

Corporate Influence on the Business and Human Rights Agenda of the United Nations



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I. Introduction

Efforts to create an international legally binding instrument to hold transnational corporations (TNCs) accountable for human rights abuses have recently gained new momentum.

In September 2013 the Government of Ecuador delivered a statement on behalf of 85 member states of the United Nations (UN) at the 24th session of the Human Rights Council (UNHRC) asking for a legally binding framework to regulate the activities of transnational corporations and to provide appropriate protection, justice and remedies for the victims of human rights abuses.

Many civil society organizations welcomed the initiative of Ecuador and called on the Human Rights Council to take steps towards the elaboration of a binding Treaty on Business and Human Rights. They established the Treaty Alliance in order to collectively help to organize advocacy activities in support of such a binding Treaty.

Nobel Prize laureate Joseph Stiglitz reinforced their call in a keynote address to the UN Forum on Business and Human Rights in Geneva in December 2013 by asking Governments and the UN to move towards a binding international agreement enshrining the norms of the UN Guiding Principles on Business and Human Rights.

These efforts are only the latest link in a chain of initiatives at the UN to hold corporations accountable to the public. They started in the 1970s with the discussions about a Code of Conduct for Transnational Corporations and continued in the late 1990s with the attempt to adopt the UN Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights.

All these efforts met with vigorous opposition from TNCs and their business associations, and they ultimately failed. At the same time, many corporate actors have been successful in implementing public relations strategies that have helped to present business enterprises as good corporate citizens seeking dialogue with governments, the UN and decent concerned 'stakeholders', and able to implement environment, social and human rights standards through voluntary Corporate Social Responsibility (CSR) initiatives.

The UN Global Compact and the UN Guiding Principles on Business and Human Rights became prime examples of an allegedly pragmatic approach based on consensus, dialogue and partnership with the corporate sector – in contrast to regulatory approaches to hold corporations accountable. These multi-stakeholder initiatives helped to increase the influence of powerful corporate actors on discourse and policymaking – and served to sideline those Governments, civil society activists and scholars who advocated for legally binding instruments for TNCs.

This working paper gives an overview of the debate from the early efforts to formulate the UN Code of Conduct to the current initiative for a binding Treaty on Business and Human Rights. It particularly focuses on the responses by TNCs and their leading interest groups to the various UN initiatives, specifies the key actors and their objectives, and describes how many of their demands were ultimately reflected in governmental positions and UN decisions. In this context it also highlights features of the interplay between business demands and the evolution of the regulatory debates at the UN. This provides an indication of the degree of influence that corporate actors exert and their ability – in cooperation with some powerful UN member states – to prevent international binding rules for TNCs at the UN and, instead, promote legally non-binding, 'voluntary' approaches such as CSR and multi-stakeholder initiatives.

The working paper ends with remarks on what could be done to counteract and reverse corporate influence on the UN human rights agenda. This constitutes an indispensable prerequisite for progress towards effective legally binding instruments on business and human rights that can produce real improvements in the lives of affected individuals and communities.

II. Business attempts to influence regulatory efforts at the UN

1. Early steps towards a Code of Conduct for TNCs

Calls for international regulation of foreign direct investment and Transnational Corporations started in the late 1960s.¹ One key year was 1972, when Chile's President Salvador Allende accused US companies, in particular the International Telegraph and Telephone Company (ITT) and the Kennecott Corporation, of intervening in Chile's internal affairs. That same year, first calls for international codes of conduct for TNCs were made at the third United Nations Conference on Trade and Development (UNCTAD III) in Santiago de Chile. At this conference, governments stressed the growing importance of TNCs and the need to ensure that their operations did not conflict with the interests of developing countries and were in accordance with their national development needs.² Representatives of many developing countries pointed out that the lack of effective arrangements for the supervision of TNCs was a serious gap in the system of international institutions.³

In July 1972, the Economic and Social Council (ECOSOC) of the UN requested the UN Secretary General to appoint a Group of Eminent Persons to study the role of multinational corporations, their impact on development and their implications for international relations.⁴ In its comprehensive report, published in 1974,⁵ the group stated:

*"While multinational corporations are subject to the jurisdiction of individual Governments in respect of their activities within specific countries, the global character of these corporations has not been matched by corresponding co-ordination of actions by Governments or by an internationally recognized set of rules or a system of information disclosure."*⁶

The group recommended, inter alia, to establish under the ECOSOC a commission on multinational corporations, "(...) composed of individuals with a profound understanding of the issues and problems involved."⁷

Subsequently, in 1974, the ECOSOC established a Commission on Transnational Corporations, albeit as an intergovernmental body, complemented by the UN Centre on Transnational Corporations (UNCTC) as its special research and administrative body.

In 1977, an Intergovernmental Working Group, composed of delegates of 48 countries, started working on a draft Code of Conduct which aimed, *inter alia*, at establishing a legally binding international framework defining the responsibilities of TNCs towards their host countries, creating more transparency in their structure and activities, and preventing tax avoidance, price manipulation or other non-competitive or harmful business behavior.

The UN funds, programs and specialized agencies set out to formulate their own TNC codes. By the mid-1980s, more than 30 codes of conduct covering various corporate sectors and practices were under consideration by various UN bodies.. Only a few of them, however, were finally adopted. They include the 1977 Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy of the International Labour Organization (ILO), the 1985 UN Guidelines for Consumer Protection, the 1985 International Code of Conduct on the Distribution and Use of Pesticides of the Food and Agriculture Organization (FAO), and the 1981 International Code of Marketing of Breastmilk Substitutes adopted by the World Health Organization (WHO) and endorsed by the United Nations Children's Fund (UNICEF).

However, the efforts of the 1970s and 1980s to move towards legally binding instruments to regulate TNCs soon tapered out – not least as a result of strong corporate pressure.

1 Sources for this section include: Richter (2001), ch. 1 and 2, Box 5.2; Richter (2002); Hansen (2002); Richter (2004); Hummel (2009); and Teitelbaum (2010).

2 Cf. UNCTAD (1972), p. 26.

3 Ibid., p. 233.

4 Cf. ECOSOC Res. 1721 (LIII) of 2 July 1972. Among the 20 members of the group were US Senator Jacob Javits, the President of the European Commission Sicco Mansholt, the German Minister Hans Matthöffer and the Chilean diplomat and former ILO Director Juan Somavia.

5 Cf. UN (1974).

6 Ibid., p. 51.

7 Ibid., p. 52.

The corporate offensive against a Code of Conduct

TNCs and their interest groups used various strategies to undermine the initial efforts of the UN to hold companies accountable. Many companies established their own campaigns against international regulation or worked through industry associations like the International Chamber of Commerce (ICC). Harris Gleckman, former senior officer at the UN Centre on Transnational Corporations, described ICC's position at that time as follows:

*"The ICC was the lead body for business with the Commission and all of UNCTC projects. This association argued that TNCs were no different from mom-and-pop corner stores, except that they were larger. And being larger, they said, was not a reason to single out one type of firm. Moreover, in their view, standards for all firms should best be established on a country-by-country basis, not at the UN. Therefore any international environmental or social standard was inappropriate and unnecessary."*⁸

TNCs used their considerable influence on the media and politicians to shed a bad light on the UN and called for funding cuts and policy changes. One remarkable example was the global tobacco company campaign against the WHO. A lengthy WHO report, based on millions of pages of confidential documents released in several lawsuits and issued in 2000, offers a uniquely detailed case study of the anti-UN corporate offensive.⁹ In the mid-1980s, the tobacco companies launched a secret campaign to attack the WHO, discredit its work and reduce its budgets. The report shows how top executives of the world's leading tobacco companies *"instigated global strategies to discredit and impede WHO's ability to carry out its mission."*¹⁰ The Philip Morris Company, for instance, held a strategy session in Boca Raton, Florida, in 1989 where executives planned a world-wide offensive against tobacco critics (the Boca Raton Action Plan), identifying the WHO as its most dangerous opponent.¹¹ The WHO concluded:

*"Evidence from tobacco industry documents reveals that tobacco companies have operated for many years with the deliberate purpose of subverting the efforts of the World Health Organization (WHO) to control tobacco use. The attempted subversion has been elaborate, well financed, sophisticated, and usually invisible."*¹²

Particularly those TNCs who were potentially most affected by regulatory efforts of the UN, such as the infant food and pharmaceutical industries, elaborated sophisti-

cated counter measures. Nestlé, for example, hired public relations (PR) practitioners to develop strategies of "issues management" to undermine efforts of international regulation.¹³ These PR experts recommended to TNCs and their associations, *inter alia*, to attempt to gain access to every possible UN forum, and improve their images through strategic sponsorship of good causes or close association with reputable groups and institutions, while splitting critics through divide and rule strategies.

One telling example is the case of Rafael Pagan Jr., a PR executive and President of the Nestlé Coordination Center for Nutrition in the early 1980s. Pagan developed a comprehensive PR strategy for TNCs to fight for corporate "survival" and to deal *"constructively and effectively"* with the *"international regulatory mood."*¹⁴ His strategy included:¹⁵

- » establishing an issues management unit (such as Nestlé's Coordination Center for Nutrition) with a *"responsive, accurate corporate issue and trends warning system and analysis capability;"*
- » *"organizing effective NGOs, and gaining representation for them at every possible UN agency."* (By NGOs, Pagan meant at the time international business organizations such as the International Council of Infant Food Industries (ICIFI) and the International Pharmaceutical Manufacturers' Association (IPMA).)
- » working with national and international civil servants *"not to defeat all regulation, but to create regulation that legitimises and channels our rights, opportunities and contributions;"*
- » *"reaching out to hold an ongoing dialogue with the many new publics whose understanding we need to remain in business;"*
- » separating the *"fanatic"* activist leaders from those who are *"decent concerned"* people, and *"stripping the activists from the moral authority they receive from their alliance with religious organisations."*

Issue management approaches as reflected in these recommendations have been shaping corporate PR strategies since the 1980s and have also influenced the approaches of governments, UN bodies, and an increasing number of NGOs towards TNCs.

8 Personal communication, 12 November 2013.

9 Cf. WHO (2000).

10 Ibid., p. iii.

11 Ibid., pp. 63.

12 Ibid., p. iii.

13 Cf. Richter (1998) and Richter (2001), chapter 8.

14 Cf. Pagan (1982).

15 Quoted in Richter (2001), pp. 148.

Changes in government and UN policies towards the corporate sector

Government support of binding international rules for corporations weakened when neoliberal economic theory and policy began to take hold in the Reagan/Thatcher era of the 1980s.

In 1986, for instance, the US State Department emphasized at the World Health Assembly its

*"(...) strong position that the World Health Organization should not be involved in efforts to regulate or control the commercial practices of private industry, even when the products may relate to concerns about health. This is our view regarding infant food products, and pharmaceuticals, and tobacco and alcohol."*¹⁶

In March 1991, the US government sent a Demarche Request to its foreign embassies, asking them to lobby for the abolishment of the UN Code of Conduct negotiations:

*"We believe that the Code is a relic of another era, when foreign direct investment was looked upon with considerable concern. The Code does not reflect the current investment policies of many developing countries. (...) In the light of the above, Washington agencies have decided to seek the support of host government officials responsible for foreign investment and quietly build a consensus against further negotiations. (...) We stress that the Demarche should be given to officials responsible for investment not those responsible for UN affairs."*¹⁷

The Code's official demise came in 1992, when the President of the UN General Assembly (GA) stated that *"no consensus was possible (...) at present"* and that *"delegations felt that the changed international environment and the importance attached to encouraging foreign investment required a fresh approach."*¹⁸

One of the last attempts in this period to introduce international corporate regulation via the UN was made at the UN Conference on Environment and Development (UNCED) – the 'Earth Summit' – held in Rio de Janeiro in June 1992. The UNCTC had drafted a series of recommendations on "Transnational Corporations and Sustainable Development" to be included in UNCED's programme of action, Agenda 21. But a coalition of Western governments and corporate lobbyists managed to get the UNCTC chapter on the environmental responsibility of TNCs removed from the agenda.

