1. Introduction

This chapter first introduces the topic and objective of the book, explaining the importance of understanding how arguments made in negotiations on new sustainability norms can promote acceptance of change in a context of divergent interests, and how this knowledge is of benefit to civil society, businesses and public organisations with a concern for sustainability (1.1). The chapter proceeds to explaining why the emergent Business and Human Rights (BHR) regime is an important and relevant case for understanding such a multi-stakeholder regulatory process with competing and often conflicting interests among participants in the regulatory process and the stakeholders whom those participants represent (1.2). Next, it sets out the approach and methodology undertaken for the analysis of the discursive construction of sustainability related norms in five case studies (1.3), explaining the pragmatic approach that draws on socio-legal regulatory theory and systems thinking on how change may be communicated into acceptance, combines this with discourse analysis developed in a political science context, and also considers theory on argumentative stabilising and de-stabilising strategies developed in linguistic communication science. The five case studies, body of empirical data and coding of texts are introduced. Finally, the structure of the book is set out (1.4).

1.1 WHAT THIS BOOK IS ABOUT

The current concern with social, environmental and climate-change related sustainability has been accompanied by calls on private organisations to reduce adverse impacts and enhance their positive impacts on society. Business organisations, in particular, are expected to change their actions to avoid adverse impacts, but also other societal actors like local governments and private non-for-profit organisations are called upon to consider the implications of their actions on society. With the call for change of actions comes a need for norms to guide such change. In addition to private codes of conduct and guidance on sustainability, civil society and business organisations rely on national governments and international
organisations, especially the United Nations (UN) to deliver normative directives in the form of soft law (non-binding guidance) or hard law (binding rules). A series of efforts to develop new international law or policy on climate change or social sustainability issues shows that political support, which governments may give to international organisations like the UN to regulate such problems in a manner that draws on their authority and power and may evolve into hard law, is not easily forthcoming or uniform. A diversity of interests at stake often complicates the process of developing norms and reaching agreement.

When we think about normative directives for private or public organisations for actions that conform to global sustainability needs, the focus is often on the substantive content of the rule as such: in other words, what are organisations encouraged or required to do? However, that normative substance is a result of the road that led to the agreed rule, whether soft or hard. In a context marked by interests of different business organisations and sectors, different civil society organisations with diverse focus issues, and various national or local governments with diverging interests, developing norms of conduct becomes a process of negotiation in which participants often have regard for their own interests. The bumpy road to the 2015 Paris Climate Change Accord is a case in point, but in no way unique. Similar concerns can be raised for many other fields. For example, due to differentiated interests global supply chains for timber products apply public, private or hybrid sustainability-related schemes that are not fully aligned within the sector.

Sustainability challenges are likely to remain pressing in the short, medium and longer term, even with the not unlikely potential to expand to extra-terrestrial resource exploitation as resources on this planet are being depleted. For global society to agree on norms of conduct without wasting valuable time, there is a need to understand how norms on sustainability issues are negotiated and how stalemates that have marked many such effort in the past can be broken. This book responds to that need by undertaking an analysis of the discursive construction of detailed normative guidance for businesses and states in regard to business responsibilities on human rights, and the argumentative strategies applied in that context. Spurred by a combination of the general Corporate Social Responsibility (CSR) movement and concerns with adverse business impacts on human rights, a process undertaken under the UN between 2005 and 2011 resulted in what is emerging as an autonomous specialised regime within the general international law regime. Set apart from the conventional state-centrist regime of international human rights law, the BHR regime formally recognises that business organisations have responsibilities in regards to standards of conduct developed under international law. Even
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if so far on a soft law basis, this is a major novelty, which forms part of the output of the process and confirms the significance of the process that lead to that result.

To understand how this came about, this book analyses the multi-stakeholder process leading to the emergent BHR regime, as well as other multi-stakeholder processes that were initiated around the same time by international organisations to develop normative guidance on business responsibilities for human rights or on CSR with a strong human rights element. Recognising that arguments are a major part of what convinces participants in a process of negotiation to agree or what inhibits agreement, the focus is on the content of the debates that took place to develop normative guidance.

In the longer term, an expanded recognition of the private sector as having international responsibilities could have considerable and highly interesting potential. Such recognition and resulting normative directives could involve businesses more actively in responding to transnational sustainability challenges. This underscores the pertinence of understanding and learning from the discursive process that led to a breakthrough in the field of business and human rights, a social sustainability field that until the early 2000s was marked by a stalemate. In revising or updating the conception of relevant actors and their roles in terms of both output and process, the construction of business responsibilities for human rights offers insights for other emergent issue-specific regimes. That applies in particular to those that relate to the division of rights and obligations between and across public and private actors in a global world with increased competition for resources and increased awareness of the consequences of such competition.

Accordingly, the analysis also has regard to the argumentative strategies framing the specific arguments made in the construction of the BHR regime and related multi-stakeholder processes. It considers how particular types of arguments can promote or inhibit acceptance of normative change with other participants by either speaking to the interests and logic of those participants, or not doing so. Such knowledge can help participants in future processes of developing, negotiating and agreeing on normative guidance in the sustainability field to develop convincing arguments and effective argumentative strategies. Regardless of whether such processes occur at the international, national or local level or aim at developing public, private or public-private (hybrid) norms, these insights will be of benefit to civil society organisations, businesses, governments, intergovernmental organisations or other parties with an interest in sustainability.
1.2 WHY BUSINESS AND HUMAN RIGHTS IS SIGNIFICANT FOR UNDERSTANDING MULTI-STAKEHOLDER REGULATION ON PRIVATE-SECTOR IMPACT ON SOCIETY

1.2.1 Breaking a Stalemate in Sustainability Regulation: The UN Framework and the UN Guiding Principles

A milestone was reached when in 2008 and 2011 the UN Human Rights Council adopted normative directives for both states and businesses to prevent, manage and remedy adverse impacts on human rights caused by businesses. The first breakthrough in the previous stalemate was reached with the UN ‘Protect, Respect and Remedy’ Framework (UN Framework), which the Human Rights Council adopted in 2008. In 2011 the UN Guiding Principles (UNGPs) followed, spelling the general normative directives introduced in the UN Framework into detailed operational steps. Both came about through processes that led to broad agreement in the UN Human Rights Council and support from non-state actors from the camps of civil society as well as business. These processes were discursive in debating, shaping and eventually reaching agreement on concepts that were not well defined, in particular the normative idea of what responsibilities the business sector has for human rights, and the implications of that overall concept and its sub-elements. Clarifying the role of the private sector in a field generally marked by state obligations was a major point of contention in the discursive process.

Entitled a ‘policy framework’ and developed by an expert at the request of the UN Secretary-General, the UN Framework broke ground in three major ways: First, the fact that the document became adopted – in the language of the Human Rights Council, ‘welcomed’ – was significant because preceding UN efforts on the regulation of business responsibilities for human rights had failed to achieve similar agreement. Second, the

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idea of businesses having responsibilities for human rights assumes that these private non-state actors have duties that under international law are normally seen to pertain to governments and other public organisations. The adoption of the UN Framework entailed an explicit recognition by the normally state-centrist UN that non-state actors must consider their impact on human rights, act in such a way as not to cause harm, and must be prepared to be held accountable for adverse impacts, whether such accountability is in front of courts of law or through the market. Third, the process through which the UN Framework was developed was unusual and innovative for UN human rights rule-making and potentially beyond, because it explicitly involved the business sector along with other non-state actors in the evolution of a new set of norms. While non-state actors are often involved in UN human rights rule-making, they normally participate as rights-holders or representatives of actual or potential victims. Civil society provided important input to shape the process. However, interestingly and by contrast to conventional international human rights law-making, business organisations were involved too and played a role in developing the normative result. The outcome of this process was a settling, at least in part, of the previously contentious issues of what business responsibilities for human rights entailed, and whether businesses have such responsibilities at all. This involved a discursive process in the construction of an idea that at the outset was fluid. As will be explained below, much of this was due to the idea of business responsibilities for human rights emerging on a backdrop of the CSR discourse. CSR, too, had been subject to a discursive construction in public-private multi-stakeholder processes under the UN and the European Union (EU) that had been vibrant but also complicated in the years prior to the agreement on the UN Framework.

