

SVENJA KRISTIN LANGENHAGEN

# Corporate Social Responsibility in International Sales Law

*Max-Planck-Institut  
für ausländisches und internationales  
Privatrecht*

*Studien zum ausländischen  
und internationalen Privatrecht*

533

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**Mohr Siebeck**

Studien zum ausländischen und internationalen Privatrecht

533

Herausgegeben vom

Max-Planck-Institut für ausländisches  
und internationales Privatrecht

Direktorium:

Holger Fleischer, Ralf Michaels, Anne Röhel





Svenja Kristin Langenhagen

# Corporate Social Responsibility in International Sales Law

Mohr Siebeck

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ISBN 978-3-16-164052-0 / eISBN 978-3-16-164053-7

DOI 10.1628/978-3-16-164053-7

ISSN 0720-1141 / eISSN 2568-7441

(Studien zum ausländischen und internationalen Privatrecht)

The Deutsche Nationalbibliothek lists this publication in the Deutsche Nationalbibliographie; detailed bibliographic data are available at <https://dnb.dnb.de>.

Published by Mohr Siebeck Tübingen 2025.

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Mohr Siebeck GmbH & Co. KG, Wilhelmstraße 18, 72074 Tübingen, Deutschland  
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Dedicated to

*Peter Mankowski*

(1966–2022)



## Foreword & Acknowledgements

This book emerged from my dissertation which I submitted in September 2023 and which I defended at the Faculty of Law of the University of Hamburg in April 2024. This book encompasses (legal) developments until 2023 but also points out significant current developments.

Writing a dissertation indicates perseverance, at least that is how it is often proclaimed. However, it is not possible to persevere through such a large but at the same time lonely project alone, and certainly not during the Covid pandemic. Therefore, my heartfelt thanks go to all the people who accompanied and encouraged me on the way to writing this book.

I was raised only by *Regine Langenhagen*, my wonderful and very clever mother, who supported me with all her strength in my education so that I will have a bright future, for which I am very thankful. Although she comes from a non-academic family, she was successful in her career in a male-dominated industry and taught me that education is key, especially as a woman. She showed me the world and that it is up to me to spread my wings and realise my dreams. So, I studied law at the University of Hamburg. Nevertheless, initially, I had not planned to write a doctoral thesis. Writing a PhD thesis was completely out of my imagination. Me and a PhD?

It was *Prof. Dr. Peter Mankowski* (1966–2022) who gave me the confidence to write a dissertation by offering me this opportunity. He has always supported me since my legal studies. My greatest gratitude goes to him. Only because of him and his faith in my potential, I decided to do so. His faith in me opened the door so that I could also believe in myself. The topic ‘Corporate Social Responsibility in International Sales Law’ was approved by him with great enthusiasm. He even invited me to write my dissertation at his chair at the University of Hamburg as his research assistant. He was not only an excellent professor, life teacher and team leader. He was special in every aspect. If I had to describe him with one sentence, I would describe him as wise genius with the right pinch of humour and a big spoonful of honest cordiality. *Prof. Dr. Peter Mankowski* is an inspiration for me until today. I will always carry him in my heart.

I am no less grateful for the outstanding support of my other supervisor *Prof. Dr. Mareike Schmidt* who stood by me both professionally and personally during the whole dissertation phase, but especially after the



unexpected death of *Prof. Dr. Peter Mankowski* in February 2022. Without her, the thesis would not have the legal persuasiveness it now has.

I am also very grateful to *Prof. Dr. Wolfgang Wurmnest* – my ‘adoptive’ doctoral supervisor. I truly appreciate his loyalty as well as his advice and multifaceted support.

*Prof. Dr. Peter Mankowski* and *Prof. Dr. Eckart Brödermann* supported me in obtaining a doctoral scholarship from the *Albrecht Mendelssohn Bartholdy Graduate School of Law*. Without the support by this great institution this doctoral thesis would not have been possible. I am very grateful to the directors, staff and members of the *Albrecht Mendelssohn Graduate School of Law*.

One of the biggest professional leaps I was able to make was during my doctoral research stay at the *Lauterpacht Research Centre for International Law* at the *University of Cambridge*. There I met outstanding academics who inspired me and gave my work a special depth. I would like to mention *Dr. Ketty Getachew* and *Dr. Cora Masche*, whom I hold in high esteem, not only because of their professional expertise and cleverness.

I owe the completion of this thesis above all to the *Max Planck Institute for Comparative and International Private Law* in Hamburg where I was allowed to do a research stay to finish my dissertation. Here, too, I met exciting people. who were a great professional and human support to me in completing this project. *Dr. Annegret Lamadé* deserves special mention here.

My heartfelt thanks go to my best friend *Helena Thiel* who not only proofread my thesis but also supported me with legal discussions and always encouraged me not to give up, which was surely not an easy task. Without her acumen and firm belief in me, you would not be holding this book in your hands.

Finally, I want to thank *Paul Ole Gasthuber* from the bottom of my heart who supported me in finishing this book – always with uplifting and loving words as well as outstanding empathy and patience.