Instead, the Conference's Secretary-General Maurice Strong invited the newly-formed Business Council for

Sustainable Development (BCSD)¹⁹ to draft recommendations on industry and sustainable development. They are clearly reflected in Chapter 30 of Agenda 21 under the title "Strengthening the role of business and industry." Its key message is:

*"(...) leaders in business and industry, including transnational corporations, are increasingly taking voluntary initiatives, promoting and implementing self-regulations and greater responsibilities in ensuring their activities have minimal impacts on human health and the environment. (...) A positive contribution of business and industry, including transnational corporations, to sustainable development can increasingly be achieved by using economic instruments such as free market mechanisms (...)"*²⁰

The main policy recommendation in Chapter 30 is:

*"Governments, business and industry, including transnational corporations, should strengthen partnerships to implement the principles and criteria for sustainable development."*²¹

These sentences in Agenda 21 demonstrate the fundamental shift in the UN from a norm-setting to a cooperative approach towards the corporate sector.

In the same year, the UNCTC and the UN Commission on Transnational Corporations were closed down, and their responsibilities were partly transferred to UNCTAD.

2. From regulation to "partnership": the shift towards the Global Compact

Corporate influence on the UN increased significantly after Kofi Annan had assumed the post of UN Secretary-General in January 1997. In the following years, Annan travelled to the annual World Economic Forum (WEF) in Davos, held talks with senior officials of business interest groups, particularly the ICC, and participated in various meetings with corporate executives.

On 9 February 1998, the UN Secretary-General met with the ICC in a major conclave in Geneva. This time, there were 25 top corporate executives in attendance, including representatives of Coca-Cola, Unilever, McDonalds, Goldman Sachs, British American Tobacco and Rio Tinto.

16 Quoted in Chetley (1990), p. 92.

17 Quoted in Braithwaite and Drahos (2000), p. 193.

18 Samir Shihabi, quoted in Transnationals (1992), p. 1.

19 The BCSD was created in 1992. In 1995, it merged with the World Industry Council for the Environment (WICE) to become the World Business Council for Sustainable Development (WBCSD), see www.wbcscd.org. Its current chairman is Paul Polman, the Chief Executive Officer of Unilever.

20 Cf. Agenda 21, Chapter 30, para. 3.

21 Ibid., para. 7.

Following the meeting, the ICC and the UN Secretary-General issued a joint statement declaring that “broad political and economic changes have opened up new opportunities for dialogue and cooperation between the United Nations and the private sector” and committing the two entities to “forge a close global partnership to secure greater business input into the world’s economic decision-making and boost the private sector in the least developed countries.”²²

Maria Livanos Cattai, ICC Secretary-General from 1996 to 2005, lauded the new relationship: “The way the United Nations regards international business has changed fundamentally,” she wrote afterwards in a guest column in the International Herald Tribune. “This shift towards a stance more favourable to business,” she continued, “is being nurtured from the very top.”²³

The new partnership between the UN Secretary-General and the ICC prepared the ground for Kofi Annan’s initiative for a “global compact of shared values and principles.” He presented this idea to the business executives assembled at the World Economic Forum in Davos in January 1999, arguing that it would give “a human face to the global market.”²⁴

The idea evolved from a concept which the then UN Assistant Secretary-General and chief advisor for strategic planning, Professor John Ruggie from Harvard University, had developed for the UN Secretary-General. The main objective of this initiative was to engage companies voluntarily in helping to pursue central UN principles in the areas of human rights, core labour standards, environment and (since 2004) fighting corruption. In return, the Secretary-General promised companies support in striving towards these principles but also to go further:

“More important, perhaps, is what we can do in the political arena, to help make the case for and maintain an environment which favours trade and open markets.”²⁵

Kofi Annan made the “business case” for the Global Compact just a few months after the collapse of negotiations on an agreement on liberalizing investment regulations in the Organization for Economic Cooperation and Development (OECD) (the Multilateral Agreement on Investment, MAI). This was also at a time when the movement critical of neoliberal globalization was gaining increasing importance and momentum worldwide. In his Davos speech, he reminded business leaders about the

“(…) enormous pressure from various interest groups to load the trade regime and investment agreements with restrictions aimed at reaching adequate standards in the three areas of human rights, labour and the environment.”

In short: it was, *inter alia*, in exchange for the UN’s support of unhindered trade that the UN Secretary-General asked companies to

“(…) make sure that in your own corporate practices you uphold and respect human rights; and that you are not yourselves complicit in human rights abuses.”²⁶

The official launching of the Global Compact took place on 26 June 2000, at UN headquarters in the presence of chief executives and other top managers of almost 50 corporations. These included Daimler Chrysler, Unilever, Deutsche Bank, BP Amoco, Royal Dutch Shell, Volvo, Credit Suisse, Dupont and Nike, all of whom agreed to sign the compact.

On the day of the launching event in New York, ICC head Maria Livanos Cattai warned in an article in the International Herald Tribune:

“Business would look askance at any suggestion involving external assessment of corporate performance, whether by special interest groups or UN agencies. The Global Compact is a joint commitment to shared values, not a qualification to be met. It must not become a vehicle for governments to burden business with prescriptive regulations.”²⁷

The focus on values and joint learning rather than rules has remained the leitmotif of the Global Compact until today. Since its official launch, the initiative has grown to, in its own words, “the world’s largest corporate citizenship and sustainability initiative” with more than 7,000 participants from the corporate sector in 145 countries around the world.²⁸

Governments, particularly from the global South, were at first skeptical of the Secretary-General’s initiative, which had been launched without a mandate from the UN member states. European governments, led by Germany, reacted to this by introducing a new agenda item at the General Assembly, “Towards Global Partnerships.” Since 2001, the General Assembly has dealt with this item on a bi-annual cycle.²⁹ According to Global Compact Office Executive Director Georg Kell, this move henceforth allowed for “high-level debates on the role of the private sector while avoiding intergovernmental oversight.”³⁰

26 Ibid.

27 Cf. Livanos Cattai (2000).

28 Cf. www.unglobalcompact.org/ParticipantsAndStakeholders/index.html.

29 For the first resolution see UN Doc. A/RES/55/215 from 21 December 2000; the most recent resolution was adopted on 6 December 2013 (“Towards global partnerships: A principle-based approach to enhanced cooperation between the United Nations and all relevant partners”, UN Doc. A/RES/68/234).

30 Cf. Kell (2013), p. 38.

22 Quoted in Corporate Europe Observatory (2001). See also Livanos Cattai (1998).

23 Quoted in Corporate Europe Observatory (1998).

24 Cf. UN Secretary-General (1999); Kell (2013), pp. 31-52; and Tesner with Kell (2000).

25 Cf. UN Secretary-General (1999).

3. The Norms on the Responsibilities of TNCs with Regard to Human Rights

In parallel to the discourse on corporate social responsibility, multi-stakeholder initiatives and UN-business partnerships which became dominant after the Earth Summit 1992, some actors put corporate accountability and the need for binding rules for TNCs right back on the UN agenda, albeit somewhat away from the public limelight. In 1993, the then Sub-Commission on Prevention of Discrimination and Protection of Human Rights,³¹ which at the time was a subsidiary body of the UN Commission on Human Rights (UNCHR), commissioned three reports on TNCs and human rights.³² These reports stressed the need to create an international legal framework for TNCs. For example, the 1996 report states:

“A new comprehensive set of rules should represent standards of conduct for TNCs and set out economic and social duties for them with a view to maximizing their contribution to economic and social development.”³³

This basic consideration prompted the Sub-Commission to appoint a working group to address in more detail the working methods and activities of TNCs. Already at its first session in August 1999, this working group announced that it would develop a *“code of conduct for TNCs based on the human rights standards.”³⁴* After a consultation process lasting almost four years and involving business associations, civil society organizations, trade unions and institutions of the UN system, the working group under the guidance of David Weissbrodt submitted its draft version of *“Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights”* in August 2003.³⁵

The UN Norms were a set of 23 articles defining the obligations of states and corporations in human rights legal language as well as outlining some means of implementation, and definitions. In addition to state duties to ensure that transnational corporations respect human rights, they also attributed direct human rights obligations to TNCs in a sentence that caused much debate afterwards:

“Within their respective spheres of activity and influence, transnational corporations and other enterprises have the obligation to promote, secure the fulfillment of, respect,

ensure respect of and protect human rights recognized in international as well as national law (...).”³⁶

The Norms also included, *inter alia*, specific sections on the obligations of TNCs with regard to consumer and environmental protection.

On 13 August 2003, the Sub-Commission approved by consensus the draft version and transmitted it to the UN Commission on Human Rights.

At its 2004 session, this draft version of binding standards for TNCs was given a cool response by the Commission. It explicitly stressed that this document *“has not been requested by the Commission and, as a draft proposal, has no legal standing.”³⁷* Instead of adopting the Norms, it commissioned the United Nations Office of the High Commissioner for Human Rights (OHCHR) to compile a further report on the topic. In 2005, the Office submitted a comprehensive report that still referred to the UN Norms as one of several instruments deemed important regarding corporate responsibility that required further assessment.³⁸

However, the resolution on the topic of *“Human Rights and transnational corporations and other business enterprises”* of the Commission on Human Rights in April 2005 completely ignored the Norms, effectively hushing them up.³⁹ Instead, it called on the UN Secretary-General to appoint a special representative on the issue of human rights and transnational corporations and other business enterprises.

The corporate sector response to the Norms

The working group and its proposed Norms met with vehement opposition from corporate lobby groups. Already in 2003, the ICC and other major business associations – which included prominent Global Compact members – had started organizing the derailment of the suggested course of action. They did not support the idea of genuinely integrating the Norms into the Global Compact, let alone the notion of the United Nations actually adopting and enforcing legally-binding Norms. Instead, they used the Global Compact to campaign against their adoption.

The ICC and the International Organisation of Employers (IOE) stated in their submission to the 2003 session of the Commission on Human Rights that the Norms would not positively contribute to

31 ECOSOC renamed it as the Sub-Commission on the Promotion and Protection of Human Rights in 1999.

32 Cf. UN Docs. E/CN.4/Sub.2/1995/11 of 24 July 1995, E/CN.4/Sub.2/1996/12 of 2 July 1996 and E/CN.4/Sub.2/1998/6 of 10 June 1998.

33 Cf. UN Doc. E/CN.4/Sub.2/1996/12 of 2 July 1996, para. 74.

34 Cf. UN Doc. E/CN.4/Sub.2/1999/9 of 12 August 1999, para. 32.

35 Cf. UN Doc. E/CN.4/Sub.2/2003/12/Rev.2 of 26 August 2003.

36 *Ibid.*, para. 1.

37 Cf. UN Doc. E/CN.4/DEC/2004/116 of 20 April 2004.

38 Cf. UN Doc. E/CN.4/2005/91 of 15 February 2005.

39 Cf. UN Doc. E/CN.4/RES/2005/69 of 20 April 2005.

*"(...) either the encouragement of responsible business conduct or to the promotion and protection of human rights," since "[m]any IOE and ICC member companies have moved beyond such a legalistic approach to human rights, and have taken practical initiatives to promote and protect human rights in concrete ways within their own sphere of influence."*⁴⁰

They insisted that the "establishment of the legal framework for protecting human rights and its enforcement" was up to national governments and that the draft Norms would actually "divert the attention and resources of national governments away from implementing their existing obligations on human rights."⁴¹

The ICC and the IOE described the proposed Norms as *"(...) counterproductive to the UN's ongoing efforts to encourage companies to support and observe human rights norms by participating in the Global Compact."*⁴²

They warned that carrying forward the Norms risked *"(...) inviting a negative reaction from business, at a time when companies are increasingly engaging into voluntary initiatives to promote responsible business conduct."*⁴³

Thomas Niles, president of the US Council for International Business (USCIB) between 1999 and 2005, called the Norms "totally duplicate and unnecessary,"⁴⁴ and ICC head Maria Livanos Cattai argued:

*"A key point in this discussion is that transnational corporations (...) are more often than not part of the solution to human rights challenges rather than part of the problem. There is overwhelming empirical evidence to show that transnational corporations tend to raise standards – including human rights."*⁴⁵

In April 2004, prior to the consideration of the Norms by the Commission on Human Rights, the ICC and the IOE sent a massive 40-page document to the member states. Its major proposal was to strike the Norms off the UN agenda and to discourage any further work in that direction. The title of the document already contained its key message:

*"The Sub-Commission's Draft Norms, if put into effect, will undermine human rights, the business sector of society, and the right to development."*⁴⁶

While the ICC and IOE expressed appreciation of the Sub-Commission having opened up the discussions about the relationship between business and human rights, they em-

phasized that the proposed Norms were a "step in the wrong direction." They urged the UN to instead focus on the promotion of business as a motor of "every society's right to development, a right which is the foundation for the increased enjoyment of the economic and social rights of all individuals." In the end, the document proposed a way in which the Commission on Human Rights, as the parent body of the Sub-Commission, could restore its "credibility":

*"The Commission is urged to make a clear statement disapproving of the Sub-Commission's draft, and to clear up confusions. In particular the commission should set the record straight by stating, in unambiguous terms, that the duty-bearers of human rights obligations are States not private persons (including private business persons); and that the draft Norms are neither 'UN Norms' nor 'authoritative'; and that the Norms is a draft with no legal significance without adoption by the law-making organs of the United Nations."*⁴⁷

It seems that the members of the Commission on Human Rights followed the advice of the business lobby as they distanced themselves from the Norms and then went on to fundamentally change the course of the UN approach on business and human rights.

