

The State Duty to Protect Human Rights: Operational Principles/Ensuring Policy Coherence (UNGP Principles ¶¶ 8-10)

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11.1 Introduction

After the unnumbered introductory section entitled “General Principles” which serves as a chapeau to the framing and structural principles that follow,¹ the thirty one substantive principles follow. These are divided along the lines of the Protect-Respect-Remedy Framework introduced in the 2008 SRSG Report 8/5 (Protect, Respect, Remedy)² and the premises on which they were elaborated.³ The Three Pillar Framework was welcomed by the

¹ Discussed Chapter 6.1.

² Special Representative of the Secretary-General on human rights and transnational corporations and other business enterprises, Protect, Respect and Remedy: a Framework for Business and Human Rights A/HRC/8/5 (7 April 2008); available [https://undocs.org/en/A/HRC/8/5]; last accessed 25 February 2024.

³ Discussed Chapter 3.2.4.2.

UNHRC and on the elaboration of which the SRSG's mandate was extended.⁴ The "State Duty to Protect Human Rights" includes UNGP Principles 1-10; the "Corporate Responsibility to Respect Human Rights" includes INGP Principles 11-24; and "Access to Remedy" includes UNGP Principles 25-31.

The State duty to protect human rights focuses on the nature of State obligation with respect to the core objectives of the UNGP to prevent, mitigate, and remedy adverse human rights impacts. Its ten principles consists of a set of "Foundational Principles" (UNGP Principles 1-2), and four sets of functionally differentiated operational principles. These include "General State Regulatory and Policy Functions," (UNGP Principle 3);⁵ "The State-Business Nexus;" (UNGP Principles 4-6);⁶ "Supporting Respect for Human Rights in Conflict-Affected Areas," (UNGP Principle 7);⁷ and "Ensuring Policy Coherence," (UNGP Principles 8-10).⁸ Its conceptual genesis was developed in two of the SRSG's 2007 Reports.⁹

The operational principles are just that—guidance respecting the tools available to States connected to the broad objectives of the foundational principles to the fulfillment of which their deployment is to be directed. UNGP Operational Principles serve as the expression of the SRSG's second mandate from the UN Human Rights Council to operationalize the Three Pillar framework introduced by the SRSG in his 2008 Reports.¹⁰ This operationalization was to be undertaken through the elaboration of "practical recommendations" and "concrete guidance" to states, businesses and other social actors on its implementation."¹¹ The resulting framework, condensed to a short text and longer Official Commentary, provide a dense set of principles, expectations, and interpretive challenges. The fundamental interpretive characteristic of the UNGP as a whole, however, remains unchanged. The principle is grounded in a fixed set of objectives, but they produce a set of pathways toward its realization that create a sometimes quite broad range of discretionary choices that can be used to reflect sometimes substantial differences in conditions on the ground and in the conceptual framing of political-economic models. Those discretionary choices, then, can also produce a certain amount of incoherence at the international level, which reflect the sometimes irreconcilable differences between fundamental premises among political systems and the way in which they identify and value actions and effects with human rights impacts.

⁴ Human Rights Council, Mandate of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, A/HRC/Res/8/7 (18 June 2008) [https://ap.ohchr.org/documents/E/HRC/resolutions/A_HRC_RES_8_7.pdf] (hereafter the UNHRC 2008 Resolution). Discussed Chapter 3.3.2.

⁵ Discussed in Chapter 8.

⁶ Discussed in Chapter 9.

⁷ Discussed Chapter 10.

⁸ Discussed Chapter 11.

⁹ Special Representative of the Secretary-General on human rights and transnational corporations and other business enterprises, Business and human rights: mapping international standards of responsibility and accountability for corporate acts, A/HRC/4/35 (19 February 2007); available [<https://undocs.org/en/A/HRC/4/35>]; last accessed 25 February 2024; 2007 SRSG Report Mapping 4/35 Addendum 1— Special Representative of the Secretary-General on human rights and transnational corporations and other business enterprises, Human rights impact assessments - resolving key methodological questions Addendum 1: State responsibilities to regulate and adjudicate corporate activities under the United Nations core human rights treaties: an overview of treaty body commentaries A/HRC/4/35/Add.1 (13 February 2007); available [<https://undocs.org/en/A/HRC/4/35/Add.1>]; last accessed 25 February 2024. Both are discussed at Chapter 3.2.3.

¹⁰ Discussed Chapter 3.2.4.

¹¹ UNHRC Resolution 8/7 2008—Human Rights Council, Mandate of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, A/HRC/Res/8/7 (18 June 2008) [https://ap.ohchr.org/documents/E/HRC/resolutions/A_HRC_RES_8_7.pdf]; ¶ 4(a).

This Chapter considers the “Ensuring Policy Coherence,” (UNGP Principles 8-10) operational principles policy coherence principles to the UNGP’s State duty to protect human rights. The issue of coherence is as complicated as the systems onto which the concept is projected. In the context of a State duty to protect human rights, the complications emerge in three distinct but interrelated forms, which are then interrelated with the sensibilities of objectives of human rights in economic activity. The first (UNGP Principle 8) is a reflection of the complexities of the organization of State power and its misalignments where they touch on economic policy with human rights implications. These might relate more directly to the way in which the State may design its smart mix of measures (UNGP Principle 3) to its own internal operations. The second (UNGP Principle 9) is a reflection of the realities of the projection of State policy with respect to trade and investment in which the State duty becomes more centered. These might relate more directly to the State duty operational principles around the State-Business Nexus (UNGP ¶¶ 4-6)) principles. The third (UNGP Principle 10) focuses on the complexities of inter-governmental relations in which the State duty may play a direct or indirect role or within which that duty might be implicated or affected. These touch on all of the operational principles but with specific relevance to issues of conflict zones under UNGP Principle 7. Together the three principles seek to define the scope within which the application of the State duty’s fundamental principles (UNGP Principles 1-2) ought to be applied with the tools the State may use to develop a smart mix of measures (UNGP Principle 3). In this sense, the “coherence” provisions, then, serve as a sort of capstone, an organizing referent, of the State duty within the context of the State’s internal and external operations.

11.2 UNGP Principle 8

11.2.1. UNGP Principle 8: Text

8. States should ensure that governmental departments, agencies and other State-based institutions that shape business practices are aware of and observe the State’s human rights obligations when fulfilling their respective mandates, including by providing them with relevant information, training and support.



11.2.2. UNGP Principle 8: Commentary on Text

UNGP Principle 8 can be divided into four operative parts. The first identifies the actors to which the Principle’s guidance is addressed (“States should ensure”). The second focuses on the objects of the guidance (“governmental departments, agencies and other State-based institutions that shape business practices”). The third, describes the nature of the guidance (“are aware of and observe the State’s human rights obligations when fulfilling their respective mandates”). And the last offers a set of suggested measures for providing the “to ensure” guidance (“by providing them with relevant information, training and support”). Each of these presents some interpretive issues.

“States should ensure.” The Principle is an articulation of an expectation borne by States. The elasticity of the term “should” has been discussed in connection with wither State Duty principles and its meaning and direction does not change here.¹² The expectation is one built around ensuring. The term “ensure” derives from the Old French *asseurer*—to assure.¹³ The old French is itself derived ultimately from the Latin *ad* plus *securus*, to make safe or secure, and in that sense, to render secure. It does not suggest the attainment of that state but rather action towards that state. This meaning is retained in the Spanish (“deben assesugar”) version of the UNGP. The French version uses the word *veiller*, suggesting (in English) the term to watch or to keep guard over a thing, condition, or objective. The object is roughly the same, to seek to insure that a thing or condition or objective is attained or protected. The purpose is movement toward that objective. In the more prosaic language of government—the expectation expressed in UNGP Principle 8 is that the objective of policy coherence within the State be fulfilled as a priority policy. That is that the State ought to express a policy commitment to coherence in the manner, perhaps, that enterprises are to express their commitment to respect human rights under UNGP Principle 16, and in the language of that Principle “express their commitment to meet this responsibility.”

“Governmental departments, agencies and other State-based institutions that shape business practices.” The expectation of assurance directed to States has as its object “Governmental departments, agencies and other State-based institutions that shape business practices.” There are two components here. The first is the identification of the object of expectation—the apparatus of the State broadly construed. And the second is that only those elements of the State apparatus “that shape business practice” are subject to the expectation. A broad reading of this portion of the principle might read into its description a presumption that every State apparatus, however loosely connected to traditional State organs, fall within this definition, unless it can be shown that they do not shape business practices. That would exclude very few parts of the State apparatus. A much narrower reading would flip the presumption—that there is a presumption of no connection to business practice unless it can be positively shown. The most reasonable reading is somewhere between these interpretive extremes. But it is clear that the text of the Principle invites not just line drawing, but dynamic line drawing. As the State duty changes, as new State organs are created that touch on the regulation of business practices, then those too would be included.