Hamburg, January 2025

*Svenja Kristin Langenhagen*

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# Abbreviations

|                                   |  |
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| AcP                               | Archiv für die civilistische Praxis                                      |
| AG                                | Aktiengesellschaft (Public limited company)                              |
| AGB                               | Allgemeine Geschäftsbedingungen (Standard Terms)                         |
| Am. J. Comp. L.                   | American Journal of Comparative Law                                      |
| AMR                               | The Academy of Management Review   |
| Annals Fac L Belgrade<br>Int'l Ed | Annals of the Faculty of Law in Belgrade -<br>International Edition      |
| Art.                              | Article(s)   |
| Austr. Yb. Int'l L.               | Australian Year Book of International Law                                |
| AVR                               | Archiv des Völkerrechts  |
| b2b                               | Business to business   |
| b2c                               | Business to consumer   |
| BB                                | Betriebs-Berater   |
| BeckOGK                           | beck-online.GROSSKOMMENTAR   |
| BGB                               | Bürgerliches Gesetzbuch (German Civil Code)                              |
| BHRJ                              | Business and Human Rights Journal  |
| c2b                               | Consumer to business   |
| c2c                               | Consumer to consumer   |
| CC                                | Corporate Citizenship  |
| CCZ                               | Corporate Compliance Zeitschrift   |
| CISG                              | UN Convention on Contracts for the International Sale of<br>Goods (1980) |
| CISG-AC                           | CISG Advisory Council  |
| CoC / CoCs                        | Code of Conduct / Codes of Conduct                                       |
| Colum. J. Transnat'l L.           | Columbia Journal of Transnational Law                                    |
| COP                               | Communication on Progress  |
| CPIL                              | Switzerland's Federal Code on Private International Law                  |
| CR                                | Corporate Responsibility   |
| CRC                               | Convention on the Rights of the Child (1989)                             |
| CSDDD                             | EU Corporate Sustainability Due Diligence Directive                      |
| CSR                               | Corporate Social Responsibility  |
| CUNY L. Rev. F.                   | City University of New York Law Review                                   |
| DB                                | Der Betrieb  |
| DePaul Bus. L. J                  | DePaul Business Law Journal  |
| EC                                | European Community   |
| Ed. / Eds.                        | Editor / Editors   |
| EICC                              | Electronic Industry Citizenship Coalition                                |
| EJLE                              | European Journal of Law and Economics                                    |
| EJLR                              | European Journal of Law Reform   |

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| ERCL           | European Review of Contract Law  |
| ERPL           | European Review of Private Law   |
| ESG            | Environmental Social Governance  |
| EU             | European Union   |
| EUI            | European University Institute  |
| EUR            | Euro   |
| EWCA           | England and Wales Court of Appeal  |
| FAO            | Food and Agriculture Organization of the United Nations  |
| FCPA           | U.S. Foreign Corrupt Practices Act   |
| FCSSC          | The Finance Centre for South-South Cooperation   |
| Fn             | Footnote(s)  |
| FSC            | Forest Stewardship Council   |
| FTA            | Free Trade Agreement(s)  |
| FTSE100        | Financial Times Stock Exchange Index concerning the 100 most highly capitalised corporates listed on the London Stock Exchange companies in the United Kingdom |
| GAFTA          | Grain and Food Trade Association   |
| GATT           | General Agreement on Tariffs and Trade   |
| GDP            | Gross Domestic Product   |
| GMP            | Good Manufacturing Process   |
| GoJIL          | Goettingen Journal of International Law  |
| GroJIL         | Groningen Journal of International Law   |
| GTCs           | General terms and conditions   |
| HGB            | Handelsgesetzbuch (German Commercial Code)   |
| HRC            | Human Rights Council   |
| ICJ            | International Court of Justice   |
| IFAD           | International Fund for Agricultural Development  |
| IHR            | Internationales Handelsrecht   |
| IJGLS          | Indiana Journal of Global Legal Studies  |
| IJPDLM         | International Journal of Physical Distribution & Logistics Management  |
| ILC            | International Law Commission   |
| ILO            | International Labour Organization  |
| IPR            | Internationales Privatrecht  |
| IPRax          | Praxis des Internationalen Privat- und Verfahrensrechts  |
| ISO            | International Organization for Standardization   |
| ITBLR          | International Trade & Business Law Review  |
| IWRZ           | Zeitschrift für Internationales Wirtschaftsrecht   |
| J. Bus. Ethics | Journal of Business Ethics   |
| J. Public Aff. | Journal of Public Affairs  |
| JLC            | Journal of Law and Commerce  |
| JWV            | Jenaer Wissenschaftliche Verlagsgesellschaft   |
| JZ             | Juristenzeitung  |
| LCLR           | Lewis & Clark Law Review   |
| LkSG           | Lieferkettensorgfaltspflichtengesetz (German Supply Chain Due Diligence Act)   |
| LLB            | Bachelor of Laws   |
| LMCLQ          | Lloyd's Maritime and Commercial Law Quarterly  |
| MAA            | Moot Alumni Association  |