At the outset, both the concepts of CSR and business responsibilities for human rights were what discourse scholars refer to as ‘floating signifiers’, elaborated in Chapter 3 (3.2.1). Closely connected with this and in the process of branching off into a discourse of its own, the emergent BHR regime evolved partly within the discursive struggles and outcomes of processes to define or ‘fix’ the meaning of CSR. The evolution of the BHR regime also reached back to previous efforts within the UN to set norms of conduct for transnational corporations (TNCs), both with regard to

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3 The terms Transnational Corporations (TNC) and Multinational Corporations (MNC) are used interchangeably by the international organisations that play a role in emergent rule-making for sustainable business conduct. The Organisation for Economic Development and Cooperation (OECD) and International Labour Organization (ILO) prefer ‘MNC’ while the UN prefers
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their societal impacts (through an almost 20-year process to draft a Code of Conduct for TNCs\(^4\) that was begun in the 1970s), and more specifically on human rights (through the process leading to the so-called Draft UN Norms on Business and Human Rights, or ‘Draft Norms’).\(^5\)

Hence, it is relevant to look at the process that led to the UN Framework and UNGPs in order to understand why the breakthrough occurred and how the foundations for agreement on a previously contentious issue were created. These are the central questions guiding this book.

At only 30 pages, the relative brevity of the UN Framework for treating a complex topic was due to formal UN requirements. Similar to other UN human rights texts, such as the Universal Declaration on Human Rights (UDHR), such brevity invites elaboration. Accordingly, in 2011 the UN Framework was followed by the UNGPs. Responding to a request from the Human Rights Council for an operationalisation of the UN Framework, the UNGPs explain in more detail how states and businesses should act in order to honour their legal obligations and, in the case of businesses, also social expectations with regard to adverse human rights impacts caused by businesses. Like the UN Framework, the UNGPs are limited to a 30-page document. For both, a series of much more extensive sub-reports and other documents add additional information.

The UN Framework develops a structure of three ‘pillars’: (1) the State Duty to Protect, (2) the Corporate Responsibility to Respect, and (3) for both states and businesses to provide Access to Remedy. This normative structuring takes its point of departure in international human rights law, which has primarily been concerned with the three-pronged obligation of governments to respect human rights (observe rights, such as the freedom of speech), protect human rights (against violations) and fulfil human rights (providing for health services, education, etc.). For pragmatic reasons governed by the aim of reaching agreement on a partial solution


rather than seeking to solve all problems at the risk of no agreement at all.\textsuperscript{6} The UN Framework limits the corporate responsibility to respect human rights, that is, to a so-called negative responsibility to ‘do no harm’. While the UN Framework did not develop normative guidance for how the private sector may contribute to the fulfilment of human rights, it also did not rule out that companies can contribute to the delivery of public goods of a human rights nature. The UNGPs build upon the three Pillars set out by the UN Framework.

Neither the UN Framework nor the UNGPs establish new human rights. Rather, they explain the implications for businesses and governments of already existing human rights, with a particular focus on adverse business impacts. Both documents refer to the International Bill of Human Rights and the International Labour Organisation’s (ILO) fundamental labour conventions as the minimum standards that should inform business responsibilities for human rights. The former comprises of the UDHR, the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the International Covenant on Civil and Political Rights (ICCPR). The latter comprise of eight ILO treaties on so-called core labour rights, that is the abolition of slavery and forced labour; the elimination of child labour; the protection of labour unions and the right to organise and engage in collective negotiation; and freedom from discrimination in the workplace.

\subsection*{1.2.2 Business and Human Rights as an Emergent Regime}

The processes towards the UN Framework and the UNGPs can be considered transnational law-making, because they included public and private actors in regulating issues that are essentially public policy concerns. Transnational law is a field that merges elements of conventional public (international, regional, and sometimes even national) law and conventional private law as well as new forms of law- and rule-making.\textsuperscript{7} Transnationalisation of law is

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partly a result of the fact that markets have internationalised while governments remain by definition bound by their borders.

While human rights from the philosophical perspective may be considered moral obligations for everyone, a juridification\(^8\) of human rights that has occurred in national and international law during the past centuries establishes the respect, protection and fulfilment of human rights as obligations of states. This is clear from the UDHR and the large number of international and regional human rights treaties that have been developed during the twentieth century. Even so, the UDHR’s reference to ‘all actors in society’ in its preamble (a policy introduction) has been taken by companies with a commitment to social responsibility as an invitation to the private sector to commit to human rights. Yet the wording was not originally intended to apply to businesses.\(^9\) At the time when the UDHR was developed from 1945 to 1948, it was largely unfathomable that businesses would attain the political and economic power that they came to have during the second half of the twentieth century.

According to the so-called horizontality doctrine, which has been developed in international human rights law, states’ obligation to protect human rights goes beyond protecting individuals against harm caused by state agencies. It also includes the protection of individuals against human rights abuse caused by non-state actors, such as businesses. While the full extent of the implications of the horizontality doctrine remain debated,\(^10\) the core of the doctrine informed the UN Framework with regard to the state duty to protect human rights.

From the perspective of international law, the protection of human rights is an obligation of states. Moreover, the fulfilment of social, economic or cultural human rights, such as providing for access to health services or to primary schooling, is a governmental obligation under

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\(^8\) The term ‘juridification’ refers to an expansion of law into fields beyond law. It entails a legal framing of societal phenomena (such as social expectations of companies), a proliferation of law into other fields of practice or science (such as politics or ethics), or an increased regulation by law of social actors or processes. See further K. Buhmann (2016) ‘Public regulators and CSR: The “Social Licence to Operate” in recent United Nations instruments on Business and Human Rights and the juridification of CSR’, 136(4) Journal of Business Ethics pp. 699–714 with references at section 5.


international human rights law. However, from the political or political-economic perspective, many and especially social and economic human rights correspond to public policy objectives, e.g. in regard to health and education or an increasing enhancement of occupational health and safety and general working conditions. Involving businesses in developing norms of conduct to that end therefore amounts to involving businesses in a process with the aim of contributing to the solution of public policy objectives. This accords with the understanding of transnational law that as explained Professor Harold Koh may appear to be private, but is fundamentally public in character, represented by such fields as human rights, labour, environmental and public health law.\textsuperscript{11}

Accordingly, the adoption of the UN Framework and subsequently of the UNGPs indicates a major shift in the idea of what types of actors carry responsibilities for human rights. The shift brought about the emergence of a new legal regime, which recognises businesses as having explicit responsibilities under international law, despite their status as so-called for-profit non-state actors. Even if those responsibilities are currently framed in policy and soft law documents, they refer explicitly to international legal standards in international human rights and labour law, which were originally developed and adopted as obligations for states. The recognition of businesses as bearers of international responsibilities, even on a soft law (guiding) basis, is a major change in the way that bearers of international obligations are perceived.

An international regime may be defined as a set of implicit or explicit principles, norms, rules, and decision-making procedures\textsuperscript{12} around which actor expectations converge.\textsuperscript{13} In the past, treaty-related normative developments such as the prevention of nuclear proliferation have been defined as emergent autonomous regimes.\textsuperscript{14} In international relations studies,

\textsuperscript{12} Krasner defines norms as standards of conduct in terms of rights and obligations, and rules and procedures as instructions for action and practices of making and realising collective choices (see S. D. Krasner (1982) ‘Structural causes and regime consequences: regime as intervening variables’, 36(2) International Organization pp. 185–205, at 186). This work applies rule with a broader meaning, e.g. ‘rule-making’ and ‘law-making’ are used interchangeably.
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regimes are forms of cooperation that exist despite the restrictions that they place on involved actors.\textsuperscript{15} Convergence on a regime is attractive despite such restrictions, because it offers order in place of anarchy.\textsuperscript{16} The evolution of the conventional state-centrist human rights regime, which evolved based on ethics, political philosophy and national law and which became codified in international law during the twentieth century, is a case in point. This human rights regime limits each state’s power vis-à-vis individuals within its jurisdiction, but on balance, the international human rights regime contributes to global order by reducing abuse of power that threatens peace and co-existence.

