit contaminated water sources nearby (Andrew 2011). Incidents of contamination have happened frequently over the last few years with 13 cases of large-scale contamination caused by various companies since April 2009 (State Impact, Operators With Active Wells In Pennsylvania n.d.). The last case involving Chevron happened at the end of 2011, when a leak in a pipe was discovered. Yet, the consequences were underestimated. In

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<sup>62</sup> Hydraulic fracturing or short “fracking” is ‘a process of natural-gas drilling that involves pumping vast quantities of water, sand and chemicals thousands of feet into the earth to crack the deep shale deposits and free bubbles of gas from the ancient, porous rock’. This method can be seen either as a huge source of domestic energy or as a risky procedure which can lead to contaminated air and water (Griswold 2011)



late February, about 1,000 cubic yards of oil had already contaminated the environment according to the Department of Environmental Protection (DEP) in Pennsylvania (Oil and Gas Lease Blog 2012; Hopey 2012). A second spill happened shortly after in 2012 (Hopey 2012).

At the beginning of 2014, there was no news on the oil spills at Marcellus Shale caused by Chevron in 2011 and 2012. However, the method itself remains highly controversial and presents one of the three dirtiest methods of producing energy (Biggs 2014). Fracking involves an excessively high water consumption (2 to 8 million gallons of water, equivalent to 7.6 to 30.3 million litres, per fracking operation), a huge volume of contaminated wastewater, toxic substances (up to 600 different chemicals), and increased traffic, as water and wastewater need to be transported to fracking locations. And these are just a few of the side effects of these operations (ibid.).

According to *The Guardian*, fracking in the USA has generated 280 billion gallons (equivalent to more than 1000 billion litres) of contaminated wastewater to date (Goldenberg 2013). Only one to two per cent of the fracking water used is made of chemicals. Yet, the list of chemicals injected is long and the mixture each company uses is not disclosed (Manthos 2013). Some of the water remains underground together with two-thirds of the chemicals (Biggs 2014). The wastewater which returns to the surface is toxic and needs to be treated accordingly. However, the two conditions, water underground and water coming to the surface both pose certain risks. Fracked wells are usually cased so that the water remains underground. However, if the casing collapses, which happens in at least six per cent of the cases with figures rising over time, the toxic water contaminates the ground water (ibid.).

The toxic water spilled to the surface during operations often “cannot be processed by wastewater treatment plants” (ibid.). Hence, it is stored in open pits exposed to natural forces (ibid.). And, even if the water is discharged at treatment plants and processed, wastewater containing bromide can mix with the drinking water, which in the US is usually chlorinated, producing cancer-causing substances (Goldenberg 2013). In some of the mixtures used by companies, cancer-causing substances, like naphthalene or formaldehyde, are already part of the mixture (Manthos 2013). Whether fracking operations can be made safer in the future remains to be seen. However, in the light of these facts, it appears to be quite urgent to develop new regulations protecting communities and the environment.

In 2014 the state Pennsylvania sued major mineral oil corporations for MTBE gasoline spills from underground storage tanks, thereby contaminating groundwater. MTBE is a well-

known dangerous fuel additive but used by oil corporations regardless. The article also states, oil companies were aware of their leaking underground tanks. These spills, going on for two decades already, costs the state a huge amount of money for clean-ups (Conti 2014). Furthermore, as it turned out only one month later, the *Pittsburgh Gazette* discovered “Half the spills at Marcellus Shale well sites that resulted in fines weren’t spotted by gas companies, which are required by state law to look for and report spills of drilling-related fluids”. The newspaper continues with that surprisingly the many spills that were not discovered by the gas companies themselves but about “a third were first identified by state inspectors while others, about one-sixth, were discovered by residents” (Hamill 2014).

**Fraudulent Siphoning in Tennessee** In 2016, Chevron was accused of “fraudulently siphoning more than USD 18 million over a period of about 30 years from a cleanup fund that people contribute to every time they fill up at the pump”, thereby misappropriating taxpayers’ money (Insurance Journal 2016). Chevron together with its subsidiaries including Texaco allegedly “used taxpayer funds to pay for leaks and spills at more than 100 Tennessee gas stations, despite having private insurance that paid for the clean-up costs” according to the *Insurance Journal* (ibid.).

### **Brazil since 2011**

In November 2011, a leak was reported in Chevron’s Frade oil platform, located in Campos Basin, offshore of Rio de Janeiro (Fick 2011). Later, Chevron admitted the leak appeared due to a pressure miscalculation, hence accepts the responsibility (Riveras 2011). However, more oil than Chevron originally expected leaked through, and Chevron’s cleaning methods came under fire (BBC News 2011a; Tales 2011). Meanwhile, a civil lawsuit has already been filed against Chevron “seeking damages of 20 billion reais, or about USD 11.2 billion, from the company” (Romero 2012).

In February 2013, criminal charges against Chevron were dropped, perhaps because there was no discernible ecological damage and the spill did not reach the Brazilian coast as the New York Times reported (Reuters 2013). Yet, Chevron has been charged with USD 17.5 billion in damages in a civil lawsuit. One third of the money shall be invested into social and environmental projects according to Chevron (ibid.). The damages following this lawsuit are considered “many times larger than those U.S. courts awarded plaintiffs against operator BP Plc. in the much larger 2010 Deepwater Horizon spill, which fouled beaches, damaged

fisheries and killed 11 people in the Gulf of Mexico” (Blount 2013).

### **Eastern Europe since 2011**

Protests were seen during the first quarter 2012 due to Chevron’s fracking activities in Romania. Evoked by a concession given to Chevron in March 2012 and still insufficient information on the ramifications of fracking activities, activists urged the government to withdraw the concession. Chevron then temporarily suspended its exploration. The company claimed it was meanwhile surveying seismic data to provide more reliable information on the fracking procedure (Euractiv 2012). New reports with regard to protests in Romania were released in October and December 2013. New protests emerged as Chevron’s secret lease agreements were uncovered. These were supposedly only filling the pockets of government officials and not supporting local communities in any way (Fry 2013). In December 2013, reports stated Chevron forcefully removed Romanian protesters (Dale-Harris 2013). A later report from December 2013 stated Chevron had resumed its fracking activities despite various recent protests (Peixe 2013).

While protests in Bulgaria led to a decision passed by the parliament to ban fracking throughout the country, the Ukrainian government in contrast agreed only recently to a 50 year contract with Chevron (Euractiv 2012, Reed and Kramer 2013). The “Global Shale Gas Initiative” by the US Department of State launched in 2010 and aimed at lobbying for shale gas extraction in other countries still faces a strong opposition in Europe (Fry 2013).

### **Argentina since 2013**

In 2012 Chevron signed a huge oil project in cooperation with Argentina’s YPF, a national state oil giant. The deal includes the exploration of shale gas deposits in Loma La Lata Norte, which belongs to the Vaca Muerte reserve in Patagonia. Yet, the indigenous Mapuche feared negative environmental impacts on their region and started protesting (AFP 2013). However, Chevron’s latest project may be under risk, as Ecuadorian plaintiffs try to freeze Chevron’s assets wherever possible and Argentina in general is a difficult environment in general regarding regulation and development (Romero and Krauss 2013).

As the drilling started to take off the entire region is about to change, as *Terramérica* states: “A new well is drilled here every three days, and the demand for labour power, equipment, inputs, transportation and services is growing fast, changing life in the surrounding towns”

(Frayssinet 2014). This of course brings prosperity to the region but as other fracking activities in the US have already shown, and very clearly so, this “prosperity” comes at a cost: the contamination of groundwater, huge amounts of water usually sourced from rivers close-by, a new infrastructure for operations impacting the surrounding communities and the natural environment, and an increased risk of earthquakes due to the deep drilling (Chow 2016; US Geological Survey n.d.).

### ***3.7.3 Communication Analysis***

The list of Chevron’s abuses could certainly go on for a while.<sup>63</sup> However, the incidents in the nine countries illustrated above already provide an adequate insight into Chevron’s general business practice. A comparison of Chevron’s public representation and the business reality apparently reveals extreme incongruity. In this section three examples are provided, describing in more detail the difference between Chevron’s communication and the business reality. Unfortunately, as the list of Chevron’s abuses is so long, not every incident can be compared with Chevron’s communication strategy.

The first example is Chevron’s showcase project in Australia, the Gorgon project, is described as a “Symbol of Australia’s Progress for Decades” and an “Emerging Australian Icon”, providing investments into Australia, thousands of jobs and clean energy sources (Chevronaustralia.com, Gorgon n.d.). Moreover, for this project Chevron provides its “cutting-edge 21st century technology” and operations will be conducted in a responsible manner. The company’s statements go on in this manner, blowing its own trumpet by saying that “[a]s a world-class example of environmental management, it’s shown that conservation and development can successfully co-exist.” (Chevronaustralia.com, Environmental Approvals n.d.),

However, all of Chevron’s operations at the coast of northwest Australia bear a high environmental risk. First, species, some of them only to be found in Australia, will suffer severely not only during construction phase. Their habitat, which can be land or sea, will be affected by dredging operations. Furthermore, water species are exposed to underwater noise, bright light from gas flaring and air pollution. Second, leaking pipelines causing oil spills can

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<sup>63</sup> For more detailed information on Chevron’s unsustainable business operations until 2010 see the “Alternative Annual Report” for Chevron (Truecostofchevron.com 2011)

cause severe damage to the marine fauna. Third, the Kimberley's intactness is important to endangered species, the Aborigines and Australia's nature-based tourism in this region.<sup>64</sup> Fourth, this area is exposed to frequent tropical storms endangering the general safety of operations. And finally Chevron's new technology of injecting its emission into the grounds has not yet even been fully assessed. The long-term consequences of injecting high volumes of gas into an underground reservoir cannot be anticipated (Truecostofchevron.com 2011).

Another example is Chevron's second showcase, its Richmond refinery "at home" in California, which is also not as green as it may appear from the report. The enormous minimisation<sup>65</sup> of gas flaring was not a voluntary action but rather presents compliance with state imposed regulation (Bay Area Air Quality Management District n.d.). Also, Chevron's business activities in San Joaquin Valley and in Texas proved to be unsustainable and have violated national law. The company was fined accordingly. Finally, recent incidents of oil spills at Marcellus Shale deposit do not foster any belief in Chevron's efforts regarding the claimed operational excellence and sustainability.

When it comes to the company's fracking activities, particularly in the Marcellus Shale area, the risks evolving from these operations are entirely left out of the report. The positive picture of shale gas drilling is still held up by emphasising job creation and the benefits for the people in Pennsylvania by boosting the declining economy: "[T]he people of southwestern Pennsylvania benefit from this resource without compromising their communities or the environment" (Chevron.com 2012, 20). In contrast to this statement, a map by Earth Justice evidently shows people living in the Marcellus Shale area are already negatively affected by drilling operations (Earthjustice.org 2011). However, Chevron is only a minor player in the field of shale gas exploration in the US. This market is mainly driven by Halliburton, Schlumberger, Baker Hughes, and Chesapeake (Sider 2013; Goodell 2012).

Finally, the Chevron vs. Ecuador case proves very well how manipulative the company actually is. In first claiming that Donziger, the plaintiff's lawyer, was involved in fraudulent

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<sup>64</sup> The Kimberley's nature-based tourism generates 40% of the total income in this region (Truecostofchevron.com 2011)

<sup>65</sup> California's approach to reducing air pollution, which includes flare minimisation, is actually a good thing. However, even this well meant campaign yields new problems: California was aiming to reduce air pollutants, such as sulphur. This required oil companies to install better technology to clean their emissions, especially when processing heavier and dirtier types of oil, e.g. tar sands oil. The problem arising from this approach now is an increased carbon dioxide output due to the labour-intensive process to clean the dirtier oil (Nguyen 2012).

practices by allegedly ghost-writing environmental reports and moreover accusing Judge Zambrano of the Ecuadorian Court of receiving a ghost-written verdict by environmental activists and supporting lawyers (Amazon Defence Coalition 2016). However, as it turned out, Chevron's claim could not be supported by forensic investigation. Even worse for Chevron, its own star witness confessed it was bribed by Chevron in order to lie at court by falsely stating he had ghost-written the verdict for Zambrano (Hershaw 2015, Smallteacher 2015). Interestingly, this new conclusion to the case is nowhere stated on Chevron's website (Chevron.com, Ecuador Lawsuit n.d.).

It seems the praised actions and operations in Chevron's report do not correspond with reality. Benefits for people and environment seem to be only purported or provide a compensatory effect only, for example paying an amount of about USD 1 to 1.5 million will not bring any killed turtles or destroyed marine life back to Barrow Island, Australia (Truecostofchevron.com 2011). Particularly in countries where Chevron is not making much progress regarding environmental efforts, the strategy of "social" or "environmental" investments with regard to sponsoring or donations becomes remarkably clear. In countries like Nigeria, Angola, Kazakhstan or Indonesia where Chevron is among the worst polluters, the company proudly states to the public how much it invests in people's health and education. For example in Nigeria and Angola Chevron is boasting with its philanthropic projects, such as the HIV/AIDS initiative or fish farming in the Niger Delta or supporting small and medium sized businesses and the screening of new-borns for sickle cell disease in Cabinda, Angola and (Chevron.com, Economic Development n.d.; Chevron.com, Health n.d.; Chevron.com, Angola n.d.). While in Kazakhstan the company is empowering women (Chevron.com, Economic Development n.d.), in Indonesia Chevron is providing vocational training, health services and support for small businesses in Indonesia (Chevron.com, Indonesia n.d.). However, also this list could go on for a while, as Chevron apparently has initiated dozens of these programs.

Yet, in its 2011 report Chevron at least also commented on incidents like the oil spill in Brazil in 2011, though the company does not seem to tire of constantly reaffirming its mantra of safety (Chevron.com 2012). In another report published in 2013, Chevron at least briefly commented on incidents like the oil platform explosion off the coast of Nigeria and the fire at Chevron's Richmond Refinery in the US (Chevron.com 2013).

In sum, Chevron is a company, which at least comments on recent scandals and does not

completely ignore the press. Yet, from all the incidents described it becomes clear that Chevron is preaching its striving for excellence in safety but does not seem to go any further, in any of its reports. Every year again, there are incidents happening across the world where Chevron operates. So, what else are these statements other than just lip service to reassure the public? In the light of these incidents, which are not exhaustive by far, Chevron's efforts appear to be simple green washing. For every harming project there might be a "compensatory" one but this only keeps up a balance, which benefits Chevron since it can further pursue its unsustainable business practice.

#### ***3.7.4 Voluntary Commitment Analysis***

Regarding its commitments to external standards and principles, which in the case of Chevron are only few, it can be said that the ILO Declaration of Fundamental Principles at Work seemed to be respected so far, at least in light of the incidents described in this case study. However, the picture looks different for Chevron's various commitments to Human Rights, namely the UNGP, the UNDHR, Voluntary Principles on Security and Human Rights, and Chevron's on Human Rights policy adopted in 2009.

Most certainly there were Human Rights infringements in Nigeria and Angola, as well as in Myanmar and Eastern Europe. In the case of Nigeria and Eastern Europe, protestors have been forcefully removed, which implies an infringement of freedom of opinion, as stated in article 19. In Angola, people were facing restrictions of movement with regard to the Cameroon-Chad Pipeline, which goes against article 13, while the situation in Myanmar shows people suffering from torture and other humiliating treatments, as well as forced labour by the Burmese Junta, which infringes the articles 3 to 5 of the UNDHR. Furthermore, all incidents infringe the articles 1 and 2.

Furthermore, it is highly questionable in how far Chevron's various environmental abuses are in accordance with its own Environmental, Social and Health Impact Assessment (ESHIA). Unfortunately, there is now detailed information regarding the concrete content of ESHIA stated on Chevron's website or report.

#### ***3.7.5 Case Conclusion***

In conclusion, the Chevron case clearly shows that often enough domestic or national law is

violated, sometimes due to mere negligence and other times due to insufficient or deficient monitoring and oversight. At Chevron, internal standards like business and ethics code have been ignored and internal assessments (ESHIA) apparently must have failed. Yet, this does not restrain the CEO from constantly stating the company's efforts in terms of operational excellence, safety and care for the environment. Throughout the report these are reaffirmed. Chevron at least comments on recent scandals. On the other hand, a quite striking characteristic of Chevron's business behaviour still is its "compensation strategy". This includes "doing good" in the communities in which the company operates through donations, and health and education programmes for example, which is also described in illustrating ways in the reports. Yet, news reports cannot hide the fact that people in these communities as well as the environment, have been quite negatively impacted by Chevron's operation or are still exposed to these impacts.

### 3.8 Case Study Summary

After providing a diversified though by no means exhaustive account on five companies from four different sectors, the main points of this case study will be summarised in brief below.

The financial institutions HSBC and JPMorgan were both involved in Bernard Madoff's Ponzi scheme. Yet, their records in terms of violation of national legislation differ. While JPMorgan was intensively involved in the scandal around mortgage-backed securities, HSBC received negative press through money laundering and tax evasion scandals, foremost in Europe. When it comes to investments both companies invested in environmentally harmful projects or companies, such as Sinar Mas in Indonesia, thereby accelerating deforestation. Furthermore, environmentally damaging investments at HSBC are focused on the energy and utilities sector (see Jaitapur, India and HidroAysén Chile, BankTrack 2016c; BankTrack 2016d), while JPMorgan instead invests in controversial mining operations. Both companies were involved in indirectly financing banned cluster munitions. Yet, the difference is that some countries have signed the convention banning these while others have not. Hence, there are still loopholes<sup>66</sup> regarding investments in cluster munitions producer even after adoption of

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<sup>66</sup> Investments are still considered as legal if they do not support the production of cluster bombs directly, e.g. when a financial institution "only" invests in a questionable company (Taylor 2011).



the Convention on Cluster Munitions by the majority of countries in 2008<sup>67</sup>. HSBC officially refrained from further supporting this industry in any way in 2010, when the convention became internationally binding (cp. HSBC.com 2010, IKV Pax Christi 2016). JPMorgan on the other hand continues investing in companies like Textron or Alliant Techsystems/Orbital ATK in question despite inhumane consequences<sup>68</sup>. The US has not signed the convention up to the present day; hence there is no legal obligation to refrain from these investments.

The cases of Hewlett-Packard and Walmart certainly reveal some similarity due to the nature of their businesses. Both companies source their goods or part of their goods from countries across the world, thereby commanding over a complex supply chain. When it comes to sourcing, there is no way around China. Yet, particularly in China adherence to human rights cannot be ensured. First, China is a country under a communist regime which clearly does not consider the Declaration of Human Rights as binding despite adopting it (United Nations 2013). Second, though China has labour laws in place, enforcement is difficult due to a still high level of corruption (Rank 83 from 168, Transparency International n.d.; International Labour Organisation 1994). Consequently infringements of human rights and violation of national legislation occur frequently. Here, the question arises of how far MNCs themselves can exert influence on a situation which lacks legal enforcement by erecting higher obligatory standards for their suppliers combined with reliable surveillance. However, in contrast to HP, Walmart is approving these questionable circumstances in its sourcing countries not limited to China. Around the world, almost wherever Walmart sources from, and even in its home country, the company's business behaviour arouses negative reactions, which are frequently published in the press. In contrast to the companies already summarised, Chevron shows instead an almost never-ending record of environmental abuse. Negative impacts of the company's business are reported from almost every country in which Chevron operates. Furthermore, Chevron does business with countries which questionable political systems such as Myanmar, therewith facilitating money laundering and human rights abuses.

In addition to these detailed cases, the study provides insights regarding the background structure of projects. Huge projects like hydropower or nuclear power plants usually involve a

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<sup>67</sup> The convention became compulsory international law for UK in 2010 (Cluster Munition Coalition, Treaty Status n.d.).

<sup>68</sup> The latest report by IKV Pax Christi (2016) mentions loans to Textron and Alliant Techsystems (or its holding company Orbital ATK), which were provided in January 2014 and September 2015 respectively, while maturity dates for various loans given to those companies lasting until 2019 and 2020 respectively.

number of companies from different sectors, for example construction, operation, supply, financial and other services. The case of the planned Jaitapur nuclear power plant in India has several parties involved (BankTrack 2016d). The project is led by Nuclear Power Corporation of India Ltd (NPCIL) and receives technological supply from the French company AREVA, while HSBC and Société Générale among others will potentially provide financial support for the project. Comparable to this is the organisation behind HidroAysén in Chile (BankTrack 2016c). Here, the joint venture of the two utilities companies Chilean Colbún SA and Endesa from Spain will operate the dam and have contracted its construction, while several financial institutions like HSBC, Royal Bank of Scotland (RBS) and Banco Santander are involved in the finance of this project by providing loans. Financial support of projects or companies can take various forms; the most common are probably the options of providing loans (e.g. through issued bonds) or buying or holding shares of a particular company (Investopedia.com, Definition Bonds n.d.; Investopedia.com, Definition Shares n.d.). Sometimes, syndicates of various banking institutions are involved to financially back up huge projects. However, it can be difficult to identify all parties involved in a project and their particular financial backgrounds. Projects like the ones mentioned in the case study sometimes span entire networks of support around the globe thus creating a huge potential for negative impacts potentially affecting various sectors across the world.

The case study furthermore reveals that responsibility in terms of sustainable and ethical business operations is often placed outside the daily business and value chain of the companies in question. Exemplary for this method, which can be considered as a “compensation strategy”, is Chevron. Wherever Chevron’s operations have caused negative impacts on surrounding communities and environment, the company carried out a compensation strategy including efforts to provide support regarding education and health. Convinced by market ideology and the doctrine of business studies one might consider these efforts as comparably generous and perhaps even laudable regarding the high level of voluntary engagement of the company.

Most companies consider an approach as seen in the Chevron case as a philanthropic strategy often associated with social responsibility towards society. They engage in sponsoring and charity activities, promoting art, education and health. In some cases, foundations are even erected to “outsource” these efforts and separate them from daily business (Goldmansachs.com n.d.; JPMorgan.com, Global Philanthropy n.d.). These foundations may even create an impression of increased interest and endeavour. Yet,

responsibility is much more than this and requires a holistic strategy going beyond simply throwing money at the problem. A middle course between profit doctrine and a moralist's perspective of condemning such business practices, together with wanting to divest these companies of their licence to operate, is an alignment of business objectives with sustainable and even ethical objectives. This approach can yield several positive long-term results like an improvement in reputation, cost savings or a higher turnover with a potentially higher profit due to a boosted reputation, depending on the specific strategy applied. Here, Hewlett-Packard can serve as an example to some extent since it disclosed negative issues to the public voluntarily and worked on solutions e.g. in the case of conflict minerals sourced from the Democratic Republic of Congo. Furthermore, HP increased its efforts regarding adequate recycling. However, this issue is still controversial.

It must be said, of course, that it is not only the big global players who are involved in harming projects and investments. Operations by small and medium sized business can also cause negative impacts on communities and the environment. The crucial difference is that these do not have such a high exposure to public and press. In addition, their influence to change the current situation is rather minor compared to global companies which sometimes even command profits as high as the GDP of some countries (Trivett 2011).<sup>69</sup> Serious influence can only be reached through a kind of voluntary association and joint collaboration, while MNCs can assert much more influence at the same time with their sheer power over the market and the economy due to their prominent position.

Finally, the study has presented evidence that some actions undertaken by companies only *convey* sustainability. For example, HSBC's carbon offset strategy. Nowadays, more and more companies are striving for carbon neutral business operations. However, any company will reach a certain point in time when a reduction in GHG emissions is not feasible by cutting back energy consumption alone. The alternative is to purchase carbon credits to offset remaining emissions (Business Dictionary online n.d.). However, in the case of HSBC this strategy rather led to even more devastating effects and more than 20,000 Ugandans had to leave their homeland to make way for plantations enabling companies to offset GHG emissions of their operations.

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<sup>69</sup> For further discussion see Worstall 2011. However, the author at Forbes might be right in stating that the fact that Exxon's profit (including salaries) is comparable to Luxembourg's GDP is not surprising since in each venture the work of about 200,000 people roughly accumulates the same amount, but if we take into account the other article it is quite interesting to see how Exxon's profit easily exceeds the GDP of developing countries. This is the crucial point at issue and not a comparison between rich companies and wealthy nation states.

To sum up briefly, the previous case studies have illustrated that social and environmental concerns are often enough not included in corporate decision-making. Furthermore, internal policies and voluntary commitments are in many cases compromised or ignored. There is also a frequent non-compliance with national law evident. Yet, particularly infringements of voluntary commitments like the UNGC, the EPs, and initiatives like UNEP FI and UN PRI remain without serious consequences. This implies that voluntary commitments and initiatives seem to have no significant impact on a company's business behaviour. As monitoring and sanctioning mechanisms are entirely missing, corporate misbehaviour goes "unpunished".

Apparently, voluntary commitments are merely creating the impression of companies being concerned about social and environmental issues. They primarily fulfil the function of increasing reputation while at the same time allowing a company to do "business as usual".

Altogether, this nuanced picture of a company's business behaviour is rather trust-eroding and the actual effectiveness of these initiatives often lacking "teeth" must be called into question.

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# Chapter 4

## Corporations & Liability: History, Theories and Application

**Abstract** A vital part of business responsibility is the liability of a corporation for corporate misconduct. Hence, in the wider context of business responsibility, punishment of corporations in cases of unlawful corporate behaviour plays an important role. This chapter concentrates on a particular kind of corporate liability, namely corporate criminal liability (CCL). The chapter is divided into three major thematic parts with three subsections respectively: a first part on the history and conceptualisation of criminal liability, a second part concentrating on the application in practice and a last one comparing the CCL practice in the US and the EU, with a specific focus on Germany in particular. In detail, the first part describes the historical developments of CCL, then discussing the status of a corporation and lastly expounding the definition of corporate liability. The second thematic part continues with explaining different types of liability, examples of liability in practice and how criminal liability of corporations is established at US courts. The last thematic section explains in more detail the CCL regime in the US and in the EU. While in the third subsection a closer look at Germany reveals that a jurisdiction, which does not criminally punish corporations, shows a surprisingly similar outcome when it comes to punishing corporate misconduct.

### 4.1 History

From a historical viewpoint, corporate criminal liability is not a recent phenomenon. Corporations were criminally punished as far back as in the middle of the 19<sup>th</sup> century. The history of corporate criminal liability has its origin in UK, which can be considered the pioneer of CCL. By the beginning of the 20<sup>th</sup> century, these developments had also spread over to Canada<sup>70</sup> and the US. In the UK, the first cases which were enforced in the name of the ruling King or Queen of England, dealt with public nuisances caused by misdeeds without intent, such as nonfeasance, omission or negligence by corporate actors (Khanna 1996). As early as in 1842, a corporation in the UK was indicted for nonfeasance, which was classified

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<sup>70</sup> Canada appeared to have adopted corporate criminal liability as early as around 1900 as the case of *Union Colliery Co. v. The Queen* illustrates. At that time, Canada's adopted Criminal Code also included the punishment of corporations. Accordingly, Canada started to punish corporations in criminal proceedings earlier than the US (cp. Supreme Court of Canada 1900)

as a crime. In the case of *The Queen v. The Birmingham & Gloucester Railway Co.*, a corporation or corporation aggregate was recognised as indictable for the first time (Supreme Court of Canada, 1842). This was a break-through for CCL. Then in 1848, in the case of *The Queen v. The Great North of England Railway Co.*, Lord Denman C.J. challenged former court decisions only considering nonfeasance as a crime, and hence as indictable. Here, another milestone was taken towards corporate criminal liability as Lord Denman C.J. extended the scope of indictment by also adding misfeasance as a positive act (Supreme Court of Canada 1848).

At the same time, corporate liability was also addressed in the US. Corporations were held liable for example in civil proceedings initiated by a private party in contrast to criminal proceedings initiated by the state. The cases mentioned subsequently are the first cases in which companies are recognised as being indictable as a whole due to misconduct by their representatives or employees. Corporations were held liable based on the application of the tort law doctrine *respondeat superior*, originally relating to a master-slave relation, then referring to a corporation-employee relation.

According to Friedman, *Marshall v. Baltimore & Ohio Railroad Company* in 1853 was the earliest case where a US company was considered indictable (Friedman 1999, Justia US Supreme Court 1853): “The constitutional privilege which a citizen of one state has to sue the citizens of another state in the federal courts cannot be taken away by the erection of the latter into a corporation by the laws of the state in which they live. The corporation itself may therefore be sued as such” (Justia US Supreme Court 1853). However, one year earlier, in 1852, the tort law doctrine of *respondeat superior* was applied in a context of corporate liability in the case of *Philadelphia & Reading Railroad Company v. Derby* (Justia US Supreme Court 1852). This doctrine originating from 17<sup>th</sup> century England “was meant to deter employers from escaping financial responsibility for the actions of their employees” (Green 2012). As noted before, the doctrine of *respondeat superior* is also linked with the concept of vicarious liability.

Civil proceedings in US courts in the 19<sup>th</sup> century further showed the liability of corporations and contributed to a more defined scope of liability requirements (Diskant 2008). In 1858, in the case of *Philadelphia, Wilmington & Baltimore Railroad Company v. Quigley* it is stated: “A railroad company is responsible in its corporate capacity for acts done by its agents, either ex contractu or in delicto, in the course of its business and of their employment” (Justia US Supreme Court 1858). In another case, a reference is made to the case above: “No doubt, a corporation, like a natural person, may be held liable in exemplary or punitive

damages for the act of an agent within the scope of his employment, provided the criminal intent, necessary to warrant the imposition of such damages, is brought home to the corporation” (Justia US Supreme Court 1893). Already here crimes of intent were mentioned and included, though a real milestone towards criminal liability of corporations in the US was only taken some time later in 1909.

According to Friedman (1999), the case of *New York Central R. Co. v. United States*<sup>71</sup> was pivotal (Justia US Supreme Court 1909). This case dealt with wrongful acts and officially addressed a crime which was intended. Here, the New York Central Railway Company was found guilty for violating the Elkins Act.<sup>72</sup> A conviction in this case was based on the following assumption: “Congress can impute to a corporation the commission of certain criminal offenses and subject it to criminal prosecution therefor”, and “[w]hile corporations cannot commit some crimes, they can commit crimes which consist in purposely doing things prohibited by statute, and in such case they can be charged with knowledge of acts of their agents who act within the authority conferred upon them” (Justia US Supreme Court 1909). Furthermore, “[t]he Court will recognize that the greater part of interstate commerce is conducted by corporations, and it will not relieve them from punishment because at one time there was a doctrine that corporations could not commit crimes” (ibid.).<sup>73</sup> Though it was alleged that stockholders suffered under this overall punishment of a corporation, this step was necessary: the beneficiary of illegal acts, in this case the company, needs to be punished for unlawful practice, otherwise the Elkins Act or any other act would have fallen short due to insufficient law enforcement and punishment of the violation (Khanna 1996, Laufer 2001).

The history of corporate liability reveals different strands of development. In the UK it was

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<sup>71</sup> It is noteworthy that the U.S. Supreme Court in this case criminally convicted a corporation based on crimes committed by employees based on *respondeat superior*, which is a tort law doctrine. Yet, the Supreme Court “did not dictate that courts *must* read vicarious corporate criminal liability into federal statutes where Congress is silent”. However, exactly that happened in later cases at lower courts at the federal level, whereas no later decision by the Supreme Court ever appealed this verdict. As a consequence of case law, where judges can refer to previous cases, this doctrine arrived in criminal law at the federal level (cp. Kwedar 2010)

<sup>72</sup> The Elkins Act had been initiated to stop the practice by railroad companies of providing rebates to huge companies, thereby discriminating smaller companies and farmers. This practice of rebates granted by the railroad companies arose due to the highly competitive railroad network at that time. Shippers pressured railroad companies for rebates, otherwise they would use the network of another company. To prohibit this practice of violation against the Elkins Act, both railroad companies and shippers were punished in a case of granting and accepting rebates (cp. Theodor Roosevelt Center n.d.)

<sup>73</sup> The following is also important in this context: “[...] the Act of February 19, 1903, c. 708, 32 Stat. 817, known as the Elkins Act, is not unconstitutional because it imputes to the corporation, and makes it criminally responsible for, acts violative of the Interstate Commerce act done by its agent.” (Justia US Supreme Court 1909)

always through public enforcement or criminal proceedings that corporate offences were punished. These offences were also classified as crimes. Accordingly, corporate criminal liability was adopted as early as in the middle of the 19<sup>th</sup> century. Canada followed at the beginning of the 19<sup>th</sup> century by adopting a Criminal Code including corporate misconduct. In the US, private parties in civil proceedings as well as the government sued corporations based on the doctrine of *respondeat superior*. With regard to developments in the US Khanna states: “From the late 1600s to the early 1900s, the government conducted public enforcement primarily through criminal proceedings. Public enforcement using civil proceedings only arose after corporate criminal liability had reached its present level of applicability” (Khanna 1996, 1485). In the US, civil law and civil proceedings at that time did not provide the same options to sentence corporations as they do today, e.g. regulatory enforcement in particular cases (US Department of Justice 1999). This raises the question of whether criminal law as practised today can still be considered as the ultimate remedy against corporate misconduct or whether it needs substantial revision. A discussion on this issue and on the advantages and downsides of the US and the German approach is presented later on in this comparing different CCL regimes.

## **4.2 Corporations and Corporate Personality**

Before delving deeper into what corporate criminal liability means, the status of a corporation must first be ascertained in order to define what liabilities a corporation actually has. Therefore, in the following section, two vital questions in this context are discussed: is the corporation a person and if so, to what extent and with what consequences? For a better illustration of the practical implications of this question the US debate on corporations and their rights is discussed.

### ***4.2.1 The Corporation as a Legal Person***

Chapter two already legally defined what a corporation is. Now, as a step further, the status of a corporation needs to be delineated more clearly. What is the meaning of a corporation being a ‘legal person’, and what are the implications with regard to obligations and rights of corporations?



In general, discussing corporate liability necessarily evokes the question of how a corporation should be conceived as a whole, as fault must be attributed to ‘someone’ in order to punish misconduct, i.e. a ‘person’. Often, the meaning of particular terms used in this context is not very clear and distinctions are blurred. There are discussions revolving around what kind of ‘person’ a corporation actually is. Furthermore, terms like ‘personality’ and ‘personhood’ in a corporate context are sometimes used interchangeably. Definitions regarding who or what a ‘legal person’ is also vary. An attempt is made below to illuminate the various meanings. This is necessary in order to define the obligations of a corporation, and based on that to determine the preconditions for responsibility as well as the scope of liability later on in this chapter.

A corporation is *de jure* a ‘person’, namely a legal or juristic person. A corporation is a legal construct equipped by law with certain rights (like entering into contracts, suing other parties etc.) and obligations (e.g. being accountable, liable, taxable).

Current law is based on a concept, which focuses on the individual, may this person be natural or artificial as in the case of a corporation. Hence, in order to be recognised by law this entity is reduced to an artificial single person. Correspondingly, its personhood must be of fictitious nature, as it is through recognition by law only. Natural persons are recognised by law, and have certain rights (like voting, donating, freedom of speech etc.) and duties (e.g. paying taxes). So, what is the difference between these two kinds of ‘individuals’?

Max Weber once stated that any legal concept of a person is necessarily also a juridical one. In this sense, legal personality is always an artificial one created through law (Weber 2010). Yet, there is a significant difference in whether legal personality is applied to a natural person or to a corporation. Any legal personality also has a legal capacity, which means being the subject of legal rights and duties. Natural persons are equipped with this capacity by birth, while non-human entities, like corporations, receive this capacity only by being recognised as a legal person by law. To put it more clearly, a natural person is not a legal person<sup>74</sup> but has a legal personality and legal capacities whereas a corporation is only a legal person but also has a legal personality and legal capacities based accordingly on being recognised by law. The

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<sup>74</sup> At least, only considering non-human entities such as corporations as ‘legal persons’ appears to be more common. In its OECD Glossaries series on corruption, the OECD clearly differentiates between natural and legal persons. Yet, the Oxford Dictionary also includes individuals under the term legal person (cp. Cornell University Law School, Legal Person n.d.; US Legal, Person Law and Legal Definition n.d.; Oecd.org 2008; Juraforum.de n.d.; Oxford Dictionaries, Legal Person n.d.)

status of a legal person only applies to non-human entities, therefore personhood or personality is of an artificial nature, as only established through law in contrast to the personhood and personality of a human being (Cornell University Law School, Natural Person n.d.; Cornell University Law School, Legal Person n.d.; Cornell University Law School, Artificial Person n.d.).

Correspondingly, the scope of rights and obligations or duties must be necessarily different between natural persons and corporations. Natural and legal persons are both equipped with the ability to contract, yet only natural persons can for example marry, create constitutions and hold constitutional rights (Gierke 1887; Cornell University Law School, Legal Person n.d.). Conversely, it can be said that legal persons dispose of certain rights or duties a natural person does not have, as the scope of these rights and duties was specifically created for a particular context, the context of business (Gierke 1887). Furthermore, a legal person such as a corporation is generally considered as having the capacity to act, the same as a human being. Yet, it can only act through its organs, which in the end are natural persons. However, others, like Otto von Gierke, argued that a corporation has a *de facto* personhood, which is sociologically derived as opposed to personhood only declared by law *qua* the status of a legal person (French 1979).

