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Oñati International Institute for the Sociology of Law
Avenida Universidad, 8 – Apdo. 28
20560 Oñati – Gipuzkoa – Spain
Tel. (+34) 943 783064 / opo@iisj.net / https://opo.iisj.net

The evolution of transnational sustainability governance through a systems theory lens: From rejection to acceptance of business responsibilities for human rights

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KARIN BUHMANN*

Abstract

This article applies Luhmann's systems theory approach to the argumentative dynamics of the processes and outcomes of key UN and EU initiatives during the decade 2002-2011 in regards to the development and acceptance of human rights responsibilities for business enterprises. That decade saw a change from rejection to welcoming of ideas on such responsibilities as a key corporate sustainability issue. Applying systems theory to these empirical cases, the article demonstrates that the systems theory perspective is capable of providing important insights on communicative aspects of a regulatory process towards a normative change in contexts with multiple and diverse interests at play. Such processes can play important roles when the transnational character of sustainability problems exceeds the nation state, and the territorial limits of national public law and the weak private-actor coverage of international law pose challenges to conventional regulation. Based on this challenge, and building on the empirical analysis, the article contributes to the emergent scholarship on how transnational sustainability issues may be governed.

Key words

Business and human rights; sustainable business conduct; rationality-based arguments; regulatory communication; regulated self-regulation

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* Professor of Business and Human Rights, Department of Management, Society and Communication, Copenhagen Business School (CBS). Address: CBS: Dalgas Have 15, 2000 Frederiksberg, Denmark. Contact: kbu.msc@cbs.dk

Resumen

Este artículo aplica el enfoque de la teoría de sistemas de Luhmann a la dinámica argumentativa de los procesos y resultados de iniciativas clave de la ONU y la UE durante la década 2002-2011 en relación con el desarrollo y la aceptación de las responsabilidades de las empresas en materia de derechos humanos. En esa década se pasó del rechazo a la aceptación de las ideas sobre dichas responsabilidades como cuestión clave de la sostenibilidad empresarial. Aplicando la teoría de sistemas a estos casos empíricos, el artículo demuestra que la perspectiva de la teoría de sistemas es capaz de aportar importantes conocimientos sobre los aspectos comunicativos de un proceso regulador hacia un cambio normativo en contextos con múltiples y diversos intereses en juego. Tales procesos pueden desempeñar un papel importante cuando el carácter transnacional de los problemas de sostenibilidad sobrepasa al Estado nación, y los límites territoriales del derecho público nacional y la escasa cobertura del derecho internacional por parte de los actores privados plantean retos a la regulación convencional. Partiendo de este reto, y basándose en el análisis empírico, el artículo contribuye a la erudición emergente sobre cómo pueden gobernarse los problemas transnacionales de sostenibilidad.

Palabras clave

Empresas y derechos humanos; conducta empresarial sostenible; argumentos basados en la racionalidad; comunicación normativa; autorregulación regulada

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1. Introduction

Recent years have witnessed a surge of legal requirements for business enterprises to undertake risk-based (corporate sustainability) due diligence or disclose information on their plans and practices for such due diligence, i.e. to identify and manage human rights, environmental and other societal risks with which they are involved (see e.g., Macchi and Bright 2020, Gatta 2020). The adoption of general or sectoral risk-based due diligence laws is a trend across most regions, including Europe, the Americas, Australia, and Asia (Augenstein 2022). This has been accompanied by a rise in private or public-private guidance texts, codes of conduct or similar non-binding instruments on responsible business conduct, also recommending that companies integrate risk-based due diligence into their management processes (Smit *et al*. 2020, Tramontana 2020). In view of these developments, one might expect that agreement on companies having responsibilities for human rights is as general as that on states' human rights obligations. However, two decades ago, the idea of sustainable and responsible business conduct involving responsibility for harmful human rights impacts was a topic of major contention. Not only business enterprises and their organisations, but also some states challenged the idea of business responsibilities for human rights as conflicting with basic human rights doctrine (Buhmann 2009). As described by Kinley *et al*. (2007), this laid to rest an early United Nations (UN) initiative, the so-called draft Norms on Business and Human Rights (UN 2003). The contention and corporate lobbying also undermined the ambitious aims of the EU Commission to create normative guidance corporate sustainability in regard to human rights and the environment through the European Multistakeholder Forum (MSF) on corporate social responsibility (CSR), launched in 2002 (Fairbrass 2011, Kinderman 2013). Yet, only a few years after the failures of the draft Norms and EU MSF, broad agreement was reached by the UN on two key texts, the UN *Protect, Respect and Remedy* Framework (UN Framework) (UN 2008a) and the (UN) Guiding Principles on Business and Human Rights (UNGPs) (2011), both of which were developed through multi-stakeholder processes.

Whether established in national or international law, or set out in private instruments, risk-based due diligence goes back to two interconnected sources, namely the soft law UNGPs, which describe the steps of the due diligence process, and the UN Framework, an analytical report which first proposed the idea of human rights due diligence (Buhmann 2017). Both resulted from a process initiated just a year after the demise of the draft Norms. The OECD Guidelines for Multinational Enterprises (1976) were updated in 2011 to adopt the UNGPs' due diligence approach and apply it to environmental and other societal issues as well. This contributed to spurring the application of risk-based due diligence to a broad range of corporate sustainability issues in the near-global legislative trends noted above. The OECD dubbed the practice 'risk-based' due diligence to distinguish it from the 'transactional' due diligence approach conventionally applied by corporate lawyers to identify and manage financial and legal liability risks to a company. The EU has taken the terminology a step further by introducing the term 'corporate sustainability' due diligence for an EU directive proposed in 2022, which if adopted will require that companies undertake due diligence to identify and manage their impacts on human rights and the environment (European Parliament 2023). The term is in line with the 'corporate sustainability' terminology that has become common when referring to the intersection between company self-regulation and public efforts to

spur companies to act responsibly with regard to their societal impacts, as opposed to 'corporate social responsibility', which has a more purely voluntary and business-driven meaning (Rasche *et al*. 2023).