Like studies of international law and international relations in general, regime theory takes a state-centric point of departure. It may be expanded to issue-specific cooperation involving non-state actors where the extension to such actors is generated by the difference between the existing lack of order and the order offered by the regime.\textsuperscript{17} The normative convergence that evolved with the support of non-state actors, states and international organisations in 2008 and 2011 for the UN Framework and UNGPs, respectively, represents an example of such an emergent regime. This emergent Business and Human Rights (increasingly in the literature referred to as ‘BHR’) regime breaks off from conventional state-centrist human rights by explicitly recognising for-profit non-state actors as bearers of specifically defined responsibilities, and also by in practice including them in the rule-making process. Eventually, this may come to innovate conventional international law, but currently, we are witnessing a new development that is still taking shape and is doing so because it is occurring in a singular field within international law.

The explicit focus on actions of non-state actors that often occur across the borders of home and host states, brings a transnational character to the emergent BHR regime. Indeed, in addition to being an emergent specialised regime in international law, the BHR field represents a transnational regime in terms of both the actors involved in the collaborative regulatory process, and in the normative outcome of that process. Being UN driven, it also exemplifies that the UN as an international organisation and in its rule-making is able to adapt to the growth of transnational interaction, impacts and concerns.

This is significant far beyond the human rights field. The impact that

\textsuperscript{16} Seppala (n 15).
\textsuperscript{17} Ibid.
businesses have on human rights has formed a major element in the ‘social’ or ‘people’ dimension of the normative idea of CSR for years and the interface between the role of the public and the private sectors in regard to sustainability. International sustainability policies increasingly integrate the role of businesses in solving global sustainability problems (evidenced by the 2015 Sustainable Development Goals (SDGs)), but turning policy agreement into directives for implementation continues to encounter challenges (such as the Paris Climate Change Accord as well as the SDGs). As evidenced by the complex journey towards the Paris Accord, even the process of reaching agreement on a global concern as acute as climate change encounters difficulties, in part because of the numerous and often conflicting interests at stake between governments and the private sector, and even within those. The process towards the emergent BHR regime too suffered from such conflicts, which as it will be described below brought it close to a complete standstill before a major turn-around occurred that led to the UN Framework and UNGPs.

1.2.3 The Significance of the Emergent BHR Regime for Insights on Regulating Sustainability Through Discursive Processes Involving Multiple Interests

Centred from within the UN and already agreed international human rights law but explicitly extending it to non-state actors, the BHR regime offers concreteness that the emergent transnational climate change regime lacks.\(^\text{18}\) The evolution of agreed normative directives that explicitly assign a role for the private sector in regard to a core policy concern of nation states and of the international society – such as human rights – is a novelty that offers potentially significant insights for other policy areas and international regulation of transnational policy concerns. The significance is further underscored due to the need to take account of or handle jurisdictional limitations of nation states against the fact that human rights or other sustainability-related impacts caused by transnational businesses often occur outside the home states of companies.

This makes it pertinent to understand how the issue of business responsibilities for human rights, which at the outset suffered from lack of agreement and support, was discursively constructed into a normative idea that

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enjoyed agreement, and more particularly what lessons this may hold for future negotiations on norms of conduct in fields with highly divided conflicts of interests. This book provides insights for those concerned with the evolution of norms of conduct that govern business impact on society in order to limit adverse impact, or promote positive impact. This pro-active and preventative approach by no means excludes the parallel existence of re-active and punitive measures. However, because sustainability impacts are often hard to fully remedy, prevention is preferable so as to avoid the need for a cure that is often incomplete. With a particular focus on moving the agenda forward through agreement from state and non-state actors on new norms of conduct, new understanding on strategies for promoting change based on normative directives or regulated self-regulation is relevant to civil society, businesses committed to sustainability, public regulators, academics and others with a concern in promoting sustainable business action. It will help these actors structure arguments and negotiation processes so as to have maximum influence and stimulate change in business organisations in support of sustainability and necessary changes of conduct.

1.3 APPROACH, METHODOLOGY AND CASES

1.3.1 A Pragmatic Approach to an Interdisciplinary Topic

As noted above, there is a close connection between CSR and BHR discourses. An analysis of how BHR has branched off into an autonomous discourse and an emergent regime will need to consider issues and processes that are related to the broader ‘People, Planet and Profit’ aspects of the CSR concept as well as the more specific social (or ‘People’) aspects inherent in BHR. Much CSR and BHR action has been spurred by civil society actions, sometimes complemented by media campaigns or market expectations. Thus, the development of CSR and BHR normativity for economic actors and even beyond these is pluricentric, engaging a range of organisations or actors in a de-facto role as norm-setters, even though they do not belong to traditional centres of law-makers.

The analysis here is grounded in a pragmatic approach to the development of norms of conduct relating to business impact on society within a broader context of global economic integration, sustainability, and continuous dynamic change in the political, economic, informational and regulatory conditions framing public regulation of private sector activity. A pragmatic approach is both a necessity and an effect of the point of departure being taken in a regulatory process that involved non-state
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actors in the evolution of norms of conduct for business within a context framed by international law and the UN as the world’s largest international organisation charged with ensuring peace and promoting social progress, human rights and better standards of life.19 According to the doctrinal conception of for-profit non-state actors (that is, businesses) in international law, business has little or no role – neither in terms of obligations, nor in terms of law-making. This accords neither with the enormous economic and political power that the private sector has obtained since the middle of the twentieth century, nor with the capacity of business to both contribute to society and cause societal harm, which leads to societal expectations that business enterprises take responsibility for their impacts and act both to do no harm and to do more good.20 Finally, the idea that business enterprises do not have a place in international law-making is not in accordance with how much sustainability related rule-making at both international and regional level has in fact taken to include business.21 Pragmatism, as a scholarly approach, allows for recognising observable facts even if these differ from doctrine, and to lend inspiration from methods and theories from other sciences. A pragmatic approach, therefore, is particularly well suited for a study of fields such as business responsibilities for human rights and transnational multi-stakeholder law-making, which both involve non-state actors and particularly business in ways that jump the borders of international law doctrine, and which transgress the boundaries of academic disciplines like organisational studies, law and political science by engaging or calling upon application of neighbouring disciplines. This has been aptly phrased by socio-legal theorist David Trubek as ‘crossing a number of boundaries which are often carefully policed’.22 Pragmatic studies bring forth new knowledge by doing precisely that.

Without necessarily using the term ‘pragmatism’, legal pragmatists are

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20 The 2015 update of the website and of the communication strategy of the UN Global Compact testifies to this. Originally based on ten principles, all guiding businesses to prevent or reduce harm in the issue areas of human rights, labour, environment and anti-corruption, the Compact’s website and communication in 2015 and onwards has engaged actively the 17 Sustainable Development Goals (SDGs) with a broad message to business to do more good for society by contributing to the implementation of the SDGs.
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concerned with the usefulness or expediency of a practice or approach, its practical applicability, effects and results, rather than with doctrine. A pragmatic approach focuses on solving problems of reality rather than delving into abstract conflicts based in theory. In a legal context, a pragmatic approach entails arguments or analysis, which stress the usefulness or expediency of particular actions or legal institutions. Moreover, it entails the application of relevant theories and methods in order to analyse problems found in societal reality (as opposed to theory), and it produces knowledge of practical applicability. A pragmatic approach also allows a departure from earlier theories and doctrines, such as on forms of law, duty-holding subjects or participation in international law-making, in favour of dealing with problems that are observed in the current context of societal reality. Pragmatism allows for recognition of theory complementarity, and for the application of a combination of approaches in complementary synergy. Accordingly, legal pragmatism permits the integration and application of theories from other (social) sciences, such as political science theory, as this may help identifying, understanding and analysing legal problems, their backgrounds, and solutions. Along lines shared by critical discourse analysts, pragmatic theory also recognises that language has a decisive role in the construction of perceptions of problems and reality.