The kind of personality an entity like a corporation is equipped with is described as ‘corporate personality’. This personality is distinct from its members and shareholders, and allows for an “independent legal existence” (The Free Dictionary online, Corporate Personality n.d.). How this personality is derived, whether legally or sociologically, and the related implications under the aspect of CCL are illustrated in a later paragraph on the conceptual basis of corporate liability and corporate personhood.

To put it briefly, being a person also implies having and personhood a personality, however derived (here: naturally, legally or sociologically).

In the context of a corporation, the term ‘person’ (corporate person) reflects the ascribed status of being an artificial individual, while ‘personhood’ describes the state of being that person. These two terms both characterise the status of a corporation, which is either a legal or sociological person or entity.

The term ‘personality’ (corporate personality) can be considered as further emphasising the distinctiveness of this person from other (natural) persons connected with it, therewith underlining its independent existence either in a legal or other sense (Oxford Dictionaries

online, Person n.d.; Oxford Dictionaries online, Personhood n.d.; Oxford Dictionaries online, Personality n.d., The Free Dictionary online, Corporate Personality n.d.). However, applying terms like ‘person’, ‘personhood’, and ‘personality’ to a corporation does not necessarily imply the same connotations these terms have in relation to a natural, physical person, a human being.<sup>75</sup> These terms are used in a descriptive sense only and are tied to a specific context, for example legal or sociological. As French already noted, whether a corporation has a personality or personhood *de jure* or *de facto* does also touch on the question of whether a corporation is also a moral person or has any moral capacities (French 1979; Wells 2001).

#### **4.2.2 Corporate Personhood – A US Controversy**

The subsequent outline of the status of corporations in the US briefly presents the history on how corporations came to be perceived as having some of the same rights originally only natural persons could possess. Further, it illustrates the ambiguity of granting corporations rights similar to natural persons. The purpose is to show a corporation being a “person” before the law can also create conflicts despite the advantage of making a corporation more tangible and attributing liabilities more easily.

There is some confusion about what privileges or protections a legal person can claim, particularly in the context of corporations. There is a common misunderstanding, which appears frequently in the context of the US Constitution and the granting of the status of personhood to corporations. It is sometimes claimed that corporations in the US have exactly the same rights as natural persons based on the 14<sup>th</sup> amendment, Section 1 (1868) of the US Constitution (cp. Monks and Minow 2008). However, the 14<sup>th</sup> amendment does not refer to the personhood of corporations or other entities in *any* sentence, and only relates to US natural persons: “All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside” (Cornell University Law School, Amendment n.d.). So, how could this misunderstanding about corporate personhood involving the same rights as possessed by natural persons ever arise?

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<sup>75</sup> The discussion revolving around corporate personhood and whether corporations have the same rights as natural persons appears to be a discussion more relevant in the US, particularly with regard to the 14<sup>th</sup> amendment and specific verdicts dating back to the end of the 19<sup>th</sup> century (Marlow and Beck 2012; The New York Times 2009)

The misinterpretation of the 14<sup>th</sup> amendment in favour of corporations was due to a court reporter in the case of *Santa Clara County v. Southern Pacific R. Co.* in 1886. He quoted the syllabus<sup>76</sup> or headnote, which is not an official court statement but only the opinion of a legal editor (The Free Dictionary online, Syllabus n.d.). Despite being only the opinion or summary by a court reporter, this single sentence, as accompanying the official transcript, was able to change the ruling afterwards. Syllables of subsequent cases referred to the latter and this false assertion of corporations being persons equivalent to natural persons took its course, although the court never made any decision in this case officially confirming this assertion (Clark 2008). In a case two years later in 1888, *Pembina Consolidated Silver Mining Co. v. Pennsylvania* - 125 U.S. 181, the syllabus then stated: “A private corporation is included under the designation of "person" in the Fourteenth Amendment to the Constitution, section I” (Justia US Supreme Court, 1888). Ever since then, corporations tried to claim the same rights before the law as natural persons by pointing to Section 1 of the 14<sup>th</sup> amendment, albeit with mixed results (Clark 2008).

The ambiguity of corporations having partially the same rights as human beings becomes apparent when corporations claim to be persons under the 14<sup>th</sup> amendment with reference to the 1<sup>st</sup> amendment of the US Constitution granting persons free speech and freedom of expression (Cornell University Law School, First Amendment n.d.). The right of free speech granted to corporations, which also allows corporations to donate money to political players thereby making their “voice” heard, is not without controversy. Robert Reich for example criticises that this decision has a negative impact on the ordinary citizens whose voices may then be overpowered by corporations (Reich 2014).<sup>77</sup>

The controversy around corporate personhood and related rights, however, seems to be primarily a US debate, as this discussion is basically concerned with the above court decisions linked to the 14<sup>th</sup> amendment. As already noted before, the term ‘personhood’ or ‘person’ applied to corporations does not necessarily involve any equation with human beings and their constitutional rights.

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<sup>76</sup> The syllabus concerned here is the following: “Syllabus The defendant Corporations are persons within the intent of the clause in section 1 of the Fourteenth Amendment to the Constitution of the United States” (Justia US Supreme Court 1886)

<sup>77</sup> For further reading, particularly regarding the pivotal case in this context of corporate free speech *Citizens United v. Federal Election Commission*, see for example Cohen 2010.

### 4.3 What is Corporate Liability?

As a starting point, this section aims to define what corporate liability i.e. what CCL actually is and under which conditions it applies. Thereafter, the two most common forms of corporate criminal liability will be presented in more detail and illustrated with examples.

Corporate criminal liability (CCL) can be defined as follows: “Corporate criminal liability is the liability imposed upon a corporation for any criminal act done by any natural person” (US Legal, Corporate Criminal Liability Law & Legal Definition n.d.). Criminal acts in a business context are also described as ‘white collar crimes’, which include various kinds of fraud, tax evasion, kickbacks, insider trading, embezzlement, money laundering, corruption and bribery (Cornell University Law School, White-Collar Crime n.d.).

Illegal as well as criminal misconduct can be the result of a corrupt and eroded corporate culture as a whole or of mere individual misdemeanour (Pieth and Ivory 2012). The main question behind the discussion of how to punish misdemeanour occurring within a corporation is first, how to identify wrongdoing in a company at all and second, how to attribute and address liability as a part of responsibility in organisations (De Maglie 2005). As noted in chapter two, liability basically means taking responsibility for the consequences of acts or omissions. More specifically, corporate criminal liability means that the corporation shall take responsibility for illegal or wrongful acts<sup>78</sup> by its employees. Yet, it is vital to understand that there are different approaches to corporate liability. The following sections therefore explain which types of organisations are held liable, which approaches are available to attribute offences to a corporate body, and which further preconditions have to be met in order to hold a corporation liable for misdeeds by employees.

Not every kind of organisation is deemed liable. According to De Maglie, there are three approaches to determine the type of organisations to be considered liable: it can be any organisation without a restriction; it can be a list-based approach only including specific types of organisations; the final approach is to only include organisations considered as “legal entities with status” under civil law (De Maglie 2005, 549).

Another question is how to define the scope of offenses attributable to a company. Here, again, there are three methods available: an equation of the physical and juristic person,

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<sup>78</sup> A ‘wrongful act’ is a criminal act, a crime, defined as “an action or omission, which constitutes an offence and is punishable by law” (cp. Oxford Dictionaries, Crime n.d.)

implying that the same scope of offenses committed by an individual is likewise applicable to a merely juristic person; no general rule in terms of offenses attributable to a company is in place; or a list-based approach of offenses and crimes a corporation can possibly commit (Ibid.). Furthermore, whether a corporation is liable for misconduct or not is generally tied to two conditions, firstly, whether the employee in question acted within the scope of employment<sup>79</sup> and the operating area assigned (not necessarily with an instruction or authorisation for this particular act), and secondly whether the act was carried out with the intention to benefit the company. Notably, however, even if the employee has violated internal corporate policies or disregarded orders the corporation is liable regardless (Colvin 1995, Cornell University Law School, Entity Liability n.d.). This complexity is further outlined below under the aspects of vicarious liability and imputed negligence.

As noted in the introductory part of this chapter, ‘corporate liability’ equates to ‘corporate criminal liability’, as the deed in question inducing a legal liability<sup>80</sup> for a corporation is deemed an unlawful and criminal act. An unlawful act in a business context can range from mere regulatory breaches to more serious crimes i.e. white-collar crimes, like fraud, bribery or corruption, and even crimes against humanity, like corporate manslaughter.<sup>81</sup> Punishing corporate misdemeanour on basis of a criminal conviction has at least two functions. First, it can be considered simply as a means of retribution or secondly, as a means of rehabilitation by potentially inducing a correction or complete change through the conviction of a currently eroded corporate culture (De Maglie 2005). Corporate criminal liability also implies the company is sued by the government and not some private party. This is further explained in the next section by presenting the differences between criminal law and civil law as well as the application of strict and vicarious liability.

#### **4.4 Conceptualising Corporate Personality**

The following section depicts the historical development of the concept of corporate liability. The purpose is to illuminate how the approaches, which we find in practice today,

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<sup>79</sup> For a discussion on what “within the scope of employment means“ see e.g. Pavlack Law LLC 2013

<sup>80</sup> The term ‘liability’ is also used in a financial context (cp. Investopedia, Liability n.d.)

<sup>81</sup> Corporate manslaughter, enacted in 2007, is a wrongful act indictable for all corporations under British Law (cp. Legislation.gov.uk 2007; Ministry of Justice 2007)

were derived in the first place. There exist various theories on how to perceive corporations and their personality and how to attribute liability and responsibility for misconduct. Over the next two sections, two theories are presented in more detail, the ‘fiction theory’<sup>82</sup> and the ‘realist theory’, two concepts with a long-standing tradition. The ‘fiction theory’ originates from the idea of a corporation’s fictitious personhood and is linked to Roman Law, while the ‘reality theory’ regards a corporation as “*reale Gesamtperson*”<sup>83</sup>, as a composite person (ibid., 149). This sections shows that depending on which of the concepts is taken up there are different strands of arguments with regard to why a corporations should be held liable for misdeeds by individual employees.

#### **4.4.1 Fiction Theory**

The ‘fiction’ or ‘nominalist theory’, as opposed to the ‘reality’ or ‘realist theory’, regards the personality of a corporation as merely a legal construct (Pieth and Ivory 2011; French 1979; Weber 2010).

The corporation is defined as a legal person while its personhood is only of fictitious nature, as merely created by law. The roots of this theory can be traced back to Roman Law which denied corporations a capacity for tortious liability based on the argument that corporations were only equipped with a fictitious personality (Gierke 1887, Borchard 1926; French 1979). Because of this, a corporation was not considered as possessing a will, which in turn was seen as the ultimate precondition for fault at that time (Borchard 1926; Gierke 1887).

When interpreted strictly, this atomistic concept only allowed for an individual, or more precisely, the concerned contracting party, to be sued (Borchard 1926). A principal was only liable if a case of employee misconduct could be linked to his or her own negligence, accordingly fault regarding supervision or selecting employees (ibid.; Gierke 1887). A concept of vicarious liability did not exist at that time.<sup>84</sup>

Strict Roman Law clearly denied a corporation its own will and the capability to act on its own. Only a natural person was considered as having her own will. Hence, entities only

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<sup>82</sup> Also known as ‘nominalist’ theory (Pieth and Ivory 2011; Pieth and Ivory 2012)

<sup>83</sup> For von Gierke a *Gesamtperson* can be an association of various kinds: public or clerical, confraternities, co-operations and corporations (Gierke 1887)

<sup>84</sup> For exceptions see Borchard 1926.

equipped with a fictitious personality are incapable of deliberately acting or omitting something in a way so as to induce fault. Correspondingly, if there is no will, there is no act or omission to be condemned. In practice, this means bodies like corporations are not liable, as they lack the required capacities. However, the strict application of Roman Law later gave way to an approach based on this concept of fictitious personality but then including representation and vicarious liability: the ‘fiction theory’ (Borchard 1926).

According to von Gierke, liability practice with regard to corporations later acknowledged a juristic person’s liability in torts (Gierke 1887). Von Gierke stated further that though legal practice as such had in some way abandoned this dogma of simplification, the current concept behind it was still characterised by perceiving the corporation as fictitious individual, a single legal person (ibid.). This artificially-created individual was still a distinct entity and not connected to its employees (ibid.). The employees, conflated to a unified collective, are not the corporation but acted as a surrogate for it (ibid.). Yet, the general assembly, meaning all employees, was not just an organ or a part amongst other parts in a corporation. This assembly conflated to a unified collective represented the entire corporation directly or indirectly to other parties (ibid.). Hence, groups and structures in reality involving multiple layers and organs were simplified and reduced to single and distinct entities. Von Gierke criticised this concept, claiming it disrupts the co-existence of unity and plurality, as it only recognised the conditions and rights of individuals, be it entities or natural persons (ibid.).

Even though this concept was slightly modified over time compared to strict Roman Law, this assumption of corporate personhood falls short of the given conditions today. This concept in detail is characterised by equation and simplification, which makes it particularly difficult to use it as an argumentation for corporate liability today. Corporate structures nowadays are characterised by a vertical and horizontal complexity. A company has multiple layers in terms of hierarchy, and a business network is distributed over various subsidiaries and suppliers.

#### ***4.4.2 Reality Theory***

A more progressive theory on how to justify corporate liability was presented by Otto von Gierke, a German legal scholar in the 19<sup>th</sup> century (Humboldt Universität zu Berlin online



n.d.). His approach perceived the ‘nature’ of a corporation in a much more sophisticated way. Hence, it better reflected the actual conditions of business. Moreover, his concept better meets the requirements of business today, which, as it is based on globally distributed network of subsidiaries and supplier, is impossible to reduce to a single entity. His theory is presented in more detail in this section to underline its relevance today. His ‘reality theory’ or ‘natural identity theory’<sup>85</sup> in contrast to the ‘fiction theory’ regards corporations as an entity having a real ‘personality’ and this personality exists independently of its constituting individuals (Pieth and Ivory 2012; Colvin 1995). Both descriptions, ‘reality theory’ and ‘natural identity theory’, refer to the pre-legal existence of corporate personality.

**The Conceptual Basis: Germanic Law** Von Gierke’s perception of a corporation is linked to the understanding of structured forms of organisation in Germanic Law. He underlines the organic<sup>86</sup> character of a corporation by referring to customs in that specific law. In his book *Das deutsche Genossenschaftsrecht* he referred to the former organisation of kinship groups (*Sippenverband*) as confraternities with a corporative character. Inspired by this structural organisation of kinship groups, von Gierke’s understanding of a corporation was a sociological one: the corporation, like a kinship group, was a social organism with individuals as acting organs within (Gierke 1887; Borchard 1926; French 1979). Yet most importantly, this form of organisation came into existence long before it was recognised by law and as such equipped with a fictitious personality. This way of organisation was prevalent only until municipal corporations came into existence and with it public authority (Gierke 1868). With the rise of municipal corporations the former focus on groups shifted to a focus on the rights and duties of individuals as practised under Roman Law (Weber 2010).

**The Corporation as Gesamtperson** In von Gierke’s *Genossenschaftstheorie* legal persons, like corporations, were not perceived as artificial individuals but seen as a number or collection of individuals establishing a ‘social organism’ (Gierke 1887). For von Gierke, a corporation was a *Gesamtperson*, a composition of individuals, or a “group person” as Maitland describes it.

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<sup>85</sup> In the ‘natural identity theory’ as described in Corporations Law in Australia there are similar elements to be found as in von Gierke’s theory: a corporation’s existence is derived from its being a “human product of human interaction and initiative”. A corporation as such exists prior to any law confirming its status. Second, its existence is to some extent independent from its members. The corporation is considered as a “group-person, which possesses its own group-will and has its won capacity for action”. (Tomasic et al. 2002, 59; Romano 1984, 930)

<sup>86</sup> Not to be confused with ‘organic’ in a biological sense. Von Gierke uses “Organ” and “organisch” (in English: body/organism, organic) in the context of organisation and organisational bodies within a corporation.

This concept is quite different from perceiving a corporation as a collective, as the latter merely reduces a number of different individuals to a unit, which in turn only presents another singular (Gierke 2002). A *Gesammperson* was not just the sum of all individual members within. The general assembly, accordingly all individual members of a corporation, was a corporate organ or body of an invisible 'person' behind (Gierke 1887).

The *Gesammperson* incorporated a 'community', a *Gemeinwesen*, with its own communal life and will (Gierke 1887). This communal will was unitary and permanent, as it was not determined by particular individuals. Furthermore, a *Gesammperson* consisted of several corporate organs or bodies. Through its organs the *Gesammperson* pursued its will (the unitary and permanent communal will) and corresponding actions within the given legal framework (ibid.). When an organ or body acted for the *Gesammperson* it outwardly presents the *Gesammperson* in a direct and unitary way (ibid.).

A corporate organ or body was neither a surrogate nor a mere agent for the *Gesammperson*. According to von Gierke's logic, his concept of a *Gesammperson* implied that every organ or body also inherited a part of the *Gemeinwesen*, the community. Hence, the actions pursued by an organ were consistent with the *Gesammperson's* will and envisaged action. Correspondingly, the whole *Gesammperson* was presented by a particular organ or part through which the unitary *Gemeinwille* became visible (Gierke 1887).

The *Gesammperson* is a hierarchical construct and involves the sub-ordination of organs or bodies under the unitary communal will. The organisation within is governed by an internal constitution (Gierke 1887). The distinctive aspect of von Gierke's concept is the co-existence of plurality and singularity. Von Gierke's concept includes relations between plurality (*Gesammperson* and organs, bodies) and singularity (individuals). Organs are not separated from the *Gesammperson*, neither are its individual members. Quite to the contrary, all individuals, organs or bodies are interdependent, thereby complementing the *Gesammperson's* totality (ibid.).

**Differences between Gesammperson and included Individuals** As von Gierke considered both plurality and singularity in his concept, he also distinguished different spheres of action. The general difference between an individual human being and a *Gesammperson* was that in the first case a *raison d'être* is naturally assumed while in the latter it must be first defined through law and corresponding rules (Gierke 1887). Both law and rules defined and restricted the purpose and actions or operations of a corporation (ibid.). Whereas legal norms were created around a human being's *raison d'être*, the purpose and sphere of action of a

corporation or *Gesammperson* were the subjects of the legal norm and not their impetus (ibid.). This implied that a corporation could only act within this sphere defined by law. An action outside this sphere or not compliant with the law was not legally effective implying that it could not be punished. This was completely different in the case of actions pursued by an individual human being. Here, any action was also recognised under law, and could be punished accordingly (ibid.).

When pursuing an action, any individual within a *Gesammperson* was only acting as an organ, and not in her individual capacity as a human being (Gierke 1887). An action by an individual which appeared to be performed in the context of employment was legally ascribed to the corporation or *Gesammperson* (ibid.). Yet, if an ascription was not possible, because the organ or body was not properly functioning, this action was then attributed to the individual in question. Hence, an individual action could still be legally relevant, and could indeed bear legal consequences even though the action could not be ascribed to the corporation (ibid.).

Here, a possible example could be an employee who performs actions at work, which are illegal and not related to any employment context. This action cannot be directly ascribed or attributed to the company, and the individual has to bear the consequences.<sup>87</sup>

To avoid a misunderstanding, in general an individual human being has similar rights before the law and can enter into contracts etc., as she is recognised as having a legal personality just like a corporation. Yet, in the context of von Gierke's *Gesammperson*, individual human beings do not act in their own capacity, but as an organ or body, at least as long as the act in question is performed within a *Gesammperson's* legally defined sphere.

**Gesammperson and Corporate Liability** As mentioned above, von Gierke's perception of a *Gesammperson's* liability is linked to a certain extent to the custom of kinship groups prevalent in Germany in the Middle Ages. The organisational structure of these groups required the collective or entire group to bear responsibility for individual misconduct (Borchard 1926). Therefore, for von Gierke, a *Gesammperson* was liable for culpable acts by individuals and organs acting within their scope of employment, or more precisely: the culpability of an individual acting organ corresponded with the *Gesammperson's*

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<sup>87</sup> At least according to von Gierke this action cannot be attributed or ascribed to the *Gesammperson*, as it was performed not within its the legal sphere.

culpability.<sup>88</sup>

As noted above, von Gierke's conception included that an acting organ always presented the communal will in its performance and it is only through the individual as acting organ or body alone that the will and envisaged action of a *Gesammperson* became visible to other parties, thereby constituting its legal presence.<sup>89</sup> Accordingly, this is not simply an issue of imputation. It is not even a matter of equation, as this implies there are indeed two different 'identities' to be equated, namely the acting individual and the *Gesammperson*. Rather, it must be considered as something happening simultaneously: The fault of an individual is *at the same time* the fault of the *Gesammperson*, as the individual or organ is a constituting and complementing part of it. Von Gierke obviously supported the idea of CCL as his concept entails the equation of individual fault of an acting organ with the culpability of a *Gesammperson*. Accordingly corporations can indeed be punished. However, he explicitly mentioned that convicting a corporation did not extricate individuals from liability (Gierke 1887).

**Summary of von Gierke's Concept** In brief, von Gierke's theory considered a *Gesammperson* as being capable of having a will and a potential for acting and therefore he ascribed personality to it. Yet, this personality is sociologically derived rather than legally derived. Von Gierke claimed that a *Gesammperson* already existed before it was properly recognised by law and equipped with certain rights. Its corporate personality had a pre-legal and real existence based on its structure as a group person or fellowship. There was no reason to invent a fictitious personality based on an artificially created individual. In order to constitute its legitimate presence it was no longer dependent on recognition by the state alone (cp. Derrico 1996). Von Gierke's concept also included the recognition of plurality and singularity. The concept of the *Gesammperson* took into account these different spheres of action. He clearly rejected artificially created simplicity by conflation and equation.

Another theory initially resembling von Gierke's perception of a company as a social organism with acting organs is the so-called 'organic theory'. However, in contrast to von

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<sup>88</sup> "[...] eine Gesammperson begeht diejenigen schuldhaften Handlungen und Unterlassungen, welche ein verfassungsmäßiges Organ als solches innerhalb seiner Zuständigkeit begeht." (Gierke 1887, 758)

<sup>89</sup> "[...] ein Stellvertreter mit einer derartigen Repräsentationsmacht wird zum „Organ“ [...]." (Gierke 1887, 753) and further (referring to civil servants): „[...] dass die Beamten, wenn und soweit sie eben als Organe fungieren, genau in derselben Weise wie Oberhäupter oder Versammlungen die wollende und handelnde Gesamtpersönlichkeit zur rechtlichen Erscheinung bringen." (Ibid., 760-761).

Gierke's sociologically derived theory above, this theory is equipped with a natural science-based perception: a corporation resembles the human body with employees symbolising the executive hands of an imaginary brain represented in turn by board and managers. In 1957 this perception was stated by Lord Denning<sup>90</sup> in the case of *HL Bolton (Engineering) Co. Ltd. v. TJ Graham & Sons Ltd* (Swarb.co.uk, n.d.).

#### 4.5 Corporate Liability in Practice

Generally, responsibility for criminal conduct within a company can be addressed in two ways: by attributing it to the individual only or to the corporation as a whole. Both ways include punitive measures. In the case of CCL, individual misconduct is attributed to the company, which then may lead to a conviction of the entire company (Pieth and Ivory 2012; De Maglie 2005).

In light of the previous case studies, a broader approach to business responsibility seems only feasible in a legal system that also includes corporate criminal liability. In a legal system where merely individual responsibility is recognised, broader business responsibility cannot be practiced, as there is no corporate or business entity responsible and punished for misconduct. Hence, a broader approach to business responsibility therefore requires a legal framework of corporate criminal liability or at least some other measure of corporate punishment, as individual and corporate liabilities complement each other. A corporation not recognised as responsible and indictable in the eyes of the law can neither be punished by the government nor by any private party.

In the context of business responsibility and the sanctioning of corporate crimes, it is vital to show the various possibilities available today. Generally, corporations can be held liable for misconduct in two ways: by imposing either criminal liability or civil liability. While the latter involves two civil parties (e.g. a corporation and some natural person) in a lawsuit focused on compensation or damages, criminal liability requires enforcement by the prosecution and involves punishment if convicted (Cornell University Law School, Tort n.d.;

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<sup>90</sup> Lord Denning's original statement in the case: "A company may in many ways likened to a human body. It has a brain and nerve centre which controls what it does. It also has hands which hold the tools and act in accordance with directions from the centre, Some of the people in the company are mere servants and agents who are nothing more than hands to do the work and cannot be said to represent the mind or will of the company, and control what it does. Others are directors and managers who represent the directing mind and will of the company, and control what it does". (Tomasic et al. 2002, 59).

Cornell University Law School, Civil n.d.; Cornell University Law School, Civil Procedure n.d.).

The main difference is that a criminal lawsuit results in punishment because of law violations and, as the respective regulations have been enacted by the state, the state correspondingly sues the offender. In contrast, a civil lawsuit does not involve punishment. Here, the injured party claims damages or compensation because of infringed property rights for example <sup>91</sup> by a corporation. However, sometimes criminal and civil proceedings are combined. Whether criminal law or civil law is more effective in terms of punishing corporate misconduct depends on the legal framework of the respective national jurisdiction.

Corporate liability has two strands: strict liability and vicarious liability. These are described in more detail in the next sections as they form the cornerstone of legislation and jurisdiction in the area of (criminal) liability of corporations. Examples of these two liability forms in practice will also be given at the end of that section

#### ***4.5.1 Liability Types***

**Strict Liability** Strict liability is applied in both tort law (also: civil law) and criminal law. It comprises cases of wrongful acts without “any accompanying intent or mental state” (Cornell University Law School, Strict Liability n.d.). In tort law, civil wrongdoings involving two individual civil or private parties are addressed. Tort law recognises three grounds for penalisation: intentionality (a wrongdoing committed with the clear intention to do so), gross negligence (a wrongdoing caused by for example severe carelessness or inattention) and strict liability (often applied in the context of product liability) (Cornell University Law School, Tort n.d.). It should be noted that intentionality and gross negligence could sometimes be hard to prove despite thorough investigation.

In contrast to tort law, criminal law always involves the government as principal plaintiff, which enforces the law against a person, natural or legal. The misdeed in question must be defined as a crime where a crime is “any act or omission (of an act) in violation of a public law forbidding or commanding it” (Cornell University Law School, Criminal Law n.d.). In order to convict criminal behaviour, prosecutors must prove that two conditions are met, a physical and a mental one. There must have been an act or omission in a physical sense, the

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<sup>91</sup> Property rights belong to private law and are therefore enforced in a civil lawsuit.

*actus reus*, and the person in question must have had a certain mental state of criminal intent, or a guilty mind, a *mens rea*, to perform the act or omission (Cornell University Law School, Criminal Law n.d.; Cornell University Law School, Actus Reus n.d.; Cornell University Law School, Mens Rea n.d.; The Free Dictionary online, Mens Rea n.d.). This corresponds with intentionality under tort law.

Criminal law also recognises strict liability. However, in practice the related offences are often merely regulatory offences, for example violation of health and safety regulations in a business context, and are strictly speaking not “crimes” as such (E-Lawresources, Strict Liability n.d.). Yet, in light of *actus reus* and *mens rea* as basic requirements for liability in criminal law, the application of strict liability is not uncontroversial. In criminal law strict liability can actually also be applied in cases of gross negligence or even if there is no proof of fault at all: “Strict liability in criminal law is a form of responsibility without culpability. If you are strictly liable for a criminal offense, you are punishable for the offense even if your conduct is not morally blameworthy” (Coleman 2015). Accordingly, under strict liability in criminal law it is no longer necessary to prove a *mens rea* (E-Lawresources, Strict Liability n.d.).

To sum up briefly, the difference between tort law and criminal law is that the latter requires proving *mens rea* to establish liability. This specific characteristic is only excluded when strict liability is used in criminal law, which is primarily applied in areas of regulatory offences.<sup>92</sup>

**Vicarious Liability and *Respondeat Superior*** The application of vicarious liability is only feasible in tort law, i.e. civil law. It is based on the idea that one person can be held liable for another person’s misdeeds, if there is a certain legal relationship between the two. While vicarious liability can be applied in any relation (for example gross negligence of parental control causing an infringement or an injury), *respondeat superior* is specifically applied in a context of employment. However, this doctrine only includes personnel standing in a direct relation to the company in the event of damage or loss, such as employees, as opposed to contractors (US Legal, Respondeat Superior Doctrine Law & Legal Definition n.d.). In a

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<sup>92</sup> Regulatory offences are not considered as “crimes” but as a “wrong” against the government. It is a “wrong” prohibited by statute and not by common law, which refers to case-by-case decisions made by a judge in court. In contrast to common law based on case law, statutory law is written law and refers to substantial laws issued by the government (Williams and Company 2004; The Free Dictionary online, Regulatory Offense n.d., Diffen n.d.)

business context this means an employer is responsible for the negligent acts of her employees. Accordingly, vicarious liability can be considered as “imputed negligence” (The Free Dictionary online, Vicarious Liability n.d.). Yet, this does not imply that the company in question is also the perpetrator or tortfeasor.<sup>93</sup>

Vicarious liability can be divided into strict vicarious liability and qualified vicarious liability. As with strict liability in general, strict vicarious liability is applied in cases even where a person is not culpable, or in the context of business, where a company already had preventive measures in place. Hence, a corporation is liable despite actions taken for prevention. This somewhat rigid approach is practiced in the US for instance. By contrast, the UK pursues an approach of qualified vicarious liability. This means, if a company can prove it actually had measures in place for prevention, which is called a “due diligence defence”, it can avoid liability (Pieth and Ivory 2011, 23).

Imputable negligence is characteristic for *respondeat superior*, which today is primarily applied in courts in the US. This is a common law doctrine originating from tort law first applied in England in the 17<sup>th</sup> century. Originally, it referred to a master-slave relationship, but today it is more generally based on a principal-agent relationship. Since the beginning of the 20<sup>th</sup> century, this relation has been re-defined in a context of work relations and is applied by US courts in the context of CCL. This development has led to a principal, i.e. the company, then being liable for negligent acts of its agent, i.e. the employee, if these occurred within the scope of employment (Cornell University Law School, *Respondeat Superior* n.d.; The Free Dictionary online, *Respondeat Superior* n.d.). Applying this specific form of vicarious liability in criminal proceedings also made it possible to criminally convict companies based on individual misdemeanour by employees.

A detailed definition of *respondeat superior* is given by Joseph Story in his book *Commentaries on the Law of Agency: As a Branch of Commercial and Maritime Jurisprudence, with Occasional Illustrations from the Civil and Foreign Law*, first published in 1839: “It is a general doctrine of law, that, although the principal is not ordinarily liable (though sometimes he is) in a criminal suit, for the acts or misdeeds of his agent, unless, indeed he has authorized or cooperated in these acts or misdeeds; yet, he is held liable to third persons in a civil suit for the frauds, deceits, concealments, misrepresentations, torts, negligences, and other malfeasances or misfeasances and omissions of duty of his agent in the

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<sup>93</sup> For more information on respondeat superior doctrine see Greenwood 2004.



course of his employment, although the principal did not authorize, or justify, or participate in, or, indeed, know of such misconduct, or even if he forbade them, or disapproved of them” (Story 1839). Story claims that this rule is the only way to guarantee safety to third parties.

#### ***4.5.2 Examples of Corporate (Criminal) Liability***

In the context of liability of corporations it is helpful to illuminate the various kinds of liability by some tangible examples. Strict liability in tort law is applied in cases of defective products, which is linked to product liability (Cornell University Law School, Products Liability n.d.). If a manufacturer has been aware of selling a defective product and sells it regardless thereof, the buyer, here the plaintiff can make a claim. This also explains the huge number of court proceedings in the US regarding defective cars, medical products with side effects, or products put on the market without a full description of all imaginable effects possibly occurring in the course of their use.

Strict liability in criminal law is applied when regulations have been infringed. This is defined as a regulatory offence, which includes pollution of air, soil and water, unlicensed activities, and violation of health and safety standards amongst others. Vicarious strict liability in tort law is applied for example in a case where someone slips on a wet ground because the cleaning staff has left behind a wet floor without putting up warning signs. The same is true of *respondeat superior*, which can be applied in employment-related cases only.

The US Federal court also uses the doctrine of *respondeat superior* in criminal proceedings. Here, the employer i.e. the whole company can be criminally convicted for the crimes of its employee, for example in the case of money laundering. This doctrine is the most common doctrine to convict corporations on a federal level (Kweddar 2010). Qualified vicarious liability in tort law as practised at UK courts offers companies the possibility to avoid liability for wrongful actions of its employees, if they can prove to have had precautionary measures in place. Taking the “wet floor” example from above, this could mean that a company is no longer liable if it can demonstrate that the cleaning staff had been trained on safety issues. However, qualified vicarious liability is only applied in courts in the UK, not in the US. The paragraph below concentrates on the US and the UK as front-runners of CCL.

### ***4.5.3 Corporate Criminal Liability at Court***

Let us now turn from the underlying theories that have influenced approaches in legislation and court decisions regarding a corporation's liability in the past to the actual and current practice of corporate criminal liability. As noted in the previous section on concepts, a corporation can only act through its employees. Correspondingly, it is only by their fault that a corporation can commit unlawful acts. Hence, it is important to examine which type of personnel actually induces an imputation of fault to the corporation in practice. Decentralised structures of organisations today increase the difficulty of identifying the actual cause and source of wrongdoings and of properly attributing responsibility and enforcing punishment (Pieth and Ivory 2012).

There are two main approaches to corporate criminal liability officially applied at court, namely 'vicarious liability' (in the sense of respondeat superior as recognised in criminal proceedings at US courts, see above) and 'identification liability' (or 'identification doctrine', 'identification theory'). Both are considered as a "derivative form of liability", which means liability caused by individual misconduct is imputed to the company (Colvin 1995, 2). They only differ regarding the scope of people "from whom liability may be imputed to the corporation" (ibid.). The 'identification liability' approach is based on the perception that only upper management personnel can be identified as the 'directing mind'<sup>94</sup> of a company and therefore as representatives of the company itself as opposed to regular employees.<sup>95</sup> Accordingly, this concept only acknowledges liability to be imputed to the company in a case of misconduct by upper management personnel (Colvin 1995). In contrast, 'vicarious liability' includes misconduct by all employees and agents acting within their scope of employment to be imputed to the company (ibid.).

From a historic perspective, these two approaches of imputation can be both linked to the modified version of Roman Law as presented in 'fiction theory' described above. Here, representatives act as surrogates for a distinct entity with a fictitious personhood, the

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<sup>94</sup> See Lord Denning's statement: "Others are directors and managers who represent the directing mind and will of the company, and control what it does." (Tomasic et al. 2002, 59)

<sup>95</sup> For example, the 'Corporate Manslaughter and Corporate Homicide Act 2007' in the UK is based on 'identification liability' ("CMCHA") (Legislation.gov.uk 2007).

corporation.<sup>96</sup> And, in turn, because representatives and corporation are distinct from one another, criminal liability can be only established through an act of imputation.<sup>97</sup>

However, these practices also have their weak points. While ‘vicarious liability’ includes all employees, ‘identification liability’ only recognises key personnel, accordingly upper management, to be relevant in the context of imputation. The wide range of personnel included in ‘vicarious liability’ leads to a major problem: the concept is simultaneously underinclusive and overinclusive. Underinclusiveness is induced by the requirement of identifiable individual fault for misconduct to be imputed to the company. If particular individuals cannot be identified as responsible, perhaps due to complicated and obscure corporate structures, the corporation is not considered liable though misconduct obviously happened (Colvin 1995, De Maglie 2005). The overinclusiveness on the other hand leads to a conviction of a corporation based on individual fault even where there is no corporate fault in the sense of negligence or a defective corporate culture (Colvin 1995). Hence, punishment of an entire corporation may be too severe.

In contrast, the concept of ‘identification liability’ is not considered as being overinclusive as it is clearly limited to a specific range of personnel able to induce corporate liability. However, by only including key personnel, this concept does not reflect the actual corporate conditions of increasingly used decentralised structures in the form of different sites and units of a MNC, complex matrix organisations in international groups and so on (Colvin 1995; De Maglie 2005). In sum, both concepts lack the link to culpability as both are too much focused on individual fault rather than on corporate fault (Colvin 1995). As the underlying notion of both vicarious and strict liability is derived from ‘fiction theory’, current requirements of reflecting complex corporate structures today are not met.

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<sup>96</sup> In his article *Corporate Criminal Liability* Pieth links ‘fiction theory’ with the concept of ‘identification liability’. Unfortunately, he confuses the process for imputation with elements linked to the ‘organic theory’ (‘limbs’ presenting regular employees, ‘brain’ presenting upper or senior management level). The association of different kinds of employees with naturalistic notions is actually rooted in ‘organic theory’ as the UK case of *HL Bolton (Engineering) Co. Ltd. v. TJ Graham & Sons Ltd.* Pieth quotes reveals (cp. Pieth and Ivory 2012; Tomasic et al. 2002)

<sup>97</sup> In contrast, ‘reality theory’ assumes that an employee’s fault is automatically also the fault of a corporation, since these two entities are intertwined. An employee acting as an organ of a corporation is at the same time acting as the corporation (Gierke 1887). Yet, it seems the underlying concept of ‘reality theory’ is not reflected in corporate criminal liability law today.

