

Responsible Enterprise

The emergence of a
global economic order

by

Birgit Spiesshofer

2018

C.H. BECK · HART · NOMOS

Table of Contents overview

Preface	V
Table of Contents	IX
Table of Abbreviations	XV
Introduction	1
PART A	
CORPORATE SOCIAL RESPONSIBILITY	
Chapter 1. Foundations of the Corporate Social Responsibility Discussion	17
I. Renaissance of historical conceptions	17
II. Elementary CSR conceptions	24
Chapter 2. CSR Conceptions of the United Nations	31
I. Draft UN Code of Conduct on Transnational Corporations	32
II. UN Global Compact	35
III. Business and Human Rights	40
IV. The UN CSR system	124
V. Summary	128
Chapter 3. The OECD CSR Conception	133
I. The OECD Guidelines for Multinational Enterprises	133
II. The OECD CSR system	162
III. Summary	163
Chapter 4. The ISO CSR Conception	165
I. Guidance on social responsibility ISO 26000:2010	168
II. The ISO CSR system	204
III. Summary	206
Chapter 5. CSR Strategy of the European Union	209
I. CSR relevant European fundamental and human rights	210
II. The CSR approaches of the European Union	212
III. Summary	217
Chapter 6. National CSR Strategies	219
I. CSR and national law (transnationalization)	220
II. National law and extraterritorial issues	228
III. National jurisdiction for extraterritorial matters	233
IV. Summary	239
Chapter 7. Sector-specific CSR Conceptions	241
I. The mining industry	241
II. The financial sector	268
III. The textile industry	330
IV. The legal profession	351
V. Summary	366
Chapter 8. Evaluation of the CSR Discourse and Further Questions	367
I. Enterprise	367
II. Responsibility	368
III. Governance	369

Table of Contents overview

**PART B
RESPONSIBLE ENTERPRISE**

Chapter 9. Enterprise	373
I. The conception of enterprise	373
II. Group responsibility	393
Chapter 10. Responsibility	407
I. Responsibility in the CSR debate	407
II. Fundamental questions of enterprise responsibility	415
Chapter 11. Governance	463
I. Is CSR law?	465
II. The CSR conception of governance	495
III. Constitutionalization	530
Epilogue	549
Bibliography	551

Table of Contents

Preface	V
Table of Contents overview	VII
Table of Abbreviations	XV
Introduction	1
1. CSR-definition?	3
2. CSR as key concept/term or leitmotif	6
3. CSR as normative-cultural expectations for enterprises	8
4. Working hypothesis: normative CSR is “law”	9
5. Overview	11
 PART A CORPORATE SOCIAL RESPONSIBILITY 	
Chapter 1. Foundations of the Corporate Social Responsibility Discussion	17
I. Renaissance of historical conceptions	17
1. The honorable businessman	17
2. Lex mercatoria	19
3. Summary	24
II. Elementary CSR conceptions	24
1. Carroll’s responsibility pyramid	25
2. The business of business is business (Milton Friedman)	25
3. Triple Bottom Line (“People, Planet, Profit”)	28
4. Summary	30
Chapter 2. CSR Conceptions of the United Nations	31
I. Draft UN Code of Conduct on Transnational Corporations	32
1. Enterprise	32
2. Responsibility	33
3. Governance	34
4. Summary	35
II. UN Global Compact	35
1. Enterprise	36
2. Responsibility	36
3. Governance	37
4. Summary	39
III. Business and Human Rights	40
1. General human rights doctrine	41
a) Human rights as “universal world law”?	41
b) Enterprises as subjects of international law	45
c) Summary	46
2. UN Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with regard to Human Rights (“Draft Norms”)	46
a) Direct obligations on enterprises	47
b) Enterprise	50
c) Responsibility	50
d) Governance	51
e) Summary	52
3. Report of the UN High Commissioner for Human Rights on the Responsibilities of Transnational Corporations and Related Business Enterprises with Regard to Human Rights	53
a) Human rights responsibility of enterprises	54
b) Enforcement of human rights standards	55
c) Summary	56
4. UN Special Representative on Business and Human Rights (John Ruggie)	56
a) Foundations	57
aa) Interim Report of 22 February 2006	57