4. The UN Guiding Principles on Business and Human Rights

On 28 July 2005, Kofi Annan appointed his confidant John Ruggie as Special Representative for business and human rights. As the architect of the Global Compact and a champion of a global governance concept based on cooperation with business rather than on its global regulation, Ruggie's appointment set a clear political course.

After assuming office, Ruggie started a consultation process over the following six years. He conducted nearly 50 international consultations in many regions of the world and received hundreds of submissions and commentaries, many of them from business associations and TNCs (see the list of business associations, companies and law firms in the Annex).⁴⁸ He did this in response to the request of the UN Commission of Human Rights

40 Cf. ICC/IOE (2003).

41 Ibid.

42 Ibid.

43 Ibid.

44 Quoted in Balch (2003).

45 Quoted in Whelan/Moon/Orlitzky (2009), p. 377.

46 Cf. ICC/IOE (2004), p. 1.

47 Ibid., p. 40.

48 For an official overview of the process with links to key resolutions cf. the website of the OHCHR www.ohchr.org/EN/Issues/Business/Pages/SRSGTransCorporIndex.aspx; for more information about the process cf. the portal of the Special Representative www.business-humanrights.org/SpecialRepPortal/Home. It is maintained by the Business & Human Rights Resource Centre and contains much valuable material, including all documents and papers published by the Special Representative and his team, as well as submissions and commentaries by supporters and critics.

*"(...) to liaise closely with the Special Adviser to the Secretary-General for the Global Compact and to consult on an ongoing basis with all stakeholders, including States, the Global Compact, international and regional organizations such as the International Labour Organization, the United Nations Conference on Trade and Development, the United Nations Environment Programme and the Organization for Economic Co-operation and Development, transnational corporations and other business enterprises, and civil society, including employers' organizations, workers' organizations, indigenous and other affected communities and non-governmental organizations."*⁴⁹

When the Commission on Human Rights had adopted its resolution on human rights and transnational corporations in April 2005, the United States had been one of the three countries rejecting it, on the grounds of its

*"(...) negative tone towards international and national business, treating them as potential problems rather than the overwhelmingly positive forces for economic development and human rights that they are."*⁵⁰

The USA also signified that it would oppose any future resolution not explicitly clarifying that it was *"not intended to further the cause of norms or a code of conduct for TNCs."*⁵¹ This statement set a strong political signal to the address of the Special Representative.

Subsequently, in his first Interim Report, in 2006, Ruggie distanced himself in deliberately undiplomatic terms from the UN Norms and those who had supported them. In his words,

*"(...) the Norms exercise became engulfed by its own doctrinal excess. Even leaving aside the highly contentious though largely symbolic proposal to monitor firms and provide for reparation payments to victims, its exaggerated legal claims and conceptual ambiguities created confusion and doubt even among many mainstream international lawyers and other impartial observers."*⁵²

Ruggie criticized the Norms, claiming that they

*"(...) take existing State-based human rights instruments and simply assert that many of their provisions now are binding on corporations as well. But that assertion itself has little authoritative basis in international law – hard, soft or otherwise."*⁵³

His conclusion was that

*"(...) the divisive debate over the Norms obscures rather than illuminates promising areas of consensus and cooperation among business, civil society, governments and international institutions with respect to human rights."*⁵⁴

Thus Ruggie once again emphasized his approach based on consensus and cooperation with business, rather than on travelling a *"treaty road"*⁵⁵ and proposing solutions that *"may – or may not materialize a quarter century hence."*⁵⁶

According to Ruggie, the business community and governments *"were relieved"* that the Norms would not feature in his work. After this move, he says, they *"(...) took seriously my claim that I would take a rigorous evidence-based approach and search for practical solutions, not driven by doctrinal preferences."*⁵⁷

In Ruggie's words, his dialogue and consensus-oriented approach to addressing the issue involved *"intensive research and extensive consultations; organising global networks of volunteers in law firms, universities, NGOs, and businesses."*⁵⁸ Much pro-bono work was done by corporate law firms,⁵⁹ and occasionally, experts were seconded directly from companies to support John Ruggie, such as Christine Bader, at that time a BP oil company employee.⁶⁰

One example of the intense corporate involvement in John Ruggie's work was the engagement of the International Council on Mining & Metals (ICMM). This business interest group presents itself as *"a CEO-led collaborative of 22 of the largest mining, minerals and metals companies in the world."*⁶¹ Throughout Ruggie's six-year mandate, ICMM participated in at least eight consultations and sent six submissions and letters of support to the Special Representative (see box 1).

The international business associations ICC, IOE and the Business and Industry Advisory Committee to the OECD (BIAC), which, in their own words, *"together form the most representative voice of global business,"*⁶² played a particularly influential role in the work of the Special

49 Cf. UN Doc. E/CN.4/RES/2005/69 of 20 April, 2005, para. 3.

50 Statement of US Delegate Leonard Leo at the Commission on Human Rights on Item 17, "Transnational Corporations", 20 April, 2005.

51 Ibid.

52 Cf. UN Commission on Human Rights (2006), para. 59.

53 Ibid., para. 60.

54 Ibid., para. 69.

55 Cf. his article from May 2008 "Treaty road not travelled", Ruggie (2008a).

56 Letter from John Ruggie to Julieta Rossi, Director, ESCR-Net, 15 October, 2007.

57 Cf. Ruggie (2013), pp. 54-55.

58 Cf. Ruggie (2013), p. xii.

59 Teitelbaum mentions a note by the Special Representative on the website of the UN Office at Geneva (UNOG) announcing the reliance on voluntary services of 15 international law firms specialized in counselling big corporations, (2010) p. 6. See also the list of firms in the Annex of this working paper.

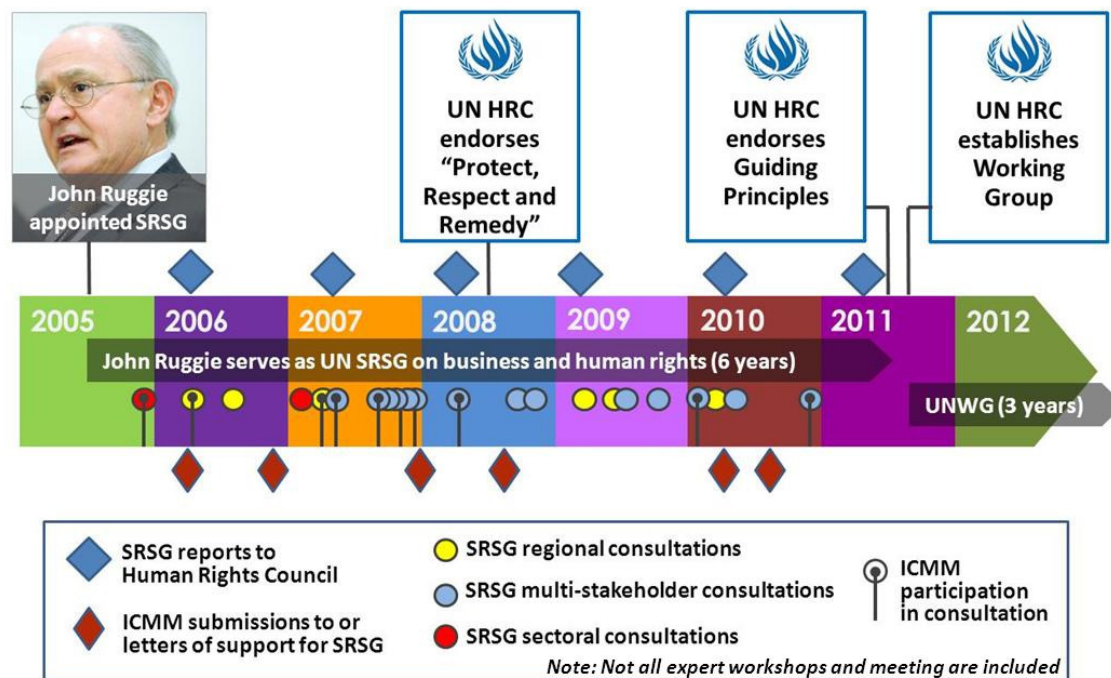
60 Cf. Bader (2014).

61 Cf. International Council on Mining & Metals (2013), p. 1.

62 Cf. IOE/ICC/BIAC (2011b), p. 1.

Box 1: The International Council on Mining & Metals engagement in the work of John Ruggie

Figure 1. ICMM engagement throughout the mandates of the UN SRSG



Source: International Council on Mining & Metals (2011), p. 2.

Representative.⁶³ In a joint letter to John Ruggie dated 14 October 2005, the Secretary-Generals of ICC and IOE expressed their support of “both your mandate and your appointment”, and they declared:

“We stand ready to do all that we can to assist you in a positive and open manner as you consider what are often complex and difficult issues.”⁶⁴

In the same letter, the business lobby clearly expressed its expectations regarding the outcome of this process:

“(...) business believes the success of your work could be defined by the way in which you are able to:

- » reinforce the extent to which business already makes a contribution and move the debate away from anti-business rhetoric to create a more effective partnership approach;

- » identify and clarify the wide range of instruments, codes and other mechanisms for assisting companies;
- » explicitly recognize that there is no need for a new international framework;
- » ensure that good practice is promoted and extended;
- » find ways for states to better discharge their obligations and to encourage ways of improvement where the rule of law is less than adequate.”⁶⁵

In his reports of the following six years, John Ruggie met these expectations to a large extent.

63 For their joint statements and comments on business and human rights see www.iccwbo.org/advocacy-codes-and-rules/areas-of-work/corporate-responsibility-and-anti-corruption/international-business-and-human-rights/.

64 Cf. ICC/IOE (2005).

65 Ibid.

The “Protect, Respect, Remedy” Framework (2008)

In June 2008, the Special Representative presented his “Protect, Respect and Remedy: a Framework for Business and Human Rights” report to the UN Human Rights Council.⁶⁶ This report formed the preliminary conclusion of a three-year research and consultation process.

The report is marked by an ambiguous discourse. Ruggie did acknowledge that corporations were involved in human rights abuses and pointed at problems for countries protecting human rights when confronted with pressure by transnational corporations and their business associations. But the dominant discourse in the document portrayed transnational corporations as victims of political and legal circumstances or lack of knowledge.

The Framework suggests looking at “*governance gaps created by globalisation*” as the “*root cause of the business and human rights predicament*”. Gaps “*between the scope and impact of economic factors and actors, and the capacity of societies to manage their adverse consequences*” created a “*permissive environment for wrongful acts by companies of all kind without adequate sanctioning or reparation.*” Therefore, the fundamental challenge consisted of finding out “*how to narrow and ultimately bridge the gaps in relation to human rights.*”⁶⁷

To address the identified governance gaps, Ruggie presented heterogeneous advices to the different actors. This was done under three headings, which he alternately called three fundamental principles or three foundational pillars:

1. the [state duty to protect](#) against human rights abuses by third parties, including businesses;
2. the [corporate responsibility to respect](#) human rights;
3. greater access by victims to [effective remedy](#), both judicial and non-judicial.

This overall structure signified that henceforth the issue of business and human rights would have to be based on a clear distinction between (strong) state “duties” to protect versus (weak) corporate “responsibilities” to respect human rights.

