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Business and Human Rights: Understanding the UN Guiding Principles from the perspective of Transnational Business Governance Interactions

Karin Buhmann*

Abstract

This article analyses the United Nations (UN) Guidelines on Business and Human Rights adopted in 2011 by the UN Human Rights Council from the perspective of Transnational Business Governance Interactions (TBGI) analytical framework.¹ The article identifies and discusses dimensions of interaction and components of regulatory governance which characterise the Guiding Principles, focusing in particular on the rule formation and implementation. The article notes that the Guiding Principles actively enrolled other actors for the rule-making process ensuring support in a politically and legally volatile field. It identifies mutual ‘piggy-backing’ by the Guiding Principles and other TBGI schemes, complementing the Principles’ very limited limitation and enforcement modalities and lending support to the rule-making and implementation of other schemes. The article concludes that the UN Guiding Principles are unique in several respects of relevance to transnational business governance interaction and indicate the relevance of the TBGI approach to public regulatory transnational business governance initiatives. The analysis of the Guiding Principles as interactional transnational business governance suggests that this form of governance offers prospects for public institutions as a means towards regulating global sustainability concerns.

Key words: UN Guiding Principles on Business and Human Rights (2011); TBGI analytical framework; transnational law, OECD’s Guidelines for Multinational Enterprises; orchestrating responsible business conduct

1. Introduction

The proliferation of private and multi-stakeholder public-private initiatives aiming to shape business conduct by non-enforceable forms of regulation in order to limit adverse business impact on society and promote sustainable global development has fascinated scholars from a range of disciplines for decades. Within this field, the issue of Business & Human Rights has emerged as an

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¹ Eberlein, Burkard, Kenneth W Abbott, Julia Black, Errol Meidinger & Stepan Wood, ‘Transnational Business Governance Interactions: Conceptualization and framework for analysis (2014) 8(1) *Regulation & Governance* 1-21

issue that states and businesses worldwide cannot ignore. It is broadly recognised that while business enterprises may contribute to the realization of human rights, such as by providing access to decent work and improved standards of living, business activities may also involve abuse of human rights. As noted by the United Nations (UN) Working Group on Human Rights and the Office of the High Commissioner for Human Rights, this has been underscored by recent tragedies like the Rana Plaza factory collapse, recurring reports of migrant worker exploitation, environmental impacts affecting people's rights, and many cases that never attract international attention. Moreover, in preparation for the international policy and development agenda past the 2015 'Millennium' Goals there is growing worldwide recognition of the human rights aspects of sustainable development and of the role business can play in addressing global challenges such as climate change, poverty and inequality.²

While private initiatives like the Forest Stewardship Council (FSC) have a history of several decades, multi-stakeholder initiatives (MSI) organised by public organisations are more recent and pose more challenges to the literature on governance, regulation and Corporate Social Responsibility (CSR).³ As evidenced by the UN Global Compact, launched by the (then) Secretary-General of the UN, which is the world's largest international organisation whose members comprise most of the world's States, the evolution of transnational business governance schemes is not limited to private initiative. Indeed, with the adoption of the UN *Protect, Respect and Remedy* Framework in 2008 and its operationalisation through the 2011 UN Guiding Principles on Business and Human Rights, the transnational regulation of business impact on society has undergone significant evolution.

Although technically limited to the issue of human rights, the development of these UN instruments have brought publicly initiated schemes strongly onto the stage, in practice reaching beyond human rights. The UN Guiding Principles differ from both the UN Global Compact another important recent regulatory MSI CSR scheme, the ISO 26000 Social Responsibility Guidance Standard: unlike the Global Compact, they explicitly connect State law and private regulation; and unlike ISO 26000, which like many other business governance schemes was launched by a private organisation,⁴ the Principles were developed from within a public international organisation. In terms of regulatory governance, the UN Guiding Principles are a novelty which connects elements of the state-centered international law not only to national law and legal institutions, but also to the forces of the market which drives many of the non-state business governance initiatives (Cashore 2002) in order to gain maximum influence on business conduct. The Principles comprise three complementary 'pillars': (1) the State Duty to Protect against human rights infringements at the horizontal level between individuals; (2) the Corporate Responsibility to Respect, which comprises both compliance with applicable laws and respect for social expectations of business organisations; (3) Access to Remedy, which implies that appropriate and effective remedies should be made available to alleged victims by States as well as by business organisations.

² UN Working Group and OHCHR (2014) 'Save the date': 2014 United Nations Forum on Business and Human Rights 2014, at <http://www.ohchr.org/EN/Issues/Business/Forum/Pages/2014ForumonBusinessandHumanRights.aspx>, last accessed 25 May 2014.

³ Scherer, Andreas Georg and Guido Palazzo (2011) The new political role of business in a globalized world: A review of a new perspective on CSR and its implications for the firm, governance and democracy, *Journal of Management Studies* Vol. 48 No. 4: 899-931.

⁴ The International Organization for Standardization (ISO) is an independent, non-governmental organization made up of members from the national standards bodies of 163 countries. According to its website, ISO is the world's largest developer of voluntary International Standards (http://www.iso.org/iso/home/about/about_governance.htm and <http://www.iso.org/iso/home/about.htm>, last accessed 13 September 2013).

The Guiding Principles have already had significant influence on several other public and private business governance instruments, including the Global Compact, OECD's Guidelines for Multinational Enterprises, ISO 26000 as well as EU and national law and policy. With limited own specific implementation modalities, the Guiding Principles also interact with the Global Compact, ISO 26000, OECD's Guidelines, EU policy and law and national law for their implementation. The way in which the Guiding Principles as a publicly initiated multi-stakeholder initiative on business governance has claimed the stage potentially changes prospects for sustainability oriented transnational regulation of business governance. Maximising this potential may be improved through understanding of the interactional aspects.

Adding to the relevance of such an undertaking, the Guiding Principles have proved to have significant actual and potential impact on business conduct as explicit guidance on how to internalise human rights concerns, exercise due diligence to avoid infringing on human rights, and provide remedies. Multinational and other companies are actively applying the Guiding Principles and collaborating with specialised organisations to develop tools for specific application. In particular, elements of the Corporate Responsibility to Protect, the Guiding Principle's 'second pillar', have been internalised by international organisations and standard-setting bodies (like those mentioned above) as well as governments (for example through National Action Plans on Business & Human Rights), businesses, investors and labour organisations. A website dedicated to the Guiding Principles lists examples of implementation and specific implementation guidance, in May 2014 counting more than 30 for businesses, more than 25 for governments, and more than 50 for investors, trade unions and other organisations.⁵

Thus, the Guiding Principles differ from the many private or public-private multi-stakeholder initiatives on Corporate Social Responsibility (CSR) by being developed under the UN Human Rights Council, which awards the Principles with a significant degree of state-based support related. They differ from their UN 'cousin', the Global Compact, by having a more explicit and direct business governance guidance character, by explicitly connecting state duties and business responsibilities, by their focus on remedies, and not least by the influence that the Guiding Principles have had on other intergovernmental and multi-stakeholder private or public-private instruments governing business conduct. This unprecedented convergence around a set of guiding principles on responsible business conduct warrants an examination of the Guiding Principles as a particular transnational business governance instrument.

This article adds to emerging knowledge on public governance of transnational business conduct by discussing the Guiding Principles from the perspective of the Transnational Business Governance Interaction (TBGI) framework⁶. The article shows that the Guiding Principles have worked around the political and institutional constraints of state-centred international law by actively involving or 'enrolling' private non-state actors in the development of business governance norms, and by 'piggy-backing' onto other transnational business governance schemes for their implementation.

⁵ See The Business & Human Rights Resource Centre, 'UN Guiding Principles on Business and Human Rights – Implementation – tools and examples', at <http://www.business-humanrights.org/UNGuidingPrinciplesPortal/ToolsHub> (last accessed 25 May 2014); see also the introductory discussion in De Felice, Damiano (forthcoming May 2015) 'Measuring respect for human rights by corporations: Challenges and opportunities in the production of business and human rights indicators', 37(2) *Human Rights Quarterly*.

⁶ Eberlein *et al.* 2014, *supra* fn 1.

With its main focus on the Guiding Principles, the article takes its empirical point of departure in an initiative which has been organised within a public regulatory setting. In adopting a public regulatory perspective to regulatory business governance and CSR, it follows the line of the sustainability ‘orchestration’ literature.⁷ More specifically, the UN Guiding Principles are examined as a type of transnational law. The analysis provides an intergovernmental and therefore, by implication, state-based perspective to the TBGI literature. By analysing the UN Guiding Principles as a so far unique example of intergovernmentally initiated soft law involving both public and private organisations in the making and interacting with other schemes for the implementation, the article contributes to understanding the interaction between private and public regulation as governance modalities to shape business conduct to reduce adverse impact on society. It contributes to the literature on regulation and governance by discussing and explaining aspects of the UN Guiding Principles, a CSR instrument that has so far not been much addressed in this literature from the perspective of governance and transnational interaction.⁸ In addition, the discussion of the implementation of the Guiding Principles and their influence on other business governance adds to the debate on the Guiding Principles and their precursor, the UN Framework in the business ethics literature, which has so far focused on the moral background and possible conflicts between the legal and philosophical dimensions.⁹ This adds to the combined business governance and ethics literature by exploring the Guiding Principles as an example of how ethical or responsible business governance may be promoted through the development of norms of conduct, their implementation, and enforcement.

The article proceeds as follows: Section 2 explains the background that motivates the analysis of the Guiding Principles from the TBGI perspective. 2.1 introduces the political and regulatory backdrop to the Guiding Principles and sketches their interaction with other business governance schemes of a transnational character. 2.2 offers a literature review and draws up some challenges which the Guiding Principles pose to existing scientific knowledge. With a particular focus on transnational law, 2.3 describes the pragmatic approach adopted by the article to discuss transnational regulatory developments with legal implications. Section 3 sketches the TBGI analytical framework (3.1) and explains the methodology (3.2), focusing on key definitional issues and elements for the purposes of the current subject. Section 4 is the analysis of the Guiding principles from the TBGI perspective. 4.1 offers an overview of the Guiding Principles highlighting interactional aspects in their formation and implementation. 4.2 discusses dimensions of interaction and components of regulatory

⁷ For example, Schleifer, P., ‘Orchestrating sustainability: the case of European Union biofuel governance’ (2013) 7(1) *Regulation & Governance* 533-546; Verbruggen, P., ‘Gorillas in the closet? Public and private actors in the enforcement of transnational private regulation’ (2013) 7(1) *Regulation & Governance* 512-532; Abbott, Kenneth W. & Duncan Snidal, ‘Taking responsive regulation transnational: Strategies for international organizations’ (2013) 7(1) *Regulation & Governance* 97-113.

⁸ Compare, however Wood, Stepan, ‘The Case for Leverage-Based Corporate Human Rights Responsibility’ (2012) 22(1) *Business Ethics Quarterly* 63-98; Muchlinski, Peter, ‘Implementing the new UN Corporate human rights framework: Implications for corporate law, governance and regulation’ (2012) 22(1) *Business Ethics Quarterly* 145-177.

