



GLOBALISATION AND THE RISE OF MULTINATIONALS – THE DIVERGENCE OF RESPONSIBILITY AND ACCOUNTABILITY

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STATEMENT

Research dissertation presented for the approval of Senate in fulfilment of part of the requirements for the Master of Law in approved courses and a minor dissertation. The other part of the requirement for this qualification was the completion of a programme of courses.

I hereby declare that I have read and understood the regulations governing the submission of Master of Law dissertations, including those relating to length and plagiarism, as contained in the rules of this University, and that this dissertation conforms to those regulations.

CONTENT

STATEMENT	- 2 -
BIBLIOGRAPHY	- 5 -
LIST OF ACRONYMS AND ABBREVIATIONS	- 16 -
1 INTRODUCTION	- 20 -
1.1 Motivation	- 20 -
1.2 Problem Definition	- 21 -
1.3 Objective Target	- 21 -
1.4 Structure	- 22 -
2 GLOBALISATION AND THE RISE OF MULTINATIONALS	- 23 -
2.1 Globalisation and Multinationals	- 23 -
2.2 The Impact of Globalisation	- 24 -
2.2.1 The Top 100 Economic Entities	- 24 -
2.2.2 The Increase of Power of the Private Sector	- 26 -
2.2.3 Public Perception, Responsibilities and Opportunities	- 28 -
2.2.4 The Admonishing Conscience of Civil Society	- 28 -
2.2.5 Forms of Corporate Misconduct	- 29 -
2.2.6 Interim Conclusion	- 31 -
3 GLENCORE XSTRATA PLC – ‘THE BIGGEST COMPANY YOU’VE NEVER HEARD OF’	- 33 -
3.1.1 Marcell Reich and the Eve of “Fall Gelb”	- 33 -
3.1.2 The Emergence of Zug and Switzerland to the World’s largest Commodities Hub	- 34 -
3.1.3 Glencore’s Flotation and the Merger with Xstrata	- 39 -
3.1.4 The Future Lies in Africa – Glencore Xstrata’s Listing on JSE	- 46 -
3.1.5 The Giant’s Alleged Corporate Misconduct	- 48 -
3.1.6 Interim Conclusion	- 51 -
4 THE ACCOUNTABILITY GAP	- 52 -
4.1 The Accountability Gap	- 52 -
4.1.1 Divergence Between Responsibility and Accountability	- 52 -
4.1.2 The Cause of the Accountability Gap	- 53 -
4.1.3 Interim Conclusion	- 56 -
5 LEGALLY BINDING APPROACHES TO CLOSE THE GAP	- 57 -
5.1 Enactment of Binding Extra-Territorial Law	- 57 -
5.2 Foreign Direct Liability	- 60 -
5.3 Interim Conclusion	- 64 -
6 NON-BINDING PRINCIPLE BASED FRAMEWORKS	- 66 -
6.1 Unilateral Guiding Principles: King Report III and CRISA	- 67 -
6.2 Multilateral Guiding Principles: The OECD Guidelines For Multinational Enterprises	- 69 -
6.2.1 Introduction and System of the Guidelines	- 70 -
6.2.2 Reasons for the Revisions in 2000 and 2011	- 71 -
6.2.3 The Revised Guidelines	- 73 -
6.2.4 National Contact Points	- 76 -
6.2.5 Interim Conclusion	- 79 -
7 SWITZERLAND: PUBLIC AND POLITICAL DEBATES	- 82 -
7.1 NGOs and Coalitions	- 82 -
7.2 Activities on a Political Level	- 84 -
7.2.1 Parliamentary Requests	- 84 -
7.2.2 Interdepartmental Platform on Commodities: Background Report	- 84 -

Statement

8 FINAL CONCLUSIONS AND RECOMMENDATIONS..... - 89 -

8.1 Final Conclusions - 89 -

8.2 Recommendations..... - 91 -

8.2.1 National (Swiss) Level..... - 91 -

8.2.2 International Level - 93 -

8.3 Concluding Remarks - 94 -

9 ADDENDA - 95 -

9.1 Corporate Clout 2013 - 95 -

9.2 Probo Koala - 98 -

9.3 Human Rights Violations Conducted by Multinationals - 99 -

9.4 Xstrata in South Africa - 101 -

9.5 Market Shares (Commodities) of Trading Centres - 102 -

9.6 Parliamentary Requests..... - 103 -

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LIST OF ACRONYMS AND ABBREVIATIONS

<i>Abbreviation</i>	<i>Explanation</i>
ABB	Asea Brown Boveri
AG	Aktiengesellschaft (Ltd)
ATS	Alien Tort Statute
BC	Before Christ
BGE	Bundesgerichtsentscheid (decision of the Swiss Federal Court)
CC	Corporate Citizenship
CEO	Chief Executive Officer
CHF	Swiss franc
CIME	Committee on International Investment and Multinational Enterprises
CNN	Cable News Network
& Co.	and Company
CRISA	Code for Responsible Investing in South Africa
CSR	Corporate Social Responsibility
DDR	Deutsche Demokratische Republik (German Democratic Republic)
DRC	Democratic Republic of Congo
EAER	Federal Department of Economic Affairs, Education and Research
ECOSOC	Economic and Social Council
ed	edition

List of Acronyms and Abbreviations

eds	editors
eg	exempli gratia
EITI	Extractive Industries Transparency Initiative
et al	et alia (and others)
etc.	et cetera
et seqq	et sequens
EU	European Union
EUR	Euro
FDFA	Federal Department of Foreign Affairs
FDF	Federal Department of Finance
FDP	Free Democratic Party
f./ff.	following page(s)
G20	Group of Twenty Finance Ministers and Central Bank Governors
GBP	pound sterling
GDP	Gross Domestic Product
GLENCORE	Global Energy Commodities and Resources
GRI	Global Reporting Initiative
Ibid	Ibidem (in the same place)
IBM	International Business Machines
ICBC	Industrial and Commercial Bank of China
i.e.	id est

List of Acronyms and Abbreviations

IIRC	International Integrated Reporting Council
ILO	International Labour Organization
IMF	International Monetary Fund
IPO	Initial Public Offering
IR	Integrated Reporting
JSE	Johannesburg Stock Exchange
King Report	King Report on Corporate Governance
Ltd	Limited
MBA	Master of Business Administration
NAFTA	North American Free Trade Agreement
Nazi	Nationalsozialistische Deutsche Arbeiterpartei
NCP	National Contact Point
NGO	Non-Governmental-Organization
no.	number
OECD	Organization for Economic Cooperation and Development
op cit	opere citato (in the work cited)
OPEC	Organization of the Petroleum Exporting Countries
PhD	Doctor of Philosophy
PEMEX	Petroleos Mexicanos
plc	public limited company
SA	Société Anonyme (Ltd)

List of Acronyms and Abbreviations

TNC	Transnational Companies
TUAC	Trade Union Advisory Committee
UBS	Union Bank of Switzerland
UK	United Kingdom
UN	United Nations
UNCTAD	United Nations Conference on Trade and Development
UNO	United Nations Organization
Unocal	Union Oil Company of California
US	United States
USA	United States of America
USD	United States Dollar
USSR	Union of Soviet Socialist Republics
v.	versus
WEF	World Economic Forum
WTO	World Trade Organization
ZAR	South African Rand
ZCCM-IH	Zambia Consolidated Copper Mines Investment Holdings

1 INTRODUCTION

“There is one and only one social responsibility of business — to use its resources and engage in activities designed to increase its profits so long as it stays within the rules of the game, which is to say, engages in open and free competition without deception or fraud.”

Milton Friedman, 1970¹

1.1 MOTIVATION

Growing up in Zug (Switzerland) – the region with the highest density of multinationals in relation to its population worldwide – means being confronted with the advantages and disadvantages of these entities’ activities. For many decades, the benefits – at least in the perception of the broad public and most politicians – clearly prevailed and the region uncritically profited from prosperous companies, thereby emerging to the wealthiest region of Europe’s second richest country.² However, a growing awareness of human rights violations, an increasing sensitivity for environmental and social issues and a fear of possible consequences for Switzerland’s reputation as the domicile of numerous multinationals has ignited the social and political debates on how to best curtail the negative effects multinationals can have.

Naturally, the political parties – among them the Free Democratic Party (FDP) of which I am a former member of the communal executive committee – have taken up the discussions and have developed a broad variety of solution proposals.³

¹ Milton Friedman ‘The Social Responsibility of Business is to Increase Profits’ The New York Times Magazine 13 September 1970, available at <http://www.colorado.edu/studentgroups/libertarians/issues/friedman-soc-resp-business.html>.

² With an income per capita of USD 46 474 Switzerland is – based on data from the International Monetary Fund’s 2013 estimates – Europe’s second richest country after Norway. It is, moreover, in the top 10 of the world richest countries.

³ The “FDP” is a classical liberal centre party that has been the driving force behind the creation of contemporary Switzerland.

Introduction

As a corporate lawyer advising companies I am confronted on a professional level with the positive and negative impacts of these companies' business activities. In particular, this has been highlighted since I was elected into the Board of Directors of Saroil Resources Ltd, a company disposing of licences to exploit oil wells in Russia and therefore being active in the precarious commodity industry, currently being in the focus of regulatory considerations.⁴

However, fascinated by the aspirational set of ethical principles embodied in the various King Reports and Codes, the true source of inspiration for a more thorough examination of the situation and the presentation of possible solution approaches has been the Corporate Governance course at University of Cape Town held by Richard Forster, Company Secretary of Old Mutual. He has passed his enthusiasm and passion for Corporate Governance onto me and other students he has taught.

1.2 PROBLEM DEFINITION

The disequilibrium between the multinationals' globalised area of operation and the home countries legal sphere of influence combined with a lack of a supranational institution that have the power to enact and enforce binding law on an international level is the cause for the legal vacuum multinationals are potentially operating in, leading to a so called "accountability gap".⁵

1.3 OBJECTIVE TARGET

This minor dissertation particularly aims at – inspired by and considering the King Report and after analysing the situation and examining the various possible approaches – providing a contribution to the current social and political debates in Switzerland by issuing five recommendations on how to reform and adapt the (legal) framework in order to curtail and remediate the negative impacts globally active companies potentially have in terms of social,

⁴ Saroil Resources AG (Saroil Resources Ltd), an excerpt of the commercial register of the Canton of Zug is available at <http://www.hrazg.ch/webservices/inet/HRG/HRG.aspx/getHRGHTML?chnr=1703038086&amt=170&toBeModified=0&validOnly=0&lang=1&sort=0>. Upon my return, I will assume responsibility for the legal issues and compliance in general.

⁵ For the purpose of this minor dissertation, the term "home country" refers to the country where the parent company of a multinational entity is located at, whereas "host country" refers to the country where the subsidiary of a parent company is located at.

Introduction

economical and environmental issues (in home and host countries alike) without curtailing the positive effects companies inarguably have and without immoderately jeopardising the country's vital competitiveness.

1.4 STRUCTURE

After outlining the effects and consequences of globalisation and introducing one of the multinationals that is considered to be amongst the winners of globalisation, I will illustrate what difficulties may arise and which challenges may have to be faced when trying to hold multinationals responsible and accountable for their corporate conduct under the currently existing frameworks.

Upon discussing the difficulties of binding regulatory approaches attempting to remedy these deficiencies, the mode of operation and the advantages of sets of voluntary (ethical) principles are debated and the development of such guiding principles on a supranational level is presented as an eligible, pragmatic and effective alternative.

A brief depiction of the current public and political debates in Switzerland is followed by the author's contribution to current debates in form of a set of recommendations.

2 GLOBALISATION AND THE RISE OF MULTINATIONALS

“When a company of merchants undertake, at their own risk and expense, to establish a new trade with some remote and barbarous nation, it may not be unreasonable to incorporate them into a joint-stock company, and to grant them, in case of their success, a monopoly of the trade for a certain number of years”

Adam Smith, 1776⁶

2.1 GLOBALISATION AND MULTINATIONALS

Defined as a ‘process by which businesses or other organizations develop international influence or start operating on an international scale’⁷, there is an on-going debate amongst the scholars on its historic origins. While some scholars track globalisation as far back as to the Hellenistic age (323 BC until 31 BC), others are of the notion that globalisation has to be considered as a phenomenon of the modern era. Thomas L. Friedmann for example distinguishes three eras of globalisation:⁸ Globalisation 1.0 (1492–1800) as the period of globalisation of countries, globalisation 2.0 (1800–2000) involving the globalisation of companies and globalisation 3.0 (2000–present), as a period of globalisation driven by individuals. Of primary interest here will be ‘globalization 2.0’ during which companies engaging in international trade have gained tremendous power.

A generally accepted definition of a “multinational corporation” or “transnational corporation” (hereinafter referred to as “multinationals”) does not exist.⁹ For the further use of these terms reference is made to the definition of the United Nations, which defines a multinational corporation as ‘an economic entity operating in more than one country or a

⁶ Adam Smith *The Wealth of Nations* (1776) 617.

⁷ Definition by Oxford Dictionaries, available at <http://oxforddictionaries.com/definition/english/globalization>.

⁸ Thomas L. Friedmann ‘It’s a Flat World, After All’ *New York Times Magazine* 3 April 2005 at 34.

⁹ The terms “multinational corporation / company / entity”, “multinational” and “transnational corporation” are considered to be interchangeable.

Globalisation and the rise of Multinationals

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.’¹⁰ An essential feature of a multinational company is thus that their activities regularly transcends national boundaries.

2.2 THE IMPACT OF GLOBALISATION

‘No longer the elected politicians rule the world. There are captains of industry and money managers, media tycoons and software specialists who today hold power. They turn the whole world into a marketplace’

Silvio Bertolami, 1995¹¹

2.2.1 THE TOP 100 ECONOMIC ENTITIES

Since the 1970s, the number of multinationals has increased worldwide rapidly. With the liberalisation of the world economy – the opening up of national markets and the resulting increased trade between the countries around the globe – the number of multinationals also significantly increased. Previously companies used to produce goods for their domestic market and with the entire production – from the development, the extraction of resources, the manufacturing to the marketing and distribution of the products – was largely dealt within the same state. In the course of the more recent globalisation (the last decades of globalisation 2.0) this has changed dramatically. Whereas in some cases at least the development of a product still takes place at the parent company, the resource extraction, the manufacturing and the distribution of the product is conducted by subsidiaries scattered around the world. It is estimated that the number of multinationals has increased between 1969 and 2009 from 6000 to 82 000.¹² During a similar time period, the number of foreign subsidiaries has

¹⁰ Commentary on the Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, U.N. Doc. E/CN.4/Sub.2/2003/38/Rev.2 (2003), ciper 20.

¹¹ Silvio Bertolami ‘The Sorcerers of World Economy’ *Die Weltwoche* 29 June 1995 at 12.

¹² Source : Laurent Carroué ‘Entreprises: le règne des transnationales’ in *L’Atlas des mondialisations* (2010), 84.

Globalisation and the rise of Multinationals

increased from approximately 27 000 (1980) to 820 000.¹³ Multinationals account for over a quarter of the world's gross domestic product and directly or indirectly control approximately two-thirds of world trade.¹⁴

For the first time since the establishment of Forbes' *The Global 2000* list, a Chinese company is considered to be the biggest company in the world: It is the government controlled Chinese Bank ICBC with a market value of USD 237.3 billion.¹⁵ The highest ranked (position 32) Swiss company is Nestlé with a market value of USD 233.5 billion, whereas, Standard Bank Group as the biggest South African company, with a market value of USD 19.9 billion is following on rank 231.¹⁶ If one focuses on the revenues, Royal Dutch Shell is ranked first with a revenue of USD 481.7 billion.¹⁷ The highest ranked Swiss company (14) is Glencore Xstrata with a revenue of USD 214.4 billion, whereas no South African company is finding its way into the top 500.¹⁸

Despite the global economic crisis of the past few years, 40 multinationals (based on a comparison of corporate sales and country GDPs) were among the 100 largest economic entities in 2012 (compared to 60 countries),¹⁹ as can be seen in addendum 9.1.

Despite a decrease of 20 per cent compared to the year 2002, this figures still reflect the remarkable power multinationals have.²⁰ The representation of multinationals is even more impressive if the top 150 economic entities are being taken into account: 87 multinationals have found their way into the top 150, correlating to 58 per cent of the total economical entities.²¹

¹³ Ibid.

¹⁴ Ibid.

¹⁵ Global 2000 Leading Companies 'The World's Biggest Public Companies' available at <http://www.forbes.com/global2000/list/>, accessed on 23 September 2013.

¹⁶ Ibid. 48 Swiss companies and 19 South African companies are among the 2000 biggest companies in the world.

¹⁷ Fortune Global 500 available at http://money.cnn.com/magazines/fortune/global500/2013/full_list/, accessed on 23 September 2013.

¹⁸ Ibid. 14 Swiss companies are among the 500 companies with the highest revenue worldwide.

¹⁹ Tracey S. Keys, Thomas W. Malnight, Christel K. Stoklund 'Corporate Clout 2013' available at http://www.globaltrends.com/reports/?doc_id=500539&task=view_details, accessed on 23 September 2013.

²⁰ In the year 2002, 52 multinational companies were among the top 100 economic entities. For more information see Sarah Anderson and John Cavanagh *Field Guide to the Global Economy 2* ed (2005), list available at www1.union.edu/motahare/Eco354/top_100.pdf, accessed on 23 September 2013.

²¹ Ibid.

Globalisation and the rise of Multinationals

Due to their enormous economic resources multinationals do not only affect the welfare of entire sectors of the economy, but also have a great impact on the labour market, science, values, consumer behaviour, media, politics and therefore almost every aspect of our lives. Hence they form, apart from the nation states, by far the most influential group in the current international system.

2.2.2 THE INCREASE OF POWER OF THE PRIVATE SECTOR

'The globalisation of investment capital is causing universal insecurity. It makes a mockery of national boundaries and diminishes the power of states to uphold democracy and guarantee the wealth and prosperity of their peoples.

Financial globalisation is a law unto itself and it has established a separate supranational state with its own administrative apparatus, its own spheres of influence, its own means of action. That is to say the International Monetary Fund (IMF), the World Bank, the Organization for Economic Cooperation and Development (OECD) and the World Trade Organization (WTO). These four powerful institutions are unanimous in singing the praises of "market values", a view faithfully echoed by most of the major organs of the media.

This artificial world state is a power with no base in society. It is answerable instead to the financial markets and the mammoth business undertakings that are its masters. The result is that the real states in the real world are becoming societies with no power base. And it is getting worse all the time.'

Ignacio Ramonet, former chief editor of Le Monde diplomatique, 1997²²

In order to safeguard their interests and pursue their objectives, multinationals maintain influential lobbies, whether in politics, in international organizations or international forums such as the World Economic Forum in Davos.²³ The latter provides a platform to establish

²² Ignacio Ramonet 'Disarming the Markets' *Le Monde diplomatique* December 1997, available at <http://mondediplo.com/1997/12/leader>, accessed on 24 September 2013.

²³ Originally a forum for managers, a much broader spectrum of leaders is now encountering each other. In 2012, more than 30 heads of state, 28 religious leaders, 50 executives of NGO's, Hollywood celebrities, but also 800 board members and managers from leading corporations have announced their appearance. More than 2100

Globalisation and the rise of Multinationals

contacts and cultivate relationships between influential representatives of the private industry, the government, academia and the civil society. Due to the broad representation of all groups of players, this “marketplace” has established itself as a significant international stage on which not only (political) declarations of intent are to be signed, but moreover significant foreign policy meetings are taking place.²⁴ The fact that many heads of States and members of Governments as well as many private players are present at these international conferences indicates that new foreign policy networks have been formed, reflecting the crucial and decisive role of multinationals in today's world and enabling the latter to exercise decisive influence on politicians (and ultimately society). Discussions will take place in such forums between state leaders and influential non-state players of the civil society and the private sector, while the role of traditional diplomats is more and more marginalised.²⁵ The shaping of foreign policy is nowadays at least partially conducted by players who, unlike the diplomatic or political envoys of a state, do not enjoy neither political nor democratic legitimacy. Despite the fact that representatives of multinationals are not in control of a defined territory and do not have a monopoly on violence it has to be acknowledged, that at least some of the nation states have lost in importance due to the dominant role multinationals have gained, some of them dictating the political agenda in countries with rather weak institutions. And even in (powerful) countries with strong institutions it can be observed that the power of multinationals has increased – due to the role they play and the functions they fulfil – to an extent where they are considered to be a systemic risk threatening the foundations of a society, should they cease to exist.²⁶

participants from 94 countries have found their way to Davos, trying to profit from the possibility for formal and informal talks and meetings.

²⁴ In 1990 for example the WEF has set the framework for informal talks between Chancellor Helmut Kohl and Hans Modrow, Prime Minister of the DDR. Furthermore, joint discussions between Mubarak (Egypt), Arafat (Palestine) and Netanyahu (Israel) have taken place. The WEF 2014 takes place in January and Iran's President Hassan Rohani is expected to meet with US Foreign Minister John Kerry. This will be the first meeting of officials of the two countries since the incidents (Iranian Revolution) in 1979.

²⁵ Stefan Flückiger 'Wer macht die Aussenpolitik im Bundeshaus' *Die Weltwoche* 24 April 2003 at 34 ff.

²⁶ During the financial crisis major financial service providers such as American International Group, Fannie Mae, Freddie Mac, Commerzbank and UBS AG, with assets of USD 1705 billion. The world's largest asset manager had to be rescued by the various governments because their impact on the economy was simply too big to let them fail. The US government for example has assisted the financial service providers with USD 12.6 billion, the equivalent of more than 80 per cent of their GDP in 2007).

Globalisation and the rise of Multinationals

2.2.3 PUBLIC PERCEPTION, RESPONSIBILITIES AND OPPORTUNITIES

The importance and significance of multinationals outlined above permeating and dominating our lives in various aspects brings tremendous social responsibilities of such companies with it. In fact, the discussions regarding the operations conducted by multinationals have been very controversial in the past 30 years. Yet in the 1970s the impact of multinationals and their business activities have been viewed very critically and have been considered to constitute a threat,²⁷ today a critical but more positive assessment is prevailing. This is mainly due to the realisation that the global expansion of multinationals may be conducive to the economic and social development of both the home and the host country. Additionally, since the 1990s co-operations between states and international organisations and non-state actors, in particular NGOs, have been initiated which have also indirectly contributed to the improved image of multinationals.²⁸ However, nowadays, the conduct and behaviour of multinationals is being observed and analysed by the media and NGO's more carefully and thoroughly than ever.

On the other hand, states can profit of the considerable importance of multinationals by cooperating with multinationals domiciled in the country, enabling them to gain more weight and bargaining power in the political arena.²⁹

2.2.4 THE ADMONISHING CONSCIENCE OF CIVIL SOCIETY

Civil society is, apart from the international community the most important opponent of multinationals, as far as the containment and control of their power is concerned.³⁰ NGOs and

²⁷ The relocation of production to low-wage countries and the resulting loss of local jobs particularly created tensions.