Despite the enormity of the breakthrough obtained by the UN Framework and UNPGs for wider public (and private) sustainability governance, not least on risk-based due diligence, an explanation of how and why that shift occurred on a backdrop of previous failures has not been a major issue of academic inquiry. This also means that the implications of what brought about that shift and the potential application of relevant dynamics to other transnational sustainability governance needs, such as climate change, remain underexplored. A possible reason for this lack of inquiry may be the fact that as the developments occurred within public policy and law-making institutions, the perception and analysis has been somewhat confined within institutional views on law and legislation. From the doctrinal perspective that is typically applied to institutional angles on the law, research is generally focused on what the law is, and not how it comes about (Dalberg-Larsen 2001). This article adopts a different analytical angle, namely a systems-theory inspired one, and more specifically a reflexive law approach. For the purposes of the current article, the focus is on the communicative aspects of Niklas Luhmann's systems theory, with the aim of analyzing and explaining the argumentative and communicative dynamics of the processes and outcomes of key EU and UN initiatives during the decade 2002-2011 in regard to the development and acceptance of norms or normative guidance on human rights responsibilities of business enterprises. The analytical aim goes beyond simply examining what caused acceptance of the idea that businesses should assume responsibilities for human rights (with due diligence the main means to that end). Ultimately, if a reflexive law perspective can help explain that shift, it may also generate insights for regulation of business conduct in other situations where increased corporate sustainability is desired, and contribute to the sustainability governance literature by accentuating the role that can be played by reflexive law. Reflexive law has been applied to several issues related to sustainable business conduct, ranging from labour conditions (e.g., Rogowski 1998) through non-financial or CSR reporting (Hess 1999, 2008) and environmental regulation (Orts 1995), and wider sustainability and forestry regulation (Sanford 2003, Munuo and Glazewski 2018). Hildén *et al*. (2017) touch on reflexive law as an experimental form of regulation. However, those studies mostly consider the reflexive process as a form of regulated self-regulation, not the Luhmannian communicative aspects and their role for the regulatory outcome. This article does the latter, as elaborated below.

Proposed in the 1980s, reflexive law is a theory on instrumental regulation in the sense that the aim is to shape (business) conduct to accord with societal objectives, such as reducing unemployment and environmental problems (Teubner 1983, 1984). At the time, Luhmann's systems theory was one among other innovative approaches proposed to transform the way regulation was understood and operationalised (Luhmann 1993/2015; Schwanitz 1995). Gunther Teubner' reflexive law theory (Teubner 1983, 1984) draws heavily on Luhmann's social systems theory, in turn prompting further elaboration by Luhmann on the communicative aspects (Luhmann 1986, 1992a, 1992b). Luhmann's systems theory is often thought to be rather abstract (see also Nobles and Schiff 2009). Reflexive law deploys Luhmann's theory in a way that makes the communicative aspects relatively simple to apply in an operational context.

The analysis is guided by the overall research question 'how communication from the environment in a regulatory or self-regulatory context can build business acceptance of norms of conduct that concur with societal needs related to social sustainability'. The answer to this question is particularly relevant to regulation of transnational sustainability governance, because the reach of conventional (institutional) public law is typically limited by territorial borders of national jurisdictions or the weak institutional set-up of international law, in particular with regard to private actors. Due to this topicality, the article addresses audiences that are not necessarily familiar with systems theory (as well as those who are). For the former reason, some fundamentals of systems theory and Luhmann's approach are explained, although this may be familiar to some readers. The article proceeds as follows: Section 2 briefly explains the research design and methodology, the choice of cases and selection criteria, coding and method for analysis, as well as limitations of the current research design. Section 3 offers an overview of the theoretical framework, first on instrumental regulation needs, reflexive law and systems theory; next providing an overview of the developments and shift related to the acceptance of corporate responsibilities for human rights. Section 4 is a combined analysis and discussion of the two EU-related and two UN-related cases, while section 5 concludes and draws up implications. The findings suggest that due to its systems theory perspective, a reflexive-law-oriented analysis provides important insights on communicative aspects of a regulatory process towards normative change in regard to sustainability and the generation of acceptance. The findings are not limited to the business sector. This indicates interesting potential for application of reflexive law as a regulatory strategy in contexts with multiple and diverse interests at play, such as when the transnational character of sustainability challenges exceeds the nation state and its territorially based regulatory powers.

2. Research design and method

The analysis is based on four empirical cases: the EU MSF on CSR, whose final output was the MSF Final Report (2002-2004); the CSR Alliance established by the EU Commission in 2006 leading to a report from 2008; the UN-initiated process leading to the UN Framework (2005-2008); and the follow-up process leading to the UNGPs (2008-2011). These cases present major initiatives by public international organisations to regulate sustainable business with an emphasis on human rights during a ten-year period (2002-2011), culminating in the UNGPs which have subsequently shaped much public law, policy and private self-regulation on corporate sustainability, not just on human rights.

Drawing on systems theory-based aspects of reflexive law (explained in 3.1), the analysis focuses on the deployment of the binary logics in communicative contexts and the normative outputs of the four cases related to regulation of business responsibilities for human rights through multi-stakeholder processes involving public bodies (the EU or the UN), business enterprises or business associations representing many companies, and in some cases civil society organizations. The analysis assesses arguments from a system-specific perspective against the outcome, i.e., success or failure in advancing normative agreement on business responsibilities for human rights.