⁹ Fasterling, Björn & Geert Demuijnck, ‘Human Rights in the Void? Due Diligence in the UN Guiding Principles on Business and Human Rights’, (2013) *Journal of Business Ethics* 1-16; Cragg, Wesley, ‘Ethics, enlightened self-interest, and the Corporate Responsibility to Respect Human Rights: A critical look at the justificatory foundations of the UN Framework’ (2012) 22(1) *Business Ethics Quarterly* 9-36; Bernaz, Nadia, ‘Enhancing Corporate Accountability for Human Rights Violations: Is Extraterritoriality the Magic Potion?’ (2012) *Journal of Business Ethics*, DOI 10.1007/s10551-012-1531-z; McCorquedale, Robert, ‘Corporate Social Responsibility and International Human Rights Law’, (2009) 87 *Journal of Business Ethics* 385-400; Wettstein, Florian, ‘Beyond voluntariness, beyond CSR: Making a case for human rights and justice’ (2009) 114(1) *Business and Society Review*, 125-152.

governance. 4.2.1 explains the background for the Guiding Principles with particular focus on the goal and agenda setting for transnational business governance through the UN. 4.2.2 examines TBGI dimensions and components of the Guiding Principles with regard to rule formation and 4.2.3 with regard to implementation. 4.2.4 briefly describes monitoring and information gathering, compliance promotion and enforcement, and evaluation and review, suggesting issues of transnational business governance interaction that may evolve as the Guiding Principles and their interaction with other TBG institutions mature. Section 5 concludes that the UN Guiding Principles are unique in several respects of relevance transnational business governance interaction, and show the relevance of the TBGI approach to public regulatory transnational business governance initiatives. In terms of regulatory perspectives targeting business governance, section 5 notes that the analysis of the Guiding Principles as interactional transnational business governance suggests that this form of governance is capable of migrating from private governance to becoming adopted by public institutions as a means towards regulating global sustainability concerns.

2. Motivation and general theoretical approach

2.1. The Guiding Principles and their influence on other business governance schemes

2011 was a year of ‘fast-forward’ movement in terms of public international regulation of business as regards their impact on society. With the Human Rights Council’s adoption of the Guiding Principles on Business and Human Rights, the controversial issue of business responsibilities for human rights found a resolution, which soon left its imprint on other CSR regulation. Already in May 2011, based on a draft of the Guiding Principles and their predecessor, the UN *Protect, Respect and Remedy* Framework (‘the UN Framework’),¹⁰ the Organisation for Economic Cooperation and Development (OECD) revised its *Guidelines for Multinational Enterprises*.¹¹ The EU Commission responded by revising its definition of CSR to accord with the Guiding Principles and the OECD Guidelines. It also adopted the Guiding Principles’ recommendation for ‘smart-mix’ regulation, which entails a mixture of hard and soft law and other modalities intended to affect business conduct, such as guidance and incentives. In doing so, the 2011 EU Communication on CSR¹² underscored the role which the Guiding Principles playing in informing other public initiatives towards regulating CSR. This role had been visible also in chapters of social issues in the *ISO 26000 Social Responsibility Guidance Standard*,¹³ which had been adopted in 2010 as an MSI instrument based on collaboration between business, governments, labour organisations, civil society, academics and other stakeholders.¹⁴ The Human Rights chapter of ISO 26000 was influenced by the UN Framework, as was a 2012 revision of the International Finance Corporation *Performance Standards on Environmental and Social Sustainability*.¹⁵ A member of the World

¹⁰ *Protect, respect and remedy: A framework for business and human rights*. Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie. UN Doc. A/HRC/8/5 (2008), 7 April 2008

¹¹ *OECD Guidelines for Multinational Enterprises*, Organisation of Economic Cooperation and Development, May 2011, Paris, 25 May 2011.

¹² *A renewed EU Strategy 2011-2014 for Corporate Social Responsibility*. Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. Brussels, 25.10.2011. EU Doc. COM(2011)681.

¹³ *ISO 26000 Social Responsibility Guidance Standard*, http://www.iso.org/iso/iso_catalogue/management_standards/social_responsibility.htm, last accessed 6 December 2013.

¹⁴ ISO 26000 SR was developed over a five year period between 2005 and 2010 based on a multi-stakeholder process comprising industry, government, labour, consumers, nongovernmental organizations, academics and others.

¹⁵ *Performance Standards on Environmental and Social Sustainability*, International Finance Corporation, 1 January 2012.

Bank Group, IFC provides investment services to promote development in emerging economies and help reduce poverty. The Performance Standards provide guidance for IFC's clients on how to identify risks and impacts.¹⁶

A field once held to be voluntary action, CSR is increasingly coming to be subjected to public regulation. This takes place through regulatory modalities ranging from soft to hard public law as well as incentives and reporting.¹⁷ Combining approaches of legal and organisational scholarship, the TBGI framework proposed by Eberlein and others¹⁸ has been offered as an approach to conceptualisation and analysis of schemes applying non-state authority to govern business conduct across borders. Given that initiatives to regulate CSR are not, however, limited to non-state schemes, the scholarly need to understand interactional aspects of MSI schemes that emanate from public organisations is significant to fill the knowledge gap on the evolution and effects of such schemes. Similarly, in view of the influence that the Guiding Principles have already had on other CSR instruments, it is pertinent to understand how that instrument interacts with other instruments which promote or work through the exercise of 'private authority'.

2.2. Challenges to existing knowledge

A plethora of private or public-private codes of conduct, process guidelines and reporting schemes have emerged in later decades to guide companies towards managing and limiting their adverse impact on society. With national and particularly international policy and law-makers following, the 'voluntary'-'mandatory' dichotomy, which has marked much debate on CSR, is increasingly becoming obsolete.¹⁹ Instead, business ethics oriented organisational, political science and legal scholars are seeking to understanding how public authorities are engaging in regulating CSR and by what modalities such regulation, which is often non-enforceable, works. Some scholars theorize on ways in which public or public-private MSI regulatory activities affect CSR activities in companies.²⁰ Among such scholars, however, the appreciation of underlying social objectives, such (as opposed to competition or other economic objectives) that may be explored by studying the policy background and legislative history remains limited.²¹ Organisational CSR research has

¹⁶ IFC website, http://www.ifc.org/wps/wcm/connect/CORP_EXT_Content/IFC_External_Corporate_Site/What+We+Do/, last accessed 7 October 2013.

¹⁷ Ioannou, Ioannis & George Serafeim, *The Consequences of Mandatory Corporate Sustainability Reporting* (Harvard Business School Working Paper 11-100, October 26, 2012); Buhmann, Karin, 'The Danish CSR reporting requirement as reflexive law: Employing CSR as a modality to promote public policy' 13(2) *European Business Law Review* 187-216; Buhmann, Karin, 'Corporate Social Responsibility and Public Law: Towards juridification and coherence through UN Guidance on Business & Human Rights' (forthcoming) *International and Comparative Corporate Law Journal*.

¹⁸ Eberlein *et al.* 2014, *supra* fn. 1.

¹⁹ Mares, Radu, 'Business and Human Rights After Ruggie: Foundations, the Art of Simplification and the Imperative of Cumulative Progress', in Mares, Radu (ed) *The UN Guiding Principles on Business and Human Rights* (Antwerp: Brill, 2012) 1-50.

²⁰ Knudsen, Jette Steen, 'Company delistings from the UN Global Compact: Limited business demand or domestic governance failure?' (2011) 103 *Journal of Business Ethics* 331-349; Knudsen, Jette Steen & Jeremy Moon (2013) Regulatory configurations of Corporate Social Responsibility: International interactions of national government, business and civil society. Available at SSRN http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2318186 (last accessed 4 October 2013); Fasterling, Björn & Geert Demuijnck, 'Human Rights in the Void? Due Diligence in the UN Guiding Principles on Business and Human Rights', (2013) *Journal of Business Ethics*: 1-16; Matten, Dirk & Jeremy Moon, "'Implicit" and "Explicit" CSR: A conceptual framework for a comparative understanding of corporate social responsibility', (2008) 33(2) *Academy of Management Review* 404-424.

²¹ For example, Knudsen, Jette Steen & Dana Brown (2014) 'Why Governments Intervene: Exploring Mixed Motives for Public Policies on CSR' (2014) *Public Policy and Administration* (April 2014).

undergone a shift in emphasis on CSR as based mainly on business interests and ‘doing well by doing good’²² towards greater recognition of CSR as a measure to address public policy interests. Matten and Moon’s implicit-explicit CSR²³ recognises that company conduct, especially in Europe, is influenced by governmental objectives. With the emergence of the UN Global Compact and other initiatives, organisational literature has taken to analysing how governments and intergovernmental organisations address CSR and what causes authorities to adopt measures to promote business self-regulation to minimise adverse impact on society.²⁴ In their extensive discussion of the new political role of business in a globalized world, Scherer and Palazzo²⁵ demonstrate that the division of tasks between governments and business is giving way to a more integrated approach in which companies not only assume social responsibilities that go beyond legal requirements, but also assume responsibilities which are basically of a political nature, in order to address governance gaps. The UN Guiding Principles have escaped much of this discussion as an instrument which functions through both public and private governance to influence business conduct.

Legal scholars have sought to grasp the soft, transnational and often public-private character of CSR-related regulatory initiatives that tends to fall between conventionally recognised categories of public or private, national or international law. In contexts of business economics and corporate governance legal scholars have long discussed the justification for managers’ engagement in CSR.²⁶ More recently, international law oriented scholars have particularly taken to analysing the way in which CSR and public-private MSI initiatives are affecting boundaries between the public and the private regulatory sphere. Among these, some recognise that a blurring of boundaries between public and private, international and national law as well as politics and governance is occurring and theorise on implications for understanding interaction across those boundaries.²⁷ Direct or

²² Porter, Michael E. and Mark R. Kramer, ‘Strategy & Society: The link between competitive advantage and Corporate Social Responsibility (2006) *Harvard Business Review* 78-92; Smith, T., ‘Institutional and social investors find common ground’ (2005) 14 *Journal of Investing* 57-65; Moon, Jeremy, *Government as a driver of CSR*. ICCSR Working Paper No. 20 (University of Nottingham, 2004); Berman, S.L., A.C. Wicks, S. Kotha and T.M. Jones, ‘Does stakeholder orientation matter? The relationship between stakeholder management models and firm financial performance’, (1999) 42 *Academy of Management Journal* 490.

²³ Matten, Jeremy & Dirk Matten (2008) *supra* fn 20.

²⁴ Rasche, Andreas, ‘“A Necessary Supplement”: What the United Nations Global Compact is (and is not)’, (2010) 48(4) *Business and Society* 511-537; Steurer, R., S. Margula, ‘Public policies on CSR in Europe: Themes, instruments and regional differences’. CORE Conference IV: The potential of CSR to support the integration of core EU strategies, Berlin, June 15-16, 2009; Reich, Robert B., *Supercapitalism: The transformation of business, democracy and everyday life* (New York: Knopf, 2007); Moon, Jeremy, *Government as a driver of CSR*, ICCSR Working Paper No. 20 (University of Nottingham, 2004); Haufler, Virginia, *A public role for the private sector: Industry self-regulation in a global economy* (Washington D.C.: Carnegie Endowment for International Peace, 2001).