Table of Contents

bb) Interim Report of 19 February 2007	59
b) Protect, Respect and Remedy: A Framework for Business and Human Rights	61
aa) State duty to protect	61
bb) Corporate responsibility to respect	63
cc) Access to remedy	68
dd) Response to the Protect, Respect and Remedy Framework	68
c) Guiding Principles on Business and Human Rights (UNGP)	71
aa) State duty to protect	72
bb) Corporate responsibility to respect	73
cc) Access to remedy	83
dd) (Legal) character of the UNGP	84
ee) Reception of the UNGP	87
ff) Response to the UNGP	88
d) Procedure and methods of the SRSG	94
e) Evaluation of the SRSG approach	100
aa) Enterprise	101
bb) Responsibility	102
cc) Governance	106
f) Informal and commercial continuation	108
g) Summary	109
5. UN Working Group on Business and Human Rights (UNWG)	110
a) Mandate	110
b) Procedure	110
c) Guidance on National Action Plans on Business and Human Rights	111
d) Evaluation of the UNWG approach	114
aa) Enterprise	114
bb) Responsibility	115
cc) Governance	117
e) Summary	119
6. Initiatives for an international treaty	120
IV. The UN CSR system	124
V. Summary	128
Chapter 3. The OECD CSR Conception	133
I. The OECD Guidelines for Multinational Enterprises	133
1. Historical development	133
2. Enterprise	136
3. Responsibility	138
4. Governance	145
a) Actors and norm creation	145
b) The Implementation Procedures	146
c) Paradigmatic cases	152
aa) Clean Clothes Campaign et al. v. PWT Group (Danish NCP)	153
bb) Survival International v. Vedanta Resources PLC (UK NCP)	154
cc) Summary evaluation	155
d) Excursus: Unconstitutionality of the German NCP rules	156
II. The OECD CSR system	162
III. Summary	163
Chapter 4. The ISO CSR Conception	165
I. Guidance on social responsibility ISO 26000:2010	168
1. Historical development and process	168
2. Enterprise	174
3. Responsibility	175
a) Definition of social responsibility	178
b) Scope of social responsibility	187
4. Governance	195
II. The ISO CSR system	204
III. Summary	206
Chapter 5. CSR Strategy of the European Union	209
I. CSR relevant European fundamental and human rights	210

Table of Contents

II. The CSR approaches of the European Union	212
1. Voluntary conception	212
2. A renewed EU strategy (2011–2014) for Corporate Social Responsibility	212
3. A new CSR strategy in 2017?	216
4. Creeping expansion of competence through CSR	216
III. Summary	217
Chapter 6. National CSR Strategies	219
I. CSR and national law (transnationalization)	220
1. CSR as the “new lex mercatoria”?	220
2. “Human rights” as a-national global law?	223
3. CSR and “governance gaps”	224
4. National action plans for business and human rights	225
5. Transnational soft law with national hard sanctions	227
II. National law and extraterritorial issues	228
III. National jurisdiction for extraterritorial matters	233
1. Universal jurisdiction	233
2. Applicable law	236
3. Improvement of access to remedies	237
IV. Summary	239
Chapter 7. Sector-specific CSR Conceptions	241
I. The mining industry	241
1. Industry-related initiatives	242
a) International Petroleum Industry Environmental Conservation Association (IPIECA) ...	242
b) International Council for Mining and Metals (ICMM)	243
2. Issue-specific approaches	244
a) Voluntary Principles on Security and Human Rights	244
b) Extractive Industries Transparency Initiative (EITI)	245
c) Blood diamonds	247
d) Conflict minerals	248
aa) National law with extraterritorial effect (Sec. 1502 Dodd-Frank Act)	248
bb) Hybrid norm system	255
(1) OECD Due Diligence Guidance	255
(2) EU Regulation 2017/821	257
(3) Chinese due diligence guidelines	258
(4) Industry standards	259
(5) International Conference on the Great Lakes Region	261
3. Project specific regimes (Chad-Cameroon Pipeline Project)	264
4. Summary	266
II. The financial sector	268
1. Responsible finance	273
a) Thun Group Discussion Paper	273
b) World Bank policies	276
c) International Finance Corporation Sustainability Framework	277
d) Equator Principles	280
2. Responsible export credits	283
3. Responsible investment	285
a) UNEP Finance Initiative (UNEP FI)	286
b) UN Principles for Responsible Investment (UNPRI)	287
c) Principles for Sustainable Insurance (PSI)	295
d) Sustainable Stock Exchanges Initiative (SSE)	297
4. Ratings, rankings, benchmarking and sustainability indices	298
5. Non-financial reporting	301
a) Legal obligations on non-financial reporting	303
aa) European Union	303
bb) European Union member states	308
cc) USA	311
dd) Brazil	313
ee) Nigeria	313
ff) Japan	314
gg) China	314