|                    |  |
|--------------------|--|
| MIT                | Massachusetts Institute of Technology                                  |
| MIT SMR            | MIT Sloan Management Review  |
| MSC                | Marine Stewardship Council   |
| MüKo               | Münchener Kommentar  |
| NCPs               | National Contact Points  |
| ND Cal             | Northern District of California  |
| NGO                | Non-Governmental Organisation  |
| NJCL               | Nordic Journal of Commercial Law                                       |
| NJW                | Neue Juristische Wochenschrift   |
| No.                | Number(s)  |
| NOK                | Norwegian krone  |
| NuR                | Natur und Recht  |
| NZG                | Neue Zeitschrift für Gesellschaftsrecht                                |
| OECD               | Organization for Economic Co-Operation and Development                 |
| OHCHR              | Office of the United Nations High Commissioner for Human Rights        |
| Pace Int. Law Rev. | Pace International Law Review  |
| Para               | Paragraph(s)   |
| PDF                | Portable Document Format   |
| PICC               | UNIDROIT Principles of International Commercial Contracts 2016         |
| RBA                | Responsible Business Alliance  |
| REEP               | Review of Environmental Economics and Policy                           |
| RES                | Resolution   |
| RIPE               | Review of International Political Economy                              |
| Rutgers Law Rev.   | Rutgers Law Review   |
| SA                 | Société anonyme (France)   |
| SDGs               | UN Sustainable Development Goals                                       |
| SEC                | United States Security and Exchange Commission                         |
| Sec.               | Section(s)   |
| Sent.              | Sentence   |
| SJZ                | Schweizerische Juristen-Zeitung  |
| SRI                | Socially Responsible Investment  |
| SSRN               | Social Science Research Network  |
| StudZR-WissOn      | Studentische Zeitschrift für Rechtswissenschaft<br>Wissenschaft Online |
| TFEU               | Treaty on the Functioning of the European Union                        |
| TVPA               | Trafficking Victims Protection Reauthorization Act                     |
| TWAIL              | Third World approaches to international law                            |
| U.N.T.S.           | United Nations Treaty Series   |
| U.S.               | United States of America   |
| UCLA Law Review    | University of California Los Angeles Law Review                        |
| UFLPA              | United States Uyghur Forced Labor Prevention Act                       |
| UK                 | United Kingdom   |
| ULR                | Uniform Law Review   |
| UN / U.N.          | United Nations   |
| UNGC               | United Nations Global Compact  |
| UNGP               | United Nations Guiding Principles on Business and Human Rights         |



|          |   |
|----------|---|
| UNICEF   | The United Nations Children's Fund                                |
| UNIDROIT | International Institute for the Unification of Private Law        |
| USD      | U.S. Dollar   |
| VAT      | Value-Added Tax   |
| VCLT     | Vienna Convention on the Law of Treaties (1969)                   |
| VJ       | Vindobona Journal of International Commercial Law and Arbitration |
| Vol      | Volume  |
| WTO      | World Trade Organization  |
| WVB      | Waren-Verein der Hamburger Börse e.V.                             |
| YbILC    | Yearbook of the International Law Commission                      |
| YbILC    | Yearbook of the International Law Commission                      |
| ZaöRV    | Zeitschrift für ausländisches öffentliches Recht und Völkerrecht  |
| ZEuP     | Zeitschrift für Europäisches Privatrecht                          |
| ZGR      | Zeitschrift für Unternehmens- und Gesellschaftsrecht              |
| ZIP      | Zeitschrift für Wirtschaftsrecht                                  |
| ZRP      | Zeitschrift für Rechtspolitik                                     |

## Introduction and Course of Further Investigation

Corporate Social Responsibility (in the following: CSR) is a complex, interdisciplinary<sup>1</sup> and currently very strongly discussed global topic. In broad terms: It is about the tension between the corporate aim of profit maximisation and simultaneously respecting human rights, protecting the environment as well as turning the back on corruption and bribery.

Thereby, CSR is, in particular, an issue concerning business activities of a transnational character, especially concerning transnational supply chains. Transnational supply chains span around the globe like a giant net, enabling us to buy cheap products whenever and from wherever we want. Yet, we should not forget that everything has its price. If we do not pay it, others have to.

The products themselves or their components are regularly produced on the other side of the globe where human rights and environmental risks are usual. This especially applies to countries of the Global South, where it can be observed that they offer no or only a very low level of minimum wages and particularly lower human rights and environmental protection standards.<sup>2</sup> This might even be the case for economically weak countries that are signatories to human rights treaties or treaties on environmental protection; yet, it is often criticised that in such cases there was insufficient legal or factual enforcement (so called ‘weak governance zones’).<sup>3</sup> In comparison, human

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<sup>1</sup> Smits, (2017) 24(1) IJGLS, 99 (99 et seq.) with various references.

<sup>2</sup> Wolfmeyer, *Steuerung von CSR durch Recht*, 8; similar Ulfbeck/Andhov/Mitkidis, in Ulfbeck/Andhov/Mitkidis, *Law and Responsible Supply Chain Management*, 1 (3); cf. also Reinhardt/Stavins/Vietor, (2008) 2(2) REEP, 219 (224); Scozzaro, (2016) 19(2) CUNY L. Rev. F., 59 (61); Maryanov, (2010) 14(11) LCLR, 397 (406).