²⁵ Scherer, Andreas Georg and Guido Palazzo (2011), *supra* fn 3.

²⁶ Berle, Adolph A., Jr., ‘Corporate powers as powers in trust’, (1931) 44(7) *Harvard Law Review* 1049-1074; Dodd, E. Merrick. ‘For whom are corporate managers trustees?’ (1932) 45(7) *Harvard Law Review* 1145-1163; Berle, Adolph A. and Gardiner C. Means, *The Modern Corporation and Private Property* (New York: Macmillan, 1932); Teubner, Gunther, ‘Corporate fiduciary duties and their beneficiaries: A functional approach to the legal institutionalization of corporate responsibility’, in Hopt, Klaus J. and Gunther Teubner (eds) *Corporate Governance and Directors’ Liabilities* (Berlin and New York: Walter de Gruyter, 1985) 149-177.

²⁷ Eberlein *et al.* (2014) *supra* fn 1; Krisch, Nico and Benedict Kingsbury ‘Introduction: Global governance and global administrative law in the international legal order’, (2006) 17(1) *European Journal of International Law* 1-13; Lobel, Orly (2005) ‘The Renew Deal: The fall of regulation and the rise of governance in contemporary legal thought’, (2005) 89 *Minnesota Law Review* 262-390; Joerges, Christian, Inger-Johanne Sand & Gunther Teubner (2004) *Transnational Governance and Constitutionalism* (Oxford: Hart); Kingsbury, Benedict, Nico Krisch and Richard B. Stewart, ‘The Emergence of global administrative law’ (2005) 68(3) *Law and Contemporary Problems* 15-61; Backer, Larry Cata, ‘Multinational Corporations, transnational law: The United Nations’ Norms on the Responsibilities of Transnational

implicit critique against the UN Guiding Principles thrives in both the organisational and legal literature.²⁸ However, so far, little analysis has been made of the interactional character and other features of the Guiding Principles that may allow this publicly initiated MSI initiative specifically targeting business impact on society to push change.

Scherer and Palazzo argue that current theorizing on the firm in the CSR literature has not yet sufficiently integrated the new political role of private business, explaining that much of the literature pursues an instrumental view of CSR and builds on an economic paradigm which advocates a strict separation of political and economic domains.²⁹ The ‘political CSR’ perspective proposed by those authors “suggests an extended model of governance with business firms contributing to global regulation and providing public goods”.³⁰ Those authors recognise debates in legal studies, including the impact of globalisation on the regulatory power of state institutions, the blurring of boundaries between the public and the private, and the difficulty of international organisations like the UN and the International Labour Organisation (ILO) in filling governance gaps resulting from state’s lack of will or capacity to honour their obligations. They also recognise that with private and lower-level public actors and multi-stakeholder initiatives seeking to fill the governance gaps arising from the incapacity of international organisations and nation states, global governance is emerging as a new form of transnational regulation.³¹

Governance gaps are precisely what have led political scientists to emphasise the impact of weak governance and the need for more effective public guidance or hard regulation of company conduct to limit adverse effects on society.³² Contrary to the discussions in much of the above literature, the 2008 UN Framework and the 2011 Guiding Principles address governance gaps specifically in terms of governments’ omission of fulfilling their obligations under international and sometimes national law. By combining governmental duties (to protect against human rights violations, including but not only through national law) and business responsibility (to respect human rights, including through compliance with national law), the Guiding Principles seek to address the conditions of weak governance which allow business organisations to infringe on human rights. Simultaneously, the Guiding Principles play on other transnational business governance instruments for their implementation. The Guiding Principles offer a timely case for both contributing to filling the gap in the literature in terms of the interplay between public and private business governance, and providing the literature with enhanced insight into this instrument.

2.3. A pragmatic transnational law approach

In discussing the Guiding Principles as an example of transnational business governance, this article adopts the pragmatic approach within legal scholarship. Pragmatism as a scholarly approach allows

Corporations as a harbinger of Corporate Social Responsibility in international law’ (2006) 37 *Columbia Human Rights Law Review* 287-389.

²⁸ Fasterling and Demuijnck (2013) *supra* fn 9; Deva, Surya, ‘Treating Human Rights Lightly: A Critique of the Consensus Rhetoric and the Language Employed by the Guiding Principles’, in Deva, Surya and David Bilchitz (eds) *Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect?* (Cambridge: Cambridge University Press, 2013); Bernaz (2012) *supra* fn 9; Cragg 2012 *supra* fn 9; Knox, John H., ‘The Ruggie Rules: Applying human rights law to corporations’, in Mares, Radu (ed) *The UN Guiding Principles on Business and Human Rights* (Antwerp: Brill, 2012) 51-83; Mares (2012) *supra* fn 19.

²⁹ Scherer, Andreas Georg and Guido Palazzo (2011), *supra* fn 3.

³⁰ Scherer, Andreas Georg and Guido Palazzo (2011), *supra* fn 3, at 900-901.

³¹ Scherer, Andreas Georg and Guido Palazzo (2011), *supra* fn 3.

³² Ruggie, John G., ‘Reconstituting the global public domain – issues, actors and practices’ (2004) 10(4) *European Journal of International Relations* 499-531; Ruggie, John G., ‘Business and human rights: the evolving international agenda’ (2007) *American Journal of International Law* 101(4) 819.

for recognising observable facts even if these differ from doctrine (for example, the very limited role of business organisations in international law). In a legal context, a pragmatic approach entails arguments or analyses which stress the usefulness or expediency of particular actions or legal institutions, focusing on solving problems of reality rather than delving into abstract conflicts based in theory and doctrine.³³ Because they cut across established and even ‘carefully policed boundaries’³⁴ both in terms of legal and other social science theory and national territory, global social and environmental concerns do call for innovative approaches. In turn, this calls for a pragmatic approach, which for the purposes of the current article entails recognition of the blurring of boundaries between the public and private legal and policy domains, rather than a questioning of it.

Buying into the pragmatic approach to international law, some scholarly approaches recognise an increasing transnationalisation of international law. Transnational law applies to or involves public and private actors, often of an international respectively multinational character, and also often operates across the boundaries of national or regional legal systems. Transnational law merges elements of conventional public (international, regional, and sometimes even national) law and conventional private law as well as new forms of law and rule-making, including private self-regulation, such as corporate or sector-wise codes of conduct for companies with transnational operations.³⁵ Transnationalisation of law is partly a result of the fact that markets have internationalised while governments remain by definition bound by their borders. International law is becoming transnationalised when it relates to issues that used to be subject to private or national regulation, often in an effort to remedy governance gaps resulting from the inability by national legal systems to adequately regulate transnational business and its social impact. From this perspective, the Guiding Principles may be considered a type of transnational law, which builds on conventional international law but goes beyond this in seeking to regulate business conduct across territorial borders.

Transgressing boundaries between public and private, national and international law, transnational law differs from the ‘stateless law’ that Gunther Teubner³⁶ has discussed: stateless law skirts the state and suggests that the state is becoming insignificant for regulatory purposes with regard to transnational activities of the private sector; transnational law by contrast recognises a role for states and organisations created by states (intergovernmental organisations) in an attempt to regulate concerns of a transnational character that often involves private actors.

3. Analytical framework: Transnational Business Governance Interactions

³³ Tamanaha, Brian Z., *Realistic Socio-Legal Theory: Pragmatism and a social theory of law* (Oxford: Oxford University Press, 1997).

³⁴ Trubek, David M., ‘Human Rights, Transnational private law litigation and corporate accountability’, in Joerges, Christian, Inger-Johanne Sand & Gunther Teubner (eds) *Transnational Governance and Constitutionalism* (Oxford: Hart, 2004) 321-325, at 322.

³⁵ Zumbansen, Peer, ‘Transnational law, Evolving’, in Smits, Jan (ed.) *Elgar Encyclopedia of Comparative Law*, (Cheltenham: Edgar Elgar, 2nd ed 2012) 898-925; Koh, Harold, ‘Why do nations obey international law? (Review essay)’ (1997) 106(8) *The Yale Law Journal* 2599-2659 at 2626-2627.

³⁶ Teubner, Gunther, ‘“Global Bukowina”: Legal pluralism in the world society’. in Teubner, Gunther (ed.) *Global Law without a State* (Hants: Dartmouth, 1997) 1-30; Teubner, Gunther, ‘Contracting worlds: The many autonomies of private law’ (2000) 9(3) *Social and Legal Studies* 399-417.

The two previous sections have demonstrated that the Guiding Principles are a novelty in terms of transnational business governance. They are a soft law instrument developed under the auspices of an international organization, the United Nations, which like other international organizations normally makes law for states. Yet the Guiding Principles target not only states, but also businesses directly. As such, they are transnational according to the characterization set out above, and they are a business governance instrument. Moreover, as indicated they interact with other transnational business governance instruments for their implementation. Analysis of the Guiding Principles and their interactions with such instruments to understand these novel aspects and add to the theory on transnational law therefore calls for a theoretically based analytical framework that itself relates explicitly to transnational law. As explained by Eberlein *et al.*³⁷ and elaborated in the introductory article in this Special Issue, the Transnational Business Governance Interactions framework is a theory based analytical approach that engages precisely with transnational legal theory in order to clarify and understand interactions between diverse organizations in the area of governing business in a transnational context.

Eberlein *et al.* draw on the example of private and public institutional interactions to govern sustainable forestry to demonstrate that the TBGI field is ripe for systemic interaction. Their analytical quest goes beyond the analysis of isolated aspects of the TBGI phenomenon: they wish to explore interrelations between aspects of transnational business governance and interactional features, such as drivers and mechanisms, towards a fuller understanding of the implications of transnational business governance interactions.³⁸ From the perspective of the current article, the overall aim of the TBGI quest may be described as contributing to joining the dots towards a more comprehensive understanding of how business governance may be promoted (or ‘governed’) towards responsibility and sustainability across transnational activities that tend to skirt the reach of conventional public regulators. It is from this perspective that the TBGI framework is a fitting point of departure for an analysis of the UN Guiding Principles to understand what lessons the Guiding Principles offer for transnational business governance.

3.1. The TBGI framework

The TBGI framework proposed by Eberlein *et al.* offers a matrix for analysis of interaction across six dimensions of interaction and six components of regulatory governance. The full matrix provides a detailed mapping of interaction: who or what interacts, drivers and shapers, mechanisms and pathways, character of interaction, effects of interaction and change over time; in combination with the components: goal/agenda setting, rule formation, implementation, monitoring and information gathering, compliance promotion and enforcement, and evaluation and review.³⁹ The dynamics may be explored at diverse levels of detail, focusing on selected aspects of interaction or mapping all aspects of interaction (as illustrated by Eberlein *et al.* with regard to forest governance).⁴⁰

The TBGI framework has been proposed as an analytical framework for identifying and analysing a series of dimensions of interaction comprising various components of regulatory governance. Through identification and analysis of interaction between dimensions of interaction and components of regulatory governance, the TBGI framework “allows scholars to investigate the drivers, forms, causal mechanisms, and pathways of [transnational business governance], as well as

³⁷ Eberlein *et al.* (2014), *supra* fn 1.