It is not clear what business practices are. At its broadest, it could mean virtually anything that may touch on the operations of business, from its internal affairs to virtually any sort of interaction business might have in the market, the community or where ever and however it operates. At its narrowest, of course, the term might be understood as a term of art, and confined to a specific range of practices that are understood to be specific to the practices of business. In the context of the UNGP, that narrowing would not be unmoored. One might tie business practices to those actions that are the subject of the corporate human rights due diligence responsibility under the UNGP 2nd Pillar; in effect, if the business practice is one that would come within the ambit of human rights due diligence under UNGP Principles 17-22, then it would also constitute a business practice with respect to which the expectation of UNGP Principle 8 applies.

“Are aware of and observe the State’s human rights obligations when fulfilling their respective mandates.” The State, then, is expected to ensure—to assure or pay attention—that, with respect to the shaping of business practices, all of its State organs are (1) aware of and (2) observe (3) the State’s human rights obligations, (4) when fulfilling their respective mandates. In one sense UNGP Principle 8 inverts the thrust of UNGP Principle 3. If UNGP Principle 3 was focused on the smart mix of measures that the State is expected to utilize, in a smart mix, to meet their duty, then UNGP Principle 8 focuses on the awareness of those State organs which must deploy the

¹² See Chapter 7.2 and 7.3; 8.2 and 9.2.

¹³ Etymology online, ensure, available [https://www.etymonline.com/search?q=assure], last accessed 21 October 2024.

measures identified in Principle 3, of the expectation that utilize these measures whenever their activities shape business practice. Together UNGP Principles 3 and 8 constitute a whole—the former on the identification of the measures, the latter in the awareness of State organs of the expectation of the circumstances under which those measures are to be utilized both to meet the State’s international legal obligations (at a minimum) and to ensure that the State response is coherent throughout its institutional organs.

It is worth noting the standard for the fulfillment of the expectation—that with respect to a State’s human rights duty the relevant State organs are (1) made aware of AND (2) that they observe those obligations however they may be expressed in law and policy. Recall, from the UNGP’s General Principles, that the State duty is, at its minimum, limited to a State’s international legal obligations, those to which the State binds itself or to which it is bound.¹⁴ The State, however, can significantly augment its human rights obligations to whatever level it sees fit, in accordance with the premises of its political-economic model. UNGP Principle 8 applies in equal measure to the international legal obligation minimum as well as to any additional obligation undertaken by the State. The object is not merely that the State must fulfill its duty to protect human rights throughout its operations and in all of its organs—but that its organs must be managed in a way that each undertakes its part of that duty in a way that aligns with those of all others.

11.2.3 UNGP Principle 8: Official Commentary

The Official Commentary adds a little bit of nuance to a reading of the text, and offers guidance about preferences for reading and applying UNGP Principle 8. More importantly, it appears to provide a set of justifications for pointing guidance in a particular direction. The Commentary starts with a recitation of the premise underlying its drafting: “There is no inevitable tension between States’ human rights obligations and the laws and policies they put in place that shape business practices.” That premise suggests two things. The first is that depending on the application of a political-economic model, there could be a tension between the understanding and fulfillment of a State’s human rights obligations (as understood, perhaps, by others) and the State’s obligation respecting its macro-economic policies as manifested in (but not limited to) laws and policies that shape business practices. The second is that this reconciliation need not necessarily reflect extra-national desires about the interpretation and application of these international human rights obligations which, in practice, may be fashioned in ways that balance out in favor of business practice expectations rather than in any specific approach to judging human rights obligation compliance. More bluntly stated, one can as easily avoid the inevitability of tension by aligning the interpretation of human rights obligations to economic principles as one can by aligning the interpretation and application of business practices to human rights principles.

The Object of UNGP Principle 8, then, is to realize this principle through the coordinated operations of the organs of the State. To that end, UNGP Principle 8 is meant to offer in place of tension a balancing in the service of policy coherence. The UNGP Principle 8 Commentary explains it this way:

However, at times, States have to make difficult balancing decisions to reconcile different societal needs. To achieve the appropriate balance, States need to take a broad approach to managing the business and human rights agenda, aimed at ensuring both vertical and horizontal domestic policy coherence. (UNGP Principle 8 Commentary).

¹⁴ Discussed Chapter 6.

The Commentary divides coherence into a vertical and horizontal component, each characterized by a distinct set of measures and actions. *Vertical Coherence* is driven by an appropriate (smart) mix (recall UNGP Principle 3)¹⁵ of “necessary policies, laws and processes to implement [the State’s] international human rights law obligations” (UNGP Principle 8 Commentary). *Horizontal coherence*—coherence between the organs of State—

means supporting and equipping departments and agencies, at both the national and subnational levels, that shape business practices – including those responsible for corporate law and securities regulation, investment, export credit and insurance, trade and labour – to be informed of and act in a manner compatible with the Governments’ human rights obligations.¹⁶

Note the breadth of the horizontal coherence expectation within the state apparatus. It extends not just to the agencies into which the administrative authority of the State is organized, but also, and quite specifically, the core legal frameworks within which business activity is regulated. The intent is fairly clear—that human rights obligations are to be projected into the law and management of business activity. It does not suggest the reverse, that business principles and protections be projected into the application of human rights obligations, even with respect to the identification and measurement of impact—positive or adverse.

11.2.4 UNGP Principle 8: Other Authoritative Interpretation/Commentary

11.2.4.1 the 2010 Draft. Draft UNGP Principle 8, circulated from the end of 2010,¹⁷ was initially designated as Draft Principle 3. The draft version diverged from the final text in one small respect. The final version omitted the phrase “at both the national and sub-national level” from the text. There does not appear to be any reason for that but to tighten the language because it would be reasonable to read in that phrase into the text. That is true whatever the form of State organization (federal republic, unitary state, confederation or the like).

In its draft form, what became UNGP Principle 8’s Commentary was also only modified slightly in its final form. What became the final version’s initial sentence—stating that there is no inevitable tension between a State’s human rights obligations and the regulation of business practices was missing from the draft version of the Commentary. The need to balance different societal needs and the paragraph on vertical and horizontal coherence were transposed unchanged.

11.2.4.2 The Travaux Préparatoires and Pre-Mandate Text. The issue of coherence that became UNGP Principles 8-10 played a significant role in the articulation of the Protect, Respect, and Remedy Framework developed at the end of the first period of the SRSG’s mandate that were included in the SRSG’s 2008 Report and its Annexes.¹⁸ The Travaux Préparatoire for the second part of the SRSG’s mandate also reflect the conceptual

¹⁵ Discussed Chapter 9.

¹⁶ UNGP Principle 8 Commentary.

¹⁷ Special Representative of the Secretary General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John G. Ruggie, Draft Guiding Principles for the Implementation of United Nations “Protect, Respect, and Remedy” Framework, A/HRC/— (N.D. circulated from November 2010) available [<https://media.business-humanrights.org/media/documents/files/reports-and-materials/Ruggie-UN-draft-Guiding-Principles-22-Nov-2010.pdf>]; or “https://menschenrechte-durchsetzen.dgyn.de/fileadmin/user_upload/menschenr_durchsetzen/bilder/Menschenrechtsdokumente/Ruggie-UN-draft-Guiding-Principles-22-Nov-2010.pdf], last accessed 25 February 2024. Discussed Chapter 2.3.4.

¹⁸ Discussed Chapter 3.2.4.

basis for what would become UNGP Principles 8-10. These were developed as part of the development of what became the text of the UNGP in the SRSG's 2009 and 2010 Reports.¹⁹

11.2.5 Other Glosses

Some commentators have advanced quite decided views about what the UNGP should or must mean in a variety of contexts. That is precisely what the SRSG hoped might happen as governing collectives continued to adjust whatever might pass for (temporary) consensus in ways that align (more or less) with the tenor of the times and the influence of those driving particular instances of convergence of opinion about what the UNGP is or ought to be or ought to be used for.²⁰ This Commentary notes the this sort of scholarship, and its importance for the application of the UNGP from time to time, and perhaps, as a time limited step toward more fundamental transformations.²¹ Nonetheless, that literature provides less value as a means of understanding the UNGP itself. Rather this important work goes to the politics of aligning collective acceptance of the application of the UNGP at one point along a spectrum of plausibly justifiable approaches. It does not go to the meaning or understanding of the UNGP itself; “such debates need to be distinguished from assertions about what the UNGPs do or do not say—the text is there, 31 Principles with Commentaries.”²² That, then, certainly was the intent of the SRSG when he noted in response to an assertion about the meaning of the UNGP in a particular context.²³

Jena Martin has provided a gloss on UNGP Principle 8.²⁴ Martin emphasizes that policy coherence may have substantial regulatory effects, especially for administrative units that do not traditionally focus on human rights.²⁵ To those ends, Martin suggests that a robust pathway toward effective coherence lies in the construction and implementation of National Action Plans;²⁶ a project the guidance of which has been an important element of the political agenda of the UN Working Group for Business and Human Rights.²⁷ Following the Working Group's

¹⁹ Discussed in Chapter 3.2.5.1. See Special Representative of the Secretary-General on human rights and transnational corporations and other business enterprises, Business and human rights: Towards operationalizing the “protect, respect and remedy” framework A/HRC/11/13 (22 April 2009); available [<https://undocs.org/en/A/HRC/11/13>]; last accessed 25 February 2024.