The analysis draws on a dataset of 127 statements and reports available at official websites set up under each of the initiatives. All texts were manually coded according

to deployment of the economic, political and legal functional sub-systems' binary codes (also explained in 3.1) in their arguments targeting specific functional sub-systems. The results of the coding were assessed against the outputs of the regulatory processes to identify the relation between the normative outcome and deployment of arguments triggering binary codes of the functional sub-system intended to adapt and accept new norms. Due to space limitations, only few examples are provided.

Applying the systems theory-oriented theoretical lens of reflexive law to empirical data, the article contributes to an emergent literature that combines systems theory with empirical cases (e.g., Campilongo *et al.* 2021, Thornhill 2023).

The analysis offers a limited picture of the communicative processes assessed, since it does not include other factors that shape the evolution of sustainable business conduct, such as interdiscursivity with other instruments, new knowledge on social impacts of business, or political factors. With these reservations, the analysis allows for a discussion of insights on the regulatory dynamics offered by Luhmann's systems theory as operationalised through the reflexive law lens explained in the following.

3. Theoretical framing

3.1. Instrumental regulation needs, reflexive law and systems theory

From the legal perspective, the regulation of business to reduce harmful societal impacts encounters two main challenges. The first of these is closely related to the starting point of the UN Framework and UNGPs: to *prevent* harm. While remedy and accountability are important, ideally they should not even become relevant. To prevent harm, regulation must be instrumental to shape business conduct in desired ways *ex-ante* before harm takes place, rather than by *ex-post* penalisation. Second, harmful effects to be prevented often occur in other jurisdictions than the home state of the company whose transnational operations cause or contribute to them. Due to the limits of enforcement across national jurisdictions, this means that regulation should operate across borders and be effective even without a threat of penal sanctions if the company does not change its conduct as desired by the instrumental regulation. Accordingly, such regulation must function by speaking directly to the logic of a company to drive change from the inside, as it may not be possible to rely on the conventional institutional approach of governmental enforcement and sanctions.

From the socio-legal perspective, law has a strong instrumental aspect to shape desired conduct for the future (Dalberg-Larsen 1999). While much legal theory tends to focus on enforcement (Berger-Walliser *et al.* 2016), some systems theory inspired socio-legal theories lean towards instrumental regulation to promote normative change through advancing an appreciation of societal interests and needs and self-regulation, rather than through enforcement (Rogowski 1998, Dalberg-Larsen 2001). This fits the regulatory needs for corporate sustainability as well. Sheehy (2016) observes that the issue of company regulation or self-regulation on societal sustainability impacts can be analyzed both through systems theory and institutionalist lenses.

Socio-legal scholars with an interest in business impacts on society have long theorised on the instrumental aspects of (public) law for shaping business conduct. Much of this literature notes communication as important element, but does not specify how such

communication works for the purposes of transmitting public policy objectives on sustainability concerns onto businesses in order to shape their conduct. Since the 1970s, several theoretical constructs and propositions have been suggested with the aim of advancing desired business conduct through the means of law. For example, proposing the notion of *responsive law,* Nonet and Selznick (1978) argued that to target societal change and complexity, law should be oriented towards purpose and result and responsive to reality; and that regulatory processes should apply various procedural and institutional modalities, including deliberation and communication within the relevant setting.[1] Proposed in the early 1980s, *reflexive law* embodies a communicative process of regulation involving business in addressing public policy concerns, such as environmental and social problems (Teubner 1983, 1984; compare Luhmann 1986, 1992a, 1992b, 1993/2015). A theory on (governmental) regulation of (private) self-regulation (Rogowski 2015), reflexive law took inspiration from responsive law, incorporated Luhmann's theory on the communicative dynamics inducing adaptation based on irritation from the environment, and added some elements from Jürgen Habermas' discourse ethics (Teubner 1983, 1984).

As a theory of communication, Luhmann's systems theory is 'radical' (Nobles and Schiff 2009) in understanding communication as occurring only when meaning is created with the recipient. To understand the significance for the current enquiry, it is relevant to revisit fundamental aspects of the theory. Luhmann's theory understands social (sub-) systems as having their own environments, and the binary logics of functional sub-systems as foundational to their distinction between themselves and their environment as well as communication (Schwanitz 1995, Luhmann 1992b, 1993/2015, 1995, Nielsen 2024). From a self-regulatory perspective, they must be able to understand their own function in relation to the whole, to observe other systems and through this gauge their performance, and to observe themselves (Sheehy 2016). These elements are significant for reflexive law, which embodies an assumption that functional sub-systems respond to communication that triggers an internal adaptation in response to irritation from the environment (Teubner 1984, Teubner *et al.* 2005, Nobles and Schiff 2012). Luhmann's theory describes the binary logic of the sub-system that must be triggered for that purpose (i.e., for companies, the economic logic of profit or (risk of) loss; for governments, the political sub-system's logic of power or loss of power; for the legal sub-system, the logic of legal or non-legal, or its corollary of binding or non-binding).

Reflexive law's Luhmannian element operationalises this through communication as conducive to self-regulation (Teubner 1993). Through processes that bring together elements of the functional sub-system that is intended to change conduct and stakeholders in the environment, the former (e.g., business enterprises) can be exposed to the needs and concerns of the environment (e.g., policy-makers, regulators or civil society), for example through consultations or dialogues. This may cause irritation that

[1] Additional examples of key relevance to the topic of shaping business conduct to respond to societal needs include Ayres and Braithwaite's (1992) *responsive regulation,* which assumes that a plurality of motivations for compliance interact (such as economic and reputational). Proponents of *pro-active law* (Berger-Walliser and Shrivastava 2015, Berger-Walliser *et al.* 2016) recognise stakeholder engagement and communication across systemic functions as important for companies to prevent legal disputes and reach their strategic goals, but do not delve on the regulatory process as a way to promote specific norms of conduct or internalise societal needs.

triggers internal adaptation to the external pressure (Teubner 1986, Rottleuthner 1988, Rogowski 2015) – provided the process is effective in generating pressure on the recipients.