³⁸ Eberlein *et al.* (2014), *supra* fn 1.

³⁹ Eberlein *et al.* (2014), *supra* fn 1, at 7.

⁴⁰ Eberlein *et al.* (2014), *supra* fn 1, at 15.

effects on regulatory capacity, performance and outcomes”.⁴¹ The theory based point of departure for the framework is the definition of transnational business governance (TBG) as “systematic efforts to regulate business conduct that involve a significant degree of non-state authority in the performance of regulatory functions across national borders”.⁴²

Only some of the key elements of the definition have been explained for the purposes of the TBGI analytical framework. ‘Transnational’ refers to arrangements across borders which involve “significant non-state authority”.⁴³ What is understood by ‘non-state’ or ‘significant authority’ is not made explicit, leaving the elaboration open. By contrast, ‘state’ is understood to “denote all institutions of the state, including international, supranational, and trans-governmental structures”.⁴⁴ In other words, international organizations like the UN and the OECD are included in principle. ‘Business’ indicates commercial activity. It is this activity that is being ‘regulated’ under TBGI schemes. ‘Governance’ actually refers to ‘regulatory governance’, that is governance through state or non-state regulation in terms of “organized and sustained attempts to change the behavior of target actors to further at collective end, through rules or norms or means of implementation and enforcement”.⁴⁵

Despite the definition’s emphasis on non-state authority, the TBGI framework has been applied to sustainability or CSR related issues with a strong public governance element, such as EU regulation of forestry legality⁴⁶ and state responses to non-state certification programmes.⁴⁷ Indeed, in introducing the TBGI framework its proposers recognize that TBGI schemes may involve a range of heterogeneous actors, such as individuals, technical experts, political entrepreneurs, NGOs, business organizations and government agencies.⁴⁸ While they do not make explicit what is understood by ‘significant non-state authority’, they explain that the framework is applied to initiatives in which non-state actors exercise such authority either alone or *with* state actors.⁴⁹

The TBGI framework focuses on interactions between actors and schemes, and between schemes and state institutions. Interactions may be within a sector or across sectors. They may be “symmetrical or asymmetrical, antagonistic or synergistic, intentional or unintentional”.⁵⁰

It is this interactional focus that makes it interesting to apply the TBGI perspective to the UN Guiding Principles. Due to their combination of state-based rules and institutions and their aim to regulate business activities across territorial and sector-specific boundaries, the Guiding Principles constitute a unique development in transnational business governance. Initiated within a quasi-legislative body⁵¹ under an international organization, the Guiding Principles are interactional

⁴¹ Eberlein *et al.* (2014), *supra* fn 1, at 3.

⁴² Eberlein *et al.* (2014), *supra* fn 1, at 3.

⁴³ Eberlein *et al.* (2014), *supra* fn 1, at 3.

⁴⁴ Eberlein *et al.* (2014), *supra* fn 1, at 3.

⁴⁵ Eberlein *et al.* (2014), *supra* fn 1, at 3 with references, esp. to to Held & Held (2011) and Levi-Faur (2013).

⁴⁶ Overdevest, Christine & Jonathan Zeitlin, ‘Assembling an experimentalist regime: Transnational governance interactions in the forest sector’ (2014) 8(1) *Regulation & Governance* 22-48.

⁴⁷ Guldbrandsen, Lars, ‘Dynamic governance interactions: Evolutionary effects of state responses to non-state certification programs’, (2014) 8(1) *Regulation & Governance* 74-92.

⁴⁸ Eberlein *et al.* (2014), *supra* fn 1, at 3.

⁴⁹ Eberlein *et al.* (2014), *supra* fn 1, at 3 (emphasis added).

⁵⁰ Eberlein *et al.* (2014), *supra* fn 1, at 3-4.

⁵¹ The UN Human Rights Council has preparatory functions for international human rights law which is formally adopted by the UN General Assembly. That and its ability to develop resolutions that endorse other soft law instruments provide it with a quasi-legislative role. For reference to the Council as quasi-legislative, see also Ruggie, John (2013)

across institutions and state and non-state authority both in their background and normative sources, and for their implementation and influence. Several key instruments, which as noted above have been influenced by the Guiding Principles and their precursor, the UN Framework, have TBGI features. This applies to ISO 26000,⁵² as well as the Global Compact, the IFC Performance Standards and the 2011 revision of the OECD Guidelines for Multinational Enterprises. Lacking enforcement modalities of their own and detailed implementation structures, the Guiding Principles also draw on procedural elements under those other TBGI schemes for their own implementation as regards business governance.

3.2. Methodology

Acknowledging that transnational business governance interactions involve heterogeneous actors and vary as regards interests pursued, values and other foundational aspects,⁵³ the TBGI framework allows for a degree of flexibility as regards analysis of the dimensions, components and dynamics. The TBGI model's appeal to scholars from diverse fields of regulatory governance naturally invites as diverse methods to be applied. The current article analyses the Guiding Principles from the pragmatic approach to transnational law indicated above, focusing particularly at the ways in which the Guiding Principles were evolved through interaction between public and private actors involved in the rule formation process and the implementation of the Guiding Principles through interaction with other transnational business governance instruments. The method is document study applying the legal method of document study to identify sources of law, including law-in-the-making, and legal (reflexive law informed) discourse analysis. The former entails the legal method of studying legislative history including informing policy objectives, and similarly as regards implementation. The latter entails a legal discourse analytical take on the construction of business responsibilities for human rights through the process that led to the UN Framework on which the Guiding Principles and their implementation build.⁵⁴ This method entails a close reading of documents and analysis of interaction and interdiscursivity between documents and the way in which involved actors deploy these strategically to influence other actors towards sensitivisation and agreement on specific interests.⁵⁵

In this article, the TBGI dimensions are understood as follows: 'Who and what interacts' are the institutions (private, public including inter-governmental organisations and their sub-institutions, such as the UN Human Rights Council, and civil society) and key individuals holding specific

Just Business, W.W. Norton & Company, at xiii. The same applied to the Council's predecessor, the Commission on Human Rights, which drafted the first mandate of the SRSG on Business and Human Rights, and which debated and rejected the Draft Norms on Business and Human Rights, which had been developed by an expert Sub-Commission under that Commission.

⁵² Webb, Kernaghan (2012) ISO 26000: Bridging the Public/Private Divide in Transnational Business Governance Interactions, *Osgoode Hall Law School Research Paper Series*, Research Paper No. 21/2012.

⁵³ Eberlein *et al.* (2014), *supra* fn 1, at 3-4.

⁵⁴ This analysis builds on a detailed study conducted under a grant from the Danish Research Council for the Social Sciences and published in full in Buhmann, Karin, *Normative discourses and public-private regulatory strategies for construction of CSR normativity: Towards a method for above-national public-private regulation of business social responsibilities* (Copenhagen: Multivers Academic, 2014).

⁵⁵ Buhmann, Karin, 'Business and Human Rights: Analysing Discursive Articulation of Stakeholder Interests to Explain the Consensus-based Construction of the "Protect, Respect, Remedy UN Framework"' (2012) 1(1) *International Law Research* 88-101; Buhmann, Karin, 'Navigating from "trainwreck" to being "welcomed": Negotiation strategies and argumentative patterns in the development of the UN Framework', in Deva, Surya and David Bilchitz (eds) *Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect?*, (Cambridge: Cambridge University Press, 2013) 29-57.

institutional tasks (*in casu*, the holder of the mandate as the Special Representative of the UN Secretary-General on Business and Human Rights ('SRSG'), John Ruggie).⁵⁶ 'Drivers and shapers' are understood as the background interests that actors pursued or which motivated actors to engage in the interaction. By 'mechanisms and pathways' this article understands the specific communicative modalities, including networks, discursive strategies and technical forms of communication. 'Character of interaction' is the degree of competition, co-optation, chaos or alignment between interacting instruments or institutions, whereas the 'effects of interaction' is the result, and 'change over time' in this article focuses on normative change in the concept and regulatory directives on business responsibilities for human rights.

4. The UN Guiding Principles: Interactional aspects of regulatory governance

As noted in the Introduction, the Guiding Principles have generated an unprecedented convergence among businesses, governments, intergovernmental organisations, investors, labour organisations and other organisations around the specific and detailed Principles and their implementation. The Guiding Principles have proven to be a game changer in the sense that this one instrument has delivered unprecedented agreement on and direction to how business can engage actively with human rights to honour both social expectations and understand and manage complex legal requirements and governance gaps, many of which are fed by the transnational character of business activities as well as the often insufficient implementation by states of their international human rights law obligations in national law. Moreover, the Guiding Principles have delivered direction for states on what their obligations are to protect against human rights violations by businesses, and for both states and businesses on what they can do to ensure access to remedy for victims of business related human rights infringements.

To appreciate how the Guiding Principles have proved a game changer in the complex area of intergovernmentally driven transnational business governance warranting the current analysis, this section opens with an overview (4.1.) that explains the background and process and introduces interaction with other schemes. A number of the Guiding Principles' explicit points of guidance on business action or state's obligations are noted as examples in the subsequent section (4.2.), which is an analysis of the interactional aspects based on the TBGI analytical framework.

4.1. Overview

The background to the Guiding Principles was a series of failed efforts within the UN to establish an instrument to regulate business impact on society, followed by the success of the immediately preceding initiative. The first major and comprehensive effort by an international organisation to develop an instrument to regulate business conduct stretched from the 1970s into the 1990s. Drafted by the UN Commission on Transnational Corporations, the draft UN Code of Conduct on Transnational Corporations⁵⁷ had been intended to prescribe duties for transnational corporations

⁵⁶ To appreciate the international law character of the Guiding Principles and their predecessor, the UN Framework, it is important to note that John Ruggie, a Professor at Harvard University, developed both in his capacity as holder of the UN mandate. Thus, although the UN Framework and the Guiding Principles are sometimes referred to as the 'Ruggie Framework' and the 'Ruggie Principles', they are not the brainchild of an academic in his academic capacity that might be unrelated to the overall political and regulatory governance context, but of a holder of a UN mandate who was charged with a specific set of tasks that arose precisely on the background of that context and were set out in resolutions by the UN Commission on Human Rights and the UN Human Rights Council (UN 2005, UN 2008b respectively).

⁵⁷ The Commission was established by the Economic and Social Council under resolution 1913 (LVII), 5 December 1974. The most recent version of the draft Code dates from 1990 (*Draft Code of Conduct on Transnational Corporations*, UN Doc. E/1990/94, 12 June 1990).