²⁰ For examples of this type of important engagement, see, e.g., Gerardo Ryes Chavez, ‘Awareness, Analysis and Action: A Rights Holder Perspective on Building the Fair Food Movement and the Way Forward for Worker-Driven Social Responsibility,’ (2023) 8(1) *Business and Human Rights Journal* 85-89; Surya Deva, ‘The UN Guiding Principles’ Orbit and Other Regulatory Regimes in the Business and Human Rights Universe: Managing the Interface,’ (2021) 6(2) *Business and Human Rights Journal* 336-351.

²¹ Andreas Rasche and Sandra Waddock, ‘The UN Guiding Principles on Business and Human Rights: Implications for Corporate Social Responsibility Research,’ (2021) 6(2) *Business and Human Rights Journal* 227-240 (“they are but a first step in what is likely to be a long-term process of change that may well involve a far more fundamental transformation of business purpose and practice so that their aspirations can be realized” *ibid.*, 239).

²² “Letter from John Ruggie to Saskia Wilks and Johannes Blanenbach” (19 September 2019), available [<https://media.business-humanrights.org/media/documents/files/>], last accessed 15 May 2024. documents/19092019_Letter_John_Ruggie.pdf (accessed 9 March 2021).

²³ See Discussion Chapter 1.1.

²⁴ Jena Martin, ‘Guiding Principle 8: Ensuring Policy Coherence,’ in Barnali Choudhury (ed), *The UN Guiding Principles on Business and Human Rights: A Commentary* (Cheltenham, UK: Edward Elgar, 2023), pp 63-69.

²⁵ *Ibid.*, pp. 63-64.

²⁶ *Ibid.*, p. 64-69. For a critique, see, Larry Catá Baker, ‘Moving Forward the UN Guiding Principles for Business and Human Rights: Between Enterprise Social Norm, State Domestic Legal Orders, and the Treaty Law That Might Bind Them All,’ (2015) 38 *Fordham Int'l L.J.* 457-542, 468-491.

²⁷ United Nations General Assembly (UNGA), Report of the Working Group on Issue of Human Rights and Transnational Corporations and Other Business Enterprises (July 2019) UN Doc A/74/198.

guidance, Martin notes that coherence consists of coherence in policy documents and in government measures.²⁸ Both are predicates to issues of implementation, examples of which Martin considers.²⁹

Martin also considers state agency coordination as an element of UNGP Principle 8 compliance. The crux of the interpretation suggests that coherence is possible where all agencies align their mandates around oversight of business and human rights adverse impacts.³⁰ That basis of alignment, in which all mandates are understood as an expression of human rights within the context of specific mandates would resolve the problem of tension between potentially competing or irreconcilable mandates across agencies in government.³¹ Martin considers the Working Group's suggestion of the range of principle challenges to this approach as the basis for the fulfillment of the balancing approach described in the Principle. Lastly, Martin notes that the issue of coherence within the State may also be a function of the business sector involved, as well as whether the entity involved is private or state owned. In that respect, UNGP Principle 8's coherence expectation ought to be read together with UNGP Principle 4.³²

11.3 UNGP Principle 9

11.3.1. UNGP Principle 9: Text

9. States should maintain adequate domestic policy space to meet their human rights obligations when pursuing business-related policy objectives with other States or business enterprises, for instance through investment treaties or contracts.



11.3.2. UNGP Principle 9: Commentary on Text

UNGP Principle 9 can be divided into five parts plus an example that is meant to emphasize a specific application. The first describes the level of obligation expected of States (“States should maintain”). The second identifies the object of the obligation (“adequate domestic policy space”). The third describes goal of this obligation (“to meet their human rights obligations”). The fourth specifies the context within which this goal based obligation is to be deployed (“when pursuing business-related policy objectives with other States or business enterprises”). And the last foregrounds a specific application context (“for instance through investment treaties or contracts”).

“States should maintain.” The Principle is an articulation of an expectation borne by States. The elasticity of the term “should” has been discussed in connection with wither State Duty principles and its meaning and

²⁸ Martin, ‘Guiding Principle 8,’ pp. 65-66.

²⁹ Ibid., p. 67.

³⁰ Ibid.

³¹ Ibid., p. 68.

³² Discussed Chapter 9.2.

direction does not change here.³³ The signification of the expectation embedded in the meaning of the word should apply in a way similar to that set out for UNGP Principle 9.³⁴ The expectation is one built around maintaining. The term “maintain” derives from the Anglo-French *meintēnir*, which, in turn, is borrowed from the Old French *maintenir*, 12c.) which, interestingly enough, referenced the communal expectations (of men) for keeping a wife, and from that more generally acquired a meaning tied to sustaining; persevering in, and practicing continually some object, other than but in parallel with the expectations for the keeping of, a wife.³⁵ The overtones of the Roman notions of *parens patriae* is not far distant. The term is ultimately sourced in the Latin *manu tenere*, to “hold in (or the) the hand,” in the manner in which a parent holds the hand of a child—a master their servant and so on. The object clearly follows. This is a *parens patriae* obligation expected of a State in the way that, in high patriarchy, the social order *expected* a certain level of “keeping” by a man of his wife.

Nonetheless, and like the ordering of patriarchy, the obligation is an expectation only—the State may lose reputation, and others may change their behavior with respect to the State, but the social order, or in this case the international order, would not invoke formal and binding processes of redress against a State that fails in their maintenance expectation. In the more prosaic language of government—the expectation expressed in UNGP Principle 9 is that the objective of maintaining an adequate policy space within the parameters specified in UNGP Principle 9 ought to be fulfilled in the manner in which one might properly maintain the family under ancient conceptions of that social unit. Note, in this respect, that UNGP Principle 8 imposes an expectation of “ensuring” while UNGP Principle 9 imposes an expectation of “maintaining.”³⁶ The character of their respective expectations are in this sense quite distinct. The former speaks to reassuring, protecting, to keep safe and making something secure; the latter speaks to continuously practicing a certain relation to a thing, of holding it “in an existing state or condition.”³⁷ It follows that while the expectation of UNGP Principle 8 is for positive action; the expectation under UNGP Principle 9 is protective and passive in the sense of keeping what one has to the extent, as one sees in the text that follows, that preservation, that maintenance, is adequate and especially in the sense of adequacy in the provision for dependent family members—in this case the inhabitants of a State subject to its authority.

“Adequate domestic policy space.” The object of the expectation of maintenance is an adequate domestic policy. The term adequate is both relational and contextual. It refers to *sufficiency*—to what is needed or desired.³⁸ Need and desire are a function of context and the relationship of the obligation holder to others within the social community in which the obligation’s sufficiency is to be judged. It is in this sense subjective and temporally dynamic—it changes over time to suit conditions and the needs derived from and as the relation of State parties. It is not an objective standard, that is a standard that is measurable against a fixed and defined set of facts or factors. The thing that must be maintained in an adequate state is “domestic policy.” The concept of domestic policy, like that of adequacy, is also contextual and relational.³⁹ It is an object, a memorialization of action, and the space within the border of which that object may act. In the French the term might be understood, as the French since Robespierre understood it, as a State’s *politique intérieure*.⁴⁰ Nonetheless, the meaning of public policy for the

³³ See Chapter 7.2 and 7.3; 8.2 and 9.2.

³⁴ Discussed Chapter 11.2.2.

³⁵ Etymology Online, maintain, available [https://www.etymonline.com/word/maintain], last accessed 22 October 2024.

³⁶ Chapter 11.2.2.

³⁷ Etymology Online, maintain, *supra*.

³⁸ Etymology Online, adequate, available [https://www.etymonline.com/search?q=adequate], last accessed 21 October 2024.

³⁹ Henry Kissinger, ‘Domestic Structure and Foreign Policy, (1966) 95(2) Daedalus 503-529.

⁴⁰ Maximilien Francois Marie Isidore Joseph de Robespierre, Discours applaudi de Robespierre sur les grands principes moraux du gouvernement français, lors de la séance du 17 pluviôse an II (5 février 1794), Archives Parlementaires de la

purposes of the UNGP appears to be slightly, though significantly, different. Nonetheless, neither the Spanish and the French versions of the UNGP refer to either “la política interior” or “la politique interieur” of a State; rather the term used is “action nationale” (French version) or “marco normativo” (Spanish version). The Spanish version can be roughly translated as regulatory framework; that is as something that may be objectified even in virtual space. The French can be translated as national action, also indirectly pointing to a space but foregrounding what must occur within it. It is in this later sense that action nationale is connected in a sense with the more ancient, and perhaps honest, term used by Robespierre to support the Terror—the internal politics of the State—and the space within which those politics may occur, the adequacy of which is now expected to be maintained.