As a system responds to communication in its own binary code, the effectiveness of the process depends on the environment's capacity to activate the logic of the entity intended to self-regulate, typically by arguing in a way that resonates with that binary code (Buhmann 2017). Forming part of the functional sub-system of the economy, companies will respond to communication that activates their system-specific rationality or code of profit/non-profit. An argument suited to this may talk about risks of economic loss, for example a company's reputational risks that may affect customers' buying preferences or processes to manage such risks of loss of income. The political sub-system will react to messages that activate its rationality of power/no power. An argument triggering this logic may talk about governments' incapacity to prevent business-related harm to the environment or human rights in global value chains, thereby activating the system's concern with losing power due to being perceived by voters as ineffective at governing. The legal system's rationality of legal/not legal may be invoked by related distinctions, such whether action is mandatory or voluntary, which dominated much of the discussion of business and human rights in legal theory until the adoption of the UNGPs (Buhmann and Wettstein 2017). As noted by Rogowski (2023), efforts of one system to regulate another embody intersystemic relations. These are subject to the limitations and dynamics that characterise functional sub-systems. A functional sub-system can only observe itself, and only 'speaks' its logic/code, but it may 'mimic' that of others in order to create pressure (compare King 1996). As an example, communicative effects between public regulation of businesses and business self-regulation on sustainability can be observed as economic language spreads through society, including through the legal subsystem (Sheehy 2016).

3.2. The incremental evolution of private and public regulation of corporate responsibilities for Human Rights

In the literature, expectations on companies to take responsibility for their impacts on society are often stated to go back to Bowen's (1953) *Social Responsibilities of the Businessman*. Bowen discussed "the obligation of businessmen to pursue those policies, to make those decisions, or to follow those lines of action that are desirable in terms of objectives and values of our society." However, in a legal context, the issue goes back at least to debates between Berle (1931) and Dodd (1932) on the extent to which companies may pursue public interests as a matter of corporate governance. Leading organizational scholars have long recognised the observance of public law (Carroll 1979, 1991), or even the 'spirit' of such law or its inherent objective (Schwartz and Carroll 2003) as one element in CSR, on a par with economic and ethical/discretionary responsibilities.

In the 1980-90s, global society witnessed an increasing concern with the capacity of business to cause harm to society, and a realization that the rights of business enterprises under international economic law were not properly matched by their responsibilities under human rights or environmental law, whether national or international (Ruggie 2013). Business-related human rights abuse attracted strong attention with consumers, media and other stakeholders with regard to adverse business impacts. In the face of the

jurisdictional limitations on national legislators to regulate extraterritorially as well as of limited political willingness to adopt regulation of business conduct through international law, a series of voluntary initiatives emerged to provide guidance, especially on labour and human rights impacts. In 1998 an expert UN sub-commission began work on what became known as the draft Norms on Business and Human Rights, a detailed document laying claim to eventually becoming an international hard law instrument. The draft Norms were presented to the UN Commission on Human Rights (the predecessor for the Human Rights Council) but rejected, partly due to corporate lobbying of the governments that were members of the Commission (Kinley *et al*. 2007). Opposition was largely due to concern about new legal duties being imposed on businesses. UN efforts to develop a code of conduct for responsible business, launched in the 1970s, has also failed in the early 1990s (Mayer 2009). By contrast, in 2000, a voluntary instrument, the UN Global Compact had been developed and approved by a multi-stakeholder group comprising representatives of the UN, business and civil society, launched in 1999 (Buhmann 2017). The Compact sets out ten principles, of which a total of six are essentially on human rights (principles 1-2 on human rights and principles 3-6 on labour rights), but does not provide detailed guidance in a set form; nor does it lay claim to the status of an international law instrument, whether soft or hard.

Around the same time as the UN rejected the draft Norms and initiated the process that eventually led to the UNGPs, the EU Commission pushed for business agreement on responsibilities for human rights in a transnational business context. The Commission launched the Multi-Stakeholder Forum (MSF) for CSR through a Commission Communication (EU 2002). The Communication indicated an objective for the output be ambitious recommendations for European businesses about human rights and labour rights. However, the MSF failed to deliver on the ambitious objective of new norms for business, especially on human rights. Like the failure of the draft UN Norms, the failure of the MSF has also been explained by corporate lobbying (Fairbrass 2011, Kinderman 2013).

Functioning 2002-2004, the MSF comprised the Commission, European business associations and civil society organisations. The output, a final report setting out recommendations (MSF 2004), was quite vague, both on business responsibilities for human rights and in normative guidance for CSR more generally. Moreover, rather than detailed guidance for businesses, it made recommendations for EU Member States to act to live up to their own legal duties to ensure that human rights are respected and implemented. Thus, the MSF report did not deliver on the intended objective, and turned the problem of business-related human rights abuse back to governments, challenging the effectiveness to deliver on such obligations and public policy concerns. Neither the Commission nor civil society organisations embraced the result. In response, the Commission in 2006 launched a new initiative, the CSR Alliance. Introduced with a new Communication (EU 2006), the Commission once more aimed to place international human rights law as a strong normative source for European business in regard to CSR. An initiative from the Commission and comprising business enterprises, its establishment required business support. From this perspective, the fact that the CSR Alliance became established was a success in view of the resistance that a similar aim to introduce a strong human rights normativity for European businesses had received by

business in the MSF. The normative outputs of the Alliance are relatively limited but do contain some references to human rights and relevant normative guidance (CSR Alliance 2009).