(TNCs) to respect host countries' development goals, observe their domestic law, respect fundamental human rights, and observe consumer and environmental protection objectives. In 1998 an expert group under a Sub-Commission under the UN Commission on Human Rights set about to draft guidance for business conduct with regard to human rights. The final version, the draft Norms on Human Rights Responsibilities of Transnational Corporations and Other Business Enterprises,⁵⁸ was debated by the Commission for Human Rights in 2004 and 2005. Due to political disagreements between States, which were members of the Commission, the Draft Norms failed to generate sufficient support for recognition. The Commission instead recommended that the UN Secretary General appoint a Special Representative to deal with the issue of business and human rights.⁵⁹ The mandate was charged upon Professor John Ruggie as Special Representative of the Secretary-General. In June 2008 the UN Human Rights Council (which in 2006 succeeded the Commission on Human Rights) 'unanimously welcomed' the *Protect, Respect, Remedy* Framework,⁶⁰ commonly referred to as 'the UN Framework' or, sometimes, 'the Ruggie Framework'. A second mandate,⁶¹ asking John Ruggie to 'operationalise' the framework, resulted in the *Guiding Principles*.⁶²

For development of both the UN Framework and the Guiding Principles, the SRSR and his team engaged in broad consultations involving intergovernmental organisations, state representatives, civil society, business organisations, and academics.⁶³

Soon after the adoption of the Guiding Principles, the UN Global Compact website on guidance for the Compact's human rights principles (Principles 1 and 2) was updated to refer to the UN Guiding Principles.⁶⁴ A link to and explanation of the UN Framework had been uploaded to the Global Compact website in 2008. Already before the formal endorsement of the Guiding Principles, the UN Framework and the Guiding Principles (in their November 2010 draft version) were taken into consideration by the OECD in the revision of the Guidelines for Multinational Enterprises, which was adopted in Paris in May 2011.⁶⁵ The revision included a full new Chapter on Human Rights; an integration of the Due Diligence approach of the Guiding Principles not only to human rights but also to other issue areas covered by the Guidelines; and a revision of the 'National Contact Points' (NCP) complaints mechanism in accordance with the Guiding Principles' procedural standards for remedies. The OECD Guidelines are recommendations addressed by governments to MNEs operating *in or from* adhering countries.⁶⁶ The territorial scope of the Guidelines means that companies may be subjected to grievances in front of home state NCPs for actions committed even

⁵⁸ *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with regard to Human Rights* 2003 (UN doc. E/CN.4/Sub.2/2003/12/Rev.2).

⁵⁹ *Human rights and transnational corporations and other business enterprises*, UN Doc. E/CN.4./2005/L.87, 15 April 2005

⁶⁰ UN (2008), *supra* fn. 10.

⁶¹ *Mandate of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises* (Human Rights Council Resolution 8/7 June 2008)

⁶² *Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises: Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect, Remedy' Framework*, UN Doc. A/HRC/17/31, 21 March 2011.

⁶³ For details, see Knox (2012), *supra* fn 28; Buhmann (2012), *supra* fn. 55.

⁶⁴ Global Compact website, *Human Rights Guidance Material*, http://www.unglobalcompact.org/issues/human_rights/tools_and_guidance_materials.html, last visited 21 September 2013.

⁶⁵ OECD (2011), *supra* fn 11.

⁶⁶ Besides OECD countries, some non-OECD countries, including Argentina, Brazil and Egypt adhere to the Guidelines.

in non-OECD states. Addressing both parent companies and local entities within a MNE, the Guidelines provide non-binding principles for enterprises with the aim of promoting positive contributions by enterprises to economic, social and environmental progress.⁶⁷

Relationships between the ISO 26000 Social Responsibility (SR) Guidance Standard and the Guiding Principles are more complex. On the one hand, the section on human rights was aligned with the UN framework on the corporate responsibility to respect human rights, relating to the due diligence concept elaborated by the latter (clause 6.3). On the other hand, the influence was narrow as to the contentious issue of an organisation's 'sphere of influence'. The concept of 'sphere of influence', which has also been employed by the Global Compact since its launch and was also included in the Draft UN Norms, was the object of considerable attention and research by the SRSG's work during his 2005-2008 mandate. This led to a rejection of the concept in favour of a process which the SRSG termed Human Rights Due Diligence.⁶⁸ The SRSG and his team argued that it would be counterproductive to apply the concept of 'sphere of influence' to ISO 26000, characterizing the concept as ambiguous, misleading, morally flawed, and susceptible to strategic gaming. The final version of ISO 26000 was amended in an effort to accommodate these objections.⁶⁹ ISO 26000 does not apply the concept to organisations' impact but retained the concept in relation to what the Guiding Principles refer to as 'leverage' (an organisation's capacity to influence other organizations' decisions). Indeed, as SRSG John Ruggie (who had also been instrumental in the establishment of the Global Compact) had recognized that the concept of 'sphere of influence' can be useful in other contexts that the corporate responsibility to respect human rights, for which he rejected it.⁷⁰ This suggests that the Guiding Principles interact with other transnational business governance instruments in diverse ways. The subsequent sections investigate this interaction with particular focus on two components of interactions: rule formation and implementation (4.2.2 and 4.2.3). In order to set the context, dimensions of interaction framing the goal and agenda-setting are briefly set out (4.2.1). This is done with a particular focus on the global governance challenge⁷¹s and interactional process that formed the foundation for the rule formation process of the Guiding Principles and their implementation. The components of monitoring and information gathering, compliance promotion and enforcement, and evaluation and review are only briefly indicated (4.2.4), mainly to suggest future perspectives for both practice and research. Due to the novelty of the Guiding Principles these components are not yet very evolved.

4.2. Dimensions of interaction and components of regulatory governance

4.2.1. Background to the Guiding Principles: Goal and agenda setting for transnational business governance through the UN

As indicated, the Guiding Principles operationalise the UN Framework on Business and Human Rights. The two therefore at an overall level share the same *goal* and contribute to the same general *agenda setting*. But the UN Framework which broke the ground for the Guiding Principles' explicit and detailed transnational business governance within UN of a transnational law type

⁶⁷ OECD (2011), *supra* fn 11, Chapter 1.

⁶⁸ UN (2008), *supra* fn 10; *Clarifying the concepts of "Sphere of Influence" and "Complicity"*, UN Doc. A/HRC/8/16, 15 May 2008.

⁶⁹ Wood, Stepan 'The meaning of "sphere of influence" in ISO 26000', in Henriques, Adrian (ed) *Understanding ISO 26000: A practical approach to social responsibility* (British Standards Institution, London 2011) 115-130.

⁷⁰ UN (2008), *supra* fn 10.

⁷¹ Ruggie, John G., *Just Business* (Boston: W.W. Norton Publishers, 2013); Ruggie John G., 'Global Governance and 'New Governance Theory': Lessons from Business and Human Rights' (2014) 20 *Global Governance* 5-17.

approximating conventional international law. The UN Framework also differed from the UN Global Compact, which was also a groundbreaker in terms of establishing guidance for business, but does so in a much softer fashion which builds on voluntary business commitment.

An activity initiated under the UN Human Rights Council, the overall *goal* of the Guiding Principles on which the Guiding Principles build is to contribute to sustainable development in accordance with the UN's objective as stated in the UN Charter article 1.⁷² The UN Charter was drafted in the conventional state-centrist international law context, in which business organizations hold no place as bearers of duties. The Universal Declaration on Human Rights, which was developed to spell out the substantive contents of the human rights that the UN Charter refers to in a general way, in its preamble makes reference to 'all organs of society'. In 1948 when the Universal Declaration was adopted, businesses were not thought to be included among such organs.⁷³ Nor is it likely that anyone fathomed that within a few decades would business organizations be so economically and politically powerful as to pose significant risk to human rights in a way that would not be easily regulated under the law of their home state.

As an operationalisation of the UN Framework, the Guiding Principles in terms of their more immediate *goal and agenda* refer back to the UN Framework and the objective of the SRSB's first mandate.⁷⁴ This came about in part as a result of the attention increasingly paid by the UN to the capacity of business organizations to cause human rights violations. This owes much to civil society organizations, such as global Non-Governmental Organisations (NGOs) like Amnesty International and Human Rights Watch as well as numerous regional and local NGOs. These *actors* have played a key role in getting the issue on to the agenda of the UN, eventually leading to the Guiding Principles through the establishment of the SRSB's 2005-2008 mandate and the preceding debates on the Draft UN Norms. Some sustainability oriented business organizations, such as the World Business Council for Sustainable Development (WBCSD) and Business for Social Responsibility (BSR) have also played a role in this respect. Especially since the late 1990s such organizations as well as academics and some governments had interacted to convince policymakers and international regulators of the necessity of developing a transnational normative framework with the capacity to

⁷² In particular in this context the Charter's art. 1, section 3, which states, according to which the purposes of the UN include "To achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion".

⁷³ Henkin, Louis, 'The Universal Declaration at 50 and the challenge of global markets', (1999) 25 *Brooklyn Journal of International Law* 17-25, at 24-25; Mayer, Ann Elisabeth, 'Human rights as a dimension of CSR: The blurred lines between legal and non-legal categories', (2009) 88 *Journal of Business Ethics* 561-577.

⁷⁴ The SRSB's 2005-2008 mandate was defined as follows:

- (a) To identify and clarify standards of corporate responsibility and accountability for transnational corporations and other business enterprises with regard to human rights;
- (b) To elaborate on the role of States in effectively regulating and adjudicating the role of transnational corporations and other business enterprises with regard to human rights, including through international cooperation;
- (c) To research and clarify the implications for transnational corporations and other business enterprises of concepts such as "complicity" and "sphere of influence";
- (d) To develop materials and methodologies for undertaking human rights impact assessments of the activities of transnational corporations and other business enterprises;
- (e) To compile a compendium of best practices of States and transnational corporations and other business enterprises (Commission on Human Rights 2005, para. 1).

govern business conduct, especially but not only where a company's home country is not the same as the country in which it causes adverse social impact.⁷⁵

A combination of the limitations of the conventional system of international law and the actors' interests, values, perceptions and resources were at play, working as *drivers and shapers*. Constraining the adverse impact of multinational enterprises on society presented a particular challenge to the UN as an international organization with a state-centrist structure. Based on the conventional (Westphalian) conception of international law, UN rule-making tends to address states. International law-making in the human rights field in particular is constituted by obligations for states, and rights for individual persons. Nothing technically impedes international law to regulate companies, but as evidenced by the fate of the Draft UN Code of Conduct and the Draft UN Norms, political will among states as international law-makers has been limited in terms of introducing binding requirements on companies to regulate their conduct and its environmental and social impact. Sustainability related obligations on companies have been introduced in a limited number of areas, in particular in the environmental field.⁷⁶ Where the Draft UN Norms had failed, the UN Framework succeeded and created the basis for the Guiding Principles. The Norms failed partly because of antagonism caused by the treaty-like language that led to lobbying by some large business organisations, and perhaps also due to limited insight into the often protracted international law-making process and its many steps towards a fully-fledged treaty.⁷⁷ The UN Framework was accepted partly due to the innovative and inclusive multi-stakeholder process, partly because the insistence by the SRSG to refer to it as a 'policy framework' although in effect much of its contents has a soft law character. The novel transnational business governance framework offered by this approach allowed for agreement across past antagonism and across the intellectual and political boundaries of state-centrist international law.