<sup>3</sup> Weilert, (2009) 69 ZaöRV, 883 (898) with reference to Krebber, (2008) 63(2) JZ, 53 (59) on public international labour law and exemplarily on child labour; cf. also McBarnet/Kurkchian, in McBarnet/Voiculescu/Campbell, *The New Corporate Accountability*, 59 (66); Knaak, *Integrating Human Rights into Business*, 40 with further references; similar Mitkidis, NJCL 2014, 1 (3); cf. also Lin, (2009) 57(3) Am. J. Comp. L., 711 (718); Glinski, in McBarnet/Voiculescu/Campbell, *The New Corporate Accountability*, 119 (119); cf. Hoffberger-Pippan, (2020) 58(4) AVR, 400 (400); Zimmermann/Weiß, (2020) 58(4) AVR, 424 (424); Weller/Thomale, (2017) 46(4) ZGR, 509 (514 et seq.); Schwenzer, (2008) 47(8) Lov Og Rett – Norsk Juridisk Tidsskrift, 451 (454) on ‘failing states’; cf. also Schröder, in Fröhlich, *CSR und Beschaffung*, 145 (148) (also on the example of child labour regulation

rights and environmental standards are much higher in the Global North. If products and their components were to be produced here in the Global North and not in the Global South, the price calculation would be very different.

In turn, this disproportionality is an open invitation for multinational corporations and transnational acting enterprises to create their business in the most efficient and cost-saving way in order to maximise profits<sup>4</sup> and to keep up with their peers.<sup>5</sup> By, for example, outsourcing, subsidiaries, contracting with suppliers and sub-suppliers and insofar reshaping supply chains to transnational cost-efficient supply chains,<sup>6</sup> multinational corporations and transnational acting enterprises transfer their business to transitional and developing countries, and thereby escape costly compliance with the strict human rights and environmental standards of their home country (race to the bottom).<sup>7,8</sup> It is a ‘game of regulatory arbitrage’<sup>9</sup> in the interest of profit maximisation.

In this context, risks for human rights and the environment evolve as corporations may ‘exploit’ lower standards in other countries in the interest of profit maximisation.<sup>10</sup> As practice shows, the conscious or unconscious ‘exploitation’ of lower standards can lead to harmful consequences for workers, citizens and the environment.<sup>11</sup>

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in India as falling short of the ILO core labour standards); cf. also *Schwenzer/Muñoz*, (2021) 23(3) EJLR, 300 (307).

<sup>4</sup> *Knaak*, Integrating Human Rights into Business, 40 with further references; *Wolfmeyer*, Steuerung von CSR durch Recht, 8; *Oelze*, in Fröhlich, CSR und Beschaffung, 37; cf. also *Vytopil*, Contractual Control in the Supply Chain, 26; *Schindowski*, StudZR-WissOn 2019, 84 (85 and 97).

<sup>5</sup> *Lin*, (2009) 57(3) Am. J. Comp. L., 711 (717 et seq.).

<sup>6</sup> *Lin*, (2009) 57(3) Am. J. Comp. L., 711 (718); *Tjon Soei Len*, Minimum Contract Justice, 64 et seqq. on the textile industry.

<sup>7</sup> *Wolfmeyer*, Steuerung von CSR durch Recht, 8; *Vytopil*, Contractual Control in the Supply Chain, 27; *Schindowski*, StudZR-WissOn 2019, 84 (97) with further reference.

<sup>8</sup> Cf. *Weilert*, (2009) 69 ZaöRV, 883 (885); cf. also *Rühmkorf*, CSR, Private Law and Global Supply Chains, 79; *Wolfmeyer*, Steuerung von CSR durch Recht, 8; *McBarnet*, in *McBarnet/Voiculescu/Campbell*, The New Corporate Accountability, 9 (45); *McBarnet/Kurkchian*, in *McBarnet/Voiculescu/Campbell*, The New Corporate Accountability, 59 (62); *Knaak*, Integrating Human Rights into Business, 36; *Vytopil*, Contractual Control in the Supply Chain, 27; *Lin*, (2009) 57(3) Am. J. Comp. L., 711 (717 et seq.); *Wickert/Risi*, Corporate Social Responsibility, 13.

<sup>9</sup> *McBarnet*, in *McBarnet/Voiculescu/Campbell*, The New Corporate Accountability, 9 (45).

<sup>10</sup> Cf. also *Wolfmeyer*, Steuerung von CSR durch Recht, 7; *Vytopil*, Contractual Control in the Supply Chain, 26; *McBarnet/Kurkchian*, in *McBarnet/Voiculescu/Campbell*, The New Corporate Accountability, 59 (61); *Nalin*, in *Schwenzer*, 35 Years and Beyond, 317 (319 et seq.); *Tjon Soei Len*, Minimum Contract Justice, 18.

<sup>11</sup> *Benedek/Marrella*, in *Benedek/Feyter/Marrella*, Economic Globalisation and Human Rights, 311 (316).