The Framework dedicated a whole section to the gaps in judicial and non-judicial grievance mechanisms which states, companies and other actors could provide. It noted the limited coverage of existing mechanisms at the international level and suggested as one possible solution the creation of a “*global ombudsman function*” that could receive and handle such complaints.⁶⁸

Although this proposal represented the only substantial innovation in the entire report of the Special Representative, he stressed the problems that the creation of such an institution would entail. And yet it was this proposal that the international business associations reacted to very sensitively in their commentary on the report. Whereas they gave a mainly positive assessment of its other passages, ICC, IOE and BIAC declared in their joint statement:

*“We do, however, have serious reservations about the idea of establishing a global ombudsman function as part of the business and human rights mandate. There are no convincing arguments that establishing an international ombudsman – even if it were practical and possible – would do anything to address the lack of access to effective and impartial judicial mechanisms at the national and local levels that the Special Representative mentions.”*⁶⁹

They thus indicated that governments would have to reckon with considerable resistance on the part of business if they went beyond the existing mechanisms and legally non-binding arrangements in combating corporate violation of human rights.

From the Framework to the Guiding Principles

When the Framework was presented to the member states in the Human Rights Council, they unanimously approved it but found it difficult to apply. Therefore, they extended the Special Representative’s mandate until 2011 with the task of “operationalizing” and “promoting” the Framework.

After another three years of intense research and consultation John Ruggie presented what is now known as the UN Guiding Principles on Business and Human Rights in March 2011.⁷⁰

Ruggie explicitly stated that the Guiding Principles did not create any new human rights obligations for companies. He particularly stressed in his report that the

*“Guiding Principles’ normative contribution lies not in the creation of new international law obligations but in elaborating the implications of existing standards and practices for States and businesses; (...) and identifying where the current regime falls short and how it should be improved.”*⁷¹

66 Cf. UN HRC (2008).

67 Ibid., para 3.

68 Ibid., para. 103.

69 Cf. IOE/ICC/BIAC (2008).

70 Cf. UN OHCHR (2011).

71 Ibid., para. 14.

The Guiding Principles rest on the same three pillars as outlined in Ruggie's 2008 Framework:

- » **The State duty to protect human rights:** States are obliged under international law to protect people against human rights abuse by business enterprises "through effective policies, legislation, regulations and adjudication." The State duty to protect "lies at the very core of the international human rights regime."⁷²
- » **The corporate responsibility to respect human rights:** It is the responsibility of business enterprises to respect human rights, and to put an end to and rectify any adverse impacts of their business activity.
- » **Access to effective remedy:** As part of their duty to protect, states must provide those affected by business-related human rights abuses with access to effective remedy, both judicial and non-judicial, by taking steps to "investigate, punish and redress" such abuses when they occur.⁷³

These three pillars are concretized through 31 principles that detail the fundamental obligations and responsibilities, and include specific recommendations to governments and business enterprises for their operationalization.⁷⁴

Not surprisingly, Ruggie's fundamental approach towards corporate accountability remained unchanged. In the words of legal expert Nicola Jägers,

*"(...) Ruggie has steered determinedly away from the concept of human rights obligations for corporations and instead placed exclusive emphasis on the State as sole duty bearer."*⁷⁵

While she regarded this as "perhaps understandable in light of the deadlock that followed after the rejection of the (...) UN Norms," she added:

*"However, the outright dismissal of the notion of corporate duties is regrettable and seems somewhat at odds with the intention that the Guiding Principles are to become 'a common global platform for action on which cumulative progress can be built (...) without foreclosing any other promising longer-term development'."*⁷⁶

At least the Guiding Principles clearly state that the corporate responsibility to respect human rights "is a global standard of expected conduct for all business enterprises wherever they operate," and that it exists "independently of States' abilities and/or willingness to fulfil their own human rights obligations and does not diminish those obligations."⁷⁷

A key feature of the Guiding Principles is the reference to "due diligence" of companies as the prime means to "know and show that they respect human rights."⁷⁸ At a conference sponsored by the U.S. Council for International Business, the U.S. Chamber of Commerce and the IOE, and hosted by The Coca-Cola Company (Atlanta, 25 February 2010), Ruggie described the shift towards human rights due diligence as

*"(...) a potential game changer for companies: from 'naming and shaming' to 'knowing and showing'. Naming and shaming is a response by external stakeholders to the failure of companies to respect human rights. Knowing and showing is the internalization of that respect by companies themselves through human rights due diligence."*⁷⁹

Ruggie made the 'business case' for this approach by arguing that

"(...) human rights due diligence can help companies lower their risks, including the risk of legal non-compliance. (...) There are situations in which companies currently harm human rights and, at the same time, may be non-compliant with existing securities and corporate governance regulations. Why? Because they are not adequately monetizing and aggregating stakeholder-related risks, and therefore are not disclosing and addressing them.

*Such risks stem from community challenges and resistance to company operations, typically on environmental and human rights grounds. (...) Stakeholder-related risks to companies include delays in design, siting, permitting, construction, operation and expected revenues; problematic relations with local labor markets; higher costs for financing, insurance and security; reduced output; collateral impacts such as staff distraction and reputational hits; and possible cancellation, forcing a company to write off its entire investment and forgo the value of its lost reserves, revenues and profits—the last of which can run into the billions of dollars."*⁸⁰

72 Ibid., Introduction, para. 6.

73 Ibid., Principle 25.

74 It is beyond the scope of this paper to provide a detailed analysis of the Guiding Principles. For this see, for instance, UN OHCHR (2012), van Huijstee (2012), Jägers (2011), Vandenhole (2012), and Heydenreich/Paasch/Kusch (2014, chapter 3 in the German version of the report). See also the special webportal www.business-humanrights.org/UNGuidingPrinciplesPortal/Home.

75 Cf. Jägers (2011), p. 160.

76 Ibid.

77 Cf. UN OHCHR (2011), Principle 11.

78 Ibid., Principle 15.

79 Cf. Ruggie (2010), p. 4.

80 Ibid., pp. 4-5.

Ruggie's reasoning did not put the spotlight on the victims of human rights abuses, but in contrast portrayed TNCs as victims of complex circumstances, lack of knowledge and stakeholder resistance.

This view is partly counterbalanced by part III of the Guiding Principles that deals with the "access to remedy" for victims of human rights violations. This section of the document describes various categories of judicial and non-judicial, state and non-state based grievance mechanisms. The Guiding Principles highlight the practical and procedural barriers to accessing judicial remedy and emphasize that

*"(...) many of these barriers are the result of, or compounded by, the frequent imbalances between the parties to business-related human rights claims, such as in their financial resources, access to information and expertise."*⁸¹

One suggestion to address this problem at the international level was the creation of a global ombudsman function. This proposal was mentioned in the 2008 Framework but met with strong resistance from corporate interest groups like ICC and IOE. Consequently, John Ruggie decided not to pursue it any further.

All in all, the Guiding Principles have met with mixed reactions from civil society organizations and academics (see box 2), while business associations and many TNCs welcomed them unanimously.

The corporate sector response

Major business associations but also a number of individual transnational corporations and international law firms (sometimes on behalf of their corporate clients) expressed strong support for the Special Representative and the results of his work. Many of them had already responded positively to the Draft Guiding Principles published by John Ruggie in November 2010 for public consultation. Among them were the International Business Leaders Forum, the International Council on Mining & Metals, the US Chamber of Commerce, the Confederation of German Employers' Association (BDA), and BASF.

Many of them, again, submitted letters of support for the Special Representative and his Guiding Principles immediately ahead of the important 17th session of the Human Rights Council in June 2011, where the Principles were to be adopted. This support was initiated by Ruggie himself, who had encouraged business associations, individual companies, and law firms, particularly those he had worked with in his various research and pilot projects, to

send letters of support to their governments, directly to the Council, or to him, and to post them online.⁸² According to Ruggie, *"(...) a significant number from diverse regions did so, which helped to solidify backing among many Council delegations."*⁸³

In response to his request, General Electric stated that the Guiding Principles *"helped to clarify the distinct interrelated roles and responsibilities of states and business entities in this area"* and that they would *"no doubt serve as a lasting beacon for businesses entities seeking (to) grow their service and product offerings while respecting human rights."*⁸⁴

In a similar vein, The Coca-Cola Company *"strongly endorsed"* the Guiding Principles and called them *"a foundation and flexible framework for companies like ours."*⁸⁵

Both companies are also part of the core group of 18 major corporations leading the Global Business Initiative on Human Rights (GBI), founded in April 2009 as the successor of the Business Leaders Initiative for Human Rights (BLIHR). The GBI had been closely involved in the process of elaborating the Guiding Principles.⁸⁶

Shortly before the Guiding Principles were presented to the Human Rights Council, the leading business associations IOE, ICC and BIAC issued a joint statement, thanking Ruggie for his *"dedication and tireless effort over the past six years to develop and open communication and consensus among all stakeholders, which has been a significant part of his contribution to the way in which these issues are addressed."*⁸⁷

The business associations welcomed the Guiding Principles since, they said, they took into account all their suggestions, including the suggestions to make a *"clear distinction between the respective roles of states and business enterprises,"* to adopt a *"principled pragmatism"* approach, and to focus on *"recommendations that are prac-*

82 Cf. Ruggie (2013), p. 158.

83 Ibid.

84 Letter by Bob Corcoran, Vice President Corporate Citizenship, General Electric Company and President of the GE Foundation, 20 May 2011, quoted on http://en.wikipedia.org/wiki/United_Nations_Guiding_Principles_on_Business_and_Human_Rights.

85 Letter by Edward E. Potter, director, global workplace rights at The Coca-Cola Company, 26 May 2011, quoted on http://en.wikipedia.org/wiki/United_Nations_Guiding_Principles_on_Business_and_Human_Rights. The original letters of General Electric and Coca-Cola are still listed on the business and human rights website (www.business-humanrights.org/SpecialRepPortal/Home/Protect-Respect-Remedy-Framework/GuidingPrinciples/Commentaries) but are not accessible anymore.

86 According to its website *"GBI has played an active role in supporting leadership from the United Nations in clarifying the role and expectation on corporations regarding human rights. In 2010/11, during the final year of the mandate of the United Nations Special Representative on Business and Human Rights, Professor John Ruggie, GBI members made statements (individually and collectively) in support of the UN Guiding Principles on Business and Human Rights."* Cf. www.global-business-initiative.org/about/.

87 Cf. for this and the following quotes IOE/ICC/BIAC (2011c).

81 Cf. UN OHCHR (2011), Principle 26.

Box 2: Ambivalence of the Guiding Principles

The responses of civil society organizations to the Guiding Principles have been divided. While a few welcomed them as a historic breakthrough in the attempt to provide global human rights standard for business, many others expressed their dissatisfaction with the weakness and legally non-binding character of the Principles. According to Human Rights Watch (HRW),

*“the UN Human Rights Council squandered an opportunity to take meaningful action to curtail business-related human rights abuses. (...) The council failed to put in place a mechanism to ensure that the basic steps to protect human rights set forth in the Guiding Principles are put into practice. (...) In effect, the council endorsed the status quo: a world where companies are encouraged, but not obliged, to respect human rights.”*ⁱ

28 other civil society organizations and social movements – including FIAN International, Habitat International Coalition, the International Baby Food Action Network (IBFAN), La Via Campesina, Centre Europe Tiers Monde (CETIM), and the Transnational Institute (TNI) – had actually asked the Human Rights Council not to endorse the UN Guiding Principles because they did not see them as a *“suitable means to advance the cause of human rights in the field of business.”* They argued that the Guiding Principles failed to make any specific recommendation on how to proceed towards international binding regulations for transnational corporations but relied instead primarily on voluntary actions by corporations.ⁱⁱ

The differing perception can be explained, *inter alia*, by the ambivalence of the Guiding Principles with regard to three key points:ⁱⁱⁱ

- » While the Guiding Principles basically leave no doubt as to the binding nature of the state duty to protect human rights, more detailed recommendations on implementing this duty to protect need to be developed to ensure that states also meet their human rights obligations effectively.
- » Whereas the Guiding Principles require enterprises to carry out ‘human rights due diligence’ in their business relations, there is only little indication of how states should monitor compliance with this human rights due diligence, if at all.
- » While the UN Guiding Principles refer to ‘strong policy reasons’ for states to also discharge their duty to protect human rights outside of their territory, they remain cautious when describing the reach of extraterritorial duties to protect.

i Arvind Ganesan, business and human rights director at Human Rights Watch, on 16 June 2011, cf. www.hrw.org/en/news/2011/06/16/un-human-rights-council-weak-stance-business-standards.

ii Statement to the Delegations on the Human Rights Council 2011, 17th Session, Agenda Item 3: Final Report of the SRSG on the issue of human rights and transnational corporations and other business enterprises (www.tni.org/sites/www.tni.org/files/statement.pdf).

iii The following three paragraphs are taken from Heydenreich/Paasch/Kusch (2014), pp. 3-4.

tical and achievable”, rather than “seeking to create new international obligations or to assign legal liability.”