Politically it would be difficult for the actors who had supported the Framework and adopted the Resolution which asked the SRSG to 'operationalise' the Framework not to adopt the resulting Guiding Principles.⁷⁸ This allowed for the adoption of a transnational business governance instrument, which departed from the 'policy' title of the UN Framework by taking a step 'back' into conventional international soft law speak by adopting a name – 'Principles' – which resonates with other international soft law instruments. This is an interesting example of the dynamics at play, which also involved an interaction between politics and law in terms of practice as well as theory: The 'policy' title of the UN Framework exemplifies the SRSG's pragmatic approach to the highly politicized character of the evolution of potential business duties for human rights under international law. By referring to the UN Framework as a policy instrument, its character was discursively 'de-legalized' and therefore de-politicized. This made its broad acceptance by actors easier, also among both states and business representatives that had been opposed to the Draft UN

⁷⁵ Bendell, Jem, *Barricades and boardrooms: A contemporary history of the corporate accountability movement*, Technology, Business and Society Programme Paper Number 13 (Geneva: United Nations Research Institute for Social Development (UNRISD), 2004).

⁷⁶ For example, the 1969 Convention on Civil Liability for Oil Pollution Damage and the 1982 UN Convention on the Law of the Sea.

⁷⁷ Kinley, David and Justine Nolan, 'Trading and Aiding Human Rights in the Global Economy', (2007) 7(4) *Nordic Journal of Human Rights* 353-377; Buhmann, Karin, 'Development of the "UN Framework": A pragmatic process towards a pragmatic output', in Radu Mares (ed.) *The UN Guiding Principles on Business and Human Rights: Foundations and Implementation* (The Hague: Martinus Nijhoff Publishers, 2012) 85-106.

⁷⁸ De Schutter, Olivier, 'Preface', in Deva, Surya and David Bilchitz (eds) *Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect?* (Cambridge: Cambridge University Press, 2013).

Norms.⁷⁹ Once the UN Framework was broadly accepted, the basis was in place for a formal adoption of the operationalization mandate.⁸⁰ Having accepted the UN Framework (even as a ‘policy instrument’), the UN Human Rights Council was set on a course towards also accepting the operationalization. Naming the operationalization document – the Guiding Principles – by a recognised form of international soft law was a bold step by the SRSG in that it might have generated resistance like the UN Norms, but having created a sound political basis, the reception of the soft law term was completely different in this case.

The *mechanisms and pathways* applied by the SRSG and other actors to establish the goal and set the agenda involved interest-based networks and discursive strategies. I have described this interaction in detail elsewhere in analyses of the discursive construction of the UN Framework and evolution of background for the Guiding Principles.⁸¹ Related networking and strategies has been applied with success in other sustainability contexts, including some related to business governance.⁸² In the context of business and human rights, these networks and strategies generated acceptance of the need for a transnational business governance instrument that had the authority of the UN and responded to global social expectations of business conduct not only in compliance with applicable law but also with business ethics or CSR.

As regards *character of interaction*,⁸³ the UN Framework process came to develop a degree of coordination towards an agenda in a way that combined diverse interests within an overall goal of reducing the risk of business related human rights violations. This was very different from the Draft UN Norms that had been marked by competition and chaos.⁸⁴ Initially, interaction between civil society and some business organizations involved in the development of the UN Framework had carried over competition from the UN Norms process. Later, this gave way to some coordination involving different stakeholder types and groups, with acceptance induced by the SRSG’s discursive articulation of diverse stakeholders’/actors’ specific interests.⁸⁵ The *effect of interaction* was the creation of an acceptance among international policy-makers in the UN Human Rights Council and among business and civil society organizations of the need for a transnational business governance instrument on human rights. This ensured collaboration rather than antagonistic counter-action throughout the SRSG’s second mandate, and therefore facilitated the process that eventually led to the Guiding Principles.

From the launch of the draft UN Code of Conduct via the debate of the Draft UN Norms through the UN Framework to the Guiding Principles a significant *change over time* took place. While in all of these cases, there was broad although not universal support for the launch of the process to develop a transnational business governance instrument, only the UN Framework and Guiding

⁷⁹ Buhmann (2012), *supra* fn. 77.

⁸⁰ UN (2008), *supra* fn. 10.

⁸¹ Buhmann, Karin, ‘Integrating human rights in emerging regulation of Corporate Social Responsibility: The EU case’, (2011a) 7(2) *International Journal of Law in Context* 139-179; Buhmann (2012) *supra* fn 77, Buhmann (2013) *supra* fn 55.

⁸² Hajer, Maarten A., *The Politics of Environmental Discourse: Ecological Modernization and the Policy Process* (New York: Clarendon Press – Oxford, 1995); Reinalda, Bob, ‘Private in form, public in purpose: NGOs in international relations theory’, in Arts, Bas, Math Noortmann and Bob Reinalda (eds) *Non-state actors in international relations* (Hants: Ashgate, 2001) 11-40.

⁸³ As defined by Eberlein *et al.* (2014), *supra* fn. 1, at 16.

⁸⁴ Kinley, David, Justine Nolan and Nathalie Zerial, ‘The politics of corporate social responsibility: Reflections on the United Nations Human Rights Norms for Corporations’, (2007) *Company and Securities Law Journal* 35-42.

⁸⁵ Buhmann (2012) *supra* fn 77.

Principles processes were successful towards delivering an output that was accepted. A number of institutional factors differ, such as the geopolitical agenda (which in the case of the Draft Code of Conduct between the 1970s to the early 1990s shifted from a North-South conflict under influence of the Cold War and the New International Economy agenda to a geopolitical context informed by the end of the Cold War and new geopolitical constellations and trends in economic growth and investment) and the body that initiated the process. In the case of the Draft UN Norms, this was an expert body under the politically composed UN Human Rights Commission, in the case of the UN Framework the UN Secretary-General based on recommendations by the Human Rights Commission, and in the case of the Guiding Principles the new UN Human Rights Council, a politically composed body having succeeded the Commission, and which had already adopted the UN Framework.

The rejection of the Draft UN Norms by the Commission for Human Rights led the Commission to the adoption of the first SRSG mandate. This step by itself reflected an acceptance of the goal and agenda of a process of developing a transnational business governance instrument on human rights to reduce business related human rights abuse, probably combined with a political desire to be in charge of the process and the agenda setting rather than leaving it to human rights law experts and conventional ways of drafting international human rights law. This part of the agenda setting objective is reflected in the SRSG's mandate,⁸⁶ which explicitly called on the mandate holder to involve and consult with not only 'the usual suspects' of international human rights law-making – governments, intergovernmental organisations and human rights NGOs – but also to involve business. That mandate led to the UN Framework, which in turn created the background for the SRSG's second mandate and the specific interactional rule formation process that resulted in the Guiding Principles.

Having set the backdrop, the subsequent sections look specifically at the Guiding Principles, starting with interaction towards rule formation.

4.2.2. Rule formation

As regards *who and what interacted* in the process that created the Guiding Principles, the Guiding Principles are the result of an unusual interaction between the UN Human Rights system and non-state actors. The SRSG adopted a broadly consultative process already for the development of the UN Framework, and continued this during his second mandate, which resulted in the Guiding Principles. In both cases, that approach had been included in the task set out by the Commission for Human Rights and the Human Rights Council respectively. They had invited the mandate holder to undertake a broad stakeholder oriented approach and to consult with companies, states, inter-governmental organizations and civil society.⁸⁷ Yet, a formal invitation to consult need not translate into active consultation, let alone into interaction between diverse actors in various meetings. Business organizations had been consulted during the later stages of the formulation of the Draft UN Norms, but in a way that led at least some but rather influential organizations to characterize the process as insufficiently inclusive of business.⁸⁸

From the outset, the SRSG's broadly consultative process included not only those governmental, intergovernmental and non-governmental actors who are conventionally consulted in international

⁸⁶ UN (2005), *supra* fn. 69.

⁸⁷ UN (2005), *supra* fn. 69; UN (2008), *supra* fn 10.

⁸⁸ Kinley, Nolan and Zerial (2007), *supra* fn. 84, at 40; Backer (2006), *supra* fn. 27, at 321-327; Hearne, Bernadette (2004) Proposed UN Norms on human rights: Is business opposition justified?' *Ethical Corporation* 22 March 2004.

law-making on human rights, but also private sector actors, who in the pertinent context were prospective duty-bearers. Due to the state-centrist structure of international law, the private sector is normally excluded from international law-making. Civil society has long been included in consultations for the development of human rights law, but this has generally been in the capacity of representatives of victims and other holders of rights, not as bearers of duties. The integration of business representatives into the process ensured in a pragmatic fashion that businesses organisations were given ownership for the process of rule formation. By doing this, the SRSG effectively heeded points that had been made decades ago by international law scholars who already then saw a need for regulating business conduct and understood that involvement of business in the rule-making process would cater for acceptance.⁸⁹ Obviously, inviting specific actors (*in casu* business) into a rule-making process that aims to regulate these actors conduct may entail a risk that the process of rule-making is diluted. Yet both Friedman and Charney held that without being actively involved as participants in the rule-making process, businesses might not wish to engage actively with the implementation of resulting rules.⁹⁰ Related observations on participation as an element in ‘process legitimacy’ in an international law rule-making context in order to provide resulting rules with a compliance pull in place of a strong enforcement system have been made by Thomas Franck.⁹¹ By strategic usage of the discursive construction of rule-making within a reflexive law context, the SRSG succeeded in engaging even previously strongly opposed business organisations in active participation leading to detailed guidance on business conduct.⁹² Whether this will translate into an effective ‘compliance pull’ at the time of writing remains to be assessed in detail.

The integration of business and other non-state actors into the process of rule formation was further supported by a discursive strategy which articulated the interests of business as well as other involved actors/stakeholders.⁹³ This effectively functioned as an articulation of *drivers*, which helped generate interaction among stakeholder to shape the drafting of the Principles and achieve acceptance of the outcome. Once the battles on the UN Norms and the mandate for the SRSG’s first term had been fought and the UN Framework adopted by the Human Rights Council, the *character of interaction* as regards the goal and agenda for the Guiding Principles shifted towards a sort of cooptation through which the outcome – the Guiding Principles – took on a meta-regulatory effect with certain elements achieving a quasi-monopolistic position. A particularly strong example of this is the influence which rule formation of the Guiding Principles had on the OECD Guidelines for Multinational Enterprises as regards Due Diligence and remedial procedures.⁹⁴ Another example is the influence on ISO 26000 that was exerted by the SRSG’s conceptions of the ‘sphere of influence’ and Human Rights Due Diligence.⁹⁵

As an *effect of the interaction* between non-state and state actors, the norm formation process resulted in a detailed instrument comprised of 31 Guiding Principles, which spell out the

⁸⁹ Friedmann, Wolfgang, *The changing structure of international law* (London: Stevens & Sons, 1964); Charney, Jonathan L., ‘Transnational Corporations and developing public international law’, (1983) 32 *Duke Law Journal* 748-788.