Following the rejection of the draft Norms, the Commission for Human Rights had second thoughts and in 2004 asked for the appointment of a Special Representative of the Secretary-General ('SRSG') on Business and Human Rights, with a mandate of identifying and clarifying corporate responsibilities for human rights. The mandate was charged on John Ruggie, a political scientist and Harvard professor who had also been involved in setting up the Global Compact. The task evolved over two three-year terms. The first term resulted in the UN 'Protect, Respect and Remedy' Framework, a 30-page report that was received favourably by the Human Rights Council in 2008. The UN Framework did not suffer the business lobbying that contributed to rejection of the draft Norms and was generally supported by governments. The mandate for the second term asked for an 'operationalisation' of the UN Framework. This resulted in the UNGPs, which were adopted by the Human Rights Council in 2011. Unusually for UN human rights instruments, the UN Framework and UNGPs were both developed through multi-stakeholder processes that included the private sector (as well as governments and civil society). Normally, the development of UN human rights instruments involves governments, as well as civil society as representatives for victims. The processes leading to the UN Framework and UNGPs differed in that regard: the private sector was involved in response to a realization that the omission to do so early had contributed to business opposition to the draft Norms (OHCHR 2004). The UN Framework contains policy recommendations, while the UNGPs are soft law and therefore guiding but not legally binding.

The UN Framework and UNGPs did not develop new human rights or obligations but explain the implications of already existing human rights for a business context and provide guidance for how adverse business impact can be identified, prevented, mitigated, and accounted for, as well as for remedying business-related human rights abuse. The outward-risk oriented human rights due diligence is key in this regard. The UN Framework broke the ground by proposing the concept as a management process; the UNGPs provided the detailed elaboration that has since been adopted with a broader corporate sustainability perspective by other instruments, as mentioned in the Introduction.

Accordingly, the UN Framework and UNGPs were successful outputs when assessed against the stated objectives of the mandates. The multi-stakeholder processes led to broad consensus on the outputs within the Human Rights Council as well as business and civil society. This stands out against previous failures for the UN to develop normative guidance on businesses' human rights responsibilities. Later criticism of the Framework and UNGPs for being too limited in scope (e.g. Kolstad 2012, Wettstein 2015) does not reduce the importance of the two documents as being fundamental break-throughs in regard to the recognition and evolution of business responsibilities for human rights. Notably, while civil society organisations have later criticized the boldness of the UN Framework and UNGPs, they did support the processes at the time (Buhmann 2009, Bijlmakers 2013).

Following this introduction to the systems theory aspects of reflexive law and the four cases of the EU MSF and the EU CSR Alliance, UN Framework, the UNGPs, the next section proceeds to the analysis with an emphasis on the communication triggering the core rationality of recipients. The analysis proceeds chronologically, starting with the EU MSF and ending with the UNGPs.

4. Shifting business opposition to acceptance

4.1. The EU MSF and CSR Alliance

In the MSF, European business associations argued that human rights are obligations of governments should not belong (or be shifted) to companies, and that governments are expected to protect human rights by society and citizens who provide them with their power to govern. Seen from Luhmann's systems theory perspective, they argued with reference to legal and political rationalities that inform governments, including the EU and its Member State authorities. These arguments were suited for causing irritation with governments. But since the argument presented by business was not for governments to change conduct or adopt new norms but, rather, retain status quo of human rights obligations pertaining to states, the irritation – caused by communication relating to governments' tasks and power – resulted in deflecting the idea that businesses have explicit duties for human rights or that they should assume social responsibilities based on international labour standards or human rights, i.e., public international law with governments as duty-bearers. Arguing with reference to the political tasks and legal obligations of governments, business associations also successfully shifted the general discussion on roles and responsibility from companies to authorities by referring to states' legal obligations under international law. This is reflected in the final report calling on the EU and Member States to address business social impacts by better honouring their own legal obligations, e.g. by noting that

> as it is a clear responsibility of national governments to promote democracy and human rights, governments provide the appropriate legal framework for protecting human, social and economic rights of citizens. (MSF 2004, p. 16)

Playing a stronger role in an internal power-struggles between the two involved EU Directorates-Generals (DGs) of Social Affairs and Trade (Buhmann 2011, Kinderman 2013), the former basically reinvoked the Commission's ambitious objectives of the MSF initiative, while DG Trade committed to reducing formal requirements for business enterprises, arguing as an important task for the EU to

> (shape) the regulatory framework in such a way that it does not create unnecessary burdens on businesses. (Liikanen 2003)

Those arguments were not well suited for causing irritation with business that could have prompted adaptation to the original aims for the MSF to develop normative standards for their social responsibilities. Rather, following Sheehy's (2016) observation, DG Trade's argument demonstrates the success of business to spread the economic rationality within the political and legal public governance system. This can explain the MSF Final report's limited normative directives targeting business and its observation that tasks related to business's respect for human rights, also in third countries, remain with the EU and Member States.

Assessed from the systems theory perspective, businesses mastered the logic of their opponents and deployed this to the effect of limiting efforts to increase CSR normativity to the extent that this relates to governmental tasks or public policy objectives. Communicating mainly in its own logic, the Commission did not challenge this by presenting arguments apt to trigger the economic rationality of business and cause adaptation that could have triggered adaptation.

Summing up, in the MSF, businesses presented arguments in the binary language of the legal and political rationality of the Commission and Member States, especially their human rights obligations and the power-implications of not being seen to protect human rights effectively. Because they were voiced in its own political and legal rationality, the Commission accepted the arguments, even though this undermined the Commission's original objectives of the MSF to result in novel and ambitious norms for sustainable business conduct. Accordingly, businesses succeeded in almost singularly defining the output and its normative contents.