²⁸ See chapter 6.

²⁹ An illustrative example is the official visit to South Africa of Swiss Federal Councillor Johann Schneider-Ammann from 4-8 September 2013, meeting South African Minister of Trade and Industry Rob Davies. Since the managing partner of our law firm (Umbricht Attorneys at Law, Zurich), Georg C. Umbricht, is the president of the Swiss-South African Chamber of Commerce (SwissCham Southern Africa, <http://www.scsa.ch>) and has therefore been part of the business delegation accompanying Federal Councillor Schneider-Ammann, I had the chance to join the delegation and participate in the official program. The business delegation inter alia consisted of representatives of Nestlé S.A., Novartis AG, the Roche Group, Banque Julius Baer & Co Ltd., UBS AG, Bühler AG, ABB Ltd and Glencore Xstrata plc has added significant weight to the official Swiss (diplomatic) delegation. As the representatives of Economiesuisse, the Swiss Business Federation, after a few glasses of wine and off the records admitted: The South African officials are actually primarily interested to meet the members of the business delegation, hence the diplomatic delegation is rather accompanying the business delegation than vice versa.

³⁰ John M. Kline 'Political activities by transnational corporations: bright lines versus grey boundaries' in: United Nations Conference on Trade and Development *Transnational Corporations*, Vol. 12, Number 1 (2003), at 9.

Globalisation and the rise of Multinationals

media are acting as the voice of civil society, playing a pivotal role in ensuring that any unethical conduct or an abuse of the multinational's abundant power will be revealed and scourged by the public.³¹ In particular NGOs are actively engaged demanding social, sustainable and human rights-compliant corporate policies, particularly in cases where the state, whether due to a lack of legal options, a rigid diplomatic system or due to its economic dependence, does not oppose to the multinationals' misconduct.³²

The public pressure and the media echo multinationals have to face increased enormously in recent years. Negative side phenomena of entrepreneurial activities are subject to intense public criticism, and multinationals have to carefully balance their financial interests versus the broad interests of society in order to avoid any undesired reputation and goodwill impairments.

2.2.5 FORMS OF CORPORATE MISCONDUCT

If multinationals are being named in connection with human rights violations, regularly their involvement is of an indirect nature: 'The vast majority of serious complaints about transnational corporations concern their alleged role in supporting, encouraging and benefiting from the egregious human rights abuses committed by joint venture partners, suppliers, and other groups with whom they do business.' The difficulty is that 'in the majority of these cases, it is hard to prove the corporations in question *intended* to commit the abuses(.)', which points to the problem of the accountability gap.³³

³¹ The increased recognition of NGOs is for example evidenced by its observer and consultative status with ECOSOC (UN) and the establishment of an "Open Forum", parallel to the WEF. The website www.oneworld.org provides a good overview of currently important NGO activities. A good example for a very active NGO is the Berne Declaration (<http://www.evb.ch/en/p9451.html>), 'promoting more equitable, sustainable and democratic North-South relations since 1968.' Their "demand charter" includes (i) a comprehensive product liability, (ii) environmental sustainability, (iii) decent working conditions, (iv) appropriate marketing, (v) CSR-conform lobbying (no lobbying activities which are in contrast to the CSR policy), (vi) ethical tax policies, (vii) full transparency, (viii) standardised controls, (ix) consistent liability and compensation and (x) that CSR has to come from the top.

³² Ulrich Beck 'Die Subpolitik der Globalisierung: Die neue Macht der multinationalen Unternehmen' (1996) 47 *Gewerkschaftliche Monatshefte* at 674. Beck explains the potential threat of global businesses: 'However, global corporations hold not only a key role in shaping the economy, but society as a whole - even if it is "only" in that they can withdraw the material resources of the company (capital, taxes, jobs).' As a result, multinationals gain enormous power over the affected governments.

³³ Rachel Chambers 'The Unocal Settlement, Implications for the Developing Law on Corporate Complicity in Human Rights Abuses' at 15 available at www.wcl.american.edu/hrbrief/13/unocal.pdf, accessed on September 27, 2013.

Globalisation and the rise of Multinationals

An example of an indirect involvement in human rights violations is the business deal considered by the “King of Oil” (Marc Rich) to be his ‘most important and most profitable’ deal of his life.³⁴ Despite an oil embargo against South Africa’s apartheid regime enacted by the United Nations General Assembly, the Swiss company Marc Rich + Co AG mutated to become South Africa’s most important oil supplier from 1979 to 1994 presumably enabling the apartheid regime to keep its machinery going, allegedly delivering 400 million barrels oil at averagely USD 8 above the spot market price per barrel.³⁵ This has resulted in a profit for Marc Rich + Co AG of approximately USD 2 billion.

Another disturbing example is the one of Trafigura AG.³⁶ In order to save refining costs and maximise profits, Trafigura AG (revenues in 2012: USD 120 billion) simply applied a procedure called “caustic washing” after buying sulphurous crude oil from the Mexican PEMEX very cheaply.³⁷ By doing this on a chartered ship in the open sea, compliance with environmental standards was avoided.

However, the disposal of the waste product of this “offshore refining process”, a penetrating smelling sediment full of sulphur and caustic soda, resulted in a colossal problem. Initially, Trafigura tried to get rid of the waste by simply declaring it as slops.³⁸ Ports are required to provide disposal facilities for slops. However, Trafigura’s tanker *Probo Koala* (refer to addendum 9.2 for image) did not manage to trick the ports of Malta, Augusta (Sicily) and Gibraltar. In Amsterdam, Trafigura rejected an offer of APS, a private waste disposal company who has analysed the “slops”, to take care of the waste for €1000 per cubic metre.³⁹ Obviously this was deemed too much for Trafigura, who (organised through its subsidiary “Puma Energy”) instead accepted an offer from a newly found waste management company located

³⁴ Quotation of Marc Rich in Daniel Ammann’s *The King of Oil* (2009) 194. It must be mentioned though that Switzerland was not a UN member and hence Swiss companies were (legally) not obliged to adhere to the embargo.

³⁵ If one goes even further back in history, the comparison with many of the still existing German companies during the Nazi regime comes to mind.

³⁶ Trafigura AG is a Swiss-Dutch multinational trading with commodities, formed by former Marc Rich traders.

³⁷ Caustic washing is a controversial, in many places for environmental reasons prohibited method by which some of the sulphur is bound by adding chemicals. It is however much cheaper than an ordinary treatment in a refinery.

³⁸ Slops is an oily dirt water occurring by cleaning the tanks with water.

³⁹ The accumulated waste in the meantime amounted to 250 cubic metres. The disposal would have cost Trafigura €250 000.

Globalisation and the rise of Multinationals

in Abidjan at the Ivory Coast, charging between USD 30 and 35 per cubic metre. However, the waste management company simply dumped the waste on a local (and open) landfill, ultimately causing various illnesses of approximately 100 000 people and even more tragic, the death of 15 people.⁴⁰

Apart from the indirect complicity in relation to government human rights violations, multinationals are also being criticized for their direct involvement in human rights violations, environmental scandals and cases of corruption etc.

An example of a direct involvement in human rights violations are the activities of Shell in the mid-90s in Nigeria. Shell has collaborated with the Nigerian military regime which was responsible for the persecution, torture and murder of political opponents. Shell did not only not make use of its position of economic strength by not intervening in any kind of form, but moreover (allegedly) requested, assisted and financed the brutal actions conducted by the Nigerian military regime.⁴¹ In terms of environmental scandals, Shell has been accused for being responsible for environmental damages caused by oil spills in Nigeria.

2.2.6 INTERIM CONCLUSION

The criticism in connection with the business activities of multinationals encompasses a wide range of human rights, social and environmental issues. The examples cited above are not exhaustive and the problem areas embrace harmful or poor working conditions, minimum wages, excessive working hours, child labour or forced labour, discrimination in personnel selection, physical abuses, corruption and non-transparent business practices, as well as reckless pollution, depletion of natural resources and contributing to an accelerated climate change.

⁴⁰ For further information see the UN Report of the Special Rapporteur on the adverse effects of the movement and dumping of toxic and dangerous products and wastes on the enjoyment of human rights, Okechukwu Ibeanu, available at www2.ohchr.org/english/bodies/hrcouncil/.../A-HRC-12-26-Add2.pdf, accessed on 27 September 2013 and the BBC High Court defence against Trafigura libel suit released by WikiLeaks, available at www.timothyhorrigan.com/documents/bbc-trafigura.pdf, accessed on 27 September 2013.

⁴¹ For more information check the website of the Center for Constitutional Rights on <http://ccrjustice.org/learn-more/faqs/factsheet%3A-case-against-shell-0>, accessed on 27 September 2013. The lawsuits against Shell in front of United States District Court for the Southern District of New York under the 1789 Alien Tort Statute were settled for USD 15.5 million.

Globalisation and the rise of Multinationals

There is no doubt that many of the practices illustrated above are not human rights compliant and constitute a violation of ethical values. The ever-increasing pressure in the very competitive private sector does not contribute to an adequate consideration of humanitarian and environmental issues, and the numerous critical reports about multinationals' misconduct do in fact reflect this.

The exemplary listing of these problematic and questionable business practices could be easily extended by other examples, so that Peter T. Muchlinskys title question 'Human rights and multinationals – is there a problem?'⁴² decidedly has to be answered with yes, as the graphs pertaining to alleged human rights violations illustrate in addendum 9.3.⁴³ However, the scope of Muchlinsky's question has to be broadened to other (environmental and social) issues.

⁴² Peter T. Muchlinsky 'Human rights and multinationals – is there a problem?' in *International Affairs* nr. 77 (2001) 31-48 at 31.

⁴³ Figures in the graphics: Ruggie Report.

3 GLENCORE XSTRATA PLC – ‘THE BIGGEST COMPANY YOU’VE NEVER HEARD OF’⁴⁴

‘I do not know how oil does smell’

Marc Rich, King of Oil, 2011⁴⁵

What, at first sight, seems to be an unspectacular multinational as many others is in truth a giant and has been referred to twice in this minor dissertation. Glencore International AG with a revenue of USD 186.152 in the year 2012 has taken position 66 in the Corporate Clout 2013.⁴⁶ Furthermore, the company has been mentioned in connection with the business conducted by Marc Rich with the apartheid regime – albeit then using its original company name.⁴⁷ But for a better (comprehensive) understanding of the company’s background, it is essential to briefly have a look at Europe’s chaos and turmoil caused by World War II and the migration processes thereby instigated.

3.1.1 MARCELL REICH AND THE EVE OF “FALL GELB”

Born in 1934 in Antwerp (Belgium) as the son of a Polish father and a French mother, Marcell Reich did not get to spend much time in the most important diamond trade center in the world. In order to enable the execution of Fall Gelb,⁴⁸ the German Nazi-troops captured Belgium and the Netherlands in May 1940 in advance. Since Reich was born into a Jewish

⁴⁴ Onstad, Eric; Macinnis, Laura and Webb, Quentin ‘Special Report: The biggest company you’ve never heard of’ *Reuters* available at <http://www.reuters.com/article/2011/02/25/us-glencore-idUSTRE7101DC20110225>, accessed on 18 November 2013.

⁴⁵ Daniel Ammann ‘Ich weiss nicht, wie Erdöl riecht’ *Die Weltwoche* 27 January 2011 available at <http://www.weltwoche.ch/index.php?id=540961>, accessed on 13 November 2013.

⁴⁶ See page - 95 - ff.

⁴⁷ See page - 30 - .

⁴⁸ The “Fall Gelb” is the code name for a very successful operation of the German troops in World War II, taking the French Forces completely by surprise. The strategically brilliant plan which is the root of the French defeat is considered to have revolutionised military affairs in the mid-twentieth century and has been developed by Generalleutnant Erich von Manstein, however inspired by Generalleutnant Heinz Guderian.

Glencore Xstrata plc – ‘The Biggest Company You’ve never Heard of’

family, this meant that the Reich’s had to give up everything and flee to France as fast as they could. However, since the successful execution of Fall Gelb has led to a French defeat, the journey of the Reich’s did not come to an end yet. Planning on emigrating to Australia, they ended up in the United States of America, where Marcell Reich changed his name to Marc Rich, and the surname soon turned out to speak for itself.

After giving up his marketing studies, Marc Rich started to work for Philipp Brothers in New York in 1954. Founded in 1901 by two German Jewish brothers, it used to be the world’s largest commodities trading company.⁴⁹ After an intermezzo as office manager for Philipp Brothers in Madrid and a dispute regarding his remuneration, Rich ended up incorporating his own company, the Marc Rich + Co AG, with a few other (former) traders of Philipp Brothers on 3 April 1974 in Zug, and therefore in the same city as the European headquarters of the latter has been located since 1956.⁵⁰ But why did they both choose a little city with 20 000 citizens in the center of Switzerland?

3.1.2 THE EMERGENCE OF ZUG AND SWITZERLAND TO THE WORLD’S LARGEST COMMODITIES HUB

Formerly being a rural area living from livestock breeding and the dairy industry, Zug emerged to the wealthiest Canton of Switzerland through attracting national and international companies by enacting tax privileges for certain companies in 1924.⁵¹ Despite plans of Nazi Germany to invade Switzerland, the neutral country had, moreover, not been devastated during World War II and therefore had an intact infrastructure.⁵² Additionally (and after World

⁴⁹ For more information see Helmut Waszkis’ *The History of a trading Giant*.

⁵⁰ Daniel Ammann *The King of Oil* (2009) 48 and 76.

⁵¹ The „Holdingprivileg“ grants a privileged taxation to holding companies. No tax is being levied on profits on a Cantonal level, but a rate of 0.002 per cent is being levied on the companies’ share capital. Additionally, a tax rate of 8.5 percent applies at a national (federal) level. The “Domizilprivileg” applies to companies that do not conduct any business in Switzerland. Whereas no tax is levied on a Cantonal level on revenues from abroad, once again a capital tax of 0.0075 per cent applies. Furthermore, the federal profit tax of 8.5 per cent is being levied. Companies that mainly carry out business abroad but also conduct domestic business activities are referred to as “mixed companies”. If qualified as a such, the non-domestic revenues are taxed at between 5–25 per cent on a Cantonal level whereas the domestic profits are taxed at a standard rate. Additionally, a cantonal capital tax of 0.001 per cent is levied. On a federal (national) level, a tax rate of 8.5 per cent on all the revenues applies.

⁵² Operation Tannenbaum (fir tree) refers to an invasion plan devised by the Wehrmacht (the German armed forces) in 1940. Hitler was disgusted by the political system (direct, decentralised democracy) and the values Switzerland stood for and denominated Switzerland to be the mortal enemy of the new Germany.

Glencore Xstrata plc – ‘The Biggest Company You’ve never Heard of’

War II quite remarkably), the Swiss Franc (CHF) was always freely convertible and neither the import nor the export of capital has been restricted or controlled in any way. Furthermore, Zug offered – with Zurich being only twenty minutes away – access to an international airport and more importantly to one of the world’s most important and sophisticated financial centres.

At least some of the factors mentioned above have also attracted Philipp Brothers in 1956 to set up their European headquarter there. Upon Rich’s departure from Philipp Brothers, his company, Marc Rich + Co AG, starting in 1974 with a share capital of CHF 2 million (approximately ZAR 22 million) in a four-room apartment in Zug’s neighbourhood where all the Italian immigrants used to live, quickly became a global player concluding lucrative deals amongst others with despots and dictators such as the Shah of Persia and after the revolution in 1979 his antipode Ayatollah Khomeini, Chilean Dictator Augusto Pinochet, Cuba’s “el massimo lider” Fidel Castro, the Sandinista government in Nicaragua and the South African apartheid regime presided by B.J. Vorster and later P.W. Botha. In a business relying on trust and loyalty the departure of personalities such as Marc Rich, Pincus Green, Alexander Hackel, John Trafford and Jacque Hachuel from Philipp Brothers proved to be fatal for the latter – and a blessing for the pariahs themselves.

Whereas Marc Rich + Co AG prospered during the 1970s and 1980s and profited from the collapse of the oligopoly of the “seven sisters”,⁵³ the 1990s heralded the decline of the King of Oil, as he was called in the meantime. Not only did Marc Rich have to bear the death of his daughter and the divorce from his wife, but moreover Marc Rich + Co AG conducted the worst deal ever by attempting to manipulate the global zinc market, causing the company a loss of USD 172 million. Besides this, the criminal charges instigated inter alia by Rudolph W. Guliani,

⁵³ During the 1970s (and inter alia instigated by Libya’s young colonel Muammar al-Gaddafi), many oil-blessed (OPEC) countries nationalised their oilfields, thereby cancelling the for the “seven sisters” (Jersey (Exxon), Socony-Vacuum (Mobil), Standard of California (Chevron), Texaco, Gulf, Royal Dutch Shell and British Petroleum) profitable concession system of the past few decades and thereby ending their factual domination of the oil market. Oil traders such as Marc Rich tremendously gained in importance ensuring the oil producing countries through their network the sale of the oil. The oil producing countries and the traders instead of the oil multinationals were now the decisive players in the oil business. During these decades, the oil market has become very volatile due to the numerous oil crisis inter alia caused by the conflicts between Israel and its neighbours. In the meantime, the demand for oil has increased steadily. By succeeding to conclude a long-term oil-procurement contract, traders took advantage of the volatile oil market, storing the oil and selling it at much higher spot prices. Marc Rich is attributed to be the inventor of the spot market.

Glencore Xstrata plc – ‘The Biggest Company You’ve never Heard of’

who became later Mayor of New York, in the US in 1983 against Marc Rich, Pincus Green and Marc Rich International (a subsidiary of Marc Rich + Co AG) did not prove to be conducive for the companies’ reputation and business.⁵⁴

Negative headlines and spotlight are poisonous in a secretive business based on confidence and trust. On 29 November 1993, the managers of Marc Rich + Co. AG committed “patricide” on Marc Rich “forcing” him to sign a management buyout contract. Marc Rich sold his company shares in 1994 for USD 600 million.⁵⁵ Marc Rich therefore suffered a similar fate as Philipp Brothers did nearly 20 years before.

The new owners of Marc Rich & Co. AG renamed the company in 1994 into Glencore (Global Energy Commodities and Resources) International AG (hereinafter “Glencore”) and the multinational has – in terms of revenues – evolved to the 12th biggest company in the world over the years, with a revenue of USD 214 billion in 2012.⁵⁶ In the aftermath of this change of ownership, Glencore has desperately tried to negate its origin. In its prospectus published in connection with the issue of new shares in order to enable the merger with Xstrata (see subchapter 3.1.3.2, hereinafter referred to as “merger prospectus”), neither the famous but disgraced founder nor the former name of the company have been mentioned a single time.⁵⁷ The New Statesman has ironically called Rich to be ‘Glencore’s worst kept secret (...)’.⁵⁸

However, a few of the “Rich boys” have chosen to start their own business. Trafigura, the world’s third biggest raw material seller does not only do dubious offshore refining, but also

⁵⁴ The Washington Post has titled Rich as the “refugee of the century”. The charge sheet involved inter alia tax evasion, organised crime and trading with the enemy. In June 1983, Marc Rich left New York with his family and moved to Switzerland, never ever setting a foot on American soil again. The US has started numerous attempts to get hold of Rich and has not even refrained from sending federal agents to Zug with the order to kidnap Rich. However, this illegal action was prevented by Swiss Police. In January 2001 and upon lobbying activities by Ehud Barak, Shimon Peres and other influential persons, both Marc Rich and Pincus Green were pardoned by Bill Clinton on his last day of office.

⁵⁵ The company was active in 128 countries and had an alleged value of USD 1 to 1.5 billion.

⁵⁶ Fortune Global 500 2013 available at http://money.cnn.com/magazines/fortune/global500/2013/full_list/?iid=G500_sp_full, accessed on 30 September 2013.

⁵⁷ Glencore has successfully avoided to mention its origin and connection to Marc Rich by ignoring the fact that it has been incorporated in 1974 under the name Marc Rich + Co AG and by avoiding to use the name of Marc Rich by simply referring to “the founder”. For more information see page 57 of the merger prospectus.

⁵⁸ Oliver Williams ‘Marc Rich, Glencore’s fugitive founder’ *New Statesman* 10 October 2012, available at <http://oncogenesis.rssing.com/browser.php?indx=1309563&item=2935>, accessed on 14 November 2013.

Glencore Xstrata plc – ‘The Biggest Company You’ve never Heard of’

makes respectable profits. Having its headquarters in Lucerne, the companies’ annual revenues amounted to USD 120 billion in 2012.⁵⁹

Founded as an infrastructure and electrics company meant to be active in South America, Südelektra was incorporated in 1926 and renamed in 1999 into Xstrata AG, after the majority of its shares have been acquired by Marc Rich + Co. AG in 1990.⁶⁰ Xstrata turned into a mining giant through a rather aggressive acquisition-strategy in the past few years, operating in over 20 countries and employing 70 000 people, with a revenue of USD 31.168 billion in 2012.⁶¹ Xstrata is very active in South Africa, as can be seen in the graph in addendum 9.4.⁶²

However, this is not the only reference to South Africa. Xstrata’s (former) almighty CEO and Chairman, Michael Davies, is a South African citizen, born in Port Elizabeth. After graduating in Accounting at Rhodes University, he was working as Finance Director at Eskom where he got in contact with Südelektra.

The presence of commodity giants such as the above-mentioned multinationals in combination with a highly sophisticated financial market in Zurich and Geneva along with the fact that Switzerland has constantly been ranked among the top three nations in terms of life quality and is considered to be the most competitive and innovative country in the world⁶³ has attracted other commodity traders such as primarily oil-trading Vitol SA (revenue 2012:

⁵⁹ Trafigura does not publish its profits. Information available at <http://www.reuters.com/article/2013/01/11/trafigura-revenues-idUSL5E9CB9MH20130111>, accessed on 30 September 2013.

⁶⁰ Excerpt of the Commercial Register of the Canton of Zug available at <http://www.hrazg.ch/webservices/inet/HRG/HRG.aspx/getHRGHTML?chnr=1703001204&amt=170&toBeModified=0&validOnly=0&lang=1&sort=0>, accessed on 30 September 2013.

⁶¹ Annual report of Xstrata at 66 available at <http://www.glencorexstrata.com/investors/reports-and-results/xstrata/2012/annual-report-2012>, accessed on 30 September 2013.

⁶² Source: <http://www.glencorexstrata.com/assets/Uploads/x-factsheet-xstrata-in-south-africa.en.pdf>, accessed on 30 September 2013.

⁶³ For more information see the World Economic Forum’s Global Competitiveness Report 2013 available at <http://www.weforum.org/issues/global-competitiveness>, accessed on 30 September 2013.