In sum 79 million children are working under exploitative conditions,<sup>12</sup> which means that the wealth stemming from transnational supply chains is up to 17.5 % carried out on the backs of children in an exploitative way.<sup>13</sup> In general, the numbers of child labour without the limitation to 'exploitative conditions' are even higher. Moreover, even though there were estimations that child labour decreases and will further decrease,<sup>14</sup> according to recent estimations by UNICEF, "roughly 160 million children were subjected to child labour at the beginning of 2020, with 9 million additional children at risk due to the impact of COVID-19. This accounts for nearly 1 in 10 children worldwide."<sup>15</sup>

When it comes to the prohibition of forced labour, the numbers are also shocking. Estimations as of 2016 reveal that there were 24.9 million people trapped in forced labour, while 16 million of them are in the private sector.<sup>16</sup> From 2016 to 2021 there was even an increase of 2.7 million people trapped in forced labour, amounting to a total number of 27.6 million people.<sup>17</sup> Out of the 27.6 million people in forced labour, 17.3 million are exploited in the private sector.<sup>18</sup>

Unsafe and unhealthy working conditions are also a major concern in transnational supply chains. That unsafe working conditions such as insufficient fire and building safety measures can even lead to deaths can be shown by two prominent examples: the first one being the Rana Plaza building collapse in Bangladesh on 24 April 2013 where 1,113 workers were killed and

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<sup>12</sup> <<https://www.bmz.de/de/themen/lieferketten>> (last accessed 30 July 2023).

<sup>13</sup> Global supply chains equal 80 % of global trade and provide livelihood to 450 million people, cf. <<https://www.bmz.de/de/themen/lieferketten>> (last accessed 30 July 2023).

<sup>14</sup> UNICEF ("Progress to end child labour has stalled for the first time in 20 years, reversing the previous downward trend that saw child labour fall by 94 million between 2000 and 2016."), <<https://www.unicef.org/protection/child-labour>> (last accessed 18 May 2022); cf. also *Wilson*, *Ethical Standards*, 25 et seq. ("Corporations worldwide are increasingly moving away from the use of child labour, and will continue to do so in the coming years."); *Butler*, in *Schwenzer*, *35 Years and Beyond*, 295 (309) ("Most importantly, since UN Global Compact and concepts like corporate social responsibility have become 'sexy', the global number of children in child labour has declined by one third since 2000."), referring to outdated data of the ILO (2015).

<sup>15</sup> <<https://www.unicef.org/protection/child-labour>> (last accessed 30 July 2023).

<sup>16</sup> <<https://www.ilo.org/global/topics/forced-labour/lang--en/index.htm>> (last accessed 18 May 2022).

<sup>17</sup> International Labour Organization (ILO), *Walk Free*, and International Organization for Migration (IOM), *Global Estimates of Modern Slavery, Forced Labour and Forced Marriage*, September 2022, available at <<https://publications.iom.int/books/global-estimates-modern-slavery-forced-labour-and-forced-marriage>> (last accessed 30 July 2023), 22.

<sup>18</sup> <<https://www.ilo.org/global/topics/forced-labour/lang--en/index.htm>> (last accessed 30 July 2023).

more than 2,400 injured,<sup>19</sup> and second, the fire at a textile factory in Karachi (Pakistan) on 11 September 2012 where 260 people died and 32 were injured.<sup>20</sup> The factories mainly produced for European clothing enterprises like Kik.<sup>21</sup>

Unfortunately, it is not only human rights which are at risk. Particularly alarming is the destruction of forests and rainforests (especially in Brazil and Indonesia)<sup>22</sup> in order to create cropland (oftentimes monoculture plantations) or land for farmed animals (sometimes illegally and under corruption)<sup>23</sup>, and associated with this the dispossession of indigenous people, the decrease of biodiversity, and the killing and extinction of wildlife.<sup>24</sup> The shrinking of the global lungs results in an increasing CO<sup>2</sup> content within the earth's atmosphere, leading to a higher global average temperature, so boosting climate change.<sup>25</sup> In addition, the excessive deforestation leads to fire susceptibility.<sup>26</sup>

However, as can be observed, the legal as well as the economic landscape is changing. When the research for this thesis began in June 2019, the wind was still sweeping through the desert of CSR regulatory measures. One oft-heard criticism was that there was only non-binding *soft law*. Now, CSR *hard law* regulatory measures sprout from every hole and one can hardly keep up. The CSR regulatory measures have evolved on an international, supranational and national level, which are addressed further below, respecting any regulatory development until 2023 but also pointing out significant current developments.

The legal dimension is not the only driver for the implementation of CSR aspects in business activities. There is also an economic dimension. The consumer demand for ethically produced and traded products steadily increases, which is supported by the fact that the global turnover of 'Fairtrade'-labelled products has increased from EUR 2.895 billion in 2008 to EUR 9.8 billion in 2018.<sup>27</sup> Let alone in Germany, the turnover with fair trade products

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<sup>19</sup> <<https://bangladeshaccord.org/about>> (last accessed 4 May 2023).

<sup>20</sup> <<https://www.business-humanrights.org/en/latest-news/kik-lawsuit-re-pakistan/>> (last accessed 4 May 2023).

<sup>21</sup> <<https://www.business-humanrights.org/en/latest-news/kik-lawsuit-re-pakistan/>> (last accessed 4 May 2023).

<sup>22</sup> Cf. only Sieveking, (2014) 36(8) NuR, 542 (543).

<sup>23</sup> Sieveking, (2014) 36(8) NuR, 542 (543).