⁹⁰ *Ibid.*

⁹¹ Franck, Thomas M., *The power of legitimacy among nations* (Oxford: Oxford University Press, 1990); see also Ruggie (2013), *supra* fn. 51, at 168)

⁹² Buhmann, Karin and Cedric Ryngaert, ‘Human Rights challenges for multinational corporations working and investing in conflict zones’, (2012) 6(1) *Human Rights and International Legal Discourse* 3-13.

⁹³ Buhmann (2012), *supra* fn. 55.

⁹⁴ See below this article and detailed discussion in Buhmann (forthcoming), *supra* fn. 17.

⁹⁵ Wood (2011) *supra* fn. 69.

implications of the UN Framework provisions, emphasising operational aspects for states as well as businesses. For each of the three Pillars, the Guiding Principles set out some foundational principles and some operational principles. The two foundational and eight operational Principles on the State Duty to Protect are followed by five foundational and nine operational Principles (11-15 and 16-24 respectively) on the Corporate Responsibility to Respect, which in turn are followed by Principles on Access to Remedy, comprising one foundational and six operational Principles (25 and 26-31 respectively). Each of the Guiding Principles is accompanied by a detailed commentary contained in the same report as the one which sets out the Principles.⁹⁶

Although the Guiding Principles were formally authored by the SRSG, they resulted from a collaborative process that involved not only the SRSG and his 'team' as an author collective, but also a process in which partial conclusions were offered for debate through annual reports and detailed elaborative addenda to the Human Rights Council. These were widely shared on the internet and generating diverse responses, comments and suggestions from a range of actors, including state, business and business associations, and civil society including academics. Perhaps even more importantly, as in the case of the UN Framework this was a process in which elements were tested with diverse audiences including multi-stakeholder meetings around the world as well as specific civil society, business or (inter-)governmental groups before they were revised and refined for incorporation into SRSG reports.⁹⁷ Although the SRSG retained the final role as the editor and the person who selected what responses to include and how to do so, as a result of the collaborative process the Guiding Principles may be perceived to build on interaction between state and intergovernmental, business and civil society actors.

4.2.3. Implementation

As regards the *author* or the *mode* of interaction, the implementation of the Guiding Principles as a business governance instrument is based on a combination of interactions between public and private institutions, drivers and mechanisms. At the overall UN level, implementation is supported by the establishment of a Working Group on Business and Human Rights, which is comprised of five experts in the field and undertakes field visits, organizes surveys and engages with stakeholders, including through the Annual Forum on Business and Human Rights. The Forum is a two-day event taking place at the UN in Geneva and in particular targets non-state stakeholder from business, civil society and academia, without however excluding state-actors. In addition, the Guiding Principles are implemented through activities at the level of nation states as a result of the State duty to protect, which is elaborated in the Principles' Pillar One.

In practice, however, much of the implementation takes place through the Guiding Principles' influence on or integration into other transnational business governance instruments. Interaction with and between institutions such as the UN Global Compact and NCPs established under the OECD Guidelines therefore plays a major role in the implementation. Interaction between the SRSG and the OECD for the 2011 revision of the Guidelines for Multinational Enterprises and the ISO 26000 formulation process played a major role as *drivers and shapers* for the integration of the Guiding Principles towards implementation in the practices of business organizations as well as state action under the State Duty to Protect: because the Guiding Principles have no enforcement mechanism of their own and as noted above limited specific implementation modalities, the

⁹⁶To further explicate the Guiding Principles on the corporate responsibility to respect, the UN Office of the High Commissioner for Human Rights in 2012 published an interpretive guide (OHCHR 2012).

⁹⁷ Ruggie (2013), *supra* fn. 71; Buhmann (2012), *supra* fn. 77.

potential for implementation through other transnational business governance instruments worked as a strong driver for interaction and shaper of the form of interaction and its normative output.

Also among this category, interaction between the SRSG and the process of formulating the 2012 International Finance Corporation (IFC) Performance Standards affects implementation of the Guiding Principles through integration into environmental and social risk assessment. The IFC Standard applies to all investment and advisory clients whose projects go through IFC's initial credit review process.⁹⁸ Through their own TBGI character, in particular their goals, actors and mechanisms, these institutions integrate the Guiding Principles as parts of their own recurrent rule formation to be implemented, monitored, promoted and evaluated through their own modalities. As in most cases those are more elaborate and build on detailed procedural rules, they support and promote the implementation of the Guiding Principles.

In other words, the Guiding Principles 'piggy-back' themselves towards implementation through interaction with related TBGI institutions albeit in fields that are only partially associated with human rights. The piggy-backing is mutual: the solidity of the Guiding Principles as a form of new international soft law endorsed by the Human Rights Council provides the TBGI schemes that integrate elements of the Guiding Principles with an element of authority gleaned from the UN system at the political and quasi-legislative level. This authority lends legitimacy to TBGI schemes of less global (OECD), less formal (UN Global Compact) or less 'law-like' regulatory character (ISO 26000). And the attention which has been paid by business organizations, civil society organizations, intergovernmental organizations and governments to the Guiding Principles as solid and authoritative advice on business conduct also shines on the institutions that have adopted elements from the Principles. Sharing a common transnational governance task and a common problem of navigating in an area of weak enforcement institutions, the Guiding Principles have functioned as a driver and shaper of other CSR-related TBGI institutions to mutual benefit. The OECD Guidelines' integration of the Guiding Principles' process oriented due diligence concept is a particularly clear example of this: With the 2011 revision, OECD's Guidelines not included a full new human rights chapter in line with the Guiding Principles and integrated the due diligence process. The also apply the Guiding Principles' due diligence process requirement to most of the issue areas covered by the Guidelines, including labour/industrial relations, environment and anti-corruption. The OECD Guidelines and the grievance institutions called National Contact Points that adhering states commit to establishing therefore function as a state-based implementation modality for the Guiding Principles. The jurisprudence of the NCPs across the range of most of the OECD Guidelines' issues areas as well as guidance developed by the OECD may contribute to ongoing elaboration of what is expected by businesses in terms of a due diligence process in accordance with the UN Guidelines.

Such institutions function as *mechanisms and pathways* of interaction across TBGI schemes, supporting the implementation of the Guiding Principles towards impacting business governance. The OECD Guidelines' integration of the Guiding Principles' due diligence concept expresses a type of mimicry,⁹⁹ the effects of which have multiplied through the Guidelines' application of the due diligence concept to most issue areas covered by the Guidelines.¹⁰⁰ The Global Compact's

⁹⁸ IFC (2012) *Performance Standards on Environmental and Social Sustainability*, International Finance Corporation, 1 January 2012; IFC (2012) *International Finance Corporation's Guidance Notes: Performance Standards on Environmental and Social Sustainability*, International Finance Corporation, 1 January 2012.

⁹⁹ Guldbrandsen (2014), *supra* fn 47.

¹⁰⁰ The Guidelines' due diligence recommendations do not apply to the chapters on Science and

referencing the Guiding Principles in its guidance materials on human rights draws on the authority of the Guiding Principles while offering the Guiding Principles a path into the CSR policies and activities of the more than 11,000 business organizations which are members of the Global Compact.¹⁰¹ ISO 26000's interaction with the SRSG on the concepts of 'sphere of influence' and (human rights) due diligence constituted a cognitive pathway of learning. This incorporated the outcome of analyses made during the SRSG's mandates and of interaction with diverse actors during those processes to identify interests related to business and human rights. These analyses also included human rights related aspects of other ISO 26000 issues, and processes to avoid business related human rights abuse. This fed into several sections of ISO 26000 while also promoting the implementation of the Guiding Principles through the human rights section (3.6). In most of these cases, the character of interaction was characterized by the cooptation of the norms contained in the Guiding Principles.

For ISO 26000, however, the interactional struggle on the application of the concepts of 'due diligence' or 'sphere of influence' carried an element of competition as regards regulatory effectiveness and legitimacy. The SRSG with his team sought to influence the ISO process to replace the 'sphere of influence' broadly by due diligence. In the end the 'due diligence' approach prevailed as regards human rights issues while sphere of influence also remained in use for other ISO issue areas.¹⁰² As a result, the convergence between the Guiding Principles and ISO 26000 is less uniform than that between the Guiding Principles and OECD's Guidelines.

A good two years after the endorsement of the Principles, the major *effects* of the Guiding Principle's implementation oriented interaction with other TBGI schemes fall into two different areas: a normative homogenization, and the regulatory capacity and performance of actors. None of these fit squarely with the issues identified in the TBGI framework,¹⁰³ thereby underscoring the broad spectrum of potential effects of transnational business governance interaction when state-based regulatory governance is included in the picture. In this case, the effect on other TBGI institutions is strengthened by the authority which the Guiding Principles carry as a UN initiative.

The homogenization of transnational business governance norms occurs in two key areas. First, as regards the corporate responsibility to respect human rights in accordance with the detailed elaboration of the Guiding Principles. This homogenization effect is found with the OECD Guidelines, IFC's Performance Standards and ISO 26000 as well as several other TBGI instruments in the CSR areas, including the UN Global Compact and policy instruments like the EU's 2011 CSR Communication.¹⁰⁴ Second, as regards due diligence in the particular sense and with the particular elements and activities prescribed by the Guiding Principles. Contrary to static oriented financial due diligence exercises such as those which business organizations and their lawyers are familiar with, for example in the context of mergers or acquisitions, due diligence exercised in accordance with the Guiding Principles is an ongoing process for the duration of a particular

Technology, Competition and Taxation (OECD 2011, Commentary to General Principles, para. 14).

¹⁰¹ The Global Compact's Guidance Material website on Human Rights opens by noting 'In June 2011, the UN Human Rights Council endorsed Guiding Principles on Business and Human Rights, which, among other things, provide guidance for business on how to implement the corporate responsibility to respect human rights, a key element of Global Compact Principle 1 and 2', and offering a link to the Guiding Principles in the six UN languages (http://www.unglobalcompact.org/issues/human_rights/tools_and_guidance_materials.html, last accessed 23 September 2013).

¹⁰² ISO 26000 (2010), *supra* fn 13, clause 5; Wood (2011) *supra* fn. 69; Ruggie (2013), *supra* fn. 71.

¹⁰³ Eberlein *et al.* (2014), *supra* fn. 1, at 13-14.

¹⁰⁴ EU (2011), *supra* fn. 11.

activity. Human rights due diligence prescribed by the Guiding Principles should be undertaken to identify, prevent, mitigate and account for how a business organization addresses its adverse human rights impacts. The process should include assessing actual and potential human rights impacts, integrating and acting upon the findings, tracking responses, and communicating how impacts are addressed (Guiding Principle 17). The OECD Guidelines' and ISO 26000's adoption of the Guiding Principles' due diligence concept are particularly clear example of the homogenization.