Glencore Xstrata plc – ‘The Biggest Company You’ve never Heard of’

303 billion!)⁶⁴, Gunvor SA⁶⁵ (revenue 2012: USD 93.1 billion)⁶⁶ or MERCURIA ENERGY TRADING SA, founded in 2004 by two former Phibro (as Philipp Brothers has been renamed meanwhile) executives. The company also mainly trades crude oil, but has specialised itself on trade with the insatiable Chinese market. With a revenue of USD 98 billion in 2012, the company is considered to be among the top five of the world’s largest commodity traders.⁶⁷

Over the past ten to fifteen years – during the so called commodity super cycle – this little and completely landlocked alpine nation without any own resources has emerged to the world’s most important centre for the trade of commodities, with estimated 500 companies and, (considering the revenues “only”) 10 000 employees. A commodity cluster has developed comprising – besides trading – shipping, insuring, transaction financing, providing inspection services and product testing, being responsible for 3.5 per cent of Switzerland’s GDP of USD 632.32 billion in the year 2012.⁶⁸

The graph in addendum 9.5 illustrates and reflects Switzerland’s preeminent, almost hegemonic position in the world’s energy, minerals and agricultural commodities trading market.⁶⁹

However, Switzerland’s position is not undisputed. In particular Singapore is known to actively campaign on its own behalf, along with Hong-Kong and Dubai who are also lurking and trying

⁶⁴ Vitol 2012 report available at <http://www.vitol.com/latest-news/222-vitol-2012-report>, accessed on 1 October 2013.

⁶⁵ Gunvor SA also mainly trades with oil and has – upon the dismantling of Mikhail Khodorkovsky’s Yukos – succeeded in becoming the largest trader of Russian oil. According to rumours, Vladimir Putin allegedly holds shares of Gunvor himself. For more information see ‘Oil trading group Gunvor denies Putin links’ *Financial Times* 3 December 2010 available at <http://www.ft.com/intl/cms/s/0/e2a8af96-fe3f-11df-abac-00144feab49a.html#axzz2gSeJW6Eo>, accessed on 1 October 2010.

⁶⁶ ‘Oil trader Gunvor’s 2012 revenues topped \$90 bln document’ *Reuters* available at <http://www.reuters.com/article/2013/05/14/gunvor-profits-idUSL6N0DV3AP20130514>, accessed on 1 October 2013.

⁶⁷ For more information see http://en.wikipedia.org/wiki/Mercuria_Energy_Group and <http://www.reuters.com/article/2013/06/11/mercuria-earnings-idUSL5N0EH3EZ20130611>.

⁶⁸ Report of the interdepartemental platform on commodities to the Federal Council *Background Report: Commodities* at 1 available at <http://www.eda.admin.ch/eda/en/home/recent/dossie/rohsto.html>, accessed on 1 October 2013.

⁶⁹ Source: *Ibid* at 11.

Glencore Xstrata plc – ‘The Biggest Company You’ve never Heard of’

to attract the trading giants. The regulatory pressure in the various locations might just turn out to be of decisive nature.⁷⁰

3.1.3 GLENCORE’S FLOTATION AND THE MERGER WITH XSTRATA

3.1.3.1 EUROPE’S BIGGEST PRIVATE COMPANY GOES PUBLIC

‘We will get firepower and we can buy assets when opportunities present themselves in areas and sizes that we could not do before’

Ivan Glasenberg, CEO of Glencore, 2011⁷¹

As indicated before, Glencore’s past business practices have been of a rather opaque and sometimes even mysterious nature, thereby providing a fertile soil and ample room for rumours and speculations. It’s discreet and non-transparent way of conducting business combined with a poor communication strategy has been heavily criticised (inter alia by NGO’s), ultimately leading to “honouring” Glencore with the Public Eye Award in 2008 for its treatment of water resources and its work forces, both with regard to its Colombian coal mines.⁷²

However, the veil of discretion and non-transparency covering the business practices has (arguably) at least partially been lifted with Glencore’s initial dual public offering (IPO) in May 2011 at the London Stock Exchange and the Hong Kong Stock Exchange, with offerings of USD 11 billion being the largest IPO in the entire history of the London Stock Exchange (notably founded in 1801). In compliance with the IPO regulations, Glencore issued a 1637 pages strong

⁷⁰ See for example Deloitte’s brochure ‘Trading up’ at 10 available at http://www.deloitte.com%2Fassets%2FDcom-Switzerland%2FLocal%2520Assets%2FDocuments%2FEN%2FEIU%2Fch_en_Deloitte_Trading_Up_2013.pdf&ei=i eBKU5bXILSw7AaB_oC4Bg&usg=AFQjCNH_n27c-PG0FvE38GNUU4RGiBO6Qw&bvm=-bv.53371865,d.ZGU, accessed on 1 October 2013.

⁷¹ Javier Blas ‘Glencore says listing will boost firepower’ available at <http://www.ft.com/cms/s/0/d3f20718-639d-11e0-bd7f-00144feab49a.html#axzz2kc2Ru27a>, accessed on 14 November 2013.

⁷² The Public Eye Award is annually awarded by the Public Eye to companies with a poor performance in corporate social responsibility (CSR) issues. Conceptually, the Public Eye is a counter-event to the World Economic Forum. Unsurprisingly, the commodity sector is above-averagely represented as a the Public Eye’s “hall of shame” reveals. For more information see <http://www.publiceye.ch>.

Glencore Xstrata plc – ‘The Biggest Company You’ve never Heard of’ prospectus, thereby (according to Wikipedia) revealing ‘invaluable information about this private company that has remained discreet for thirty-seven years.’⁷³

Considering the (according to some analysts under-priced) offer price of 530 pence per share, Glencore’s market value has been appraised at GBP 36.7 billion (or USD 60 billion and therefore a fifty fold increase in value to when Rich sold his 51 per cent stake for USD 600 million), turning the former “Rich boys” holding fair amounts of shares into very wealthy persons.⁷⁴ According to the NGO Berne Declaration, ‘the six top managers of Glencore earned more from the stock market flotation in 2011 than the GDP of each of the 96 poorest countries in the world.’⁷⁵ With a post-IPO stake of 15.8%, the IPO has propelled Glencore’s South African CEO Ivan Glasenberg into position 125 of Forbes’ *The World’s Billionaires* in 2012 with a net worth of USD 7.3 billion.⁷⁶

Unsurprisingly, Marc Rich stated in an interview made by Daniel Ammann and published in the Swiss weekly newspaper *Die Weltwoche* on the occasion of the ten years anniversary of Bill Clinton’s pardon, that he would have rather kept the company private had he still been in charge. He argued that ‘It’s much more practical not to be a listed company. Then you don’t have to provide any information. As I said, discretion is a key success factor in this business. We preferred to be secretive and tight-lipped. This was a business advantage. Our business

⁷³ http://en.wikipedia.org/wiki/Glencore_Xstrata#Glencore.27s_Initial_Public_Offering_.28IPO.29, accessed on 13 November 2013. However, the effect on transparency is in as far limited as listed companies do not have to reveal information pertaining to transactions amongst the subsidiaries since only consolidated figures have to be published.

⁷⁴ The same is also true however for the Swiss municipalities in which the “Rich boys” live, such as Ruschlikon the lake of Zurich in the case of Ivan Glasenberg. The IPO has brought additional USD 392 million into the public coffers of the municipality with 5 000 inhabitants – just through the taxes levied on the income the IPO has created. The municipal assembly of Ruschlikon has decided to use the tax revenues to further reduce the already low tax rate by 7 per cent. However, the tax blessings have not been welcomed by all citizens and have caused intensive discussions in the municipal assemblies. Some citizens clearly stated that they do not want any “dirty money” from a commodity giant. In the neighbour-town of Ruschlikon, in Hedingen (and in other municipalities such as Affoltern am Albis, Hausen am Albis, Ofelden, Kappel am Albis and Mettmenstetten as well), its citizens decided to donate 10 per cent (USD 110 000) of the tax revenue of USD 1.1 million to relief organisations. The background is that Glencore is inter alia being criticized for paying low taxes in the countries it exploits its commodities by transactions amongst its subsidiaries that are not considered to be at arm’s length (transfer pricing). For more information see 3.1.5.1.

⁷⁵ Berne Declaration ‘Commodities’ available at <http://www.evb.ch/en/p21306.html>, accessed on 5 December 2013.

⁷⁶ Forbes ‘The World’s Billionaires’ available at <http://www.forbes.com/profile/ivan-glasenberg>, accessed on 13 November 2013.

Glencore Xstrata plc – ‘The Biggest Company You’ve never Heard of’

partners appreciated it as well.⁷⁷ Nevertheless, seventeen years after having sold his stake to the management, Rich announced to buy shares of the company again at the occasion of the IPO.

This might be due to the fact that in the eyes of Rich, ‘Glencore is a very well managed company. It is the best company of the industry.’⁷⁸ And its CEO, Ivan Glasenberg, is seen by Rich to be a brilliant man. Glasenberg grew up in the Johannesburg suburb of Illovo as the son of a Jewish luggage manufacturer and importer from Lithuania, whereas his mother is South African. Before obtaining a MBA from the University of Southern California in 1983, he studied at the University of Witwatersrand where he obtained a Bachelor of Commerce and Accountancy. Glasenberg was hired by Rich in 1984 in the US and became a coal trader at the age of 27 in South Africa. In 2002, Glasenberg became CEO of Glencore and in 2011 he obtained the Swiss citizenship.

The reasons for the management of “the best company of the industry” to jettison the secretive, discreet and non-transparent business model are manifold. One of the main reasons, however, seems to be the clearance of debts. A comparison to its competitors reveals that the pre-IPO Glencore has had high debts and a rather poor BBB-credit rating. A further downgrading of the credit rating has been seen as a sword of Damocles hanging over the company, disallowing at least some of the institutional investors to hold Glencore bonds. Moreover, the financial crisis and the collapse of Lehman Brothers has dried out the loan market and severely impacted the short-term securities market.

Besides the above-mentioned difficulties in terms of corporate financing, the prospectus revealed another reason for the IPO: To fill up the war chest for takeovers and acquisitions. Irrespective of the acquisition of further mines or the increase of stakes in mines, rumours about a planned dream merger par excellence have always circulated in the financial press.

⁷⁷ Daniel Ammann op cit note45.

⁷⁸ Ibid.

Glencore Xstrata plc – ‘The Biggest Company You’ve never Heard of’

3.1.3.2 THE MERGER OF THE ‘SIAMESE TWINS’

With a sumptuously filled “war chest”, Glencore did not hesitate long to make a dream come true. In February 2012 the intention to merge has been announced. The two companies domiciled in Zug have been intertwined for a long time. In order to get access to the Swiss capital market, Marc Rich + Co AG purchased a 53 per cent stake in Südelektra (as Xstrata was formerly named) from a private bank and subsequently used it as a finance vehicle by selling some of its shares. As a result, Glencore’s stake in Südelektra who was renamed to Xstrata in 1999, dropped to 33.65 per cent in 2012.⁷⁹

In the aftermath of a failed IPO of some of Glencore’s coal mines in Australia in 2001, Xstrata acquired the coal mines from Glencore together with coal mines in South Africa. By then, Mick Davies had already been appointed as CEO of Xstrata. According to the financial press, the election of Davis as CEO was orchestrated by Glencore.⁸⁰

In order to enable Xstrata to acquire the mines from Glencore, Xstrata made an initial public offering at the London Stock Exchange in 2002. Moreover, Xstrata AG (the former Südelektra) merged into Xstrata plc, a company incorporated in London for the purpose of the listing at the London Stock Exchange. However, the headquarters remained in Zug.

Moreover, Willy R. Strothotte, Glencore’s strong man after the departure of Marc Rich, acted as President of the board of Xstrata since 1995.⁸¹ At a later stage, Ivan Glasenberg joined Xstrata’s board. Furthermore, the two multinationals have concluded exclusive purchase contracts for their commodities and have collaborated in terms of marketing.

The board of Glencore reasoned the need for the merger inter alia as follows:

‘The Glencore Board believes that the Merger has compelling logic for both Glencore and Xstrata and that it is the logical next step for two highly complementary businesses. The Glencore Board believes

⁷⁹ For more information see page 77 of the merger prospectus.

⁸⁰ See for example Peter Koenig ‘Secretive Swiss trader links City to Iraq oil scam’ *The Sunday Times* 25 September 2005 available at <http://www.thesundaytimes.co.uk/sto/business/article149517.ece>, accessed on 14 November 2013.

⁸¹ Excerpt of the commercial register of the Canton of Zug available at <http://www.hrazg.ch/webservices/inet/HRG/HRG.aspx/getHRGHTML?chnr=1703001204&amt=170&toBeModified=0&validOnly=0&lang=1&sort=0>, accessed on 14 November 2013.

Glencore Xstrata plc – ‘The Biggest Company You’ve never Heard of’

that putting together the operational excellence of Xstrata and its leading portfolio of industrial mining and metals assets with the marketing skills and the developing asset base of Glencore will enable the Combined Group to take advantage of changing trends in the way that natural resources are consumed and supplied globally, especially as a result of demand in emerging economies.

The Merger will bring together two highly complementary businesses with a long-standing relationship. Both companies have proven track records of growth and value creation for shareholders:

- Glencore has grown from an equity value of approximately USD 1.2 billion at its management buy-out in 1994 to a market value (including the Glencore Group’s holding in Xstrata) of approximately USD 50 billion as at 6 February 2012; and
- Xstrata has delivered total shareholder returns of over 370 per cent. (3) since the IPO in March 2002 and has grown from an equity value of approximately USD 500 million at creation in 2001 to a market value of approximately USD 59 billion as at 6 February 2012. The Combined Group will benefit from enhanced scale and diversity. It will be the fourth largest global diversified natural resources company and will be a major producer and marketer of 18 commodities. Specifically, the Combined Group will be:
 - a global leader in export thermal coal, ferrochrome and integrated zinc production;
 - the third largest producer of copper, aiming to grow into the largest independent producer within four years; and
 - the fourth largest producer of nickel.

The Combined Group will have operations and projects in 33 countries with over 150 mining and metallurgical facilities, offshore oil production facilities, farms and agricultural facilities and offices in 40 countries with approximately 130,000 employees. Its presence at each stage of the commodities chain will provide it with superior market insight and access to opportunities. These factors, along with its established footprint in emerging regions for natural resources investment, including the African copper-belt, Kazakhstan and South America, as both an operator and a provider of marketing and logistics services to new producers, will provide the Combined Group with substantial new optionality and greater strategic flexibility.⁸²

The impressive figures mentioned above indicate the enormous measure of this merger, occasionally cited as “the mother of mergers”. Financial Times had to go as far back as to 1907 when Royal Dutch and Shell merged to find an amalgamation of comparable dimensions.

⁸² Merger prospectus, 42 f.

Glencore Xstrata plc – ‘The Biggest Company You’ve never Heard of’

In preparation of Glencore’s IPO in 2011 at the London Stock Exchange, Glencore International plc with its registered office in St. Helier / Jersey had been incorporated as ultimate parent company of Glencore International AG and its fourteen subsidiaries in Switzerland. Therefore, and since Xstrata plc had its registered office in London, the merger was governed by the laws of the United Kingdom. The merger was implemented by a scheme of arrangement under Part 26 of the UK Companies Act (enabling Glencore to acquire all of Xstrata’s shares) and had to be sanctioned by the court. The initial offer of Glencore allotted for each of Xstrata’s scheme share 2.8 Glencore shares, thereby valuing each of Xstrata’s shares at 991.5 Pence and the entire share capital at GBP 30.1 billion (USD 47 billion). In order to provide Xstrata’s shareholder with the required amount of Glencore shares, Glencore intended to issue additional 5 660 317 060 shares pursuant to the merger.⁸³

The merger should have been approved by Glencore’s shareholder in my hometown (Zug, Switzerland) on 11 July 2012. At 11 am on that day however, Simon Murray, Glencore’s chairman, appeared in front of the gathered shareholders and hurriedly cancelled the general meeting, thereby referring to unexpected “overnight developments”. Subsequently, Xstrata cancelled its shareholder meeting to be held on the following day as well.

Later, mainly due to opposition from Qatar’s sovereign wealth fund, Glencore had to improve its offer by increasing the Glencore shares offered to Xstrata’s shareholders to 3.05 for each Xstrata share. Moreover, Glencore announced that it is deliberating about changing its offer from a scheme of arrangement requiring the acceptance of 75 per cent of Xstrata’s shareholder to a takeover, requiring a lower threshold of (more than) 50 per cent. What initially has been announced to be a merger of equals almost became a bitter overtone of a hostile takeover.

After breakthrough talks brokered by former Prime Minister Tony Blair, the general meetings approved the adjusted offer (Xstrata: 80 per cent, with Glencore not being able to vote its 33.65 per cent stake; Glencore: 99.43 per cent) in November 2012. Upon all the approvals required by the competition authorities in the various affected countries, a long mutual

⁸³ Ibid at 29.

Glencore Xstrata plc – ‘The Biggest Company You’ve never Heard of’

history culminated in the merger which was completed on 2 May 2013 and therefore 450 days after the intention of merger was announced. As intended, the merger was implemented by a scheme of arrangement, leading to an admission 6 163 949 435 new Glencore shares at the London Stock Exchange.

The merger has created a USD 65 – 80 billion colossus and has propelled Glencore Xstrata plc (hereinafter “Glencore Xstrata”) into position four of the largest mining companies in the world and enabled Glencore Xstrata to become the world’s largest diversified commodities trader. Glasenberg expects the synergies to amount to USD 2 billion.

However, analysts speculate that this takeover is just the beginning and that Anglo American is likely to be the next acquisition target.

In the context of the first offer, Glencore proposed in its prospectus that Mick Davies should run the merged company as CEO, with Ivan Glasenberg being the Deputy CEO and President. In its revised offer however, Glencore abstained from earmarking Davies as CEO and proposed that Glasenberg should become CEO of the combined group board.⁸⁴ This is said to have severely damaged the long friendship between the two South African executives, who both grew up in the same Jewish neighbourhood. After a decade Davies left Xstrata. It remains to be seen if Davies with his strong operating record adheres to the industry’s tradition by setting up an own investment venture and causing a brain drainage at Glencore Xstrata by encouraging former colleagues to join him in.

⁸⁴ Ibid at 46.

Glencore Xstrata plc – ‘The Biggest Company You’ve never Heard of’

3.1.4 THE FUTURE LIES IN AFRICA – GLENCORE XSTRATA’S LISTING ON JSE

‘Africa is an important and growing market for the Group and South Africa has a strong institutional investor base.’

Glencore Xstrata, 2013⁸⁵

On 10 September 2013, Glencore Xstrata announced its intention to list on the Johannesburg Stock Exchange (JSE) by the end of the year. On 31 October 2013, Glencore Xstrata announced that JSE has approved its application for a secondary listing which is set to take place on 13 November 2013. On 13 November 2013 Glencore opened trading the 34.8 million shares being worth more than ZAR 1.9 billion at the JSE at ZAR 55 per share.

Glencore Xstrata was warmly welcomed in South Africa, inter alia by JSE’s CEO Nicky Newton-King: ‘We welcome Glencore Xstrata to the JSE’s main board. It’s a huge accolade for the exchange that a multinational company of Glencore Xstrata’s size and stature would select the JSE for its secondary listing. We are confident that this listing will enhance Glencore Xstrata’s growth prospects and profile on the continent. The listing reflects well on South African financial markets and sends a positive message to potential issuers both local and international.’⁸⁶

Generally, the listing at JSE is seen as a vote of confidence for South Africa and a powerful signal. Mike Teke, deputy president of the Chamber of Mines in South Africa considers the listing to be a ‘stamp of approval’ for South Africa.⁸⁷ Former JSE chief marketing officer and now Sasfin Capital corporate finance head Noah Greenhill pointed out that ‘This [new listing]

⁸⁵ Statement in Glencore Xstrata’s announcement of 10 September 2013 available at <http://www.glencorexstrata.com/media-centre/news/glencorexstrata/2013/investor-day-2013>, accessed on 16 November 2013.

⁸⁶ ‘Glencore Xstrata lists on the Johannesburg Stock Exchange’ available at http://www.jse.co.za/About-Us/Media/Press-Releases/Full-Story/13-11-14/Glencore_Xstrata_lists_on_the_Johannesburg_Stock_Exchange.aspx, accessed on 16 November 2013.

⁸⁷ David McKay ‘What does Glencore bring to the JSE’ available at http://www.miningmx.com/page/news/markets/1634792-What-does-Glencore-bring-to-the-JSE#.UukD9_n8JD8, accessed on 16 November 2013.

Glencore Xstrata plc – ‘The Biggest Company You’ve never Heard of’

is a huge development for the JSE and it is highly beneficial for South Africa as a whole’.⁸⁸

Zeona Jacobs, director for issuer and investor relations at the JSE, admitted to be excited: ‘It does mean a lot. A company of this size and magnitude means a lot in terms of trading. We’re very excited.’⁸⁹

The listing of Glencore Xstrata is said to be the biggest listing since British American Tobacco (BAT) in 2008. Moreover, Glencore Xstrata is now the third biggest company on JSE, after SABMiller and BAT.

But why should Glencore Xstrata want to comply with JSE’s rather onerous (requiring compliance with the King Report III) listing requirements? As Glasenberg explained, South African investors clamoured for a possibility to invest directly in Glencore Xstrata without being confined by foreign ownership limits. Furthermore, Glasenberg stated that the listing ‘on the JSE is a significant step for Glencore. It not only deepens our relationship with South Africa, it highlights our confidence in Africa as a place to invest. We welcome our new stakeholders and look forward to building long-term mutually beneficial relationships with them.’⁹⁰

Some analysts speculate if Glencore Xstrata’s managers are just entering up a new market to sell their shares over the next few years. The senior management holds approximately 25 per cent of the shares, and the companies listed at JSE besides Glencore Xstrata are not as diversified. It is therefore expected that Glencore Xstrata’s shares will be met with lively interest from institutional shareholders in South Africa. Another view is that Glencore Xstrata is paving the way for a takeover of Anglo American. Doing so, while being listed on JSE, might antagonise a perception that Anglo American is being “exported”.

⁸⁸ Brendan Ryan ‘Glencore Xstrata set to burst onto JSE’ available at <http://www.bdlive.co.za/business/mining/2013/09/11/glencore-xstrata-set-to-burst-onto-jse>, accessed on 16 November 2013.

⁸⁹ David McKay op cit note 87.

⁹⁰ ‘Secondary Listing on the JSE’ available at <http://www.glencorexstrata.com/media/news/glencorexstrata/2013/secondary-listing-on-the-jse-2/>, accessed on 16 November 2013.