<sup>24</sup> Cf. also Sieveking, (2014) 36(8) NuR, 542 (543) and Amnesty International, Fence off And Bring Cattle: Illegal Cattle Farming in Brazil's Amazon, AMR19/1401/2019.

<sup>25</sup> Sieveking, (2014) 36(8) NuR, 542 (543).

<sup>26</sup> Sieveking, (2014) 36(8) NuR, 542 (543).

<sup>27</sup> Statista, 'Umsatz mit Fairtrade-Produkten weltweit in den Jahren 2004 bis 2018', 2019, available at <<https://de.statista.com/statistik/daten/studie/171401/umfrage/umsatz-mit-fair-trade-produkten-weltweit-seit-2004/>> (last accessed 30 July 2023).

has increased from EUR 29 million in 1993 to nearly EUR 2.36 billion in 2022.<sup>28</sup> This shows that the ‘CSR consumer market’ is growing significantly.<sup>29</sup>

Against this backdrop, corporations are increasingly required to take over their social responsibility for the impact of their business abroad with regards to human rights and environmental protection. Thereby, CSR has been and is again discussed in a variety of legal fields.<sup>30</sup> Most often the legal discussion is around the rights and remedies of victims of human rights violations as third parties in the field of tort law or considering the protective effect for third parties of contracts between supply chain participants. Consumer rights are also regularly addressed.

In contrast, this research project addresses the business-to-business (b2b) arena of transnational supply chains, drawing attention to the contracts between the participants of a transnational supply chain. Thereby, the legal links between the participants of a transnational supply chain are predominantly international sales contracts. This is where international sales law comes into play.

Yet, some question whether international sales law is even the right instrument to promote ethical standards because international sales law is ‘actually’ about the risk allocation between the contract parties, and not about public interests.<sup>31</sup> It is precisely this question that affects – on an abstract and theoretical meta-level, but with major practical implications – the relationship between private autonomy and human rights law, i.e. the relationship between private law and international law. Should private autonomy be understood as the holy grail and completely independent of public interests?<sup>32</sup> To put it bluntly: should the contracting parties have the freedom to agree on anything they want, regardless of the consequences for themselves or, more importantly in the context of CSR, for others? These questions touch on the broader question of how much influence the state and public interests should have on

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<sup>28</sup> Statista, ‘Umsatz mit Fairtrade-Produkten in Deutschland in den Jahren 1993 bis 2022’, 2023, available at <https://de.statista.com/statistik/daten/studie/226517/umfrage/fairtrade-umsatz-in-deutschland/> (last accessed 30 July 2023).

<sup>29</sup> Cf. also already *McBarnet*, in *McBarnet/Voiculescu/Campbell*, *The New Corporate Accountability*, 9 (17) with reference to older surveys.

<sup>30</sup> For example in public international law, cf. only *Dörr*, in *Dörr/Dutta/Hilpold*, *Unternehmensverantwortung und Internationales Recht*, 133; in corporate and finance law, cf. only *Kapoor*, *Corporate Social Responsibility: Das Leitbild der nachhaltigen Entwicklung im deutschen Aktienrecht*; in tort law, cf. only *Ulfbeck/Ehlers*, in *Ulfbeck/Andhov/Mitkidis*, *Law and Responsible Supply Chain Management*, 91; *Vytopil*, in *Ulfbeck/Andhov/Mitkidis*, *Law and Responsible Supply Chain Management*, 110.

<sup>31</sup> Raising this concern *Saidov*, (2017) LMCLQ, 65 (30 – online version); following him *Martis*, *Ethische Standards im Kaufrecht*, 53 et seq.; both arguing that the function of sales law is the risk allocation between the parties and not interests of the general public.

<sup>32</sup> On the culture of law and private autonomy, cf. *Mankowski*, *Rechtskultur*, 404 et seqq.

‘private contractual relations’ between private actors. It also raises the question of whether private enforcement is preferable to public enforcement.

Irrespective of how we will answer these questions on a meta level – even though I will try to give an answer on this in my conclusion below based on the findings of this thesis – the current reality remains that companies are increasingly being asked to assume their social responsibility in their business activities, making CSR a legal and economic necessity. This interest in CSR is inevitably reflected in international sales contracts along transnational supply chains. Therefore, the issue of CSR is of great importance for international sales law and thereby highlights the interplay between public international law and private law, specifically in the field of business and human rights. Here, the concrete question arises if and how CSR considerations (can) find their way into international sales contracts between private actors?

In answering this question, the study focuses on the interrelation between CSR in transnational supply chains and the United Nations Convention on Contracts for the International Sale of Goods 1980 (CISG) as the generally applicable set of rules for the international trade of goods and which can, as a harmonising legal framework for civil and common law jurisdictions, at least provide some guidelines for domestic sales law.

The interrelation between CSR, transnational supply chains and international sales and contract law has played an increasing role in legal literature in the last decades, yet in comparison to other academic disciplines only a minor one.<sup>33</sup> However, the discussion on CSR and international sales and contract law is picking up speed. This research project aims to fill gaps, to critically analyse existing legal ideas on the topic as well as to establish new approaches on how CSR can be promoted along transnational supply chains through international sales law. It also serves to detect any weaknesses of international sales law. Above all, practical considerations play a major role, taking into account the recently and increasingly changing legal landscape in the field of CSR on an international, EU and national level.<sup>34</sup> Thereby, any conclusions can only be understood as parameters, at least providing some guidelines for the circumstances of the individual case.