Table of Contents

hh) South Africa	314
ii) India	315
b) Voluntary reporting initiatives	315
aa) Global Reporting Initiative (GRI)	316
bb) Other international reporting approaches (SASB, IIRC, ISAE3000, AA1000)	320
cc) German reporting standards (DRS 20, DNK)	321
c) Fundamental issues	322
aa) Integrated reporting	322
bb) Safe harbor rules	323
cc) Supply chain reporting	324
dd) Audits and certification (example SA8000)	325
6. Summary	328
III. The textile industry	330
1. Supply chain responsibility	331
a) Standards	332
b) Contract	333
c) Supply chain management	338
d) Between Scylla and Charybdis: Liability	338
2. The Rana Plaza Governance System	340
a) The Rana Plaza accident	340
b) Sustainability Compact	341
c) Accord on Fire and Building Safety in Bangladesh (Accord)	342
d) Alliance for Bangladesh Worker Safety (Alliance)	344
e) Rana Plaza Arrangement	345
f) Evaluation of the Rana Plaza Governance System	346
3. Summary	349
IV. The legal profession	351
1. Basic questions	353
a) Legal advice	353
b) Lawyers as service providers	353
c) Law firms and lawyers' associations as "enterprises"	354
d) The attorney-client relationship	354
aa) "Leverage"	355
bb) The role of the lawyer as "legal" advisor and organ in the administration of justice	355
2. The International Bar Association (IBA) Guidances on Business and Human Rights	359
a) Process	359
b) IBA Guidances on Business and Human Rights	362
c) Reception	364
3. The OECD/IBA Memorandum of Understanding	365
4. Summary	365
V. Summary	366
Chapter 8. Evaluation of the CSR Discourse and Further Questions	367
I. Enterprise	367
II. Responsibility	368
III. Governance	369
PART B	
RESPONSIBLE ENTERPRISE	
Chapter 9. Enterprise	373
I. The conception of enterprise	373
1. Definitions of enterprise in the CSR debate	374
2. Conceptions of enterprise	376
a) The term enterprise in common parlance	376
b) Institutional or functional conception of enterprise	377
c) The context-dependence of the conception of enterprise	377
3. The conception of enterprise in the context of CSR	379
a) Functional-teleological conception of enterprise	379
b) Nonprofit organisations as enterprises	380
aa) The Catholic Church	381
bb) Professional sports organizations (FIFA)	385
cc) Charitable organizations (UNICEF, WWF, ADAC)	387

Table of Contents

4. Summary	392
II. Group responsibility	393
1. Piercing the corporate veil	394
2. Agency theory and vicarious liability	395
3. The enterprise as an economic unit	396
a) The wide (functional) conception of enterprise	396
b) Enterprise liability	400
4. Operator responsibility	401
5. Duty of care to third parties	401
6. Contract, guarantee and factual groups	403
7. Summary	404
Chapter 10. Responsibility	407
I. Responsibility in the CSR debate	407
1. Responsibility approaches in the CSR debate	407
2. Systematizing fundamental questions on CSR	411
a) Who?	411
b) For what?	411
c) According to which standards?	412
d) How?	413
e) To whom?	413
f) Why?	414
3. Summary	414
II. Fundamental questions of enterprise responsibility	415
1. The role of enterprises	415
a) Business ethics approaches	416
aa) Ordoliberal approach	416
bb) Integrative and republican approach	417
cc) Governance ethics approach	417
dd) Anglo-American approaches	418
ee) Primacy of democracy to philosophy	420
b) Statutory requirements	421
aa) Anglo-American legal systems	421
bb) German law	423
2. The scope and limits of enterprise responsibility	426
3. Responsibility and competition	428
4. Responsibility and power	430
5. Ethics of good intentions and ethics of results (Gesinnungs- und Verantwortungsethik)	433
6. Functional conception of enterprise and differentiated responsibility	435
7. Universalism vs. historical-cultural contextualism	436
a) Business ethics in the world religions	438
b) The development of Christian business ethics	439
aa) Catholic business ethics	439
bb) Protestant business ethics	442
c) Business ethics in Islam	444
d) Confucian business ethics	452
e) Global economic ethic	457
aa) "Global ethic" (Küng, Weeramantry)	458
bb) Sustainable diversity in law (Glenn)	460
cc) Overlapping consensus (Rawls)	461
8. Summary	461
Chapter 11. Governance	463
I. Is CSR law?	465
1. Conceptions of law	470
a) State-centric conception of law	470
b) Soft law	474
c) Pluralist conception of law	477
d) Anthropologic conception of law	478
e) Relative conception of law	480
2. CSR as global, transnational or world law?	482
3. The transnationalization of law as a process	485

Table of Contents

4. CSR and public international law	485
a) International treaty law	485
b) Customary international law	487
c) General principles of law	492
d) Secondary sources of law	492
e) Relationship to national law	493
5. Summary	494
II. The CSR conception of governance	495
1. The conception of governance	495
2. CSR governance: “smart mix” (governance by/with/without government)	498
a) Governance by government	499
aa) Actors and functions	499
bb) Norm creation, implementation and enforcement	499
cc) Dispute resolution	500
b) Governance with government	500
aa) Actors and functions	501
bb) Norm creation, implementation and enforcement	502
cc) Dispute resolution	511
c) Governance without government	513
aa) Actors and functions	514
bb) Norm creation, implementation and enforcement	515
(1) Self-regulation	515
(2) Third party regulation (inter alia the legal profession, Facebook community standards, supply chain)	516
(3) Cooperative governance	525
cc) Dispute resolution	525
3. Summary	529
III. Constitutionalization	530
1. Erosion of national constitutions (de-constitutionalization)	532
2. New-constitutionalization?	537
a) State-centric approaches (“containment”, “transfer”)	538
b) The constitutionalization of CSR (“legal internet”)	540
3. Recommendations for legal-policy and academic discourse	545
4. Summary	547
Epilogue	549
Bibliography	551