Throughout the many meetings of the MSF, civil society organizations generally argued through political or legal system logics. The effect was to confirm the Commission's own politically and legally rationed objectives with the MSF. For example, the Social Platform, a Group of 38 European NGOs and networks in the social sector, expressed hesitation towards the voluntary approach, underscoring the general duty and role of governments to regulate by conventional legislation, in accordance with international law obligations to protect human rights, including labour rights. The Social Platform held that CSR should be complementary to conventional "regulatory instruments", (Parent 2002), observing that

> Whilst the voluntary action of companies can play a very useful role here, we insist that CSR must not be seen as a replacement for regulatory instruments. (Parent 2002)

The Social Platform also argued standards provided in international law (e.g., ILO's labour rights) should provide the baseline for CSR normativity, noting,

> Furthermore, CSR is a global issue, and European discussion must be based upon existing international standards, in particular those of the International Labour Organisation, which must provide a 'floor' to the CSR debate. (Parent 2002)

As another example, the European Consumers' Organisation BEUC also applied arguments grounded in legal system-reasoning considerations. BEUC observed,

> a strong market place needs a strong regulatory framework and a regulator who is clear about his tasks. This may be a different task from the one government used to play. (…) To set the rules for transparency in the market place is the primary role of governments and the EC. (Peeters 2002)

Following a series of Round Tables towards the end of the MSF process, civil society organisations jointly presented their proposals on one single list. While some proposals supported learning and training for companies and other recognised the importance of market mechanisms, civil society proposals underscored the role of governments and existing law and international instruments (MSF – Civil Society 2003). The sub-themes proposed by civil society mainly alluded to legal or political system interests, as exemplified by the following:

- The enabling governance framework for convergence of CSR including standards and market mechanisms
- Synergies between voluntary CSR and existing law and international agreements
- Credibility, accountability and verification of CSR practices and tools, including reporting and codes of conduct (MSF – civil society, 2003).

Overall, much of the civil society reasoning did not to resonate with the economic logic of business and was therefore not successful in making business appreciate the concerns of civil society with regard to adverse social or environmental impacts.

By contrast, the Commission's change of argumentative strategy in 2006 when presenting the CSR Alliance shows that addressing business by arguing in a manner that is suited to cause irritation by connecting to their logic can make businesses engage actively with the CSR agenda. Indeed, the Commission explicitly noted that it had 'reflected' on an alternative 'approach that inspires more enterprises to engage in CSR' (EU 2006, 5).

Like the MSF, the CSR Alliance was conceived with the aim of inducing business self-regulation towards embracing responsibility for human and labour rights. The Alliance idea was announced in a Commission Communication, an EU policy document (EU 2006). The Annex part of that document, which describes the Alliance in detail, deployed a series of economic rationality statements, such as CSR being business-driven, explicitly recognising the economic role of businesses in society, and referring to CSR as meaningful for business to achieve a better image in society and therefore better conditions for entrepreneurship, innovation and economic success.

The shift to economic system language is obvious for example in the Commission's description of the Alliance as 'a vehicle for mobilizing the resources and capacities of European enterprises and their stakeholders' (EU 2006, 6). Likewise, it is clear in arguments like

> [CSR] matters because (…) matters to individual companies, big or small, who through innovative products and services, new skills and stakeholder engagement can improve their economic, environmental and social performance in the short and long term. (EU 2006, 10)

Despite the formal form of an EU Communication, the document launching the Alliance is marked by a pervasive and explicit deployment of arguments relating to economic risks to businesses of disregarding sustainable business conduct and societal expectations, and the benefits that understanding and preventing human rights impacts may have for managing such risks. Reading this from Luhmann's systems theory perspective suggests that an argument reasoning that specific sustainable business practices are good for business image and innovation (and therefore implicitly supportive of profit-making) turned business opposition (that had affected the output of the MSF), into acceptance of the importance for business of respecting human rights. Assessed against the Commission's arguments during the MSF process, systems theory can explain this turn on business embracement of the normative idea as a result of the Commission's explicit deployment of arguments relating directly to the binary code of business. Even though many of those arguments related to the benefits for business

rather than risks, they caused irritation followed by adaptation. Business accepted to join an initiative aiming to increase their awareness of human rights norms and practices to understand human rights impacts, because they saw this as being good for business and therefore reducing risks. The Alliance came to be joined by various European companies, including some organised in business associations that had argued against an ambitious normative output of the MSF.

4.2. The UN Framework and UNGPs

Like they did in the MSF, throughout the 2005-2008 process resulting in the UN Framework, businesses also argued that human rights are obligations of governments and should not be pushed on to companies. They were successful in that ideas for businesses to have legal obligations for human rights were rejected. The success of business arguments based in the binary logic of politics and law carried over from the UN Framework into the UNGPs.

The UN Framework confirms the view grounded in the horizontality doctrine in international human rights law, which holds that states have a legally binding duty under international law to protect human rights at the horizontal level between individuals and third-parties (such as companies). Under the heading the *state duty to respect,* the Framework elaborates on legally binding obligations of states, based on states existing commitments to protect individuals and communities against human rights abuse caused by businesses. The horizontality doctrine was still somewhat contentious at the time (e.g. Knox 2008). The deployment of the state duty to protect by the UN Framework and later the UNGPs has been widely accepted and may have contributed to the mainstreaming of the doctrine.

Using the term 'responsibility' instead of 'duty', the Framework defines the *Corporate responsibility to respect human rights* as a social expectation on companies ['the basic expectation society has of business', para 9], not a legally binding obligation. The Framework also notes that companies are 'specialized economic organs' and 'their responsibilities cannot and should not simply mirror the duties of States' (para. 53). Resonating with the economic logic of business, such communication softened companies' resistance towards an overall adaptation to recognise that assuming non-binding responsibilities for human rights can be good for business.