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<sup>33</sup> See, however, for example just recently 2023: *Martis*, Ethische Standards im Kaufrecht; 2022: *Aslan*, Handel mit ethischen Produkten; 2022: *Köhler*, in Duden, IPR für eine bessere Welt, 161 (169 et seq.); cf. also 2015: *McCall-Smith/Rühmkorf*, in Ulfbeck/Andhov/Mitkidis, Law and Responsible Supply Chain Management, 15 (17); 2015: *Rühmkorf*, Corporate Social Responsibility, Private Law and Global Supply Chains; 2015: *Mitkidis*, Sustainability Clauses; 2015: *Beckers*, Enforcing Corporate Social Responsibility Codes; 2015: *Vytopil*, Contractual Control in the Supply Chain; *Cafaggi*, ERCL 2016, 218 (218); *Cafaggi/Iamiceli*, ERCL 2020, 44; 2009: *McBarnet/Kurkchiyan*, in *McBarnet/Voiculescu/Campbell*, The New Corporate Accountability, 59; *Vandenbergh*, (2007) 54(4) UCLA Law Review, 913 (913).

<sup>34</sup> This thesis encompasses legal developments until September 2023.

In order to find out whether and how the almost 45-year-old CISG can meet today's requirements of international trade, this study is divided into six chapters: *Chapter 1* provides an introduction to the context of CSR and transnational supply chains on which the further investigation into the interplay with the CISG is based and serves some limitations to this investigation. *Chapter 2* concerns the question if the CISG is even regularly applicable in the context of CSR and transnational supply chains. *Chapter 3* examines the crux of every (international) sales contract: the goods and their conformity, but in the context of CSR and transnational supply chains. This resembles the question of whether there is a 'CSR conformity' standard under the CISG, including questions of the burden of proof. *Chapter 4* addresses the follow-up question whether and how the buyer must meet the duty of examination and notification when it comes to 'CSR conformity' of the goods. In case there is 'CSR non-conformity' of the goods or at least a 'CSR breach of contract', the buyer may resort to remedies under the CISG which will be addressed in *Chapter 5*. However, the seller might be exempted from its 'CSR-liability' which will be investigated in *Chapter 6*.



## Chapter 1

# The CSR Context – CSR, Transnational Supply Chains and International Sales Law

In the following, for the purposes of the present investigation, the ‘CSR context’ will be established in order to show the relevance of the topic for international sales law and, in turn, the relevance of international sales law for CSR.

In introducing CSR, at first, the term will be circumscribed to establish an understanding of CSR for this investigation [§ 1]. Further, in order to understand where the CSR discussion had its starting point, it will be deduced that the CSR discussion is a result of economic globalisation and is closely related to transnational supply chains [§ 2]. The CSR debate particularly concerns the transnational supply chains of specific industries. Therefore, some negative examples from practice will be displayed in selected so-called ‘CSR-sensitive industries’ [§ 3].

Against this backdrop, the question arises as to how it is (still) even legally possible for business enterprises to circumvent human rights and environmental protection standards. Insofar, a short overview of the legal landscape will be given, considering the possibility of ‘legal standard avoidance’ in the interest of profit maximisation and to the detriment of human rights and the environment [§ 4].

However, the wind has changed. CSR regulatory measures are currently and increasingly evolving as global answers to the legal asymmetry in the field of business and human rights. A short insight into these global answers on an international, EU and national level will be given, showing the currently developing ‘legal responsibility’ of corporations for human rights and environmental protection in their business activities [§ 5]. Besides the growing ‘legal responsibility’ to respect human rights and the environment, business enterprises even have a self-interest in CSR – particularly considering their transnational supply chains [§ 6].

Against this backdrop, in the coming years, it will be about creating or renewing transnational supply chains in a (more) human rights and environmentally friendly way. Consequently, as far as transnational supply chains are concerned, whereby ‘transnational supply chains’ will be illustrated in more detail also from a legal perspective [§ 7], the governing law of the international sales contracts concluded along a transnational supply chain is

the decisive connecting factor for whether CSR efforts can be promoted in and through international sales law. Due to the international nature and complexity of transnational supply chains, the CISG offers itself as a uniform law that harmonises international sales contracts along the entire supply chain [§ 8].

## § 1 The Understanding of 'CSR' for This Investigation

CSR is not a completely new phenomenon.<sup>1</sup> Nevertheless, although the CSR discussion has been taking place for a few decades now,<sup>2</sup> there is still no common and consistent definition of CSR<sup>3</sup> and it does not strictly follow only one concept<sup>4</sup>. Rather, there are various definitions, approaches and theories.<sup>5</sup> The European Commission (meanwhile)<sup>6</sup> defines CSR as '*the responsibility of enterprises for their impacts on society*'.<sup>7</sup> Others define CSR as sacrificing profits in the interest of society, and thereby voluntarily going beyond legal requirements.<sup>8</sup>

Further, CSR is circumscribed as leaving the *shareholder approach* in the direction of the *stakeholder approach*, i.e. business enterprises do not only aim for profits in the interests of their shareholders, but (also) care for the interests and human rights of their employees, consumers, suppliers and their workers, creditors and local communities which might be affected by their business activities.<sup>9</sup>

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<sup>1</sup> Cf. only Carroll, (1979) 4(4) AMR, 497 (497).