“To meet their human rights obligations.” The expectation to maintain an adequate policy space, that is to “mantener un marco normativo nacional adecuado,” or to “maintenir une marge d’action nationale suffisante,” has a purpose. That purpose is to meet a State’s “human rights obligations.” In the Spanish language version, the operative word is “asegurar” (with overtones of assurance drawing back on the sense of that term in UNGP Principle 8); in the French language version, the operative word is “satisfaire” that is to satisfy in a legal sense certainly.⁴¹ Thus depending on the text, the complexion of the purpose of the expectation varies slightly around the State’s human rights obligation—to meet, to assure, or to satisfy—but all pointing to an expectation of compliance in a legal and moral sense. It ought to be recalled, as well that the expectation of maintaining a policy space to meet these obligations are limited, at their narrowest, to the State’s international legal obligations to which it binds itself or is bound.⁴²

“When pursuing business-related policy objectives with other States or business enterprises.” The expectation to maintain an adequate domestic policy space to meet a State’s human rights obligations is triggered, at least for purposes of UNGP Principle 9 only in the context of the pursuit, *by a State*, of business-related policy objectives with other States or business enterprises. The “when pursuing” element suggests an active element. That is the obligation to maintain a space in a State’s *domestic* policy space in order to meet a State’s human rights obligations arises where the State engages in external transactions with other States or business enterprises that are business related. That is, that the object of UNGP Principle 9 is create an expectation of domestic policy that is related to a State’s international legal obligations in human rights where the State seeks to bind itself on business related matters with both public and private actors. The nature of the expectation, then, is clear: *foreign* entanglements of States with other entities (States and business enterprises) will have *domestic* effects for which the State must be able to act in ways that meet its minimum international legal obligations respecting human rights.

The objective creates something of a hole in the structure and operation of the UNGP, one that runs throughout the First Pillar of the UNGP (Principles 1-10, as well as in the General Principles). It is this: The possibility of the application of the expectation to actors other than States and enterprises. In this case a narrow reading of the text of UNGP Principle 9 would be that its expectation is limited to State pursuit of business-related policy only with other States (intergovernmental activities) or enterprises (sovereign contracting with foreign enterprises) recalling that a State’s expectations with respect to domestic relations with enterprises is the object of UNGP Principles 4-6.⁴³ Consequently there is no expectation of States to maintain domestic policy state related

Révolution Française Année 1962 84 pp. 330-337, available [https://www.persee.fr/doc/arcpa_0000-0000_1962_num_84_1_34787_t1_0330_0000_5], last accessed 21 October 2024.

⁴¹ In the Spanish language version, “para asegurar el cumplimiento de sus obligaciones de derechos humanos;” and in the French language version, “pour satisfaire à leurs obligations en matière de droits de l’homme.”

⁴² Discussed Chapter 6.

⁴³ Discussed Chapter 9.

to their human rights obligations as they touch on their relationships with NGOs or other actors—for example international organizations of any kind. While this interpretation is plausible so is its inverse. Read broadly, UNGP Principle 9 invites States to maintain (and used within their “smart mix of measures”⁴⁴ to maintain an adequate domestic policy space to meet their obligations with respect to all third parties (UNGP Principle 1),⁴⁵ including those arising from the pursuit of business-related policy objectives. Recall that UNGP Principle 1 describes a mandatory obligation of States to protect against human rights abuse by “third parties, *including business enterprises*.”⁴⁶ The State’s obligations to protect against abuse with respect to its international legal obligations (at a minimum), then, extends to all third parties, not just business. In this case, for example, that might mean that the State would be expected to develop human rights based compliance criteria, including potentially the application of a mandatory form of human rights due diligence, applicable to non-state actors other than enterprises where such third parties become essential actors within processes meant to fulfill the State’s legal obligations under international human rights law (at a minimum). That would suggest that the expectation of UNGP Principle 9 would extend, for example, to foreign non-governmental organizations with respect to business-related policies expected to have domestic effect that touches on a State’s human rights international legal obligations.⁴⁷

It ought to be noted that the term “business-related” is first mentioned in the black letter of UNGP Principle 9. It appears again in the blackletter of UNGP Principle 10,⁴⁸ in reference to the multilateral institutions to which that Principle applies. It does not appear as a term in the 2nd Pillar corporate responsibility to respect human rights. It appears again in the 3rd Pillar Remedies Principles. In UNGP Principles 25-28 it is used to describe the breadth of the State duty as a function of business-related human rights abuse in connection with the scope of the mechanisms that may be provided to fulfill the remedial obligation.⁴⁹ The term, however, does not appear in UNGP Principle 1, which speaks to protection against human rights abuse—without reference to its relationship to business.⁵⁰ Putting the two together, it would be possible to discern in the shift from a general mandatory duty to protect against human rights abuse in UNGP Principle 1, to the fulfillment of portions of that duty limited to “business-related” human rights or human rights abuses, appears to limit the breadth of the provisions—UNGP Principles 9, 10, 25-28—to business-related human rights abuse. It is important to note that this reduction in the scope of the expectations connected to the State duty to protect, in its policy and regulatory expectations, and more importantly, in the scope of the State duty respecting remedy, is a baseline set of expectations, including the mandatory expectations of UNGP Principles 25-27 and the remedial expectation in UNGP Principle 28. Consistent with the UNGP General Principles, States may undertake greater responsibility, including responsibility to realize the full potential breadth of UNGP Principle 1. Nonetheless, States need work only toward the minimum necessary under the UNGP. .

“For instance through investment treaties or contracts.” This last part of UNGP Principle 9 seeks to foreground a class of State action which the text suggests is at the center of the expectation described in this Principle. This text potentially raises an interpretive issue. There is a suggestion that the inclusion of this example

⁴⁴ Discussed Chapter 8.

⁴⁵ Discussed Chapter 7.1-7.2.

⁴⁶ Discussed Chapter 7.2.1.

⁴⁷ Consider Jessica F. Green, *Rethinking Private Authority : Agents and Entrepreneurs in Global Environmental Governance: Agents and Entrepreneurs in Global Environmental Governance* (Princeton University Press, 2013); Larry Catá Backer, ‘Economic Globalization and the Rise of Efficient Systems of Global Private Lawmaking: Wal-Mart as Global Legislator,’ (2007) 39(4) *Connecticut Law Review* 1739-1784.

⁴⁸ Discussed Chapter 11.4.

⁴⁹ Discussed Chapter .

⁵⁰ Discussed Chapter 7.2.

might be interpreted as an invitation to apply an ancient legal dictum from the Common law—*expressio unius (est) exclusio alteris* (to express one thing is excludes all others). Certainly the principle has been no stranger to international legal texts.⁵¹ In this case that would suggest that States could plausibly read this part of UNGP Principle 9 narrowly to include only those business-related policy objectives that are of a character—in form and/or in effect—like investment treaties or contracts. That narrow interpretation, it could be argued, aligns the provisions of UNGP Principles 8-10 on policy coherence within the State apparatus, with UNGP Principles 4-6 on the state-business nexus focused on the realization of policy objectives within the operational spaces of enterprises.⁵²

However, a broader reading of the text is plausible as well. That reading would suggest that the trigger for the application of UNGP Principle 9 is the pursuit of business-related objectives by the State—in whatever form or context that may take. This broader interpretation makes more sense when one reads UNGP Principle 9 together with UNGP Principle 8 as two distinct but related expressions of expectations around policy coherence. UNGP Principle 8 focuses on national bureaucracies (but importantly not its political or judicial branches). It provides a norm focused on the core structural mandate of a governmental administrative apparatus—ensuring awareness of and compliance with a State’s human rights obligations in the course of fulfilling their mandates. Or better put, UNGP Principle 8 creates the expectation that the mandates of State bureaucracies would be amended or otherwise be deemed to incorporate a duty of human rights awareness and compliance. The means by which that mandate would be fulfilled would be left to the State within the cluster of mechanisms suggested in UNGP Principle 3.⁵³ UNGP Principle 9, on the other hand, focuses on the policy space which these bureaucracies manage (under the direction, of course) of the political authorities and subject to the interpretive constraints imposed through the judicial authorities. That policy space, already subject to the expectation that its bureaucracies will cultivate awareness and compliance with the State’s international human rights obligations, is expected also to ensure awareness and compliance with a State’s international human rights obligations where there are internal administrative effects to external State activities. The heart of both principles are the mandates of the State administrative apparatus (UNGP Principle 8) and the policy space within which that apparatus operates (UNGP Principle 9). Together the two principles describe the two principle elements around which domestic policy is formed and to which it responds. The first focuses on the internal operations of the administrative apparatus, the second on the alignment of the expectations within that space and the consequences of the State’s engagement with States and other parties respecting business-related objectives

11.3.3 UNGP Principle 9: Official Commentary

The Official Commentary to UNGP Principle 9 is brief. It focuses on the connection between a State’s external and internal policy with the potential to produce adverse human rights effects tied to economic activity, and especially the economic activity of business.