They also welcomed *“the recognition expressed in the Guiding Principles that the area of business and human rights is an emerging field that will continue to evolve over time.”* This is why, in their view, *“it must be acknowledged that the Principles set out objectives that companies should strive to achieve, and that use of the Principles by companies will take time and constitutes an on-going process.”*

IOE, ICC and BIAC expressed the hope that *“once adopted, the Guiding Principles should be left unchanged for a number of years in order to allow for a period of reflection, adoption and application by States and the business community.”*

They also hoped that the follow-up mechanisms would continue to follow the approach of *“principled pragmatism”* and be based on a *“multi-stakeholder approach focused on capacity building and information.”* The statement ended with a blunt warning:

“Conversely, we would be extremely concerned with a follow-up mechanism based on the traditional approach of a Special Rapporteur with a complaints-receiving mandate. We believe that such an approach would undermine the very productive consultative process developed by the SRSG [Special Representative of the Secretary-General] and significantly increase the risk that the process would return to the highly contentious debate that preceded his mandate.”

The Human Rights Working Group of the Global Compact echoed the general assessment and expectations of the business lobby.⁸⁸ In a joint statement, the Working Group strongly encouraged the UN and its member states

*"(...) to maintain and build on the inclusive and multi-stakeholder component that has been so successful in engaging all stakeholders over the past five years. Without such a multistakeholder element in follow-up options proposed to the Council, the positive momentum that has developed over recent years may be at risk, with fragmentation and polarization to the detriment of human rights. We therefore urge the Special Representative and UN Member States to give strong endorsement to further multi-stakeholder cooperation and involvement in follow-up to the mandate and in all future activities and initiatives in the area of business and human rights."*⁸⁹

Member State endorsement of the Guiding Principles

On 16 June 2011, the member states of the Human Rights Council unanimously endorsed the "Guiding Principles on Business and Human Rights for implementing the UN 'Protect, Respect and Remedy' Framework."⁹⁰

In their resolution, they praised the Special Representative for his work and pointed at the broad range of activities undertaken in the fulfillment of his mandate, including in particular the *"comprehensive, transparent and inclusive consultations conducted with relevant and interested actors in all regions and the catalytic role he has played in generating greater shared understanding of business and human rights challenges among all stakeholders."*⁹¹

Fully in line with the expectations of the corporate interest groups and the Human Rights Working Group of the Global Compact, the Council emphasized

*"(...) the importance of multi-stakeholder dialogue and analysis to maintain and build on the results achieved to date and to inform further deliberations of the Human Rights Council on business and human rights."*⁹²

88 The Working Group (renamed UN Global Compact Human Rights and Labour Working Group in 2013) currently has the following corporate members: ABB Ltd., AngloGold Ashanti Company, Aramex PJSC, Barrick Gold Corporation, BSR, Calvert Investments, Cerrejon, Enel, Eni S.p.A, Furnas, General Electric Company, Grupo Los Grobo, Grupo Sancor Seguros, Grupo Santander, Hitachi, KPMG, Maersk Oil and Gas, MAS Holdings (Pvt) Ltd, Mattos Filho, Monsanto, Nestle S.A., Novartis International AG, OMV Aktiengesellschaft, Rio Tinto Plc, Rosy Blue, Sakhalin Energy, Sodexo, Teck, Telenor Group, Total, twentyfifty Ltd., Unilever, Vattenfall AB; cf. www.unglobalcompact.org/docs/issues_doc/human_rights/Human_Rights_Working_Group/HRWG_Members.pdf.

89 Cf. UN Global Compact (2011a).

90 Cf. UN Doc. A/HRC/RES/17/4 of 16 June 2011.

91 Ibid., para. 2.

92 Ibid., para. 5.

This position was reinforced by the representative of the United States in the Council debate:

*"As we seek to implement the Guiding Principles, we want to stress the importance we attach to the multi-stakeholder process in general, and specific processes dealing with business and human rights. We believe that cooperation and coordination with other international bodies and the dialogue with relevant actors will continue to be a key part of the success of the mandate (...)."*⁹³

The consensus of governments in the Human Rights Council to this first authoritative statement in relation to business and human rights ever adopted by the UN was overwhelming. John Ruggie tirelessly pointed out that it was also the first time that the Human Rights Council (as well as its predecessor body, the Commission on Human Rights)

*"(...) has ever 'endorsed' a normative text on any subject that governments did not negotiate themselves."*⁹⁴

At the same time Ruggie underlined that the endorsement of the Guiding Principles by the Human Rights Council only marked *"the end of the beginning"* of a long-term process.⁹⁵

In its resolution on the Guiding Principles, the Human Rights Council defined the next steps in this process, replaced the position of the Special Representative by a new Working Group and created an annual Forum on Business and Human Rights that should bring the process forward. Leading civil society organizations, however, criticized the disappointing lack of ambition for the follow-up mandate, as it remained unclear whether the Working Group and the Forum on Business and Human Rights would provide a robust and credible mechanism for protecting rights and seeking solutions for people whose rights were abused in connection with business operations (see box 3).

93 General Statement by Daniel Baer, Deputy Assistant Secretary of State for Democracy, Human Rights and Labor, 16 June, 2011 (www.humanrights.gov/2011/06/16/businesses-and-transnational-corporations-have-a-responsibility-to-respect-human-rights/).

94 Cf. Ruggie (2014a), p. 1.

95 Ibid., p. 5.

Box 3: Shortcomings of the Guiding Principles follow-up mechanism

In a joint civil society statement to the Human Rights Council the International Federation of Human Rights (FIDH), the International Commission of Jurists (ICJ), Human Rights Watch, the International Network for Economic, Social and Cultural Rights (ESCR-Net), and Rights & Accountability in Development (RAID) criticized the following three main shortcomings of the follow-up mechanism to the Guiding Principles:ⁱ

- » *“It focuses almost exclusively on the dissemination and implementation of the proposed Guiding Principles, which are incomplete in important respects and do not fully embody the core human rights principles contained in the UN “Protect, Respect, Remedy” Framework approved by the Council in 2008.*
- » *“It lacks a mandate for the follow-on mechanism to examine allegations of business-related abuse and evaluate gaps in legal protections, an aspect stressed by civil society groups from around the world. Neither of these essential tasks is embedded in the proposed three-year follow-on mandate for a new special procedure, a working group of five experts.*
- » *“It does not clearly recognize the Council’s unique role to provide global leadership in human rights by working toward strengthening of standards and creating effective implementation and accountability mechanisms.”*

The human rights groups further explained their criticism as follows:

“First, the (...) central focus on the proposed Guiding Principles is misplaced. Although the Guiding Principles are a starting point, on their own they cannot effectively tackle today’s main challenges. They do not constitute the comprehensive set of recommendations and guidance (...). The Guiding Principles are meant to serve as a guidance tool to implement the “Protect, Respect, Remedy” Framework and will need to be developed further over time and/or complemented with other initiatives. Full implementation of the 2008 UN Framework will require more work on key issues such as accountability, the extraterritorial reach of laws and jurisdiction, and remedies for victims.

“Second, the (...) resolution limits the role of the new Working Group of five experts to a large extent to simply promoting and disseminating the Guiding Principles. The working group should instead be given a clear mandate to examine, assess and formulate recommendations with regard to current practice by governments and companies, including in relation to concrete cases and existing problems, in order to evaluate whether and how the UN Framework is being implemented, and in doing so it should refer to the Guiding Principles as well as to all applicable and relevant international responsibilities and obligations.

“Third, the Special Representative on business and human rights, (...) has correctly said that the UN ‘can and must lead intellectually and by setting expectations and aspirations’. The follow-on mandate should work in this spirit, in order to close governance gaps brought about by globalization and substantially reduce business-related violations of human rights. This necessarily entails work to analyse protection gaps and options for further legal developments. Victims of business-related harm deserve no less.”

ⁱ Cf. Joint Civil Society Statement on Business and Human Rights to the 17th Session of the UN Human Rights Council, June 15, 2011 (www.escr-net.org/docs/i/1605781).

5. Working Group and Forum on Business and Human Rights

As follow-up to the work of the Special Representative the Human Rights Council decided in June 2011 to create two new entities within the UN: a Working Group on the issue of human rights and transnational corporations and other business enterprises and a Forum on Business and Human Rights.⁹⁶

Working Group on Human Rights and Transnational Corporations

The Working Group was to consist of five ‘independent’ experts, of balanced geographical representation, to be appointed by the Human Rights Council for a period of three years. The Council defined as the main objective of the Working Group “(...) to promote the effective and comprehensive dissemination and implementation of the Guiding Principles (...).”⁹⁷ This should be done, *inter alia*,

⁹⁶ Cf. UN Doc. A/HRC/RES/17/4 of 16 June 2011, paras. 6 and 12.

⁹⁷ *Ibid.*, para. 6.

through capacity building, information exchange, country visits, and regular dialogues with all relevant actors. Thus the mandate of the Working Group was limited explicitly to activities around the Guiding Principles. Looking into alternative regulatory instruments or specific cases of human rights violation by individual companies would have been beyond the mandate of the Working Group (see also box 3).

In September 2011 the Human Rights Council appointed the following five members of the Working Group:⁹⁸ Michael Addo, Alexandra Guáqueta (Chair), Margaret Jungk, Puvan Selvanathan, and Pavel Sulyandziga. Three of them have close links to the Global Compact and/or international business associations. Puvan Selvanathan is Head of Sustainable Agriculture at the UN Global Compact Office in New York. Alexandra Guáqueta is a member of the World Economic Forum's Council on Human Rights, the Better Coal's Stakeholder Advisory Committee, and the Board of Trustees of Shift.⁹⁹ Margaret Jungk was the 2011/12 Chair of the World Economic Forum Global Agenda Council on Human Rights, is a member of the UN Global Compact Human Rights Working Group, and advisor to the Global Business Initiative on Human Rights.

The members of the Working Group formally took up their role on 1 November 2011. The Working Group held three sessions of five days each per year in 2012 and 2013. Another three sessions have been scheduled for 2014. The Working Group published reports on each of its sessions and submitted annual reports to the Human Rights Council and the General Assembly.¹⁰⁰

Occasionally, the Working Group commented on developments outside the scope of the UN Human Rights institutions in the narrow sense. For instance, in its report to the 2012 General Assembly the Working Group expressed concern that the outcome document of the UN Conference on Sustainable Development (Rio+20, 20-22 June 2012), entitled "The future we want", failed to explicitly mention that business should respect human rights in the drive to a green economy and sustainable development. The Working Group called this a "missed opportunity" and added:

"This is critical, given that the role of the business sector has been a central element of discussions about how to achieve sustainable development goals. Socially, envi-

*ronmentally sustainable and inclusive development cannot be achieved unless business respects the human rights of people affected by their activities. This is especially relevant for groups that are particularly vulnerable to negative human rights impacts, including children, indigenous peoples and marginalized population groups. The Working Group calls on Member States to integrate the Guiding Principles in the preparations and negotiations towards the United Nations development agenda beyond 2015."*¹⁰¹

In the same report to the General Assembly, the Working Group emphasized the importance to engage strategically with those multi-stakeholder initiatives that have the potential to advance the effective dissemination and implementation of the Guiding Principles. Among the initiatives that had been aligning their work with the Guiding Principles, the Working Group explicitly mentioned the Fair Labor Association, the Global Network Initiative, the Voluntary Principles on Security and Human Rights, the Thun Group of banks¹⁰² and the International Council on Mining & Metals.¹⁰³

A number of business associations and individual companies expressed their general support for the Working Group. Among those who sent initial submissions immediately after the establishment of the Working Group in 2011 were BASF, Chevron, Daimler, CSR Europe, Econsense, ICMM and, again, the coalition of IOE, ICC and BI-AC.¹⁰⁴

IOE/ICC/BIAC repeated in their joint recommendations to the Working Group what they regarded as underlying characteristics of the Guiding Principles that were important for their long-term success, particularly that they were pragmatic, dialogue oriented, distinguished between the roles of states and business enterprises, were flexible, did not seek to create new international legal obligations or to assign legal liability, and were relevant over the long term (implying that they did not have to be further elaborated).¹⁰⁵ The business associations stressed that the Working Group should focus initially on disseminating and raising awareness of the Guiding Principles. The unspoken message between the lines was that the Working Group should be aware of the strict limits of its mandate and should not attempt to look beyond the consensus around the Guiding Principles.