## 4.6 Corporate Criminal Liability in Comparison

By punishing corporations for misconduct the government officially acknowledges first that corporations are in some way capable of taking responsibility for actions, and second that corporate misconduct like criminal individual wrongdoing is a serious misdemeanour in the criminal sense, which needs to be effectively punished, including severe sanctions serving as preventive measures.

As there is no international court, which charges corporations for misconduct, this is handled by national courts. Many countries have already adopted legislation in terms of corporate criminal liability (CCL). Amongst these are many European countries and Commonwealth nations like the UK and Australia, as well as the US. These various national approaches differ in with respect to which types of organisations are considered capable of criminal liability, which offenses can be attributed to an organisation and what the requirements or criteria are for attributing responsibility (De Maglie 2005). However, legal conditions of CCL, decreed sanctions and the level of effectiveness of punishment vary substantially from country to country. Furthermore, the actual practice of CCL in a country determines its effectiveness in the end.

The following chapter describes the application of CCL in various national legal systems. This also brings to light the magnitude of the variation across countries which have recognised CCL. As CCL is handled only on a national level, effective punishment of crimes committed by global corporations is subjected to certain limitations. In addition, there may be practical constraints: it can be difficult for civil parties in the US for example to enforce claims against US corporations, as these corporations can usually afford the best lawyers to protect their interests effectively.

In this chapter, an overview of the current status of CCL in the US and the EU will be presented. As the US appears to have the most advanced approach to CCL, a more detailed presentation for the US will be given here. Next, different corporate criminal liability approaches implemented in member states of the European Union will be described. Subsequently, the liability of corporations in Germany will be discussed in particular to give a prominent example of corporate punishment in the absence of a CCL regime. Finally, the German example is compared with the CCL practice in the US with surprising results

### ***4.6.1 Corporate Criminal Liability in the United States***

In light of the previous case studies in chapter three, it is valuable to discuss the US legal system, as apart from HSBC, the other four companies concerned are all headquartered in the US. Moreover, the US implemented the punishment of corporations already more than 100 years ago. Accordingly, today their CCL approach is very comprehensive, which is also inspiring current reforms in the UK.

As the US history on prosecuting corporations goes back to the middle of the 19<sup>th</sup> century, accordingly, there are plenty of court cases and examples available. Since 2000, the US application of CCL has experienced more and more alterations. Therefore, it serves as a descriptive model to show how CCL is applied under a common law system.

In this section, the common law model is introduced and compared to the civil law system. Also, *respondeat superior*, a relevant doctrine in the context of corporate liability already discussed in the previous chapter is expounded further here. Next, the US prosecution of corporations in practice is described. In this context, two features, which appear to making procedures more effective, are outlined. This outline includes an introduction of the so-called ‘agreement’, and, as this feature has been induced by the US sentencing guidelines, a subsequent description thereof. The section closes with a short summary and a discussion of critical voices and alternatives.

#### ***4.6.1.1 The Common Law Model and Respondeat Superior***

When discussing corporate criminal liability it is necessary to take into consideration the underlying legal system. Like the UK, the US and other Commonwealth countries follow the legal tradition of common law (University of California at Berkeley n.d.). Common law has three discernible characteristics distinguishing it sharply from a civil law system: it is an adversarial-based system, it is based on case law, and it usually provides for a jury trial. Common law systems in contrast to civil law jurisdictions are not based on codified law. This means, a “comprehensive compilation of legal rules and statutes” does not exist (ibid.). It is a case law system based on judicial decisions or precedents, which are recorded. A judge decides a case at hand based on former decisions. Yet, regarding previous decisions, there is an obligation for lower courts to follow decisions by higher courts relevant in this case (New Zealand Ministry of Justice n.d.). A notable characteristic of this system is that it allows for

judges to actively shape current legislation and trends in law by deciding which precedent is to be applied.

With the common law jurisdiction comes the adversarial or adversary system applied in court. This is a binary system where the truth finding process is driven by a contest between two opposing parties. Prosecutor and defendant each represent their party's version and arguments in front of an impartial party, the judge and/or the jury (ibid.). During trial, the judge functions merely as a referee. Finally, either judge or jury decide whether the defendant is guilty and resolve upon the sentence. It is worth mentioning that the jury generally consists of laymen without any special legal training. However, in practice this procedure also entails the risk of truth being overshadowed by competition and the objective of each party to win the case at hand.

Another characteristic particular to the US legal system is the application of *respondeat superior*, a form of vicarious liability in tort law but here also applied in criminal law cases (Diskant 2008). As described in the previous chapter, this is actually a doctrine originating from tort law. Under this doctrine, corporations can be held liable for any tort committed by employees during the course of employment. Yet, even within the US system there is a different law practice regarding *respondeat superior* at state and federal levels respectively. Where federal law generally applies the principle of *respondeat superior* in civil as well as criminal cases, leaving aside the question of intent, which is actually crucial in criminal law, state law follows a tripartite approach. The Model Penal Code applied in state law comprises three courses of action: first, for crimes of intent, state law follows the English identification model; second, a kind of qualified vicarious responsibility can be applied; third, there is the broader federal approach of vicarious liability, *respondeat superior*, available (Wells 2001). However, it is noteworthy in this context that after the pivotal *New York Central R. Co. v. United States* case, *respondeat superior* is no longer applied in cases of corporate misconduct at the Supreme Court level. By contrast, it is still utilised very often at Federal Court level (Kwedat 2010).

#### **4.6.1.2 US Prosecution in Practice**

Taking action against corporate crimes requires an effective prosecution. In criminal proceedings in the US the prosecution has a great amount of discretionary power at its disposal. Yet, corporations also have powerful legal protection available during investigation phase and trial. This chapter aims to shed some light on the US practice of the prosecution of

corporations.

In criminal proceedings, the prosecution has two approaches available when it comes to punishing criminal corporate behaviour: conviction or agreement. Generally, in the US legal system, the police and investigative authorities handle investigations and the gathering of evidence. The prosecutor oversees and directs these processes, while the judge is rather in the background and has no active role at this stage of process (Diskant 2008). During the gathering of evidence, and also later, defendants are not obliged to cooperate with the investigators due to the US system's adversarial nature. If the defendant decides to cooperate with the prosecution, particularly in white-collar crimes, this co-operation process is usually accompanied by a whole squad of corporate attorneys (ibid.).

In lawsuits aimed at conviction, the corporation has privileged protective tools available to shield itself from thorough investigation. In the US, high and mid-level employees usually have a contract of indemnity with the corporation. This means, the corporation bears the costs of legal fees induced by criminal investigation of an individual employee's work conduct. This contract serves as a kind of "legal insurance" for the employee as the corporation protects her or him from investigation and prosecution (ibid.). Furthermore, there is the "attorney-client privilege", a juridical doctrine developed in 1915. This privilege shields the company from disclosure of any communication between attorney, in-house counsel or lawyer and corporate employees. If this privilege is asserted it is almost impossible for the prosecution to contact any individual employee without going through the attorney or in-house lawyer first (ibid.). The only exemptions here are fraud and money laundering (The Free Dictionary online, Attorney-Client Privilege n.d.). Moreover, defence attorneys can actively affect the trial by overseeing "the execution of search warrants and subpoenas" and by contesting "the admissibility of each piece of evidence thereby obtained." (Diskant 2008, 154).

In the following two sub-chapters, specific features of the US prosecution procedure are detailed to allow a judgement later on whether they can be effective tools when holding corporations criminally liable.

**Specific Features of the US system: Agreements** As noted above, the US approach to corporate criminal liability is very broad. In order to tackle certain difficulties linked to the

corporate world of crime today, such as decentralised corporate structures spanning around the globe, the identification of the individual offender, and the appropriate measure of punishment, the US legal system has some “tools” available. These features are characteristic for the US system and are not usually applied elsewhere (except for agreements described below, which are also applied in the UK). Amongst these are specific jury instructions like the ‘willful-blindness’ doctrine, the ‘collective knowledge’ doctrine and the patchwork verdict (Neumann Vu 2004). There is also the feature of agreements called Non-Prosecution Agreement (NPA) and Deferred-Prosecution Agreement (DPA), which can be considered as devices to bypass criminal conviction. In this section, agreements and their application are described in more detail.

Effective prosecution requires quick proceedings, prompt decisions and enforcement thereof without undue delay. However, cases of corporate misconduct can be complicated. Though there is obviously damage or loss, evidence is sometimes difficult to ascertain. For example, correctly identifying the perpetrator(s) involved, gathering all relevant evidence, or estimating the magnitude of the damage or loss can be difficult. To accelerate procedures and advance a prompt enforcement so-called ‘agreements’ are often applied. These may present a more efficient alternative to conviction.

The worst that could happen to a company after being criminally convicted is a meltdown. A prominent example of a conviction leading to a corporation’s meltdown is the former audit company Arthur Andersen. The company, which was involved as auditor in the Enron scandal (BBC News 2002), was accused of obstructing investigation by the destruction of relevant audit material of its major client. The consequences of the Arthur Andersen conviction in 2002 were devastating (Greenhouse 2005). After being criminally convicted the company could not pursue its business any further due to a complete loss of reputation. However, the consequences of the Andersen conviction have been obviously disturbing and criminal convictions of large companies have been curbed to avoid corporate meltdowns. As a consequence, this effect has led to alternative ways of making companies accountable and liable for corporate wrongdoing without involving criminal charges. Three procedural options shall be briefly discussed here: NPAs, DPAs and plea bargains.

The NPA and DPA are both considered as pre-trial diversions initiated by the responsible prosecutor and enforced by the US Department of Justice (DOJ) and the US Securities and Exchange Commission (SEC) (Washington Legal Foundation n.d.). Over the past few years, these agreements have gained official acceptance and are considered an effective middle way



between a rather limited civil enforcement and an over-detering conviction (Warin 2013). NPAs and DPAs mostly come into use in cases of fraud and corruption (for example, corporations bribing foreign government officials, which is considered a violation of the “Foreign Corrupt Practices Act” (FCPA) (ibid.; The United States Department of Justice n.d.). The NPA, which is only occasionally pursued, does not require a guilty plea by the company, criminal charges are not filed and the entire process is often rather informal. Here, an agreement is reached between the company, its lawyer and the US Attorney’s Office. In contrast, the more frequently applied DPA involves filing criminal charges and requires the company to waive “its right to indictment by a grand jury” (Washington Legal Foundation n.d., 1). In turn, the prosecution is deferred as long as the company is compliant with the conditions of the agreement. Usually, the prosecution is deferred for a period of one to three years. If the company has been fully compliant during that period, charges are then dropped.

Such agreements typically involve massive monetary fines, reformation of business operations and compliance with other conditions determined by the prosecutor, for instance waiving the valuable “attorney-client-privilege” and employee indemnification (ibid., 5). Additionally, implementing compliance mechanisms and strong compliance monitoring are also indispensable prerequisites for a later revocation (in the case of DPAs there is an option for revocation of conviction after a successful probation period).

NPAs and DPAs are considered by proponents as an ideal procedure to realise optimal deterrence while minimising collateral consequences that come with a normal conviction. Beyond monetary fines, which can be attained by conviction as well, disclosure to the prosecution of all relevant material, compliance enforcement and structural reforms of the company are usually significant positive consequences (Warin 2013). Furthermore, a DPA is used to facilitate the conviction of individual employees (Diskant 2008). Yet, opponents criticise that these agreements are nothing more than “a slap on the wrist” as the actual threat of conviction is eliminated (Elkan and Bohrer 2012). The intensity of punishment and deterrence is considered significantly lower in comparison to a conviction as the conduct is not labelled criminal (Corporate Crime Reporter 2013). It remains questionable whether these forms of agreement can prevent recidivism (Markoff 2013).

The third option without trial is the “plea bargain” or “plea agreement”. Also a kind of agreement, plea bargains still differ from DPA and NPA. In contrast to the other two agreements, the company in question pleads guilty but outside a regular court trial in order to benefit from the comparably favourable conditions and advantages already described in

connection with DPA and NPA (The Free Dictionary online, Plea Bargaining n.d.). However, as with DPA and NPA, the plea bargain opens the door for prosecution to enforce disclosure, compliance and reforms.

While DPAs, NPAs and plea bargains overlap in many ways, they differ primarily in one aspect: in a plea bargain, indictment is not entirely dismissed and the company is required to plead guilty (Diskant 2008). Yet, it remains an open question why the DPA is preferred by prosecution over a plea bargain and therewith too easily absolves corporations from criminal liability despite the same enforcement power (ibid.).

One possible explanation is that DPAs are easier to initiate since corporations are more cooperative if they do not have to plead guilty (Corporate Crime Reporter 2013). It is like a fast track for the prosecution to enforce and implement all necessary actions including a monetary fine without the effort of a time-consuming trial. Yet, all these actions could be feasible as well with a standard prosecution resulting in a conviction, sending a clear signal to the public that this behaviour is unacceptable and to be condemned. When there is a conviction, the corporation is forced to cooperate, as there is no choice left (ibid.).

In sum, after the Andersen downfall, there are now options to circumvent prosecution altogether. The latter development is due to modifications in the US Sentencing Guidelines, which shall be therefore outlined next.

**The US Federal Sentencing Guidelines for Organisations** As well as the agreements discussed in the section above, there are also the US Federal Sentencing Guidelines for Organisations (FSGO) promoting quick proceedings by certain guidelines. These have been modified particularly since the Andersen meltdown. As these guidelines play a crucial role in terms of corporate punishment, they are outlined here.

Issued in 1991, the FSGO Organizational Guidelines (chapter 8) have been pivotal in reshaping the US judicial system (Ethics Resource Center 2012). Of course, corporations were also punished before with punitive fines but these fines were not commensurate to the actual costs of damages the corporation had caused. Therefore, the FSGO were drafted to achieve an ‘optimal deterrence’ in the sense of a coherent and balanced approach to fines and punishment (ibid.; Markoff 2013). Accordingly, the FSGO are designed to foster prevention and deterrence. The US Sentencing Commission has set up a programme of seven steps for an effective compliance programme (Ethics Resource Center 2012). By focussing on compliance

and due diligence mechanisms in companies and taking these into account when it comes to indictment and conviction, the FSGO reward the implementation of preventive measures.

When it comes to a conviction, there is a 95 per cent reduction in fines, if the company is able to show it had implemented effective mechanism and agrees to cooperate with investigation by the government. Yet, fines are 80 per cent higher, if the company lacked effective compliance and was wilfully ignorant with regard to violations (ibid.). The idea behind this new approach by the US Sentencing Commission is that the implemented compliance mechanism should serve as a hedge against a few rogue employees violating the law and thereby inducing a case of corporate criminal liability (ibid.). However, this approach also led to a significant increase in convictions and penalties.

At the same time, due to the focus on incentivising cooperation with the government, a new form of handling corporate criminal liability was introduced: the agreement. The DPA and NPA described in the previous section were first used by the DOJ in 1993 (Ethics Resource Center 2012). Yet, over the first decade these agreements were only occasionally applied in contrast to the second decade after the year 2000 (Copland 2005). Suddenly, the use of DPAs and NPAs increased significantly after the Andersen downfall, while numbers peaked with 39 in 2007 and 40 in 2010.<sup>98</sup> The Enron and Andersen scandals at that time, in particular, induced modifications in juridical procedures and the FSGO. Modifications in juridical procedures enabled an increased use of DPAs and NPAs more than ever. The “Thompson Memo” by the then-Deputy Attorney General Larry Thompson was responsible for these changes. This memo was aimed at avoiding another public downfall such as Arthur Andersen. Hence, the Thompson recommendations explain how these developments then led to a significant increase in the use of DPAs and NPAs (Fiorelli and Tracey 2007).

Another series of modifications was implemented in 2008 and the latest amendments to the guidelines were made in 2010. However, some problems still persist today. Overall, the policies still lack consistency regarding a concrete configuration of an Effective Compliance and Ethics Program (ECEP) as mapped out by the US Sentencing Commission. Also, there is still no overall alignment with other federal agencies (according to a FSGO report there are at least 25 federal agencies) responsible for regulation and enforcement in terms of corporate conduct. Therefore, more transparency regarding an effective configuration and implementation and a stronger recognition of ECEP in trials are important issues for most

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<sup>98</sup> There were only a total of 17 cases of DPAs and NPAs together in the first decade, but from 2004 until the first half of 2012 there were 217 agreements (cp. Warin 2013)

companies (Ethics Resource Center 2012; Laufer 2006; Copland 2005).

Another important point is that the FSGO were also to include large companies. Yet, in the course of application more and more cases with large companies are solved via a pre-trial initiation of agreements. Accordingly, there is no trial where the FSGO could be applied, compliance programmes credited or fines reduced (Ethics Resource Center 2012). Instead, cases of large companies fall into a “non-transparent realm of prosecutorial discretion” by agreements between company and prosecutor without any institutional oversight (Copland 2005, 2, 9-10). Prosecutors in the United States are considered as having power and influence actually exceeding their competencies, as they “lack necessary business judgment” to proficiently intervene in company processes (ibid., 11). Due to limited capacities in court it is questionable whether a court involvement could substantially improve the current conditions (Ethics Resource Center 2012). Perhaps in the end there would be only more transparency at the expense of a time-efficient approach.

Criticism, for example by Laufer, points to the problem that this cooperative approach considering companies as partners when it comes to uncovering violations might result in a blame-shifting process scapegoating regular employees to shield senior management from responsibilities and preserve a company’s reputation.<sup>99</sup>

#### 4.6.1.3 Summary

To sum up, the US legal system seems to have some potential for conflict based on its adversarial nature and some other particularities as mentioned above. The adversarial characteristic implies a competition-based system. This system is thought to be fair and just, as two parties can present their arguments before an impartial judge. However, in practice this system leads to obstruction as each of the two competitive attorneys naturally tries to “win the battle” as success is measured by conviction rate (Diskant 2008, 159-60).

Another difficulty with this system is the prominent position of the prosecutor. The prosecutor is independent of the judge so she decides “when to bring charges”, what kind of charges and whether to offer alternatives like a plea bargain or other agreements (ibid., 160). Therefore, the law enforcement itself lies in the hands of the prosecutor, leaving much room for discretion. The prosecutor fulfils three functions: she participates in investigations, is thought to impartially judge the facts and to pursue charges. Here, adjudicative and

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<sup>99</sup> This phenomenon is also described as reversed whistle blowing (RWB) (cp. Laufer 2006).

prosecutorial functions are not clearly divided which presents a potential for conflicts as it challenges a prosecutor's actual impartiality (Mosteller 2011). Besides these conflicts related to the system in general, there is even more conflict potential in the some of the specific features of the US juridical system, like particular privileges, agreements<sup>100</sup> and certain jury instructions. Though corporations are criminally liable in the US, convictions imposed on corporations involve the risk of a company's downfall, as was the case with Arthur Andersen. Yet, a detailed study by Markoff<sup>101</sup> refutes the phenomenon of a corporation's downfall after conviction. Markoff argues that only companies from specific industries, like financial services, the drug industry and health care services as well as the consulting business, are particularly exposed to this risk. All these industries are either dependant on co-operation with the government, like for instance for licensing, or their most important asset is their reputation as with the financial and consulting industry (Markoff 2013; Copland 2005). Accordingly, convicting a large company of one of these industries not only leads to a strong public attention, but also to a stigma diminishing or even wiping out a company's reputation.

Application of NPAs and DPAs has increased sharply over the last ten years, confirming that the DOJ considers this application as an alternative to a conviction, and even to plea agreement, which includes a conviction without trial. It also remains an open question whether the increased application of agreements leads to better results with regard to the prevention of corporate misconduct in the first place. Laufer also claims that these recent developments stifle substantial reforms in the US legal system.<sup>102</sup> Nevertheless, it is worth noting that convicting or penalising a company under corporate criminal liability does not discharge individual employees from responsibility and charges. In a trial, company and employee can be co-defendants, which means one party can plead guilty in order to co-operate with the government (Diskant 2008).

#### 4.6.1.4 Critique and Alternatives

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<sup>100</sup> Though the UK introduced the DPA in April 2013 it is not comparable to the DPA and its practice and conditions in the USA. Both countries have a common law regime but their systems differ in substantial ways (cp. Rogersahota.com 2012).

<sup>101</sup> See Markoff's "Core Business Modell" (cp. Markoff 2013).

<sup>102</sup> "We read about plea agreements and wonder what connects corporate liability and blame with these creative diversions from the criminal justice system. With mixed goals, liability rules are tied to penal objectives and functions that are so varied, so mutable, as to be incidental and generally unimportant. This makes the connection between the sources of liability and the value of punishment so muddled that the only thing maximized is discretion. The commitment to mixed goals also makes the possibility of law reform that much more unlikely." (Laufer 2006, 196).

There are voices in the world of academia urging a change or reform of the current system. In light of criticism and possible alternatives, the following issues will be discussed: overly discretionary powers of the prosecution together with the adversarial system in general, civil liability as an alternative to criminal punishment, and the currently excessive use of agreements.

Robert P. Mosteller, for example, urges for a reform. As described above, in the US system the adjudicative branch is not clearly separated from the prosecutorial one. Among the prosecutor's tasks are not only gathering information, but also the evaluation thereof and later the decision on charges. In comparison to inquisitorial systems there is, according to Mosteller (2011), too much power and discretion in the hands of the prosecution, thereby disregarding the principle of separation of powers. It must be stressed that in an inquisitorial system the judge supervises the information-gathering process and also makes the charging decision (The Free Dictionary online, Inquisitorial System n.d.). Mosteller (2011) doubts that a prosecutor making the charging decision is also able to neutrally gather all relevant information and to impartially judge the facts at hand. He considers the inquisitorial system more neutral in terms of fact evaluation and with regards to the procedures at trial. The inquisitorial system provides a results-oriented approach as it aims to impartially discover all relevant information prior to the trial. There are no two competitive parties pitting against each other in the discovery of truth (ibid.). Therefore, he argues for a clear separation of the adjudicative branch from the prosecutorial one. Furthermore, the focus prior to and during the trial should be rather placed on impartially compiling all relevant evidence, and making this available to all parties for a transparent and fair trial as opposed to competition, which blurs the truth instead.

There are also arguments for a change from recent developments like agreements and criminal conviction to civil liability of corporations, complemented by individual liability. Khanna and Copland are for example proponents of this approach. The question of whether criminal sanctions are the most efficient, which means to deter corporations from wrongdoing, has been debated ever since the Andersen downfall. For some proponents of alternative strategies, criminal sanctions are usually too powerful and lead to over-deterrence, meaning "too much regulation and criminalization" (Khanna 2004, 133). Too many resources are spent on increased monitoring and compliance mechanisms. As well as this, if it comes to a conviction a corporation's reputation is at risk. A stigma induced by a conviction only leads to increased transaction costs (Beale and Safwat 2005). Yet, for other proponents of

alternatives, the current strategy is considered as not deterrent enough, because corporations can still lobby in favour of more leniency, they have procedural protections during criminal trials, and criminal penalties are usually lower than civil penalties (*ibid.*).

Khanna, on the other hand, advocates a stronger focus on civil liability, as criminal proceedings are, according to him, more cost-intensive due to procedural protections. Furthermore, it is society which usually bears “the higher sanctioning costs of stigma penalties” (Khanna 1996, 1533). Apart from that, civil liability offers the same consequences as criminal liability does: imposition of cash fines and other supplementary sanctions. However, according to Khanna, effectiveness could be further enhanced by modelling all relevant functions available in criminal proceedings into civil proceedings (*ibid.*). First steps have been already taken by improving civil investigative demand (CID). In addition, for more efficiency in terms of costs and capacities the same judge hearing a civil case against a company should be also entrusted with criminal cases against individuals related to that case (*ibid.*). Khanna (2004) also sees stronger enforcement options in civil proceedings as both government agencies and private litigants are involved in contrast to criminal proceedings, which are only enforced by DOJ. Penalties can reach higher levels too, since private litigants can claim and enforce compensatory damages of amounts different to regular punitive fines by the government (*ibid.*).

In opposition to this, Beale (2009) claims that harsh sanctions are a basic characteristic of the US legal system. It seems that for her civil liability is not an option. Beale is convinced that criminal liability sends a stronger message to the public, and thereby clearly condemns corporate wrongdoing. A civil trial may only be perceived as a right to wrongdoing, which can be purchased (Beale and Safwat, 2005). Furthermore, as more and more European states are adopting the approach of corporate criminal liability, though different from the US approach, it can be hardly considered as out-dated. Quite to the contrary, these developments in Europe can be seen as acknowledging the economic power corporations can exert (Beale 2009). However, Beale considers a criminal indictment as inappropriate and excessive if there are only one or a few rogue employees exploiting corporate structures for their own benefits (*ibid.*).

Another critique is brought forth by Copland and Markoff, who are both critical of the somewhat excessive application of agreements. According to Copland (2005), a constant, rigorous documentation and evaluation regarding costs and benefits is required to substantially increase transparency regarding the application of NPAs and DPAs. He also

claims it is vital to build a coherent national framework providing guidance when pursuing an agreement and to give increased attention to pre-existing compliance programmes when deciding on the conditions of an agreement. Furthermore, he strongly suggests involving judges in this procedure to limit prosecutorial discretion. However, more generally Copland (2005) advocates a more restricted use of NPAs and DPAs in the future and instead endorses civil liability combined with a regulatory approach, which according to him also benefits the economy.

Markoff (2013), like Copland, has criticised the excessive use of NPAs and DPAs. However, in contrast, he claims the same effects can be achieved by either a plea bargain or a regular conviction, e.g. compliance requirements. Moreover, he has concluded that a corporation's core business is not affected by convictions. Instead of DPAs, the DOJ should foster plea agreements, which also involve a conviction but are more efficient compared to criminal proceedings involving a trial in terms of costs and judicial capacities. Also, the DOJ should consider the 'core business model' when deciding on whether to pursue an agreement or initiating a trial. With these guidelines at hand, according to Markoff (2013), there is no longer an excuse for an excessive use of DPAs and NPAs.

#### ***4.6.2 Corporate Criminal Liability in the European Union***

After presenting the US approach to corporate criminal liability, the handling of corporate wrongdoing by the EU and its member states is now expounded. This section starts with some introductory remarks on the functioning of the EU in general. The strategy by the EU institutions is then outlined with respect to the handling of corporate wrongdoing. Thereafter, the approaches by the various EU member states will be explained, followed by a short summary. After this, the extent of corporate liability in Germany will be described in more detail to better illustrate the shortcomings of imposing administrative fines only. Finally, a comparison will be made between the German and the US approach to corporate liability. This comparison also highlights the advantages and disadvantages of the two legal systems, civil law and common law.

In the European Union, as it consists of a number of sovereign states, there is no universal approach to corporate criminal liability. There is also no EU criminal code, as generally all criminal affairs are managed by the member states. In terms of legislation, the European



Union follows a tripartite approach: this involves exercising exclusive competence in certain fields, sharing competence together with the member state(s) in question in a number of other areas, or by merely being supportive. Exclusive competence is exercised in fields linked with the EU internal market, like for example rules of competition (Borchard 2010).

Shared competence concerns domains relevant for economic, social and territorial cohesion where the EU competence creates added value for the member states in sectors such as agriculture, environment, transport and energy supply, and security and justice amongst others (ibid.). Here, the EU co-regulates these sectors together with the member states. This means, the domains named above are partially regulated by the EU through mandatory regulations, and by the member states through a complementing national regulation of these domains. In some areas, the EU only coordinates or complements national legislation. Regulating these areas is exclusively the responsibility of the member states. Here, the EU cannot aim for any harmonisation, as the EU member states themselves are responsible for drafting and enacting national legislation. This considerable administrative discretion by the member states applies to domains like healthcare policy, national culture, tourism, and education (ibid.).

Generally, EU law functions via regulation, directives and decisions. Regulations are directly imposed on national governments, while directives are addressed to national authorities for implementation in their respective national legislation. Decisions only apply in specific cases.

#### **4.6.2.1 EU Criminal Law**

To centrally protect EU-wide financial interests the *Corpus Juris* was first drafted in 1997, and subsequently revised in 2000. The latest version of the *Corpus Juris* comprises eight offences. These are namely fraud, market-rigging, money-laundering and receiving laundered money, conspiracy, corruption, misappropriation of community funds, abuse of office with regard to managing community funds, and disclosure of secrets related to an office held (European Commission 2000).

Investigation is handled by the European prosecution (EPP) consisting of an Attorney General and attorneys from all member states of the EU, with the power of investigating all over the EU. Hence, the *Corpus Juris* is not based on a co-operation between states but

represents an approach on the EU-level by EU-warrants and investigations covering all member states. Yet, as the respective national court decides on the verdict, a transfer of the suspect(s) in question is required to the responsible national (ibid.).

Under the assumption that there are enough investigators, the advantage of this centrally organised investigation is certainly time efficiency, as there no coordination with other concerned national governments is necessary. Also, information is collected centrally and not dispersed among several offices in the European Union. However, the *Corpus Juris* cannot be considered as a comprehensive EU criminal law system. In 1999, OLAF, the European Anti-Fraud Office was established which addressed these interests and accordingly overtook the latest draft (European Commission, Anti-Fraud n.d.).

#### 4.6.2.2 EU Policies and Regulations

As noted above, regulation in some areas can be also enacted directly and exclusively by the EU. In this section, EU regulations and directives relevant in the context of corporate (criminal) liability will be presented. These illustrate which particular areas concerning corporate liability are regulated by an over-arching approach imposed on all member states. The following areas of regulation and policies are particularly important here and are further detailed below: competition policy, prevention of the financing of terror (money laundering), policies against fraud and corruption, prevention of tax evasion, policies for the protection of the environment, consumers and health, and employment policies (EUR-Lex 2002; EUR-Lex 2003; EUR-Lex 2006a; EUR-Lex, Consumer Safety n.d.; EUR-Lex, Employment and social policy n.d.).

**White-Collar Crimes** Competition policy, a regulation, serves as a measure to regulate the EU internal market. Monopolizing and other anti-competitive behaviour distort the regular functioning of the market in favour of only a few companies and therefore need to be restricted by appropriate law (EUR-Lex 2010b, cp. Article 101, 102).<sup>103</sup> The EU also fights against organised and financial crimes<sup>104</sup> by addressing national governments to implement

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<sup>103</sup> Formerly, this was the Council Regulation (EC) No 1/2003 (EUR-Lex 2002b). This regulation referred to the former articles 81 and 82 of the EC Treaty. The updated version is now to be found in the Consolidated Version of the Treaty of the European Union, p.88-89, Articles 101, 102. This regulation was amended partially in 2004 and 2006 (EUR-Lex 2010b).

<sup>104</sup> For a definition of financial crimes see International Money Fund 2001.

certain directives (EUR-Lex, Justice, Freedom and Security n.d.). Some of these have already been adopted by the member states and are in force.<sup>105</sup> Amongst these are laws to prevent money laundering (usually in connection with measures against the financing of terrorism), financial fraud and bribery amongst others (EUR-Lex 2005). In contrast, tax evasion and avoidance are handled through a regulation (EUR-Lex 2010c; EUR-Lex 2012).<sup>106</sup> Furthermore, the EU combats fraud by fighting corruption<sup>107</sup> based on directives and with specific legislation for the private sector (EUR-Lex 2003a; EUR-Lex, Fight against fraud n.d.; EUR-Lex 2003b). An institution which specialises in fraud investigation and the development of policies on EU level regarding the misuse of EU budgets and funds, the European Anti-Fraud Office (OLAF), was set up in 1999 (European Commission, European Anti-Fraud Office, OLAF). Generally, crimes like money laundering, fraud and corruption are also fought against on EU level with the help of OLAF, Europol and Eurojust (EUR-Lex, European Anti-Fraud Office (OLAF) n.d.; EUR-Lex, European Police Office – Europol n.d.; EUR-Lex 2002a).

**Environmental Crimes** In the area of environmental protection the EU pursues a two-fold approach: the environment is protected through criminal law and through directives of a regulative kind. Two EU directives are associated with criminal law. The EU directive of November 2008 prohibits, among other things, unlawful emissions into water, air or soil, disposal of waste, plant activities substantially damaging the environment, and damaging protected habitats (EUR-Lex 2008b). A directive from September 2005, then amended by another directive in November 2009, deals with maritime pollution caused by vessels (EUR-Lex 2009b). Further directives and regulations concern the following fields: soil protection and proper waste management (e.g. waste disposal and waste handling), the safeguarding of a

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<sup>105</sup> Several legal measures regarding confiscation and recovery of assets linked to financial crime came into force between 2001 and 2007. These are Council Framework Decision 2001/500/JHA; Council Framework Decision 2003/577/JHA; Council Framework Decision 2005/212/JHA; Council Framework Decision 2006/783/JHA; Council Decision 2007/845/JHA (European Commission, Confiscation and Asset recovery, n.d.). Measures to reduce the risk of corporate and financial malpractice have not been adopted yet but communicated, see COM (2008) 766 and COM (2004) 611 (EUR-Lex 2008a, EUR-Lex 2004a).

<sup>106</sup> Furthermore, the EU Commission envisages a coordinated strategy to prevent tax evasion and fight fiscal fraud. A communication on this was made in 2006 but no specific legislation has yet been adopted, see COM (2006) 254 (EUR-Lex 2006a). See further Consolidated Version of the Treaty of the European Union, p.181, Article 310 §6 and p.189 §1-5 (EUR-Lex 2010b).

<sup>107</sup> Currently there are two decisions in force presenting the basis of the EU's efforts regarding the fight of corruption. The first deals with the corruption of officials, the second one serves the protection of the EU's financial interests: Council Act 97/C 195/01 and Council Act 95/C 316/03 ((EUR-Lex 1997; EUR-Lex 1995). Furthermore, there are two communication documents by the European Commission regarding a strengthening of the actual efforts, which also include a future anti-corruption policy: COM (2011) 308 and COM (2003) 317 (EUR-Lex 2011; EU-Lex 2003b).

certain air and water quality (e.g. air emission ceilings for pollutants, industrial emissions, pollution prevention and control or water protection), and the protection of biodiversity and nature (cp. EUR-Lex, Air Pollution n.d.; EUR-Lex, Water Protection and Management n.d.; EUR-Lex, Waste Management n.d.; EUR-Lex, Protection of Nature and Biodiversity n.d.; EUR-Lex, Soil Protection n.d.).

**Consumer Protection** The rights of consumers in the European Union are recognised and protected in many ways (cp. EUR-Lex, Consumers n.d.). First, consumers are protected from “unfair commercial practices” like “misleading practices” and “aggressive commercial practices”. While “misleading practices” are considered as deceiving the consumer based on false information, such as advertisements presented in a misleading or comparative way, “aggressive commercial practices” are seen as seriously affecting the consumer’s freedom to make transactional decisions (EUR-Lex 2005b; EUR-Lex 2006c). Product safety and the general safety of food and feed circulating in the EU to ensure the consumer’s health and safety is regulated by another EU directive issued on 3<sup>rd</sup> December 2001 and an EU regulation from 28<sup>th</sup> January 2002 (EUR-Lex, Consumer Safety n.d.; EUR-Lex 2001; EUR-Lex 2002c). Furthermore, the EU has issued several regulations regarding the labelling and packaging of food stuff, among these are directives concerning certain labelling standards, the specific labelling of GMOs (genetically modified organisms) contained in the product, and the declaration of added vitamins and other substances to food stuffs (EUR-Lex, Product labelling and packaging n.d.; EUR-Lex 2000b; EUR-Lex 2003c; EUR-Lex 2006d). To ensure cooperation between the member states regarding matters of consumer’s safety, a EU regulation was adopted in 2004 (EUR-Lex 2004b). Product liability by producers in the EU in the case of defective products had first been regulated by a directive from 1985, which was amended by another regulation adopted in 1999 (EUR-Lex 1985; EUR-Lex 1999).

**Fair Working Conditions** The employment and social policies adopted by the European Union are also relevant in a business context. In order to tackle discrimination and ensure an equal treatment of persons in an occupational context, the EU has released directives dealing with “equal treatment of individuals in the European Union, regardless of their religion or belief, disability, age or sexual orientation“, as well as directives dealing with gender equality and the combatting of discrimination based on ethnic or racial origin (EUR-Lex 2000c; EUR-Lex 2006b; EUR-Lex 2000a). Furthermore, the rights of peoples with disabilities are protected by a EU Council Decision from 2009 in accordance with the United Nations Convention (EUR-Lex 2009a). Regulations and directives to ensure health and safety at work

are also in place (EUR-Lex 2007). Lastly, great importance is attached to respecting human rights. In the EU Treaty and the Charter of Fundamental Rights of the European Union the principles of human rights are stated accordingly (EUR-Lex 2010b; EUR-Lex 2010a).