The choice of a pragmatic approach is anchored in the fact that conditions of society are subject to continuous change. This challenges regulatory strategies to adapt so that they may respond to the current conditions at any point of time. Thus, while businesses and civil society, being non-state actors, do not have a formal role in international law-making, the role that such non-state actors have taken or been given in recent decades’ efforts to grapple with social, environmental and climate change threats prove that in practice, non-state actors play crucial roles. These roles are obvious in the implementation of political goals and legal agreements. However, the necessity to involve businesses in the impleme-

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26 Tamanaha, ibid., at 58–59.
27 Dalberg-Larsen, (n 24) at pp. 103–11, 140–41.
28 Ibid., at 24–5.
tation and the expert role of civil society have led to a growth of formal and informal inclusion of these actors also in the processes to develop policy and international law.\textsuperscript{29} Many civil society groups, notably non-governmental organisations (NGOs), but also some business associations enjoy consultative status with the UN,\textsuperscript{30} and some have done so for a long time. However, the political role and influence in some cases go beyond strictly ‘consultative’. With regard to NGOs, this has been observed in the environmental sphere,\textsuperscript{31} whereas business influence has been considerable in relation to business enterprises’ social impacts.\textsuperscript{32}

This study adopts a pragmatic legal approach within the broad field of socio-legal studies.\textsuperscript{33} Socio-legal studies encompass a group of disciplines that apply a social science perspective to the study of law.\textsuperscript{34} In accordance with the legal pragmatist approach, the theoretical framework in here (explained in section 1.3.2.2) has regard to regulatory strategy and communication. It draws in part on legal theory, but also applies discourse theory and textual analysis from political science, as well as argumentative strategy theory developed in business communication/organisational studies.

At the foundational level, the study is grounded in a conviction of the need for international law to adapt in order to respond to the emerging power of the private sector. This necessitates a pragmatic renewal in terms of how the regulatory process takes account of the expertise of civil society,

\begin{itemize}
  \item \textsuperscript{30} This is possible under art 71 of the UN Charter, which empowers the UN Economic and Social Council (ECOSOC) to ‘make suitable arrangements for consultation with non-governmental organisations which are concerned with matters within its competence’.
  \item \textsuperscript{31} A. Kolk (2001/2013) ‘Multinational enterprises and international climate policy’. In Arts, Noortmann and Reinalda (n 29), pp. 211–5; Arts (n 29).
  \item \textsuperscript{33} Tamanaha (n 25), at 2. 7.
  \item \textsuperscript{34} Studies of responsive law and autopoietic law (see further below) are also socio-legal studies, due to their combinations of theories of law and its relation to society, see Tamanaha, ibid., at 19 with references.
\end{itemize}
the political and economic power of business, and the claims of both to participation in law-making pertaining to business impact on society. At the same time, the study is based on a strong belief in the capacity of law – in terms of both legal theory and specific fields of legal practice and law-making, especially international law – to provide institutionally sustainable solutions to pressing societal and global problems. Unfolding such capacity is feasible, provided openness to societal change reflected in legal scholarship and theory-based legal practices, and a willingness to adapt in order for international law theory and practice to respond to such change.

Accordingly, the current study’s approach to international law is process oriented. As described by Professor Rosalyn Higgins, international law can be considered as a process of dynamic adaptation to political, economic and other changes rather than as an unchanging system of actors and rules. In here, process and norms connect not just in the study of specific cases but also to inform a quest for understanding processes through which state-centrist international human rights law as a set of norms of conduct relates to and feeds into broader sets of norms on business impact on society. In a broader perspective this has implications for international and transnational law-making to address global concerns that involve companies in both their cause and solution.

The study approaches both BHR and CSR from the perspective of public regulation and public-private co-regulation as modalities to induce self-regulation in companies. This perspective differs from the company perspective taken by many CSR studies, including those that have been conducted within other social sciences than law. It also differs from the more squarely cut private law or international law approaches taken by many law-based studies of CSR or BHR.

Issues related to BHR as well as the field of CSR and their regulation transgress the boundaries of legal sub-areas normally seen to be distinct: international law and national law, public law and private law. Even emerging regulation of CSR initiated at intergovernmental level builds on a plurality of sources of CSR-normativity, encompassing private regulation and codes, international law, national law, as well as a plurality of modalities of regulation, some of which include non-state actors not normally seen at the tables where international law, even international soft law, is made.

A few international business organisations, such as the International Chamber of Commerce (ICC), hold consultative status with the UN. Generally, however, companies have not previously been seen as partners to regulatory initiatives within the fields of human and labour rights except through representative organisations of employers within the ILO’s tri-partite structure or through representatives in specific trade- or
business-related international regulatory initiatives designed to promote international trade rather than regulate business conduct.

In line with the pragmatic approach, the study not only draws on other social science approaches but adapts these to use in the context of the focus on the discursive construction of business responsibilities for human rights, leading to the emergent BHR regime. In line with the process-oriented law-making focus, for empirical data the study draws on processes of developing normative directives related to businesses’ social impact on society.

In this, the pragmatic and process focus on international law also informs the empirical basis for the study, meaning that unlike many other studies of law, this one is not based on an analysis of case law or decisions by authorities. Case law relating to BHR and CSR is (so far) found mainly in specific national jurisdictions, especially in so-called Common Law countries (the United States, the United Kingdom and state members of the Commonwealth of Nations (formerly the British Commonwealth)). That limited and culturally specific basis somewhat reduces its applicability to events occurring in so-called Civil Law jurisdictions, especially if there is no connection to Common Law states. As many of the world’s countries, including socialist states, are Civil Law jurisdictions, the significance of this should not be overlooked.

In sum, a pragmatic approach is relevant in a context like the current one, because it allows for an analysis of facts that are observable and have legal relevance although they do not build on conventional legal method of gathering empirical data, and for an analysis combining theory developed inside as well as outside of the field of law. A combination of theories makes sense precisely because it is useful for analysing observable phenomena that are not contained within singular academic fields or sub-fields, and for understanding how normative evolution occurs in a multi-stakeholder process that needs to span diverse and frequently not aligned concerns.

1.3.2 Methodology

1.3.2.1 Case studies
Case studies provide empirical basis for the analysis and offer real-life examples of the complexity surrounding the discursive construction of sustainability normativity. Five selected cases are subjected to analysis by application of a combination of discourse analysis and socio-legal theory.

The ten-year period from 1998 to 2008 witnessed the emergence of the UN Global Compact in 1999, the failure of the Draft UN Norms on
Business Responsibilities for Human Rights in 2003, the relative success of two EU initiatives – the 2002–04 EU Multi-Stakeholder Forum (MSF) on CSR and the CSR Alliance, launched in 2006 – in developing guidance on CSR, but also a relative failure of these EU initiatives of giving a strong role to human rights in such guidance, and finally in 2008 the ground-breaking adoption by the UN Human Rights Council of the UN Framework on Business and Human Rights. Led by Professor John Ruggie in his capacity as the UN Secretary-General’s Special Representative on Business and Human Rights, commonly referred to as ‘SRSG’, the process towards the UN Framework is hereafter referred to as the SRSG process. The UN Framework formed the basis for the UNGPs, and the adoption of both paved the way for negotiations currently taking place for an international treaty on business and human rights. With a particular focus on the processes leading to the normative outputs, the empirical case studies applied in this work comprise of the Draft UN Norms, the UN Global Compact, the SRSG process, the EU MSF, and the EU’s CSR Alliance.