Glencore Xstrata plc – ‘The Biggest Company You’ve never Heard of’

It remains to be seen what the impact of the listing is. Particularly of interest will be the effect on Glencore Xstrata’s (branded as poor) corporate governance, since it will now have to comply with or rather apply the progressive principals embodied in the King III Code on Corporate Governance or, in case of non-appliance, provide explanation why the company has not applied the principals.

3.1.5 THE GIANT’S ALLEGED CORPORATE MISCONDUCT

For a company of such dimensions pursuing the characteristic business strategies of the extractive industry it does not come as a surprise that it is being confronted with criticism and allegations.

3.1.5.1 TAX EVASION, ENVIRONMENT AND HEALTH IMPACT IN ZAMBIA

Mopani Copper Mines plc is an indirect subsidiary of Glencore Xstrata exploiting the copper deposits in Zambia. The Zambian company is held by Carlisa Investment Corporation, a joint venture between Glencore Xstrata (73.1 per cent), First Quantum Minerals (16.9 per cent) and ZCCM-IH (10 per cent).

Glencore Xstrata’s subsidiaries allegedly performed financial and accounting manipulations through mechanisms such as transfer pricing and cost inflations at the Zambian mine, ultimately resulting in losses at Mopani Copper Mines plc. Despite record high copper prices Glencore Xstrata’s indirect subsidiary has always suffered losses in recent years and has subsequently never paid profit taxes. The Zambian government requested the independent accounting firm Grant Thornton to review the financial and accounting practices of Mopani Copper Mines plc. The investigations and clarifications led Grant Thornton to the conclusion that the tax avoidance conducted by Mopani Copper Mines plc have cost the Zambian government hundreds of millions USD of lost revenue.

Based on Grant Thornton’s leaked draft report, the Swiss NGO “the Berne Declaration” together with other NGO’s from Zambia, France and Canada have filed a collective complaint

Glencore Xstrata plc – ‘The Biggest Company You’ve never Heard of’

for breach of the OECD Guidelines for Multinational Enterprises at the competent national contact points in Canada and Switzerland in April 2011.⁹¹

Besides the alleged financial and accounting manipulation, Glencore Xstrata’s indirect subsidiary is also accused of polluting the air through its emission of sulphur dioxide and dust and of polluting the drinking water through the use of sulphuric acid in order to extract the copper from the ore. It is alleged that Mopani Copper Mines plc has not complied with the Zambian standards pertaining to the emission of sulphur dioxide since the year 2000. Moreover, the subsidiary has not planned to take any measures until 2014 or 2015.⁹²

3.1.5.2 DEMOCRATIC REPUBLIC OF CONGO: KATANGA MINING LIMITED

Glencore Xstrata is also being criticised for doing business inter alia through the above-mentioned subsidiary in places such as the Democratic Republic of Congo (DRC). The central African Country is on position 186 of UN’s Human Development Index and hence second-last.⁹³ Apparently, systematic bribery, corruption and appalling safety and human rights situations are said to be characteristic for business conducted and mines operated in the DRC.

In particular Glencore Xstrata has been accused by Global Witness to have been involved in a potentially corrupt deal by indirectly acquiring a 37.5 per cent stake in the Kansuki copper mine from Dan Gertler, an Israeli business man. Gertler happens to be a friend of President

⁹¹ For more information see http://en.wikipedia.org/wiki/Glencore_Xstrata and <http://www.evb.ch/p19263.html>. For more information about the OECD Guidelines for Multinational Enterprises see subchapter 6.2. The Swiss National Contact Point describes its approach in such a case (for more information see <http://www.seco.admin.ch/themen/00513/00527/02584/index.html?lang=en>, November 2013) as follows: ‘The NCP receives credible information that a company has not respected the Guidelines – or at least part thereof. In a preliminary examination, the NCP collects facts of the specific case (substantial content of the submission, justification, relevance) as well as the parties involved (identity, interest in the input) and decides whether a connection with the OECD Guidelines can be established. If this is the case, the NCP contacts the parties involved. The NCP may offer a platform for dialogue or assumes the role of a mediator and thus tries to contribute to an agreement between the parties. The mediation process is in general confidential and requires the consent of all parties. However, with respect to the results of the procedure, the NCP needs to find a balance between transparency and confidentiality. The NCP publishes the results of a procedure if both parties agree and a solution is found for a conflict. In the case where no agreement is reached, the NCP publishes this result as well. Furthermore, the NCP can where appropriate make recommendations.’

⁹² For more information see the Berne Declaration (ed) *Commodities – Switzerland’s most dangerous business* 2 ed (2012) 105 ff.

⁹³ For more information see <http://hdr.undp.org/en/statistics>.

Glencore Xstrata plc – ‘The Biggest Company You’ve never Heard of’

Joseph Kabila, who allegedly enabled Gertler the acquisition of the shares at an enormous discount.⁹⁴

Moreover, water pollution through the use of acid to extract the copper, seems to be once more an issue.⁹⁵

3.1.5.3 INVESTMENTS IN COLOMBIA

As already mentioned in subchapter 3.1.3.1, Glencore Xstrata has been awarded with the Public Eye Award in 2008 for its treatment of water resources and its work forces, both with regard to its Colombian coal mines. Moreover, Glencore Xstrata’s Colombian subsidiary Cerrejon has been accused of forced expropriations and evacuations in a larger dimension, in cooperation with Colombian authorities.

Another Colombian subsidiary, Prodeco, was apparently fined USD 700 000 in 2009 for environmental misconduct.⁹⁶

3.1.5.4 UN’S OIL FOR FOOD PROGRAMME

Glencore respectively Marc Rich + Co AG certainly had a tradition under its former owner of dealing with rogue states such as (apartheid) South Africa, Cuba, the USSR and Iran. In the context of the above-mentioned UN programme that was designed to alleviate the severe impacts that the international sanctions developed on Iraq’s civil population, Saddam’s regime was allowed to export crude oil provided that the proceeds were used for humanitarian goods. However, besides buying the aforesaid goods, Saddam Hussein abused the programme to enrich himself by requiring the oil trading companies to pay a surcharge of 10 to 30 cents per barrel. The UN requested all oil trading companies dealing with Iraq to abstain from paying such illegal surcharges. Consequently, oil traders saw themselves confronted with two options: They could either cease to do business with Iraq or pay the illegal surcharges requested by Saddam’s regime.

⁹⁴ For more information see Wikipedia’s article available at http://en.wikipedia.org/wiki/Glencore_Xstrata, accessed on 16 November 2013.

⁹⁵ Ibid.

⁹⁶ Ibid.

Glencore Xstrata plc – ‘The Biggest Company You’ve never Heard of’

According to the Inquiry Committee consisting of Paul A. Volcker, Richard J. Goldstone and Mark Pieth, which had been established in 2004 by the UN to investigate the manipulations, Glencore allegedly chose the second option, albeit not directly but through intermediaries.⁹⁷ However, Glencore denied that any surcharges had been paid upon instruction and on behalf of Glencore. Moreover, Glencore claimed that it has not had any knowledge of such surcharge payments.⁹⁸ Preliminary judicial investigation lead by Switzerland’s Attorney-General in the aftermath of the UN report led to the finding that there is indeed a “lack of culpable information” and no further criminal proceedings have been instituted against Glencore.⁹⁹

3.1.6 INTERIM CONCLUSION

The largest diversified commodities trader in the world and the fourth largest mining company. Position twelve in the Fortune Global 500 list, valued at USD 65–80 billion. A company running more than 90 offices in over 50 countries and operating more than 150 mining and metallurgical sites, oil production facilities and agricultural sites, thereby providing jobs to approximately 190 000 people. From an economic perspective, only the employment of superlatives seems to be appropriate to describe the company’s success, dimensions and subsequently powers.

It does almost come as a surprise that a colossus of such magnitude often operating in countries with weak governance and weak institutions is not being confronted with more allegations in terms of corporate misconduct.

Because a multinational of such economic dimensions has massive impacts on the various communities it operates in, it can, and in fact does, impact the society beyond the local municipalities. Moreover, its business in general and its exploitation processes respectively the way they are conducted in particular also heavily influence the (natural) environment. Needless to say that this comes along with an enormous responsibility in terms of environmental, social and governance issues.

⁹⁷ The Report on the Manipulation of the Oil-for-Food Programme, 27 October 2005, 3, 12 ff., 144.

⁹⁸ Ibid at 144.

⁹⁹For more information see http://www.parlament.ch/d/suche/seiten/geschaefte.aspx?gesch_id=20063428 and <http://www.reuters.com/article/2011/02/25/us-glencore-idUSTRE71O1DC20110225>, both accessed on 18 November 2013.

4 THE ACCOUNTABILITY GAP

'We invest in many countries and we have many opportunities around the world where we can invest our money. Governments are free to make their rules as they wish but once they make their rules we will decide if that's a place that justifies a big investment.'

Ivan Glasenberg, CEO of Glencore Xstrata, 2013¹⁰⁰

In the light of the aforesaid, the question has to be raised if and how the negative side effects of multinationals' activities can be curtailed. Moreover, the question arises whether and how globally operating companies can be held accountable for their misconduct. Especially their enormous economic weight and thus their influence on the various societies and their political framework illustrates their hazard potential in terms of environmental, social and governance issues. While the world economy has rapidly globalised, its political and judicial control remains confined by national borders.

4.1 THE ACCOUNTABILITY GAP

4.1.1 DIVERGENCE BETWEEN RESPONSIBILITY AND ACCOUNTABILITY

Firstly, it should be noted that legally there is no such thing as a multinational company, since companies are considered to be legal persons of the private law, i.e. are bound and governed by the law of the State in which each company is domiciled. This is where their legal personalities derive from. 'Companies are accountable (...) mainly through the governments of those countries where the companies conduct their activities.'¹⁰¹ Subsequently, each subsidiary of a (multinational) parent company can have its own nationality. Thus a

¹⁰⁰ Statement of Ivan Glasenberg in the context of the secondary listing of Glencore Xstrata at the JSE available at <http://www.bdlive.co.za/business/mining/2013/11/14/glencore-lists-on-jse-with-ceo-glasenberg-warning-about-mining-laws>, accessed on 17. November 2013.

¹⁰¹ Koenig-Archibugi Mathias 'Transnational corporations and public accountability' in Held David and Koenig-Archibugi Mathias (eds) *Global Governance and public accountability* (2004) 235.

The Accountability Gap

multinational company is a network of companies incorporated under the laws of different states.

For the time being, it therefore has to be acknowledged that multinational's business activities are subject to and governed by diverse national legal systems and frameworks.

Furthermore, it must be noted that globalisation has fundamentally altered the relationship between the national state and the private sector, in as much as multinationals can hardly be controlled by national governments having only the traditional (territorially limited) legal, police and policy instruments at their disposal, which is why Percy Barnevik, former CEO of ABB Asea Brown Boveri Ltd, has spoken of the so-called "accountability gap".¹⁰² This also seems to be the notion of Beth Stephens stating that 'There is a gap between the economic reality and the legal tools available to hold transnational enterprises accountable for their actions.'¹⁰³

4.1.2 THE CAUSE OF THE ACCOUNTABILITY GAP

This accountability gap is evidenced, for example, in the context of subsidiaries. Despite their own legal personality deriving from the respective national law, subsidiaries are regularly inspected and instructed by the parent company and thus do not have any independent power of decision. Now, assuming that a subsidiary is contravening against international economic law upon instruction of its parent company, it does indeed seem inequitable to deny an accountability of the parent company. However, the revelation of the legal status of a controlled company as well as the causal connection between its actions and the inputs and instructions of the parent company can be problematic and difficult to prove, and international law does not provide for a regulation applicable to a transnational corporation as a whole.

This is attributed to the cross-border activities and the flexible behaviour of multinationals which allows them to bypass national legal frameworks and to choose – in accordance with

¹⁰² Hans Galli 'Interview mit Percy Barnevik' *Der Bund* 6 February 1996 at 5.

¹⁰³ Stephens Beth 'The Amoral of Profit: Transnational Corporations and Human Rights' (2002) 20 *Berkeley Journal of International Law*, 54.

The Accountability Gap

their economic maxims – countries with low social, environmental and labour standards as economically most profitable production sites. The more they scatter their operations across the world, the less power and control a single government has towards them. The global operations of multinationals are being faced by territorially limited norms of single states. This has certainly contributed to the shift in power from nation states to multinationals that has been observed in the past decades. Glasenberg's statement quoted above illustrates this.¹⁰⁴

In short, a multinational enterprise 'is global, and the nation state local.'¹⁰⁵ With regard to the accountability of multinationals for problematic business practices this in turn means that a control by national regulations is increasingly difficult. This tendency is further reinforced by the following developments:

1. The global competition between states in attracting large multinational investors may mean that the states are forced to propose (legal) frameworks which, while being conducive for to the profit maximisation of multinational companies, will be detrimental for national environmental and social standards. In fact, many multinationals profit from inadequate standards in third world countries allowing them to significantly cut their costs, while the states cannot effectively leverage the standards because of the fear of a disinvestment.¹⁰⁶
2. The performance of judicial systems of developing countries with corrupt governments and / or unstable political conditions and weak institutions is often unsatisfactorily or is characterised by a lack of transparency. This impedes the effective enforcement and control of possibly even existing social and ecological standards massively. This results in a little significance of such standards and norms for powerful multinationals.

¹⁰⁴ Glasenberg has – notably in the context of Glencore Xstrata's listing on JSE – threatened to disinvest from South Africa, should the amendment of the mining laws the South African Government is contemplating about not suit Glencore Xstrata.

¹⁰⁵ Stephen J. Kobrin 'Sovereignty@Bay: Globalization, Multinational Enterprise, and the International Political System' available at <https://mgmt.wharton.upenn.edu/files/?whdmsaction=public:main.file&fileID=4002>, accessed on 19 November 2013.

¹⁰⁶ Again reference is made to the quotation of Glasenberg above, although South Africa certainly does not have to be considered a country with low environmental (and social) standards. But the threat of disinvestment and / or relocation proves to be effective, independently from whether the threatened state is a developing nation, an emerging nation or a developed nation.

The Accountability Gap

3. A binding global framework requiring multinationals to comply with certain agreed Standards of conduct and demanding them to refrain from ecologically, socially and ethically unsound business practices is entirely missing.¹⁰⁷ An attempt by the UN to develop and agree amongst the member countries, on a legally binding code of conduct for transnational corporations, with the aim 'to establish mechanisms of accountability, at the same global scale as the activities of TNC's'¹⁰⁸ failed after decades of negotiations in 1992 due to a conflict of interest, mainly between the capital-importing and the capital-exporting states.¹⁰⁹ Thus, up to today, there are no *binding* global principals for multinationals and subsequently no supranational institution demanding and enforcing compliance. It has to be attested that a certain (and in some cases massive) imbalance between states and multinationals is in fact a reality.

4. As legal entities of the national private law, the international law status of multinational companies is debated controversially. In accordance with modern concepts multinationals do not only have rights, but also obligations. A responsibility of the private sector, based on international law, seems in principle to be conceivable. Whether the legal reality will actually customise to this notion, remains to be seen. The discussion to what extent multinationals are bound by international obligations in terms of human rights, is in full swing. In any case, the current system of international law demands that – at least in the context of aggravated violations of human rights – states in fact do have an obligation to ensure compliance in their territory. This includes the obligation to prevent violations of human rights by third parties, in casu to prevent human rights violations by transnational corporations. Otherwise the state – at least in theory and apart from a possible liability of the multinational in question – potentially has to bear the responsibility under international law. It follows that a state might be held to account for questionable business

¹⁰⁷ The same is not true however for a non-binding framework. The UN Global Compact, launched in the year 2000, does provide standards for multinationals. However, the ten principals are not of binding character and not very detailed.

¹⁰⁸ Koenig-Archibugi Mathias op cit note 101 at 251 et seq. In principal, the idea was to directly impose the same human rights duties on companies based on international law as for countries.

¹⁰⁹ For more information see Ilias Bantekas 'Corporate Social Responsibility in International Law' (2004) 22 *Boston University International Law Journal* 318.

The Accountability Gap

practices conducted by multinationals, while the latter might be able to evade international justice.¹¹⁰

4.1.3 INTERIM CONCLUSION

Considering the outlined international and political background, it has to be stated that the conditions under which multinationals currently can be held accountable for the negative side effects of globalisation, seem to be vague and unclear. As mentioned above, there is no supranational law that applies in cases where, for example, parent companies and their subsidiaries are involved in corporate misconduct. This has led to the formation of grey areas which in legal terms are not clearly defined. An adequate national legislation is in some cases non-existent, not applicable or simply not being enforced, and international law does not provide for a satisfactory control and remedy at all.

Strategic alliances and closer relations with suppliers and sub-contractors (“outsourcing”) increasingly blurs the traditional corporate boundaries.¹¹¹ Hence the question arises how to deal with misconduct performed by suppliers and sub-contractors. Even in cases of a strong involvement of suppliers and sub-contractors a legal nexus between the latter and their clients, the multinationals, can often not be established which is why multinationals cannot be held (legally) accountable for the formers misconduct.

In summary, globalisation has led to a loss of power of national states. Whereas multinationals through their subsidiaries and global production shifts and the inclusion of suppliers and sub-contractors have burst the chains and fetters of national boundaries, no equivalent development has happened on a national respectively supranational level – there is no supranational institution that encounters the multinationals. Because of the lack of such a development respectively based on the fact that the question of whether the individual state laws still provide an effective tool for the control of multinationals has to be denied, globalisation has caused a disequilibrium enabling shrewd multinationals to operate in a power vacuum.

¹¹⁰ Stephens Beth op cit note 103 at 83.

¹¹¹ This is also a concern of the OECD. See eg the OECD Guidelines for Multinational Enterprises.

5 LEGALLY BINDING APPROACHES TO CLOSE THE GAP

'It is necessary only for the good man to do nothing for evil to triumph'

Statement attributed to Edmund Burke, 18th century Irish political philosopher and statesman

As illustrated above in 4.1.23. a binding code of conduct for multinationals could not be agreed on so far on an international level – and the author doubts that the national states will be willing to sacrifice a part of their sovereignty in the short to medium term enabling the enactment of binding international laws.

Considering the divergence between the global operating range of multinationals and the limited jurisdiction nation-states have, at a first glance it might seem difficult to find an adequate approach to close the gap on a non-international level. However, the customary international law is considered to provide for a tool enabling nation-states to (at least in theory) directly or indirectly influence the multinationals' behaviour.

5.1 ENACTMENT OF BINDING EXTRA-TERRITORIAL LAW

The territorial sovereignty of a nation-state includes the competence to legislate. This competence is in principle limited to the territory of the nation-state in question. In special cases, however, a nation-state may legitimately expand its regulatory powers to extra-territorial areas. This requires a legitimising reference point, since without a such, the application of national law on extra-territorial incidents would violate the international principle prohibiting the intervention in other states' affairs.

The principle of active personality is considered to be an eligible reference point. The competence to legislate is thereby linked to a natural person's nationality, whereas in the case of a legal person the registered office /headquarters is serving as a reference point.¹¹²

¹¹² In determining the nationality of a legal person, mainly formal aspects are valued.

Legally Binding Approaches to Close the Gap

According to the principle of active personality a state may 'regulate the conduct of its own citizens abroad (...), but not however, enforce these rules abroad (...).'¹¹³

Hence, a state is in principle authorized to regulate undesirable business conduct of its legal entities abroad thereby conceivably imposing extraterritorial liability in cases of a breach of the law, and, if the misconduct has not been subject to legal proceedings in the host country, pursue the perpetrator in front of its national courts.¹¹⁴

Based on the foregoing, inter alia the following approaches have been developed:¹¹⁵

In 1999, a socialist parliamentarian proposed to establish universal jurisdiction for Belgian courts with regard to (i) multinationals having assets in Belgium that have (ii) violated human rights standards. The proposal was rejected inter alia in consideration of the possible adverse effects on Belgian economy.

Likewise, in 1999 the European Parliament submitted a resolution to the European Council and the European Commission to provide for a legally binding 'European code of conduct governing company operations worldwide which would incorporate existing minimum international standards on human rights, minorities, indigenous peoples, working conditions,

¹¹³ Tina Kempin Reuter & Michael Frei *Repetitorium Völkerrecht* 2 ed (2012) 62.

¹¹⁴ For example, a country may enact legal standards prohibiting bribery of foreign officials by corporations. John Ruggie demands in principle 2 of his final 'Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises' dated 21 March 2011 (Ruggie Principles), that 'States should set out clearly the expectation that all business enterprises domiciled in their territory and/or jurisdiction respect human rights throughout their operations.' He asserts that currently 'States are not generally required under international human rights law to regulate the extraterritorial activities of businesses domiciled in their territory and/or jurisdiction. Nor are they generally prohibited from doing so, provided there is a recognized jurisdictional basis.' Moreover, Ruggie states that 'There are strong policy reasons for home States to set out clearly the expectation that businesses respect human rights abroad, especially where the State itself is involved in or supports those businesses.' See also footnote 119.

¹¹⁵ For a more elaborate discussion see Chatham House 'Human rights and Transnational corporations: Legislation and Government regulation' available at <http://www.google.co.za/url?sa=t&rct=j&q=&esrc=s&source=web&cd=3&ved=0CDYQFjAC&url=http%3A%2F%2Fwww.chathamhouse.org%2Fsites%2Fdefault%2Ffiles%2Fpublic%2FResearch%2FInternational%2520Law%2Ffil150606.pdf&ei=ewGTUsv6PI-0kAej84CICQ&usq=AFQjCNGJcGANzqA8Upf8dFySzNftddCWSA&sig2=wD3EM6dIISX35tvC0dgF-w&bvm=bv.56988011,d.eW0&cad=rja>, accessed on 25 November 2013.

Legally Binding Approaches to Close the Gap

the environment and anti-corruption measures.¹¹⁶ The aim was to enact a law demanding 'socially and environmentally sustainable operations (...)' enabling legal actions against perpetrators who 'failed in their basic duty of care.'¹¹⁷ However, in 2001, the European Commission favoured, in its Green Paper *Promoting a European Framework for Corporate Social Responsibility*, a voluntary approach to Corporate Social Responsibility and the European Parliament's proposal was not followed up.¹¹⁸ However, it is expected that the Ruggie Principles¹¹⁹ will give new impetus to the debate in the EU and its future policy in terms of Corporate Social Responsibility. It remains to be seen if the European Parliament's preference for a binding regulatory approach will be taken up by the European Commission which favoured a voluntary approach in its Green Paper.¹²⁰

The *Australian Corporate Code of Conduct Bill 2000* attempted to establish standards on the conduct of Australian transnational corporations by requiring them to (also) comply abroad with environmental, labour, health and safety and human right standards. This law would have also applied to subsidiaries and subcontractors. However, the Parliamentary Joint Statutory Committee considered the draft to be 'impracticable and unwarranted (...)', moreover 'unnecessary and unworkable (...)' and concluded that its imperialistic tendencies might potentially damage foreign relations and encourage Australian multinationals to relocate to other jurisdictions.¹²¹ The Australian Parliament subsequently rejected the proposed law.