#### 4.6.2.3 Summary

Up to today not every principle of the Treaty has been put into practice. Some overarching EU regulations, directives and decisions in certain areas have not been put forward yet, for example those regarding tax evasion or the systematic implementation of the Human Rights. The EU is striving to communicate and implement more and more principles to be realised in joint efforts with the member states. Generally, EU legislation may create the impression of a very balanced approach by also including the member states in some areas, and even allowing them full discretion in other areas. However, a major obstacle to the implementation of overarching EU rules regarding corporate liability is first, the lack of options to harmonise the national approaches to corporate criminal liability, as these fall into legislative areas the EU does not touch. The second obstacle is the broad diversity among member states due to their history, national size, and population. Furthermore, the present stage of development, the quality of control systems in place, and the control ambition as such vary from country to country.<sup>108</sup> Finally, member states may vary in ascribing importance and priority to sectors like agriculture, industry, service industry, and the finance industry.

Furthermore, it needs to be stressed that enactment of regulation by the EU institutions often takes a long time. This is due to the fact that sometimes member states are unable to agree unanimously on the drafts proposed. These drafts are also frequently influenced by lobbying groups on EU level, and efforts by the EU regarding new effective regulations are often deliberately slowed down by these groups.<sup>109</sup> Moreover, apart from a few EU investigative authorities like OLAF or Europol, there are no other authorities for example investigating and dealing with transnational infringements like food scandals. This listing is far from exhaustive; only a few issues have been picked up for a better illustration of the EU's shortcomings.

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<sup>108</sup> There are sometimes enormous differences between the member states. This becomes quite evident in the case of corruption. While ten EU member states (Denmark, Finland, Sweden, the Netherlands, Germany, UK, Belgium, Austria and Ireland) belong to the top 20 states listed by the Transparency International Corruption Perceptions Index, other countries like Slovakia and Croatia (both 50), Czech Republic (37), Romania and Greece (both 58), Italy (61) are lagging far behind (Transparency International 2015).

<sup>109</sup> For an example see EU REACH, discussed in chapter 6 in the section on Corporate Power.

#### 4.6.2.4 Corporate Criminal Liability in the Member States

As of today, the European Union has 28 member states with Croatia being the latest to accede to the EU on 1<sup>st</sup> July 2013 (European Union, Croatia n.d.). As described above, some legislation is directly drafted and enacted by EU institutions while other legislation needs to be implemented by the member states. There are also particular EU regulations in place to harmonise efforts in specific areas relevant in terms of cohesion. Yet, criminal law presents an exemption. Currently, the EU has no ambition to harmonise the criminal law of its member states, as one of the main premises of the EU is member state sovereignty. Neither is an adoption of a universal EU criminal code planned. Hence, as long as the member states are sovereign, any approach to harmonisation is difficult to accomplish. The principle of state sovereignty also brings about fundamental differences in the area of criminal liability of corporations. As national standards in criminal law vary from country to country, the situation of corporate criminal liability in the EU resembles a patchwork. Sanctions imposed in the respective member states differ with regard to what kind of misconduct is punished, who will be punished and how punishment is imposed.

Altogether, four different approaches practised by member states on how to deal with corporate wrongdoing can be identified: an approach where only individuals are prosecuted, a regulatory or quasi-criminal approach, a list-based approach to corporate criminal liability and an all-crimes approach. However, the approaches to corporate criminal liability in the EU are different from the US model, as almost all of these are based on a civil law system with statutory law, except for the UK.

**No Corporate (Criminal) Liability** There are only two member states within the European Union not prosecuting corporations in any way in cases of corporate wrongdoing: Bulgaria and Greece (Allens Arthur Robinson 2008; Allen and Overy 2012). Corporate fault is not recognised in either of these countries and therefore a company is not sanctioned in any way (Lex Mundi 2012).

**Quasi-Criminal Liability of Corporations** This approach is pursued by the EU countries Germany, Latvia, and Slovakia (Bohuslav 2011; Parker and Szabo 2011). These countries follow a regulatory approach when it comes to corporate wrongdoing. Accordingly, corporations are not criminally punished or convicted, but only charged with capped monetary fines or other sanctions like liquidation, forfeiture of rights, or confiscation of money and assets (Lex Mundi 2012; Bohuslav 2011; Clifford Chance 2012). Fines vary from

a maximum of €1 million in Germany, €1.66 million in Slovakia to a fine not exceeding 30% of the transaction value in Latvia (Clifford Chance 2012; Bohuslav 2011; Lex Mundi, 2012).

**List-Based Approach to Corporate Criminal Liability** A list-based approach in terms of criminal liability of corporations is pursued by ten of 28 member states, namely the Czech Republic, Estonia, Finland, Italy, Lithuania, Malta, Poland, Portugal, Slovenia and Spain. This approach implies that a corporation can be indicted based on certain pre-defined offences only (Ginter 2009; Grech 2006; Bohuslav 2011; Jakulin n.d.; Lex Mundi 2012; Clifford Chance 2012). Yet, these lists including certain crimes can vary from country to country, as there is no universal standard. Furthermore, national approaches vary regarding the specific requirements for imputation to the corporation in terms of context and the type of personnel involved. Last but not least, the magnitude of fines imposed also varies significantly.

While the scope of pre-defined offences varies from state to state there are certain offences prosecuted by a majority of member states following this approach. Amongst these are corruption (except for Estonia and Lithuania), various types of fraud, such as fraudulent accounting (Czech Republic), subsidy fraud (Estonia), trade fraud (Italy) and money laundering. Furthermore, bribery is prosecuted in Finland, Malta, Estonia, Lithuania, Poland and Slovenia. Involvement of corporations in any kind of organised crime are only punished in the Czech Republic and Malta, while human trafficking is only an issue in the Czech Republic and Portugal. Counterfeiting is prosecuted in Italy, Poland and Portugal. A quite interesting and noteworthy development is that some member states also criminally punish environmental crimes, such as pollution of soil, air and water. The Czech Republic, Estonia, Finland, Malta, Poland and Spain, accordingly the majority of the ten, are active in prosecuting this kind of violation (Ginter 2009; Abela 2012; Clifford Chance 2012; Lex Mundi 2012).

It is not only the offences punished which vary from state to state but also the liability requirements. A clear requirement for holding a company liable in all EU states with a list-based approach is that the offence in question was committed in the interest, to the benefit or on behalf of the company (Ginter 2009; Grech 2006; Jakulin n.d.; Lex Mundi 2012; Clifford Chance 2012). States like Czech Republic and Finland also require that the offence in question was committed in a context of professional activities related to the company or in a

context of employment (Clifford Chance 2012; Lex Mundi 2012). However, the scope of personnel inducing liability for a company is in some states limited to upper and senior management. In cases of corporate criminal liability, states like Estonia, Malta, Lithuania, Poland, and Slovenia exclusively apply the ‘identification doctrine’, while Finland follows a hybrid model of ‘identification doctrine’ in combination with vicarious liability in cases of negligence and ‘anonymous liability’ if the individual offender cannot be identified (Ginter 2009; Grech 2006; Jakulin n.d.; Lex Mundi 2012; Clifford Chance 2012).

When it comes to punishment, all EU states impose fines; however, these vary from a maximum of EUR 850,000 imposed in Finland, to fines ranging between EUR 1 million and €2 million in Italy<sup>110</sup>, Lithuania, Poland, Portugal and Slovenia, and a maximum of €16 million in Estonia (Ginter 2009; Grech 2006; Bohuslav 2011; Jakulin n.d.; Lex Mundi 2012).<sup>111</sup>The most common sanctions are liquidation or dissolution, which are applied by all states except for Italy, Malta and Poland (Ginter 2009; Jakulin n.d.; Lex Mundi 2012; Clifford Chance 2012). Additionally, in Italy, Lithuania and Poland a company sentence is made public (Lex Mundi 2012; Clifford Chance 2012).

This overview is not exhaustive but highlights that the list-based approach has a very broad variety in terms of offences considered as punishable by the member states. In the light of these substantial variations, the question arises as to whether an approach to a EU-wide harmonisation makes sense, and how long it will take to achieve harmonisation. This harmonised approach needs to include at least some specific crimes combined with the most common punishment practices, and a standardisation with regard to monetary penalties.

**All-Crimes Approach to Corporate Criminal Liability** An all-crimes approach in terms of criminal liability of corporations is pursued by thirteen of the 28 member states, namely Austria, Belgium, Croatia, Cyprus, Denmark, France, Hungary, Ireland, Luxembourg, the Netherlands, Romania, Sweden and the UK (Lex Mundi 2012; Clifford Chance 2012; Nuutila 2012). These countries have implemented a corporate criminal liability regime, which does not distinguish between the scope of crimes of natural and legal persons. However, as with

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<sup>110</sup> In the case of Italy Clifford Chance (2012) mentions a maximum penalty of €1.549 million, while LexMundi (2012) states EUR 500,000.

<sup>111</sup> Malta only seizes proceeds of benefits gained from illegal corporate actions. No information is available on the Czech Republic and Spain.



the list-based approach, there are variations with regard to the magnitude of fines imposed<sup>112</sup>, and the requirements for imputation.

Although companies can be prosecuted for the same crimes as natural persons, the scope of requirements inducing company liability differs significantly among the member states. The broadest approach to company liability is pursued by countries like Belgium, Denmark, the Netherlands, Romania and Sweden. Criminal liability of a company can be induced by an offence committed by any employee regardless of hierarchy. The only requirement is that the offence is connected to (the exercise of) business relevant activities and occurred within the working environment or was committed within an employment scope.

While some countries do not include *mens rea* as a requirement for establishing company liability, like Belgium and Denmark, implying that ‘strict liability’ is applied, other countries like Sweden and the Netherlands do not embrace this form of liability (Clifford Chance 2012; Lex Mundi 2012). Romania on the other hand applies ‘general liability’ invoked through the management body’s knowledge, consent or even encouragement of individual wrongdoing linked to the company in question (Lex Mundi 2012). Charging a company with a monetary penalty is a common approach in all countries just mentioned. While Belgium, Denmark, the Netherlands and Romania also provide for other sanctions such as confiscation and forfeiture of assets, prohibition with regards to conducting specific activities, or even dissolution of the enterprise, Sweden only makes use of fines. The size of the fines varies substantially from country to country<sup>113</sup> with the lowest maximum penalty of EUR 58,000 in Sweden, EUR 606,000 in Romania, EUR 760,000 per offence in the Netherlands and even no limits in Denmark (Lex Mundi 2012; Clifford Chance 2012).

A more restricted approach to corporate criminal liability is pursued by countries formerly belonging to the British Commonwealth of Nations, like Cyprus, Ireland and the UK as well as by Luxembourg and France. When it comes to punishing corporate wrongdoing, these countries apply the ‘identification doctrine’ (Carolan 2011). Liability requirements are similar to those already presented further above: torts in question must have been committed in the scope of employment. Additional requirements when applying ‘identification doctrine’ are

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<sup>112</sup> In this context it is noteworthy that for example monetary fines imposed under the EU anti-trust-law often far exceed fines imposed by national courts. In the course of the LIBOR scandal in 2013, the EU fined companies involved a total of EUR 1.7 billion. Compared to the US the EU can be considered as much more aggressive when imposing fines (US 2013: EUR 765 million vs. EU 2013: EUR 1.9 billion) (cp. Hecking 2014).

<sup>113</sup> In Belgium corporate fines are calculated based on several factors. No information is given with regards to a minimum or maximum.

acting in the interest of the company or on its behalf.

The proof of *mens rea* plays a major role when attributing liability to the company in the former Commonwealth states, in France and partially in Austria (Lex Mundi 2012; Carolan 2011; Clifford Chance 2012). It is necessary to prove that the employee(s) in question had a criminal intent while pursuing his or her actions. Yet, in contrast to the former Commonwealth states, France and Austria also take gross negligence into account thereby allowing for strict liability in some cases (Lex Mundi 2012). Here again, punishment imposed on corporations varies from state to state. While a fine is always imposed by any state applying an all-crimes approach, confiscation, prohibition of certain activities and debarment from public procurement (UK), placement under judicial supervision (France), compensation (UK) or even permanent closure (France) are also provided for (Clifford Chance 2012; Lex Mundi 2012).

The fine imposed varies from a maximum of up to EUR 1 million (France), over EUR 1.8 million (Austria) and EUR 12.5 million (Luxembourg) to a sum which can put a company entirely out of business (UK) (Lex Mundi 2012; Clifford Chance 2012).

The last group pursuing an all-crimes approach is represented by Hungary and Croatia (Lex Mundi 2012). Here, requirements to impose liability to a corporation are a ‘wilful criminal act’ or the purpose to gain financial advantage. However, in Hungary the group of employees inducing liability is limited to a “legal entity’s representatives or its member or employee under special further circumstances” (Ibid., 114). Companies are charged with the same sanctions already mentioned, fines vary from EUR 1,500 (Hungary) to up to EUR 685,000 (Croatia) (Lex Mundi 2012). However, in these two countries it is an ultimate precondition to identify a natural person in order to impose liability on the corporation. In turn this implies no attribution of liability to the company regardless of any wrongdoing that had indeed happened if no natural person could be identified. However, apart from criminal liability imposed on corporations under an all-crimes approach, individuals can be also prosecuted.

#### **4.6.2.5 Summary**

The European Union seems to allow for a wide variation in terms of how corporate wrongdoing is to be punished by its member states. Currently, four approaches are practised by the 28 member states. There are only two member countries, namely Bulgaria and Greece,

where companies are not sanctioned at all. Another three countries only impose quasi-criminal liability; Germany, Latvia and Slovakia, while the majority of member states either apply a list-based (10 of 28) or an all-crimes approach (13 of 28) when it comes to punishing corporate fault.

The list-based approach is restricted to certain crimes only, which are predefined by the judicial branch. This approach does not recognise all crimes attributable to a natural person as also being attributable to a legal person, such as a corporation. However, many common crimes like money laundering, bribery, corruption, and sometimes also environmental crimes and human trafficking are often included. In contrast, the all-crimes approach does include any crime to be attributed to a corporation for punishment that can be also committed by a natural person.

Altogether, 23 member states out of 28 have established a corporate criminal liability regime, with some of them adopting corporate criminal liability only recently. However, this huge number of states indicates that there are indeed grounds to criminally punish corporate wrongdoing. The UK has definitely been the pioneer in this matter, holding corporations liable for public nuisances as early as in the 19<sup>th</sup> century by applying the doctrine of *respondere superior* to corporations. The same developments were observed in the 19<sup>th</sup> century in the USA. An interesting aspect worth mentioning is that the UK is now adopting a “law tool” which originates in the US, the DPA. Yet, although both are based on common law, the UK legal system differs from the US system, and so the scope and application of DPAs are expected to vary as well. Nevertheless, within the European Union, the UK legislation (also concerning ex-Commonwealth states like Ireland, and other nations still belonging to the Commonwealth like Cyprus) based on common law presents an exception.

It remains to be seen whether the European Union will attempt to harmonise these approaches in the future. Certainly, it will be difficult to harmonise 28 states with currently very diverse jurisdictions. And, harmonisation would also require interference with the respective criminal laws of each of the member countries (an area the EU aimed to leave alone). Yet, these huge differences in legislation may also contribute to companies seeking the most convenient location to pursue their business operations unhindered and less exposed to the risk of prosecution in cases of corporate wrongdoing. Hence, this current situation of corporate criminal liability in the European Union might turn out to be a problem due to enormous differences regarding the forms of wrongdoing recognised, the personnel included and the magnitude of punishment imposed.

The above comments refer to the provisions for corporate wrongdoing in place in the respective EU member states. Yet, another point in practice is how effective control procedures and prosecutions are handled, to which extent existing legislation is actually applied and which verdicts are passed in the end for appropriate punishment. The actual application by the EU member states is difficult to assess. Public sources such as investigations by Transparency International and similar bodies do not give sufficient guidance in this respect.

### ***4.6.3 Corporate Criminal Liability in Germany***

In 2006, the scandalous Siemens bribery case<sup>114</sup> raised the question of whether from now on Germany “needs” a concept of CCL to ensure justice after this kind of enormous corporate misconduct (Rohwetter 2007; Prantl 2010). Other European countries like Belgium, France and the Netherlands already have recognised and adopted corporate criminal liability within their respective spheres of jurisdiction. Hence, as some countries have adopted certain measures to criminally punish corporations while others have not, the question arises of whether a corporate criminal liability regime is more effective than other measures when dealing with corporate misdemeanours.

Despite being one of the most prosperous EU nations in terms of economic success, Germany is still reluctant to “catch up” with its neighbouring states when it comes to punishing corporate wrongdoing. Among those member states favouring a corporate liability regime, Germany appears to be lagging behind, as an entity such as a company is still not recognised as being culpable for offences under German criminal law (De Maglie 2005; Schmucker 2011).

#### **4.6.3.1 Legal Situation and Procedures**

Germany, like every other EU member state in continental Europe, has a civil law system with statutory law. The German legal system is not adversarial. Therefore, when it comes to prosecution, the court still oversees investigations handled by prosecution and police. Furthermore, the judge has the final say in proceedings and the option to alter charges

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<sup>114</sup> For a chronology on this issue see Shields 2008.

suggested by the prosecutor. Finally, prosecution in Germany is tied to written law, which generally does not leave much room for prosecutorial discretion like individual interpretations and modifications (Diskant 2008).

There has officially been a *Wirtschaftsstrafgesetz* (WiStG), a criminal law dealing with economic offences in Germany, since 1954 (Gabler Wirtschaftslexikon online n.d.). The latest changes were made in 2010. Yet, unlike the title may indicate, the German *Wirtschaftsstrafgesetz* does not refer to corporate wrongdoing and white-collar crime as such, but rather deals with affairs of economic management.<sup>115</sup>

The *Wirtschaftsstrafrecht*, the commercial criminal law, on the other hand does not officially exist as such in the form of a cohesive legal framework but serves only as a general collective term for various economic crimes like embezzlement, fraud, corruption and bribery, and granting of undue advantages (Anwaltskanzlei Dr. Böttner n.d.). These crimes are all subsumed under German criminal law (Dejure.org, §263 StGb n.d.; Dejure.org §266 StGb n.d.; Dejure.org, §299 StGb n.d.; Dejure.org, §334 StGb n.d.; Dejure.org, §333 StGb n.d.). Yet, German criminal law can only be applied to natural persons (Schmucker 2011). This implies that any individual within a company can be prosecuted based on these economic crimes but not a company. Hence, any criminal offence or regulatory offence committed by a juristic person, like a corporation, falls under the *Ordnungswidrigkeitengesetz* (OWiG), the German law on regulatory offences. This means that any offence by a corporation is only recognised as a regulatory offence and charged with a fine (Dejure.org, §30 OWiG n.d.). Critics consider this approach as not deterrent enough, less effective and not condemning enough compared to a corporate criminal liability regime (Beale and Safwat 2005; Neumann Vu 2004). There are even more limitations to the German system, for example without the identification of an individual offender who is prosecuted separately, a regulatory fine cannot be imposed on the company (Clifford Chance 2012). However, identifying an individual offender and establishing guilt is a difficult endeavour as scandals at Volkswagen<sup>116</sup> and

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<sup>115</sup> The *Wirtschaftsstrafgesetz* comprises provisions with regard to the violation of price regulations, excessive prices in the real state sector, and violation of the *Sicherstellungsgesetz*, a law directed at states of emergency (cp. Bundesministerium der Justiz und für Verbraucherschutz 1975; Dejure.org, *Wirtschaftsstrafgesetz* n.d.).

<sup>116</sup> The Siemens bribery scandal mentioned in the introduction of chapter 4 permeated the entire company. Discovered in 2008, bribery appeared to be a “business model” at Siemens and was common practice on any hierarchical level (cp. Watson 2013). Ferdinand Piech, chairman of Volkswagen AG, has always denied any knowledge regarding the scandal of organised pleasure trips for the works council. While two high-ranked employees, namely chairman of the works council Klaus Volkert and chief human resources officer Peter Hartz have been convicted, Ferdinand Piech remained unaffected (cp. Süddeutsche Zeitung online 2010).

Siemens demonstrate.<sup>117</sup>

In Germany, investigation procedures with regard to criminal proceedings have the following characteristics: the prosecution or any other prosecuting authority can initiate investigation procedures based on a suspicion of a criminal offence, e.g. induced by a criminal complaint. During the investigation phase, all evidence is gathered, which is usually organised by the prosecution or delegated to the police. When all necessary evidence has been gathered and the suspect has had the possibility to take a stance, the prosecution decides on how to proceed. There are three options after completing investigation procedures: indictment, abandonment of action for lack of probable cause, or abandonment of action in accordance with the German *Opportunitätsprinzip* (Niedersächsische Staatsanwaltschaften n.d.). This principle is the counterpart to the *Legalitätsprinzip*, and both shall be described in brief below.

The *Legalitätsprinzip* is the central precept for prosecutorial investigation procedures. Comprising ten paragraphs this precept describes prosecutorial tasks, obligations and options. The following statements are noteworthy (Der Generalbundesanwalt beim Bundesgerichtshof n.d.):

- Prosecution is obliged to initiate investigation procedures if there is sufficient indication regarding an offence (§1)
- The purpose of prosecutorial investigation procedures is the clarification of the circumstances in the given case (§2)
- Prosecution in Germany is not adversarial, accordingly prosecution is not partisan (§4)
- Investigations must be executed in a fair and objective manner (§4)
- Based on the evidence gathered the prosecution decides whether to bring in an indictment or not (§9)

The *Legalitätsprinzip* is not applied in cases of only minor delinquency or insignificant public interest. In these cases, the *Opportunitätsprinzip* comes into effect in proceedings dealing with both criminal and regulatory offences (Niedersächsische Staatsanwaltschaften n.d.; Naucke 2013). This principle indicates prosecutorial discretion to pursue an abatement

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<sup>117</sup> cp. Beale: “corporations have learned to structure transactions so as to avoid the imposition of liability on directors and officers” (2005, 123).

of action right after investigation in cases where a punitive fine (*Geldstrafe*)<sup>118</sup> is not considered appropriate. The abatement applied can also include certain conditions, instructions, compensations and administrative penalties (*Geldbuße*).

Prof. Wolfgang Naucke in his article criticises the increased undermining of the *Legalitätsprinzip* by the *Opportunitätsprinzip*, which has almost become the rule in criminal proceedings (Naucke 2013). An increased application of the *Opportunitätsprinzip* is critical, as it also gives rise to prosecutorial discretion and fewer obligations (Ibid.). Another peculiar characteristic of the German judicial system is that prosecutors are bound by instructions from the federal state justice ministers. As prosecutors are obligated to report to the respective federal state justice minister, the minister can in turn give instructions to investigators even in individual cases, therewith influencing the investigation in general as well as the investigation outcome (Hoyer 2011a). In combination with the *Opportunitätsprinzip*, in particular, this characteristic of the German judicial system can lead to arbitrary outcomes due to the potential of political corruption (ibid.). The *Opportunitätsprinzip* allows for a discretionary decision by the prosecutor alone to stop proceedings. If a justice minister exerts influence on a prosecutor and he or she in turn makes use of the *Opportunitätsprinzip*, this often leads to a sudden abatement of action under certain conditions, particularly in controversial cases involving politicians or managers who are close to the state. There are many German politicians who hold supervisory board positions or similar offices in German companies (Scheer 2013). About 60 per cent of investigations do not lead to a trial possibly due to an intermingling of politics and business (Hoyer 2011b).

Beyond that, there are even more subtle ways of influencing prosecutors. As federal state justice ministers have the power to appoint, promote and also unseat prosecutors, “*vorausseilender Gehorsam*” or pre-emptive obedience is a common reaction (ibid.; Frank 2011). Both Transparency International and the German association of judges (Deutscher Richterbund) criticise this condition of dependence and have argued for a self-administration of the judicial branch (Transparency International, Strafverfolgung, n.d.; Deutscher Richterbund n.d.).<sup>119</sup>

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<sup>118</sup> In Germany there is a difference between *Geldstrafe*, here translated as punitive fine and *Geldbuße*, translated as administrative penalty. Both can be simply translated as a fine, yet the context is very relevant. A *Geldstrafe* always has punitive character and is related to criminal proceedings, while *Geldbuße* usually appears in a context of regulatory offences belonging to the *Ordnungswidrigkeiten-gesetz*.

<sup>119</sup> However, there are also voices criticising this autonomy as decoupled from democracy, as there is no parliamentary oversight anymore. In Germany, state authority is executed by the people through democratic legitimation. This applies to all branches. Accordingly, without oversight by the parliament, which consists of

### 4.6.3.2 Recent Developments

A shift in terms of investigation procedures can be detected, as it seems to be a current trend in Germany to outsource investigations, particularly in cases related to corruption in organisations. Under the label of compliance, more and more companies are engaged in internal investigations or mandate external consulting companies to conduct internal investigations. Results are then handed over to and validated by the prosecution to be used in trials later (Transparency International, *Interne (Korruptions-) Untersuchungen in Unternehmen und Strafverfolgung*, n.d.). As courts are usually overloaded and capacities limited, this procedure allows for significantly cutting short the normal duration of prosecutions. Yet, the downside of this approach for corporations is increased costs for lawyers, auditors and consulting agencies (Jahn 2011). However, in essence this can be considered as a step forward regarding corporate liability, as companies subject themselves to an investigation that they have adopted due diligence with regard to their business affair. This course of action may also contribute to streamlining procedures and to speeding up prosecution. It does, however, not render the critical arguments on the present state of prosecution practice as listed above invalid.

### 4.6.3.3 Corporate Criminal Liability in Germany?

There are critics still pushing for alternatives in terms of punishing corporate wrongdoing. And, as the majority of the EU member states have already adopted approaches to corporate criminal liability, continuing resistance against this will render Germany an outsider within the European Union sooner or later. The federal justice minister of North Rhine-Westphalia (NRW) argues, for instance, that the current legislation does not do justice to cases of organised irresponsibility, as the complex corporate structures of today impede the identification of responsible individuals. Furthermore, he considers the current maximum administrative penalty as not deterrent enough and instead suggests turnover-related fines (Körner 2012). The state of NRW has already made a draft on a possible criminal law for corporations with its own legal code, the *Verbandsstrafgesetzbuch*, a criminal code referring to juristic persons. This code shall also include references to the German criminal code and the code of criminal procedure.

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democratically elected representatives, the branch is missing its democratic legitimation (cp. Deutscher Richterbund 2013).



When it comes to punishing corporate wrongdoing, two strands of sanctions are available: sentence or restriction order. Sentences comprise monetary penalties, a warning in combination with a suspended sentence, and public announcement of the sentence. Restriction orders include exclusion from subsidies and public contracts, as well as liquidation as *ultima ratio* (Deutsches Institut für Compliance n.d.). In the context of liability of corporations for corporate wrongdoing in Germany, it is noteworthy that the German antitrust law already allows for punishment of corporations as such. However, the application of punishment here is very particular. In a case of antitrust offence in Germany, antitrust law and the law on regulatory offences are combined. While the antitrust law recognises the corporation as an entity, the law on regulatory offences, the German OWiG, does not. Therefore, corporations violating antitrust laws can be only punished by sanctioning the parent company for neglecting legal responsibility under §30 OWiG (Dejure.org, §30 OWiG n.d.). However, by reorganisation and reallocation of assets a company can still escape monetary penalties (Bundeskartellamt online 2012). Furthermore, it is important to point out that the German law system is not too far away from the current application of DPAs common in the US. A closer look on the German judicial system reveals that certain conditions determined and imposed by prosecutors to defer or cease prosecution is also a common procedure here. As demonstrated above by Joachim Vogel with reference to Siemens, the German prosecution process has similar functions available compared to the US DPA (The European Criminal Law Association 2013).

#### 4.6.3.4 Summary

As the majority of EU member states have already adopted a corporate criminal liability regime, Germany as one of the most powerful and prosperous states of the European Union, seems to be lagging behind. Diskant describes Germany as merely substituting “individual accountability and administrative oversight for a regime of corporate criminal liability” (Diskant 2008, 146). His article "*Comparative Criminal Liability: Exploring the Uniquely American Doctrine through Comparative Criminal Procedure*" seems to favour the German approach over the US approach of imposing criminal liability on corporations. Of course, a statutory law based in an inquisitorial system may invoke less discretion and more reliability at first. Yet, in the light of the facts above, Diskant’s support remains to be contested.

The scope of the German system in terms of making corporations liable for wrongdoing is

limited, as only individuals can be prosecuted and an administrative fine can only be inflicted if individual wrongdoing can be identified. Furthermore, the German systems allows for substantial discretion. Whether a charge is pressed or not is in the hands of the prosecutor and the German prosecutor is not entirely independent. Quite to the contrary, he or she is exposed to political influence by the respective justice minister, bearing the risk of being transferred or removed from his or her current position if not cooperating. In sum, it is about time to think about alternatives. And, as many states are already practicing corporate criminal liability, a change of course in Germany would definitely contribute to a more harmonious juridical landscape in the European Union.

#### ***4.6.4 Comparing Corporate Liability in the United States and in Germany***

At first glance, it may appear that comparing these two very different legal systems is like comparing apples to oranges. And indeed, these two systems are very different. Yet, a comparison not only underlines the differences but surprisingly also unveils similarities, despite different constellations in the legal and political system and the distinct history of the two countries. The major difference is the legal system itself. While Germany is based on a civil law system with statutory law, the US represents quite the opposite with a common law system based on case law. This fundamental difference in turn leads to entirely different procedures. Whereas Germany follows the inquisitorial system, where the judge has an active role in revealing the truth, the US adopted the adversary system in which primarily two lawyers, the prosecutor and the defence counsel, compete to convince the judge and jury of their respective version of truth (The Free Dictionary online, Inquisitorial System n.d.).

In contrast to the inquisitorial system, the adversarial system provides various procedural protections for the defendant (Diskant 2008). Yet, these procedural protections can also create obstructions with regard to ascertaining the actual course of events and the relevant facts of the case. And, as the truth at US courts is rather a matter of which lawyer is most proficient in convincing jury and judge, obstructing an objective truth-finding process by making use of procedural protections is not uncommon. Furthermore, the adversarial system equips the prosecutor with discretionary powers a German prosecutor does not have, a “far-reaching and virtually unbridled authority” (ibid., 143). However, it is worth mentioning here that at some point the German prosecutor does indeed have discretionary power. After completing

investigations the prosecutor makes a decision on whether a charge is to be pressed or not and here he or she can make use of the *Opportunitätsprinzip*, implying the option to drop charges for want of evidence.

The option of criminally convicting companies and thereby condemning corporate wrongdoing is also considered by proponents as sending a stronger message to the public, in contrast to merely administrative penalties (Neumann Vu 2004; De Maglie 2005). Accordingly, there is more stigma and reputational cost involved with a criminal conviction, which has both its advantages and downsides as presented above (Diskant 2008). This effect of stigma and condemnation which is not feasible through civil penalties is often used as a justification for corporate criminal liability. A criminal approach to corporate wrongdoing is furthermore considered as providing an option for rehabilitation. By punishing a company, a defective corporate culture can possibly be corrected (De Maglie 2005). However, that still depends on whether the respective criminal approach generally comprises corporate culture as an element of a manifestation of corporate wrongdoing, as for example practiced at Australian courts (Brown and Snyder 2012). In addition, this option is also present in Germany. In the Siemens case, prosecution also imposed conditions on the company including a change of senior management personnel (Berghoff and Rau 2012).

Finally, interest groups and lobbyism certainly play a role in the US. Interest groups enforce the maintenance of a corporate criminal liability regime, in contrast to a stronger focus on individual liability (Beale and Safwat 2005).

And, in the light of recent developments in the US this interest by lobby groups is quite reasonable: so long as a corporate criminal liability regime exists, there is the option for bypassing prosecution via a DPA or NPA in many cases of corporate wrongdoing. And this circumvention in turn offers the particular benefit of not being criminally convicted despite an existing regime.

The characteristic both systems share, as different they may appear, is that ultimately the individual is the focus target of the prosecution (Diskant 2008). In Germany, this focus is already inherent in the system, as it only recognises fault caused by natural persons. Accordingly, only individuals can be prosecuted under German criminal law. In contrast, the US system allows for corporate criminal liability. Yet, it is through recent developments like DPAs and NPAs that the prosecution eventually targets individuals, facilitated by routinely

imposed conditions such as disclosure of all relevant material. Therefore, it can be stated that both in Germany and in the US, individual employees are punished for almost the same crimes (ibid.). Also, due to the application of DPAs and NPAs, employees in the US often no longer benefit from indemnification and are therefore exposed to prosecution (ibid.).

#### 4.7 Chapter Conclusion

The idea of punishing corporations for misconduct caused by their employees gained a foothold in the middle of the 19<sup>th</sup> century in England and almost at the same time in the US. A transformation of an already established principle implying vicarious liability, the principle of *respondere superior* allowed for the imputation of liability originally caused by individual misconduct by an employee to the entire company. While the US and UK had already established systems, developments in countries in Europe or more precisely in the European Union took until after the middle of the 20<sup>th</sup> century.

Today, the landscape of CCL in the European Union is very diverse, with the pioneer UK on the one hand and Germany rather lagging behind on the other. In between, there are two more approaches to be found: an approach based on lists, including or excluding certain corporate offences to be punished (list-based approach) and an all-crimes approach where companies are equated with natural persons with regard to the scope of crimes they can commit. The majority of the member states of the European Union are already applying either a list-based or an all-crimes approach. However, the EU itself does not have an over-arching criminal or penal code dealing with corporate crime at a EU-level, except for anti-trust law.

Criminal law is still the responsibility of each individual member state. Yet, there is apparently a huge divergence in how criminal law is practised in the individual member states. In light of this, it remains an open question as to why the current *Corpus Juris* should not be further extended to also include more than just “financial interests” and receive more empowerment. Legislation towards the handling of corporate criminal liability at the EU-level and the development of a CCL standard among the member countries would each contribute to an increased harmonisation in terms of the intensity of corporate punishment and the scope of corporate offences to be punished.

The advantage of CCL is that corporations can be punished even when an individual offender cannot be identified. Also, offences resulting from a corrupt corporate culture can be

punished more effectively. Furthermore, punishing a corporation under criminal law gives a stronger signal to the public that the practice in question cannot be tolerated. And, though companies are punished, individual liability is not diminished. Hence, two parties are punished: the company or corporation, representing a certain system or structure, and the individual offender(s) who committed the offence in question within these structures.

However, a CCL regime only makes sense if there are not constantly options available for bypassing this regime. Recent developments with regard to the increased use of agreements in the US, which will also be partially implemented in the UK, challenge the actual purpose of such a regime. Generally, CCL cannot be considered as being superior to its alternatives, such as punishing primarily individuals, unless it is more effective in deterring corporate crime.

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# Chapter 5

## Global Politics & The Economy: Analysing the Status Quo

**Abstract** In the previous chapters, soft law (voluntary measures) and hard law (legal theory and legal system) were outlined in detail and current soft law measures were demonstrated by several extensive case studies. Yet, in the end, none of these measures seemed to lead to more responsible business practices. These insights support the conclusion that evidently there must be a serious problem inherent in the current system. Looking for an explanation of this outcome, this chapter goes further afield, placing the discussion of the feasibility of responsible business in a wider context. This chapter aims to draw the bigger picture surrounding the question of feasibility of responsible business by looking more closely at the current status of politics and the economy, by outlining and critically examining alternative concepts, and by discussing the potential threat of corporate power. The chapter starts by summarising and discussing the insufficiencies of soft law and hard law measures in the first two sections. Section three takes a closer look at politics and the economy and reveals the drivers behind current conditions, namely neoliberalism, globalisation and hegemony. In the light of these drivers, the question of the degree of state autonomy today is then discussed. In section four, alternatives to CSR and sustainability are presented and discussed to complete the picture of measures available today. Section five then delves more deeply into the phenomenon of corporate power by illuminating issues such as corporate tax dodging, controversial patent rights and lobbyism.

### 5.1 CSR, Sustainability and Sustainable Development

*“Corporate social responsibility (CSR) is a concept that seems to generate endless disputes without solution.” –*

Duane Windsor (2014)

When it comes to CSR, it is fundamental to differentiate between the concepts and the actual practice. In chapter two, three established concepts related to CSR have been described in more detail. However, in conclusion the concept level lacks shape and certain sharpness. Yet, as Duane Windsor (2014) points out, there is “a lengthening list of proposed complements, substitutes, and integrative frameworks for CSR under various labels”.

In addition to the lack of sharpness, these academic perspectives on CSR are often too idealistic and optimistic, as they usually assume legally compliant behaviour, which in

practice is frequently not the case as illustrated by the case studies in chapter three. Thus, these perspectives are somewhat disconnected from business reality and are primarily built on a normative assumption on how business *should* be. In addition, these concepts are in no way holistic but only reinforce a dichotomy by differentiating between “regular” business responsibilities and apparently more specific “social” business responsibilities. Hence, CSR concepts cannot be considered as inducing a fundamental change in business. And, after 20 years of practice, reality seems to only confirm that.