IPIECA, the global oil and gas industry association for environmental and social issues,¹⁰⁶ sent a similar message to the Working Group:

98 Cf. www.ohchr.org/EN/Issues/Business/Pages/Members.aspx.

99 Shift was established by John Ruggie in July 2011 as non-profit organization to help governments and businesses to put the Guiding Principles into practice. Its team was centrally involved in shaping and writing the Guiding Principles, and John Ruggie is Chair of its Board of Trustees. Among the Board members is Maria Livanos Cattai, former Secretary-General of the ICC. The following TNCs are listed as current project participants of Shift: CEMEX, The Coca-Cola Company, Ericsson, Femern, General Electric, H&M, Herbert Smith Freehills, Hitachi, Kosmos Energy, L'Oréal, RWE, Total and Unilever; cf. www.shiftproject.org.

100 Cf. www.ohchr.org/EN/Issues/Business/Pages/Reports.aspx.

101 Cf. UN Doc. A/67/285 of 10 August 2012, para. 31.

102 See www.ohchr.org/Documents/Issues/Business/ForumSession1/SubmissionsStatements/ThunGroup.pdf.

103 Cf. UN Doc. A/67/285 of 10 August 2012, para. 28.

104 Cf. www.ohchr.org/EN/Issues/Business/Pages/Submissions.aspx.

105 Cf. IOE/ICC/BIAC (2011b).

106 Cf. www.ipieca.org.

“IPIECA acknowledges the importance of preserving the momentum and consensus that has emerged around the UN Protect, Respect and Remedy Framework in recent years. To this end, we hope that rather than attempting to elaborate precise sector or implementation requirements based on the Guiding Principles, the Working Group will use its mandate to foster a culture of cooperative effort around the implementation of the Framework.”¹⁰⁷

After the adoption of the Guiding Principles, corporate interest groups, in particular ICC, IOE and BIAC, followed a dual strategy. While they signaled support for the Working Group and declared their preparedness to stay actively engaged in all forms of consensus-oriented, nonbinding multi-stakeholder dialogues on business and human rights (such as the new Forum on Business and Human Rights), they also emphasized its limited mandate (and thus indirectly its low political profile) and took care that it was not exceeded or bypassed by other UN bodies. When the UN Secretary-General announced the preparation of a report on business and human rights in mid-2012, ICC, IOE and BIAC sent out a clear warning signal:

“The UN system has a crucial role to play with regard to the advancement of business and human rights and the dissemination and implementation of the Guiding Principles. The focus of the United Nations Secretary-General’s report, however, needs to be clearly distinguished from the work of the newly established UN Working Group on Business and Human Rights: Whereas the Working Group focuses on promoting the Guiding Principles through its work with stakeholders around the globe, the Secretary-General’s report takes an inside view on how to optimally use the UN system to promote the Guiding Principles. It would be therefore counterproductive if the Secretary-General’s report in any way forestalled the work of the UN Working Group or the relevant stakeholders. The IOE, ICC and BIAC urge that this nuance be taken into consideration to avoid any unintentional consequences or confusion.”¹⁰⁸

The report of the Secretary-General in fact concentrated on the *“contribution of the United Nations system as a whole to the advancement of the business and human rights agenda and the dissemination and implementation of the Guiding Principles on Business and Human Rights”* and avoided any recommendation beyond the scope of the Guiding Principles.¹⁰⁹

The report, however, contains the following recommendations whose implementation could have far reaching consequences for the UN and its relationship with the corporate sector:

“To lead by example, the United Nations system should apply the Guiding Principles in its internal policies and procedures, grounded on the responsibility to avoid causing or contributing to human rights abuses or being associated with such abuse through relations with business entities. In particular, this implies having in place due diligence processes to identify and address potential or actual adverse human rights impact directly linked to operations, products or services by the business relationships of the United Nations. (...)

“Specifically, the Organization’s approaches to investment management, procurement and partnerships with the business sector should be aligned with the Guiding Principles.”¹¹⁰

Forum on Business and Human Rights

As a second follow-up mechanism to the Guiding Principles, the Human Rights Council decided to establish a Forum on Business and Human Rights *“under the guidance of the Working Group.”¹¹¹* The Forum should

“(...) discuss trends and challenges in the implementation of the Guiding Principles and promote dialogue and cooperation on issues linked to business and human rights, including challenges faced in particular sectors, operational environments or in relation to specific rights or groups, as well as identifying good practices;”¹¹²

It should

“(...) be open to the participation of States, United Nations mechanisms, bodies and specialized agencies, funds and programmes, intergovernmental organizations, regional organizations and mechanisms in the field of human rights, national human rights institutions and other relevant bodies, transnational corporations and other business enterprises, business associations, labour unions, academics and experts in the field of business and human rights, representatives of indigenous peoples and non-governmental organizations in consultative status with the Economic and Social Council; the Forum shall also be open to other non-governmental organizations whose aims and purposes are in conformity with the spirit, purposes and principles of the Charter of the United Nations, including affected individuals and groups (...).”¹¹³

Thus, the Forum, which meets annually for two working days, was designed as a global meeting place for multi-

107 Cf. www.ohchr.org/Documents/Issues/TransCorporations/Submissions/Business/IPIECA.pdf.

108 Cf. IOE/ICC/BIAC (2012), p. 1.

109 Cf. UN Secretary-General (2012).

110 Ibid., para. 102-103.

111 Cf. UN Doc. A/HRC/RES/17/4 of 16 June 2011, para. 12.

112 Ibid.

113 Ibid., para. 13.

stakeholder dialogues around the issues of business and human rights, without any decision-making power or political mandate to deliver recommendations to the Human Rights Council. As the only formal outcome of the Forum, its Chairperson (appointed annually by the Council) prepares a summary of its discussion, to be made available to the Working Group and the participants of the Forum.

Despite its low political profile, more than 1,000 participants from 80 countries attended the first Forum on Business and Human Rights in December 2012, including representatives of 170 civil society organizations and more than 150 private companies and business associations.¹¹⁴

The following year's Forum (2-3 December 2013) attracted even more attention.¹¹⁵ With a total of 1,489 pre-registered participants from over 110 countries, it was presented as *"the largest global gathering convened to date to discuss progress and challenges in addressing business impacts on human rights and the implementation of the Guiding Principles (...)"*.¹¹⁶ Around 17 per cent of registered participants were from business enterprises and associations, law firms, business advisory services and consultancies, 36 per cent from civil society, and 14 per cent from state delegations. More than 160 representatives from transnational corporations, including around 50 from major oil, gas and mining companies (e.g. AngloGold Ashanti, BP, Chevron, Rio Tinto, Shell, Total, Vale) were registered, as well as more than 50 representatives of business and industry associations.

The massive business presence at the Forum indicates the interest taken in this kind of informal exchange of information and experience. However, even within the Forum's narrow mandate, its effectiveness remained limited. In an assessment of the first Forum 2012, Mariëtte van Huijstee, researcher at the Dutch Stichting Onderzoek Multinationale Ondernemingen (SOMO), wrote:

*"Although the Forum attracted an overwhelming number of stakeholders from several sectors, it failed to realise a true dialogue between these stakeholders. While rights holders and civil society organisations used the space provided by the Forum to bring up multiple cases of business and human rights abuses they continue to face, companies, states and public institutions used the Forum to explain the policies they have adopted to manage their risks to human rights. Policy (that is: risk management) and practice (that is: addressing impacts) barely met, the instances of business related human rights abuses raised by rights holders remained unaddressed (...)"*¹¹⁷

114 Cf. the list of registered organizations for the 2012 Forum (as at 28 November 2012) www.ohchr.org/Documents/Issues/Business/ForumSession1/FBHR_ListRegisteredOrganisations.pdf.

115 Cf. the preliminary unofficial registration list www.ohchr.org/Documents/Issues/Business/ForumSession2/ListOfParticipants.pdf.

116 Cf. UN Doc. A/HRC/FBHR/2013/4 of 15 April 2014, para. 7.

117 Cf. van Huijstee (2012).

Many CSOs raised more fundamental concerns over the forum. They don't expect dialogue in a multi-stakeholder forum to lead to real changes in corporate practice and prefer other approaches and fora. Some of them were among the more than 140 participants from various CSOs around the world who gathered in Vienna, in June 2013, on the occasion of the 20th anniversary of the 1993 World Conference on Human Rights. In their Vienna+20 CSO Declaration, they criticized *"non-binding, voluntary approaches that provide 'guidance' and recommend good corporate practice, but avoid sanctions and allow corporate abuse to continue."*¹¹⁸ They called on states to *"urgently develop and institute binding systems of regulation and norms that TNCs should respect, and which all States will have the obligation to ensure, by establishing strong systems of accountability for violations of human rights and effective remedy and justice for all affected people, including along the supply chain."*¹¹⁹

Already in September 2011, a group of experts in international law and human rights, including a number of UN Special Rapporteurs on human rights adopted the so-called Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights. They demanded that states take measures either individually or via international cooperation in order to protect the economic, social and cultural rights of people not only within but also beyond their territory. They particularly stressed that state responsibility also extended to acts and omissions of non-State actors such as corporations and other business enterprises.¹²⁰

In addition to CSOs and human rights experts, a growing number of governments agreed that the Guiding Principles and their implementation mechanisms had their clear limitations. In a joint statement presented at the 24th session of the Human Rights Council in September 2013, the Government of Ecuador declared on behalf of 85 countries (see also box 4):

*"We are mindful that soft law instruments such as the Guiding Principles and the creation of the Working Group with limited powers to undertake monitoring of corporate compliance with the Principles are only a partial answer to the pressing issues relating to human rights abuses by transnational corporations. These principles and mechanisms fell short of addressing properly the problem of lack of accountability regarding Transnational Corporations worldwide and the absence of adequate legal remedies for victims."*¹²¹

118 The Vienna+20 CSO Declaration, para. 25 (www.inpea.net/images/vienna-20-cso-declaration2013.pdf).

119 Ibid., para. 29.

120 Cf. Maastricht University (Ed.) (2012).

121 Cf. <http://business-humanrights.org/media/documents/statement-unhrc-legally-binding.pdf>.

Box 4: Statement on behalf of a Group of Countries at the 24th Session of the Human Rights Council, delivered on 13 September 2013

Statement on behalf of a Group of Countries at the 24th Session of the Human Rights Council

General Debate – Item 3

“Transnational Corporations and Human Rights”

Geneva, September 2013

Mr. President,

We deliver this statement on behalf of the African Group, the Arab Group, Pakistan, Sri Lanka, Kyrgyzstan, Cuba, Nicaragua, Bolivia, Venezuela, Peru and Ecuador.

States who subscribe to this statement welcome the steps taken by the Human Rights Council in order to address the issue of the role and responsibilities of transnational corporations and human rights, in particular the work of former United Nations SRSG for Business and Human Rights, John Ruggie, who elaborated the Guiding Principles on Business and Human Rights endorsed by the UN Human Rights Council in its resolution 17/4, of July 2011, and the creation of the Working Group on Human Rights and Transnational Corporations and Other Business Enterprises with a mandate “to promote the effective and comprehensive dissemination of the Guiding Principles on Business and Human Rights”.

The increasing cases of human rights violations and abuses by some Transnational Corporations reminds us of the necessity of moving forward towards a legally binding framework to regulate the work of transnational corporations and to provide appropriate protection, justice and remedy to the victims of human rights abuses directly resulting from or related to the activities of some transnational corporations and other businesses enterprises.

The endorsement by the UN Human Rights Council in June 2011 of the “Guiding Principles on Business and Human Rights: Implementing the United Nations Protect, Respect, and Remedy Framework” was a first step, but without a legally binding instrument, it will remain only as such: a “first step” without further consequence. A legally binding instrument would provide the framework for enhanced State action to protect rights and prevent the occurrence of violations.

