Guest Editorial

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Dear Reader,

It is with great pleasure that I accepted the invitation by the Editorial Board to act as guest editor for this "Ruggie Special" of the *Dovenschmidt Quarterly*. The theme of this issue is the responsibility of business to respect human rights, which was the subject of the recent mandate of Prof. John Ruggie in his capacity as Special Representative of the UN Secretary General on the issue of Human Rights and Transnational Corporations and other Business Enterprises. Started in 2005 for a period of initially two years, John Ruggie's mandate came to a very successful end in 2011, after six years of very intense work with governments, corporations and civil society, when the UN Human Rights Council unanimously endorsed the Guiding Principles on Business and Human Rights implementing Ruggie's UN "Protect, Respect and Remedy" Framework, equally unanimously endorsed by the UN Human Rights Council in 2008.

These unprecedented unanimous endorsements by the UN marked the end of a nearly 40 years lasting discussion and negotiation in the UN aimed at a normative framework for corporate social responsibility (CSR) and in particular the responsibilities of business in the field of human rights. This long period of protracted negotiations in the UN had commenced with the creation, in 1974, of a UN Commission on Transnational Corporations, to address the controversies between the developed countries and the group of newly independent states, which later in the same year had asserted the existence of a New International Economic Order (NIEO), on the operations of multinational corporations in the developing world. The UN Commission's objective was to formulate a UN Code of Conduct on Transnational Corporations. However, increasingly diverging views on the legal status of this new instrument and on the need of international regulation of multinationals between developed countries and business organizations on the one hand and developing countries on the other hand, sparked by the prevailing trend of deregulation of business in Western economies, caused the Code to be shelved in 1990. However, with the ever-increasing globalization of markets and the resulting growth of power of multinationals without appropriate countervailing power, the cry for international regulation did not stop. New initiatives on the UN level were the development and launch of a voluntary system of best practices in major fields of corporate activity, the UN Global Compact in 2000, and the establishment of a Subcommission of the UN Human Rights Committee, consisting of some 30 experts, who in 2003 proposed Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights. The direct binding effect on multinationals of this draft UN instrument, stimulated by the Subcommission, appeared a bridge too far both for governments and for corporations, which still are not recognized as subjects in international law, and the Draft Norms, as they are now still widely quoted, did not lay aside their draft status. As a result, in 2005 Kofi Annan appointed John Ruggie, who in his capacity of UN Assistant Secretary General had already been the architect of the UN Global Compact in 2000, as his Special Representative with the mandate mentioned above.

As its name reflects, the 2008 UN Framework 'Protect, Respect and Remedy' consists of three pillars, the state duty to protect and the corporate responsibility to respect human rights, with the third pillar containing principles on remedy, both judicial to be provided by states and non-judicial to be provided by states and by corporations. The UN Guiding Principles contain the relevant norms and instruments, legal and non-legal, and policy measures applicable both for states and for business organizations, respectively, as a coherent and comprehensive architecture. While in most instances the state duty to protect human rights is a legal obligation under international law on the part of states to respect the human rights of their citizens, both natural and legal persons, and includes the need for the states to regulate their citizens' mutual duties, the corporate responsibility to respect human rights is, in Ruggie's words, a global standard of expected conduct, even in cases where states fail to regulate or enforce this responsibility. The principles on the provision of remedies are also inspired by both legal and ethical imperatives. In sum, Ruggie's Guiding Principles contain a smart mix of both regulatory – hard, soft and self-regulatory – and non-regulatory measures.

Ruggie's thorough analysis and resulting smart regulatory mix have had already wide-ranging consequences on the concept of CSR. While the prevailing paradigm had been for a long time its voluntary nature, proclaimed by business and on its track by governments, Ruggie's typology has dramatically changed this CSR paradigm. As Ruggie has shown, the substantive CSR norms are based on societal expectations, which may or may not crystallize in a range of forms of regulation, from individual self-regulation all the way up to the hardest law, criminal law. In many instances, these sub-

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stantive norms, aptfully summarized collectively under the heading People, Planet, Profit, have already crystallized into one or more of these various forms of regulation.