*“Companies have gone to ever greater lengths to paint a self-portrait of a responsible corporate citizen.” –*

The Consumer Study by Accenture (2014, 6)

Theoretical issues aside, the implementation of CSR concepts in practice is also contested. The emergence of CSR has in some ways institutionalised business responsibility beyond legal responsibilities. Yet, while the practice of CSR has generally led to some improvement, particularly more awareness towards environmental and social aspects, it is often still nothing more than a fig leaf for corporations. As CSR and also sustainability have become a widespread phenomenon, these strategies are also implemented to maintain competitiveness. Today, companies lacking these strategies are considered as lagging behind. Thus, simply formally adopting these principles does not imply any true underlying ethical commitment.

A striking characteristic of these CSR and sustainability considerations is that these are often neither consistently nor comprehensively integrated into the business model.<sup>120</sup> CSR in a company is frequently associated with mere philanthropic activities like sponsoring and charity, while sustainability is reduced to saving resources. Therefore, with regard to the practice of the latter in particular the question arises as to how far sustainability is “*useful* as an environmental governance framework” at all (Harm Beson and Craig 2014). Furthermore, the later shift from an orientation towards “moral responsibility and ‘the right thing to do’ in favour of an approach focussed on the hard facts of a quantifiable, verifiable business case” (Accenture 2014, 11) has missed its target according to an analysis conducted by global consulting company Accenture. In fact, this means that supposedly “objective” criteria are of

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<sup>120</sup> Interestingly, the European Commission states in a paper that companies “are increasingly aware that corporate social responsibility can be of direct economic value”. The paper goes on with “Although the prime responsibility of a company is generating profits, companies can at the same time contribute to social and environmental objectives, through integrating corporate social responsibility as a strategic investment into their core business strategy”. This last comment again strikingly confirms that as long as companies do not fully integrate these strategies into their core business a CSR strategy cannot yield any economic benefits, i.e. nothing more than some activities external to the business strategy. See European Union (Commission of the European Communities 2001, 4).

no great help in fostering responsible business behaviour. After all, what exactly are “objective” and quantifiable criteria with regard to CSR or sustainability? In the end it is mostly about quite obvious numbers, e.g. key figures including the consumption of water, electricity, fossil fuel, paper etc. Calculating these numbers can help improve a company’s efficiency with regard to consumption and waste and hence act more *environmentally responsibly*. Yet, numbers cannot help a company conduct its business more ethically (which is a part of acting responsibly, namely towards human beings, animals and vital natural resources of all kinds), as this also requires non-quantifiable criteria. However, environmental responsibility related to waste reduction and saving resources is at least a step in the right direction.

As various examples from the case study in chapter three illustrate, companies frequently violate domestic laws. This can happen for several reasons: mere negligence, insufficient or deficient monitoring and oversight, or simply because it pays. Furthermore, internal policies to better integrate social and environmental concerns systematically into decision-making are often ignored. The same is true for publicly stated voluntary commitments to principles and guidelines, often reduced to lip service.

*“The simple reality is that CSR, the way it has been adopted by most companies, has done little or nothing to convince the general public that corporations are actually contributing positively to society.” –*

Dirk Matten (2014)

In the end, it appears as if companies are merely concerned with profits regardless of CSR and sustainability measures officially adopted. Furthermore, it seems as if companies adopt these environmental and human rights policies or principles and guidelines, and publish annual CSR and sustainability reports to counter criticism and to escape governmental regulation (Clerck 2010). This outcome, however, not only negatively affects the environment and communities in which these companies operate; consumers today are also highly dissatisfied with the situation. Now, after two decades of voluntary practice of CSR and sustainability measures, companies are still unable to tangibly integrate their commitment into their business policy, products and services (Accenture 2014). Hence, business has failed ‘to live up to the expectations’ it has created through its public statements and commitments, and people are no longer buying these commitments. As Dirk Matten (2014) underlines with regard to the tragic Rana Plaza incident (BBC 2014a) in Bangladesh, many brands and retailers “were active members in the church of CSR – but this did not prevent them from



having their products assembled in an abysmal sweatshop, whose collapse last year ultimately killed more than 1100 people”.

Similar to the actual corporate practice of CSR, commitments to sustainability are often nothing more than mere rhetoric. At first sight, Walmart’s recent initiative together with eight large suppliers looks very promising. Together, they plan to give a low-interest loan of \$100 million to municipalities to improve their current recycling structure. However, it can again be debunked as a very easy and obviously cheap strategy to gain public attention for supposedly green initiatives: first, it is only a loan and not a donation; second, this amount presents only 0.0016% of the annual profits of these companies taken together: third, \$100 million is a drop in the ocean with regard to realising the large scale municipal projects required for better recycling (Prindiville 2014).

*“This is not to protect the natural world from the depredations of the economy. It is to harness the natural world to the economic growth that has been destroying it.” – George Monbiot (2014a)*

Environmental concerns by businesses today can be integrated into various ways, for example by supporting certain international conventions for the protection of biodiversity, wetlands, habitats etc. Initially, these conventions sound like a positive contribution to preserving nature and wildlife. Yet, they also come along with an increasing valorisation and commodification of nature (Candeias 2004). Initiatives like the UN REDD also run the risk of being simply a loophole for companies. By easily offsetting carbon emissions in the UN REDD scheme or any other offset scheme, companies may neglect their responsibility to effectively reduce their carbon emissions (Unmüßig 2011). In addition, the concept of biodiversity offsets is linked to the idea that “nature is fungible and tradeable, that it can be turned into something else: swapped either for money or for another place, which is said to have similar value” (Monbiot 2014a). In the end, the offset approach is just another approach, which only further propels the commodification of nature. Here, nature is co-opted by economics and turned it into a useful “tool”.

According to studies conducted by global consulting firm Accenture, even the majority of CEOs believe that business has not done enough to address issues of sustainability (Accenture 2014). Three years previously, perspectives regarding sustainability had been much more positive. Today, however, CEOs are instead frustrated, as many are still “unable to locate and

quantify the business value of sustainability” (ibid., 11).<sup>121</sup> Also, currently many do not see “the urgency or the incentive for their own businesses to do more” (ibid., 12). Many CEOs have the impression that shareholder expectations and the market structure, in short the capitalist system, prevent them from adopting strategies with more impact. They feel the pressure of constant accumulation of financial value due to the given “structures, incentives and demands of the market” (ibid., 11).

Unexpectedly, the majority of CEOs also call for more intervention by the government. Around 85 per cent wish to have clearer policies and market signals with regard to green growth (ibid.). Governments are considered as playing “a leading role in shaping the landscape for sustainability at global, national and local level” (ibid., 13). Only by a consistent long-term regulation including new standards and taxation regimes can companies collaborate and thereby create a more transformative impact. Rather surprisingly, for some companies, government regulation even leads to a competitive advantage over other companies abroad, which is for example the case with the REACH framework enacted by the EU, a regulation for the chemical industry (ibid.). By adapting to the REACH framework, companies in Europe are ahead of companies in other nations.

For companies it is costly to adjust to ever-new introduced regulations, which depend on the currently prevailing political parties and coalitions who determine environmental policies (ibid.). Moreover, often inconsistent, geographically narrow and short-term oriented environmental politics and policies only create a prisoner’s dilemma<sup>122</sup> for companies, as some companies have to adjust, while other companies from other sectors (and other countries with different policies) perhaps are not even affected. Hence, a cohesive and collaborative approach regarding environmental policies and regulation is also in the responsibility of the government. Regulations need to embrace a portfolio of tools, such as carbon caps or taxes, removing subsidies for industries like energy and agriculture and shifting these to financing sustainable agriculture, and more projects related to renewable energy (Fullerton 2014).

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<sup>121</sup> This seems to correlate in some ways to what Eccles et al. observed in their studies: Only companies very engaged in sustainability could outperform others over a period of 18 years by an average of 4.8 per cent/p.a. (criteria for sustainability: adoption of environmental, social and governance policies in the 1990s, including at least 40 per cent of all available policies, such as “carbon emissions reduction policies, green supply-chain policies and energy and water-efficiency strategies”, further social policies aimed at “included diversity and equal-opportunity targets, work-life balance, health and safety improvement”, community-oriented policies like “corporate citizenship commitments, business ethics, and human-rights criteria” and other policies related to customers’ health and safety, and product risk) (Eccles et al. 2012).

<sup>122</sup> A statement by Dennis L. Meadows (co-author of the book *The Limits to Growth*) in an interview, seems to tie in with the prisoner’s dilemma problem: there is also “a “commons” aspect, in that one person alone cannot make decisions to conserve the resource. If he does, others will simply use more.” (Willinger n.d.)

*“The pursuit of sustainable development goals, however, has not resulted in either sustainability or effective mitigation of climate change.” – Melinda Harm Beson and Robin R. Craig (2014)*

Finally, the idea of sustainable development is also prone to criticism. This fundamental concept overarching sustainability aims in essence at preserving the environment for future generations. Hence, it is long-term oriented and therefore requires thorough deliberation. Yet, according to Melinda Harm Beson and Robin K. Craig, this mission of reducing carbon emissions can by no means be seen as being under control, as carbon emissions have further increased globally<sup>123</sup> despite efforts and public commitments (Harm Beson and Craig 2014). It seems the concept together with its adopted measures, like global policies, climate initiatives and agreements “has failed to meaningfully change human behavior” (ibid.). Why? Because change cannot be achieved simply by using more advanced technology. Nature’s resources are still being exploited to exhaustion and more effectively so due to the prevailing growth dogma in economics and an ever-growing world population<sup>124</sup>. Severe poverty has not been solved either (Gambino 2012). There is still a strong north-south divergence in terms of global justice and this cannot be solved solely through a commitment to sustainable development. The problem is much more complex and not only tied to environmental issues but also to issues of international politics, trade and agreements, foreign investment and so on. Also, as Paul de Clerck highlights, governments are deliberately involved nowadays in “tackling global problems such as poverty, climate change, and deforestation, through global initiatives like the Millennium Development Goals and the Global Compact”, yet they do not acknowledge that “companies are often at the source of these problems” (Clerck 2010, 155).

The next problem with the idea of sustainable development is rather a logical one. Today, there is simply no existing method, which “can adequately reflect the interests of future generations and of human beings located outside the institutional system at hand” (Bithas 2011, 1705). Because sustainable development is aimed at future generations, which involves very long-term considerations, it does not help to make assumptions based on the estimation of environmental costs today and the mitigation of environmental damage already inflicted. The interests of future generations cannot be factored in, first, as they do not have a voice, and

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<sup>123</sup> Global carbon emissions are primarily driven by the top 5 polluters China, the US, India, Russia and Japan (Wolfe 2014)

<sup>124</sup> As the population is particularly growing in Africa (while declining in industrialised nations) this only further aggravates already severe problems like starvation, health issues, and political conflicts to only name a few (Pflanz 2013)

second, mechanisms currently available are only able to deal with the costs of environmental damage, i.e. negative externalities, today. This intergenerational issue must be solved by going beyond traditional tools provided by environmental economics. It is not just about estimating costs but about building and maintaining the functioning of the environment, as well as its infrastructure (ibid.).

In conclusion, the measures proposed today such as CSR and sustainability on the business side, and sustainable development as a wider approach driven by international politics, have not yet solved the problems of irresponsible and unethical behaviour, nor have they contributed to a significant overall reduction in global emissions.<sup>125</sup> These measures seem to have failed to achieve what they were created for.<sup>126</sup> Perhaps, the time has come for a more fundamental change, away from the dogma of growth, profits and free markets. Furthermore, we need solutions to escape the vicious circle of ever more consumption. Consumerism, which is based on a large quantity of physical products available, offers us “quantitative satisfaction” at the price of nature’s integrity. In turn, we consume even more physical goods in order to substitute these lost values, which even increases degradation (Willinger n.d.). As Matten (2014) states, we need “a debate about the current global system of capitalism”. And, we need such vigorous debate on a larger scale right now.

## 5.2 Current Legal Practice

As already illustrated in the previous section, the prospects of both CSR and sustainability measures for having a significantly positive impact are rather limited. This is also due to the fact that these measures clearly lack strength, being only voluntary in nature and are merely patching an ailing system. Since CSR and sustainability are usually not integrated into the core of business but are rather a loose bunch of initiatives running alongside other business activities, these will never be able to change the way of doing business in fundamental ways.

Hence, if voluntariness does not really prove to be a solution to enabling more responsible

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<sup>125</sup> This is also due to some nations like the US, which have still not ratified the Kyoto Protocol. Also, the last climate summit by COP19 in 2013 in Warsaw could not put forward significant achievements (United Nations Framework Convention on Climate Change n.d.; Zammit-Lucia 2013)

<sup>126</sup> As Bendell states “Both the OECD Guidelines and ILO Tripartite Declaration were non-binding on both states and corporations, and proved to be weak instruments” (Bendell 2004, 13; International Court on Human Rights Policy 2002, 11)

business, the question remains how far compulsory measures are able to prevent and deter companies from acting irresponsibly before the fact, or at least deter them from doing it again through effective punishment. The subsequent section tries to get to the bottom of this by contesting the current legal practice of punishing corporate misdemeanour, and the effectiveness thereof.

In the previous chapter the legal systems and the practice of law in the US, the EU, and Germany in particular, were described in more detail. These systems each have their own issues and shortcomings yet, generally, there are certain circumstances today already ‘protecting’ companies from widespread responsibility. First, the status of being a legal person limits the company’s liability. For example, if subsidiaries are conducting risky business operations the company as such cannot be held accountable, as these are legally separate entities from the company. Secondly, the status of being a legal person shields responsibility from the individuals that makes decisions on the company’s behalf (Bendell 2004).

With regard to the US in particular critics argue there is still too much discretionary power in the hands of prosecutors, and that is why the adjudicative branch needs to be clearly separated from the prosecutorial side. Furthermore, the adversarial system practiced in US courts tends to hamper the discovery of truth<sup>127</sup>, as there are two competitive parties pitted against each other. Moreover, the US corporate criminal liability regime, including criminal conviction, is increasingly circumvented today by the use of agreements, which do not require incriminated companies to even plead guilty. If companies in a clear case of law infringement no longer need to plead guilty, a clear signal to the public is missing. Also, it seems as if this kind of objectionable conduct can simply be bought, as in the end it is only a matter of the money the company needs to spend on fines to further continue with its questionable business practices. Of course, large fines are frequently imposed on the company but for companies

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<sup>127</sup> At first sight, the adversarial or adversary system as practiced in the US appears to be quite a fair practice: there are two parties each with an incentive to present facts that can help. Yet, could it not as well be the case that each party is only striving to win over the jury to its particular version of events? And, as a part of its strategy, tries to discredit and chip away at the other party’s image? This appears to frequently be the case when the other party is of colour, for example African-American. Moreover, it may not be only the colour-bias rendering US verdicts unfair in some cases. Money can also play a crucial role: the better the lawyer, the higher the chances of convincing the jury. Professional lawyers are often hard to afford. For example in a civil lawsuit where a private party is bringing an action against a company, financial means of the private party are often limited while the company can often afford squads of top lawyers making it comparably easy to win the case. For racism in the U.S. criminal system see for example CBS Charlotte 2013. For an example on corporate power in this context see for example Russia Today 2014.

these are often nothing more than the costs of doing business. Furthermore, the fines are not high enough to effectively deter companies from law infringements, as the financial industry clearly illustrates (see the number of SEC probes against financial institutions<sup>128</sup>). Imposing fines is at least one way, and evidently the only feasible way, to punish a company. Yet, the system may be improved by reconsidering the size of the fines, and by tightening the conditions of repeat offenders.

What then is the use of such a regime when the actual practice substantially differs from the legal purpose? Some critics challenge the effectiveness of a corporate criminal liability regime altogether. Fines imposed on entire corporations are usually justified by the argument that the corporation as a whole also benefitted from these illegal acts, hence the corporation has to pay. However, this logic falls short, as these fines are often not considered by corporations as justified punishments for wrongdoing but simply as the costs of doing business in general (Reich 2014d). For example a company like JPMorgan had more than \$8 billion in legal costs<sup>129</sup> (after tax) in 2013 alone, and around \$31 billion since 2009 which is more than a third of its net profits of \$82 billion in the same period (JPMorgan.com 2014, BuzzFeed Business online 2013). Further, in the current system often enough responsible individuals are not held accountable.

*“Corporations don’t break laws; specific people do.” – Robert Reich (2014d)*

It seems these fines do not have an effectively deterrent impact on corporations. They also do not change the attitude towards illegal activities. Fines are only additional operating costs for companies and, as individuals are not caught, the internal structure and thinking within the company will not change either. With the increasing use of agreements, companies no longer have to plead guilty but only pay a fine, which in the end is merely an administrative act. Another issue is where all this money actually goes, as it is not used for compensation as in civil cases. This route of agreements frequently taken by regulators is often built on the assumption that convictions against either corporations or individuals are more difficult to enforce (Kay 2014). Yet, Jed Rakoff, federal judge in New York for several years, claims with regard to agreements that the “deterrent effect of successfully prosecuting individuals far

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<sup>128</sup> For an overview see for example USC University of Southern California n.d.

<sup>129</sup> It is not quite clear, in how far these “legal costs” also include fines imposed on the company. In the case of JPMorgan, these legal costs have arisen from increased litigation and regulatory probes.

outweighs the prophylactic benefit of imposing internal compliance measures that are often little more than window dressing” (ibid.).

*“We don’t run this country for corporations [...]”* – Elizabeth Warren (2014)

In addition, a severe aspect of the US system is “the growing imbalance of economic power between corporations and real people” as Robert Reich (2014a) puts it. As corporations also represent a concentration in capital and therewith a high concentration of wealth, they have the power to influence legislation by lobbying: “Wealth concentration leads to distortion, shifting of regulation in favour of the wealthier and the corporations” (ibid.). Current examples are eviscerated anti-trust laws or tax and bankruptcy laws in the US among other countries (ibid.).<sup>130</sup> Moreover, Senator Warren observes a certain infiltration of the US Supreme Court by pro-corporate judges. As these tendencies increase, she fears a “Supreme Court that is a wholly owned subsidiary of big business”, running the risk of losing its already fragile independence from corporations altogether (Warren 2014).

Yet, it is not only the US legal practice that is facing conflicts; the current legal practice in the EU also has its shortcomings. The EU has no over-arching criminal or penal code dealing with corporate crimes on the EU-level (except for anti-trust law) and national criminal procedures with regard to corporations are not harmonised in any way. This is due to the EU’s non-interference regarding national criminal law. Hence, there is a wide variation of practices observed when it comes to punishing corporations. In total, four different approaches<sup>131</sup> are currently applied by 28 member states with the majority having adopted a variant of corporate criminal liability.

Finally, even the German system cannot be considered as superior in any way. There is an inquisitorial system as opposed to an adversarial one, which at least appears to be contributing more to the discovery of truth in the course of a trial. Still, cases often do not even lead to a trial, as an intermingling of politics and business can also be seen in Germany.<sup>132</sup> A German

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<sup>130</sup> Another example is the “Halliburton Loophole” (The Ecologist online, 2014)

<sup>131</sup> Currently, there are two approaches not including corporate criminal liability: these are “no criminal liability of corporations”, and “quasi-criminal liability”, which is a regulatory and administrative approach. The other two approaches, namely “list-based” and “all crimes” each represent a variation of a corporate criminal liability regime.

<sup>132</sup> A critical German documentary, Monitor, revealed in 2006 “that hundreds of private-sector employees had been working in German ministries (mostly federal), sometimes for many years”. Furthermore, these private-sector employees had not only “worked quietly inside the government for a considerable length of time” but

legal peculiarity, the *Opportunitätsprinzip*, gives the German prosecutor the discretion to simply impose a fine and thereby stop proceedings before it comes to a trial. This can particularly be the case with trials against companies where politicians hold board positions. In order to shield politicians from corporate scandals investigations may be discontinued in favour of merely imposing a fine (Hoyer 2011). Furthermore, where politicians are not involved, German prosecutors may be put under pressure by large companies lobbying for their business interests.<sup>133</sup> Thus, the German system cannot be considered as independent. Yet, here it is the judicial branch running the risk of being politically influenced, while in the US the judicial branch is increasingly subjugated by corporate power. Moreover, in the German legal system corporations are only punished with administrative fines, which neither send a strong signal to the public nor underline the seriousness of the misdemeanours committed. On the other hand, the German legal system aims to track down the responsible individuals but due to a more and more complex organisational structure today this remains a burdensome endeavour.

The current situation seems to reveal “systemic failings in the legal and governance system that should ensure that multinationals are not violating social, environmental, and human rights, and that citizens, communities, and the environment are protected against such violations” (Clerck 2010, 156). The current legal practice from any country discussed above is far from being fully effective. There are issues of judicial independence from either political or corporate power, and further issues regarding the speed of procedures and the limited effectiveness of current measures for deterrence. By using the vehicle of agreements, the speed thus achieved in procedures is much faster compared to court trials. Nonetheless, this fast-track lacks a strong signal to the public as well as to the company concerned, as there is neither a plea of guilty nor a conviction involved. Also, in the case of companies like JPMorgan, which are faced with a great number of lawsuits each year, it must be called into

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“many of them had actively contributed to legislation directly affecting the industries they were employed by” (Katzemich 2010, 115-116). However, this phenomenon also persists in the US under the name “revolving door”. Former federal government employees then work for top industries lobbying at Washington D.C. (OpenSecrets.org, Revolving Door, Overview n.d.; OpenSecrets.org, Revolving Door, Top Industries n.d.). US President Obama now strives to make government more transparent and efficient (The White House n.d, United States Office of Government Ethics n.d.)

<sup>133</sup> A frequent and popular argument by companies is that their company especially is very important to the German economy. See for example the SAP case in German (Hoyer 2011). Apparently, this has not changed to date, as recent communication in this topic from 2014 by Transparency International proves (Transparency International 2014a; Transparency International 2014b).



question whether this current practice of agreements including the fines involved is deterrent enough.

Effective monetary penalties must be enforced in a way so that, first they are not tax-deductible and, secondly, they cannot be easily classified by a company as additional operating costs. In order to be effective, punishment must include several dimensions which really propel a change in corporate culture and current corporate mechanisms, for example individual responsibility based on strict liability<sup>134</sup> in addition to corporate responsibility, as well as improved compulsory oversight mechanisms and stringent evaluation thereof.

For a corporate culture to change, individual accountability must play an important role, though identification is difficult in a complex environment such as global corporations. Only if individuals are made responsible, fined, put on probation, and in serious cases even laid off, will others realise that deviant behaviour does not pay off, neither personally nor for the company. Furthermore, transparency and periodic evaluation are needed regarding a company's progress toward better monitoring by way of external auditing, which should be a clear mandatory requirement of every agreement or conviction. If there is no progress in governance and transparency, acts of manipulation, negligence of duties, insider-trading and other criminal acts are not going to stop.

### **5.3 International Politics and the Economy**

While the two previous sections looked into the effectiveness of voluntary and compulsory measures in promoting responsibility, this section now places the discussion in a wider context. As noted further above, it seems that neither voluntary measures, like corporate CSR and sustainability strategies, nor compulsory measures like probation and conviction together with monetary fines appear to be successful in achieving more responsible behaviour. The reason why neither of these ways actually succeeds seems to be the underlying economic and political system. Voluntary and compulsory measures only present rather isolated approaches to motivate, urge or as a last resort enforce responsibility and responsible behaviour. Yet, in enabling more responsible business, the economy and politics play a crucial role, which shall

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<sup>134</sup> For example, John Kay states that strict liability is the only remedy to corporate misbehaviour. Individuals must be held responsible for inappropriate and illegal behaviour, as employees and as supervisor alike. A benefit of strict liability is that “[i]t is not necessary to inquire into motive, attribute blame or ascertain exactly what the people concerned knew”. It is sufficient to prove that the event as such has happened, and that the employee has acted “with the authority of the institution” (Kay 2014).

be examined more closely in the next sections. The first section describes the role of neoliberalism and its link to capitalism and globalisation. The section thereafter deals with the phenomenon of globalisation in more detail. The phenomenon of globalisation is connected with the concept of global hegemony, which challenges the neutrality of political decision-making today. Finally, in the light of global hegemony and the powerful position business has nowadays, the question of state autonomy will be discussed.

### ***5.3.1 The Emergence of Neoliberalism***

As neoliberalism is the prevalent political and economic concept of our time, some inherent characteristics shall be described in more detail here. These are, amongst others, the idea of a deregulated free market, the regime of constant capital accumulation and circulation, the mantra of economic growth as a means to propelling social development, and the all-pervasive concept of competition. However, it is very important to understand that neoliberalism is in no way a homogenous concept, neither theoretically nor in practice, with regard to the set of policies and regulations associated with it.<sup>135</sup> On the contrary, it is very much characterised by plurality and often contradictory ways (Walpen und Neunhöffer 2006). However, given its history this does not come as a surprise.

The term ‘neoliberal’ was probably first coined by the German Alexander Rüstow and other economists associated with the German *Freiburger Schule* (Boas and Gans-Morse 2009). This school of thought evolved between World War I and World War II. Friedrich von Hayek’s (*Austrian School of Economics*) former work also came very close to the concept proposed by the *Freiburger Schule* (ibid.). It was only later that Hayek advocated *laissez-faire* more and more, which became quite evident later in his book *The Road to Serfdom*. Therefore, what is known as neoliberalism today comprises at least two very distinct ways of thinking: the *Freiburger Schule* advocating a strong state and regulatory frameworks, and the *Austrian School*, as well as the later *Chicago School of Economics* (see Milton Friedman), speaking up for *laissez-faire*<sup>136</sup> and deregulation (ibid.). However, despite being different in

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<sup>135</sup> As Tickell and Peck (1995) underline, there is “a series of neo-liberal *political projects*” referring to political eras like Thatcherism or Reaganism to only name the most prominent ones (369). Yet, these all “differ from one another”.

<sup>136</sup> Ultimately, however, neither classical liberalism *laissez-faire* nor the *laissez-faire* envisaged later by the Chicago School (for example Milton Friedman) were characterised by genuine non-intervention by the state. Polanyi already discovered this paradox with regard to classical liberalism. Yet, in my opinion, this paradox also applies to the Chicago School strand of neoliberalism advocating deregulation (cp. Polanyi 1973, Peck and

their objectives, the schools all share a common opponent: Keynesianism (Peck and Tickell 2007).

Presenting a counter movement to the Keynesian welfare state, neoliberalism as an actual political and economic era was ‘born’ in the course of the crisis of Fordism, and ever since then has been hybrid in nature (Peck and Tickell 2007). According to Peck and Tickell (2007), neoliberalism has never existed in a ‘pure’ form, and there was no “simple convergence towards a singular neoliberal norm” (31). Rather, in the light of different neoliberal politics like Thatcherism and Reaganism, neoliberalism must be perceived as a “*restructuring strategy*”, dismantling the Keynesian welfare state, as opposed to a “governing ideology” (ibid.).

The various schools aside, neoliberalism today can be perceived in different ways<sup>137</sup>: as only describing a policy framework, as an ideology, or more holistically as a new way of the practice of government, i.e. governmentality (Larner 2000). According to Larner and others, seeing neoliberalism in a context of governmentality enables a broader conceptualisation in contrast to neoliberalism perceived as only presenting a policy framework or ideology. The idea of governmentality with regard to neoliberalism particularly underlines two important characteristics: the supposed withdrawal of the state, which can be seen as a re-organisation, and the “particular politics of self”, as Larner terms it (Larner 2000; Peck and Tickell 2007). The latter epitomises the dogma of individual responsibility, and encourages people “to see themselves as individualized and active subjects responsible for enhancing their own well being” (Larner 2000). Neoliberal governmentality with regard to the individual turns us into being our own master and slave at the same time (Han 2014). Since Fukuyama’s theory of an “unchallenged global neoliberalism” after the end of the Cold War in 1989, political alternatives have significantly lost their meaning (Antonio and Bonanno 2000). It seems neoliberalism today is the uncontested political and economic concept of our time<sup>138</sup>, as

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Tickell 2007, Carroll and Carson 2003).

<sup>137</sup> There are many different ways of perceiving neoliberalism today. For example, Boas and Gans-Morse (2009) suggest at least five different perspectives (neoliberalism as economic reform policies, a development model, a normative ideology, an academic paradigm, or simply an era), while Mudge (2008) speaks of three dimensions or ‘faces’ as she calls these (intellectual, bureaucratic, and political).

<sup>138</sup> However, Tickell and Peck for example do not perceive neoliberalism as a (regulatory) solution to the problems of the Post-Fordist regime. Quite the contrary, they see it as a “regulatory hole”, not representing an institutional fix. Neoliberalism itself is a regulatory problem with a “massive destructive capacity”: “far from providing the basis for a new regulatory fix, neo-liberalism represents the source of the problem” (Tickell and Peck 1995).

policy-making globally is very much driven by its imperatives, which will be further detailed over the next sections.

A look back at recent history, namely the last century, illuminates the background of the neoliberal dogmas we are still holding onto today. Capitalism, which is the economic basis of neoliberalism, is legitimated by being a “natural” and efficient order (Candeias 2004). This idea can be traced back to classical liberalism and its concept of a free market being capable of self-regulation based on Adam Smith’s “invisible hand” theory (Dell and Knoedler 2004). Neoliberalism acknowledges and renews this assumption, by focussing on an economic and social system characterised by efficiency (Eucken and Oswalt 2001). Accordingly, from a neoliberal perspective there is no need for responsibility particularly towards society, as this system already presents the natural and efficient order, which consequently cannot be improved any further (Candeias 2004).

*“Western societies forced consumption with supply-led demand, creating wants and needs as well as ways of satisfying them.” – Jem Bendell (2004, 3)*

For the emergence of neoliberalism, economic developments like Fordism played a crucial role in heralding the neoliberal era in the 1970’s, when the extensive welfare state was considered as having failed. The era of Fordism<sup>139</sup> commenced in the United States during US President Roosevelt’s New Deal (1933 to 1939), a programme initiated to overcome the “Great Depression” (Encyclopaedia Britannica, Great Depression n.d.). However, it was not until the end of World War II that Fordism gathered pace (Willamette.edu n.d.). Originally, merely a production method, Fordism later also symbolised a new way of life. This new way of life based on a consumer society was inextricably built on an externalisation of social and material costs (Candeias 2004). Yet, this era of mass production and mass consumption heralded prosperous post war years (ibid.). Furthermore, it was characterised by a Keynesian welfare state including a social security system providing for instance unemployment insurance and a social medical system (Willamette.edu n.d.; Eblinghaus and Stickler 1998).

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<sup>139</sup> The expression ‘Fordism’ originates from Henry Ford’s assembly line concept in production. This new way of production based on Taylorist ways of organisation including a high level of standardisation enabled mass production. It further enabled mass consumption, as assembly line produced goods were much cheaper, and therefore affordable for a wider base of customers (Eblinghaus and Stickler 1998, Gabler Wirtschaftslexikon, Fordismus n.d.)

The post-war years were also the time of a great rise in international trade due to first steps taken towards liberalisation and deregulation. Free trade agreements like the General Agreement on Tariffs and Trade (GATT) signed by 23 nations in 1947 contributed to international economic growth, while the Bretton Woods system<sup>140</sup> together with new institutions like the International Monetary Fund (IMF) and the World Bank provided monetary stability (Encyclopaedia Britannica, Liberalization n.d.). All these initiatives and institutions together enabled the unfolding and functioning of a capitalist market economy (Candeias 2004). In fact, Fordism represented a giant regime of accumulation driven by mass production and mass consumption, which in turn boosted demand and made monetary and fiscal policies an indispensable part of economic growth (Candeias 2004; Eblinghaus and Stickler 1998). It further enabled comprehensive processes of power concentration and centralisation due to the extent and structuring of production, thereby creating large corporations (Candeias 2004).

These prosperous years were only to last until the 1970s, when the Energy Crisis<sup>141</sup> marked a significant change. The post-war welfare state together with its pronounced consumerism resulting from Fordism came to a halt. The Energy Crisis, which was at the same time also the crisis of Fordism and the Keynesian welfare state, demanded a change. After all, post-war systems like Bretton Woods were considered too tight, as deregulation and liberalisation did not go far enough (Candeias 2004). Moreover, the crisis was seen as having been triggered by over-regulation primarily with regard to the social security system. Hence, efforts in deregulation resulted in a restructured, leaner state, meaning more privatisation, and reduced social security benefits among others, while product and capital markets were further liberalised (ibid.; Eblinghaus and Stickler 1998). These efforts marked the era of Post-Fordism, characterised by increased deregulation and liberalisation propelling globalisation. This in turn, together with a cross-border integration of the markets in terms of products and finance, was necessary in order to carry forward the system of accumulation including mass production and mass consumption (Eblinghaus and Stickler 1998). At around the same time,

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<sup>140</sup> The Bretton Woods system was an international monetary system with fixed exchange rates. Together with the IMF and World Bank this system enabled a significant economic recovery after World War II on an international scale (Bundeszentrale für politische Bildung n.d.).

<sup>141</sup> Suddenly, after many prosperous years producing e.g. the Baby Boomer generation in the United States and the German *Wirtschaftswunder* generation, society and politics were confronted with a huge challenge. The Arab oil countries initiated an embargo against the United States as a reaction to their intervention in Israel. This embargo produced a global energy shortage, basically an oil shortage, bringing up the enormous energy dependency also necessary to maintain a system of mass production (Kreienbaum 2013).

new technologies regarding transport, communication and information also emerged.<sup>142</sup> These new technologies then enabled “a process of rapid internationalization of financial and productive capital” and led to an increased global interlocking (Overbeek 2005, 47; Candeias 2004). The Washington Consensus in 1989<sup>143</sup> and the North American Free Trade Agreement (NAFTA) in 1994 further propelled international integration (Offices of the United States Trade Representative n.d.). In addition, the replacement of GATT by the foundation of the World Trade Organization (WTO) in 1995 led to even more participating nations.

This significant emphasis on deregulation and liberalisation also marks the beginning of the neoliberal era with a focus on international competitiveness and a global capital market (Candeias 2004). The neoliberal free market ideology was further pushed by certain intellectuals like Milton Friedman, and taken forward by organisations and think tanks like the Mont Pélérin Society or the World Economic Forum (Overbeek 2005; Candeias 2004). Neoliberalism developed into a fundamental overarching economic and social precept (Candeias 2004). Due to an increased global economic interdependence neoliberalism then became hegemonic, subjugating society at large to the calculus of economics.<sup>144</sup>

*“Finance has not only provided business and the consumers they need with low interest rates; it also stands at the center of neoliberal restructuring.” – Sam Gindin (2014)*

In a neoliberal global economy capital plays a vital role: “Finance reallocates capital to where it is most profitable, enforces the closure of plants the market deems inefficient, facilitates mergers, and through venture capital supports the development of new high-tech companies.” (Gindin 2014). In order to further promote global economic growth “[c]apital had to be liberated from all unnecessary constraints on its mobility”, so funds could circulate freely across national borders (Overbeek 2005, 48). In the 1980s, the Washington Consensus

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<sup>142</sup> The rise of new technologies suggests progress. Yet, neoliberalism led to even more environmental destruction than Fordism. The Fordist regime of mass production and consumerism was already energy and emission intensive. But the global economy and better infrastructure for faster transport increased energy consumption and emissions even more which further accelerated the degradation of the environment (Candeias 2004)

<sup>143</sup> The term Washington Consensus was coined in 1990 by economist John Williamson and refers to a framework by the United States government and Washington based international institutions comprising 10 policies. According to Joseph Stiglitz, these were considered as being “desirable in just about all the countries in Latin America” (Internationalrelations.org n.d.; Center for International Development at Harvard University n.d.).

<sup>144</sup> This ideological conjunction of applying economic measure to social criteria can be traced back to Gary S. Becker. He considered the economic cost-benefit-analysis to also be relevant with regard to human behaviour. To him, human behaviour was fundamentally driven by maximising individual benefits (Candeias 2004).

enabled the IMF to have a leading role in restructuring the global capital market (Candeias 2004). The financial sector played a fundamental role in financing large businesses and large scale economies. (ibid.). That is why today it is no mere accident that investment banking is the industry with the highest power concentration and market power (ibid.). However, there are different opinions regarding the role of finance in the neoliberal global economy. While for example Bourdieu is convinced of the crucial role finance plays in the neoliberal economy, others like Harman object that also industrial capital still plays an important role (Bourdieu 1998; Harman 2007).

These issues aside, the fundamental problem with our global economy today is that this “existing system heavily privileges mobile (specifically financial) capital and allows transnational capital to circumvent or evade taxation<sup>145</sup> practically without sanction” (Overbeek 2005, 53). Up to today, there exist only voluntary forms of self-regulation and there is neither global agreement nor an international organisation equipped with regulatory powers to solve this issue (ibid.).