The Commentary highlights the principal focus of this Principle’s attention—bilateral investment treaties, free trade agreements or contracts for investment contracts. These are a matter of attention to home States for their ability to affect the domestic policy space of States even as they appear to be projections of State authority outward. The principle applies in reverse as well. Such agreements can have significant effects on domestic policy

⁵¹ Aaron X. Fellmeth and Maurice Horwitz, *Guide to Latin in International Law* (2nd ed., OUP, 2022); Joseph Klingler, Yuri Parkhomenko, Constantinos Salonidis, *Between the Lines of the Vienna Convention?: Canons and Other Principles of Interpretation in Public International Law* (Kluwer Law International, 2018).

⁵² Discussed in Chapter 9.

⁵³ Discussed in Chapter 8.

for host states. “For example, the terms of international investment agreements may constrain States from fully implementing new human rights legislation, or put them at risk of binding international arbitration if they do so.”⁵⁴ Indeed, Mr. Ruggie explained the contours and dangers of incoherence in his 2008 Report, which was further elaborated in Addendum 1 to that Report.⁵⁵ The Commentary serves to underscore the caution built into the black letter of UNGP Principle 9, to “ensure that they retain adequate policy and regulatory ability to protect human rights under the terms of such agreements, while providing the necessary investor protection.”⁵⁶

11.3.4 UNGP Principle 9: Other Authoritative Interpretation/Commentary

11.3.4.1 The *2010 Draft*. Draft UNGP Principle 4, circulated from the end of 2010,⁵⁷ which was finalized as UNGP Principle 9, diverged from the final text in one potentially important respect. The difference may shed light on the meaning and plausible interpretation of text, or at least limit the scope of the plausibility of textual interpretation and application. Where the final version of UNGP Principle 9 read “for instance through investment treaties and contracts” the Draft Principle 4 read “particularly when they enter into investment treaties or contracts.” The difference may be small but important. The use of the word particularly in the draft suggests that the object of the word is given special emphasis or is an object of a higher degree of attention. It also suggests that other objects could be treated either as worthy of less attention or special treatment. In the context of UNGP Principle 9, the Draft language would have suggested that special attention would be required for investment treaties and contracts with respect to the maintenance of adequate policy spaces; the rest perhaps less. The text as endorsed eliminated this suggested of particularity by substituting “for instance” for “particularly.”

The Draft Commentary to Draft Principle 4 is also substantially similar to the final version that appears as the Commentary to UNGP Principle 9. Additions were made both for clarity, balance, and to provide examples. The term “contracts for private investment contracts” in the Draft Commentary was changed to “contracts for investment contracts” and with it the elimination of an interpretation that might have put investment contract with public companies outside the scope of the Principle. The final version also underscored the value of these economic agreements (“create economic opportunities for States”)—a statement that was not included in the draft Commentary. The final version of the Commentary also included an example⁵⁸ that might be interpreted as suggesting an area of particularly important attention (and thus moving the particularity language of the black

⁵⁴ UNGP Principle 9 Commentary.

⁵⁵ Discussed Chapter 3; Special Representative of the Secretary-General on human rights and transnational corporations and other business enterprises, Protect, Respect and Remedy: a Framework for Business and Human Rights A/HRC/8/5 (7 April 2008); available [<https://undocs.org/en/A/HRC/8/5>]; last accessed 25 February 2024 (and especially A/HR/8/5, ¶¶33–42); Special Representative of the Secretary-General on human rights and transnational corporations and other business enterprises, Protect, Respect and Remedy: a Framework for Business and Human Rights A/HRC/8/5 Addendum 1 A/HRC/8/5/Add.1 (23 April 2008); available [<https://undocs.org/en/A/HRC/8/5/Add.1>]; last accessed 25 February 2024.

⁵⁶ UNGP Principle 9 Commentary.

⁵⁷ Special Representative of the Secretary General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John G. Ruggie, Draft Guiding Principles for the Implementation of United Nations “Protect, Respect, and Remedy” Framework, A/HRC/— (N.D. circulated from November 2010) available [<https://media.business-humanrights.org/media/documents/files/reports-and-materials/Ruggie-UN-draft-Guiding-Principles-22-Nov-2010.pdf>]; or “https://menschenrechte-durchsetzen.dgyn.de/fileadmin/user_upload/menschenr_durchsetzen/bilder/Menschenrechtsdokumente/Ruggie-UN-draft-Guiding-Principles-22-Nov-2010.pdf”, last accessed 25 February 2024. Discussed Chapter 2.3.4.

⁵⁸ UNGP Principle 9 Commentary (“For example, the terms of international investment agreements may constrain States from fully implementing new human rights legislation, or put them at risk of binding international arbitration if they do so” Ibid.).

letter of the Draft Principle into the example contained in the Commentary to the final version). The example of international investment treaties constraining implementation of new domestic human rights legislation is one that had been a concern of SRSG Ruggie from the start of his mandate.⁵⁹

11.3.4.2 The Travaux Préparatoires and the Pre-Mandate Text. The focus on the use of private law regulatory mechanisms (principally through contracts) had been a central element of the investigations of the SRSG since the start of his mandate. In 2007 the SRSG examined contract clauses that were meant to reduce the adverse human rights impacts of stabilization clauses in BITs.⁶⁰ More importantly, SRSG Ruggie also developed Principles for Responsible Contracts which were circulated at the same time as the UNGP Text was submitted for endorsement to the UN Human Rights Council.⁶¹ The object was to provide concrete guidance in filling the policy space between investment treaties or contracts and the potential for adverse human rights impacts through private law. These became, by 2015, incorporated into the United Nations Principles for Responsible Contracts.⁶²

1.3.5 Other Glosses.

One must again distinguish between glosses on the UNGP, and efforts to argue for one or another best reading among the range of plausible approaches to an interpretation and application of the UNGP. Arguments toward a “best” or “sound” interpretation does not go to the meaning or understanding of the UNGP itself but rather to debates about its application in specific times, places, and spaces. As the SRSG noted: “such debates need to be distinguished from assertions about what the UNGPs do or do not say—the text is there, 31 Principles with Commentaries.”⁶³ That, then, certainly was the intent of the SRSG when he noted in response to an assertion about the meaning of the UNGP in a particular context.⁶⁴

⁵⁹ An interview with Professor John Ruggie, United Nations Special Representative of the Secretary General on Business & Human Rights, Investment Treaty News (1 October 2008); available [<https://www.iisd.org/itn/en/2008/10/01/an-interview-with-professor-john-ruggie-united-nations-special-representative-of-the-secretary-general-on-business-and-human-rights/>] last accessed 1 October 2024. Discussed in Special Representative of the Secretary-General on human rights and transnational corporations and other business enterprises, Human rights impact assessments - resolving key methodological questions Addendum 4: Business recognition of human rights: Global patterns, regional and sectoral variations A/HRC/4/35/Add. 4 (8 February 2007); available [<https://undocs.org/en/A/HRC/4/35/Add.4>]; last accessed 25 February 2024; and Chater 3.

⁶⁰ Discussed Chapter 3. See,

⁶¹ Special Representative of the Secretary General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John G. Ruggie, Addendum 3: Principles for responsible contracts: integrating the management of human rights risks into State-investor contract negotiations: guidance for negotiators A/HRC/17/31/Add.3 (25 May 2011); available [<https://documents.un.org/doc/undoc/gen/g11/134/20/pdf/g1113420.pdf>]; last accessed 25 February 2024.

⁶² United Nations, Principles for Responsible Contracts Integrating the Management of Human Rights Risks Into State-Investor Contract Negotiations Guidance For Negotiators (NY & Geneva: United Nations, 2015, HR/PUB/15/1) (“The principles for responsible contracts should be read in conjunction with those Guiding Principles and implemented with due regard to the obligations of States set out in international human rights law.” Ibid., Preface, p. 2).

⁶³ “Letter from John Ruggie to Saskia Wilks and Johannes Blanenbach” (19 September 2019), available [<https://media.business-humanrights.org/media/documents/files/>], last accessed 15 May 2024. documents/19092019_Letter_John_Ruggie.pdf (accessed 9 March 2021).

⁶⁴ See Discussion Chapter 1.1.