¹¹⁶ 'European criteria for European companies operating in developing countries LDCs: towards a European code of conduct' available at <http://www.europarl.europa.eu/oeil/popups/ficheprocedure.do?id=16279>, accessed on 25 November 2013.

¹¹⁷ Ibid.

¹¹⁸ For more information see Andreas Rühmkorf 'The Promotion of Corporate Social Responsibility in English Private Law' available at <http://www.google.co.za/url?sa=t&rct=j&q=&esrc=s&source=web&cd=23&ved=0CD4QFjACOBQ&url=http%3A%2F%2Fetheses.whiterose.ac.uk%2F4349%2F1%2FA%2520R%25C3%25BChmkorf%2520PhD.pdf&ei=YyCTUumlM8WpkAe6s4CQBQ&usg=AFQjCNGlr5QS737znQkl26HrPHSyXdOEVQ&sig2=P8B479Dwh7TpFdv8cCVY4A&bvm=bv.56988011,d.eW0>, accessed on 25 November 2013.

¹¹⁹ See footnote 114. The formal terminology of the Ruggie Principles is 'United Nations Guiding Principles on Business and Human Rights' and they set out principles for states and companies in terms of human rights based on a three pillar implementation concept: (i) a state duty to protect human rights, (ii) a corporate responsibility to respect human rights and (iii) access to remedy for victims of corporate misconduct.

¹²⁰ Constitutionally, a proposal by the European Commission to the European Parliament to legislate would be required therefore.

¹²¹ Parliamentary Joint Statutory Committee on Corporations and Securities, Report on the Corporate Code of Conduct Bill 2000 para 4.5 et seq.

5.2 FOREIGN DIRECT LIABILITY

The Parliamentary Joint Statutory Committee referred in its report to an already existing possibility to hold multinationals liable for their business practices conducted abroad by noting ‘that existing case law provides avenues for foreign plaintiffs to seek redress for wrongs committed by Australian corporations overseas (...)’¹²², commonly referred to as “foreign direct liability”.

In principle, this terminology stands for legal actions being pursued against a multinational on the basis of the home country’s domestic tort law. The difficulties pertaining to the separate legal personality of the parent company’s subsidiary having conducted the wrongdoings in the host-country are circumvented by eg proving a negligent behaviour of the former, alleging that it did not apply the required duty of care. This is due to the fact that parent companies allegedly ‘have direct responsibilities toward third parties in those host countries (...)’, based on their ‘knowledge of, and influence on, the operations of its subsidiaries or business partners.’¹²³

In the examples of corporate misconduct provided for in subchapter 2.2.5 the behaviour of Shell and Trafigura has led to claims in the Netherlands and the UK based on the tort laws of the respective countries.¹²⁴

However, until recently a 224-years old US federal statute originally envisaged to protect diplomats and signed by President George Washington emerged as driving force behind the foreign direct liability cases-trend. The talk is of the Alien Tort Statute (ATS), a *federal* statute dated 1789. It stipulates that ‘The district court shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of

¹²² Ibid para 4.50.

¹²³ Liesbeth F.H. Enneking ‘Crossing The Atlantic? The Political and Legal Feasibility of European Foreign Direct Liability Cases’ (2007) Volume 40, Number 4 *The George Washington International Law Review* at 924.

¹²⁴ Whilst the largest class action brought before a UK court with 29 614 claimants has been settled (amicably) in September 2009 obliging Trafigura to pay out GBP 30 million, the case brought before a Dutch court (district Court of the Hague) against Shell’s Nigerian subsidiary in the case of two oil spills in Nigeria ended in holding the latter civilly liable on 30 January 2013. However, all the claims against the parent company were dismissed. For a more elaborate discussion of the concept of foreign direct liability see Liesbeth Francisca Hubertina Enneking’s theses *Foreign Direct Liability and Beyond*.

Legally Binding Approaches to Close the Gap

the United States.¹²⁵ Broadly speaking, these rather unspectacular 33 words arguably provide for a tool that can be applied in cases where international law has been violated, thereby granting universal jurisdiction to the *federal* US courts. Hence it allows citizens not domiciled in the US to seek remedy in *federal* US courts for human rights violations committed outside the US.

After a long sleeping beauty slumber lasting nearly 200 years, the statute had been “rediscovered” in 1980 in *Filartiga v. Pena-Irala*.¹²⁶ Several law suits against natural persons allegedly having violated human-rights were to be followed. However, until recently, it was controversially discussed if the ATS does also apply to corporations. Several lawsuits against multinationals under the ATS have been lodged, amongst them lawsuits of the Khulumani Support Group South Africa against more than 20 multinationals for wrongdoings during the apartheid era and against Royal Dutch Petroleum (*Kioble v. Royal Dutch Petroleum*) for the collaboration with the Nigerian military regime referred to in subchapter 2.2.5.¹²⁷ Many of them have ended in profitable settlement agreements.

Unsurprisingly, the dramatic rise in human rights lawsuits since the 1980s with no direct link to the US has led to harsh critique both within and outside the US. Amongst the concerns expressed is the fear of an interference by courts with the US government’s foreign policy¹²⁸ caused by the extraterritorial nature of the ATS making persons and potentially companies

¹²⁵ § 1350 of title 28 of the United States Code.

¹²⁶ Two Paraguayan plaintiffs (living in the US) sued a former Paraguayan police chief (also resident in the US) for having tortured and murdered a family member. For more information see http://en.wikipedia.org/wiki/Alien_Tort_Statute.

¹²⁷ The Khulumani Support Group was established in 1995 by victims of the apartheid policies and their families. In 2002, the group filed putative class action suits in the US based on the ATS against multinationals such as Daimler, Ford, IBM and Swiss multinationals Oerlikon Bührle, Credit Suisse and UBS. The multinationals were accused of having facilitated human rights violations committed by the apartheid regime by eg selling computers and cars to the South African Government. In the light of these events, the Swiss Federal Council on 16 April 2003 even decided to restrict the access to its official archives in order to prevent Swiss enterprises from being disadvantaged in the lawsuits in the US by the revelation of potentially “uncomfortable facts”.

The Nigerian plaintiffs in *Kioble v. Royal Dutch Petroleum* alleged that they were victims of severe human rights violation (murder, torture, deprivation of property, etc.) conducted by the Nigerian Government, however in collaboration with Royal Dutch Petroleum.

¹²⁸ South African President Thabo Mbeki for example heavily criticised the lawsuits in the US based on ATS arguing that it interferes with the objectives of the Truth and Reconciliation Commission. See Meron Tesfa Michael ‘Moment of Truth: South Africa’s Truth and Reconciliation Commission Closes its Doors’ *Worldpress.org* 2 March 2003 available at <http://www.worldpress.org/Africa/1077.cfm> (‘We consider it completely unacceptable that matters that are central to the future of our country should be adjudicated in foreign courts.’).

Legally Binding Approaches to Close the Gap

around the world subject to US law without their knowledge, the encouragement of forum shopping and linked to it an undue burden for US courts having to deal with “foreign issues”, an adverse impact on the competitiveness of US-based multinationals and many more. Consequently, critics have demanded the US Congress to repeal or at least restrict the scope of ATS, some of them alleging that it ‘would make more sense for the Group of G7 or the Organization for Economic Cooperation and Development (OECD) to launch a comprehensive review of corporate responsibility and liability.’¹²⁹

On the other side human-rights organisations and other activists perceived the ATS to be the main driving forces behind foreign direct liability, regarding it as the most promising approach to hold multinationals accountable and have therefore set great hope and expectations into this statute.

However, the international human rights movement has suffered a major setback when the US Court of Appeals for the Second Circuit in the causa *Kiobel v. Royal Dutch Petroleum* in September 2010 came to the following conclusion:

‘We hold, under the precedents of the Supreme Court and our own Court over the past three decades, that in ATS suits alleging violations of customary international law, the scope of liability — who is liable for what — is determined by customary international law itself. Because customary international law consists of only those norms that are specific, universal, and obligatory in the relations of States *inter se*, and because no corporation has ever been subject to *any* form of liability (whether civil or criminal) under the customary international law of human rights, we hold that corporate liability is not a discernable — much less universally recognized — norm of customary international law that we may apply pursuant to the ATS. Accordingly, plaintiffs’ ATS claims must be dismissed for lack of subject matter jurisdiction.’¹³⁰

¹²⁹ Mark C. Medish and Daniel R. Lucich ‘Trying an Old Law’ *The New York Times* 1 June 2009 available at http://www.nytimes.com/2009/06/02/opinion/02iht-edmedish.html?ref=global&_r=0, accessed on 26 November 2013.

¹³⁰ *Kiobel v. Royal Dutch Petroleum*, decision by the US Court of Appeals for the Second Circuit of 17 September 2010, 1 et seq.

Legally Binding Approaches to Close the Gap

On 17 April 2013, the US Supreme court upon appeal by the plaintiffs has put the “final nail into the coffin” by affirming the Court of Appeals for the Second Circuit’s decision and concluding that the ATS does not apply to human rights violation committed by corporations in foreign territories.

In the light of the Supreme Court’s decision, inter alia the Khulumani Support Group’s (apartheid) lawsuit was rejected on 21 August 2013 by the US Court of Appeal for the Second Circuit.

However, this does not spell the end to the enforcement of sound corporate behaviour based on tort law. But surely the most promising “road” to foreign direct liability has been closed. What remains is the enforcement of sound corporate conduct through claims before US state (but not federal) courts and other courts of the Western hemisphere based on the general principles of tort law.¹³¹ ‘Although this type of tort-based litigation may not engender the level of moral condemnation that claims pertaining to corporate human rights violations on the basis of the Alien Tort Statute do, it does allow for claims in relation to a much broader range of people- and planet-related norm violations resulting from multinational corporations’ transnational activities.’¹³²

¹³¹ An example is *Lubbe v. Cape Plc*, supposedly the most prominent case in the UK. 3000 mainly South African plaintiffs having been exposed to asbestos in South African mines during apartheid filed a lawsuit in the UK against the parent company alleging that the latter has violated its duty of care. The defendant sought to stay the proceedings based on forum non conveniens. In 2003, the case was settled.

¹³² Liesbeth Francisca Hubertina Enneking *Foreign Direct Liability and Beyond* (published thesis, University of Utrecht, 2012) Preface x.

5.3 INTERIM CONCLUSION

The general principles of tort law seem to provide a suitable avenue in certain cases to seek redress for corporate misconduct committed abroad. However the scope is very limited and there is a plethora of obstacles that have not been discussed here, amongst them the “forum non conveniens-doctrine” in the case of common law countries as well as the Brussels I Regulation in case of EU member countries.¹³³ To the best knowledge of the author, all actions against parent companies based on the concept of foreign direct liability – both in the US and in Europe – have been rejected so far.¹³⁴ The same would be very likely to happen in Switzerland.¹³⁵ As a rule, the bringing of action against a Swiss parent company for transgressions of its subsidiary committed abroad is precluded. Even a wholly owned subsidiary is legally independent from its holding and a fundamental responsibility on the part of the latter for the acts of the former does not exist under Swiss law.

It has to be admitted though that this statutory concept (having its origin in the 19th century) of a legally, economically and organisationally independent company (subsidiary) does generally no longer reflect the economic reality. As a rule, the legal independence of subsidiaries is de facto reduced to a minimum or entirely absent. Moreover, the concept of piercing the corporate veil is much discussed in theory but outmost restrictively applied in practice.

¹³³ Both limit the court’s jurisdictions. For an elaborate discussion see *ibid* at 145 ff.

¹³⁴ *Inter alia* also the action against Royal Dutch Shell in the Netherlands for the environmental damages caused by its subsidiary in Nigeria (see footnote 124). According to the Dutch court, (only) Shell’s Nigerian subsidiary is responsible and liable.

¹³⁵ Insofar as can be ascertained, only one action against a multinational has been brought before a Swiss court. In 2004, a Gypsy organisation filed a lawsuit against International Business Machines (IBM) in Geneva for having provided the Nazis with a punch card technology through its German subsidiary between 1939 and 1945, thereby allegedly facilitating holocaust. IBM had its European headquarters in Geneva during the relevant time. However, in 2006, the case was dismissed due to prescription. For more information see the judgement of the Swiss Federal Court (the country’s highest court), *BGE 132 III 661*, available at <http://www.bger.ch/index/jurisdiction/jurisdiction-inherit-template/jurisdiction-recht/jurisdiction-recht-leitentscheide1954.htm>. South Africa with its apartheid history on the other side, has been involved in foreign direct liability cases as place of corporate misconduct performed by various subsidiaries of foreign parent companies, and therefore rather as source of complaints abroad than as forum where South African parent companies have been tried to be held to account. But in principal, considering that South Africa is a common law country, it is conceivable that it provides a forum for foreign direct liability cases based on tort law.

Legally Binding Approaches to Close the Gap

Besides legal difficulties practical concerns confine the applicability of foreign direct liability cases. It seems infinitely more difficult to legally assess transgressions committed abroad and to moreover establish the necessary and legally relevant link to the parent company (eg negligent behaviour), allowing the judge to apply the home countries standards and to ultimately hold the parent company to account. Furthermore, it has to be doubted that the countries currently providing suitable forums are willing to ease the access to their courts, thereby burdening their legal court systems, possibly limiting their latitude in terms of foreign policies and taking the risk of competitive disadvantages.

The same is true of course with regard to the enactment of new laws having extraterritorial effect. Hence the two related approaches do provide for a valid tool to regulate the multinational's behaviour abroad to a certain extent, but is unlikely that they become more than small puzzle pieces in the greater picture.

6 NON-BINDING PRINCIPLE BASED FRAMEWORKS

'As a lawyer of many years experience I can tell you that you can get around a rule – but it's not so easy to get around a principle'

Professor Mervyn King, 2012¹³⁶

The governance of corporations is not limited to a framework of statutory means. As elaborated in the previous chapters, the enactment of a statutory regulation on an international level, allowing multinationals to be held to account, does not seem to be realistic over the short to medium term. However, alternatives exist. Over the past two decades, more and more organisations, committees and countries have developed sets of voluntary principles contributing to good corporate governance.¹³⁷ In some cases, these codes embodying general guidelines of best practice are moreover underpinned by statutory law (hybrid approaches). In other words, another conceivable approach to encounter the existing accountability gap are non-binding, principle based guidelines reflecting the notions and concepts of Corporate Social Responsibility (CSR) or Corporate Citizenship (CC).¹³⁸ Such guidelines are devoted to directly or indirectly influence, regulate and eventually control the behaviour of multinational actors and in fact exist on both an international and national level.

¹³⁶ Jess Schulschenk 'Interview Summary Report' 14.

¹³⁷ On the basis of Jean Jacques du Plessis' definition of corporate governance (*Principles of Contemporary Corporate Governance*, 6), the author defines Corporate Governance as a "system of directing and a process of controlling a company and its organs and balancing the various interests of internal stakeholders and other parties that may be affected by the company's conduct in order to ensure responsible (social) behaviour and to achieve the maximum efficiency and profitability for a corporation enabling a sustainable long term growth". The origins of the corporate governance debate are traced back to the famous debate between Prof. E. Merrick Dodd and Prof. Adolf Berle in the 1930's, inter alia dealing with the problems caused by the separation of ownership and control.

¹³⁸ In brief, CSR and CC are concepts fostering the positive impacts of the company's business activities on the various stakeholders and moreover assuming responsibility for the negative impacts. A more detailed discussion of these very interesting concepts is however beyond the scope of this work.

Non-Binding Principle Based Frameworks

Principle based (ideally multilateral) guidelines represent a mild regulatory approach, thereby waiving a sovereign and legally binding effect and instead appealing to the responsibility and an ethical behaviour of the individuals and the corporate actors, demanding the latter to comply with (minimum) standards set out by an (international or national) organisation or committee.

6.1 UNILATERAL GUIDING PRINCIPLES: KING REPORT III AND CRISA

A weak or non-existent corporate governance has been identified as causal for massive corporate scandals and failures in the 1980s and 1990s by a committee inter alia commissioned by the London Stock Exchange and led by Lord Adrian Cadbury. The committee's recommendations were set out in the Cadbury report published in 1992. Numerous other reports were to follow, altogether forming the UK Corporate Governance Code which requests listed companies to disclose how they have complied with the principles set out therein and, in case of non-compliance, explain why they did not comply ('comply or explain' approach).

After having jettisoned the political exclusivity approach being inherent to the apartheid system in 1990, the Institute of Directors in Southern Africa convoked a committee being representative of the new South Africa and named after its chairman, Professor Mervyn E. King. The King Report containing the King Code I was issued by the committee in 1994 and heralded the beginning of a new era in corporate governance, being the first code worldwide to the knowledge of the author to opt for an approach also best reflecting the new South Africa: The stakeholder inclusive approach.¹³⁹ In 1995, compliance with the King Code became a listing requirement.

¹³⁹ The stakeholder inclusive approach in principle reflects the view that a company is not a mere economic vehicle to generate shareholders' wealth. Subsequently and unlike in the case of the shareholder primacy approach, the shareholder's interests do not precede. According to the stakeholder inclusive approach, a company's board is in fact obliged to consider and recognise all the legitimate interests of the various stakeholders such as employees, suppliers, customers, regulators, the environment, the community the company operates in, etc. It follows that a company also has a responsibility towards inter alia the society and the environment.

Non-Binding Principle Based Frameworks

In 2002 and 2009, the King Code was revised and updated (King Code II and III).¹⁴⁰ King Code III inter alia introduced a new holistic form of reporting about the company's performance in the triple context, thereby departing from the traditional (financial) reporting standards providing the reader with a very selective, one-dimensional overview of the company's performance (bottom line). In brief, the companies are now required to also report on how they have created value with regard to social and environmental issues, hence the triple bottom line (profit, people, planet).¹⁴¹

King Code III's philosophy in principle consists of three key elements: (i) ethical and effective leadership, (ii) sustainability and (iii) good corporate citizenship. An ethical leader considers ethical values such as transparency, fairness, responsibility and accountability. He or she is concerned about the ecological footprint and therefore promotes sustainability, the ethical and economic imperative of this century. He or she is aware of the impact the company has on the various communities and the environment it operates in and subsequently accepts the responsibilities linked therewith.

In the author's view, the King Report III is currently the most sophisticated, aspirational, progressive and holistic corporate governance concept existing and is likely to serve as source of inspiration around the world in the short to medium term.

Last century's ownership revolution, which has made many of us – through our pension funds – indirect (and often unaware) shareholders of some of the largest companies, has led to a very dispersed shareholding, thereby even more accentuating the problems caused by a separation of ownership and control due to an increase of managerial powers and partially absent institutional investors, the latter omitting to fulfil their conceived functions in the check and balance system.

Whereas King Code III identifies the board of directors as the focal point of corporate governance, the complementary Code for Responsible Investing in South Africa's (CRISA) focus

¹⁴⁰ The King Report containing King Code III is available at <http://www.iodsa.co.za/?page=kingIII>.

¹⁴¹ Integrated reporting is considered to be a promising tool by the author. A thorough consideration and discussion of this approach is, however, beyond the scope of this work.

Non-Binding Principle Based Frameworks

is on the institutional investors and shareholders.¹⁴² This reflects the notion that some of the recent corporate failures in relation to governance have been at least partly caused by apathetic and unengaged institutional investors. Institutional investors such as pension funds, commissioned to represent the long term interest of their beneficiaries and holding approximately one-third of South Africa's equity, are predestined to successfully play an influential role by ensuring the implementation of long term strategies and demanding (and monitoring) compliance with the King Code.¹⁴³ They have the power to ensure that the check and balance system serves its purpose.¹⁴⁴

During the past two decades, corporate governance has come to the fore internationally. Despite corporate failures such as Swissair caused by its pathetic expansion strategy (the so-called "hunter strategy"), the Swiss equivalent to the King Code, the Swiss Code of Best Practice for Corporate Governance published in 2002, proves to be mediocre and rather non-aspirational.¹⁴⁵

6.2 MULTILATERAL GUIDING PRINCIPLES: THE OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES

Since the 1970s, inter alia international organisations and NGO's have contemplated and created legally non-binding codices and guidelines for global economic actors. 'Since a hard legal answer was (...) impossible – governments chose the way of "soft" law, namely of

¹⁴² The Code for Responsible Investing in South Africa is available at <http://www.iodsa.co.za/?page=crisa>.

¹⁴³ Typical institutional investors include banks, insurance companies, hedge funds and retirement funds. Institutional investors hold approximately 55 per cent of the equity in Switzerland, although two-thirds are foreign institutional investors. For more details see Tobias Weichsler *Corporate Governance und Shareholder Value – eine Empirische Untersuchung am Beispiel der Schweiz* (PhD thesis, University of St. Gallen, 2009) 7.

¹⁴⁴ However, not everyone seems to long for more institutional investors and shareholders in general to become more active and involved, as the following quote, from an anonymous sceptical Canadian CEO (SR Leighton & Donald H Thain *Making Boards Work* (1997) 6, shows: 'The key directors on our board all know what I have done to make our company perform. They made me the CEO because I was the best candidate they could find. I have worked my butt off at great sacrifice to my family and personal life to transform this company and make it perform better than it ever had before. I don't need any of their penetrating questions or second-guessing. Thanks to my own tough bargaining, I am financially secure and set for life. If they can get someone better than me to do the job, then that's what they should do. Until then let them back off and stay out of my way.'

¹⁴⁵ The Swiss Code of Best Practice has been developed by the Swiss Business Federation and is a voluntary set of principles on a "comply or explain" basis addressed to listed companies. However, compliance is not a listing requirement. It is available at

http://www.economiesuisse.ch/de/PDF%20Download%20Files/PosPap_CorpLaw_20020627_e.pdf.

Non-Binding Principle Based Frameworks

voluntary guidelines (...) addressed to multinational enterprises.’¹⁴⁶ One of the earliest multilateral approaches taken by an international organisation was the development of OECD’s Guidelines for Multinational Enterprises (hereinafter “Guidelines”).

6.2.1 INTRODUCTION AND SYSTEM OF THE GUIDELINES

The Organisation for Economic Cooperation and Development (OECD) today consists of 34 member states that commit themselves to democratic governments and market economy.¹⁴⁷ Its Guidelines for Multinational Enterprises are considered to be one of the most important multilateral codes of conduct for multinationals. Besides the 34 member states, eight additional states have signed the Guidelines.¹⁴⁸

The Guidelines are an important example of a voluntary international code of conduct. They were designed by an OECD Committee in cooperation with trade unions and employers’ associations in 1975 and were, after being annexed to the "Declaration on International Investment and Multinational Enterprises", adopted by the then 23 OECD member countries.