The holder of the SRSG mandate initially (2005-early 2006) argued mainly with reference to political and legal rationalities, for example recognizing that the UN 'was created to provide a State-based international order' but also that that causes political problems for governments, because:

> Today we also live in a global world wherein a variety of actors for which the territorial State is not the cardinal organizing principle have come to play significant public roles. Nowhere is this more true than in the economic realm (…)
>
> [T]he rights of transnational firms - their ability to operate and expand globally – have increased greatly over the past generation as a result of trade agreements, bilateral investment treaties and domestic liberalization. (UN 2006, para. 10-12)

This gradually prepared governments and companies for a shift in types and contents of international human rights norms, to cover business conduct. Later in the process,

arguments more explicitly invoked the rationality of the specific audience. When addressing governments, which represented both policy-makers and governmental lawyers, arguments referred to the public policy interests of engaging business in respecting human rights, and governments' own law-based obligations to respect and protect human rights. When addressing business organizations, arguments noted the economic risks that firms encounter as a result of reputational damage, divestment and lost customers when they do not appreciate social expectations on their human rights impact or the complexities of human rights from a business perspective, for example,

> it has become increasingly common to see divestment campaigns based on an investor's stake in a company seen to be directly or indirectly abusing rights. (UN 2008a, para 67)

It was observed that business self-regulation reduces the likelihood that public regulators develop hard law requirements, which would reduce the economic liberty of firms. The benefits to firms of accepting enhanced and institutionalised norms of business responsibilities were repeatedly explained, e.g. because 'deriving a benefit from a human rights abuse' may not on its own bring legal liability, but 'benefiting from abuses may carry negative implications for companies in the public perception' (UN 2008b, para 75), and therefore negative economic implications.

From a systems theory perspective, economic system logics informed the argument, in order to induce companies to adapt and accept social expectations on companies to assume responsibility for their impact on human rights.

The acceptance of the Framework also meant that business enterprises internalised the concept of human rights due diligence and its outward-facing focus to identify and manage risks or harm caused by the company to society (not, like transactional due diligence, to identify and manage risk to the company). The concept was introduced by the Framework as an alternative to 'sphere of influence', a term that although applied by the UN Global Compact had been a topic of contention because of uncertainty of what defined such a 'sphere' and what the implications are. Drawing on a preliminary sub-study (UN 2008a), the UN Framework proposed due diligence as a management process and relating to risk management, explaining that

> what is required is due diligence, a process whereby companies not only ensure compliance with national laws but also manage the risk of human rights harm with a view to avoiding it. (UN 2008a, para. 3)

From the Luhmannian perspective, this resonated with the economic rationality of companies and caused irritation leading to adaptation in the form of acceptance of the novel concept of human rights due diligence and its management implications. Introducing the due diligence term, the argument connected to the transactional due diligence that companies already use to identify and manage financial or corporate liability to protect the company, and therefore protect it against economic risk. The overall argument for human rights due diligence triggered adaptation by referring to harmful societal impacts as risks, and explaining how such outward-facing risks may affect the company's reputation, liability and income. This carried over into the UNGPs' elaboration of the Framework's overall definition of the corporate responsibility to respect human rights as being to act with due diligence. At a general level, the process towards the UNGPs build on the argumentative strategy that the SRSG had developed during the process that led to the UN Framework.

From a Luhmannian systems theory perspective, the analysis of the processes towards the UN Framework and UNGPs suggests that deploying arguments explaining the benefits to business of respecting human rights and exercising human rights due diligence were crucial for business support. Arguments suggesting economic or reputational loss or the possibility to prevent such loss related to the economic binary code brought major business associations around, thereby turning the resistance that the draft Norms had encountered into broad acceptance of the UN Framework. More specifically, arguments were successful in triggering the economic logic of businesses by getting them understand that it makes economic sense to avoid being involved in harmful impacts on human rights, because that may lead to economic loss, for example due to reputational damage and loss of social license to operate. As a result, it also makes economic sense to adopt processes like human rights due diligence to avoid such harms. Accordingly, a systems theory-based analysis explains why business associations that had opposed the draft Norms supported and collaborated with the process towards the UN framework and UNGPs and endorsed the outputs. It is particularly interesting that the human rights due diligence process was framed as a management process, even though it has the avoidance of harm to society rather than the protection of risk to the business as its first objective. If done well, outward-oriented due diligence can also help reduce reputational and other harm to the business that may affect its profits.

Similar to the EU MSF process, civil society organizations generally presented arguments related to political or legal system rationalities, even though their aim was to promote business acceptance of responsibility for their human rights impact and strong normative guidance on this. For example, a position paper submitted by the International Federation of Human Rights/Fédération International des Droits de l'Homme (FIDH) in response to the SRSG's 2006 report that "universal standards" should be developed, and that they should binding and enforceable (FIDH 2006). The FIDH stated, i.a., that

> the challenge for the human rights community is to make the promotion and protection of human rights a more standard and uniform corporate practice. The FIDH believes that this will be achieved through the adoption of universal standards applicable to all companies. (FIDH 2006)

Another example is a statement from Asian civil society organisations. This too deployed arguments related to the legal system rationality, focusing on "accountability" and expressing strong support for "codification of global standards for business with regard to human rights. The statement said, i.a.,

> Any set of guidelines that is not responsive to the need for accountability for all enterprises and sub-contractors, large and small, across all sectors and regardless of location, will be seriously incomplete. (…) [We] would also strongly support any (…) form of "codification" of the global standards with regards to transnational corporations and human rights. (Asian civil society statement 2006)

Through such arguments and generally speaking to the duties of governments to protect human rights rather than the binary logic of companies, civil society statements effectively re-enforced the business arguments to deflect binding obligations for business.