Carolina Olarte-Báceres has provided a gloss on UNGP Principle 9.⁶⁵ Olarte-Báceres situates the challenge of UNGP Principle 9 as falling between the benefits of development and its consequences in the form of adverse human rights impacts (other than the human right to development).⁶⁶ Olarte-Báceres starts with a review of both the historical development of what became UNGP Principle 9 through a review of the Travaux Préparatoire and in the pre-UNGP efforts to align human rights in specific fields with the human right to development manifested in international trade and investment regimes.⁶⁷ Like the SRSG, Olarte-Báceres noted the criticism of bilateral investment treaty stabilization clauses and related provisions that might have the effect of freezing a State's ability to develop and apply evolving human rights standards. On the other hand, neither the SRSG nor the commentary considered the human rights value of development embedded within such treaties. That becomes important under, for example, Marxist-Leninist systems of human rights where the human right to (collective) development is central to their approach to human rights.⁶⁸ She also noted the continued importance of the issues of trade and investment treaties, contracts, and the UNGP.⁶⁹ What appears clear from this is a general agreement that UNGP Principle 9 created a space in which the traditional valuation hierarchies guiding trade and investment agreements, and the traditional expectations of coverage in private law respecting human rights has changed. At one end of the interpretive spectrum, UNGP Principle 9 appears to suggest that it may be used to apply a system of valuation in which human rights drives the terms and objectives of investment treaties and the protection of human rights frames private economic agreement. At the other end of the spectrum of interpretation UNGP Principle 9 also suggests that centering some forms of human rights over others—the essence of trade agreements and traditional contracts, also provides a basis for sensitivity to the domestic policy space that UNGP Principle 9 expects to be curated. Lastly Olarte-Báceres suggests the challenges that this flexibility in UNGP Principle 9 poses for consensus around a specific approach to the way in which the domestic policy space is adequately filled.⁷⁰ In the process, contemporary elite consensus, including institutional consensus within the policy circles in the UN apparatus are elaborated.

11.4 UNGP Principle 10

11.4.1. UNGP Principle 10: Text

10. States, when acting as members of multilateral institutions that deal with business-related issues, should:

- (a) Seek to ensure that those institutions neither restrain the ability of their member States to meet their duty to protect nor hinder business enterprises from respecting human rights;
- (b) Encourage those institutions, within their respective mandates and capacities, to promote business respect for human rights and, where requested, to help States meet

⁶⁵ Carolina Olarte-Báceres, 'Guiding Principle 9: Domestic Policy,' in Barnali Choudhury (ed), *The UN Guiding Principles on Business and Human Rights: A Commentary* (Cheltenham, UK: Edward Elgar, 2023), pp 70-75.

⁶⁶ *Ibid.*, p. 70.

⁶⁷ *Ibid.*, pp. 71-72.

⁶⁸ Yonghe Zhang, 'General Secretary Xi Jinping's Important Statements on Respecting and Protecting Human Rights Are Integral Parts of Xi Jinping Thought on Socialism with Chinese Characteristics for a New Era,' (2022) 21(1) *Journal of Human Rights* 3-15.

⁶⁹ Olarte-Báceres, 'Guiding Principle 9,' *supra* pp. 72-73.

⁷⁰ *Ibid.*, pp. 73-75

their duty to protect against human rights abuse by business enterprises, including through technical assistance, capacity-building and awareness-raising;
(c) Draw on these Guiding Principles to promote shared understanding and advance international cooperation in the management of business and human rights challenges.



11.4.2. UNGP Principle 10: Commentary on Text

UNGP Principle 10 can be divided into a chapeau setting out the context in which its expectations are to apply. These apply to States “when acting as members of multilateral institutions,” but only with those multilateral institutions that “deal with business related issues.” Three sets of expectations are then described within that context. The first, UNGP Principle 10(a) imposes a “seek to ensure” expectation that such multilateral institutions not interfere with either the State duty to protect nor the Corporate responsibility to respect human rights. The second, UNGP Principle 10(b), encourages the promotion of business respect for human rights. The third, UNGP Principle 10(c), recommends drawing on the UNGP Principles in the work of multilateral institutions. Each of these four elements are discussed in turn.

The chapeau. UNGP Principle 10 describes an expectation directed to States. It is triggered when States act “as members of multilateral institutions” when those institutions “deal with business-related issues.”⁷¹ The possible limiting effect of the use of the term “business-related” has been discussed in connection with UNGP Principle 9.⁷² The effect is similar here—serving as a narrowing of the general State duty to protect human rights set out in UNGP Principle 1. That leaves the term “multilateral institution” ripe for interpretation. The text of the Principle offers no guidance. In an essay published in 1992,⁷³ John Ruggie defined multilateralism as “coordinating relations among three or more states in accordance with certain principles.”⁷⁴ Multilateral institutions, then, are institutions, defined generically as “persistent and connected sets of rules, formal and informal, that prescribe behavioural roles, constrain activity, and shape expectations”⁷⁵ that serve as the structuring of coordinated relations among three or more states in accordance with the principles the fulfillment of which are their objective that bind its members and produce expectations of diffuse reciprocity.⁷⁶

The definition of multinational institutions that may well have served the SRSG as a starting (or ending) point for analysis appears to ignore, or at least leave open to States to apply as they like, the emergence of a large number of heterogeneous institutions that do not fall within the definition developed in the late 20th century, but which may operate, functionally, as multilateral institutions. Among these are interstate, infrastate, public-private,

⁷¹ Discussed Chapter 11.3.2.

⁷² Chapter 11.3.

⁷³ John G. Ruggie, ‘Multilateralism: The Anatomy of an Institution,’ (1992) 46(3) *International Organization* 561-598.

⁷⁴ *Ibid.*, p. 568.

⁷⁵ *Ibid.*, p. 570, quoting e Robert O. Keohane, ‘Multilateralism: An Agenda for Research,’ (1990) 45 *International Journal* 731, 732.

⁷⁶ Ruggie, ‘Multilateralism,’ *supra*, 570-572, citing in part, Robert O. Keohane, ‘Reciprocity in International Relations,’ 1986) 40 *International Organization* 1-27.

and private transnational institutions.⁷⁷ Many of these have been described as informal inter-governmental organizations,⁷⁸ in the same way that one speaks about “soft” law.⁷⁹ In both cases the reference is a function of an ideal (or traditionally singular or apex) form of organizing social relations within its rationalizing premises.⁸⁰ What emerges is the possibility of a broader scope of the application of UNGP Principle 10 beyond its perhaps original and formal construction of the space within which States operate within and among the community of States and other transnational actors—including religious institutions, civil society organized in institutional forms, business enterprises and the multilateral and hybrid organs through which they choose to organize their relations. Nonetheless, UNGP Principle 10 also permits a quite narrow reading of the obligation—formalist and legalist—confined to those organs created by and as instruments of States.

In addition, it might be useful, in applying UNGP Principle 10 to note the broadness of the meaning of “deal with.” The multinational institutions of States are members do not have to be constituted with a mandate that is principally or significantly focused on business-related issues. They need only deal with those issues as part of their function. Broadly read, that can significantly expand the range of multilateral institutions to which UNGP Principle 10 applies. At its limits, it might include virtually every multilateral institution that contracts with private entities for any services. At its narrowest, it can be limited to those multilateral institutions whose mandates are significantly related to and which must deal with, in ordinary course, issues that are business-related.

Like UNGP Principles 8 and 9, UNGP Principle 10 creates an expectation through its invocation of the a “should” standard. The “should standard” has been discussed earlier.⁸¹ Again, it bears emphasizing that a “should” standard describes an expectation—that is an objective or other goal that ought to take precedence. Nonetheless, that expectation is not mandatory. It may, under certain circumstances, be avoided. Avoidance or waiver of expectation may be triggered by any number of events, contingencies or policies. For example, a State may well have to balance other policies and priorities over that of the expectations outlined and the ideal fulfillment of a UNGP Principle to which it is attached where those other policies and priorities are of a mandatory character and foundational to the State’s political order. Or the expectations would have to acquire a local character because they must be embedded within the political economic model in which it is fulfilled. That is especially the case where Marxist-Leninist models of human rights may not align with the ideal developed under other political economic models.⁸²

⁷⁷ Kenneth W. Abbott and Benjamin Faude, ‘Hybris Institutional Complexes in Global Governance,’ (2022) 17 *The Review of International Organizations* 263-291.

⁷⁸ Felicity Vabulas, and Duncan Snidal, ‘Organization without Delegation: Informal Intergovernmental Organizations (IIGOs) and the Spectrum of Intergovernmental Arrangements,’ (2013) 8(2) *Review of International Organizations* 193–220.

⁷⁹ Fionnuala Ní Aoláin, ‘“Soft Law”, Informal Lawmaking and ‘New Institutions’ in the Global Counter-Terrorism Architecture,’ (2021) 32(3) *The European Journal of International Law* 919-941.

⁸⁰ Bernhard Reinsberg & Oliver Westerwinter, ‘The global governance of international development: Documenting the rise of multi-stakeholder partnerships and identifying underlying theoretical explanations. *Review of International Organizations*,’ (2021) 16(1), 59–94.

⁸¹ See Chapters 7.3.2, 8.3, and 9.2.2.