The key empirical part is a detailed study on the SRSG process that led to the UN Framework and UNGPs. Selected for the reasons set out below (section 1.3.2.4), the other cases provide a backdrop for the analysis of the SRSG process. Some of those were less successful in delivering agreement on the normative product of a regulatory process, or in delivering comprehensive norms of conduct that set directives for business with regard to their societal impact, in particular with regard to human rights. The Draft UN Norms is an example of less successful efforts at developing such norms. (As explained in Chapter 2, it was also not the first failure of the UN to develop norms of conduct for TNCs with regard to human rights, among other issues.) The UN Global Compact, which was developed and launched around the same time, was relatively more successful but contrary to the Draft Norms was explicitly described in terms intended to avoid the initiative being seen to be a legal instrument. Debates and outcomes of efforts by the EU, a regional organisation with policies to promote sustainable conduct by EU-based enterprises in regard to their activities and impacts outside their home region, also place the discourse and argumentative strategy that led to the current emergent BHR regime into perspective. The EU initiatives were not a general failure in terms of being CSR initiatives, but the processes did not deliver on the original ambitions to develop strong normative guidance and for this to be detailed in regard to human rights. By comparing discursive and argumentative strategies across these examples of constructing normative guidance on CSR with a particular focus on business and human rights, it is possible to identify what led to failures and success.
1.3.2.2 Theoretical framework: International and reflexive law, autopoiesis, discourse theory, and stabilising/de-stabilising arguments

It was noted above that the theoretical framework for the study in line with the pragmatic approach draws on legal science theory as well as discourse theory and argumentative strategy theory. This section explains the theories in more detail.

International law, including international human rights law, sets the outer framework for the analysis, as it defines the formal role of non-state actors in law-making and the inclusion of non-state actors in practice in relation to both policy- and law-making. This also speaks to the need, observed above in the discussion of the need for pragmatic renewal, for international law and its processes to adapt to changes in the political, economic and other external conditions, in order for international law to deliver solutions to societal problems. The socio-legal theory of reflexive law with a particular emphasis on communication and the role of arguments offers part of the theoretical framework for the analysis of the discursive construction of norms, which took place in the multi-stakeholder processes that make up the five case studies. The polycentric aspects of the construction of CSR and BHR normativity call for a theoretical framework that allows for analysis of multi-stakeholder debates in processes for defining economic actors’ social responsibility and developing normative directives. Applied within the theoretical regulatory framework of reflexive law, discourse analysis provides a method for such analysis the purposes of the present analysis. Finally, the theory on stabilising and de-stabilising arguments allows for performing an analysis of the internal complexity of an argument that aims at promoting (or preventing) a course towards normative change with participants in a multi-stakeholder regulatory process.

1.3.2.2.1 International law and international human rights law: state duties, doctrine, and horizontal obligations to protect

International law is founded on theories that emerged in the sixteenth century and onwards, spurred by a desire to create a legal order for states’ interaction in times of war and peace. As a result, the international law regime is fundamentally concerned with states: states are the makers of international law; they are the primary subjects of international law, both in terms of being rights-holders and duty bearers; and where accountability does arise in international law and under its institutions, it normally affects states and not individuals. Legal accountability modalities at the international level are limited, and where institutions to assess accountability do exist, sanctions are also often limited (partly as a result of the fact that international law is based on and evolves through states adopting rules pertaining
to themselves and other states: the ambition for a state to set up strong accountability modalities that it might fall prey to itself is limited). The international criminal law regime is an exception, but also only emergent and limited to specific, very serious, actions recognised to be genocide, war crimes or crimes against humanity. Under this specialised international law regime, which dates to the Nuremberg and Tokyo processes following World War II and during the twentieth century evolved into the International Criminal Court\(^\text{35}\) and tribunals related to international crimes that have occurred in specific countries in specific contexts (e.g., in Yugoslavia during the civil war of the 1990s), individuals may be prosecuted. However, this does not extend to businesses, despite these being considered individuals (so-called legal persons) in some jurisdictions.

Another specialised regime, international human rights law differs from general international law by establishing rights for individuals (against their state). Where general international law establishes rights and duties for states, international human rights law establishes rights for individuals, and duties for their states.\(^\text{36}\) In view of the diversity of human rights – civil, cultural, economic, political and social – states’ obligations for human rights comprise the duty to respect human rights (e.g., rights of freedom of expression and assembly), the duty to protect human rights (against violation by the state, e.g. through discrimination or torture by state agents), and the duty to fulfil human rights (e.g., by providing access to education and health services). According to the horizontality doctrine (mentioned in 1.2.2.), human rights obligations not only apply to the vertical relationship between a state and individuals but also to horizontal relationships within a state, for example between an individual and a corporation.\(^\text{37}\) The horizontality doctrine does not neglect the role of states: governments must protect individuals against human rights violations by other individuals and ensure enforcement.\(^\text{38}\) As we shall see in the following, this doctrine has come to play an important role in the emergent business and human rights regime, as it informs the idea of the state’s duty to protect individuals against human rights abuse caused by companies. As we shall also see, this only emerged gradually, partly because the ways


\(^{38}\) On the horizontality doctrine particularly in relation to business and human rights, see discussion in Knox (n 10).
in which international human rights law differs from general international law are not well-known by all, nor is there full agreement on the extent of states’ obligations to protect against horizontal human rights abuse.

In international law as in other fields of law, *lex lata* refers to the way the law currently is according to existing legal doctrine, whereas *lex ferenda* refers to how the law should be changed, according to the views of the person(s) or organisation(s) who make that statement. A *lex ferenda* proposal seeks to change the current doctrine. A proposal to establish binding (hard law) international duties for businesses under international human rights law is a *lex ferenda* proposal, because it aims to change the current doctrinal perception that human rights obligations are only binding duties for states. A proposal to develop non-binding specific norms on the responsibility for business in regard to human rights in a text to be adopted as a formal soft law text by an intergovernmental body with the competence to do so is also a *lex ferenda* proposal, for the same reasons. An elaboration of the obligations for states to protect human rights against abuse caused by businesses is doctrinal, referring to the specialised human rights law doctrine on the state duty to protect, which includes obligations for states to legislate and engage in other relevant activities to ensure the effective implementation and protection of the human rights in question. However, those that are not aware of that specialised doctrine or wish to contest it may counter the proposal as conflicting with doctrine, or as being a *lex ferenda* proposal. Such contestation may be a result of the horizontality doctrine still being subject to debates on its extent and implications for states as well as non-state actors.

### 1.3.2.2.2 Reflexive law and autopoiesis in communication for normative change

The theory of reflexive law belongs to a group of socio-legal theories concerned with instrumental regulation, that is, how law may be deployed as a regulatory strategy to induce change, without harm necessarily having occurred. The focus is primarily proactive, looking to change conduct with specific actors in society in order to prevent harm. Thus, the approach of reflexive law differs from the re-active enforcement approach that is often associated with institutional law. Indeed, reflexive law builds strongly on communication as a modality for inducing normative change, and in doing so is informed by systems theory rather than institutional theories. It is the communicative aspect that gives reflexive law

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relevance for the analysis of how norms of conduct for sustainable business conduct may be ‘talked’ into acceptance through a discursive process; and therefore, why that instrumental regulatory theory is a relevant part of the theoretical framework for the current study.

As explained in detail in Chapter 3, reflexive law theory, proposed by Gunther Teubner,40 draws on a combination of the system-theory of Niklas Luhmann41 and the discourse ethics of Jürgen Habermas,42 which was later expanded into Habermas’ theory on legitimate law-making.43 Reflexive law has been thoroughly addressed in socio-legal theory and applied in practice in several contexts of national or transnational regulation of sustainability related issues.44 Based on a combination of habermasian emphasis on citizens’ participation in law-making and systems-thinking that recognises the significance of the core rationality that distinguishes diverse functions in society,45 reflexive law theory focuses on multi-stakeholder law-making on issues marked by competing or often conflicting interests. Drawing on the theory of autopoiesis,
reflexive law theory posits that it is possible to induce organisational self-regulation and acceptance of a need for normative change through exchanges that engage the rationality (or logic) of the actor with whom change is desired. According to this socio-legal theory, new norms related, for example, to business impact on society can be created in a communicative process in which external stakeholders stimulate organisational change with others by sharing views on needs, concerns and demands. This occurs by stakeholders communicating in ways that resonate with the logic of the audiences by speaking directly to the implications for their core concerns – such as, in the case of business, making profits or suffering losses. As elaborated in Chapter 3, within social science, autopoiesis explains change in organisations as a result of adaptation to external pressure. Such pressure can induce change when it resonates with the rationality on which the organisation builds in terms of its core function in society. For example, for businesses, making a profit is necessary in order to remain solvent and meet shareholder expectations (regardless of its commitment to social sustainability needs, it will not be able to go on if it fails economically). Its rationality therefore turns on making a profit or suffering a loss, and it will respond to pressure that activates that logic.