This important change of paradigm is exemplified best by the revision in 2011 by the European Commission of its CSR definition of 2001. While the latter followed the ideological business-driven view that "CSR is a concept, whereby companies integrate social and environmental concerns in their business operations and their interaction with their stakeholders on a voluntary basis," the 2011 definition reads "CSR is the responsibility of enterprises for their impacts on society." As the Commission clarifies, this responsibility is a container expression and may, for any substantive norm, remain a societal expectation as the core of CSR or assume one or more of the forms of regulation and this in two dimensions, the promotion of positive impacts and the avoidance of negative impacts on society. This paradigmatic change and new approach by the Commission was informed predominantly by Ruggie's UN Framework of 2008. In its Communication of 2011 on the EU CSR Strategy 2011-2014, the EU Commission has requested all EU Member States to present National Action Plans implementing the Guiding Principles on the State Duty to Protect Human Rights in their national jurisdiction.

As guest editor, I feel privileged and am greatly indebted to Prof. Ruggie that he has accepted my invitation to provide the reader with his views on the way forward in the opening article in this issue. As the reader will notice, this contribution is a forward-looking political rather than scholarly view on this important issue by the author of the Guiding Principles himself, and I trust that the reader will appreciate this departure from the regular *DQ* style.

While the Corporate Responsibility to Respect Human Rights is a global standard of expected conduct, Ruggie has made a great effort to reinforce this societal expectation by its adoption in international soft law and self-regulatory frameworks and guidance documents on best practices in the field of CSR. His most important achievement in this respect is the adoption, in 2011, of the Corporate Responsibility to Respect Human Rights as a new chapter in the OECD Guidelines for Multinational Enterprises, the most comprehensive international CSR instrument, first issued in 1976 as "quid pro quo" complement to the OECD Declaration in International Investment and Multinational Enterprises, which purported to provide protection of international investments by multinationals in the signatory countries.

Through this move, the corporate responsibility became international soft law with a hardening supervision effect and I am also greatly indebted to Prof. Roel Nieuwenkamp, who chaired the negotiations of the OECD Member States and the other adhering countries on the update of the Guidelines, for his article on this complex process notwithstanding his very busy program as Chair of the newly established OECD Working Party on Responsible Business Conduct. I would expect that his insights in the process and the political complexities as well as the main improvements in the Guidelines will please the reader as well.

The next articles are all inspired by the UN Guiding Principles. While these are focusing on business and human rights as important part of the People aspect of the CSR scope, the comprehensive scope, structure and approach of the Guiding Principles did provide a welcome basis to look also at the role of states and businesses in the environmental field as part of the Planet aspect of the CSR scope. This is the challenge, successfully taken up by Dr. Katinka Jesse and Dr. Eric Koppe, who have analysed an equally complex landscape in the field of the respective responsibilities of states and corporations following the Ruggie approach with his smart regulatory mix. Their article will inform the reader of this equally important adjacent CSR field.

This issue ends with two articles on the remedy pillar of the Ruggie Framework. As mentioned above, this pillar consists of judicial and non-judicial remedies. Although the former cannot be missed, the latter are in Ruggie's view important for two reasons. First, adequate judicial remedies for the victims of corporate violations of human rights are still underdeveloped, in particular when it comes to violations in a cross-border context involving developing countries, where either the existing legal remedies or their application by the local courts provide no or insufficient recourse. But a no-less-important reason brought forward by Ruggie is the fact that non-judicial remedies, in particular those offered by corporations themselves in the stages, when the possibility of violations of human rights has been identified through Ruggie's due diligence procedures, or they have not yet escalated into full-scale litigation, can avoid such escalation. Offering the possibility by corporations for dialogue and, if need be, assisted negotiation to (to-be) affected parties can be a real demonstration of values-based CSR, next to being risk-based, which is often already an important motivator and illustration of good corporate governance.

The article by Prof. Martijn Scheltema assesses the effectiveness of remedy outcomes of non-judicial grievance mechanisms. He uses as starting points for his analysis Ruggie's criteria for non-judicial grievance mechanisms, being legitimacy, accessibility, predictability, equitability, transparency, and rights-compatibility. In his article, he identifies a number of important non-judicial grievance mechanisms and provides also some illustrative cases. The article by Cristina Cedillo not only discusses the developments in the field of ADR in particular through the lens of business-community conflicts, but also takes on the challenge to broaden Ruggie's non-judicial approach from human rights to the wider scope of CSR issues and to provide a conceptual model for the non-judicial resolution of CSR conflicts. Both articles are based on work in the context of the feasibility study for, launch in 2012 of, and support to the UN Working Group on Business and Human Rights by ACCESS, an expertise centre in The Hague aimed at serving governments, businesses and aggrieved parties alike with state-of-the-art knowledge and experi-

ence in the field of business-community conflicts. As one of the initiators of this centre, I have greatly appreciated Prof. Ruggie's support for this venture and I trust that the reader will agree on the importance of initiatives in this field.