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Summary

A growing number of companies considers the protection of universal human rights as important for corporate success and has enacted Corporate Codes of Conduct with Compliance mechanisms so as to ensure their respect. The thesis examines this development, analyzing why and how human rights are respected by companies.

Part I explores if, and to what extent, companies are legally bound today to respect human rights. It is shown that binding obligations capable of capturing the worldwide reach of many companies barely exist. On an international level, binding obligations are completely lacking. On a national level, both host-country legislation and extraterritorial home-country legislation are insufficient to prevent companies from abusing human rights, especially in developing countries. Companies effectively operate in a “legal vacuum”.

The main reason why human rights are respected by transnational corporations today is concern for their corporate reputation. Reputation can determine corporate success. However, as part II of the thesis explains, human rights are protected out of concern for reputation only if three conditions are met. Expectations of compliance among relevant stakeholders constitute the first condition. The second is the ability to precisely predict future behavior on the basis of past behavior. Repeated interaction between business parties, observability of this interaction by potential stakeholders or exchange of information between present and potential stakeholders is a third condition. Only if each condition is met can corporate behavior be controlled through reputation.

It proves more difficult to control the behavior of small and medium enterprises (SME) due to their great number and diversity. As the human rights abuses of SME are increasingly associated with the transnational corporations that they supply, however, these demand from them increasing compliance with human rights norms. Put otherwise, whether human rights are respected by SME is due less to concern for their own reputation and more to the demand of transnational corporations.

Part III of the thesis explores developments and instruments that have led to a better alignment of the human rights interests and financial interests of compa-

nies. Instruments that make up for inadequate behavior control through reputation are presented first.

The expectations of stakeholders regarding human rights have increased due to the awareness raised by various actors. In particular, non-governmental organizations (NGO), which have registered an enormous qualitative and quantitative growth in recent years, are sensitizing many stakeholders to the negative impacts of business activity on human rights. This process has brought about, for example, a sharp increase in Socially Responsible Investments, i.e. investments that integrate human rights considerations into investment decisions.

Furthermore, part III shows how monitoring, which allows the most precise inference of past to future behavior of companies, can be and has been improved. Sustainability reporting attests to how a company deals with environmental, social – to which human rights belong – and economic risks. The Sustainability Reporting Guidelines of the Global Reporting Initiative, already leading worldwide, are being increasingly used and have the potential for international consensus. That having been said, many stakeholders have neither the time nor knowledge to read sustainability reports. They need information bundling in the form of seals of approval. Stock indexes and rating codes for investors and certificates, social labels and awards for consumers are discussed as possible seals of approval. The certificate Social Accountability (SA) 8000 and the label FairTrade are omnipresent. Many other seals of approval are also growing in number and improving thereby the basis for monitoring. The control of corporate behavior through reputation will be even easier in future to effect due to these developments.

Additionally, many processes occurring worldwide, though they do not directly make up for missing conditions for behavior control through reputation, give companies other incentives for human rights compliance by reducing the costs involved in respecting human rights. Examples are tools for a Human Rights Impact Assessment, the strengthened co-operation of NGO and companies or specific support for SME. Tools for a Human Rights Impact Assessment help companies to identify the extent to which their activities have a negative impact on human rights, while co-operation with NGO gives companies important know-how or contacts in foreign countries. Moreover, different countries not only support learning programs for SME, but also link human rights requirements to public procurement contracts or export promotion, which linkage gives companies further incentives to comply with human rights.

Part IV of the thesis shows how companies can and do respect human rights in practice. As companies can allegedly impact almost every single human right, business is responsible for respecting all human rights. In order to do so, companies must carry out a Due Diligence. That means a comprehensive, proactive attempt to uncover actual and potential human rights risks over the entire life cycle of a business activity in order to minimize those risks. By carrying out a Due Diligence, a company can also avoid complicity in human right abuses.

A Due Diligence is composed of several steps. First, a company needs to formulate its human rights policy in a Code of Conduct. It then must conduct a Human Rights Impact Assessment in order to detect cases in which business activities are not in accordance with the Code of Conduct. If divergences are detected, measures must be identified that may correct these. The measures must subsequently be implemented in the whole company with the aid of several tools, including instruction for employees. The implementation is to be assessed for possible improvement. Internal and external reporting over the whole process also belongs to a comprehensive Due Diligence. The single steps of a Due Diligence can vary somewhat from one company to another, but the described steps serve as a frame of reference for all companies.

The thesis concludes that binding regulation is not the only way to enable effective human rights protection. Diverse processes and measures have made human rights a reality for many companies. As they are not based on command and coercion, these processes and measures constitute what I call informal human rights protection. Informal human rights protection consists particularly of reputational mechanisms, governmental and civil incentive structures, self-regulation of companies through Codes of Conduct, Multi-Stakeholder-Initiatives, Soft Law-Initiatives within International Organizations and binding obligations nationally.

The emergence of informal human rights protection reflects the gradual transformation of the structure of public international law into a transnational multi-level system, which is created, carried and enforced by diverse subjects in diverse ways. A novel and equally astonishing human rights protection beyond the classical binding regulation has been emerging in the past few years inside the “legal vacuum” mentioned earlier. The developments described are remarkable and impressive in their impact. The potential of informal human rights protection is substantial and far from exhausted.

Companies are, however, still committing many human rights abuses worldwide. It is therefore important that current processes be supported and complemented. The global reach of business activities and the issue's complexity call for international solution. The UN, and within the UN, the mandate of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, offers a legitimate forum to develop answers on how to complete informal human rights protection. In any case, the success of every effort and initiative will depend on whether the decisive parties – governments, NGO and companies – act constructively. If the opportunities offered are seized, today's "best practice" can in future become "current practice" and the respect of human rights an integral part of successful corporate management.