As this analysis shows, a systems theory perspective allows for understanding the outputs of the multi-stakeholder processes as results of communication that activated the logics of the different audience subsystem. Businesses successfully shaped the description of duties and responsibilities by deploying the legal and political rationality of governments, whether in the UN or EU contexts. But in the processes leading to the CSR Alliance, the UN Framework and UNGPs, businesses were also exposed to irritation from the environment, expressed in the logic of the economic system. This triggered internal adaptation to the external pressure, leading them to accept responsibilities for human rights in terms of understanding and preventing harm as good as for business. This is illustrated by the example of due diligence as a process to identify and manage risks. Overall, assessed against the outputs of each of the four processes covered by the analysis above, the argumentative approach and invocation of deployment of system-specific rationalities shows a clear correlation between arguments invoking relevant logics with the change that resulted from a communicative regulatory initiative.

Although some civil society organizations were vocal on their concerns about businesses causing human rights abuse, they generally argued in ways related to political and legal logics. From a Luhmannian systems theory perspective, that is fitting for causing irritation and adaptation with public governance institutions with whom civil society normally negotiate human rights norms – but not with business. This helps explain why civil society had limited influence on the normative contents of the EU and UN outputs. The systems theory perspective explains the limited impact of civil society as a result of communication that made sense to governments but not to businesses.

5. Conclusion and outlook

This article has explored how communication from the environment in a regulatory or self-regulatory context can build business acceptance of norms of conduct that concur with societal needs related to sustainability. This was done through an application of the systems theory element of reflexive law as a process of regulatory communication to four cases of international organisation efforts to develop normative standards on responsible business conduct, which took place around the time when a shift occurred that marked a new willingness for governments and business to accept the idea of business responsibilities for human rights. Explained from the Luhmannian systems theory perspective in reflexive law, a high degree of system-specific arguments addressing businesses causes irritation or pressure that induces learning and appreciation of societal expectations and needs. The analysis above has demonstrated that functional sub-systems that master communication triggering the logic of another functional sub-system has a good chance to cause irritation that may lead to adaptation with the latter to internalise external needs or concerns, or spurring agreement on new norms within that sub-system.

The communication that took place through the multi-stakeholder processes of the MSF, CSR Alliance, or leading to the UN Framework and UNGPs was regulatory-instrumental because it aimed to induce acceptance of external needs and concerns, self-regulation and organisational change. Reflexive law's focus is on pro-actively shaping desired conduct and preventatively avoiding undesired conduct. In this way, reflexive law differs from the typical conventional institutional approach to law, which works through legal demands, enforcement, and re-actively sanctioning non-desired conduct that has

occurred. Reflexive law's proactive focus therefore fits the purpose of regulating sustainable business conduct where the aim is to prevent harm from occurring in the first place.

Although the binary code works to reduce complexity in communication, as shown in the analysis above, it can, in fact, help the functional system at the receiving end develop a richer understanding of its environment's needs or concerns. This occurs when communication takes place through arguments relating to the recipient system's code, rather than if the message is transmitted in the code of the external system. The EU and UN cases above demonstrate that when the environment's needs or concerns are communicated in arguments triggering the logics of the recipient system, that system (such as the economic system) is able to digest and receive it, and therefore to adapt. Conversely, when needs or concerns are communicated in other codes, the recipient system is likely to reject the need or externalise the information as irrelevant. The communication and subsequent uptake of business responsibilities for human rights through the processes leading to the UN Framework and UNGPs are examples of the former; the EU's MSF of the latter.

In view of the strong normative connection between public policy and social expectations on sustainability concerns, and societal needs for businesses to adapt their practices accordingly, the significance for a communicative process to address business by invoking their rationality offers insights for academics, civil society and public regulators with an interest in promoting sustainable business conduct and related normativity. This may appear intuitive. However, the deployment of arguments triggering system-specific rationalities in communicating societal needs on sustainable business conduct is not. If it were intuitive, it would have been done in the MSF, or early on in UN processes towards norms on business and human rights, and civil society would have applied such arguments much more in the EU as well as UN processes. The Luhmannian systems theory and its elements in reflexive law are what makes such a communicative approach look intuitive.

Two major theoretical implications emerge from this: First, targeted deployment of system-specific rationalities in arguments can have significant effects on the willingness of those intended to adapt to do so. Second, Luhmann's systems theory is relevant as an explanatory framing for understanding how sustainable business conduct may be shaped in regulatory processes that involve multi-stakeholder communication.

The first theoretical implication means those wishing for companies to embrace enhanced norms on sustainable business conduct can create support for this with business by invoking profit-related implications to support their normative claim, as in the case of the UN processes or the set-up of the CSR Alliance. If this does not occur, businesses are more likely to be opposed, sensing that the political or legal system are trying to shift their tasks to business, as argued in the MSF. Conversely, businesses may deflect political or legal efforts to expand CSR norms or elaborate guidance by arguing to authorities that the related public policy needs are in fact governments' tasks, thereby activating political or legal rationalities. This was the case in the MSF; and also what contributed to the outputs of the SRSG process not being legally binding. Finally, civil society organisations may gain support with authorities by referring to public policy interests or governmental obligations, thus invoking their political or legal rationalities,

but that does not resonate with business. This means that civil society, too, needs to invoke business rationalities in order to create the necessary irritation to make business understand the importance of sustainable business conduct and adapt to expanded normative pressure from the environment.

The second theoretical implication, on the systems theory approach in reflexive law as an explanatory framework for multi-stakeholder communication on normativity relating to corporate sustainability and general responsible business conduct, also has important potential for application to shape normativity. The understanding offered by systems theory elements in reflexive law on regulatory communicative dynamics contributes to explaining the turn-around in business attitudes to accept and support UN guidance on business and human rights. This insight can be used for onward regulation of business conduct to advance public policy goals on sustainability in a transnational setting. Applying this knowledge holds important potential for engaging business in active contributions to other or future sustainability initiatives, such as related climate change. Insights on how societal concerns on corporate sustainability may be communicated in ways that lead to company acceptance and willingness to adapt are also relevant in specific sectoral contexts, e.g. for agricultural products, minerals, water, or other resources, such as labour or land.

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