The Guidelines were last subjected to a thorough revision in 2000 and to a minor revision in 2011. The implementation of the Guidelines has been deliberately designed in two levels: While the guiding principles – with regard to multinationals – only enjoy the status of recommendations¹⁴⁹ its implementation by national governments – specifically the establishment of National (NCPs) – is binding.

This 2-stage system illustrates the comprehensive approach of the Guidelines. The code also includes complaints and inspection procedures, which offers interested parties the opportunity to submit a complaint pertaining to a possible breach of the Guidelines by a multinational to a NCP. The latter is there by not in a judgmental, but rather mediating

¹⁴⁶ Blanpain Roger & Colucci Michele The Globalization of Labour Standards, The Soft Law Track, Global Compact, ILO Principles, NAFTA Agreement, OECD Guidelines (2004) 120.

¹⁴⁷ The OECD was founded in 1948 as an Organisation for European Economic Cooperation in France. It was originally destined to assist the administration and implementation of the Marshall plan. Upon its reformation in 1961, the organisation changed its name.

¹⁴⁸ Argentina, Brazil, Egypt, Latvia, Lithuania, Morocco, Peru and Romania.

¹⁴⁹ OECD Guidelines for Multinational Enterprises, 2011 Edition, 17. Note: Unless specifically otherwise noted, the following remarks and page numbers refer to the revised 2011 version of the Guidelines.

Non-Binding Principle Based Frameworks

position, as evidenced by the possibility to initiate a dialogue and consensus-based conciliation procedure in which the dispute is seek to be solved. However, an imposition of sanctions through the NCP is not provided for in the Guidelines.

The UN report on Norms on the Responsibilities of transnational corporations and other Business Enterprises with Regard to Human Rights highlights the Guidelines' pivotal role by considering these to be part of the four main initiatives for the enforcement of an entrepreneurial responsible behaviour.¹⁵⁰ In literature, the Guidelines have moreover found a far reaching approval. The following circumstances are particularly seen to be causal for the enhanced importance of the Guidelines:

1. The national governments are obliged to set up NPCs to support implementation.
2. The stipulation of a transparent complaint- and inspection procedure. Albeit being of non-binding nature, the Guidelines at least provide for a mediation mechanism.
3. Global nature (42 signatory states). Among the world's 193 (currently recognized by the UN) states the signatory states are responsible for by far most of the 2000 largest transnational corporations, and for up to 85% of the global investment.¹⁵¹ ¹⁵² The signatory states are thus 'origin of the largest part of global direct investment flows' and cover a large part of the headquarters of most multinational companies.¹⁵³

6.2.2 REASONS FOR THE REVISIONS IN 2000 AND 2011

The original version of the Guidelines (1976) differed from the revised versions both in terms of its content and its scope in as far as it has been geographically limited to the territories of the OECD member states. The original version already provided for National Contact Points and a complaint process, but the latter unfolded little practical effect. This has resulted in

¹⁵⁰ Commentary, op cit 10.

¹⁵¹ For more information see Global 2000 Leading Companies available at <http://www.forbes.com/global2000/list>, accessed on 21 November 2013.

¹⁵² John Evans 'OECD Guidelines – one tool for corporate social accountability' available at http://www.google.co.za/url?sa=t&rct=j&q=&esrc=s&source=web&cd=5&ved=0CFAQFjAE&url=http%3A%2F%2Flibrary.fes.de%2Fpdf-files%2Fgurn%2F00094.pdf&ei=GhKOUvP-DoHt0gWl0oD4BQ&usg=AFQjCNE2HvIYm9fIJGqevkUpYRan2Ld2bg&sig2=yNp_c2mH6q6ky6ajEtTwdg&bvm=bv.56988011,d.d2k&cad=rja, accessed on 21 November 2013.

¹⁵³ German version of the OECD Guidelines for Multinational Enterprises, 2000 Edition, 5.

Non-Binding Principle Based Frameworks

unions – hitherto the main complainants – becoming increasingly passive and moreover increasingly skeptical about the results of the conciliation procedures. Before the major revision in 2000, TUAC¹⁵⁴ General Secretary Evans stated: ‘But the Guidelines must be effectively implemented. If they are not, it will just lead to cynicism. That has been the situation for the last ten years – “voluntary” has come to mean “optional”, there have been “Kafkaesque” clarifications from the OECD CIME, and so many National Contact Points have been non-existent.’¹⁵⁵

This assessment seems to be supported and reflected in the number of filed complaints: Whereas until the mid-1980s 29 cases were brought forward, only six complaints were lodged until 2000. Furthermore, only half of the totally 35 complaints have resulted in a formal clarification by the CIME, and even these decisions lacked a measurable effect.¹⁵⁶

Having regard to the insufficient efficacy of the complaints procedure and the Guidelines as such, reference was made to the vague wording and the limited scope: ‘However, this document only affects OECD countries, most of which already have strong trade union movements and relatively consistent enforcement of labour laws.’¹⁵⁷ In other words, because of the geographical limitations on territories of the participating states the vast majority of problem cases pertaining to business activities of multinationals were in fact not governed by the Guidelines. Hence, the objective to establish principles promoting responsible business practices in the entire world failed. Retrospectively it can be said that the original version of the Guidelines (1976) proved to be rather ineffective.

¹⁵⁴ TUAC is the OECD’s Trade Union Advisory Committee.

¹⁵⁵ John Evans ‘The OECD Ministerial Council Conference on the Adoption of OECD-Guidelines for Multinational Enterprises’ available at <http://old.tuac.org/statemen/communiq/guidel2000.htm>, accessed on 21 November 2013. The CIME was the Committee on International Investment and Multinational Enterprises, a panel of the OECD inter alia being responsible for the application and interpretation of the Guidelines. In 2004, the CIME merged into the Investment Committee.

¹⁵⁶ Source: Blanpain Roger & Colucci Michele op cit note 146 at 65 and 67 et seq.

¹⁵⁷ Harvey Pharis ‘Developing effective mechanisms for implementing labor rights in the global economy’ available at

<http://www.google.co.za/url?sa=t&rct=j&q=&esrc=s&source=web&cd=2&ved=0CDkQFjAB&url=http%3A%2F%2Fdigitalcommons.ilr.cornell.edu%2Fcgi%2Fviewcontent.cgi%3Farticle%3D1472%26context%3Dglobaldocs&ei=ByaOUvmmJ5GX0QW81oDADQ&usg=AFQjCNGGnK1FA4cCODCzpcmUUFHj0RAyVA&sig2=Bs2kudt0iRKxLilJWbmo w&bvm=bv.56988011,d.d2k&cad=rja>, accessed on 21 November 2013.

Non-Binding Principle Based Frameworks

6.2.3 THE REVISED GUIDELINES

The revised OECD Guidelines still provide non-binding recommendations on transnational corporations to the governments of the member states and can be divided into three parts: Part 1 includes, in addition to a general introduction, the actual principles, which are organised in eleven thematic sections. The second part includes instructions for the implementation and the grievance procedures, while the third part includes both explanations of the principles as well as comments on the implementation and complaint procedures. The following section is devoted to a brief introduction and examination of the Guidelines.

In its introduction, the first part includes notes and draws attention to the important role multinationals play in the context of globalisation and the privatisation of the international stage. The profound structural transformations of the global economy are described as an opportunity to globally foster the development, but at the same time it is being pointed at the dangers involved.

The introduction is followed by the principles, which are divided into eleven sections (I - XI), covering the following topics:

I. *Concepts and Principles*

Emphasizes the voluntary legal status of the principles and the goal of spreading "standards of good practice". Also of importance is the geographically extended ambit of the principles.

II. *General Policies*

Includes specific recommendations related to the relationship between multinationals, the public sector of the host countries as well as the other stakeholders. Multinationals are inter alia required to

- comply with the principle of sustainable development, and
- respect the human rights and international obligations of the host State.

Non-Binding Principle Based Frameworks

A new feature of the Guidelines introduced with the revision in the year 2000 concerns the general involvement of suppliers, subcontractors and joint-venture partners.¹⁵⁸ The multinationals' duty of care is extended to these exponents.

III. *Disclosure*

The entrepreneurial activities should be transparent not only in financial terms but also in terms of social, ethical and environmental issues.

IV. *Human Rights*

The Guidelines emphasize the duty of the states to protect human rights and multinationals are held to recognise and respect human rights, thereby drawing 'upon the United Nations Framework for Business and Human Rights Protect, Respect and Remedy'.¹⁵⁹

V. *Employment and Industrial Relations*

Particularly refers to the relationship between employers and employees and in essence contains the basic labour principles of the International Labour Organisation (ILO).

VI. *Environment*

Multinationals are encouraged and required to pursue a sustainable environment policy.

VII. *Combating Bribery, Bribe Solicitation and Extortion*

Prohibits the direct or indirect bribery of government representatives and business partners.

¹⁵⁸ OECD Guidelines for Multinational Enterprises, 2011 Edition, 20 et seq.

¹⁵⁹ Ibid at 31.

Non-Binding Principle Based Frameworks

VIII. *Consumer Interests*

Requires from multinationals the application of fair business, marketing and advertising practices.

IX. *Science and Technology*

This section calls for multinationals to contribute to the technological advancement of the host country through a technology and a know-how transfer.

X. *Competition*

In consideration of the detrimental effects of agreements among competitors on the free market, the Guidelines condemn anti-competitive arrangements.

XI. *Taxation*

Multinationals are held to comply with local tax regulations and to cooperate with national tax authorities in order to enable the determination of tax liabilities.

Besides the inclusion of suppliers and subcontractors, the major innovation of the revision in the year 2000 is the territorial extension of the scope of the Guidelines. Whilst the old version (1976) was limited to the territories of the OECD member countries, the revised Guidelines also apply in those non-member states which have either (i) ratified the OECD Guidelines or are (ii) a host country of multinationals: 'The *OECD Guidelines for Multinational Enterprises* are recommendations addressed by governments to multinational enterprises operating in or from adhering countries.'¹⁶⁰ Since most of the largest multinationals have their headquarters in an OECD member state, the principles indeed guide and influence a vast majority of today's multinationals.

The integration of a chapter on human rights based on a collaboration with the United Nations Special Representative for business and cooperation, John Ruggie, is the most important renewal of the revision efforts of 2011.¹⁶¹

¹⁶⁰ Ibid at 3.

¹⁶¹ For more information on the Ruggie Principles, see footnote 114.

Non-Binding Principle Based Frameworks

6.2.4 NATIONAL CONTACT POINTS

6.2.4.1 GENERAL REMARKS

A peculiarity of the Guidelines which proves to be quite effective is the unique implementation mechanism supporting the Guidelines. Participating states are obliged to establish a National Contact Point (NCP).¹⁶² ‘The NCPs assist enterprises and their stakeholders to take appropriate measures to further the implementation of the *Guidelines*. They also provide a mediation and conciliation platform for resolving practical issues that may arise.’¹⁶³

An interested party alleging a breach or violation of the Guidelines can submit a complaint to the competent NCP.¹⁶⁴ Upon such a complaint, the NCP will assess ‘whether the issues raised merit further examination and respond to the parties involved.’¹⁶⁵ Should this be the case, the NCP will ‘offer good offices to help the parties involved to resolve the issues.’¹⁶⁶ ‘Good office’ includes inter alia, subject to the consent of the involved parties, ‘access to consensual and non-adversarial means, such as conciliation or mediation, to assist the parties in dealing with the issues.’¹⁶⁷

Since the revision of the Guidelines in the year 2000, the home NCP is deemed to be competent for issues arisen in a non-adhering country. In such a case, the home NCP shall pursue enquiries by corresponding with embassies and government officials of the country in question.

The revised Guidelines moreover require the NCP upon conclusion of the procedure – thereby further contributing to an enhanced efficiency – to either publish:

- a) A statement should the NCP’s assessment lead to the verdict that the issues raised ‘do not merit further considerations.’¹⁶⁸

¹⁶² In this respect, the Guidelines are not voluntary but mandatory.

¹⁶³ OECD Guidelines op cit note 158 at 3.

¹⁶⁴ The term “interested parties” is not defined, but NGOs are subsumed under this terminology (page 79 of the OECD Guidelines).

¹⁶⁵ OECD Guidelines op cit note 158 at 72.

¹⁶⁶ Ibid at 72.

¹⁶⁷ Ibid at 73.

¹⁶⁸ Ibid at 73.

Non-Binding Principle Based Frameworks

- b) A report in case that the provision of good office has led to an agreement between the involved parties. Information revealing the content of the agreement however requires the approval of the involved parties.
- c) A statement should no agreement be reached or in case of *unwillingness of a party* to participate in any procedures at all. Should the NCP deem it appropriate, it may include the reasons for the failure to reach an agreement in its statement.

In the light of the above, the strategy pursued by the Guidelines could, maybe best, be described as a “name and shame” concept. Considering the multinationals awareness of the detrimental reputational effect, public ‘naming and shaming’ obviously has to be considered an effective, general preventive “weapon”, contributing to and fostering an improved corporate behaviour. No multinational accused of unethical behaviour will be keen to read in a public statement issued by a governmental authority that it has been considered to be unwilling to participate in finding a solution to the raised issue.

Therefore, the Guidelines embodying ethical principles do in fact – in “cooperation and interaction” with the various constituencies of civil society such as medias and NGOs – provide a promising and remarkably efficient tool to ensure and foster sound corporate behaviour, despite their non-binding status.

6.2.4.2 MOPANI COPPER MINES PLC, ZAMBIA

In the alleged tax evasion referred to in subchapter 3.1.5.1 complaints to the NCPs of Canada and Switzerland have been submitted in April 2011, inducing the procedures outlined above and resulting in numerous statements.

On the basis of a leaked draft report by the audit firm Grant Thornton, Glencore International AG (now Glencore Xstrata) as the majority owner and the Canadian company First Quantum Ltd as well as a Zambian company belonging to the Zambian Government as the minority owners of Mopani Copper Mines plc were accused by a coalition of five NGOs of having violated Chapter II (General Policies) and Chapter XI (Taxation) of the Guidelines. The Swiss NCP’s procedure and reaction was as follows:

1. The NCP initially separately invited representatives of the parties to explain its function and to enable first informal talks.

Non-Binding Principle Based Frameworks

2. It convoked an ad-hoc group consisting of members of the Federal Department of Foreign Affairs and the Federal Department of Finance.
3. The Swiss NCP and the Canadian NCP hold meetings to discuss, approve and coordinate their procedures.
4. On 5 October 2011, the Swiss NCP concluded that the issues raised do merit further considerations and offered its good offices to promote a constructive dialogue between the parties.
5. Upon the signalled willingness of all involved parties to participate in a dialogue, the NCP drafted the Terms of Reference and appointed and contracted a professional external mediator.
6. The NCP provided for adequate facilities for the meeting held on 11 July 2011 and assisted the external mediator.
7. The NCP issued various reports and statements.

On 28 November 2012, the NCP released its final statement. Due to parallel and confidential non-judicial proceedings undertaken by Zambian tax authorities, the parties agreed to only partially disclose their mutual agreement:

- ‘• The parties reached a certain level of mutual understanding on the issues raised and clarification of issues raised.
- The parties had a thorough exchange of information and open and very constructive discussions.
- Both sides agreed to an exchange of information with the other parties, within the limits of applicable laws.
- Both parties will explore ways how to engage in further dialogue.
- The parties discussed and agreed on certain further steps.’¹⁶⁹

Despite the status as “soft law” and thus the lack of “sharp teeth”, the Guidelines with its unique implementation mechanism are quite likely to affect the operations of multinational enterprises, as the example above illustrates. Hence, OECD’s hope that its set of ethical principles will prevail as a worldwide standard creating an international level playing field for multinationals, seems to be justified.

¹⁶⁹ Final Statement by the Swiss NCP ‘Specific Instance regarding taxation policy by Mopani Copper Mines plc and Glencore International AG and First Quantum Minerals Ltd. in Zambia’ 5.

Non-Binding Principle Based Frameworks

An example of this is the “Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth” (Panel), established in 2000 by the UN secretary-general at the behest of the Security Council to investigate and report on (corporate) misconduct in the Democratic Republic of Congo. They established that companies domiciled in non-adhering countries such as (inter alia) South Africa also violated the Guidelines, the Panel applied the latter as a global standard.¹⁷⁰ Because of the “naming-and-shaming-effect” elaborated above, the Panel’s naming of 85 companies allegedly having violated the Guidelines prompted strong reactions by the latter.

6.2.5 INTERIM CONCLUSION

Principles are pervasive in nature and have an intrinsic and an extrinsic effect: *Intrinsically*, principles provide behavioural guidelines to the various individuals involved in a corporate entity. While the original principles will be of concern to the company’s management, the employees, suppliers and customers etc. will more likely be affected and guided by the company’s Code of Conduct which inter alia serves as a transmitter of the original principles.¹⁷¹ *Extrinsically*, principles as determined standards of conduct agreed upon on a broad basis create and express civil society’s expectations and therefore allows the “fourth power” (media) and NGO’s to assess the company’s degree of compliance with the principles and reveal and blame non-compliance.¹⁷² It goes without saying that civil society (and the media and the NGO’s in particular) greatly depend on transparency – as provided for by OECD’s

¹⁷⁰ UN Panel of Experts, Final Report of the Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth of the Democratic Republic of the Congo, 2002, 70.

¹⁷¹ A Code of Conduct is basically a broadly communicated guideline promulgating the company’s values, policies and principles and moreover expressing the expected behaviour. According to UNCTAD’s World Investment Report 2012 (p. 93), 90 per cent of the multinationals have CSR-codices, most of them based on multilateral reference standards of organisations such as the OECD, UNO or ILO.

¹⁷² There is a growing awareness of the nexus between corporate behaviour, the perception of the company in public, its reputation, the company’s goodwill and the impact on the bottom line (profit). Media and NGO’s fulfil a pivotal role as guardians of ethical principles. Their reports on corporate misconduct can directly affect the share value of a company. This also explains why Ivan Glasenberg in the light of numerous votes in the various municipalities (see footnote 74) and the therewith related (negative) publicity beyond the Swiss borders, (many renowned newspapers all over Europe carefully monitor what is happening and how the municipalities are voting), has broken the silence by sending a letter to the involved communities, emphasizing that the corporate misbehaviour alleged by NGO’s is without foundation and by furthermore referring to the various internal and external ethical guidelines that Glencore Xstrata adheres to. The letter is seen as expression of serious concerns about Glencore Xstrata’s reputation and its (new) willingness to be more responsive to civil society’s reservations about its business practices.

Non-Binding Principle Based Frameworks

unique implementation mechanism entailing the disclosure of statements or reports – in order to fulfil their decisive function. The reporting concept contrived by the King Committee (integrated reporting) propels reporting standards to a new level, enabling the interested parties to assess a company's performance in a hitherto unseen holistic way. It therefore does not come as a surprise that on an international level there are endeavours to globally promote this new reporting concept.¹⁷³ Other more sophisticated and / or advanced reporting concepts than the currently prevalent one such as Global Reporting Initiative's sustainability reports¹⁷⁴ or the Extractive Industries Transparency Initiative's (EITI) standards¹⁷⁵ are already being implemented by many multinationals, inter alia Glencore Xstrata.¹⁷⁶ They contribute to an enhanced transparency and an increased awareness of the relevancy of the triple bottom line.

At the same time, principles have the advantage of being adaptable and more flexible, meaning that one size does not have to fit all.

¹⁷³ The International Integrated Reporting Council (IIRC) is chaired by Prof. Mervyn E. King. 'The mission of the IIRC is to create *the* globally accepted International <IR> Framework that elicits from organizations material information about their strategy, governance, performance and prospects in a clear, concise and comparable format. The Framework will underpin and accelerate the evolution of corporate reporting, reflecting developments in financial, governance, management commentary and sustainability reporting. The IIRC will seek to secure the adoption of <IR> by report preparers and gain the recognition of standard setters and investors. Our vision is for <IR> to be accepted globally as the corporate reporting norm, benefiting organizations, their investors and other stakeholders by enabling informed decision-making that leads to efficient capital allocation and the creation and preservation of value. By encouraging a different way of thinking, <IR> will contribute towards the advancement of a more sustainable global economy.' IR 'The IIRC' available at <http://www.theiirc.org/the-iirc/>, accessed on 3 December 2013.

¹⁷⁴ 'A sustainable global economy should combine long term profitability with ethical behavior, social justice, and environmental care. This means that when companies and organizations consider sustainability – and integrate it into how they operate – they must consider four key areas of their performance and impacts: economic, environmental, social and governance. GRI's Sustainability Reporting Framework is a reporting system that enables all companies and organizations to measure, understand and communicate this information. GRI's mission is to make sustainability reporting standard practice; one which helps to promote and manage change towards a sustainable global economy.' GRI 'A Sustainable Global Economy' available at <https://www.globalreporting.org/information/about-gri/Pages/default.aspx>, accessed on 3 December 2013.

¹⁷⁵ 'The EITI maintains the EITI Standard. Countries implement the EITI Standard to ensure full disclosure of taxes and other payments made by oil, gas and mining companies to governments. These payments are disclosed in an annual EITI Report (to see all EITI Reports, go to data.eiti.org). This report allows citizens to see for themselves how much their government is receiving from their country's natural resources. Transparency can only lead to accountability if there is understanding of what the figures mean and public debate about how the country's resource wealth should be managed. Therefore, the EITI Standard requires that EITI Reports are comprehensible, actively promoted and contribute to public debate.' EITI 'The EITI Standard' available at <http://eiti.org/eiti>, accessed on 3 December 2013.

¹⁷⁶ Xstrata has published sustainability reports in line with GRI's guidelines since 2003, Glencore since 2011. Moreover, Glencore Xstrata is a supporter of the EITI Standards.

Non-Binding Principle Based Frameworks

In the light of the above, the author has come to the conclusion that ethical based (ideally multilateral) principles have to be considered as a promising, effective and pragmatic measure to intrinsically and extrinsically affect the multinational's behaviour beyond national boundaries, thereby moreover maintaining the fundamentally important principle of proportionality.

7 SWITZERLAND: PUBLIC AND POLITICAL DEBATES

'What is good for Marc Rich, is also good for Zug'

Walther Hegglin, member of the City Council of Zug, in the 1980s

Being responsible for approximately one-third of the world trade, up to 28 per cent of the human rights violations and a fair amount of the reported environmental damages in an international context¹⁷⁷ and after a ten-fold increase over the past decade of the sales revenues (CHF 763 billion) and the net receipts (CHF 20 billion) resulting in a GDP share of 3.4 per cent, a substantial (although not yet determined), share of the tax revenues, and approximately 10 000 jobs on a national (Swiss) level,¹⁷⁸ it does not come as a surprise that the commodities sector has increasingly entered public and political awareness particularly over the past three years in Switzerland. Especially the numerous NGO's studies, initiatives and reports having globalisation and its negative (and to a limited extent its positive) effects as their subject contributed to an increased sensibility of the broad public.