Due to its complex theory basis, reflexive law is sometimes thought to be highly theoretical or abstract. However, socio-legal and pragmatic legal scholars have demonstrated that the application of reflexive law can be concrete, focused and deliver results of direct application to future regulation. This book follows in those steps by taking a point of departure in selected cases of multi-stakeholder rule-making involving both public organisations and private organisations. Within this context it observes and analyses the manner in which participants in such processes use specific types of arguments with the aim of obtaining their desired normative outputs, which would either entail normative change in business conduct, or uphold a status quo situation marked by more limited normative expectations and guidance or directives for business conduct.

Among the case studies, most can be defined as examples of reflexive law either due to their explicit organisation (the Global Compact process, the EU’s MSF and CSR Alliance) or due to the way in which they came to operate (the SRS process). However, the theory of autopoiesis and the role

played by system-specific rationality in arguments also contributes to understanding argumentative strategies that were decisive for the outcome of the process towards the Draft Norms, which was neither set up nor effectively operated as a reflexive law process. Indeed, this is a key point of the current work and the theoretical insights that it provides for the creation of new sustainability norms: the application of autopoiesis offers a highly practice-oriented basis for understanding how an argument may promote acceptance of normative change with other participants in a regulatory process; and how an argument may (sometimes against its own intention) prevent change.

1.3.2.2.3 Discourse theory  Discourse theory and discourse analysis offer a way to identify and read texts to understand how their positions and arguments impact on social constructs, such as CSR, specific norms of conduct, or perceptions of accepted conduct, such as in regard to business impact on human rights. For the current study, discourse theory adds theoretical and informing perspective to the analysis of the struggles between participants in a reflexive law forum to set the meaning of value-laden ideas such as CSR and BHR. Recognised to be applicable to processes related to the social construction of policies, norms, and normative concepts, discourse theory has been applied to understand the evolution of norms of conduct in contexts of international and EU law, as well as argumentative strategies of lawyers and judges, and the communication of CSR by companies to stakeholders. In various ways, they all resemble the context for application in the current study. Studies based on discourse analysis have indicated that certain CSR-relevant practices, such as voluntary adoption of social and environmental reporting, may form part of a strategy to resist pressure for other forms of accountability by attempting to project an argument that there are no conflicts between business practice and societal interest for sustainability (and therefore no need for authorities to regulate).

50 Holdgaard (n 48).
suggests that discourse may serve in processes of network building, enrolling allies and overcoming dissent in order to achieve particular aims.\textsuperscript{53} Other studies demonstrate that corporate scandals may affect regulatory processes.\textsuperscript{54} This illustrates that discourse analysis may be instrumental for providing understanding of whether and how discourses or sub-discourses form parts of strategies to avoid (conventional) legal regulation, as well as to inform regulatory language and discourses arguing for legislative and regulatory change.

Knowledge, power and hegemony (dominance) are key features in discourse analysis. Discourse analysis is not concerned with diagnosing statements as true or false, but with analysing patterns in statements and discourses and determining results from discursive struggles to achieve hegemony in construction of concepts and knowledge.\textsuperscript{55} The application of discourse analysis in social science is in part related to the preoccupation with change as a social process that occupies much institutional, political and sociological research.\textsuperscript{56} In legal science, an interest in understanding change and mechanisms that drive processes of change is shared not only by socio-legal scholars, but also by scholars with an interest in the application of law, particularly in or by courts.\textsuperscript{57}

Joined by a common concern with power, power relations and their role (and use) to shape society through language or other statements, discourse theory comes in a number of forms and approaches. The French school represented by Michel Foucault, Ernesto Laclau and Chantal Mouffe and others, comprises rather abstract theories, which are concerned with


\textsuperscript{57} See for example, Holdgaard ibid., at 320, 323; Staffe (n 49).
power at a general level related to particular groups, organisations, etc. Through discourse, the way we use language therefore is constitutive of social reality. For example, the corporation as a legal entity may be talked into reality through language.\(^{58}\) The critical discourse analysis (CDA) school represented by Norman Fairclough and other primarily English or Germanic culture scholars offers theories that turn on specific analysis of texts focusing on words, signs, conversations and their use. Different varieties of discourse theory are often applied in combination. Laclau and Mouffe’s discourse theory recognises power as constitutive in a productive sense as well as a modality for one group’s obtaining of hegemony over others. Its authors see power as a societal constitutive factor, and discourse as constitutive of power. Set at a relatively high level of abstraction, their approach seeks to map discourses that exist in a society at a particular time or regarding a particular societal topic. That theory is often combined with other, less abstract, approaches, such as Norman Fairclough’s textual analysis.\(^{59}\) For the purposes of the current study, discourse theory is applied in a way which links abstract and concrete approaches, drawing on Laclau and Mouffe’s emphasis on discourse as a way to obtain or preserve power, and Fairclough’s approach to analysing text to understand how discourse creates and shapes power.

Discourses are communicative events in a broad sense. They are institutionalised ways of using speech and other linguistic elements in determining and consolidating action. As a particular discourse is typically about power in a specific context, discourses, in general, exercise power by transmitting (institutionalised) knowledge, influencing individual and collective action and shaping society,\(^{60}\) for example through the construction and fixation of specific concepts. Antagonistic relations arise, for example between companies and NGOs in relation to CSR normativity and expectations. This instigates discursive struggles to obtain influence in constructing meaning within a discourse or two conflicting discourses.\(^{61}\) The successful actor will see its interests protected or promoted through

\(^{58}\) E. Laclau and C. Mouffe (1985) *Hegemony and Socialist Strategy: Towards a Radical Democratic Politics*, London: Verso, esp. Ch. 3; Spence (n 52) at 858–9; Jørgensen and Phillips (n 55) at 29.

\(^{59}\) Jørgensen and Phillips ibid., at 30.


the settled meaning of the concept. By achieving dominance in this respect, hegemony is obtained.

Discourse analysis is based on the assumption that words and communicative events do not reflect an already established reality but constitute it. It also assumes that discursive patterns are maintained or changed through discursive practices. As a result, discourse analysis offers a way to critically assess and uncover the way that language constructs and changes (parts of) the world. Examples include relationships between institutions and their clients, the construction of particular phenomena, such as concepts of the environment or sustainability, national identities and particular minorities’ culture.

CDA, including Fairclough’s approach, aims to assess and illuminate how power relations are constructed and reproduced through discursive practices. Relations between men and women or between social classes are typical examples of such power relations. For the current purposes, this connects to power relations between social actors involved in multi-stakeholder processes to develop norms of conduct, including the construction of social responsibility expected of such actors. Moreover, the main power issue relates to the implications for involved actors that may result from the prospective norms of conduct that they are negotiating. In other words: are these norms likely to increase or decrease their current power or stabilise it? From the systems thinking perspective introduced above, companies will be concerned with implications for their ability to generate profits or manage risks to their profit-making; whereas public policy-makers will be concerned with their ability to be seen as effective in developing policy and law related to public policy objectives. NGOs will be concerned with their own effectiveness in making an imprint on policy and law in accordance with the aims of their constituencies (e.g., to promote environmental sustainability, decrease adverse business impacts on human rights, or promote active business contributions to the delivery of social goods). The interests at stake are considerable for political system representations, such as (inter-)governmental organisation and NGOs, economic system representations such as companies, and for the international legal system as a relevant and efficient mode of regulation of current global sustainability concerns.