*“The rich are always going to say that, you know, ‘Just give us more money, and we’ll go out and spend more, and then it will all trickle down to the rest of you.’ But that has not worked the last 10 years, and I hope the American public is catching on.” – Warren Buffet (2010)*

Deregulation and international trade drove economic growth. Initially, the idea behind economic growth was that it would also remedy poverty. In the post-war years economic growth indeed contributed to an overall elevation of society as a whole in the US as well as in Germany, as the welfare status of the *Baby boomer* and *Wirtschaftswunder* generation illustrates. However, the 1970s marked a change, as Robert Reich states with regard to the situation in the US: “Since the late 1970s, the economy has grown 147 per cent per capita but almost nothing has trickled down” (Reich 2014c). It seems only a small percentage of society has benefited from these developments. Therefore it can be stated “the rhetoric of global free trade and the reality of large-scale industrial projects had not been able to reverse the widening overall gap between the financially rich and poor” (Bendell 2004, 4). Though the income composition of poor families in the U.S. today, for example, is characterised less by public benefits, and more by the actual wage earnings compared to the 1970s, this does not

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<sup>145</sup> A very topical example is Google Australia, which is dodging taxes by circumvention via other subsidiaries located in tax havens like Singapore (Kehoe 2014).

necessarily mean that the hourly pay has increased. The percentage increase of wages in the overall composition of income is rather due to the fact that the poor have worked more hours (Irwin 2014). Income inequality and wealth inequality in Germany has also been on the rise since the mid-1990s as the OECD observed already in 2008 (OECD.org 2008, Raymunt 2014).

*“[...] competitiveness had become one of the great unquestioned virtues of contemporary culture [...]” –*  
Will Davies (2014)

Directly linked to the problem of income inequality is the uncontested dogma of competition. Regulation and policies which have been enacted since the 1970s in the emergence of neoliberalism have led to “the extension of competitive principles into all walks of life” (Davies 2014). The erroneously central meaning of economics devised by the classic liberals recurred in the 1970s, was then stripped of its actual context and history. At the time of classical liberalism, competition presented a means of freeing the market from mercantilist domination. It was considered a welcome novelty, producing a free market based on the principle of competition and no longer controlled and regulated by a sovereign (Polanyi 1973). However, neoliberalism later made competition the overarching principle now pervading all areas with no distinction between social, political and economic spheres. As the entire society is at present infused with the dogma of competition<sup>146</sup>, not only business but also social life is about either winning or losing (Davies 2014). And, as there is no general equality of opportunity, chances to “win” or to “lose” are also determined by social status and descent, which further spurs social and income inequality. Yet, competition alone will not promote morality, nor will it serve society per se, as Alexander Rüstow states (Rüstow and Tönnies 2009). Competition must be seen in its historical context, as a means for free market and not as a principle of social life.

### **5.3.2 Globalisation**

Globalisation describes a phenomenon which is characterised by an interlocking of politics

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<sup>146</sup> The competition dogma is also linked with the notion of merit, i.e. the idea of meritocracy. Yet, this notion lacks logical consistency. As George Monbiot (2014b) claims “[e]ven when outcomes are based on talent and hard work, they don’t stay that way for long. Once the first generation of liberated entrepreneurs has made its money, the initial meritocracy is replaced by a new elite, which insulates its children from competition by inheritance and the best education money can buy”.



and economies on an international scale. This interconnectedness has spurred international trade and finance, along with the formation of transnational or multinational companies (BBC.com n.d.). Due to technological progress in transportation, goods can be shipped much more quickly and cheaply than ever before.

*“[...] the first stage of the globalisation [...] was based on the massive externalisation of industrialised countries' costs for the use of natural resources to the countries of the South.”* – Mohsen Massarrat (1997, 33)

Yet, the roots of globalisation, including a sharp North-South diversion regarding industrial and living standards, can be traced back to the beginning of the Industrial Revolution, which ushered in capitalism (Massarrat 1997). It was the time when the Western hemisphere began “striving for affluence at the expense of third parties” (ibid., 31). The vast availability of raw materials together with slave and child labour contributed to the growth of many industrial sectors. This marked the beginning of a systematic externalisation of social costs, which significantly lowered the costs related to the exploitation of natural resources and the “international division of labour between the industrial North and the raw material exporting South” (ibid., 33). It led to the establishment of a strong and dominating demand side on the one hand, and a supplying side on the other. It seems this disparity is not due to an “asymmetric distribution of global resources” per se, but is based on the economic expansion by the Western hemisphere, i.e. by the US and Europe (ibid., 34). This expansion is also linked to the emergence of the free market in the wake of classic liberalism. In the 20<sup>th</sup> century, “overexploitation, overproduction and dumping prices [became] the norm”, which proponents of neoclassicism see as a result of the “free play of the market forces” (ibid., 33). This is partially true, as the liberation from mercantilist control and regulation induced a market of free play. Yet, it was expansionism, which then utilised the market to increase economic growth by now unrestricted trade. The market was unleashed and so was the driver for economic and political expansion.

Today, our system of world trade is unquestionably based on these growth models derived from the era of expansion. Disparity has even increased<sup>147</sup> since the introduction of the GATT system, the precursor of the later WTO, in the wake of neoliberalism (Bundesministerium für

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<sup>147</sup> The GATT system led to developing countries being coerced into introducing liberalisation, while industrialised countries benefited from trade protections, e.g. for agricultural products. However, these trade protections also applied in trades between industrialised countries, e.g. the U.S. protecting their market from European and Japanese imports (Massarrat 1997).

wirtschaftliche Zusammenarbeit n.d.; Massarrat 1997). These “neoliberal development strategies” are also actively driven by the policies and support of certain international institutions, like the World Bank and the IMF (Massarrat 1997, 37). In the light of recent controversies regarding the Transatlantic Trade and Investment Partnership (TTIP) between the US and the European Union, this chapter concentrates on globalisation related topics like international trade and the conflicting nature of state subsidies.

*“Through trade agreements, the EU and other economic power blocs ensure that their companies get good deals with developing countries.” – Paul de Clerck (2010, 155)*

The neoliberal political and economic system is based on the dogma of growth. Only by growing can the Neoliberal regime continue to exist. Growth, in turn, is tied to expansion in terms of capturing new growth markets, which is significantly facilitated by free trade and agreements thereof. By reducing the costs induced by governmental regulation, such as environmental regulation, taxation, and social security contributions, advantages in international trade are expected (Maier-Rigaud 2001). Furthermore, by offering more supply, demand is also expected to rise, which then boosts employment (ibid.). Hence, free trade is seen as a means for realising economic growth and job creation, which are supposed to raise living standards and alleviate poverty. However, current discussions point out that the TTIP, which is predominantly concerned with harmonising standards and regulations, and not with the elimination of trade barriers as such, will only lead to the lowest common denominator on both sides (Goldsmith 2014). The EU is said to have higher standards when it comes to food safety, agriculture, and the environment among others. Yet, these are running the risk to being compromised in the TTIP negotiations, despite public statements by the German government that its high standards are not open to negotiation (Chemnitz 2014, European Commission 2013, Sheffield 2016).

*“Neo-liberal global governance in large part functions to make market reforms irreversible through inscribing them into, and anchoring them deeply in, the legal systems of most countries” –*  
Henk Overbeek (2005, 53)

Another controversial issue of free trade in general is the specific mechanism to protect foreign investors. Bilateral and multilateral free trade agreements between two or more nation states require the participating states to ensure a certain institutional frame and consistency with regard to the application of rules and policies. Hence, free trade agreements serve the purpose of minimising the risk for foreign investors by ensuring certain rights, protection of

property, and most importantly protection from unforeseeable regulations (Candeias 2004). In current free trade agreements like the North-American NAFTA between Canada, the United States and Mexico, and in other agreements to come like the Trans-Pacific Partnership (TPP), the TTIP and Comprehensive Economic and Trade Agreement (CETA), so-called Investor-State-Dispute-Settlement (ISDS) options are included. This means that investors can sue national governments via particular investor arbitral tribunals<sup>148</sup>, which are outside of any national legislation. This means disputes are not handled by national courts. Hence, investors can circumvent national court decisions, and thereby “overthrow the sovereignty of parliaments and the rulings of supreme courts” by seeking arbitration via these tribunals (Monbiot 2013; Liptak 2004). In effect, these tribunals can be seen as a “privatised justice system for global corporations” according to The Democracy Center (McDonagh 2013). Large corporations like the US tobacco company Philip Morris, or the Swedish energy company Vattenfall have already initiated lawsuits against the governments in Australia and Germany respectively based on ISDS options in current free trade agreements.<sup>149</sup> Yet, although these lawsuits may not be successful for these corporations, they have a “powerful chilling effect on legislation”, and serve the purpose of wearing down national governments by lengthy and expensive lawsuits (Monbiot 2013).<sup>150</sup> Today, these tribunals are no longer used to “to defend trade but to challenge the functioning of government” (DePalma 2001).

With the creation of the WTO in the 1990s, global liberalisation continued through a further cutback of tariffs. International trade was expected to flourish even more with all countries to benefit from it. Yet, this trickling-down effect failed to materialise, because the WTO did not realise that liberalisation needs active configuration (Chemnitz 2014). A result of this missing configuration is state subsidies, for example those enacted by institutional bodies like the EU, which inhibit fair international trade. EU agricultural policy subsidised

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<sup>148</sup> The oldest tribunal is the Court of Arbitration founded in 1923 by the International Chamber of Commerce, based in Paris (International Chamber of Commerce, Arbitration n.d.; International Chamber of Commerce, ICC Dispute Resolution Services n.d.).

<sup>149</sup> Philip Morris is suing the Australian government under the Hong Kong Australia Bilateral Investment Treaty (BIT) for its “Tobacco Plain Packages Bill” of 2011, as it significantly reduces brand image and attractiveness of the brand. Vattenfall on the other hand claims rights under the Energy Charter Treaty, a particular international agreement for the energy sector, because of Germany’s nuclear phase-out. Both trials are still pending. It may take years for the verdicts to be decided, while legal charges further accrue (The Australian online 2014; Taylor 2011; World Health Organization 2013; Bernasconi-Osterwalder and Hoffmann 2013).

<sup>150</sup> Most probably, these costs are rather irrelevant to industrialised nations like Australia or Germany if a case against a company in the course of an ISDS is lost. Yet, developing nations may struggle with these costs, as financial means are often scarce.

agricultural production within the EU which led to sizable benefits for domestic farmers. Not only were domestic agricultural products protected by export subsidies to increase their competitiveness on the international market; agricultural surplus was also exported, while at the same time tariffs and quotas were enacted against products from outside the EU. Hence, product distribution domestically and internationally was guaranteed. Yet, this had a corrosive impact on the less developed markets outside the EU. World market prices started falling as the international market was flooded by the cheap subsidised products from the EU.<sup>151</sup> There was no chance for local small-scale farmers in for example Africa to compete. This led to a weakening of domestic farming practice in the Southern hemisphere. The WTO then prohibited the current EU practice of agricultural subsidies. Yet, due to the EU's strong position and negotiating power, some regulation which still negatively impacts developing countries remained untouched (Chemnitz 2014). It becomes clear that with subsidies, companies, or in this case entire supranational states like the EU, try to generate benefits by circumventing the rules of the market (Rüstow and Tönnies 2009). These decisions regarding state aid or subsidies are frequently driven by industry lobbying groups.

However, it is important to underline that the phenomenon of globalisation begins in the nation states. These create the conditions for free trade in the first place by approving bilateral and multilateral agreements, joining the WTO and so on. Hence, the rise of neoliberalism and the increase of international interdependence are basically due to the domestic conditions established beforehand, enabling "global accumulation to flourish" (Gindin 2014). Yet, whether these conditions have also led to a weakening of the nation state itself will be discussed in more detail later on.

### ***5.3.3 Neoliberal Hegemony at Work?***

Irrefutably, politics today is driven by neoliberal policies (Mudge 2008, Peck and Tickell 2007). It is also indisputable that our world is divided into strong states and weak states. Evidently, there is a North-South division usually associated with the 'rich' and industrially well-developed northern countries like the G7 states, many of the OECD states, and

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<sup>151</sup> Vicky Cann from the World Development Movement e.g. states: "In South Africa, for example, there has been an almost 50 per cent increase in imports of food and drink from Europe, undercutting local producers. Jars of cucumbers, for example, are being imported from Poland and sold for half the price of the locally-grown cucumbers. The reduction of tariffs on European confectionary in South Africa has resulted in a 25 per cent fall in employment in the local sweet-making industry. As a result, South Africa's trade deficit with the EU has grown since the trade deal" (Cann 2010, 69).

nowadays also China. In contrast, the southern and less developed part of the world is foremost associated with Africa but also with parts of South America and South Asia. In the light of contemporary policies, which often also include various aid programmes by industrial nations for impoverished countries in the South, the question arises of whether there is a kind of global hegemonic force strongly influencing world politics and global developments. Van Pijl for example claims, “the ruling classes of the West have achieved what comes close to a global hegemonic order” (Van Der Pijl 2009, 240).

As already mentioned above, Robert W. Cox made this global perspective on political hegemony popular in the 1980’s. He interpreted Gramsci’s concept of hegemony in the context of increased globalisation and the international intertwining of politics and markets. Yet, while Gramsci’s concept of hegemony is based on the nation state and the national civil society, Cox broadens this approach by going beyond interstate relations. According to Cox, hegemony in a nation state may expand to a world scale. World hegemony is considered as “an outward expansion of the internal (national) hegemony” which has been established by the particular domestic social classes constituting national social forces (Bieler and Morton 2004, 93). Thereby, the domestic social class then becomes a ‘transnational class’ constituting the social forces of world hegemony while at the same time civil society also expands to a global level (Fusaro 2010; Cox 1983). In the context of world hegemony the structure of national states is still maintained. Yet, national states are permeated by hegemony due to international co-operations, because world hegemony like national hegemony filters through various structures: social, political and economic (Candeias 2004; Cox 1983). Furthermore, ‘transnational’ and ‘national’ are not opposed to each other. Rather, it is a process evolving from the national level to a transnational level, and from then on taking place simultaneously on subnational, national and international levels (Candeias 2004). Still, world hegemony at the international level is “not merely an order among states” (ibid., 313).

According to Cox (1983), this is “an order within a world economy with a dominant mode of production which penetrates into all countries and links into other subordinate modes of production” (171).<sup>152</sup> Gramsci originally associated this mode of production with Fordism, the

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<sup>152</sup> However, opposed to Cox, Bieler and Morton (2004) argue that the same mode of production does not necessarily need to exist in order to establish world hegemony over other states, nor are similar state forms or ideologies required.

system of mass production and mass consumption, which equipped the United States with a vast economic power thereby establishing U.S. hegemony.<sup>153</sup> The US world hegemony was renewed after the end of the Cold War in 1989, as many parts of the world were suddenly freed from Communism and hence approachable for capitalism (Antonio and Bonanno 2000). By the 1990s, US President George H. Bush envisaged a “new world order” with the US at its centre, being the representative and enabler of a capitalist democracy.<sup>154</sup> At the same time, the so-called Washington Consensus paved the way for capitalism to entrench itself in South America. The term refers to a neoliberal policy framework in connection with the NAFTA agreement. These policies were to promote deregulation, privatisation and trade liberalisation among other things (Center for International Development at Harvard University n.d.). Accordingly, the 1990s can be well described as a second unfolding of the US hegemony, which by its Washington-based institutions and the increase in bilateral and multilateral trade agreements, filtered through other industrialised countries.

Cox claims in order to become hegemonic “a state would have to found and protect the world order which was universal in conception” and “which most other states [...] could find compatible with their interests” (Cox 1983, 171; Candeias 2004). This resembles the requirements of national hegemony outlined by Gramsci, where ideas cannot be simply imposed but must be consented to, and this in turn requires them to be universal and compatible in a way. Furthermore, this universal conception of a world order needs to be expressed and enforced. This is achieved in two ways, first, by intellectual elites promoting the new common culture and second, by institutions formulating universal norms, which are then proposed as general rules for states to be adopted. Certain mechanisms by these institutions then enable enforcement and compliance. Thus, these institutions and their established norms operate across national borders (Cox 1983). Here, particularly international politics play a major role in maintaining world hegemony. In terms of politics, hegemony also serves the purpose of securing important natural resources, which become all the scarcer. Access to these resources is vital for a nation to maintain its economic status and power

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<sup>153</sup> The example of the United States as a hegemonic force shows that hegemony is not only about state power and hence coercion. It is also about the sheer economic power enabled by the system of Fordism. Further contributing to US hegemony beyond the state was the civil society emerging around this system of mass production and mass consumption together with the ruling class (Van Der Pijl 2009).

<sup>154</sup> The neoliberal policy recommendations by the US, however, could not be successfully implemented in every country aspiring to a capitalist regime. A national economy must be perceived as being embedded in a historical and socio-cultural context, which does not necessarily respond to policies developed in a different cultural and historical context. The U.S.’s engagement in Iraq and Afghanistan well demonstrate that Western policies cannot be implemented outright (Antonio and Bonanno 2000).

(Eblinghaus and Stickler 1998). In this context of economic power, bilateral and multilateral free trade agreements, as well as patents and agreements on patents, for example the WTO Trade-related Aspects of Intellectual Property (TRIPS), are important. Apart from nation states, supranational networks like the G7 states or the EU significantly shape hegemonic structures together with international institutions like the IMF, the World Bank and the WTO.

These international institutions play a major role in the development and maintenance of world hegemony. They present private transnational organisations with large consulting and planning capacities. As van der Pijl (2009) states, the role of these institutions “allows us to conceptualize a level beyond the state, where economics and politics are synthesized in a dialogue among the corporate elite and cadre with the actual ruling class” (248). Cox (1983) describes these organisations as embodying the rules “which facilitate the expansion of the hegemonic world orders” while at the same time being “a product of the hegemonic world order” (172). The organisations in question are for example the OECD, economic and financial institutions like the IMF, World Bank and World Economic Forum, political institutions like the Bilderberg Commission and the Trilateral Commission, and the ILO (Carroll and Carson 2003).

These international organisations “ideologically legitimate the norms of the world order” by defining and designing policy guidelines to be adopted by the states (Cox 1983, 172). By states adopting these guidelines certain practices at the national level then become legitimate. Similar to Cox, Gill identifies these institutions as the organic intellectuals Gramsci assigned to the ‘ruling bloc’ (Van der Pijl 2009). The IMF and the World Bank for example provide financial support. While the IMF gives loans, the World Bank offers financial assistance over the long term. However, this support is tied to certain conditions. A state’s adherence to these conditions is ensured via “incorporated mechanisms to supervise the application of the system’s norms” which renders “financial assistance effectively conditional upon reasonable evidence of intent to live up to the norms” (Cox 1981, 145). Moreover, this “machinery of surveillance” with its elaborated mechanisms also contributes to more harmonised national policies as it creates a “notion of international obligation” for states to be responsive and act according to the rules of the system (*ibid.*).

These organisations, however, possess neither formal regulatory powers nor strong sanctioning powers. Yet, as Overbeek (2005) states: “Nevertheless their influence and prestige are enormous and most governments in the world are willing, albeit reluctantly, to comply with their ‘recommendations’” (51). According to Cox (1981), even national

ministries and other planning offices are now subordinated “to the central organs of internationalised public policy” (146). Gill (1992) goes beyond this by claiming that these new economic institutions are substantially insulated from public scrutiny and democratic accountability by specifically constructing quasi-legal and constitutional devices.

This new form of governance, which has evolved in global political economy “is increasingly characterized by *informalization* and *transnationalization*” (Overbeek 2005, 51). It includes “the creation of additional formal and informal structures of authority and sovereignty besides and beyond the state” (ibid.). Global organisations like the WTO and the IMF “have achieved a considerable degree of autonomy from the national governments” (ibid.). These often come as “voluntary programmes” including deregulation, austerity and liberalisation. This new kind of global governance is characterised by neoliberalism and driven by the accumulation of capital on an international level (ibid.).

Yet, as mentioned in the section on the emergence of neoliberalism above, neoliberalism as a political and economic concept is by far not based on one singular approach nor is it conceptually based on a single idea. Therefore, the perception of neoliberalism being driven by hegemonic forces also necessarily lacks certainty. According to Plehwe, Walpen and Neunhöffer (2006), the idea of neoliberal hegemony must be perceived correspondingly as a “hegemonic constellation” in contrast to some unanimous force driving political and economic developments. They state: “Instead of a global, homogenous neoliberal hegemony, we thus need to think of potentially quite distinct *neoliberal hegemonic constellations*, which may be constructed at national, transnational, world-regional and global levels” (3). Furthermore, whether these global neoliberal politics are driven by US hegemony or whether they represent a “natural product of diffuse, individual, rational choices”, as suggested by advocates of the Washington Consensus like Thomas L. Friedman, is impossible to assess with absolute clarity (Antonio and Bonanno 2000, 47).

#### ***5.3.4 State Autonomy under Threat?***

The degree of the autonomy of nation states today is challenged by globalisation, for example increasing free trade agreements which not only concern tariffs, but also regulation, particular hegemonic structures, and corporate power which for example influences negotiations of free trade agreements. Younger states “[t]he nation state is the primary



democratic entity that remains. But given the scale of neoliberal globalisation it is clearly no longer up to that task”, meaning by task the national agenda (Younge 2014). Furthermore, Maier-Rigaud (2001) for example claims that free trade and international competition diminish policy discretion. In addition, Rüstow asserts that negotiations are often driven by lobbying groups reducing government representatives merely to minute takers (Rüstow and Tönnies 2009). Also Eucken, a contemporary of Rüstow, criticises the decay of the nation state through increased control by lobbying groups. He ascertains a loss in political authority through lobbying groups taking over particular governmental responsibilities. Moreover, he affirms that particularly in the field of international economic relations interests by these lobbying groups are ruthlessly enforced (Eucken 2004).

Yet, Maier-Rigaud (2001) concedes that nation states are not victims. Quite to the contrary, nation states today rather court private business, offering opportunities like tax reductions<sup>155</sup>, for example Germany exempts particularly energy-intensive industries from the Renewable Energies Act, altogether more than 2,000 companies in 2014 (Süddeutsche Zeitung online 2014). Nation states can be even seen as “authors” of globalisation by seeking public consent on global rules to then establish the institutional framework, which in turn enables globalisation (Gindin 2014). Here, states and markets are not opposites but “mutually embedded partners” (ibid.). Moreover, Neoliberalism has not weakened state authority but instead led to a restructuring. Evidently, this is the case with the US and its “aggressive military, its omnipresent intrusion into private lives, and the Federal Reserve’s role in underwriting the financial system” (ibid.).

*“The state was not in retreat: it was on the march in support of corporations.”*

– Jem Bendell (2004, 9)

In support of this, Candeias (2004), for example, claims that an assumed dichotomy between market and politics rather conceals the real character of the neoliberal project. The latter he clearly sees in the liberalised transnational capital markets, while politics have been actively shaping current developments and conditions. Certain forms of politics and economy are said to be dependent on one another. He also confirms that politics is still powerful though

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<sup>155</sup> For example, Mestmäcker assesses with regard to corporatism in the EU that primarily large businesses benefit from EU support and regulations. However, he states that this support is also a political means to build and maintain international competitiveness. Yet, he also criticises the current level of influence asserted by lobbying groups in the EU, which is an undesirable development (Eucken 2004).

in different ways. This in turn refutes the often-supposed decline of status and relevance of the nation state.

In addition, the mentioned characteristic of governmentality related to the neoliberal project above underlines the role of the nation state and national governments. Though state intervention as practiced under Keynesianism has been clearly rejected under Neoliberalism, state bureaucracy has not diminished (Tickell and Peck 2004, Mudge 2008). According to Larner (2000), a distinction must be drawn between government and governance: “while neo-liberalism may mean less government, it does not follow that there is less governance” (12). Harman (2007) further confirms this, stating that state expenditures have increased even more under Neoliberalism. As shown above, through its apparatus of international institutions the neoliberal project is governed with the collaboration of national governments.

## **5.4 What are the Alternatives?**

After discussing above the bigger picture of international politics and the economy, it is nonetheless important to have a look at alternative concepts to enrich the landscape of measures available for promoting more responsible business. Therefore, this section concentrates on recent examples of approaches focused on the environment, the connection between business and society, and a concept of a “better” capitalism. The first section is about negative externalities produced by business. Here, environmental economics has at least three approaches available to address this problem. This illustration is then followed by a critique of the externalities approach. After that, so-called closed loop approaches are introduced which also focus on slowing down environmental degradation. In the third section, a recent approach called Creating Shared Value, which aims at a better connection between business and society, is described. Finally, a new concept of a “better” capitalism, Inclusive Capitalism, is critically examined in terms of its innovative potential and effectiveness promoting responsible business.

### ***5.4.1 Taxing Externalities***

Under neoliberalism, ecological issues are basically considered a result of market failure,

which is linked to the problem of so-called ‘externalities’.<sup>156</sup> The problem of externalities relates to the fact that prices do not reflect the real costs of products, while these actual costs incurred are then imposed on the society as a whole. The strand of environmental economics considers these ecological or environmental issues in market-conform ways so that further economic growth can be ensured. Measures fitting this picture are for example recycling, certain green taxes or carbon dioxide trading schemes (Candeias 2004). Three approaches advocating green or carbon taxes, and trading schemes will be subsequently outlined

**Carbon Tax** The idea of putting a price on carbon emissions can be traced back to British economist Arthur C. Pigou. In the 1920s, in his book *The Economics of Welfare*, he advocated a tax imposed on activities producing negative externalities (Library of Economics and Liberty, Arthur Cecil Pigou n.d.; Frank 2013). Observing these externalities, Pigou saw a clear justification for government intervention.<sup>157</sup> Yet, the exact calculation of his proposed Pigouvian Tax remains controversial.<sup>158</sup> The Pigouvian Tax as such is different to the carbon tax, and critics claim it requires a high degree of information regarding the costs of damage and prevention in order to calculate the optimal tax rate. Yet, according to critics, estimating the damage caused by externalities is difficult and complex (Endres 2007). Hence, the Pigouvian Tax has been more or less scrapped, particularly after Coase proposed his theorem, which at that time seemed to be superior to Pigou’s approach.

*“From an economic standpoint, however, carbon dioxide emissions are the classic externality: emissions occur at no cost to the emitting facility, but at an enormous cost to society as a whole.” –*

Reuven S. Avi-Yonah and David M. Uhlmann (2009, 30)

The carbon tax is a market-based mechanism forcing companies to internalise the costs of their negative externalities produced, and hence discourage them from socially undesirable

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<sup>156</sup> The problem of ‘negative externalities’ goes back to the British economist Arthur C. Pigou (1877-1959), who advocated taxing these externalities via the so-called Pigouvian Tax named after him (Library of Economics and Liberty, Arthur Cecil Pigou n.d.). See e.g. the definition of externalities by the OECD: “Externalities refers to situations when the effect of production or consumption of goods and services imposes costs or benefits on others which are not reflected in the prices charged for the goods and services being provided.” (OECD.org, Externalities – OECD n.d.).

<sup>157</sup> Ronald Coase later challenged Pigou’s approach to externalities based on the argument that governments fail just as markets do. Coase’s own approach to externalities in the 1960s is known under the Coase Theorem and based on the idea of property rights and transaction costs. His theory can be linked public choice theory (Library of Economics and Liberty, Ronald H. Coase n.d.; Library of Economics and Liberty, Arthur Cecil Pigou n.d.).

<sup>158</sup> See for example John V.C Nye (2008), who doubts that “the identification and measurement of a Pigouvian externality is a sufficient condition for determining the optimal level of the tax” (32). He claims an optimal tax cannot be calculated based the size of the externality as such but must also reflect “the optimality of observed outcomes” (34). Hence, an optimal tax on externalities cannot be equated with the costs arising from externalities alone.

activities (Ruth 2006). At the same time, it generates revenue for the government. The revenue in turn could - at least in theory - “raise some significant revenue for clean-energy investments”, and should therefore be invested in initiatives reducing greenhouse gas emissions, or used to give tax credits to projects that promote alternative energy sourced from wind, solar or hydropower (Pielke 2009; Reuven and Uhlmann 2009). Moreover, a steadily rising carbon tax would lead to a “virtuous” circle: as the price for carbon emissions increase, more and more companies will most probably improve efficiency through technology in order to save money in the long run (Pielke 2009). With a carbon tax imposed there are heightened incentives to invest in these clean energies on the side of both government and business. Thereby, overall greenhouse gas emissions will be further reduced, while economy steers towards a low-carbon economy.

Proponents of the carbon tax claim that the tax is easy to implement, since all it requires is the imposition of a certain price per ton of carbon dioxide emitted on the most polluting industries like coal, oil, and gas. Also, even after implementation, there is still an option to modify the tax rate by lowering or raising it. In addition, a tax can be easily imposed and collected on imports, and rebated on exports for example (Reuven and Uhlmann 2009). Companies also benefit from this mechanism, as they have a price certainty and can adjust to it accordingly. Several countries in the EU, like Denmark, Italy, Finland, the Netherlands and Sweden have already implemented a carbon tax. The same is true for Canada, while the US and the EU have implemented a cap and trade approach (*ibid.*). Imposing a carbon tax also sends a clear signal to the industry: pollution is a negative externality for which the industry is responsible. Hence, they must account for it by calculating it into their overall operating costs. This is in contrast to a cap and trade approach, which creates the impression that there is generally a right to pollute and this right can then be purchased (*ibid.*).

The carbon tax also has its downsides. An implementation of a carbon tax will most certainly be opposed by industries with rather low emissions, as they benefit from a cap and trade approach by selling their excess allowances to other companies. Furthermore, heavy polluters such as the oil, coal and gas industry will most probably exert pressure on the government, as they fear a significant increase in unavoidable costs (Reuven and Uhlmann 2009). Moreover, revenue from taxes, such as the carbon tax, is not necessarily tied to be spent on a specific purpose (Fees and Seeliger 2013). Hence, government could as well appropriate it for other elements of expenditure like pension funds or national health

insurance. Most certainly, this money will serve a purpose but not the originally envisaged purpose: spurring a low-carbon economy.<sup>159</sup> Finally, the benefit with regard to reducing carbon emissions is not quite clear, as there is no clear cap defined. Hence, the real impact only comes to light when the carbon tax has been already adopted.

**Cap and Trade** A cap-and-trade approach is linked to emission trading schemes (ETS). A cap represents the total level of, for example, carbon emissions allowed in a nation. In practice, the government determines a limit for national carbon emissions, and then allowances or pollution rights are distributed to the industry. The benefit of this cap is certainty regarding the overall level of emissions within the respective economy (Reuven and Uhlmann 2009). Yet, the actual costs for a particular company remain unclear, as the price for rights or permits to pollute depends on the market. However, the effects under a cap-and-trade approach are actually largely equivalent with those under a carbon tax (Krugmann 2009). Both systems set the same incentive, namely to reduce carbon emissions, as emissions result in pollution and thereby in costs. Also, both systems lead to increased final prices, as these additional costs will be most probably directly passed along to the customer (Reuven and Uhlmann 2009).

Yet, a cap-and-trade approach is more complex to administer in comparison to a carbon tax. Monitoring and enforcement of the allowance system in particular lead to difficulties. First, a decision needs to be made regarding the distribution of allowances, whether they will be free or auctioned. The auction in turn requires the set-up of a monitoring system to prevent cheating. And in that case, penalties need to be established and effectively imposed. Second, international trading of permits or allowances must be monitored as well, which is even more complex and difficult (Reuven and Uhlmann 2009). Further downsides are the adverse effects of the trading scheme if emissions fall below a certain cap since in that case allowances become very cheap and there is no “economic rationale to keep reducing pollution” (Hansen 2009). Also, a trading scheme may encourage companies to not actually reduce their emissions but buy carbon credits elsewhere (e.g. via UN REDD scheme) to offset their carbon emissions. Yet, these carbon-offset schemes are often not verifiable, and the actual effectiveness of this mechanism remains debatable (*ibid.*).

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<sup>159</sup> For example, Germany’s “Ökosteuer” illustrates very well that taxes originally implemented to positively impact the environment end up somewhere else. In the case of Germany, the Ökosteuer, which is imposed on the consumption of mineral oil, is used to increase the public pension fund (Die Welt online 2000).

*“Cap-and-trade is a big, fat political mess that cannot succeed in reducing emissions, but can lead to lots of benefits to many special interests.”* – Roger A. Pielke (2009)

In theory, a cap-and-trade approach may generate the same level of revenue compared to a carbon tax. In practice it depends on the proportion between the allowances auctioned and given away for free. If the allowances are free lower revenue is very probable. Also, free allowances generally run the risk of a sub-optimal reduction of greenhouse gases, thereby missing the target. Similar to the carbon tax, cap-and-trade is also prone to being lenient towards some industries or exempting certain industries from the scheme altogether (Reuven and Uhlmann 2009). This is the case with the European trading scheme for example.<sup>160</sup> Moreover, the risk of fraudulent practices like cheating cannot be entirely excluded. The implementation of cap-and-trade schemes in developed as well as developing countries unfortunately is also linked to cases of various forms of power abuse, like fraud, bribery, and corruption, for example manipulation of GHG market prices, or anti-systemic speculation (Europol 2010; UNEP Global Environmental Alert Service 2013). Finally, the prospect of a better integration with other cap-and-trade systems is largely illusory, as only the EU and the US have implemented a cap and trade approach so far (Reuven and Uhlmann 2009).

**Cap and Dividend, Fee and Dividend** There are at present two approaches discussed in this field, which vary only slightly. The first one is based on a cap-and-trade scheme. The cap-and-dividend scheme also implies a cap on carbon emissions. These emissions are then distributed via auctioning. Yet, in contrast to cap-and-trade, the resulting revenue does not remain with the government but instead is distributed to all private households on a per capita basis. As final prices are expected to increase under a cap-and-trade scheme, this “improved” version could make sure that private households can in turn offset these (Morris 2010; Kunkel and Kammen 2011). The distribution on a per capita basis also takes into account the weaker position of low-income households. Proponents assume that this cash incentive “could spur all households to try to reduce their carbon footprints” (Morris 2010).

The second approach comes closer to the carbon tax. The fee-and-dividend scheme requires

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<sup>160</sup> Unfortunately, the EU trading scheme cannot be considered a successful example for a cap and trade approach. First, in the beginning too many allowance were given away for free, which reduces the all over reduction in emissions. Secondly, many industries are exempted from the scheme altogether. The EU ETS “carbon leakage list” confirms the exemption of 175 of a total of 245 sectors from this scheme, which corresponds to 95 per cent of industrial emissions. These exemptions in turn create higher costs for customers (Van den Plas 2014).

the implementation of a fee at the point of entry like wells, mines or ports, which foremost affect the extractive industries such as coal, oil, and gas. Like a carbon tax, this fee could gradually increase. Here again, customers will later pay a higher price on products but are not affected by this fee directly. Like the cap-and-dividend scheme described above, the revenue created is then distributed to the public, rewarding those people using less energy (Nuticelli 2013; Hansen 2009). The system of fee-and-dividend has been used in British Columbia since 2008 (Nuticelli 2013). A similar scheme has been also implemented in Australia but Prime Minister Tony Abbott recently overturned the Australian carbon tax (Farr 2014).

**Critique** The approach to business including externalities is not without its critics. While it is quite clear that somehow businesses “must begin to pay the true social and environmental cost of their operations” it is less clear on which basis this can be realised (Fullerton 2014). As noted in the sub-chapter on CSR further above, particular voluntary measures already implemented by business linked to sustainability, like reporting, are by no means enough. First, on the business side, measurement procedures with regard to the use of resources and waste or emissions produced must be improved and standardised in some way. Then standardised mandatory reporting as opposed to only voluntary reporting should be introduced (*ibid.*). Second, on the political side there should be clear ambitions to develop standards for global carbon taxation, as an international approach to taxing carbon and other emissions is vital to successfully reducing global emissions. Most importantly, an improved and successful political approach to reducing carbon emissions requires an inclusion of all industries in contrast to for example the current EU ETS scheme, which privileges carbon intensive industries by giving them comparably many free permits. This has rendered the entire scheme more or less useless, as the price for permits remains low which does not motivate the industry to implement more innovative technology to emit less and save money (Monbiot 2014a).

*“[...] as soon as you monetise something in nature, a cost-benefit analysis will come in. Nature always loses, because nature goes on for ever.” – George Lakoff (2014)*

However, it is quite misleading to assume these externalities can ever be measured in terms of correct prices. The underlying problem is that some harm can be mitigated, while some is irreversible. Thus, some damages cannot be adequately estimated in terms of money, particularly the costs occurring for future generations. For example, today it is hardly assessable exactly what consequences the vast rainforest destruction will have on future

generations in terms of money. Neither do we know the costs induced by climate change for, for example, the national health system or national security (Fullerton 2014).

And, as George Monbiot (2014a) rightly points out, the real problem is even deeper. The crucial point is the unchanging neoliberal dogma behind these approaches, as also these only function over making nature just another commodity. He states that “[a]ll the things which have been so damaging to the living planet are now being sold to us as its salvation; commodification, economic growth, financialisation, abstraction” (ibid.). By commodification, the economy co-opts nature making it a part of its growth ideology to which nature then contributes with its “assets” according to their value.