<sup>2</sup> Carroll, (1979) 4(4) AMR, 497 (497) referring even to the 1930s; Zerk, Multinationals and CSR, 15 referring to the 1990s; Scozzaro, (2016) 19(2) CUNY L. Rev. F., 59 (59) referring to the 1970s; cf. also Spiesshofer, IWRZ 2019, 65 (65).

<sup>3</sup> Spiesshofer, Responsible Enterprise, 5 with further reference; for a missing common definition in Germany, cf. Weller/Hübner/Kaller, in Schmidt-Kessel, German National Reports on the 20<sup>th</sup> International Congress of Comparative Law, 239 (239); Schneuwly, Corporate Social Responsibility an der Schnittstelle von Wirtschaft, Recht und Politik, 8.

<sup>4</sup> Elementary CSR concepts are (1) Carroll's responsibility pyramid, (2) the Milton Friedman approach, and (3) the Triple Bottom Line by John Elkington; for an overview, cf. Spiesshofer, Responsible Enterprise, 24 et seqq.

<sup>5</sup> For a broad overview on CSR definitions and elementary CSR conceptions cf. only Spiesshofer, Responsible Enterprise, 3 et seqq. and 24 et seqq.

<sup>6</sup> In 2001 the definition of the European Commission described 'CSR as a concept whereby companies integrate social and environmental concerns in their business operations and in their interaction with their stakeholders on a voluntary basis.', COM(2001) 366, 6.

<sup>7</sup> COM(2011) 681 final, 6.

<sup>8</sup> Bénabou/Tirole, (2010) 77 Economica, 1 (2).

<sup>9</sup> Cf. only Campbell/Vick, in McBarnet/Voiculescu/Campbell, The New Corporate Accountability, 241 (242); Rühmkorf, CSR, Private Law and Global Supply Chains, 12 adopting this understanding.

CSR is also about doing business in compliance with environmental and social aspects defined in, for example, globally recognised (*soft law*) standards like the UN Global Compact (UNGC), the standards of the International Labour Organization (ILO) and the UN Convention on Human Rights.<sup>10</sup>

Moreover, CSR is an umbrella term to describe how corporations deal with and enforce social and environmental issues in their business activities.<sup>11</sup>

Against this backdrop, CSR addresses the question of ‘how’ profits are made.<sup>12</sup> Thereby, CSR in its scope may encompass a variety of aspects. Broadly, it is about human rights and environmental protection. In more detail and in human rights terms, CSR encompasses the prohibition of child, slave and forced labour etc., as well as issues of humane working conditions, for example, sufficient health and safety circumstances, minimum wage, the possibility to join workers unions, reasonable working hours etc. Further, CSR includes environmental aspects, such as not (irreversibly) destroying the environment, protecting biodiversity, greenhouse gases and climate change, water contamination by toxic chemicals, monocultures, deforestation etc. Consequently the ‘how’ often refers to the production process and its circumstances and consequences. Another aspect of CSR – besides human rights and environmental protection – is the prohibition of corruption. Which of these CSR aspects is of specific importance to a corporation varies considerably and depends in particular on the industry in which the respective corporation operates.

Although CSR is the most common term, there are further designations and abbreviations. ‘Corporate Citizenship (CC)’, ‘Corporate Responsibility (CR)’, ‘Sustainability Management’ or recently very commonly ‘Environmental Social Governance (ESG)’ all of which are only examples. Relevant for the respective designation is whether the underlying understanding of CSR focuses on social and/or ecological aspects.

Additionally, in pertinent literature one can also find the term ‘compliance’<sup>13</sup> or ‘corporate legal responsibility’<sup>14</sup>. ‘Compliance’ in connection with CSR can be understood in different ways. Mostly ‘compliance’ is equated with ‘legal compliance’, i.e. compliance with current legislation is understood as a minimum standard in the complex of CSR-issues.<sup>15</sup> CSR, thus, is in the vast majority of cases understood as going

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<sup>10</sup> Schröder, in Fröhlich, CSR und Beschaffung, 145 (147).

<sup>11</sup> Wickert/Risi, Corporate Social Responsibility, 22.

<sup>12</sup> Cf. McBarnet, in McBarnet/Voiculescu/Campbell, The New Corporate Accountability, 9 (9).

<sup>13</sup> Cf. only Spießhofer, NZG 2018, 441 (441).

<sup>14</sup> This term is, for example, used in this context by Nowrot, in Raupp/Jarolimek/Schultz, Handbuch CSR, 419 (420).

<sup>15</sup> Schröder, in Fröhlich, CSR und Beschaffung, 145 (146); cf. also Spießhofer, in Hauschka/Moosmayer/Lösler, Corporate Compliance, § 11 Compliance und CSR para 1 who

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