⁸² See, e.g., Zhang Yi, ‘The Historic Achievements of the Communist Party of China in Respecting and Protecting Human Rights in the New Era,’ (2024) 23(2) *The Journal of Human Rights* 287-305 (rights to subsistence and development as the top priority to achieve common prosperity). Its fulfillment in Chinese outbound economic activity is discussed in Larry Catá Backer, ‘Chinese state-owned companies and investment in Latin America and Europe,’ in Judith Schönsteiner, Markus Krajewski (eds) *Human Rights and Environmental Sustainability in State-Owned Enterprises* (Routledge, 2024)

UNGP Principle 10(a) is straightforward. It creates the expectation that when States participate in the work of a multilateral institution that deals with business-related issues as a member, it should “seek to ensure” that those institutions avoid two things in its operation and work product. The first is that those institutions do not “restrain the ability of their member States to meet their duty to protect.” The second is that those institutions do not “hinder business enterprises from respecting human rights.” The “seek to ensure” expectation does not imply that States must succeed; but it must do something with respect to the objectives specified in the sub-Principle. Instead it suggests a striving toward the two objectives specified in the black letter of UNGP Principle 10(a). The operative expectations which States are expected to seek to ensure—restrain and hinder—are open ended. The suggestion in the text is that these might be read contextually and within the broader set of expectations specified in UNGP Principles 2–10. At their broadest, it encompasses any restraint irrespective of significance—for who can judge significance. There is a temporal element as well—UNGP Principle 10 permits an assessment of “restraint” and “hinder” that may focus either on the present or the future, and that may be assessed from out of past behaviors projected forward. This accords with the fundamental expectation of preventing, as well as mitigating and remedying adverse human rights impacts built into the State Duty (UNGP Principle 1),⁸³ as well as on State practice in related areas.⁸⁴ It is presumed that the expectation in UNGP Principle 10(a) is to be fulfilled with respect to both the State’s binding international legal obligations, and its management of the human rights impacts if economic activities which it might affect through the smart mix of measures described in UNGP Principle 3.⁸⁵

UNGP Principle 10(b) speaks to encouragement. What are to be encouraged are multilateral institutions to promote business respect for human rights. Tellingly, that encouragement does not expressly extend to encouraging States to fully comply with their legally binding international human rights obligations.⁸⁶ That encouragement, however, is meant to be mindful of the limits of the mandates and capacities of these multilateral institutions which are the objects of such encouragement. That encouragement may be elaborated through legal, regulatory, or policy frameworks. In addition, UNGP Principle 10(b) also encourages States, when requested, to provide technical assistance, capacity-building, and awareness raising to help other States meet their duty to protect human rights against abuse by business enterprises, at least within the minima specified in UNGP Principle 1.⁸⁷

Of course, it is not clear whether States are required to lend such aid in the forms and within policy or principle preferred by the multilateral institutions. That might pose a problem where the State whose aid is sought has adopted a n approach that differs from that of the multilateral institution. More likely, the encouragement standard in this sub-Principle may point to the encouragement, as well, of finding common ground, with respect to the delivery of such aid. At the same time, one can also read UNGP Principle 10(b) “request” provision as extending as well to non-state actors that may adversely impact human rights in economic activity—for example non-governmental organizations and organizations that are not profit motivated, but which are attached to economic activity in the sense of deriving revenue for their and using those finds to purchase labor and material for their work. Beyond that, States might also be encouraged to project their own view of the most appropriate way

⁸³ Discussed Chapter 7.

⁸⁴ The work of the Ethics Council of the Norwegian Pension Fund Global may prove instructive in this respect, especially in the context of its development of the concept of “unacceptable risk.” Consider, for example, Larry Catá Backer, ‘Regulating financial markets: what we might learn from sovereign wealth funds, in Bertram Lomfeld, Alessandro Somma, and Peer Zumbansen (eds), *Reshaping Markets Economic Governance, the Global Financial Crisis and Liberal Utopia* (CUP 2016). See generally, Larry Catá Backer, *Sovereign Investing and Markets-Based Transnational Rule of Law Building: The Norwegian Sovereign Wealth Fund in Global Markets.*” (2013) 29(1) *American University International Law Review* 1-122.

⁸⁵ Discussed Chapter 8.

⁸⁶ Discussed Chapter 6.

⁸⁷ Discussed Chapter 7.

that multilateral institutions ought to promote respect for human rights in accordance with their own political economic model. That, indeed, may be understood as a principal objective of UNGP Principle 10(c).

UNGP Principle 10(c) focuses on the management of business and human rights challenges entertained by, or within the mandate and capabilities of multilateral institutions. The sub-Principle specifies that, to the ends of this management of business and human rights challenges, there is an expectation that States draw on the UNGP to promote shared understanding and international cooperation. That is straightforward enough, perhaps. However, the plain language of the provision might also conceal the difficulties of the politics behind them. And yet the management of those difficulties, grounded in the sometimes quite different approaches of States to the recognition and response to adverse human rights impacts, is also built into the sub-paragraph. The principle element of the sub-paragraph, in this sense, is the expectation that the UNGP itself will serve as the framework and language within which differences, as well as challenges can be managed within multilateral institutions.

11.4.3 UNGP Principle 10: Official Commentary

The Official Commentary ties the principles and justifications underlying UNGP Principles 8 (policy coherence within government) and 9 (policy space for domestic impacts of international agreements) with the necessity for policy coherence at the international level. The Commentary situates the object of UNGP Principle 10's focus on State participation in multilateral institutions within the wider ambit of horizontal policy coherence at the international level. The Commentary emphasizes that the expectations described in UNGP Principle 10 are an expression (or application) of the more general international human rights law obligations to which States are bound. That is, the State's international human rights law obligations follows State action everywhere States operate, including when they participate in multilateral institutions.

The Commentary focuses on UNGP Principle 10(b)'s expectation of a willingness of States to lend their capabilities to capacity building and awareness raising at the behest of multilateral institutions (including, perhaps primarily—the apparatus of the UN Human Rights Council and its mechanisms (Universal periodic reviews; treaty monitoring bodies; and the special procedures) along with the UN High Commissioner for Human Rights and their apparatus. The object is to enhancing sharing of technical knowledge so that all States might be better able to meet their respective minimum legally binding international human rights obligations. This was a matter of substantial attention by the SRSG Ruggie and were given a prominent role in the 2008 Report.⁸⁸

But capacity building and information sharing were not meant merely to assist other States, but also to ensure that in the assisting some sort of interpretative coherence might also be achieved, “thus promoting more consistent approaches.”⁸⁹ To those ends multilateral institutions, it is suggested, can play an important role. “Collective action through multilateral institutions can help States level the playing field with regard to business respect for human rights, but it should do so by raising the performance of laggards.”⁹⁰ To those ends, the Commentary also notes the positive role that non-state actors might play.

⁸⁸ Discussed Chapter 3; Special Representative of the Secretary-General on human rights and transnational corporations and other business enterprises, Protect, Respect and Remedy: a Framework for Business and Human Rights A/HRC/8/5 (7 April 2008); available [<https://undocs.org/en/A/HRC/8/5>]; last accessed 25 February 2024 (and especially A/HR/8/5, ¶¶ 43–46).

⁸⁹ UNGP Principle 10 Commentary.

⁹⁰ Ibid.

Lastly, echoing the thrust of UNGP Principle 10(c), the Commentary emphasized that in the work of multilateral institutions, the UNGP ought to provide a common reference point. The Commentary, though, also goes beyond that objective, suggesting that encouraging States, as an aspect of their international legal human rights obligations to use the UNGP as a common reference point “could serve as a useful basis for building a cumulative positive effect that takes into account the respective roles and responsibilities of all relevant stakeholders.”⁹¹ The “cumulative positive effects” reference looks back to the animating objective of the principled pragmatism framework that served as the foundation of the SRSG’s vision in crafting what became the UNGP.⁹² It might also be interpreted as a reminder of the political objective at the heart of the SRSG’s project, and through that, of the UNGP—to bring human rights, and human rights impacts closer to the center of the complex of factors that shape decision making when public and private actors engage in economic activity. The objective is not limited to business enterprises. As UNGP Principle 1 reminds,⁹³ its premises can reach out to include all actors that engage in economic activity—including non-governmental institutions, for example civil society and religious organizations.

The Commentary to UNGP Principle 10(c) also suggested the value of taking into account the “respective roles and responsibilities of all relevant stakeholder.”⁹⁴ What it did not do was specify either who were to be included in the category “relevant stakeholder”. Nor did it suggest the mechanisms for determining who had the authority to determine relevance. A reasonable reading would start from the premise that the meaning of the term relevant stakeholder would be highly contextual. That context might be based on connection with the adverse human rights impact; or it could be based on a functional analysis, including all individual and social collectives involved in the issues of human rights impacted by economic activity. A reasonable reading might also start from the premise that multilateral institutions were well placed to determine the scope of the stakeholder universe connected to a matter. That premise of competence, of course, might be subject to challenge either through judicial or other mechanisms (for example Specific instance complaints under the OECD Guidelines for Multinational Enterprises⁹⁵), or in state based judicial or non-judicial proceedings.

11.4.4 UNGP Principle 10: Other Authoritative Interpretation/Commentary

11.4.4.1 The 2010 Draft. What became the final version of UNGP Principle 10 was initially circulated as Draft Principle 11 from the end of 2010.⁹⁶ There was little divergence between the text of the 2010 Draft Principle and UNGP Principle 10 in final form. The most significant change from Draft to adopted principle was found in what became UNGP Principle 10(b), in which the expectation to provide technical assistance and capacity building was narrowed by imposing a “request” provisions; that is the expectation for technical assistance is

⁹¹ Ibid.