In terms of regulatory capacity and actors' performance, the endorsement with which the Human Rights Council as a UN institution provided the Guiding Principles as a transnational business governance instrument functioned as a stamp of salience on other TBGI institutions. This lent legitimacy to such other institutions, which allowed them to develop, expand or revise texts and as a result, expand their audiences, members and therefore regulatory space. The OECD's 2011 revision of the Guidelines and ISO's development of a detailed human rights Chapter in the ISO 26000 SR Guidance Standard are among the most prominent examples. This effect is further evidenced by the *change over time*, which in the case of the OECD Guidelines includes a revitalization of the NCPs reflected in a number of organizational revisions,¹⁰⁵ the establishment of a Forum on implementing due diligence in the supply chain for certain minerals and gold¹⁰⁶, and the development of a website and documents to provide due diligence guidance for responsible supply chains of minerals from conflict-affected and high-risk areas.¹⁰⁷

4.2.4. Following up: Monitoring and information gathering, compliance promotion and enforcement, and evaluation and review

At the time of writing a good two years after the adoption of the Guiding Principles it is still too early for a detailed assessment of the interactional aspects a regards follow-up to the rule-making and implementation, such as monitoring, compliance promotion and enforcement as well as review. Those issues are all highly significant for a full appreciation of the transactional strategy deployed by the Guiding Principles to follow up on the rule-formation by ensuring implementation in active collaboration with and though other TBGI institutions. To complete the picture, this section offers a brief overview but leaves detailed analysis for further study.

Just like the Guiding Principles interact with other TBGI institutions as regards implementation, much of the monitoring and information gathering as regards the business responsibility to respect human rights and remedies are exercised through the TBGI institutions with which the Guiding Principles interact. Monitoring and information gathering interaction include the Global Compact through its participants' Communication on Progress and the OECD Guidelines through complaints submitted to NCPs. Civil society organizations contribute in this respect, as they do in relation to the state duty to protect and its effects on business conduct in home and host states. As is the case for compliance promotion and enforcement, dimensions of interaction therefore largely resemble what was stated above in relation to implementation

¹⁰⁵ OECD (2011), *OECD Guidelines for Multinational Enterprises*, Organisation of Economic Cooperation and Development, May 2011, Paris, 25 May 2011; OECD (2011) *Annual Report on the OECD Guidelines for Multinational Enterprises: Mediation and consensus building*, Paris: OECD Publishing.

¹⁰⁶ OECD website (2013) <http://www.oecd.org/daf/inv/mne/multistakeholder-forum-may-2013.htm>, last accessed 25 May 2014.

¹⁰⁷ OECD (2013), *OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas: Second Edition*, Paris: OECD Publishing; OECD website (2013) <http://www.oecd.org/daf/inv/mne/mining.htm>, last accessed 25 May 2014.

There is no formal procedure for an evaluation and review of the Guiding Principles. However, several informal interactive processes may serve a similar objective. Key *actors* correspond to those that were instrumental in convincing the UN system and its Human Rights Commission/Council of the need to establish a transnational business governance instrument on business and human rights. In addition, new forms of interaction, such as networks, may evolve. The endorsement of the Guiding Principles by the UN Council occurred alongside an interested, emergent academic community that is made up of scholars in regulatory and governance disciplines. These scholars are ideally placed to conduct research and analysis on the effectiveness of the Guiding Principles, their implementation, monitoring, compliance promotion and enforcement. Drivers and shapers are likely to include a combination of civil society and market pressure and lessons and needs of the implementing TBG institutions. Given the UN background, states may exercise significant influence to shape an evaluation and review as well as the outcome. Host states of transnational enterprises may interact with home states with explicit policies on CSR or business and human rights to establish a need for particular evaluations. Through their regular review of states' reports on human rights conditions, expert commissions under UN human rights treaties may question the conduct of certain businesses, the adequacy of states' regulatory efforts to implement their duty to protect, and provide guidance for both states and businesses to improve the understanding and application of the Guiding Principles to particular situations or as regards specific human rights. The UN's Office of the High Commissioner for Human Rights (OHCHR) may support this through analyses, which may involve interaction with specific groups of victims of business-related human rights abuse, civil society, national human rights institutions, or state bodies, such as authorities implementing national business regulation.

Comparison between business reports (such as Global Compact Communication of Progress reports), NCPs (through cases reported on their websites or in the OECD Guidelines' annual reports), and states' action to encourage and enforce the responsibility to respect human rights (such as through states' reports to UN Human Rights expert committees) may function as *mechanisms and pathways* for evaluation and review. Analysis of experience with due diligence under the OECD Guidelines in relation to other issues than human rights, as well as experience with ISO 26000 in relation to human rights due diligence and 'sphere of influence' for other areas may also function as mechanisms for evaluation. The *character of interaction* may be diverse. In addition to orchestration organized from within the UN (the Working Group on Business and Human Rights, and the Office of the High Commissioner for Human Rights) and coordination, for example between the OECD and its many NCPs at state level, it may come to include competition between non-UN TBG institutions to seek to establish what model(s) of implementation of the Guiding Principles are the most effective.

Contrary to some of the non-state based TBG schemes discussed by the proposers of the TBGI framework¹⁰⁸ and their colleagues,¹⁰⁹ the Guiding Principles are not likely to be revised frequently. Rather, as a UN soft law instrument, they themselves may be rather static with dynamic guidance offered by expert committees or the OHCHR. More importantly from the TBGI perspective, as a UN soft law instrument the Guiding Principles may evolve into a hard law instrument, *i.e.* a treaty setting out standards of conduct for business organizations. This would take broad agreement on the

¹⁰⁸ Eberlein *et al.* (2014), *supra* fn. 1, esp. at 15.

¹⁰⁹ Guldbrandsen (2014), *supra* fn. 47; Haufler, Virginia, 'Transnational Business Governance and the Management of Natural Resources', *Osgoode Hall Law School Comparative Research in Law and Political Economy Research Paper No. 18/2012* (Osgoode Hall Law School, TBGI Project Subseries No. 6, 2012), available at <http://ssrn.com/abstract=2143388>.

benefits of the standards contained in the Principles as a modality against adverse business impact on society. Such agreement would need to be sufficient strong not be counteracted through formal or informal interaction between actors opposed to a hardening of TBG norms on business and human rights into binding standards of conduct. A repeat of the fate of the Draft UN Norms would be a strong blow to the significance of state based regulatory governance in the TBG field. By contrast, a continuation of the acceptance and spread of the norms of conduct contained in the Guiding Principles through the forms of interaction with state and non-state bodies that is sketched above would add significant regulatory perspectives to (international) state-based governance as effective means of transnational business regulation. As is the case for the OECD Guidelines' broad adoption of due diligence, such regulation could go beyond human rights to include other CSR-related issues.

5. Conclusion

As a regulatory instrument adopted by the UN Human Rights Council, the UN Guiding Principles are unique in several respects of relevance transnational business governance interaction. This includes the multi-stakeholder development of this UN Human Rights instrument, which actively included business organizations as potential duty-holders; the normative combination of State duties and business responsibilities which informs the Guiding Principles; and the significant normative influence on other TBGI schemes within a brief time span of the adoption of the Guiding Principles. Importantly, it also includes the way in which the Guiding Principles as an instrument without detailed built-in implementation or enforcement modalities work through such other schemes. This applies to Global Compact Guidance and reporting and to the OECD Guidelines' broad recommendations of due diligence. It applies to the National Contact Points as complaints handling institutions with extraterritorial reach, and to financial activities supported by IFC. Through these and the influence on ISO 26000, a transmission of elements of the UN Guiding Principles into private business governance may take place which may be applied by companies and in supply chain management across the world.

The application of the TBGI framework to the UN Guiding Principles demonstrates how non-enforceable transnational business governance is not only deployed by private or public-private organisations, but also by public institutions. This equally applies to institutions such as the UN Human Rights Council that assume a quasi-legislative role. Analysis of the Guiding Principles as interactional business governance suggests that this form of governance is capable of migrating from deployment by specialised private or public-private groups in specific sectors or regions, to becoming adopted by public institutions in their efforts to regulate global sustainability concerns. This conclusion complements related findings in relation to ISO 26000,¹¹⁰ which by contrast to the Guiding Principles started as a private regulatory governance initiative.

The implications of this migration of experimentalist forms of governance from the private to the public sphere are potentially significant in terms of contributions to global regulation of sustainable development. The influence which the Guiding Principles have had on other TBGI instruments of various degrees of private and public dominance (from ISO 26000 through IFC's Performance Standards to the Global Compact) indicates the potential of international institutions regulating global sustainability concerns through transnational business governance and its interaction with other TBGI schemes for their implementation and enforcement. Offering a way around the political

¹¹⁰ Webb, Kernaghan (2012) *supra* fn 52.

and institutional constraints of state-centrist international law, the approach may be deployed for the regulation of other sustainability issues that are affected by business: climate change, water and land usage, food security, and space exploration and exploitation are all potential candidates for transnational business governance. Their effective regulation requires public international law- and policy-makers to go beyond the state-centrist focus and actively interact with other public, public-private and private business governance schemes.

Pragmatic engagement with the private sector offers a modality for international organisations like the UN to promote sustainability related objectives to complement or supplement the obligations of states. Equally pragmatically, this may involve co-regulation along the lines of transnational law rather than conventional international law. Such activities are particularly salient when states lack the will to implement their international obligations in national law (leading to governance gaps). The TBGI approach shows the UN Guiding Principles as a bridge-builder that pragmatically cuts across the public and private regulatory spheres, not only drawing on both in combinations in order to reduce adverse business impact on society, but as indicated weaving into other regulatory initiatives in both fields. Due to the influence that the Principles have already had on regulatory business governance not only as regards but also beyond human rights, insight into the dimensions and components of the interactional aspects of this instrument and its implementation offers significant contributions to the literature on regulation, governance, business ethics and CSR.

By combining a range of actors, drivers, mechanisms and forms of interaction, transnational business governance interaction offers governmental and intergovernmental authorities opportunities to shape private sector action outside their formal regulatory boundaries. The TBGI approach to the Guiding Principles illustrates that diverse forms of interaction and components of regulatory governance offer opportunities not only to address governance gaps, but also to implement specific public policy goals beyond the traditional ‘carefully policed boundaries’ of national or international, public or private governance. With CSR no longer only ‘beyond law’ – one of the key impacts of the Guiding Principles, as evidenced for example by the EU’s 2011 CSR definition¹¹¹ - regulators may even deploy this concept to go beyond the minimum requirements of enforceable law by incorporating its normative drive into novel forms of governing business conduct.

Further research on the TBGI aspects of the Guiding Principles could uncover the regulatory perspectives through detailed analysis of the ways in which the Guiding Principles influence other TBGI schemes as well as sector-wise or regional public, public-private or private business governance. Further research perspectives on potential for regulation of global sustainability concerns include a detailed elucidation of transnational governance features relating to the rule-making process of the Guiding Principles, and analysis of the effectiveness of implementation through interaction with other TBGI schemes. Such insight may be applied in other public or public-private regulatory initiatives targeting business governance.

¹¹¹ EU (2011), *supra* fn. 12.