The textual analysis of Norman Fairclough functions as a bridge between the power analysis according to the approach of Laclau and Mouffe, and the discursive and argumentative strategy deployed in a

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62 Jørgensen and Phillips (n 55) at 21.
63 Ibid., at 9; Hajer (n 29).
reflexive regulatory process, which ideally invokes the rationality of other stakeholders in order to stimulate normative change with them. Fairclough’s approach has its focus on analysing text as a medium for constructing and reproducing power relations through discourse, in line with the general approach of CDA, which considers specific use of language, actors, mode, vocabulary and argumentation to be important elements for the purpose of analysis. For example, an analysis may consider the form of argumentation, argumentative strategies, logic and composition of text, style, and references to science. Seeing language this way therefore provides an operational mode for analysis of the construction of normativity through texts produced and presented in the context of the five case studies. CDA considers text to be intertextual and interdiscursive, that is, constituted by (and constitutive of) other utterances (such as statements) and surrounding discourses. Thus, analysis of a text gains from considering the larger context of that text, in terms of related statements and the discursive environment. Like pragmatic legal theory, CDA recognises interdisciplinary work. The interdisciplinary aspect means that CDA acknowledges the significance of contextual features, such as political and ideological components, in analysis of discourse. Critical discourse theory does not insist on one particular way of collecting data. Data collection may be on-going rather than completed before analysis is begun. It may also employ methods belonging to other fields of theory than the one which frames a study at the overall level. As critical discourse analysis is often undertaken on the basis of a large body of text, it is recognised that a complete analysis of the text body may not be possible.

Whereas Laclau and Mouffe are interested in the construction of power through discourse in the abstract sense, Fairclough’s theory-based method

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67 Meyer (n 64) at 15.
68 Ibid., at 23–4 with references.
for discourse analysis is inherently focused on the specific text. It is concerned with linguistic features of a specific statement or ‘communicative event’; with intertextuality, placing the text in a context of discursive practices; and social practices with an emphasis on the emergence of new orders of discourse, struggles over normativity, attempts at control, and resistance against regimes of power.70 In accordance with the generally flexible approach to discourse analysis, scholarly studies often adapt Fairclough’s method to fit the texts and topics subject to analysis. Such adaptation is also made in the current study, as explained in the following.

The analysis draws on Fairclough’s method in terms of the attention paid to language (with written text as a medium) as a modality for constituting or attempting to constitute change as a social practice in a wider social context. Due to the large body of text that forms the empirical materials, for the current study statements in the text material have been analysed based on a limited set of criteria (coding as explained below). This has allowed for an analysis of how linguistic elements in the text have contributed to constructing the understanding of business responsibilities for human rights within in the context formed by the five multi-stakeholder regulatory processes that form the case studies. The analysis leans on Fairclough’s recognition of textual study of linguistic elements of texts produced and presented as elements in a particular discourse that seeks to construct particular perceptions of the world to bring about change. It does not go into details of the linguistic features as would a ‘true’ faircloughian discourse analysis.71 The analysis in this work therefore is Fairclough-inspired, in keeping with the pragmatic approach outlined above and the flexibility recognised in general discourse theory for its application and adaptation to various types of texts and studies.

As social practice also contains non-discursive elements, Fairclough holds that the discourse analysis should be supplemented by other

71 A ‘true’ faircloughian analysis of internal relations of a text would provide a detailed analysis of the linguistic elements and relations of a text. It considers its semantic relations (relations between words and longer expressions, elements of clauses, and clauses and sentences), its grammatical relations, its vocabulary relations (patterns of how words or expressions co-occur, e.g. a particular noun that co-occurs with various prepositions or other compositions), and phonological relations (intonation, rhythm graphics). It would also consider the genre of a text (or texts) in a more detailed way than done in the current study. (N. Fairclough (2003) Analysing Discourse: Textual Analysis for Social Research. New York: Routledge, at 36–7).
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For the current study legal theory, in particular reflexive law theory, provides the supplementary theory for analysis, and to put the discursive elements into perspective. The theoretical foundations for these points are also elaborated in Chapter 3.

1.3.2.2.4 Stabilising and de-stabilising arguments

The theory of stabilising and de-stabilising argumentative strategies helps explain how arguments can stimulate acceptance of normative change by invoking the threat of disturbance inherent in the core rationality of an actor or organisation (e.g., for a business: an economic loss), and pitting it against its opposite by suggesting, sometimes paradoxically, the stability that may be gained by shifting stances and adopting normative change that meets the environment’s needs and therefore their rationalities.

As noted, the main contribution of reflexive law in the context of the discourse analysis is the former’s use of autopoiesis for examining how an argument may promote or prevent acceptance of normative change. The theory of stabilising and de-stabilising argumentative strategies, which has been developed with a linguistic focus to communication in a business context, adds to this with a view to a nuanced textual analysis.

In the current context, following the general analysis of interest-based discursive communication for the construction of norms on business social responsibilities, it is relevant to examine how an argumentative strategy may play on the interests of the recipient for that purpose. For example, the argument may explain how the preservation of the recipient’s interest (stabilisation) may in fact be obtained through acceptance of change (de-stabilisation). This serves to examine and demonstrate how the strength of an argument can be enhanced by strategically structuring it to speak to the interests of an audience (recipient), and how the opposite may be the case if the argument is structured mainly around the interests of the speaker (transmitter). Based on the interests that they want to protect and promote, discourse participants may seek to stabilise or destabilise the role to be played by international human rights law as a normative source for CSR based on their interests. Some will use conservative stabilising strategies to argue that human rights are obligations for states, and therefore should not be transferred onto companies as obligations or even expectations. Others will employ destabilising strategies, seeking to argue that CSR should be normatively informed by or even hinged upon international human rights law.

72 Jørgensen and Phillips (n 55) at 82.
1.3.2.2.5 Delimitation and reservations

Where power is at stake, power disparities may significantly distort a process and its outputs. That, too, applies to regulatory processes with a high degree of exchanges between participants. That power issue is highly significant for the legitimacy of a regulatory process and its outcome. In particular, privileged access to those who establish and/or act upon the output of the regulatory process, or privileged knowledge of the broader context in which that forum may be significant in that context. Such factors have been recognised in the literature on, for example, reflexive law as a method for multi-stakeholder rule-making. A detailed treatment of how to manage power disparities in these contexts goes beyond the current work. The topic has been addressed in other work by this author, which complements this book.

Figure 1.1 Basic model for text analysis

1.3.2.3 Determination of textual focus for analysis

The textual focus for the analysis is marked by bold in Figure 1.1 above. The figure draws on a basic model for text analysis developed in a business school academic environment for communication through texts based on special knowledge or concerns, and often addressing an audience with different knowledge or concerns. The model lists the main elements of a text (linguistic signs, visual signs) on which an analysis may focus and the approaches (internal, external), which an analysis may take. For the current purposes, we focus on the linguistic signs and text-external analysis (elaborated below).

Text-external analysis comprises elements outside the text, such as the transmitter (sender), recipient (audience), context, function and contextual theme. For our purposes, the transmitter and recipient are important for the appreciation of the discursive strategy and particularly the usage of

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73 See, e.g., Sand (n 44).
74 See Buhmann ((2018), n 21).
system-specific language and other text-internal elements. The text function is also important. The (intended) function relates to the objective of a text and therefore influences the discursive structure and argument. For example, the function may be assertive, directive or affective. A directive function may be binding or non-binding. A text seeking to affect the recipient may have a stabilising or de-stabilising function. These functions seek to affect the recipient’s emotional attitude towards an issue. A text with a stabilising function seeks to influence recipients to accept a particular issue or situation. A text with a de-stabilising function seeks to influence the recipient to change the matter that the text relates to. These functions are related to the objectives of discursive struggles to affect acceptance or change of conceptions of corporate responsibility for impact on society, CSR normativity and the role of human rights law for norms on business conduct.

Text-internal micro-analysis comprises specific words, syntax, sentence structure, metaphors and related elements. Text-internal macro-analysis considers the structure of the text, themes, use of pronouns, tempus etc. Text-internal elements are not specifically addressed in the analysis in this work.