7.1 NGOs AND COALITIONS

The Berne Declaration for example, a Swiss NGO 'promoting more equitable, sustainable and democratic North-South relations since 1968'¹⁷⁹ and engaging itself for a fairer globalisation, has published a 384 page book in 2012 with the title *Commodities – Switzerland's most dangerous business*.¹⁸⁰ In its conclusion, the NGO demands that companies should conduct their business in an ethically responsible manner, thereby striving to meet the higher international (instead of the host country's lower) standards. From Switzerland as the home

¹⁷⁷ Figures according to United Nations Conference on Trade and Development (UNCTAD) and the UN Human Rights Council.

¹⁷⁸ Background Report op cit note 68 at 7 et seq.

¹⁷⁹ <http://www.evb.ch/en>.

¹⁸⁰ A free copy of this thoroughly elaborated book making astonishing revelations can be downloaded for free at <http://www.evb.ch/en/p19492.html>.

Switzerland: Public and Political Debates

country of many multinationals, the NGO demands (i) a strategy ensuring that multinationals accept their responsibility (de facto a statutory regulation), (ii) the piercing of the corporate veil in order to enable foreign direct liability, (iii) the abolishment of the cantonal tax privileges mentioned in footnote 51 and (iv) generally more transparency (country-by-country report).¹⁸¹

Moreover, 50 Swiss organisations have joined forces and gathered 135 285 signatures of Swiss citizens, urging the Federal Council and the Parliament to enact binding legal provisions compelling multinationals headquartered in Switzerland to comply with human rights and environmental standards worldwide. The coalition named *Corporate Justice* has launched a campaign and submitted petition no. 12.2042 to the Parliament in June 2012:

‘With the petition, the Federal Council and the Parliament are invited to ensure that companies based in Switzerland must respect human rights and the environment worldwide. A legal basis is needed,

– compelling Swiss companies to take precautionary measures (duty of care) pertaining to their own activities, the activities of their subsidiaries and the suppliers, in order to prevent human rights violations and environmental transgressions,

– ensuring that people who suffered damages from the activities of Swiss corporations, their subsidiaries or suppliers, can file a claim and seek redress here.’¹⁸²

The Parliamentary deliberations on the petition are currently in progress. However, the coalition has increased the pressure on the Parliament on 5 November 2013 by announcing that the coalition is contemplating about a citizen’s initiative, should the Parliament’s

¹⁸¹ The NGO demands the enactment of similar disclosure regulations as provided for in the Dodd-Frank Act (US) or the EU Directives. Listed (US and EU) and non-listed (EU) companies in the commodities industry have to disclose any payments such as taxes, royalties and production entitlements etc. directly or indirectly made by them, their subsidiaries or entities under their control etc. to foreign governments.

¹⁸² Petition no. 12.2042 available at

http://www.parlament.ch/afs/data/d/bericht/2012/d_bericht_s_k17_0_20122042_0_20130514.htm, accessed on 5 December 2013. A petition is a non-binding political tool to induce a legislative process. Every Swiss citizen is entitled to submit a petition to any authority.

Switzerland: Public and Political Debates

deliberations not lead to a satisfactory result.¹⁸³ It remains to be seen if the installation of the sword of Damocles yields the desired effect.

7.2 ACTIVITIES ON A POLITICAL LEVEL

7.2.1 PARLIAMENTARY REQUESTS

The increased awareness and sensitivity of the positive and negative impacts of the commodity industry is also reflected in the media and in an increasing number of parliamentary requests revolving around the commodities industry and its regulation. Whereas eight such requests have been submitted between 2002 and 2010, this amount has sharply risen (30!) in 2011 and 2012, as the overview (2002–2012) in addendum 9.6 shows.¹⁸⁴

From 1 January 2013 until 4 December 2013, another fourteen parliamentary requests have been submitted.

7.2.2 INTERDEPARTMENTAL PLATFORM ON COMMODITIES: BACKGROUND REPORT

In the light of the above, the Federal Department of Foreign Affairs (FDFA), the Federal Department of Finance (FDF) and the Federal Department of Economic Affairs, Education and Research (EAER) have created an interdepartmental platform on commodities with the aim to analyse the legal (regulatory issues, tax situation, corporate and government responsibility) and economic situation, to elicit the various challenges such as reputational risks and foreign- and development policy considerations, and to formulate recommendations addressed to the Federal Council, the country's executive consisting of seven members and serving as collective head of state.

The mere fact that an interdepartmental platform has been set up and after months of researches and analysis a report has been elaborated reflects that such an undifferentiated

¹⁸³ Switzerland is a direct democracy. Besides a referendum, Swiss citizens may since 1891 make use of another political instrument (citizen's initiative) allowing them to amend or change the constitution, thereby forcing the Parliament to enact an implementing act. If 100 000 signatures of Swiss citizens supporting the initiative are collected within eighteen months, the initiative will be put to vote by the Swiss population. The initiative has proven to be a powerful tool to force the Parliament and the Government to get active in fields the political elite would prefer to remain passive. It moreover serves as impetus for broad political and public debates.

¹⁸⁴ Background Report op cit note 68 at 49 et seq.

Switzerland: Public and Political Debates

and uncritical approach to the needs and desires of the extractive industry as expressed in the quotation at the beginning of this chapter is no longer conceivable today.

In essence, the eagerly awaited Background Report (i) acknowledges and emphasizes the outstanding economic importance of the commodities industry for Switzerland and the pivotal role it moreover plays in world trade; (ii) draws attention to the challenges such as the growing international competition in terms of business location, reputational dangers for Switzerland caused by corporate misconduct and the impact on foreign- and development policies; (iii) it discusses regulatory-, oversight- and taxation issues such as the regulatory problems caused by the intertwinement of commodity trading and the provision of financial services and addresses the issue of corporate taxation and transfer pricing and it; (iv) presents the strengthening and promotion of corporate responsibility on a domestic and global level and capacity building in countries with a weak governance as the preferred strategy to be pursued.

The Report has inter alia and in particular presented the following recommendations addressed to the Federal Council:¹⁸⁵

Recommendation 2: *Switzerland should, as a matter of principle, implement existing multilateral standards for the commodities industry. When introducing its own regulatory provisions, care should be taken to make certain that the measures have been agreed upon multilaterally so that they do not negatively influence overall conditions for companies based in Switzerland, as compared with those in competing business locations. At the international level, Switzerland should work actively both in the drafting and in the implementation of regulatory standards to make certain that they create the conditions for a level playing field worldwide.*

Recommendation 5: *Switzerland should actively support the discussion in the OECD on possible ways of curbing tax avoidance and review implementation of the results in Switzerland. In that context, it is also important that fundamental legal principles be respected and that a level playing field in competition in the domains of taxation and subsidies be assured.*

Recommendation 6: *The G20 initiatives to increase transparency with regard to prices and quantities in the physical commodities markets should be supported in multilateral forums.*

¹⁸⁵ Background Report op cit note 68 at 43 et seq.

Switzerland: Public and Political Debates

Recommendation 7: *Switzerland should strengthen its commitment to the Extractive Industries Transparency Initiative (EITI), and actively work to enhance the influence of the EITI. In particular, Switzerland should express its support, in principle, for the proposals for reforming the EITI that are currently being discussed. These relate, among other things, to reporting requirements on financial flows on a project-specific basis and on sales by national oil companies to commodity trading companies (including those domiciled in Switzerland). At the same time, the proposals aim, while taking into account the potential sensitivity of certain business information, to promote the transparency of government contacts through the disclosure of extraction agreements between governments and commodity companies.*

Recommendation 8: *The consequences of a potential introduction of transparency requirements – similar to those of the USA and the EU – for the Swiss commodity sector should be examined – and the drafting of a consultation draft should be considered. Switzerland should, moreover, advocate internationally a global standard that foresees transparency requirements that are clearly understandable and as similar as possible for all companies active in the extraction of resources.*

Recommendation 9: *Switzerland should continue to actively promote international initiatives for increasing the transparency of product flows – such as the OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas – and should implement the standards adopted. In addition, Switzerland should launch this year, as planned, the “Better Gold Initiative” for the creation of a value chain for the fair and sustainable extraction and trading of gold. Switzerland’s foreign gold trade statistics should be broken down on a country-by-country basis in order to increase transparency in this domain. Concrete proposals for the publication of statistics should be worked out by the working group appointed by the FDF.*

Recommendation 10: *Switzerland should continue in its commitment to promote corporate social responsibility and intensify the multi-stakeholder dialogue being conducted by the FDFA and the EAER on the UN Guiding Principles on Business and Human Rights. In conformity with Postulate 12.3503, “A Ruggie Strategy for Switzerland”, as submitted by von Graffenried, a review of the existing regime should be conducted, the gaps identified, and measures needed for implementation of the UN Guiding Principles defined. Swiss companies should, in keeping with the principles of corporate social responsibility, exercise due diligence with regard to human rights and the environment – particularly when operating in fragile states – and institute measures to minimise risks, contributing thus to the positive image of the companies themselves and of Switzerland as a business location. Switzerland should focus its efforts to implement its state duties and promote corporate responsibilities within both resource extraction and merchanting.*

Recommendation 11: *A working group, in cooperation with representatives of the stakeholders involved (specifically, the cantons, as well as companies and NGOs) should prepare proposals for corporate social responsibility standards (including implementation mechanisms) for the commodity merchanting industry. Based on those proposals, consideration should be given to the submission of initiatives and international guidelines – designed, specifically, also to deal with ecological effects – before the appropriate international bodies.*

Recommendation 13: *Switzerland should continue in its existing bilateral and global commitment to development cooperation and cooperation with Eastern Europe for the promotion of good governance and should intensify its efforts in specific areas, such as those of democratic monitoring mechanisms, government capacity building, and efficient management of resource extraction revenues. This will fundamentally strengthen the abilities of resource-producing countries to reduce such risks as money-laundering, corruption, the flight of capital, and tax avoidance.*

The selection of recommendations presented above reflects and reveals the government's strategy:

- No sector specific legislation and no unilateral legislative approach;
- Instead: Redress negative impacts by strengthening and promoting Corporate Social Responsibility, thereby involving international bodies (multilateral and principle based approach). Moreover, another focus lies on capacity building in the host countries (in terms of their weak governance);
- Furthermore: Ensure and ameliorate transparency.

The report and its strategic approach has been broadly welcomed, in particular by representatives of the commodities industry and representatives of economy in general. The report seems to reflect the current political consensus. The network Corporate Justice referred to above consisting of 50 organisations however attests the government a lack of vision. 'It would be wrong to level a blanket of accusation at Switzerland claiming lack of commitment. The country has strongly supported the work of the UN Special Representative, both financially and in terms of personnel. It participates actively in several international initiatives designed to foster corporate social responsibility, especially with regard to commodities. Some examples are the UN Global Compact, the Extractive Industries Transparency Initiative (EITI) or the Voluntary Principles on Security and Human Rights in the commodities and energy sector. The problem is that all these initiatives are voluntary and legally non-binding. They are not sufficient to effectively prevent human rights violations or environmental degradation by companies. They do not enable victims to get access to remedy.'¹⁸⁶ In the eyes of Corporate Justice, self-regulation is not enough and therefore not a feasible approach.

¹⁸⁶ Corporate Justice 'Voluntary rules as sacrosanct' available at <http://www.corporatejustice.ch/en/campaign/swiss-backgrounds/>, accessed on 10 December 2013.

Switzerland: Public and Political Debates

However, the report does not mark the final result – it is just the beginning of a more thorough political and social debate.

8 FINAL CONCLUSIONS AND RECOMMENDATIONS

*'It is the absence of broad-based business activity, not its presence, that
condemns much of humanity
to suffering.'*

Kofi Annan, former UN Secretary-General, 2005¹⁸⁷

8.1 FINAL CONCLUSIONS

Globalisation 2.0 has enabled multinationals – through their transnational activities – to get rid of the shackles of national responsibility and to gain enormous economic, social and political weight and power as a consequence. This is particularly true for one of the alleged globalisation winners, the commodities sector. The world's population unsaturated and unbroken greed for raw material is used by multinationals as a hostage and has at least partially contributed to degenerate many national governments into their willing serving puppets.

Since the international community of states has at the same time failed to create supranational institutions, (and still seems to be unwilling or incapable to do so), equipped with the necessary instruments and powers to meet the winners of globalisation at eye level and to impose binding rules on the latter, the multinationals have increasingly operated in a certain regulatory and thus control and power vacuum. Legislative unilateralism on the premise of preventive and repressive laws with extra-territorial effect arguably have limited effect (not least for reasons of practicality) and are, moreover, controversially debated and vastly disapproved, for both domestic and foreign policy reasons. This finding also has its validity with regard to the concept of foreign direct liability, as evidenced by a restrictive interpretation of the scope of the (former) star and bearer of hope under the tort laws, the

¹⁸⁷ UN Secretary-General 'Latest Statements' available at <http://www.un.org/sg/statements/?nid=1508>, accessed on 16 December 2013.

Final Conclusions and Recommendations

U.S. Alien Tort Statute. The U.S. Supreme Court on 17 April 2013 has irrevocably denied an applicability of the ATS to human rights violations committed by corporations abroad.

However, this does not spell a definite end to the enforcement of sound corporate behaviour based on tort law. What remains is the onerous and gruelling attempt to enforce sound corporate conduct based on the general principles of the western hemisphere's tort laws.

As a result of an increased sensitivity, the missing supranational bodies have been at least partially substituted by the admonishing conscience of the civil society, often represented by NGOs and the media. This conscience is increasingly anchored in unilateral as well as multilateral, principle-based, ethical and non-binding guidelines.

These principles – ideally devised and enacted on a supranational level – are an expression of a mild, proportionate and pragmatic regulatory approach and develop – by encouraging leaders to pursue ethically desirable behaviour and thus reinforcing the positive aspects of globalisation – not only an intrinsic effect, but moreover – in as far as the principles are being understood as an expression of minimal expectations – an extrinsic effect enabling controls and an assessment of the degree of compliance.

The “naming and shaming” concept has proved to be an effective weapon, thereby causing civil society to condemn any form of misconduct and directly impacting the reputation and thus the value (bottom line) of multinationals. However, transparency is decisive and essential for such a concept in order to enable it to fulfil its intended role.

Due to a lack of a prospect of consensus on a supranational level it is therefore appropriate to pursue the path embarked on by further strengthening corporate governance and an ethical behaviour by means of principles-based, unilateral and multilateral Guidelines.

8.2 RECOMMENDATIONS

In the light of the above and based on the previous chapters, inspired by the findings obtained from an in-depth examination of the King Report III and the Code for Responsible Investing in South Africa (CRISA) as well as in consideration of Switzerland's liberal legislation tradition, the following recommendations are being made by the author, to be understood as impulses for further thoughts and as a contribution to the intensively conducted political and social debates revolving around the extractive industry and its regulation.

8.2.1 NATIONAL (SWISS) LEVEL

1. Globalisation has led to the rise of multinationals across the various sectors. Hence the pursuance of a multi-sectoral regulatory approach instead of a sector-specific legislation does seem as the more appropriate way to diminish the negative impacts multinationals can have in terms of environmental, social and economic issues.
2. Having the very limited global effect of a unilateral (binding) statutory regulation in mind and considering the massive detrimental impact of such a regulation on the country's competitiveness and ultimately its economy, Switzerland should not depart from its liberal regulatory approach and should therefore not (unilaterally) enact any hard-laws having a negative impact on the overall conditions for companies. Efforts to pierce or lift the corporate veil in case of multinationals to hold the parent company liable for the conduct of their subsidiaries (see subchapter 5.3) are in principle justified and do in fact reflect an economic reality, but have to be set about on an international, multilateral level.¹⁸⁸ As a general principle, Switzerland should seek to redress the negative impacts multinationals can have in international forums and not by solitary means.
3. Switzerland should – having King Code III as a model in mind and based on a apply or explain approach – revise its technical-organisational (but non-aspirational) Swiss Code of

¹⁸⁸ An interesting option to be pursued on a multilateral level and facilitating foreign direct liability would be the introduction of a rebuttable presumption to the disadvantage of the parent company assuming that the parent company has been aware of the business conduct of its subsidiaries.

Final Conclusions and Recommendations

Best Practice for Corporate Governance (Swiss Code) and particularly¹⁸⁹ implement, promote and embody:

- (i) Instead of the current shareholder primacy model (or King Code's stakeholder-inclusive approach) the enlightened shareholder value approach.¹⁹⁰
- (ii) Aspirational ethical values and concepts such as CSR and corporate citizenship, thereby intrinsically enhancing the awareness for ethically appropriate and desirable behaviour (ethical leadership) and extrinsically increasing the pressure to conduct business in an ethically correct manner.
- (iii) A provision stipulating that parent companies should – despite the legal, but as a reflection of the economic reality – assume full responsibility for the conduct of their subsidiaries.
- (iv) Ensure the utmost transparency. Transparency does – as a general rule – not restrict and limit a company in its business and wealth generation. It is a mild approach enabling civil society's constituencies to assess a company's behaviour and to fulfil its pivotal role referred to in the previous chapters. Therefore, the concept of integrated reporting should be introduced and compliance with the Swiss Code should become a listing requirement.¹⁹¹

4. In derogation of the rather hesitant position taken by the interdepartmental platform in its recommendation 8, a more brisk approach to enact similar transparency provisions as those stipulated in the Frank-Dodd Act or the EU Directives is recommended. However, once more a global transparency standard should be elaborated and promoted.

¹⁸⁹ Conceivably, sector specific principles could complement the generally applicable principles.

¹⁹⁰ In the eyes of the author, a business entity should in fact acknowledge and consider the pivotal importance of the shareholders as the providers of capital enabling its existence. Hence, a company's main focus should be to act in the best interest of its shareholders, because this is what the concept of business entities has been set up for – as a vehicle to conduct business. Considering the interdependency and reciprocity between business entities and the (social, ecological and economical) environment they operate in it is, however, appropriate to pay attention to the interests of the other stakeholders, including (inter alia) the employees, the customers, the environment and the community the company operates in, since their interests have to be seen as critical for an effective risk management and moreover and in particular to enable the company the generation of a long-term shareholder-wealth.

¹⁹¹ In compliance with the listing requirements of JSE, Glencore Xstrata will be obliged to devise an integrated report for the business year 2014. It will be interesting to observe the impact the integrated report and the concept behind it will have on the companies' strategy.

Final Conclusions and Recommendations

5. In consideration of the pivotal role shareholders in general and institutional investors in particular play in the fragile check and balance system and in order to ensure a sustainable long-term strategy, the shareholders' awareness of their responsibilities should be enhanced and the latter should be encouraged to become more active equity holders. With the publication of the "Guidelines for Institutional Investors on the Exercise of their Participation Rights in Joint-Stock Companies" (an equivalent to CRISA) on 21 January 2013 and elaborated by representatives of the economy, institutional investors and independent proxy representatives), a first step in the right direction has been made.¹⁹² However, others are to be followed; one of them could be the stipulation of a loyalty bonus (special dividend) to be granted to shareholders having held the shares for a certain time period; another (rather non-liberal) possibility to be considered is the stipulation of a legal duty for pension and retirement funds to vote at general meetings and to do so in the interest of their policyholders. Moreover, these institutional investors should be obliged to disclose how they have voted.

8.2.2 INTERNATIONAL LEVEL

Considering the transnational activities of multinationals, the international forum is the appropriate forum for most of the issues relating to the effects of globalisation. However, it is also a very lethargical, inefficient forum due to the lack of power. However, at least the adoption of reference guidelines (such as the OECD Guidelines) by the UN should be striven for. An adoption of guidelines by the UN would confer much more moral weight upon the principals embodied therein.

¹⁹² The Guidelines can be downloaded at [http://www.economiesuisse.ch/de/SiteAssets/PDF%20Download%20Files/Forms/EditForm/Richtlinien_integral_\(16012013\)_d.pdf](http://www.economiesuisse.ch/de/SiteAssets/PDF%20Download%20Files/Forms/EditForm/Richtlinien_integral_(16012013)_d.pdf).

8.3 CONCLUDING REMARKS

The – free of any aphorisms and thus rather modest – present contribution to the current national and global debate is an expression of the difficult political and social multi-dimensional framework. In the absence of a supranational institution having the power to enact and impose binding rules and considering that a solo of individual states is neither recommended nor likely, the author calls for the pursuit of a policy of small steps based on (ideally multilateral) voluntary, ethical principles, for the power of pervasive ethical principles should not be underestimated. It is certainly not the fastest, but not necessarily a less successful way leading to a more responsible (corporate) world in which companies are held accountable for their conduct – either by judges, the broad society or ideally both.