The inherent problem of pricing nature also lies in the fact of incommensurability. George Lakoff goes to ask: "If it's valuable, what's the value? What's it worth? Which is the wrong question to ask, because, first of all, much of its value has to do with what is visceral to you. What does it mean to you if you hear the birds singing, or the birds all die?" (Williams 2014). On the other hand, Monbiot (2014a) claims that estimating the price of nature is very much based on its aesthetic value. The aesthetic value in turn is very subjective, as people will most probably perceive the value of nature differently. So, in order to estimate the aesthetic value, all people would need to be asked, which, however, will not lead to a satisfying answer because the answer will only represent the average value.

In conclusion, all these measures only serve the process of making neoliberalism appear more sustainable. Aspects of ecology and sustainability modernise the current system, but without challenging it, and hence, without a significant change (Eblinghaus and Stickler 1998). This approach only tries to make neoliberal hegemony and the accumulative regime further viable (Candeias 2004). The way of only “greening” current capitalism is not a sophisticated solution for our ecological crisis today, as in the end nature is simply commodified and subjugated by the economy (ibid.).

### ***5.4.2 Closed Loop Approaches***

In contrast to the imposition of taxes or fees discussed above, closed loop approaches present a holistic concept, which also leads to rethinking how our economy works. Fully implemented it means a radical shift from a throwaway society to a collecting society based on comprehensive recycling. In essence, this approach presents the ideal of a closed cycle of



production, consumption, disposal, recycling, and then an integration of the remaining material into production again. Particularly in the light of limited resources, it is vital to develop sophisticated processes for recycling to extract resources from products for later reuse. In this closed cycle no resources or material will be wasted, for example food residues become heating fuel thereby contributing to a circulation of resources and material. The distinction between goods and waste becomes meaningless and disappears, as waste becomes a valuable good itself.

Currently, there are two popular approaches to accomplishing a closed loop cycle introducing a shift away from the linear approach of consumption and disposal: Cradle-to-Cradle (C2C) and Circular Economy. The origin of Cradle-to-Cradle can be traced back to Swiss economist and architect Walter Stahel. In the 1970s, he developed a concept to extend the duration of products and to prevent waste (Product-life.org n.d.). Later, his concept was taken up by German chemist Michael Braungart, whose own C2C concept focuses on a complete recycling of all material involved (Hamm 2009). Hence, Braungart's concept goes beyond Stahel's approach of product-life extension and waste reduction, and aims to close the cycle by creating options for complete recycling (Institute of Science in Society 2011). Furthermore, Braungart's C2C is very much based on inspiration from natural processes. Although C2C is not yet a full-fledged theory, there are already companies which have implemented C2C-based product design principles, such as US cosmetic company Aveda, which only offers products based completely on natural ingredients and sold in fully recyclable packaging (ibid., Beller 2012). The Circular Economy concept proposed by Ken Webster and Craig Johnson from the Ellen McArthur Foundation is very much based on the C2C concept (Webster and Johnson 2010). Yet, it also emphasises the connection between sustainability and C2C, as well as C2C leading to a low-carbon economy. Their work *Sense & Sustainability* is quite comprehensive, not only covering product innovation and improved production cycles but also for example urban transformation (ibid.).

In conclusion, these two approaches to a circular economy are overlapping, and can be seen as a further development of Stahel's ideas. While the approach by Webster and Johnson appears to be wide in terms of areas included, Braungart's concept is very much focused on concrete implementation and design of processes and products (cp. McDonough and Braungart 2002).

Yet, there is still some critique, as this concept lacks practicability. A full implementation

remains difficult, as the number of overall ingredients for a product must be chosen carefully, since many of these are often toxic and non-recyclable. This frequently requires a complete transformation of the original product (Beller 2012). Also, in terms of recycling, the concept of a circular economy in general is currently difficult to implement, as for example most manufacturing companies do not want to disclose all technical aspects of their products. Yet, this in turn is necessary for other companies to recycle or refurbish their parts. The unsolved issue with intellectual property therefore also prevents the full flourishing of this idea (Wiens 2014). However, despite prevailing difficulties it is definitely an important impulse for the industry to start a shift at all. It reminds us that resources are limited but that this fact does not necessarily impose a limitation on our products, if we are only smart enough to learn from nature.

### ***5.4.3 Creating Shared Value***

Creating Shared Value (CVS) is an idea developed by Michael E. Porter and Mark R. Kramer (2011), and presents an approach to improving capitalism. The authors even claim CVS reinvents capitalism. The authors criticise the currently narrow approach to value creation and consider companies as being trapped in a system, which is only about optimising short-term financial performance. The authors assess that currently implemented approaches to corporate responsibility are merely due to external pressure, and to increase reputation. This also explains why companies today “remain stuck in a “social responsibility” mind-set in which societal issues are at the periphery, not the core” (ibid., 4). Shared value in contrast also creates value for society, and goes beyond social responsibility, which is often interpreted by business as philanthropy.

*“The purpose of the corporation must be redefined as creating shared values, not just profit per se.” –  
Michael E. Porter and Mark R. Kramer (2011, 4)*

How then is shared value created? Porter and Kramer propose this happens through “reconceiving products and markets”, “by redefining productivity in the value chain”, and “by enabling local cluster development” (Porter and Kramer 2011, 5). The first step requires a company to include societal needs in their products, so that these products can benefit society. Then, externalities must be taken into account in order to enhance the value chain so that it contributes to creating shared value. This means that logistics, energy and resource use, and

procurement must be reconsidered and improved regarding efficiency. Further, a successful company in terms of shared value needs to develop its “clusters”, which means its business environment including other firms, suppliers, logistical infrastructure amongst others. Successful cluster development drives innovation and productivity. As a result, it also increases competitiveness (ibid.).

The shared value approach is different to for example a fair trade approach. According to the authors, fair trade only redistributes value by increasing the revenue of poor farmers unlike shared value which aims to expand “the overall amount of value created”, for by helping farmers improve their farming techniques to increase efficiency, yields and in the end the product itself (Porter and Kramer 2011, 5). Also, the local cluster is further strengthened to enable a network of supporting suppliers, improvement in infrastructure etc. Creating shared value is also about bringing business back in touch with its surrounding community, yet more effectively than with charity only. With this approach, the authors seek to overcome the neoclassical dogma of only profits, and aim to reconcile business and society. Kramer and Porter consider their approach as “integral to a company’s profitability and competitive position” (ibid., 6).

*“CSV offers the seductive promise that company success can be aligned with social progress – and that business can be re-legitimised in the process.” – Andrew Crane (2014)*

Yet, Andrew Crane criticises CSV as misleading. He claims CSV motivates executives to only address those social issues which create economic value for the company and its stakeholders. Instead, executives need to focus on new value created for all and not only for their stakeholders. However, there are numerous social problems and a company cannot deal with all these at the same time. Nor are these social issues all equally relevant, which inevitably leads to trade-offs. And who is to manage these trade-offs, if CSV only focuses on the easy win-win situations where both the company and the society benefit? Furthermore, in light of the “current legitimacy crisis of business” (Crane 2014). Crane claims that neither compliance with the law nor ethical standards is sufficiently reflected in Kramer and Porter’s CSV approach. He concludes, that the authors “are doing little more than restating the need for a business case for social responsibility” (ibid.). Finally, as Walter Eucken already stated decades ago, even if companies were really interested in improving societal needs and doing justice to society’s interest at large, they are not in the position to identify these interests by themselves (Eucken 2004).

#### **5.4.4 Inclusive Capitalism**

Another recent buzzword next to CSV is Inclusive Capitalism. Like CSV, this concept also aims to reinvent or at least transform current capitalism due to the current legitimization crisis. Inclusive Capitalism is a business initiative started by the Henry Jackson Society in 2012. The Henry Jackson Society is considered “a right-leaning British foreign policy think tank” (Clark 2012). However, despite this background there are many famous proponents of this initiative such as McKinsey’s managing director Dominic Barton, Lady de Rothschild Lynn Forester, IMF’s managing director Christine Lagarde, and also former U.S. President Bill Clinton (McKinsey.com 2012; Stern 2014).

As Lynn Forester states, “Inclusive capitalism is good capitalism because it presents “a broad-based improvement for all of society” (BBC.com 2014b). The Henry Jackson Initiative underlines the benefits of capitalism, as “it has made the world healthier, richer and freer than previous generations could have imagined” (McKinsey.com 2012, 8). Yet, capitalism is also said to be causing dislocations. Therefore, Inclusive Capitalism proposes three pathways to be addressed by business to enable good capitalism. First, the current education model in the US needs to be improved so that it is also reconcilable with fulltime jobs. Secondly, start-ups and smaller enterprises shall receive more support in US and UK economies. Third, management and governance must be reformed in ways going beyond short-term performance (ibid.). It is worth mentioning, this initiative derives its ideas of good capitalism from Adam Smith and his *Theory of Moral Sentiments* (ibid.). Inclusive Capitalism is further considered as going beyond CSR by finding new ways for industries to “work together to promote responsible behaviour to underpin the fairness and integrity” (BBC.com 2014b).

*“Far from acknowledging the predatory and unequalising impact of neoliberal capitalism, the document shows that the inclusive capitalism project is concerned with PR [...]” – Nafeez Ahmed (2014)*

However, this initiative has recently received a lot of criticism. While proponents acknowledge that something is wrong with today’s capitalism, unfortunately this initiative is merely concerned with preserving the current system. Basically, the initiative is about reformation and rehabilitation of the economic system but neoliberalism and capitalism as such are not contested. The crisis of capitalism is not only an economic or financial problem, but also “it is social and political and it is generated by the way neo-liberal markets undermine social democracy” (Davis 2014).

Also, the reforms proposed, “seem well-meaning at first glance, but in reality barely skim the surface of capitalism's growing crisis tendencies” (Ahmed 2014). Above all, the reforms still favour large corporations and only “offer ways to rehabilitate perceptions of powerful businesses and corporations” (ibid.). Altogether, the Inclusive Capitalism initiative along with its reforms creates the impression of “token PR moves to appease the disenfranchised masses” (ibid.). Yet, they “fail to address the very same accelerating profit-oriented systemic risks” (ibid.).

In conclusion, this initiative can be debunked as an approach by institutional and business elites to maintain the Status Quo by promulgating and reaffirming reforms. This approach is not about fundamental change; it merely presents a patch to cure a sick system. It conceals the fundamental issues of neoliberalism and capitalism, which led to the financial crisis only a few years ago and its legitimization crisis since then.

#### **5.4.5 Section Summary**

The previous sections aimed to provide an overview on some of the current alternatives to CSR and sustainability approaches. However, it turns out that not every one of those described really presents an innovation or solution to the problem of irresponsible business today.

*“The real problem with “responsible capitalism” is not that it sounds clunky on the doorstep but rather that ordinary people know in their gut that it is a contradiction in terms. They can sense how evasive it is in relation to their own experience.” – Leo Panitch (2014)*

For example, the concepts of Creating Shared Value and Inclusive Capitalism can be entirely dismissed for several reasons. Both concepts inherently lack the characteristics necessary for fundamental change, like challenging the current system. Quite on the contrary, they are very much based on the current system, taking it as their uncontested starting point. Referring to Creating Shared Value, this concept is not very different from proposed CSR approaches, as Andrew Crane states. Furthermore, the connection to be built between business and society appears to be mere rhetoric, as potential conflicts are ignored. The concept proposed by Kramer and Porter also treats compliance and ethics only peripherally. Inclusive Capitalism on the other hand appears to be quite an elitist approach which only upholds the status quo. It seems to be utterly based on capitalism, which also implies a regime

of perpetual accumulation and constant growth, and therefore is incapable of inducing any fundamental change. It only makes capitalism a little “nicer”. Basically, the steps envisaged by the initiators of Inclusive Capitalism like focussing on business-oriented education, supporting start-ups and smaller businesses, as well as rethinking the current criteria of corporate performance and improving governance are certainly of importance and worthy of support. Yet, the fact that Inclusive Capitalism is a very elitist initiative sheds a dubious light on these objectives and casts doubt on the ambitions communicated. Moreover, it is the economy and the businesses, which are supposed to put these initiatives into action as opposed to the government. It is again the mantra of voluntariness, which did not really work out in the case of CSR and sustainability either.

In contrast, approaches to pricing carbon have already proved to be particularly feasible. However, it is very vital to implement these on a global scale to ensure impact. Also, this can be only considered as one solution amongst others. Pricing carbon alone is only a vehicle to fight against climate change but more measures are needed to complement this approach, for example increasing financial support for renewable energy, or developing strategies for adaption and resilience towards the consequences of climate change. Still, the approach to taxing carbon does not break with the neoliberal dogma. The concept of a circular economy on the other hand can be considered as a ‘disruptive model’ as it requires a fundamental change of thinking. Therefore, this approach definitely has its merits; nonetheless implementation remains difficult and is most probably not feasible in every industry. Yet, most certainly, it presents a real innovation, since current economic processes are not only challenged but to be changed entirely.

## **5.5 The Question of Corporate Power**

Today, 41 of the world’s 100 largest economies are not presented by nation states but by corporations (McDonagh 2013). Or, as Paul de Clerck from Friends of the Earth states, more than the half of the biggest players in the economy are now corporations with their annual turnover often exceeding the GDP of some nation states. Over the last few decades, companies have grown ever larger by take-overs or mergers, constantly expanding their sphere of influence (Clerck 2010). According to Jem Bendell (2004), corporate power is “the power that arises due to the organizational form called a corporation” (9). Furthermore, this phenomenon can be described as “a complex set of power relations and capabilities that arise

due to the existence of corporations” (ibid.).

*“The problem is that political power tends to rise to where the money is.”* – Robert Reich (2014b)

Through the emerging global economy, large corporations could considerably benefit from new opportunities.<sup>161</sup> Through technological advancement enabled by sufficient capital available, corporations have been able to expand their business internationally, creating an opaque network of suppliers, production and manufacturing facilities, mining and extraction sites etc. spanning the globe. Yet, this global expansion also turned corporations into more powerful and influential players in international politics and developments (Cox 1981; Candeias 2004).

According to a poll by Business Week in 2000, almost 75 per cent of US Americans were convinced that “business has gained too much power over too many aspects of their lives” (Bernstein 2000). Even fourteen years ago, people in the US complained about corporations’ insensitive behaviour and their obsession with profits at the cost of product quality, safety and reliability. At that time people also already realised that companies often “buy their way into government” (ibid.). It seems nothing has changed since then. The second decade of this century can be well characterised by the same statements: profits and corporate power and influence. In the light of topicality, this section presents some manifestations of corporate power today in more detail. Issues to be discussed are corporate tax dodging, corporate plundering, and the corporate shadow regime characterised by lobbying, and undisclosed trade negotiations.

### ***5.5.1 Corporate Tax Dodging***

Corporations today have various options for avoiding taxes. And, it seems this tax avoidance has become systematic in order to maximise short-term profits. Today, this strategy presents an “integral component of many companies’ growth and profit strategies” (Godfrey 2014b). Yet, this systematic tax avoidance is often not an illegal practice. For corporations, there are at least two options for increasing profits by “saving” taxes: first, there are loopholes

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<sup>161</sup> As Jem Bendell (2004) underlines: “It is true that the first to take advantage of the reducing cost of communication and transport were capitalists and large corporations, who were actively globalizing Western consumer culture.” (13).

in national tax legislation and international tax rules such as tax treaties, which enabling companies to shifting their profits from the country of origin to a country with significantly lower taxes. Secondly, corporations often bargain particularly with developing countries about tax reductions (Godfrey 2014a). These two options are presented subsequently in more detail.

Global corporations benefit from certain loopholes in international legislation facilitating the cross-border creation of artificial tax schemes and profit shifting to lower-tax countries (Godfrey 2014a, 2). A “leading tax-avoidance vehicle” today is intellectual property (IP) (Blair-Stanek 2014, 2). Using IP as a tax avoidance scheme yields vast savings for companies and offers two benefits: first, transferring IPs to tax havens like Ireland, the Netherlands<sup>162</sup>, Singapore, or Switzerland to only name a few, can be realised by mere paperwork; second, the “fair market value” of intellectual property as such is difficult to estimate, hence corporations can easily justify a high value, which is then imposed on the taxable company in order to reduce the amount of taxes to be paid (Blair-Stanek 2014, 3). Avoiding taxes via IP (payments for intangibles) is only one option of many. Additionally, MNCs today can also save taxes via transfer pricing, intercompany (Needham 2013; Bergin 2013). Creating artificial tax schemes via the use of IP or other options named above does not necessarily represent tax fraud.<sup>163</sup>

*“The limited ability of national governments to pursue any agenda that has not first been endorsed by international capital and its proxies is no longer simply the cross they have to bear; it is the cross to which we have all been nailed.” – Gary Younge (2014)*

The second option is tax avoidance facilitated by governments. In order to attract more foreign direct investment (FDI), governments woo companies and rich individuals with exemptions, incentives and secrecy (Godfrey 2014a). Unfortunately, this growth model based on low taxation is often “the cornerstone of many governments’ growth strategies” (ibid., 7).

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<sup>162</sup> Corporate tax avoidance in the EU can be also realised by combining the ‘benefits’ of Ireland and the Netherlands. This way is called “Double Irish Dutch Sandwich”. For detailed information on this tax avoidance model (IPfinance 2013). Meanwhile, as the Netherlands have realised their role as one of the EU’s most prominent tax havens, it is reviewing its current taxation scheme (Arstechnica.com 2013).

<sup>163</sup> Two prominent examples applying this scheme are Google and Starbucks. Google for example incorporates inventions developed by its engineers in California, and then “licenses all the patent rights to a subsidiary in a tax haven like Ireland“. Unlike Google, Starbucks is a brick-and-mortar company; therefore options for IP are more limited. However, by applying IP to its trademarks, roasting methods, and even work wear, Starbucks is also profiting from this scheme (Blair-Stanek 2014, 7).



Yet, at the same time, these special offerings lead to competition, pitting economies against each other. This inescapably leads to a ‘race to the bottom’ with only one particular group to benefit from it in the end: global corporations (ibid.). Through this competition they are in the very comfortable situation of being able to choose from a range of nation states making the best “offer”.

*“Across the world many governments have adhered to an economic view that growth in the economy (and the retention of their political power) depends on attracting foreign investment, regardless of the strings and costs that come with it.” – Thomas McDonagh (2013, 4)*

This competition over attracting FDI is especially prevalent in developing countries. With a desperate starting position along with the fear of losing potential investors, developing countries “often accept the unfair conditions imposed by powerful MNCs when negotiating contracts” (Godfrey 2014a). Yet, studies show that the supposed positive effect from tax-breaks is overrated. Moreover, further empirical studies cannot confirm that the tax environment really is a key driver for making investment decisions (ibid.). In fact, for developing countries that means there is not too much to gain from offering favourable tax conditions. Quite the contrary, this practice produces great losses on their side, as these countries depend much more on revenues from taxes. To give some examples: tax revenue losses in Africa from 2008 to 2010 are estimated at USD 38.4 billion annually, while annual losses in Bangladesh are as high as USD 310 million, and losses in Peru total \$105 million (ibid.). These losses constrain government efforts to “fulfil their obligations to uphold citizens’ rights to basic services, such as healthcare and education”, and denies them a “fair chance of meeting people’s rights to public services, and tackling poverty and inequality” (Godfrey 2014a, 2, 6). Accordingly, corporations only concerned with profits using tax avoidance schemes contribute to hindering developing countries in their capability to tackle inequality (ibid.). Yet, in contrast, developing countries with functioning and effective tax systems could be much more autonomous, and thereby be less dependent on credits for from example the World Bank.

*“You do not solve the problem without confronting power.” – George Monbiot (2014a)*

In 2009, G20 leaders consented on ending bank secrecy and revising the international tax system, to stop tax abuse. Nothing much has changed so far. Yet, for 2015 there is an action plan developed by the OECD and approved by G20. The ‘Action Plan on Base Erosion and Profit Shifting’ (BEPS) aims to redefine current international tax rules (Godfrey 2014a).

However, the proposed action plan will most probably not lead to fundamental changes on a global scale for two reasons. First, the business lobby is actively exerting influence, while on the other hand the countries concerned, like the developing countries, are unlikely to be represented in the negotiations, as usually they do not belong to the OECD. Secondly, the “underlying principles of the system” are not challenged. The plan only aims to reform the current principles to be more effective for the OECD countries (ibid., 13).

In sum, corporations profit enormously from currently incoherent and unsystematic tax rules, while developing countries are only losing important streams of revenue. Moreover, due to this loss of revenue, governments are restricted in their capability to looking after their people’s needs like maintaining health and education systems, as money is scarce. This only leads to developing countries relying even more on international aid programmes driving them to dependency on international organisations and their strict norms and regulations. However, Mehta suggests developing countries should not wait for any regulation by the OECD but instead initiate their own solutions. He proposes various measures already in practice, for example a withholding tax, caps on allowable tax deductions, profit split methods applied to “cross-border transactions and transfer pricing arrangements”, natural resource contracts, which are particularly important to resource rich nations, or integrating anti-abuse rules among others (Mehta 2014, 4). All these measures have already been implemented by other countries. Therefore, developing countries should approach MNCs with a self-confident attitude and aim for re-negotiation of current agreements in the favour of these measures above. Furthermore, collaboration among developing countries would further help enforce of these measures more broadly (ibid.).

### ***5.5.2 Corporate Wealth Grab***

Tax dodging described above is one form of immoral corporate enrichment by corporations. However, there are also forms of wealth grab, like the plundering of natural resources or controversial patent rights. Both issues are outlined below. That this enrichment can happen at all is also due to the “open-access-problem”, which will be briefly outlined as well.

#### **Corporate Plundering**

*“The homelands of the South were seen as a source of cheap products for the North, rather than a place of*

*diverse knowledge and wisdom.*” – Jem Bendell (2004, 13)

The plundering of natural resources by corporations occurs around the globe. In Africa for example various sectors like oil, mining, forestry, and fishery are affected. Including revenues lost due to tax avoidance and tax evasion, Africa’s loss accounts to an amount somewhere between \$34 billion and \$50 billion annually, which is equivalent to about 5.7 per cent of the Sub-Saharan African GDP (Annan 2013, Rover 2014). This exceeds by far the amount Africa receives in international aid or foreign investment. Local elites and foreign investors are likewise engaged in plundering (Africa Progress Panel 2014). The practice of plundering, for example in the area of fishing, leads to costs amounting to \$1.3 billion a year. Even worse, it destroys the basis of existence of the artisanal fishing people<sup>164</sup> and deprives Africa of vital nutritional sources and the opportunity to engage actively in world trade itself (ibid.). Like fishery, forestry is also badly affected, as Africa is one of the hot spots for timber. All these practices are usually characterised by a high degree of opaqueness. The global loss of these illicit activities amounts to \$100 billion annually in the logging sector and \$23 billion in fishery (ibid., 88). Yet, legislation by industrialised countries also contributes to this exploitation, primarily by insufficient global regulation and neglected open-access problems but also by subsidising fuel and other resources necessary for global business (Fao.org n.d., Africa Progress Panel 2014, 91).

**The Exploitation of Natural Resources and the “Open Access Problem”** Plundering resources is only one issue. Another issue is the almost natural appropriation of nature and individual property by corporations, without any compensation for negative externalities arising from their operations. This is the case for example with fracking, which is considered as environmentally harmful. Yet, corporations are in a position of being able to override community concerns as well as individual concerns and property rights (Biggs 2014). The legal practice behind this is called “forced pooling”. It is a specific US practice which enables companies to drill under people’s properties without explicit permission, as long as neighbours have already consented. Then, the entire area is pooled enabling companies to bypass individual property rights (Baca 2011, Beans 2014).

Generally, all these issues of plundering and illicit exploitation can be linked to an “open

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<sup>164</sup> These people are deprived of their traditional resources like farming and fishing, and means to live and earn a living. Their resources are more and more “expropriated by others to feed a global market” (Bendell 2004, 2-3).

access problem”, where nature is treated as property to be accessed and co-opted by everyone (Biggs 2014). Nature is at man’s disposal, and exploitation is generally justified on the grounds that it has to serve human needs. Nature is not seen as a distinct system of its own. The “open access problem” is derived from environmental economics literature and refers to the commons problem (Stavins 2011). The commons problem is the problem of public goods, such as nature, air (or in the case of Africa above, the sea) etc. being accessible to everyone, also businesses, and therefore being exposed to exploitation. If for example a particular company refrains from exploiting the commons, while others continue, it only suffers a competitive disadvantage. In the case of a fishery this also means if that particular fishery business refrains from fishing in the West African seas, others will do it more. Accordingly, this fishery business is economically disadvantaged by not exploiting public resources (Endres 2007). This problem can only be solved by (international) governmental regulation enacting clear rules regarding the extent to which public goods can be appropriated, for example restrictions regarding time or volume. In the case of fisheries, this could mean international agreements determining and regulating fishing season and fishing volume (ibid.). However, also international agreements are frequently ignored. Therefore, effective monitoring and enforcement are vital to avoid exploitation.

**Patent Rights** Patent rights are the last point to be subsumed under the heading of corporate wealth grab. Patents usually last for 20 years and can be applied to new inventions in the area of process technology or product ideas, but nowadays also to products themselves (Lehman 2003). However, these product patents, which emerged only after the Second World War, actually run contrary to the original idea behind these patents, namely the protection of ideas (Eucken 2004). Patent rights were developed to encourage individual innovators but, as patent rights cost money<sup>165</sup>, it is the large corporations with sufficient capital which are in the position to register these protections. As a consequence, patent rights advance monopolies<sup>166</sup>, and mostly benefit those with enough capital leading to an interference of competition

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<sup>165</sup> Patent rights were invented to protect innovations. Therefore, it is only fair that through a patent right a company can at least partially compensate their costs for this innovation. If there were not this protecting mechanism innovations would no longer be profitable in many cases, which means the public would not benefit from it either. However, patent rights need to be limited in time so as to fulfil their purpose of compensating for the costs of innovation and thereby encouraging further innovation. Patent rights should not serve the purpose to permanently hinder other companies to produce a comparable product if this serves the public interest.

<sup>166</sup> Goldberg also confirms that patents necessarily lead to monopoly power, as patents present exclusive rights along with price fixing by the patent owner usually above market level. However, she claims that in the long run these profits should propel even more research and innovation leading to better products and benefiting society at large. Yet, this assumption cannot be generalised, as there are enough companies making profits out of patents not benefiting society at all (Goldberg 2009).

(Rüstow and Tönnies 2009).

Today, patents in the pharmaceutical and agricultural sector in particular lead to detrimental effects and competitive distortions (The Economist 2001). While the pharmaceutical sector usually patents a product, which is based on prior research and development including expensive testing procedures, the agricultural sector patents particular genes, which in effect present a discovery but not a brainchild (Lehman 2003; Eucken 2004). Nowadays, the seeds market is dominated by a few large global corporations like Monsanto, BASF, Bayer or Syngenta amongst others. These companies aim to develop genetically modified plants, which are pesticide resistant (Eucken and Oswald 2001). In the US for example, 95 per cent of all soy beans and 80 per cent of all corn grown is equipped with Monsanto's modified and patented genes (information refers to 2009, Leonard 2009). Furthermore, Monsanto together with its competitors DuPont and Syngenta own 53 per cent of the seed market globally (Ross 2013). However, in the long run these genetically modified (GM) seeds lead to a loss in seed variety, as short-term yield increase is favoured over biodiversity. As a result, the already widespread use today presents a threat to nature's biodiversity and may lead to a levelling of nature. This loss in biodiversity<sup>167</sup> along with more dependency on seeds in the hands of only a few global corporations in turn also increases corporate power (Eucken and Oswald 2001).

A topical example demonstrates how companies today use patents as a strategic and at the same time controversial means to gain a competitive advantage over others. The case of Monsanto, a life science company, illustrates how property rights like patents restrict the property rights of individuals, negatively impacts scientific research, and leads to unreasonable competitive disadvantages for other companies in this field (Eucken and Oswald 2001). Generally, GM seeds are based on a so called "terminator technology", which means they are sterile and can be only used for one season, as they are not able to reproduce (Ledford 2013). For the Monsanto GM seeds to grow, farmers then need to buy the company's complementing pesticide, called RoundUp. Meanwhile, Monsanto's "RoundUp Ready" seeds have become the industry standard for large-scale farms. Already in 2009,

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<sup>167</sup> Of course, individuals could take care of rare and genuine seeds using these for non-commercial purposes. Still, commercial use faces restrictions. Restrictions are imposed, first, by domestic regulation standardising seeds and products approved for the market, and second, by the increased use of GMOs increases pressure on farmers using wholly organic seeds (European Commission, Agriculture and Rural Development n.d.; Seedfreedom.in n.d.; Mammana 2014). However, technically, rare seeds could be preserved for the future in some ways.

Monsanto was said to have control over 90 per cent of seeds genetically modified in the US. And, already at that time prices for seeds by Monsanto were rising by about 25 per cent, justified by the company by better yield results (Leonard 2009).<sup>168</sup> However, before 2000 Monsanto was still a niche player. It only “rose to the top thanks to innovation by its scientists and aggressive use of patent law by its attorneys” (ibid.). This aggressive use of patent rights presents a legal innovation and gives Monsanto enormous latitude of control (ibid.).

This seed together with Monsanto’s business practice is controversial in various ways. From an individual farmer’s perspective there are two problems. First, if bad weather destroyed the farmer’s harvest, the farmer would need to buy new seeds again, as they do not reproduce. Also, due to restrictive licensing agreements in Monsanto contracts, the farmer is not allowed to reproduce the crops itself using it again the season thereafter (Ross 2013). Secondly, the widespread use of these seeds restricts the property rights of other individual farmers not using GM seeds. For example, if there is a farmer using non-GM seeds next to a farmer using GM seeds there will be a high probability of contamination by GM seeds due to pollination. The organic farmer, whose seed has been contaminated, is accused of unlawfully using Monsanto’s patented crops. Monsanto has become very aggressive in prosecuting organic farmers “unlawfully” using the company’s seeds (Russia Today 2014).

In terms of research, Monsanto’s patents also lead to restrictions. In the 1970s, it was mainly public universities, which conducted research in this field. However, this has changed today with a lot of research and hence property rights concentrated in the hands of large corporations. If some public institution or university now engages in research in the same field it is often confronted with restrictions not being able to test certain genes or further develop these as they are patented (Leonard 2009, Ross 2013). Lastly, as Monsanto has superseded its competitors these also face significant disadvantages based on Monsanto’s tight contracts. It used to be that several life science companies would bid for buying up smaller companies. But Monsanto’s contracts require smaller licenced companies to entirely destroy their Monsanto-based products, when being bought up by a competitor. As a result, smaller companies inevitably have become worthless to competitors, as all assets need to be eliminated based on Monsanto’s claimed property rights (Leonard 2009).

In conclusion, these patent rights by large corporations often have detrimental effects,

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<sup>168</sup> However, due to protests Monsanto does not pursue its GM business in the EU any further, and only concentrates on GM animal feed, which is still allowed and seen as rather uncontroversial (Cressey 2013).

negatively impacting individuals and society at large, as in the case of public scientific research. Even competitors are unreasonably negatively impacted when one influential company is in the position to dictate market conditions. Furthermore, these may further increase a loss in biodiversity<sup>169</sup>, and people may be deprived of their choices, for example with regard to food consumption or cultivation of their own plants.

### 6.5.3 Corporate Usurpation

*“While politicians talked of “free trade”, their liberalizing and privatizing policies produced a situation where one third of world trade occurred between factories and offices of TNCs; in consumer durables, the top five controlled 70 per cent of the world market” – Jem Bendell (2004, 13)*

With the vast economic power of corporations nowadays comes enormous political power. Yet, this power as opposed to political power is hardly legitimate, as it lacks democratic consent (Eucken and Oswalt 2001). Large corporations can exert significant power in the political arena thereby also influencing political decisions to their benefit, e.g. legislation enabling more financial advantages, or lowered social and environmental standards (Clerck 2010). This rise of corporate usurpation of the political arena to enforce corporate interests can take various forms. Here, two forms of powerful corporate influence shall be discussed, namely lobbying and the use of investor tribunals. Lobbyism<sup>170</sup> and arbitration tribunals both serve corporations as vehicles for enhanced enforcement.

**Corporate Lobbying** According to the Corporate Europe Observatory (CEO), lobbying can be defined as “as seeking to influence legislation, policy, or regulation, usually in return for payment” (Dinan et al. 2010, 23). In principle, there can be lobbies for all kinds of interests. Yet, corporations enjoy a much bigger budget than e.g. NGOs, which are dependent on

<sup>169</sup> A loss in biodiversity for instance occurs when large and powerful corporations like Monsanto patent particular plants, which are then widely used in agriculture (the most prominent example here is the Monsanto soy or maize). Other crop plants thereby become more and more diminished. Furthermore, farmers located in an area where patented crop plants are used do not have much of a choice anymore. For example, if they do not choose to use these patented plants, farmers are often put under pressure by these companies. Also, they fear that their organic plants will become “contaminated” by these genetically modified organisms, which means it will become all the more difficult to maintain and cultivate genuine seeds (Russia Today 2014; Gillam 2014). Also find Monsanto’s counter statement here: [Monsanto.com](http://Monsanto.com) n.d.

<sup>170</sup> See e.g. Jem Bendell quoting Leslie Sklair, John Braithwaite and Peter Drahaus in this context: “One means of corporations doing this was through lobbying. Leslie Sklair (1998:286) documented that corporations “work, quite deliberately and often rather covertly, as political actors, and often have direct access to those at the highest levels of formal political and administrative power with considerable success”. John Braithwaite and Peter Drahaus (2000) demonstrated how corporations and their lobbying groups were able to manoeuvre on the international scene in order to generate the rules they wanted” (Bendell 2004, 9).

donations. The CEO estimates there are around 15,000 to 30,000 employees working for the lobby industry in Brussels while two third alone accounts for private business interests. More than 500 companies have offices located in Brussels to engage in lobbying activities (Corporate Europe Observatory 2011). Further, the NGO states that lobbying activities in Brussels amount to more than one billion Euros, making Brussels “the world’s second biggest centre of corporate lobbying power, after Washington DC” (Corporate Europe Observatory, 7).

*“Corporations are attempting to achieve by stealth – through secretly negotiated trade agreements – what they could not attain in an open political process.” – Joseph Stiglitz (2013)*

Today, corporations seek to further strengthen their powerful position on a global scale through aggressive lobbying.<sup>171</sup> In order to conquer new markets, corporations seek to influence the conditions of multilateral or bilateral free trade agreements. A recent example is the TTIP. Here, the agricultural and bioscience industries were especially engaged in influencing the political outcome during negotiations (Haesman 2014). The Guardian even speaks of a “carefully crafted campaign to break down resistance to GM products in Europe” (Goldenberg 2013). Characteristic for these negotiations is the ultra-high percentage of encounters coming from private businesses (96 percent) compared to only a fraction of public interests represented (4 percent) (Haesman 2014).

Yet, the structure of the European Commission (EC) is particularly vulnerable to external influences. First, in terms of law implementation the EC plays a key role. The EC is the only EU institution, which can initiate new legislation (Dinan et al. 2010). Secondly, as the administration is rather small, it relies heavily on so called “outside ‘experts’ in drafting policy proposals and legislation” (ibid., 25). This consultation method is also the one used most frequently by the EC (Vassalos 2010). Hence, there is constant interaction between representatives of private business interests and public decision makers. This rather one-sided way of consultation stands in conflict with the EC’s own rules on consultation, which underline plurality, diversity, and the consideration of viewpoints from various different disciplines and sectors (ibid.). This controversial intermingling granting the industry privileged access to public decision making procedures dates back to the 1980s. Yet, that this

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<sup>171</sup> In the 1980s, the failure of governments to also address corporate power in the emergence of more and more free trade agreements became increasingly visible. Yet, it seemed to be too late, as in the 1990s corporations have already gained a powerful stand through lobbying, effectively undermining any efforts to diminish their power by governmental regulations (Bendell 2004).



also poses a serious problem in terms of transparency, neutrality and objectivity, which has not been officially acknowledged until today. Nowadays, there are around 1,000 external advisory groups with most of them dominated by experts or lobbyists from the industry (Dinan et al. 2010).

A recent example of how the industry has influenced political outcomes is the EU REACH regulation, which is short for “Registration, Evaluation, Authorisation and Restriction of Chemicals”. In 1998, the EU environment ministers consented to a fundamental reformation of the EU laws regarding chemicals. Three years later, the policy had been outlined but another five years passed until adoption (Riss 2010). While drafting the regulation, the chemical industry lobbied aggressively against it, claiming the regulation was a job killer. Here, the German chemical company BASF was particularly active in orchestrating this campaign and influencing German politicians together with BAYER, another German chemical corporation (ibid., Corporate Europe Observatory 2011). Even worse, the US lobby “ran a fierce campaign to hinder EU efforts to regulate the European chemical sector” (Riss 2010, 40). Moreover, several US federal agencies like the Environment Protection Agency (EPA), or the State Department were also engaged in these foreign lobbying activities (ibid.). By the time REACH was finally adopted, “proposals were dramatically weakened, with many loopholes allowing toxic chemicals to remain on the market” (Corporate Europe Observatory 2011, 24). Altogether, it will have taken the EU environmental ministers 20 years from consenting on a reform until full implementation by all companies, which is due in 2018 (Riss 2010).