The analysis of text complements the discourse analysis of arguments that seek to activate the core rationality of recipients (audiences) by enabling an analysis of a complementary argumentative strategy of deploying stabilising or de-stabilising strategies.75

1.3.2.4 Empirical data: case selection and coding of text
As explained in 1.3.2.1, the book draws on five case studies. This section explains the reasons for the selection of the case studies and how the texts were coded for the analysis.

The multi-stakeholder regulatory initiatives that serve as case studies were all launched by intergovernmental organisations and all aimed to develop normative guidance for business: the process towards the Draft Norms, which entailed a UN project to develop normative guidance on business and human rights and the decision by the UN Commission on Human Rights on the proposed Draft Norms (1998–2004);76 the process of developing and obtaining agreement on the principles of the UN Global Compact (1999–2000);77 the European Commission’s MSF on CSR and

76 Draft Norms.
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its main normative output, a process that was launched with the objective of developing a European Framework for CSR (2002–04);\(^7^8\) the launch of the EU’s CSR Alliance and its major normative output (2006–08); and finally the main case study: the SRSG process on Business and Human Rights 2005–11, which resulted in the UN Framework in 2008 and in 2011 the UNGPs, which were adopted by the UN Human Rights Council.

The case studies were selected on the following basis: The SRSG process is the main case study, because it delivered the break-through in terms of broad multi-stakeholder agreement on normative guidance on business responsibilities for human rights. The four other cases, addressed in Chapter 4 in order to set the backdrop for the analysis of the SRSG process in Chapter 5, occurred in the years just prior to the launch of the SRSG process and its first output, the UN Framework. Those four regulatory processes were selected as cases because all embodied an element of multi-stakeholder consultation or dialogue; because all had a strong (if not necessarily exclusive) focus on human rights; and because they represent a diversity of results in terms of contents of the normative guidance and whether it was formally adopted or launched. Two of the processes that form the case studies addressed in Chapter 4 were launched by the UN; the two others by the EU. As the SRSG process was a UN initiative, other initiatives launched by the UN for related purposes are relevant to place the SRSG process and its outcome into perspective. The EU cases have been selected because the EU is also an intergovernmental organisation, and as such unusual both in being a host region to many TNCs (which are registered in EU Member States) and in launching initiatives, in its capacity as an intergovernmental organisation with a market focus, to develop normative guidance for TNCs.

Because they had varying results in terms of their outputs and the acceptance of those outputs to be launched formally as guidance for companies, the Draft Norms, UN Global Compact, EU MSF and CSR Alliance processes therefore place the SRSG process into a broader context of the political, economic and legal issues and concerns of the time. Other efforts at major normative guidance texts for TNCs by intergovernmental organisations, such as the UN’s efforts to develop a Code of Conduct for TNCs, OECD Guidelines for Multinational Enterprises, and ILO Declarations setting guidance for on TNCs, precede the SRSG

process by more than two decades as they go back to the 1970s. They also form part of the backdrop (and are introduced in Chapter 4 prior to the case studies) but are not as relevant to place the SRSG process into the context of the time as the four recent case studies.

The text body of 153 texts is comprised of reports, written statements, or written summaries of oral statements made by participants in the processes that form the case studies. For the identification of texts, official websites of the initiatives or their host organisations have been used to the extent possible.79

Coding was done according to whether the statement expressed a political, an economic or a legal system rationality (or more of these at one time). The code of a statement therefore does not necessarily reflect the actor’s own functional sub-system, but rather, the rationality deployed by the statement. This informed the analysis by providing information on whether and how actors from different functional sub-systems deployed rationality different from their own, and therefore mainly communicated (or sought to communicate) with stakeholders with similar views or objectives, or mimicked codes from other sub-systems in order to cause perturbation within the system of the pertinent code (the recipient system). The analysis in the empirical Chapters 4 to 6 draws on the full body of 153 statements, reports and other written utterances. Due to space limitations, explicit reference is not made to all the texts that were analysed.80


80 For more details on the texts and to consult all texts and code markings, see K. Buhmann (2014) Normative Discourses and Public-Private Regulatory
1.3.2.5 Genres

A genre is not only a particular type of text, but a process of producing, distributing or consuming text. A genre may be a form of communication between organisations, such as governments or business organisations, and individuals. Genres may be identified with various degrees of abstraction – from the very general, ‘all-encompassing’ pre-genre to the very concrete. Genres are important because a genre has or may have a regulating capacity, associated with an institution’s activity to manage social practices of other institutions or networks. For example, the outcome of an activity and its significance for participants as well as consequences for the future process are managed to some extent by the way the report or summary is written.

The general genre of the texts that serve as data for this study is non-fiction. The context is political with a general objective of shaping CSR-normativity. The specific situation within the overall context may be a multi-stakeholder meeting organised by the SRSG, a meeting under the EU MSF, a reporting session for the SRSG to the Human Rights Council, or the UN General Assembly’s adoption of a resolution on the UN Global Compact in the textual context of partnerships with the private sector.

Within the overall context, a number of sub-genres occur. Because of the political context and its specific objective, a uniting feature of the sub-genres is that the content seeks to affect the construction of a particular concept. Depending on transmitter, transmitter’s objective, audience (recipient) and relational context, several sub-genres are in operation. These aspects all influence the style and form of a text to present its contents. For example, the language of a report addressing the UN Human Rights Council will typically be aligned with the international and human rights law oriented work and insight of the Council. A report addressing the Human Rights Council will keep to the form required for such reports (for example, for the reports from the SRSG, a 30-page limit, and a particular structure that is common for reports from mandate holders under the Council), and a resolution passed by the UN General Assembly will be in the particular style of such resolutions. The main sub-genres of texts produced in the context of the cases are:


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Political documents are texts from public bodies with a political mandate that allows them to require or suggest certain action by other bodies, for example, resolutions from the European Parliament. They may take the form of underlying analytical or elaborative documents (e.g., analytical reports of the European Parliament).

Policy documents are prepared by an organisation charged with setting out policy, including to encourage and institutionalise public regulation, public-private co-regulation and private self-regulation. Examples include the SRSG’s Protect, Respect and Remedy report and the EU Commission’s Green Paper on CSR. Some policy documents among those included in the current analysis may have soft law aspects or effects.

Consultation documents are prepared or presented as part of a consultative or multi-stakeholder reflexive law process. NGO or business organisations’ statements are typically submitted in such documents.

Some other genres play a minor or indirect role. These are in particular:

- Legal texts may be in form of treaties, declarations, recommendations or drafts in similar style, such as the Draft Norms. UN General Assembly resolutions are soft law albeit sometimes with strong political contents.
- Other reports or analyses include analyses by academics or researched reports by NGOs or intergovernmental organisations, etc.
- Media articles, such as articles from CSR oriented media, typically express a view of the author or media, but may also relay views of interviewees.

In the analysis, the particular genre of a text will be indicated only where this is found to be of specific use for the appreciation of the text, its linguistic elements or its discursive style.

1.4 STRUCTURE OF THE BOOK

Part I sets the stage through the introduction (Chapter 1), and explains the context for the discursive struggles on constructing the meaning and normative implications of CSR and BHR, which took place during the case study processes (Chapter 2). Additionally, it presents the theoretical framework for the study in detail (Chapter 3). Part II looks at the evolu-
tion of business responsibilities for human rights based on the empirical analysis, focusing on the discursive struggles and arguments that took place in the background cases: the Draft Norms, the Global Compact, the EU’s MSF and CSR Alliance (Chapter 4), and the main case: the SRSG process (Chapter 5). Part III performs a comparative analysis of the argumentative strategies relative to the processes and their outputs. Based on that analysis and a synthesis, insights are drawn up on the particular argumentative strategies that were decisive in defining the outcomes of the discursive struggles, identifying what elements led to the turn-around that resulted in the emergence of the BHR regime (Chapter 6). The final chapter concludes by developing implications for practice as well as theory, offering insights for effective structuring of argumentative strategies and negotiations to develop agreement around new soft or hard law framing norms on sustainable conduct (Chapter 7).