We are mindful that soft law instruments such as the Guiding Principles and the creation of the Working Group with limited powers to undertake monitoring of corporate compliance with the Principles are only a partial answer to the pressing issues relating to human rights abuses by transnational corporations. These principles and mechanisms fell short of addressing properly the problem of lack of accountability regarding Transnational Corporations worldwide and the absence of adequate legal remedies for victims.

An international legally binding instrument, concluded within the UN system, would clarify the obligations of transnational corporations in the field of human rights, as well as of corporations in relation to States, and provide for the establishment of effective remedies for victims in cases where domestic jurisdiction is clearly unable to prosecute effectively those companies.

Finally, States that subscribe this statement will like to renew their commitment to work towards the elaboration of a legally binding instrument on the basis of a careful and serious assessment of options available in the framework of the Human Rights Council. The achievement of this goal will benefit people everywhere, and contribute to enhance the level of human rights enjoyment and of protection of the environment.

Thank you Mr. President.

Source: <http://business-humanrights.org/media/documents/statement-unhrc-legally-binding.pdf>

This analysis was reinforced by Nobel Prize laureate Joseph Stiglitz. He stated in his keynote address to the 2nd Forum on Business and Human Rights in December 2013:

“We need international cross-border enforcement, including through broader and strengthened laws, giving broad legal rights to bring actions, which can hold companies that violate human rights accountable in their home countries. Soft law —the establishment of norms of the kind reflected in the Guiding Principles on Business and Human Rights— are critical; but they will not suffice. We need to move towards a binding international agreement enshrining these norms. (...)

“Economic theory has explained why we cannot rely on the pursuit of self-interest; and the experiences of recent years have reinforced that conclusion. What is needed is stronger norms, clearer understandings of what is acceptable —and what is not— and stronger laws and regulations to ensure that those that do not behave in ways that are consistent with these norms are held accountable.”¹²²

The initiative, led by Ecuador together with the growing civil society movement for a binding treaty and support from leading academics like Joseph Stiglitz, created new (and less than three years after the adoption of the Guiding Principles unexpected) dynamics towards international legally binding rules for TNCs.

6. A new momentum: The movement for a UN Business and Human Rights Treaty

While the Working Group and the Forum on Business and Human Rights have been discussing the promotion and implementation of the Guiding Principles, Governments and civil society have been facing increased corporate pressure and lobbying in other fora.

In the negotiations on a EU-US ‘free trade’ agreement (Transatlantic Trade and Investment Partnership, TTIP), large corporations and their lobby groups have frequently been meeting with the European Commission and the US Government to influence their positions. According to a list¹²³ released by the European Commission at the request of Corporate Europe Observatory (CEO), at least 119 meetings with large corporations and their lobby groups took place alone during the preparations of the negotiations between January and April 2013.¹²⁴

¹²² Cf. Stiglitz (2013), pp. 4-5.

¹²³ Cf. www.asktheeu.org/en/request/473/response/2049/attach/4/List%20of%20meetings%20with%20stakeholders.pdf.

¹²⁴ Cf. Corporate Europe Observatory (2013).

In the discussions on a Post-2015 development agenda at the United Nations, transnational corporations and their interest groups are actively promoting UN-business partnerships and growth-oriented market-based ‘solutions’ for sustainable development.¹²⁵

In a growing number of cases TNCs have sued governments for trying to implement regulations, often those related to health or environmental concerns that could “harm” private profits. E.g. in 2009, Swedish energy multinational Vattenfall sued the German government, seeking €1.4 billion (US\$1.9 billion) plus interest in compensation for environmental restrictions imposed on one of its coal-fired power plants. The case was settled out of court after Germany agreed to water down the environmental standards. In similar cases, tobacco companies sued Uruguay and Australia for introducing compulsory health warnings on cigarette packets.¹²⁶

Another recent example is the lobbying by the American Petroleum Institute (API), the trade association for the oil and natural gas industry in the US. In late 2012, the API filed a lawsuit against the US Securities and Exchange Commission (SEC) seeking to strike down Section 1504 of the Dodd-Frank Wall Street Reform Act, which requires oil, gas, and mining companies to disclose the payments that they make to governments for all extractive projects.

Several Latin American Governments have been facing a proliferation of lawsuits brought to them by transnational corporations due to bilateral investment treaties (BITs) that were signed back in the 1990s. This includes, most prominently, a legal battle between the Government of Ecuador and the transnational oil company Chevron. In November 2013, Ecuador’s highest court upheld a ruling against Chevron that found the US oil company responsible for the contamination of large parts of Ecuador’s Amazon region. The court ordered Chevron to pay US\$9.5 billion. Chevron turned the table and instead is seeking to evade this ruling by asking an investor-state tribunal to second guess the decision. Chevron claimed that the ruling issued in the Ecuadorian legal process was a violation of extraordinary investor privileges enshrined in a US-Ecuador BIT.

Based on these recent experiences, the Government of Ecuador took the initiative for a legally binding framework to regulate transnational corporations and to provide appropriate protection, justice and remedy to the victims of human rights abuses. In September 2013, it delivered a statement at the 24th session of the Human Rights Council asking for *“the elaboration of a legally binding instrument on the basis of a careful and serious assessment of options available in the framework of the Human Rights Council”* (see box 4). In addition to Ecuador, the state-

¹²⁵ Cf. Pingeot (2014).

¹²⁶ Cf. Corporate Europe Observatory and Transnational Institute (2012).

ment was signed by the African Group, the Arab Group, Pakistan, Sri Lanka, Kyrgyzstan, Cuba, Nicaragua, Bolivia, Venezuela and Peru.

Many civil society organizations welcomed the initiative of Ecuador and likeminded countries in the Human Rights Council. In a Joint Statement, signed by more than 500 groups and organizations, they called on the Human Rights Council to take steps towards the elaboration of a binding Treaty on Business and Human Rights, and to that end establish an open-ended inter-governmental working group tasked with a drafting mandate (see box 5).

In early 2014 several civil society networks and campaign groups around the world established the Treaty Alliance (www.treatymovement.com) in order to collectively help to organize advocacy activities in support of developing a binding Treaty. The groups involved include: CETIM, Dismantle Corporate Power Campaign, ESCR-Net, FIAN, FIDH, Franciscans International, Friends of the Earth International and the Transnational Institute.

It took only a few months for leading proponents of the Guiding Principles to realize the political sensitivity of the new dynamics. In January 2014, John Ruggie responded to Ecuador's initiative in an issue brief published by Harvard University's Kennedy School of Government.¹²⁷ In this paper, he repeated his general focus during the drafting of the Guiding Principles "on gaining broad consensus across the different stakeholder groups" and deliberately emphasizing "measures that states and businesses could adopt relatively quickly."¹²⁸ He continued:

*"But, then was then, and now is now. Nearly three years after the Guiding Principles' adoption, is it time to consider launching a treaty process? My answer to that question is a cautious 'it all depends' on what any such treaty would be intended to address."*¹²⁹

Ruggie explained his reluctance with "monumental challenges" apart from legal questions (about corporations as 'subjects' of international law), particularly with regard to the political feasibility of a single global corporate liability standard and the enforcement of a binding treaty. However, he also quoted himself by referring to an article he had written in the American Journal of International Law in 2007, saying that

*"(...) international legal instruments must and will play a role in the continued evolution of the business and human rights regime, but to be successful they should be 'carefully constructed precision tools' (...)."*¹³⁰

In his words, one obvious candidate for an international legal instrument concerns "the worst of the worst: business involvement in gross human rights abuses."¹³¹

Apparently, Ruggie's assessment of the treaty proposal was regarded as too moderate by some corporate interest groups. Ruggie seems to have felt obliged to publish a kind of explanatory note in May 2014, clarifying that in his earlier brief he

*"(...) expressed grave doubts about the value and effectiveness of moving toward some overarching 'business and human rights' treaty."*¹³²

Ruggie added:

*"(...) launching an open-ended intergovernmental process to negotiate what a treaty could look like and how it might work, as some have suggested, puts the cart before the horse, which is not a recommended means of achieving forward motion."*¹³³

Remarkably, Ruggie's "Update" was posted on the website of the IOE and seconded by a press release of IOE Secretary-General Brent Wilton, in which he shares Ruggie's "grave doubts."¹³⁴

The IOE Secretary-General stresses that "focus on the development of any new treaty risks detracting from efforts to promote the responsibility of business to respect human rights through the UN Guiding Principles."

The IOE also expressed concern "that the multistakeholder consensus which John Ruggie achieved in the process that resulted in the Guiding Principles could be seriously undermined, with stakeholder groups pursuing their own objectives in light of a new treaty rather than constructively seeking solutions together to address pressing issues."

The offensive IOE response gives an idea of the line of arguments and the degree of corporate pressure Governments and civil society have to reckon with when the issue of a legally binding instrument is discussed in the Human Rights Council.

131 Ibid.

132 Cf. Ruggie (2014b), p. 1.

133 Ibid., p. 2.

134 Cf. IOE press release of 7 May 2014 ("IOE Secretary-General shares John Ruggie's 'grave doubts' over Ecuador proposal for new business and human rights treaty"), www.ioe-emp.org/index.php?id=1078.

127 Cf. Ruggie (2014a).

128 Ibid., p. 3.

129 Ibid.

130 Ibid., p. 5.

Box 5: Joint Statement: Call for an international legally binding instrument on human rights, transnational corporations and other business enterprises

This statement has been endorsed by a wide alliance of international networks, organizations and social movements, listed below.ⁱ It represents the collective expression of a growing mobilization of global civil society calling for further enhancement of international legal standards to address corporate infringements of human rights. It welcomes the recent initiatives by States in the United Nations Human Rights Council, presented by Ecuador in the session of September 2013, to develop an international treaty on legally binding rules for TNCs on human rights issues.

We, the undersigned organisations,

Concerned about the continuing abuses and violations of human rights occurring all over the world which directly or indirectly engage the responsibility of business enterprises;

Concerned also that such abusive conduct often disproportionately impacts women, who comprise the majority of workers in the most vulnerable sectors, peasants, indigenous peoples, persons living in poverty, children among others, and especially concerned by the fact that justice is denied to those who suffer harm,

Considering the invaluable work done by human rights defenders and organisations, trade unions, indigenous rights and women rights defenders and others defending and protecting human rights in the face of corporate-related abuses,

Concerned at the incidence of attacks, harassment, restrictions, intimidation and reprisals against these human rights defenders,

Considering the initiatives taken by some States within and outside the United Nations human rights bodies as well as the action and work undertaken by human rights experts and bodies of the United Nations to provide better protection of human rights in the context of business operations,

Recalling existing States' obligations under global and regional human rights treaties and the need to implement and complement those treaties to make them effective in the context of business transnational operations,

Convinced of the need to enhance the international legal framework, including international remedies, applicable to State action to protect rights in the context of business operations, and mindful of the urgent need to ensure access to justice and remedy and reparations for victims of corporate human rights abuse,

1. Call upon the States to elaborate an international treaty that:
 - » Affirms the applicability of human rights obligations to the operations of transnational corporations and other business enterprises;
 - » Requires States Parties to monitor and regulate the operations of business enterprises under their jurisdiction, including when acting outside their national territory, with a view to prevent the occurrence of abuses of human rights in the course of those operations;
 - » Requires States Parties to provide for legal liability for business enterprises for acts or omissions that infringe human rights;
 - » Requires States Parties to provide for access to an effective remedy by any State concerned, including access to justice for foreign victims that suffered harm from acts or omissions of a business enterprise in situations where there are bases for the States involved to exercise their territorial or extraterritorial protect- obligations;
 - » Provides for an international monitoring and accountability mechanism;
 - » Provides for protection of victims, whistle-blowers and human rights defenders that seek to prevent, expose or ensure accountability in cases of corporate abuse and guarantees their right to access to information relevant in this context.
2. Call on the United Nations Human Rights Council to take step towards the elaboration of this treaty, and to that end establish an open ended inter-governmental working group tasked with a drafting mandate.
3. Call on civil society organisations to take measures towards the establishment of a joint initiative to achieve the objective of a legally binding instrument within the United Nations without delay.