Addenda

9 ADDENDA

9.1 CORPORATE CLOUT 2013

Addenda

The World's Largest 100 Economic Entities

Rank 2012	Rank 2011	Country/ Corporation	Country of Companies	GDP/Revenues (US\$ million, 2012)	% Change 2011-2012
1	1	United States		15,684,75	4.0%
2	2	China		8,227,04	12.4%
3	3	Japan		5,963,97	1.1%
4	4	Germany		3,400,58	-5.7%
5	5	France		2,608,70	-6.1%
6	7	United Kingdom		2,440,51	0.4%
7	6	Brazil		2,395,97	-3.9%
8	9	Russia		2,021,96	6.5%
9	8	Italy		2,014,08	-8.3%
10	10	India		1,824,83	-0.7%
11	11	Canada		1,819,08	2.1%
12	12	Australia		1,541,80	3.4%
13	13	Spain		1,352,06	-8.6%
14	14	Mexico		1,177,12	1.6%
15	15	Korea		1,155,87	3.5%
16	16	Indonesia		878,198	3.8%
17	18	Turkey		794,468	2.6%
18	17	Netherlands		773,116	-7.7%
19	19	Saudi Arabia		727,307	8.6%
20	20	Switzerland		632,400	-4.3%
21	24	Islamic Republic of Iran		548,895	10.7%
22	21	Sweden		526,192	-2.3%
23	25	Norway		501,101	2.1%
24	23	Poland		487,674	-5.1%
25	22	Belgium		484,692	-5.8%
26	31	ROYAL DUTCH SHELL	Netherlands/UK	484,489	28.1%
27	27	Argentina		474,954	6.8%
28	26	Taiwan Province of China		473,971	2.1%
29	32	EXXON MOBIL	U.S.	452,926	27.7%
30	28	WAL-MART STORES	U.S.	446,950	6.0%
31	29	Austria		398,594	-4.7%
32	38	BP	U.K.	386,463	25.1%
33	30	South Africa		384,315	-4.5%
34	37	Venezuela		382,424	20.8%
35	41	SINOPEC GROUP	China	375,214	37.2
36	36	Columbia		366,020	11.7%
37	33	Thailand		365,564	5.8%
38	34	United Arab Emirates		358,940	5.0%
39	48	CHINA NATIONAL PETROLEUM	China	352,338	46.7%
40	35	Denmark		313,637	-6.0%
41	40	Malaysia		303,527	5.4%
42	42	Singapore		276,520	4.1%
43	46	Nigeria		268,708	10.1%
44	44	Chile		268,177	6.8%
45	45	Hong Kong SAR		263,021	5.7%
46	51	STATE GRID	China	259,142	14.5%
47	50	Egypt		256,729	9.0%
48	52	Philippines		250,436	11.4%
49	43	Finland		250,126	-5.1%
50	39	Greece		249,201	-14.1

Addenda

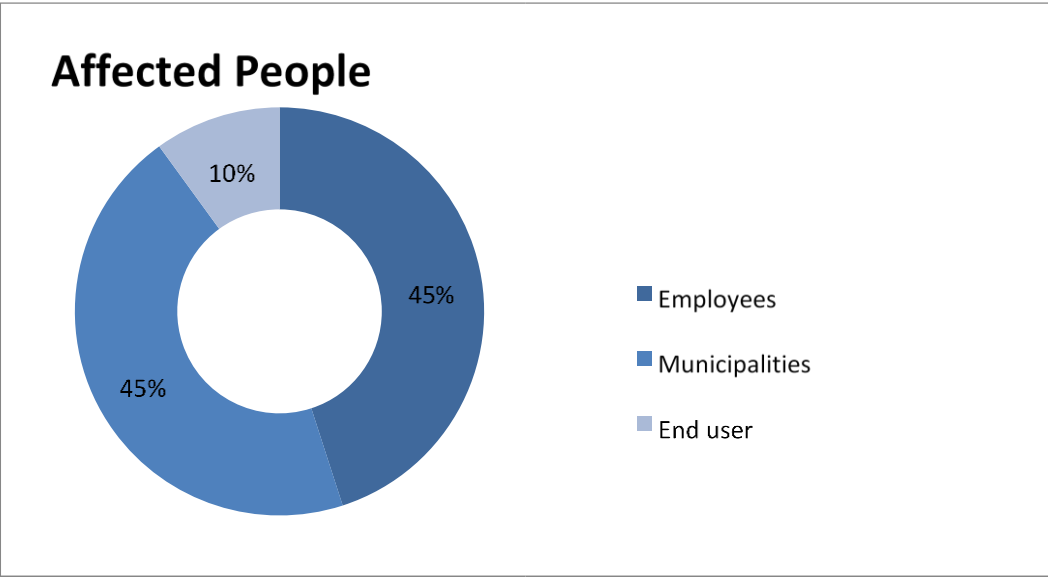
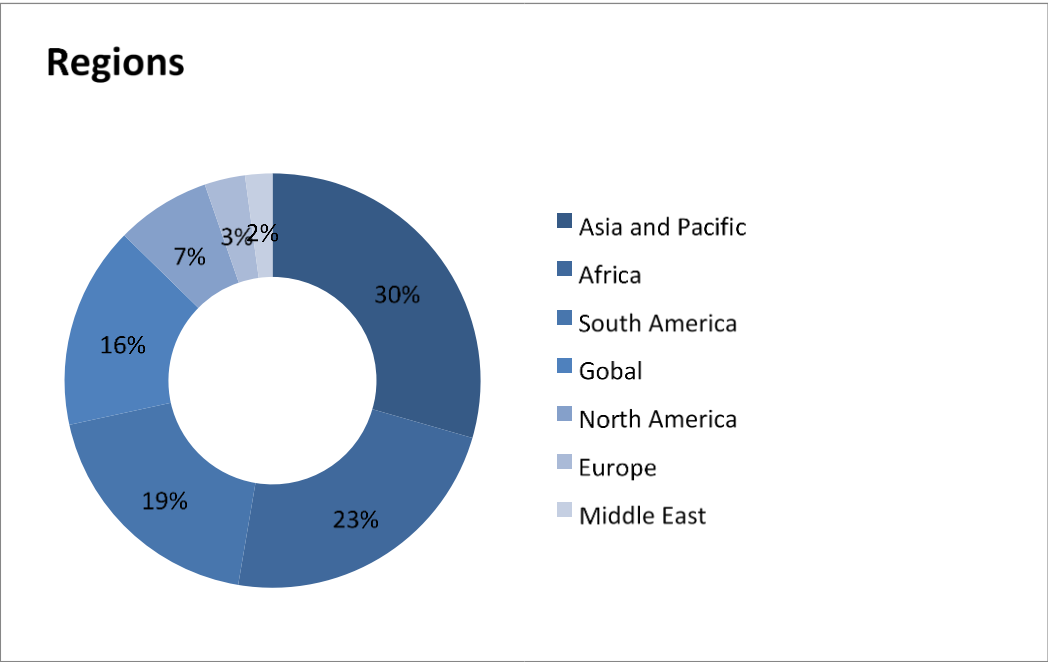
Rank 2012	Rank 2011	Country/ Corporation	Country of Companies	GDP/Revenues (US\$ million, 2012)	% Change 2010
51	59	CHEVRON	U.S.	245,621	25.1%
52	47	Israel		240,894	-1.1%
53	61	CONOCOPHILLIPS	U.S.	237,272	28.3%
54	53	TOYOTA MOTOR	Japan	235,364	6.1%
55	56	Pakistan		231,879	10.0%
56	60	TOTAL	France	231,580	24.5%
57	67	VOLKSWAGEN	Germany	221,551	31.8%
58	49	Portugal		212,720	-10.6%
59	64	Iraq		212,501	17.7%
60	57	JAPAN POST HOLDING	Japan	211,019	3.5%
61	54	Ireland		210,416	-4.9%
62	58	Algeria		207,794	4.5%
63	65	Peru		199,003	11.5%
64	62	Kazakhstan		196,419	7.3%
65	55	Czech Republic		196,072	-9.7%
66	75	GLENCORE INTERNATIONAL	Switzerland	186,152	28.4
67	66	Qatar		183,378	5.8%
68	68	Ukraine		176,235	7.8%
69	71	Kuwait		173,424	7.7%
70	70	New Zealand		169,680	4.8%
71	63	Romania		169,384	-7.2%
72	94	GAZPROM	Russia	157,831	33.0%
73	87	E.ON	Germany	157,057	25.6%
74	81	ENI	Italy	153,676	16.6%
75	74	ING GROUP	Netherland's	150,571	2.4%
76	78	GENERAL MOTOR	U.S.	150,276	10.8%
77	80	SAMSUNG ELECTRONICS	South Korea	148,139	10.7%
78	82	DAIMLER	Germany	148,139	14.4%
79	73	GENERAL ELECTRICS	U.S.	147,616	-2.6%
80	93	PETROBAS	Brazil	145,915	21.5%
81	77	BERKSHIRE HATHAWAY	U.S.	143,688	5.5%
82	69	AXA	France	142,712	-12.0%
83	89	Vietnam		138,070	12.5%
84	72	FANNIE MAE	U.S.	137,451	-10.6%
85	83	FORD MOTOR	U.S.	136,264	5.7%
86	85	ALLIANZ	Germany	134,168	5.3%
87	90	NIPPON TELEGRAPH & TELEPHONE	Japan	133,077	10.6%
88	84	BNP PARIBAS	France	127,460	-1.0%
89	86	HEWLETT-PACKARD	U.S.	127,245	1.0%
90	76	Hungary		126,873	-8.7%
91	88	AT&T	U.S.	126,723	1.7%
92	98	GDF SUEZ	France	126,077	12.7%
93	109	PEMEX	Mexico	125,344	23.5%
94	132	VALERO ENERGY	U.S.	125,095	45.4
95	128	PDVSA	Venezuela	124,754	41.2%
96	97	MCKESSON	U.S.	122,734	9.5%
97	96	Bangladesh		122,724	7.8%
98	100	HITACHI	Japan	122,419	12.6%
99	91	CARREFOUR	France	121,734	1.2%
100	129	STATOIL	Norway	119,561	36.4%

Addenda

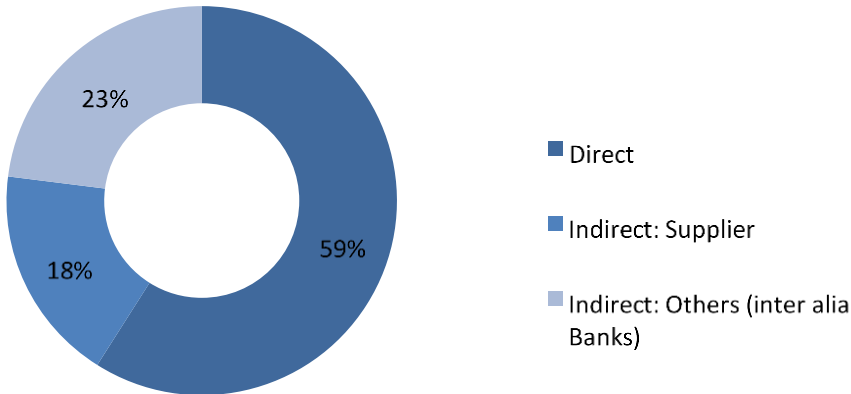
9.2 PROBO KOALA



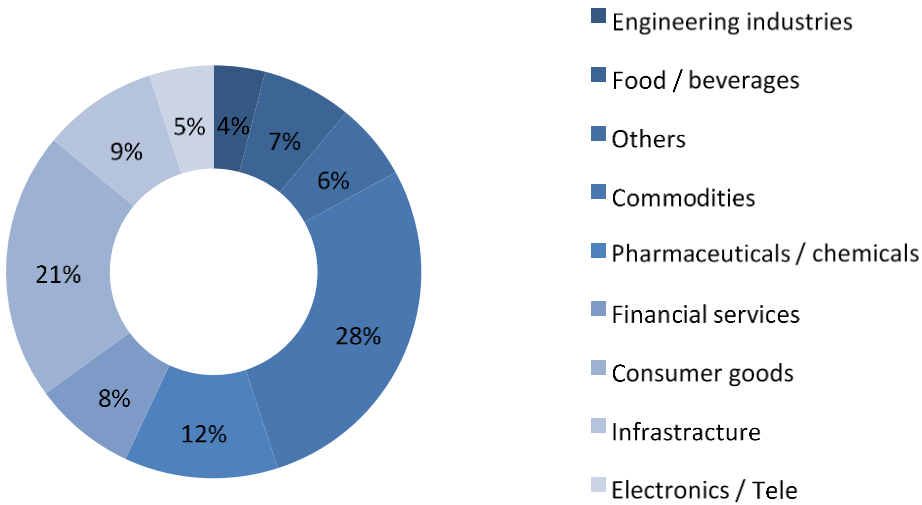
9.3 HUMAN RIGHTS VIOLATIONS CONDUCTED BY MULTINATIONALS



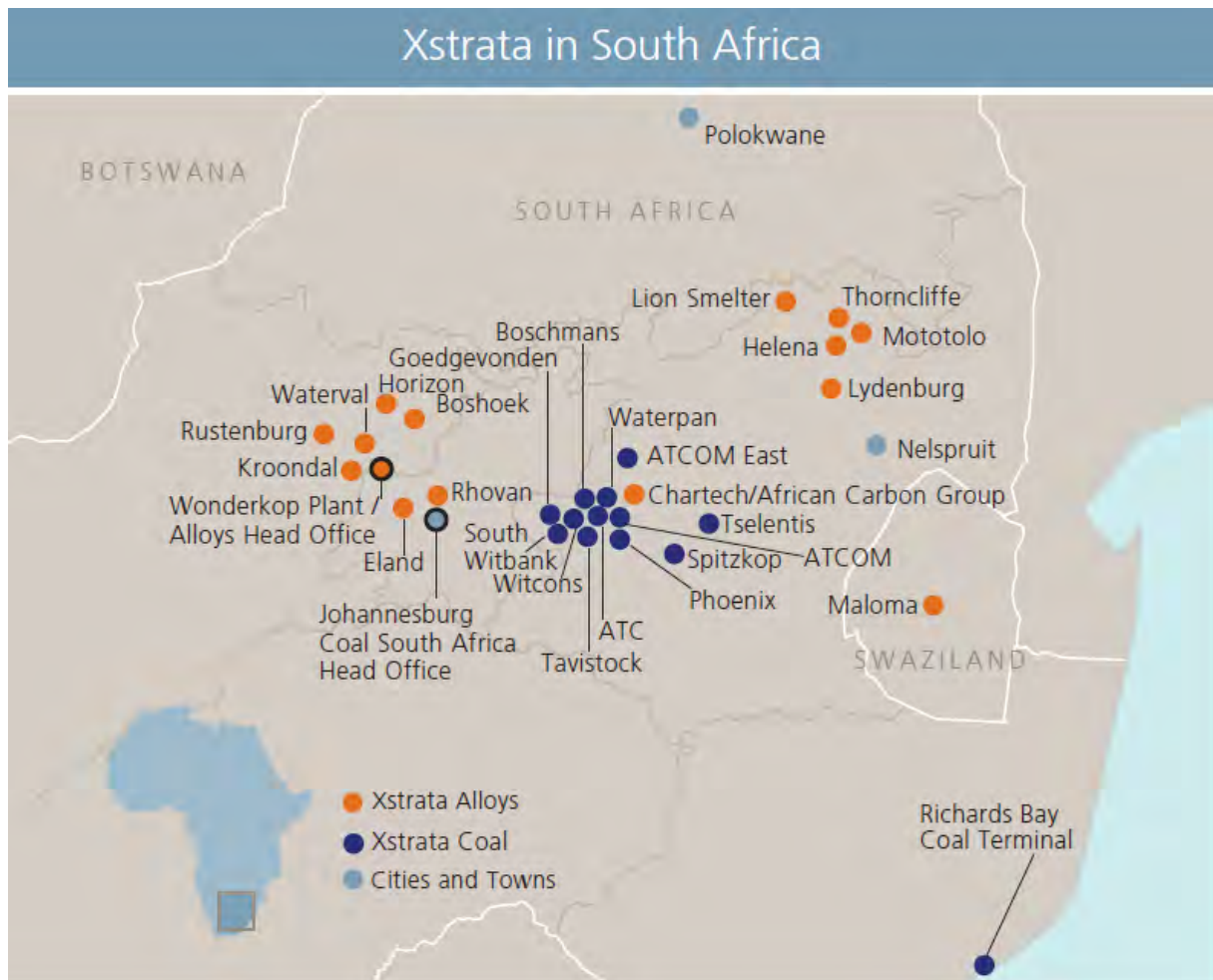
Form of participation in human rights violation



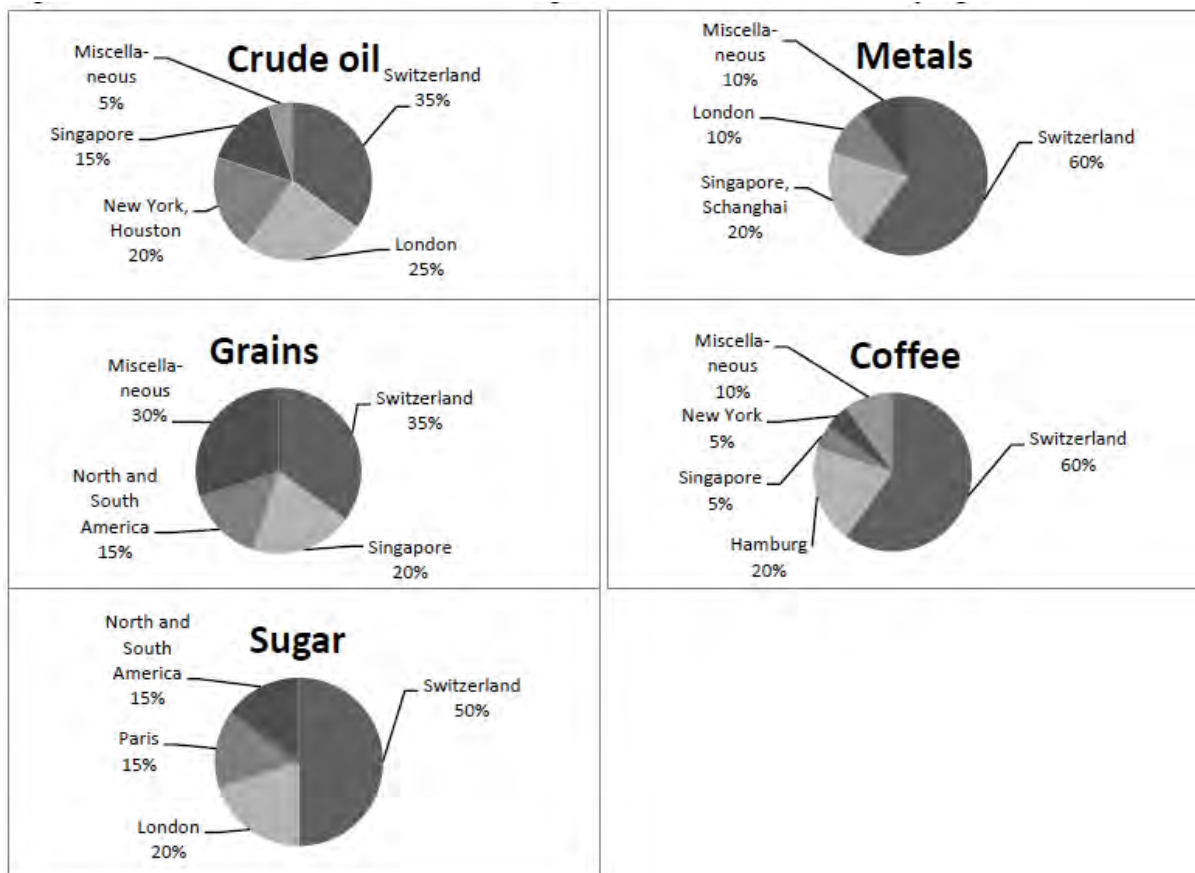
Economic sectors



9.4 XSTRATA IN SOUTH AFRICA



9.5 MARKET SHARES (COMMODITIES) OF TRADING CENTRES



Addenda

9.6 PARLIAMENTARY REQUESTS

Appendix 2: Parliamentary requests 2002 – 2012. Source: Curia Vista. Search terms: “natural resources”, “commodity market”, “commodity agreements”, “commodity prices”, and “mining” (consulted 31 December 2012)

Reference number	Title	Type	Group	Federal Council stance	Status	Submission date
05.5045	Granite industry in peril	Question time	CVP-EVP		Resolved	14.03.2005
07.3465	More price transparency for food products	Motion	SVP	Rejected	Rejected - Resolved	21.06.2007
08.3270	Food crisis, commodity and natural resource shortages	Postulate	CVP-EVP	Approved	Accepted - Referred	29.05.2008
08.3310	Food staples in financial vehicles	Postulate	CVP-EVP	Approved	Accepted - Referred	11.06.2008
08.3387	Speculation excesses in the finance industry	Interpellation	CVP-EVP		Resolved	12.06.2008
09.3819	Resource shortages. Better regulation of commodity futures markets	Interpellation	Green		Resolved	23.09.2009
10.5451	Swiss chocolate without child labour	Question time	SP		Resolved	27.09.2010
10.3736	Agriculture and the cost of living in Switzerland	Interpellation	SVP		Resolved	29.09.2010
11.3343	Uranium import declaration requirement	Motion	Green	Rejected	Rejected - Resolved	12.04.2011
11.5261	Who profits from Glencore?	Question time	SP		Resolved	07.06.2011
11.3585	Security of supply with regard to rare metals	Interpellation	CVP-EVP		Resolved	16.06.2011
11.3803	Switzerland's role as country of domicile to commodity trading companies	Postulate	SP	Approved	Rejected - Resolved	21.09.2011
11.3840	Regulate commodity merchanting companies	Motion	Green	Rejected	Not yet taken up in plenary	26.09.2011
11.3859	Country-by-country financial reporting. Switzerland a regulatory oasis?	Interpellation	SP		Not yet taken up in plenary	28.09.2011
11.3905	Securing natural resource supplies for Swiss industry	Interpellation	SVP		Resolved	29.09.2011
11.3929	Securing natural resource supplies for Swiss industry	Interpellation	SVP		Resolved	29.09.2011
11.4161	No money laundering in proprietary commodity trading	Motion	SP	Rejected	Not yet taken up in plenary	23.12.2011

12.5093	Preserve Swiss agricultural production volume	Question time	SVP		Resolved	06.03.2012
12.3138	Dubious practices in awarding of mining licences in the Congo. The role of Glencore and the IMF	Interpellation	SP		Not yet taken up in plenary	13.03.2012
12.5184	More transparency regarding financial flows in international commodity trading	Question time	CVP-EVP		Resolved	30.05.2012
12.5194	Peru and Xstrata. Independent monitoring	Question time	SP		Resolved	30.05.2012
12.5195	Peru and Xstrata. Social unrest	Question time	SP		Resolved	30.05.2012
12.5201	Killing of demonstrators in Peru. Switzerland's shared responsibility	Question time	Green		Resolved	30.05.2012
12.5208	Change in Xstrata's stance in Peru	Question time	Green		Resolved	30.05.2012
12.3442	Import and export of gold. Disclosure of statistics	Interpellation	SP		Resolved	06.06.2012
12.3449	Corporate social responsibility of international companies domiciled in Switzerland	Interpellation	CVP-EVP		Not yet taken up in plenary	07.06.2012
12.3475	Rare earth metals. Natural resource strategy	Postulate	CVP-EVP	Approved	Accepted - Referred	12.06.2012
12.3499	Human rights violations by foreign subsidiaries of Swiss companies. Access of victims to justice	Interpellation	CVP-EVP		Resolved	13.06.2012
12.3517	Violations of human rights and environmental standards by subsidiaries of multinational corporations	Interpellation	SP		Not yet taken up in plenary	13.06.2012
12.444	Insider trading rules also for currency and commodity markets	Parliamentary initiative	SVP		Not yet taken up in plenary	14.06.2012
12.3627	Extractive Industries Transparency Initiative (EITI): Switzerland's position in the strategy review process	Interpellation	Green		Not yet taken up in plenary	15.06.2012
12.3741	Due diligence for commodities from conflict and high-risk zones	Interpellation	SP		Not yet taken up in plenary	20.09.2012
12.3773	Transparency in payment flows of commodity companies	Motion	SP	Rejected	Not yet taken up in plenary	24.09.2012
12.3805	Investments in the large-scale exploitation of land and water resources in developing countries	Interpellation	SP		Not yet taken up in plenary	26.09.2012
12.3862	Coherency in economic sanctions?	Interpellation	SP		Not yet taken up in plenary	27.09.2012

12.3904	Measures against corporate impunity for human rights violations and environmental damage	Interpellation	SP		Not yet taken up in plenary	30.09.2012
12.5510	Corruption scandal in Nigeria. Reputational damage for Switzerland?	Question time	SP		Resolved	05.12.2012
12.1119	Tax conditions for commodity companies	Question	SP		Resolved	13.12.2012