**Corporate Political Influence via ISDS** Another option to influence legislation and regulation is the ISDS mechanism integrated in many free trade agreements like NAFTA, TTP or currently pending ones like CETA and TTIP. Through this mechanism of investor protection, foreign companies can sue national governments via international tribunals based on perceived discrimination due to changes in legislation and regulation putting their investment unforeseeably at risk (McDonagh 2014). These international tribunals are private and outside national and international legislation.

*“The real goal is to restrict governments’ ability to regulate and tax corporations – that is, to restrict their ability to impose responsibilities, not just uphold rights.” – Joseph Stiglitz (2013)*

Similar to a civil lawsuit, there are two parties which eventually arrive at an agreement.

Yet, the fundamental difference is that these lawsuits here target national governments instead of a second civil party. Hence, as already outlined further in the chapter on globalisation, corporate lawsuits via ISDS can have a “freezing effect” on national legislation putting the regulations in question on hold. FTAs including ISDS mechanisms are supposed to attract more investment based on this protection, yet, clear evidence confirming this is still missing (Corporate Europe Observatory 2014; McDonagh 2014). Also, it appears that corporations today, together with the help of “litigious law firms”, are abusing this tool, which was originally meant to be “a weapon of last resort for investors” (McDonagh 2014). However, delving a little deeper into the facts may help us understand the actual risks surrounding ISDS. Currently, these are much hyped in the light of TTIP and CETA soon to come.

Supranational investor protection as such is basically a good thing, particularly in countries lacking adequate legal infrastructure. If there were no such protection, investors would often refrain from investments in developing countries for example, as there are high risks involved when a country lacks legal and political stability with regard to the investor’s property (Singh et al. 2013). In order to solve the problem of uncertainties and inadequacies often related to customary international law, bilateral investment treaties (BITs) were created. These could ensure protection of foreign investors and their property. In the emergence of BITs, developed nations then suggested in the 1960s the erection of an International Centre for Settlement of Investment Disputes (ICSID)<sup>172</sup> to further increase investor protection (ibid.).

A closer look at ISDS statistics reveals that mostly investors based in the European Union are making use of this mechanism.<sup>173</sup> Countries like the Netherlands, UK and Germany generate the majority of cases, even over a long period of time.<sup>174</sup> Yet, this is not very surprising as the value of FDI in the EU is also the highest worldwide (Abbott et al. 2014). Most cases deal with investor disputes related to the energy, e.g. oil, further electricity and water industries (ibid.). Disputes are often initiated by referring to agreements based on NAFTA, the Energy Charter Treaty or the BIT between Argentina and the US. Characteristic for ISDS is the vast number of claims by investors from developed countries (85 per cent,

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<sup>172</sup> However, arbitration tribunals existed before with the earliest one established in London, UK, in 1880. International arbitration tribunals then followed a little later in 1903 again in London, and later in 1923 with the foundation of the International Chamber of Commerce (ICC) in Paris (Abbott et al. 2014).

<sup>173</sup> There are also disputes among investors within the EU. These are mostly linked to BITs and the Energy Charter Treaty. In 2013, 42 per cent of all cases brought to tribunal were initiated by EU investors against other EU investors (UNCTAD 2014).

<sup>174</sup> From 2003 to 2011, investors in the EU initiated 56 per cent of the cases. This has further increased to 76 per cent, while the US is only at 22 per cent. However, based on a country calculation, the US is the major claimant, followed by the Netherlands, the UK and Germany (Abbott et al. 2014).

corresponding to 45 out of 57) (UNCTAD 2014; Abbott et al. 2014). Also, the number of claims has risen<sup>175</sup> significantly since 2011 (OECD.org 2012). In 2013, 57 cases were initiated, with the majority being handled by ICSID, followed by the United Nations Commission on International Trade Law (UNCITRAL) as arbitrator.<sup>176</sup>

In light of the recent turmoil surrounding the TTIP negotiations it is worth mentioning that up to today the US has never filed a case against the EU or any EU-15 member state<sup>177</sup> linked to a FTA (Abbott et al. 2014). Yet, as the Corporate Europe Observatory critically and indeed correctly remarks, there have been bilateral US claims against Poland and the Czech Republic. Also, for now there are only bilateral agreements with nine EU countries, while TTIP will inevitably extend it to all EU states (Corporate Europe Observatory 2014). Also, it remains to be seen if the supposed threat from global corporations abusing ISDS to enforce their interests will really materialise. While medium to large sized companies are involved in about half of the cases, very large corporations, like MNCs belonging to the top 100, are only represented in 8 per cent of the cases (OECD.org 2012). Furthermore, though ISDS cases “are often settled in advance of a ruling”, only 16 per cent of the cases leading to a tribunal ruling were decided in favour of investors over the last ten years (Abbott et al. 2014, 2). However, a long-term assessment by UNCTAD delivers a slightly different picture: of a total of 568 cases since 1987, 274 were concluded by 2013, of which 43 per cent were decided in favour of the state, while 31 per cent were won by investors and the remaining cases were settled (UNCTAD 2014). Also, it is true that foreign investors also challenge national legislation linked to the environment. However, there were only two new cases in 2013, both concerning environmental regulation in Canada, for example fracking, which also led to a decision in favour of the investor (ibid.). Taking NAFTA as another example, only three cases out of 14 won by investors (of 83 claims ever filed under NAFTA and other US related trade agreements) are directly linked to environmental or safety issues.<sup>178</sup>

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<sup>175</sup> It is quite noteworthy that with the increase in investor disputes the emergence of an entirely new industry came along only recently. This industry is made of “entrepreneurial lawyers advising potential clients about options for resolving investment disputes through international arbitration” according to the OECD (OECD.org. 2012, 5).

<sup>176</sup> Today only a few cases are still handled by the ICC or other smaller nation-based arbitration tribunals (UNCTAD 2014).

<sup>177</sup> According to the OECD the EU-15 states are: Austria, Belgium, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Luxembourg, Netherlands, Portugal, Spain Sweden, and the United Kingdom (OECD.org. 2007).

<sup>178</sup> These disputes involve the following companies: Ethyl (1997) regarding a “Canadian ban of MMT, a toxic

Yet, BITs and other FTAs certainly have controversial potential. First, international arbitrations are usually associated with great costs. The OECD estimates these vary from \$8 million to more than \$30 million of which 82 per cent are linked to fees and expenses arising from legal services and counselling (OECD.org 2012). Furthermore, corresponding to the latest UNCITRAL rules from 2010, these costs are to be borne “in principle” by the unsuccessful party (ibid, 21). Yet, these rules only apply to ISDS cases brought before UNCITRAL and not to cases dealt with at the ICC or ICSID. Usually, it still applies that the two parties share arbitrator and institutional costs equally, while each party separately pays costs related to individual legal and expert advice (ibid.). Accordingly, in many cases the government still has to bear the costs whether it wins the case or not. And, if a government is losing a case against an investor, this means costs are then imposed on the taxpayer, see for example the NAFTA case *Metalclad v. Mexico*, where Mexico had to pay \$15.6 million in compensation to Metalclad (Singh et al. 2013).

In addition, as Thomas McDonagh (2013) states with regard to developing countries, “regardless of whether the government wins the case or not, it is spending millions of dollars defending itself, money that could otherwise have gone on teachers and doctors” (8). Also, the Corporate Europe Observatory criticises the one-sidedness of these processes: while investors can sue governments via these tribunals this is not possible the other way round. The impartiality of the tribunals as such is also challenged (Corporate Europe Observatory 2014). Furthermore, according to the OECD, these high costs “may preclude access to justice for small and medium investors” and also render smaller claims completely unfeasible (OECD.org 2012). Moreover, these high costs “may present a major obstacle to justice for developing States “exposing them to the risk of being “out-lawyered” (ibid., 23). Given the “clear dominance of developed countries on the claimant side” together with “a clear dominance of developing countries on the respondent side”, this risk appears to be quite real (Abbott et al. 2014, 9).

The clear dominance of developed countries over developing countries also points to second controversial issue. Governments of developing countries are usually under pressure to attract FDI to boost their economy (see the section on corporate tax dodging). Yet, FTAs and ISDS may threaten a government’s autonomy as well. Meanwhile the latter is also

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gasoline additive”; S.D. Myers (1998) “challenged a temporary Canadian ban on the export of a hazardous waste called polychlorinated biphenyls (PCB)”, and Metalclad (1996) “challenged the decision of Guadalupe, a Mexican municipality, not to grant a construction permit for a toxic waste facility unless the firm cleaned up existing toxic waste problems” (Public Citizen 2014, 11-12, 22-23).

considered as posing “risks and limitations on the ability of the government to pursue its constitutional-based transformation agenda” and is seen as a serious threat to “policymaking in the public interest” by developing countries in Southern Africa (McDonagh 2014).

A third controversial issue is a great lack of transparency which is often criticised as the results of the claims cannot be published without consent by the two parties involved (Singh et al. 2013). Fourth, as the ISDS only includes claims submitted by foreign investors, it is prone to double standards, as it clearly discriminates domestic against foreign investors (McDonagh 2014). A final issue, and one that is discussed frequently in the media, is the threat of freezing legislation or even the refraining from enactment altogether of certain regulations in connection with environmental or health and safety regulations, as soon as governments are challenged by investor claims (Singh et al. 2013). This is especially true in the case of developing countries, as these are even more under pressure to keep FDI in the country. However, it also applies to industrial nations, as state legislators in the US have proved by writing an open letter to negotiators involved in the TTP negotiations, and some very controversial cases like *Philip Morris v. Australia* show.<sup>179</sup>

## 5.6 Chapter Conclusion

Though this chapter aimed to provide a bigger picture, this attempt can in no way be considered as exhaustive. Yet, the chapter at hand tried to add some more interesting pieces to the overall discussion of responsible business, therewith providing a broader basis of information. Over several different sections, diverse topics like politics and the economy, the question of viable alternatives to current approaches of CSR and sustainability, and the rise of corporate power have been discussed. This has served the purpose of making dependencies visible to the reader, e.g. that neoliberalism has led to globalisation, which in turn is linked to increased free trade. Also, particular sections cast light on the role of corporations in politics today, and how far they are able to influence politics and to abuse the system of a rather deregulated global economy.

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<sup>179</sup> In the letter they state that the ISDS “interferes with our capacity and responsibility as state legislators to enact and enforce fair, non-discriminatory rules that protect the public health, safety and welfare, assure worker health and safety, and protect the environment. It should have no place in the Trans-Pacific Partnership” (McDonagh 2014; cp. Corporate Europe Observatory 2014).

In summary, it can be stated that voluntary approaches of responsible business like CSR and sustainability, which are both embedded in the approach to “sustainable development” on a political level, are rather missing the point. They merely present isolated strategies running alongside the “regular” business, not reflecting political circumstances in any way. However, these strategies serve very well the purpose of letting companies do business as usual while at the same time boosting their image as “corporate citizens” concerned about society and the environment.

The legal system also lacks effectiveness regardless of the particular national jurisdiction observed. There is a general problem with punishment as a last resort to enforce responsible business: it apparently lacks the strength to deter effectively. At the same time, repetitive punishment of companies for example by imposing fines most probably presents a reasonable source of income to states. In the light of the “mutual benefits” of this system, when letting corporations get away with crimes while at the same time enriching the government, any fundamental changes are hardly to be expected.

Finally, the prevailing system of neoliberalism and capitalism framing these issues is inhibiting fundamental change. As long as neoliberalism and capitalism with its obsession with economic growth are determining the economic and political course of action, the environment and in the end society will be negatively impacted. Economic growth inevitably leads to more and more environmental destruction, as huge amounts of resources are needed to maintain the capitalist system of accumulation. Increased globalisation in the shape of rising free trade, which is a result of neoliberal deregulation, also contributes to environmental degradation with corporations now being able to frequently challenge national environmental, health or safety regulations. Moreover, globalisation facilitates the use of legal and other loopholes by corporations, enabling these for example to escape their fair share of taxes, or expand their power so as to influence and even pressure governments. Finally, the current system further increases the disparity between North and South, industrial countries and developing countries, as long as the latter are not empowered with more autonomy to make a stand against corporate usurpation. In conclusion, this is not an environment which allows a widespread responsible business practice, even if there were more companies convinced of its priority. So, after realising the complexity and interconnectedness of these issues, what is left to build a world of more responsibility in business? The following outlook

suggests that more responsibility in business can only be achieved by a change in politics also affecting the (global) economy at large.

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# Chapter 6

## Conclusion: The Future of Responsible Business

**Abstract** This chapter presents an overall conclusion of the entire book. It summarises the insights of the previous chapters. Here, the author comes to the conclusion that voluntary measures proposed both by civil society and business and then implemented by companies, as well as legal measures established by the government and enforced through the judicial branch, are presently not sufficient to fully enable responsible business. Apparently, the concept of CSR along with its plenty of measures is only half way to more responsible business and the global economy must be taken into consideration when it comes to the feasibility of this concept. However, in light of the financial crisis and recent but reoccurring corporate misbehaviour, the question remains in how far CSR is a concept, which only needs a change in direction, and if so what needs to be improved in particular, or whether the concept should be abandoned altogether, as it can be considered as theoretically and practically flawed. This question is also briefly discussed in this part.

In the course of this book, responsible business has been scrutinized from different angles. The aim of this work was to elicit what measures exist today which are supposed to foster a responsible business practice, and whether these are actually sufficient means to realise responsible business comprehensively and with a lasting effect.

In the second chapter, concepts and measures for business responsibility in theory as well as its history were introduced to the reader. Though social responsibilities of the businessman, or more generally the business, have only been explicitly articulated from the 1950s onwards, some companies have been engaged in philanthropic activities since the 19<sup>th</sup> century and earlier.<sup>180</sup> However, that was at a time where business was still driven by its founders and a latent conflict of business and society, as we know it today, did not exist. Further due to a prevalent Christian belief, a number of businessmen in the 19<sup>th</sup> century recognised their obligation of doing business by also serving the public good (Soskis 2010).

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<sup>180</sup> One of the most prominent examples of corporate giving and philanthropy in early years is most probably The Rockefeller Foundation, founded by Standard Oil tycoon John D. Rockefeller in 1913 (Soskis 2010).



History aside, the second chapter also revealed that CSR lacks a clear definition. It serves as an umbrella term for different theoretical concepts like corporate social performance, corporate social responsiveness, stakeholder theory and corporate citizenship. Additionally, in practice CSR is associated with all kinds of initiatives, which may also include environmental aspects expressed in the concept of sustainability. However, a shift can be seen today regarding companies changing from CSR to having a more general term like Corporate Responsibility describing their strategy. Corporate Responsibility often includes activities related to the concept of corporate citizenship, corporate philanthropy and sustainability. Whereas corporate citizenship signals to the public that a company is concerned with being embedded in society and a member thereof, corporate philanthropy is only focused on charity, while sustainability usually covers the environmental dimension of business.

Joining certain initiatives, adhering to principles, standards, guidelines, or certifying processes then further complements a company's corporate responsibility strategy. These measures are primarily developed by international institutions like the OECD, the ILO and the UN or CERES, MSC or FSC to name only a few. The measures described in this book are among the ones most commonly applied by companies. Today, initiatives, principles, standards or guidelines exist in plenty, and there are even industry-specific standards available. The scope of these activities varies from only covering particularly social or environmental concerns, to governance aspects, or to comprehensively integrating all of these concerns together with anti-bribery and anti-corruption initiatives, like the OECD guidelines for example. To summarise, today the landscape of voluntary measures has grown to a magnitude, which has become more and more difficult to keep in sight.

An often neglected fact in this context is that CSR strategies can also vary from country to country as their practice is tied to the cultural and historical background of the respective country. If, for example, particular areas are already regulated on a national level, like scholarships, health insurance or communal support, there is no need for a company to integrate corresponding initiatives in its CSR strategy.

More than 20 years of voluntary action in the field of responsible business have proved that the measures named above generally led to some improvement and particularly more transparency (see for example the GRI initiative on reporting, or the Equator Principles). Yet, as the case studies have illustrated, these initiatives and instruments are by no means enough. On the one hand they really have the potential to foster more responsible business, as they in

principle offer guidance and orientation. On the other hand, corporations are often enough only using them as a means to enhance their reputation, i.e. as PR strategy, thereby abusing these measures. Even worse, such abuse is without any significant sanction because these measures are all adopted on a voluntary basis and the bodies, which developed these measure have frequently not included an effective sanction mechanism.

In brief, corporate responsibility strategies implemented by corporations are ambiguous. They do not necessarily present a company's true ambition or real concerns for the community or environment. Rather, these strategies are often only pursued half-heartedly, and in some cases can be even debunked as mere lip service. This system of established voluntary measures can only be one part of a more comprehensive system promoting responsible ways of business.

Theory and approaches on how responsible business should be conducted, as shown in chapter two, were contrasted with the actual business reality in chapter three, challenging the effectiveness of these concepts and measures. Five case studies vividly illustrated the large gap between what corporations are doing in theory, presented by their communicated corporate responsibility strategies, and how business is pursued in reality. Each company was examined in more detail by outlining its corporate responsibility strategy, followed by an elaborate presentation of the main controversial issues in which the company was involved. Subsequently, corporate communication was analysed in light of the incidents described. The conclusion drawn in each case was that though companies have a strategy and complementing measures in place they frequently do not conduct their business in a responsible way. Another very important insight of these case studies was that beyond a number of infringements of social and environmental standards, corporations are frequently involved in violations of national legislation. This insight then led the fourth chapter.

The fourth chapter examined corporate liability, in theory as well as in practice. First, primarily theoretical and historical aspects of corporate (criminal) liability were presented. Here, the kind of 'personality' of a corporation was examined more closely. In addition, different liability types and concepts were presented as well as their application in practice. The chapter further the conceptual background, which can be traced back to German legal theory (*Genossenschaftsrecht*) in the 19<sup>th</sup> century. Later in that chapter, the concrete application of corporate criminal liability today was presented. Various corporate criminal liability regimes adopted by different countries were described to illustrate the enormously

varying practices; amongst those were the US, various member states of the EU, and Germany in particular. Regimes in the US and Germany were then compared against each other. Even though Germany does not have a corporate criminal liability regime and only imposes administrative fines on corporations, the comparison with the US brought surprising similarities to light, namely that both in the U.S. and in Germany it is the individual who is held responsible in the end. Or, at least, that is an objective of both regimes. This chapter also highlighted EU-driven regulation, and the heterogeneous landscape of law practice in the EU along with the difficulties of harmonisation. However, after exploring soft law (voluntary measures) as well as hard law (legal requirements and the implementation and enforcement thereof), it became evident that neither of the measures significantly improved business practices until today in terms of more responsibility or consideration towards a company's social and natural environment. Hence, in order to discover why these measures were not sufficient to promote responsible business, the wider political and economic context was examined.

In chapter five, an analysis of the status quo led to the conclusion that there are deficiencies inherent in the national and international system of politics which enable a regime of organised (corporate) irresponsibility. An examination of the current neoliberal era revealed that deregulation in many areas gives corporations a magnitude of free play, facilitating lobbying, plundering of resources without serious consequences, or tax evasion. Politics aside, current alternative concepts to enable more responsible business were also discussed. Whereas some of these concepts could be unmasked as being media-hyped and overrated, like 'Inclusive Capitalism' and 'Creating Shared Value', other concepts like the carbon tax or the idea of a Circular Economy definitely have certain merits and have the potential to save natural resources and reduce emissions and waste. Furthermore, the two latter approaches have been already put into practice. Some countries have already implemented a carbon tax or other carbon-scheme, while Circular Economy is a model already applied by some companies. Yet, it takes many more participating countries and companies to create a significant impact. The same is true for the carbon tax. Leading industrial countries like the US, and leading emerging countries like China, which together produce high amounts of carbon emissions need to implement viable solutions to reduce carbon emissions (United States Environmental Protection Agency n.d.). A joint and workable approach by member states of the EU would also have a positive impact on reducing global carbon emissions. This chapter also revealed that the current political style dominated by deregulation would not lead

to significant changes. In addition, the dogma of capital accumulation and economic growth only spur climate change. Only a political and economic change can better conditions for society, nature, and the animal world.

In conclusion, voluntary measures proposed both by civil society and business and then implemented by companies, as well as legal measures established by the government and enforced through the judicial branch, are presently not sufficient to fully enable responsible business. The concept of CSR along with its plenty of measures is only half way to more responsible business. In the beginning it certainly spurred developments in this field but after more than 20 years of voluntary practice of responsible business towards society and the environment, stagnation can be ascertained. As illustrated by the case studies, voluntary measures cannot be the only means to promote responsible business, as too often they are compromised for the sake of profits and growth. Furthermore, such infringements of voluntary commitments by businesses too often remain without any negative impact on their reputation or other serious consequences.

The emphasis on voluntary measures fits perfectly into the neoliberal picture of deregulation. For businesses voluntary measures are less costly than more comprehensive and compulsive regulation by the government, which in contrast must be strategically and practically implemented. As long as business responsibility towards society and the environment is voluntary (except for some regulations regarding emissions for example, which are clearly focused on the environment), each company can decide individually on the extent of responsibility to be realised by their strategy. Such prevalent emphasis on voluntary measures also offers less concrete guidance, as every company can do as it sees fit. Hence, there are differences with regard to the extent of business responsibility realised by companies, which leads to some companies being more committed while others lag behind. With regard to competition the question remains, whether a company may be possibly put at a financial disadvantage when pursuing a responsible business practice. While an advanced company is often required to make sizable investments in better technologies or improved processes just to give two examples, the reluctant company may save money thereby increasing its profits or alternatively putting its savings into operations.

This vagueness in terms of regulation prevailing until today does not promote sufficient impact, and hardly offers possibilities to effectively tackle climate change for example. In contrast, a concerted effort realised by clear regulation could achieve substantial impact by

creating synergy effects and new business opportunities. This requires politics to ignore industrial lobbying groups, which often want to make us believe that regulation is a risk to business and the economy at large due to supposedly increasing costs for companies. Climate change is indeed a serious issue affecting all nations. Worse is that some countries are existentially exposed to climate change, and are additionally often exploited by the Northern industrial hemisphere.

The legal side of responsible business is currently unsatisfactory. Legal measures, like corporate criminal liability, should serve the purpose of duly punishing corporations but also of deterring companies from future misdemeanours. Deterrence, however, is only induced if punishment is effective. Yet, trials and procedures are often slow, sometimes lasting years in complex cases like for example the Chevron Texaco oil pollution affair in Mexico or the criminal Libor/Euribor manipulation involving several major financial institutions. Moreover, the responsible individuals are frequently not held legally responsible; instead a fine and conditions are imposed on the corporation. More important, if individuals are not held responsible corporate culture will not change and neither will the general way of doing business. Though agreements between the responsible company and the prosecutor, as often applied in the US, certainly speed up procedures, this way of dealing with corporate misdemeanour remains without a clear signal to the public that this way of doing business is to be condemned. For effective deterrence it is vital to impose strict conditions, and to enforce the implementation thereof. Furthermore, fines need to reach a level which severely hurts a business and can no longer be easily included as additional operating costs.

From a political perspective, national governments need to facilitate responsible business further by clear political regulation guided by a nonarbitrary regulatory framework, and supported by corresponding legislation. In addition, a global framework must be regulated jointly by international bodies in due course and more effectively. The leading industrial nations in a joint and timely approach together with the emerging and developing countries need to find common ground, for example in terms of climate change action, the plundering of natural resources, ecological damages and furthermore global tax regulation and global carbon taxation. Emerging and developing countries must be included as they are equally affected by global regulations. Global tax regulation has the potential to promote more social justice amongst developing countries, as taxes present an important revenue stream to them. An effective tax regime which allows for developing countries to receive their fair share in

return for offering companies new business opportunities, enables them to properly taking care of all of their obligations towards society like health care, education, or environmental protection.

Last but not least, economy must turn away from the growth dogma, which puts nature and the animal world increasingly at risk. The current trend of deregulation needs to be reconsidered in the light of a global impact. Taming the financial industry by strict regulation, requirements and oversight is vital to curb manipulation, complicity in tax evasion, or money laundering.

Finally, with regard to the environment, a meanwhile strong focus on renewable energy presents a double-edged sword. Huge projects, for example in the area of hydro power like the Belo Monte dam in Brazil, show that renewable energy sometimes comes at high costs for the environment and surrounding communities. Therefore, renewable energy projects cannot be considered as good *per se*. Rather, these projects must stand up to scrutiny regarding their long-term effects. A carbon tax adopted by a majority of industrial countries presents a viable option to slow down climate change. In a concerted effort, this would lead to considerably reduced resource consumption and more efficient energy strategies.

It can be ascertained that the way of global politics today where countries often enough only point at each other when it comes to the implementation of binding climate decisions or social standards is rather unrewarding. Particularly with regard to negative impacts of climate change, all countries will be affected sooner or later whether it is an industrialised nation or a developing country. Such negative impacts can potentially destroy the national infrastructure and economy, thereby putting national security and prosperity at a serious risk. Hence, it should be in the interest of every nation to slow down climate change and to reduce the risk of exposure to these negative impacts. National and independent efforts with regard to climate change are necessary to maintain the economy, national security and a place worth living for the people. National politics and economic player should work together to adapt to climate change by mitigating risks and developing concepts to promote resilience (for example resilient city development).

The international discussion today regarding climate change is very much focused on finding consent. Yet, this idealistic focus only appears to prolong viable solutions. These must be also developed on a national basis. Not finding consent globally is not an excuse for national inaction. It is the argument of self-protection and general self-interest to develop

environmental and social standards, which maintain the national economy, society and the environment.

In brief, by examining the actual business behaviour of corporations and evaluating the effectiveness of voluntary and legal frames to promote responsible business conduct this book aimed to expound the current status of responsible business. Through combining voluntary and legal aspects of responsible business this thesis goes beyond an often one-sided observation from either a standpoint of voluntary concepts of responsible business such as CSR or by a primarily legal perspective.

### **Outlook: The Future of Responsible Business**

After some empirical evidence on corporate social irresponsibility (CSI), which stands in stark contrast to the claimed CSR ambitions of those companies, however, we are still left with the question how the aspiration of responsible business could be better realised in the future.

The issue with CSI is that first it is not necessarily illegal, and secondly, it can be “intentional” as well as “unintentional” irresponsibility (Lin-Hi and Müller 2013). There are indeed cases where corporations acted in compliance with legal requirements but nevertheless their behaviour could be described as irresponsible and unethical. This is for example the case with tax evasion, since there are currently not any global regulations in place as illustrated in the previous chapter. Also the behaviour by banks paving the way for the financial crisis in 2008 was highly questionable but still not illegal, and furthermore the common practice at banks to selling products to consumers which merely benefits the bank than the consumer but still do not present a clear case of mis-selling and are rather ethically questionable and therefore irresponsible (ibid.). Hence, it can be said while violating the law can be clearly associated with irresponsible behaviour, irresponsible behaviour on the other hand is unethical but technically could be still in compliance with legal requirements.

The second issue, the differentiation between intentional and unintentional CSI, is another important criteria. While intentional CSI could be possible curbed by a proper selection of employees, a healthy corporate culture, increased awareness and sensitivity towards potentially controversial issues and a consistent approach to sanctioning improper and unethical behaviour, options are limited when it comes to unintentional CSI. Examples for

intentional CSI are bribery, corruption, manipulation or tax evasion; basically any action which is performed deliberately with the objective of achieving higher profits while being aware of that harm or disadvantage is inflicted on others, for example the tax payer, i.e. the society at large (ibid.). Unintentional CSI on the other hand does not involve a deliberate choice to harm others for the sake of achieving more profit but can be rather seen as an “unanticipated by-product of certain activities”, which also includes “unforeseen contingencies” (Lin-Hi and Müller 2013, 1932). As a result, there is a coexistence of socially responsible and irresponsible behaviour naturally within a company, since irresponsibility in some way cannot be fully avoided (ibid.; Herzig and Moon 2013). Besides, being imperfect and sometimes failing to make the right decision is an inevitable part of our human nature and the circumstance of living with a limited capacity. Yet, what becomes clear from those case studies presented in this book is that particularly in the banking sector we can definitely speak of intentional and deliberate CSI in light of the vast number of incidents over the past years. Also companies like Walmart and Chevron appear to fall into this category due to frequently recurring incidents based on the same deficiencies, like inhumane working conditions and insufficient health and safety measures in the case of Walmart and insufficient precautionary measures to prevent environmental pollution in the case of Chevron.

This brings us to the next issue: the meaningfulness and alignment of corporate responsibility strategies in general.

In one of their more recent papers Aguinis and Glavas (2013) make a very helpful and interesting distinction with regard to CSR approaches by companies, which is derived from organisational psychology. They differentiate between so called “embedded” and “peripheral” CSR (Aguinis and Glavas 2013, 315). Embedded CSR they define as being in line with a company’s core competencies and accordingly being integrated in daily routines, as well as strategy and operations, implying that all three dimensions must be taken into consideration at the same time. In contrast, peripheral CSR is very similar to what we have seen in the case studies: CSR as a set of activities not integrated and often not connected to strategy, routines and operations. This is the case with philanthropy and volunteering, which is a predominant part of many corporate responsibility strategies until today. While these initiatives could have been implemented due to normative aspirations, oftentimes they are only instrumental in reality as revealed in the case studies. In brief, still too many CSR or corporate responsibility strategies today can be considered as only peripheral, since they are either only strategically integrated or integrated in daily routines and practices but as Aguinis and Glavas (2013)



criticize, not in both at the same time. In light of this considerable deficiency it does not come as a surprise that corporate responsibility as it is currently practiced, fails to address and effectively tackle issues of socially and environmentally irresponsible corporate behaviour. Furthermore, it is hardly surprising that apparently most corporate responsibility strategies are only pursued instrumentally, since the concept seems to be lacking a meaningful perspective and overall vision like the purpose and benefits of “good business” in general, as long as it is not systematically and consistently embedded at all levels. Accordingly, today we find CSR strategies on paper, which are “mostly cosmetic”, while the reality is still about financial gain (Herzig and Moon 2013, 1874; Aguinis and Glavas 2012). Hence, CSR is not applied by corporations to explicitly promote the social good, rather “social good is only an incidental by-product of CSR—the central aim is to preserve and increase the corporation's bottom line” (Prasad and Holzinger 2013, 1918). Even worse, CSR seems to be used to conceal unethical behaviour (Armstrong and Green 2013; Green and Peloza 2014). This is happening in two ways: by CSR strategies concealing the questionable, unethical and often illegal business practice, and a reinforcement of this concealment by a distorted, one-sided communication on the company’s activities, i.e. CSR and sustainability reporting based on professional photos and nice-to-read stories. As the case studies further substantiated, there is a significant disparity between reporting and business reality, which also includes an often-misleading representation of the company in question (Herzig and Moon 2013; Prasad and Holzinger 2013). Yet, the paradox is, while these businesses are in the dire need of restoring trust and reputation through communication, i.e. by being accountable, consumers are becoming more and more sceptical of these efforts particularly by large corporations (Herzig and Moon 2013; Green and Peloza 2014; Skarmeas and Leonidou 2013). Accordingly, a (fundamental) change is absolutely crucial. But how should this change look like and who is supposed to be actively driving this change?

There are different stances. While some merely argue for a change in direction, others question the feasibility and meaningfulness of CSR as a practice altogether. Aguinis and Glavas (2013) for example argue for a change from peripheral CSR to embedded CSR, which is not only reflected in the strategy but also in daily routines. Basically, the two are arguing for a real integration, where CSR must be an all-pervading concept, penetrating through all corporate layers.

Lin-Hi and Müller (2013) on the other hand emphasise a change from CSR, i.e. “doing good” to an approach based on doing no harm. They stress that the discourse so far has been one-sided and the entire discussion suffers from that CSR is seen as pro-social behaviour

while abiding by the law is taken for granted. However, as demonstrated in the case studies, compliance with the law is frequently, and deliberately so, ignored. Accordingly, in light of those frequent law violations Lin-Hi's and Müller's stance appears to very reasonable. However, the problem is that since compliance is taken for granted it does not really promote a company's reputation when it insists on doing no harm compared to pro-social behaviour as expressed in CSR activities. Moreover, this approach of doing no harm is also not recognised or eminently embraced by consumers. Yet, it would be definitely more appropriate to starting with being compliant and then adding some initiatives and activities, which go beyond compliance. But compliance should be still the ultimate bottom line. Furthermore, abiding by the law in some way presupposes and includes ethical behaviour, as law can be seen as codified ethical norms, at least partially (Sims 2003). Moreover, being compliant is producing socially desirable results and promoting the common good. This is why laws have been enacted in the first place: to keep society in order.

Lastly, Herzig and Moon (2013) reveal several fields related to CSR, which need to be improved or changed also in light of the recent financial crisis. Based on a media and data analysis, they could identify four different arguments. The first one is similar to Aguinis and Glavas (2013), arguing that there must be a more comprehensive and integrated approach to CSR. The second one stresses moralisation and ethical leadership. The third argument emphasises a change in the professional discourse and in teaching, while the last argument is the broadest, demanding an economic restructuring and "alternative models of economic power and order" (Herzig and Moon 2013, 1875). Accordingly, while the first three arguments do not challenge the feasibility of CSR but rather argue for a change in direction, the last argument Herzig and Moon identified presents a critique of the system, corresponding with what was presented in chapter five. This approach is generally challenging the meaningfulness and feasibility of CSR within the boundaries of capitalism. Apparently, capitalism potentially limits the feasibility of responsible business and the meaningfulness of the practice of CSR within such a system. Therefore, the question remains whether CSR will be ever able to promote responsible business altogether in light of conceptual flaws, misuse in practice and the limits of our economic-political reality (Herzig and Moon 2013; Prasad and Holzinger 2013).

Hence, we are left with two options so far: a change in direction or abandoning the concept of CSR altogether and searching for an alternative system which does not run contrary to the feasibility of responsible business. No matter what the actual decision will be, three major actors need to be involved in order to make a decision in the first place: government, civil

society and business. The government can foster a change in direction by enacting a consistent and non-arbitrary framework enabling responsible business. Also, only government can impose sanction on non-compliant behaviour. Moreover, government *qua* regulation can positively as well as negatively impact economy and society. A government has the power to reducing inequality through proper and consistent regulation, for example a fair tax system, incentives to create more jobs and better paid jobs, abolishing profit maximisation etc., which all contribute to a healthy economy where society benefits equally compared to a parasitic economy, where only business and the privileged one per cent benefit (Stiglitz 2012; Hanauer 2016; Wilson and Stout 2016).

Businesses on the other hand also play a crucial role in decision-making, particularly when only a change in direction is envisaged. Those voluntary initiatives developed by businesses can serve as a foundation for later regulation. Since these are developed by businesses itself, they better reflect the actual circumstances and chances of feasibility. Government on the other hand often does not have this specific knowledge and cannot view approaches through this particular managerial and corporate lens. However, voluntariness is not a substitute for regulation. Moreover, even voluntary approaches need to incorporate entry criteria, performance measures and sanctions in case of non-compliance in order to be effective. Otherwise, voluntariness remains without any lasting positive effect whatsoever. Yet, businesses can also promote a change in system by putting an end to the obsession with profit maximisation altogether and changing to business models reconciling economic and social objectives, like B-Corporations or social entrepreneurship. This in turn will have an effect on legislation too, which needs to become broader again in terms of the legal definition with regard to the purpose of the corporation, which originally was not profit maximisation but benefiting society.

Lastly, civil society is important, as apparently the perception of CSR priorities differ between business and society (Öberseder et al. 2012). Therefore, a change in direction must incorporate the consumer perspective; otherwise corporations will not be able to doing justice to an ever-growing sceptical public. On the other hand, civil society must be aware of the fact that they need to engage actively in order to realise change based on an inclusion of their perspective. This is feasible through a critical mass of more sceptical and enlightened consumers, who are sending clear signals to corporations through for example boycotts or reduced brand loyalty and similar, that their behaviour cannot be tolerated. Furthermore, civil society is crucial when it comes to inducing a change in the system, at least in democratic regimes where the public has a say. Civil society can influence the public discourse by active

participation also signalling the government through critical NGOs or even protests, see for example the Occupy movement, that government has a responsibility to promote the common good through adequate regulation.

In conclusion, it remains to be seen whether a change in direction is sufficient to enable more responsible business, even if all four arguments presented by Herzig and Moon (2012) are taken into consideration. There are still potential limitations regarding the feasibility imposed by the neoliberal-capitalist regime as such, which can be only tamed by good regulation based on the ultimate principle to benefit of society.

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01 2011 – 06 2015	GERMAN LANGUAGE TUTOR (for Professionals)
10 2010 – 09 2013	TEACHER, CHINESE Georg-Büchner-Schule, Jügesheim, Germany
01 2009 – 04 2011	CONCEPTUAL DESIGN, PLANNING AND ORGANISATION 'Young Philosophy Conferences' at TUD in 2009 and 2010

## **LANGUAGE SKILLS**

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German: native speaker

English: fluent in speaking and writing

Chinese: advanced

French: advanced