ⁱ This statement was originally drafted by participants in the first annual Peoples' Forum on Human Rights and Business. The Forum was convened jointly by ESCR-Net and Forum-Asia from 5 to 7 November in Bangkok, Thailand.

Source: www.treatymovement.com/statement/

III. Concluding remarks: Counteracting corporate influence on the UN business and human rights agenda

Over the past four decades, the United Nations has experienced several waves of efforts to introduce legally binding instruments to hold transnational corporations accountable and liable for violations of environmental, social and human rights standards. These efforts started in the 1970s with the discussions about a Code of Conduct for TNCs. They were continued in the late 1990s, with the attempt to adopt the UN Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights. And most recently, they became revitalized through the initiative by Ecuador and the CSO campaign for a binding treaty on business and human rights.

All these efforts met with vigorous opposition from powerful business interests and some governments. Transnational corporations and their business associations had a significant impact on shaping the agenda and the discourse at the UN and in convincing Governments to strike the Code of Conduct and the UN Norms off the agenda. The key objective of corporate interest groups over the decades was to prevent three sets of measures:

- » the adoption of international legally binding rules to prevent human rights abuses related to TNC practices;
- » the introduction of monitoring and accountability mechanisms for TNCs under the aegis of the UN;
- » the establishment of an international system that would allow for suing and sanctioning those corporations who are responsible for human rights abuses and gaining reparations where national legislation is insufficient or not sufficiently implemented.

While opponents of legally binding instruments for TNCs declared the establishment of an international court for corporations absolutely unrealistic, investor-state dispute mechanisms have been established that enable TNCs to sue states and get compensation even for unrealized future profits due to what TNCs deem as unacceptably high environmental, social or human rights standards.

Efforts to counteract this tendency have also been hampered by less visible activities of TNCs. Since the 1980s, corporate PR experts have been extremely successful in implementing “issue management” strategies that helped to present business enterprises as good corporate citizens willing to dialogue with Governments, the UN and decent concerned stakeholders (in contrast to ‘ideological activists’).

‘Multi-stakeholderism’ became the flavor of the day, and the Global Compact as well as the UN Guiding Principles on Business and Human Rights were referred to as prime examples of an approach based on consensus, dialogue and partnership with the corporate sector – in contrast to what was portrayed as old-fashioned state-centered “command and control” approaches. But this type of governance model, with its emphasis on partnerships and consensus, denies the existing conflicts between social actors, in particular between large transnational corporations on the one hand and many CSOs and social movements on the other hand. Labeling all actors ‘stakeholders’, as if all were equal and had the same interests, obscures the power imbalances between various sectors and the vast differences between their agendas. This creates the illusion that “win-win” solutions can be found if only all stakeholders are sitting at the table. It promotes a depoliticized model of governance that does not address the different interests and power structures inherent in the global economic system.

By giving corporate actors privileged access to decision-makers in the UN, through multi-stakeholder bodies like the Global Compact LEAD or the Global Compact Human Rights Working Group, their viewpoints and interests have become even more prominent in the mainstream discourse – and calls for legally binding instruments for TNCs even more sidelined.

Therefore, it will not be sufficient for CSOs and Governments to merely re-vitalize calls for an international legally binding instrument, like a Treaty on Business and Human Rights. Rather, it will be essential to take into account the ‘political economy’ of the business and human rights discourse at the UN.

In this light, it seems to be advisable to follow a “dual strategy”:

1. To continue using the existing Guiding Principles as starting point and advocacy tool and demand their strict implementation, for instance through national action plans and effective state-based regulatory and judicial mechanisms, including the development of and more effective focus on extraterritorial obligations.

2. To call for [effective international regulation](#) of transnational corporations – e.g. in the form of a Treaty on Business and Human Rights – and to this end, as a first step, establish an open-ended intergovernmental working group tasked with a drafting mandate.

These two action levels are interdependent and should not be dealt with separately.

However, experiences of the past four decades clearly demonstrate that progress can only be made on the way to international binding rules for TNCs if corporate influence on discourse and decision-making is reduced. At the level of the UN, this requires, *inter alia*, the following steps:

1. [Reversing the “corporate capture” of the UN and preventing undue influence](#) of corporate actors on the global public agenda. To do so, the UN, its specialized agencies and its member states should adopt clear mandatory guidelines and policies for their relationship with corporations and establish comprehensive and enforceable individual and institutional conflict of interest policies, including mechanisms to allow for public scrutiny.
 - » [Mandatory guidelines for relationships with corporations, adopted by the member states](#). This could take the form of a General Assembly resolution, comparable to the ECOSOC resolution on the regulation of the consultative relationship with NGOs. Such a resolution should set minimum standards for the shape and composition of initiatives involving the private sector. This should prevent undue influence of business actors on public policies, any distortion of competition, and a lack of representation of affected populations. The resolution should define clear partner selection and exclusion criteria which apply to the UN system as a whole. It should prevent companies and private actors who violate internationally agreed environmental, social and human rights conventions or otherwise violate UN principles (for example through corruption, breaking UN sanctions, proven lobbying against international UN agreements, evading taxes, etc.) from entering into collaborative relationships with the UN.
 - » [Mandatory conflict of interest and disclosure policies](#). The United Nations should adopt a system-wide conflict of interest policy. All UN entities should disclose to the public any situation that may appear as a conflict of interest, and draw the necessary conclusions. They should also disclose if an UN official or professional under contract with the UN may have any kind of economic ties with the corporate sector. Specific

requirements in the code of ethics for UN employees could also help address the potential conflicts of interests raised by the circulation of staff between UN entities and national governments, private foundations, corporations, lobby groups and CSOs. A “cooling off” period during which former UN officials cannot start working for lobby groups or lobbying advisory firms could be considered.

- » [More transparency on funding and contributions from corporate sector](#). At a minimum, the UN should disclose the funding it receives from the private sector more transparently (incl. in-kind contributions like pro-bono work by consultancies or corporate law firms and the secondment of company employees to UN entities). Currently, there is no systematic reporting of the funds that the UN receives in the form of “extra-budgetary resources,” and these resources are not subjected to surveillance by member states.
2. [Strengthening the central role of the Human Rights Council in the business and human rights discourse](#). The member states in the Human Rights Council have a more active role to play in the development of international law related to TNCs and other business enterprises. The Council has a unique role to provide global leadership in human rights by working towards strengthening standards and creating effective implementation and accountability mechanisms. A small working group alone cannot be an adequate substitute for intergovernmental action. Therefore, the Human Rights Council should establish an open-ended intergovernmental working group tasked with drafting an international legally binding instrument on business and human rights. The Council should also create mechanisms to examine allegations of business-related abuse and evaluate gaps in legal protection and remedial action. In this context, the creation of the post of a Special Rapporteur on Business and Human Rights and/or an Ombudsperson function ought to be reconsidered.
 3. [Challenging the “multi-stakeholder” discourse and partnership models](#). The measures mentioned above are indispensable to counteract the dominance of corporate interests in the UN - in the field of human rights and beyond. But these measures are not ends in themselves. The key question remains whether the current mainstream approach based on voluntarism and a broad consensus of all ‘stakeholders’ – a term which includes victims as well as offenders of human rights violations – is the right way to go. The evidence of ongoing human rights violations and aggressive

lobbying strategies by transnational corporations suggests that it is not. It is important to re-establish a clear distinction between those who should regulate and the party to be regulated and to reject any discourse that obfuscates the fact that corporations have a fundamentally different “primary interest” from that of governments, UN agencies CSOs, and social movements: their prime interest – enshrined in their fiduciary duty - is to satisfy the interests of their owners and shareholders. The stakeholder discourse blurs this important distinction between the different actors.¹³⁵

However, counteracting the corporate influence on discourse, agenda-setting and decision-making at the UN and promoting new global rules for corporate actors require significant changes in the priority setting of CSOs, Governments and UN bodies.

¹³⁵ Cf. Richter (2014) who makes this argument with respect to the WHO reform process, and Marks (2013).

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List of abbreviations

API	American Petroleum Institute	OHCHR	Office of the United Nations High Commissioner for Human Rights
BCSD	Business Council for Sustainable Development	PR	Public Relations
BDA	Confederation of German Employers' Association	RAID	Rights & Accountability in Development
BIAC	Business and Industry Advisory Committee to the OECD	SEC	Securities and Exchange Commission
BIT	Bilateral investment treaty	SOMO	Stichting Onderzoek Multinationale Ondernemingen
BLIHR	Business Leaders Initiative for Human Rights	SRSO	Special Representative of the Secretary-General
CEO	Corporate Europe Observatory	TNC	Transnational Corporation
CETIM	Centre Europe Tiers Monde	TNI	Transnational Institute
CSR	Corporate social responsibility	TTIP	Transatlantic Trade and Investment Partnership
ECOSOC	Economic and Social Council	UN	United Nations
ESCR-Net	International Network for Economic, Social and Cultural Rights	UN HRC	United Nations Human Rights Council
EU	European Union	UNCED	UN Conference on Environment and Development
FAO	Food and Agriculture Organization	UNCTAD	United Nations Conference on Trade and Development
FIAN	FoodFirst Information and Action Network	UNCHR	United Nations Commission on Human Rights
FIDH	International Federation of Human Rights	UNCTC	UN Centre on Transnational Corporations
GA	General Assembly	UNICEF	United Nations Children's Fund
GBI	Global Business Initiative on Human Rights	UN-NGLS	United Nations Non-governmental Liaison Service
HRW	Human Rights Watch	UNOG	UN Office at Geneva
IBFAN	International Baby Food Action Network	UNRISD	United Nations Research Institute for Social Development
ICC	International Chamber of Commerce	USA	United States of America
ICJ	International Commission of Jurists	USCIB	US Council for International Business
ICMM	International Council on Mining & Metals	WBCSD	World Business Council for Sustainable Development
ILO	International Labour Organization	WEF	World Economic Forum
IOE	International Organisation of Employers	WHO	World Health Organization
ITT	International Telegraph and Telephone Company	WICE	World Industry Council for the Environment
MAI	Multilateral Agreement on Investment		
NGO	Non-Governmental Organization		
OECD	Organization for Economic Cooperation and Development		

Annex

List of business associations, companies and law firms involved in the work of the Special Representative of the UN Secretary-General on Business and Human Rights 2005-2011

Business Associations

AquaFed	International Business Leaders Forum
BDA (Confederation of German Employers' Association)	International Chamber of Commerce (ICC)
Business and Industry Advisory Committee to the OECD (BIAC)	International Chamber of Commerce- Netherlands
Business for Social Responsibility	International Organisation of Employers (IOE)
Commission on Multinational Enterprises of the Confederation of Netherlands' Industry and Employers (VNO-NCW)	International Petroleum Industry Environmental Conservation Association
Entreprises pour les Droits de l'Homme (EDH)	Prospectors & Developers Association of Canada
Global Business Initiative on Human Rights (GBI)	US Chamber of Commerce
International Council on Mining & Metals	

Companies

APG	Monkey Forest Consulting
Aviva	NEI Investments
BASF	Newton Investment
Boston Common	Novo Nordisk
Business Respect	Rathbone Brothers
Calvert	Rathbone Greenbank Investments
Cerrejón	Robeco
Coca-Cola	Sakhalin Energy
Compliance and Capacity International	Sime Darby
Control Risks	Social Investors
Co-operative	Standard Life Investments
Edlund Consulting	Storebrand
Ergon Association	Stratfor
F&C	Sustainalytics
Flextronics	Talisman Energy Inc.
General Electric	TIAA-CREF
Henderson Global Investors	Total
Hermes Equity Ownership Service	Triodos Bank
Maplecroft	TwentyFifty
Marston Capital Partners Limited	Universities Superannuation Scheme
Master Trust	Vigeo
MN Services	Yahoo!

Law Firms

Allens Arthur Robinson

Amarchand Mangaldas

Blackstone Chambers

Carey & Allende

Clifford Chance

Cotton & Buell

DLA Cliffe Dekker Hofmeyr

Edward Nathan Sonnenbergs

Foley Hoag

Herbert Smith

Hogan Lovells

Leigh Day & Co

Linklaters

Mannheimer Swartling

NautaDutilh

Souza, Cescon, Barrieu & Flesch

Stikeman Elliott

Wachtell, Lipton, Rosen & Katz

Weil, Gotshal & Manges

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