⁹² Discussed Chapter 3.1.

⁹³ Discussed Chapter 7.1.

⁹⁴ UNGP Principle 10 Commentary.

⁹⁵ Michele Ford, Michael Gillan, and Htwe Htwe Thein, ‘Calling multinational enterprises to account: CSOs, supranational institutions and business practices in the global south,’ (2024) 24(1) *Global Networks* (Oxford) 1-15 (<https://doi.org/10.1111/glob.12438>).

⁹⁶ Special Representative of the Secretary General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John G. Ruggie, Draft Guiding Principles for the Implementation of United Nations “Protect, Respect, and Remedy” Framework, A/HRC/— (N.D. circulated from November 2010) available [<https://media.business-humanrights.org/media/documents/files/reports-and-materials/Ruggie-UN-draft-Guiding-Principles-22-Nov-2010.pdf>]; or “https://menschenrechte-durchsetzen.dgyn.de/fileadmin/user_upload/menschenr_durchsetzen/bilder/Menschenrechtsdokumente/Ruggie-UN-draft-Guiding-Principles-22-Nov-2010.pdf], last accessed 25 February 2024. Discussed Chapter 2.3.4.

triggered in the final version only upon request of a multilateral institution. That change, in part, is consistent with the goal of coherence—by routing such assistance through the multilateral institution. Although UNGP Principle 9 does not prohibit State to State assistance without the intervention or routing through multilateral institutions, the commentary in both Draft and final version suggests the coherence enhancing value of multilateral institutions in this capacity.

The Draft Commentary is substantially the same as the final version, except that the final version added some additional details that help shape an understanding of this principle. The first was the addition of the statement that a State’s international legal obligations carry over to their participation in multilateral institutions, including their duty to protect human rights. The second was the addition of a statement acknowledging the role of “other stakeholders” in the cooper Olarte-Bácares, ‘Guiding Principle 9ation between States and multilateral institutions.

11.4.4.2 The Travaux Préparatoires and the Pre-Mandate Text. Most relevant for a gloss on UNGP Principle 2 are the forms and structures of the UN Global Compact.⁹⁷ That effort represented a way of addressing governance gaps at the global level by developing standards at the top and implementation at the operational level.⁹⁸ But in the case of UNGP Principle 2 it is one in which the State can be reinserted as a mechanism for guidance and compliance. The standards are still generated at the international level; implementation still occurs at the operational level. But the State now coordinates with an authority that may be by exercised by international organizations. The insights were reflected in the Travaux Préparatoire.⁹⁹ Indeed, the role of the SRSG in both the development of the Global Compact and the UNGP suggests the connection between the two, at least at a conceptual level. “While Ruggie’s mandate was clear, the UNGPs do not themselves constitute law or regulation. Rather the principles, particularly principle 2, rest on a core set of social norms intended to guide practice.”¹⁰⁰

11.4.5 Other Glosses.

One must again distinguish between glosses on the UNGP, and efforts to argue for one or another best reading among the range of plausible approaches to an interpretation and application of the UNGP. Arguments toward a “best” or “sound” interpretation does not go to the meaning or understanding of the UNGP itself but rather to debates about its application in specific times, places, and spaces. As the SRSG noted: “such debates need to be distinguished from assertions about what the UNGPs do or do not say—the text is there, 31 Principles with Commentaries.”¹⁰¹ That, then, certainly was the intent of the SRSG when he noted in response to an assertion about the meaning of the UNGP in a particular context.¹⁰²

⁹⁷ See, e.g., Christian Voegtlin, and Nicola M. Pless, ‘Global Governance: CSR and the Role of the UN Global Compact,’ (2014) 122 *J Bus Ethics* 179-191.

⁹⁸ Cf., Kenneth Abbott, K. W., & David Snidal, ‘International regulation without international government: Improving IO performance through orchestration. Review of International Organizations,’ (2010) 5(3) *Review of International Organizations* 315–344.

⁹⁹ Discussed Chapter 3, 4.3.

¹⁰⁰ Andreas Rasche and Sandra Waddock, ‘The UN Guiding Principles on Business and Human Rights: Implications for Corporate Social Responsibility Research,’ (2021) 6(2) *Business and Human Rights Journal* 227-240, 230.

¹⁰¹ “Letter from John Ruggie to Saskia Wilks and Johannes Blannenbach’ (19 September 2019), available [https://media.business-humanrights.org/media/documents/files/], last accessed 15 May 2024. documents/19092019_Letter_John_Ruggie.pdf (accessed 9 March 2021).

¹⁰² See Discussion Chapter 1.1.

Gamze Erdem Türkelli has provided a gloss on UNGP Principle 10.¹⁰³ She situates UNGP Principle 10 within a consensus based understanding of an interpretive community that matters for such things that reinforces what, to the commentator, is the central premises of the Principle—that States do not shed their binding international legal obligations when they step out of their role as masters of their own political spaces and join with other States in institutional organs they created for their own convenience. Türkelli notes the term multilateral institution remains undefined in the UNGP, but draws from the description of those classes of institutions that appear to qualify as multilateral institutions something of a working definition. Türkelli also draws on the subsequent decisions of States as they worked through their National Action Plans to develop a sense of emerging consensus among States respecting how they might approach the scope of the multilateral institutions referenced in UNGP Principle 10.¹⁰⁴ Occupying a space at the intersection of States, multilateral finance institutions, and business enterprises, Türkelli suggests that UNGP Principle 10 is framed not just as a mechanism for responding to adverse human rights impacts but also to enhance the political project of moving consensus and practice along lines that enhance, as that term may be understood from time to time, coherence in human rights related regulation.¹⁰⁵

Türkelli then considers each of the three duties elaborated in UNGP Principle 10. With respect to the first (UN GP Principle 10(a)), Türkelli notes both that the scope of the obligation is focused on means rather than ends,¹⁰⁶ but also that the scope of the means obligations may be less comprehensive than other multilateral instruments, especially because it is constrained by the “Protect, Respect, Remedy” Framework itself.¹⁰⁷ With respect to the second, Türkelli notes the importance of technical assistance and capacity building at the heart of the expectation in UNGP Principle 10(b). However, also noted are conceptual limitations that avoid any obligation to consider what is described as the systemic nature of the structures of global economic activity from which human rights adverse impacts may be situated; for the commentator one treats symptoms but not the disease.¹⁰⁸ And yet it may be worth noting that such viewpoints, though powerful within the contemporary discussions of those with influence over the course of these matters, reflects a political determination, grounded in its own rational ordering universe of premises,¹⁰⁹ rather than an engagement with the text as text, an engagement that Türkelli does well. With respect to the third, Türkelli notes that the embedding of the UNGP as a common reference may be useful as far as it goes for the purpose of coherence. At the same time, Türkelli notes that some multilateral institutions are not driven by a common language so much as they are driven by their own self-regulatory norms.¹¹⁰ Those norms are as easily transposed into the common language of human rights as are other meanings and intents. It is also possible to understand that, as SRSG Ruggie noted in his development of the

¹⁰³ Gamze Erdem Türkelli, ‘Guiding Principle 10: States as Members of Multilateral Institutions,’ in Barnali Choudhury (ed), *The UN Guiding Principles on Business and Human Rights: A Commentary* (Cheltenham, UK: Edward Elgar, 2023), pp 77-84.

¹⁰⁴ Ibid., pp. 78-79.

¹⁰⁵ Ibid., p. 79.

¹⁰⁶ Ibid.

¹⁰⁷ Ibid.

¹⁰⁸ Ibid., p. 80.

¹⁰⁹ There is a broad literature which by the early 21st century had coalesced around anti-capitalism as a sort of fetish useful for rationalizing transformative agendas of one sort or another. For a sampling in no particular order of significance, Kelly E. Happe, ‘Rethinking Utopia as Form. Failure, Time, and the Political Subject of Anti-Capitalism,’ (2024) 27(2) *Theory & Event* 172-198; Katie Terezakis, ‘The Revival of Romantic Anti-Capitalism on the Right: A Synopsis Informed by Agnes Heller’s Philosophy,’ (2020) 21(4) *Critical Horizons* 291-302; David McNally, *Another World is Possible: Globalization and Anti-Capitalism* (Winnipeg: Arbeiter Ring Pub, 2022); Jodi Melamed, *Represent and Destroy: Rationalizing Violence in the New Racial Capitalism* (Minneapolis: U Minnesota Press, 2011).

¹¹⁰ Türkelli, ‘Guiding Principle 10: States as Members of Multilateral Institutions,’ *supra*, p. 80.

principled pragmatism approach,¹¹¹ that the UNGP were developed in their final form precisely to provide a framing language within which it would be possible to invest text with a broad spectrum of meaning, and from meaning objectives materialized as policy and regulation.

Lastly, Türkelli sought to contextualize UNGP Principle 10 within ecologies of international economic law and international human rights law.¹¹² This was undertaken in light of three considerations. The first was that multilateral institutions do not constitute a homogenous group and that, therefore the nature of State engagement will be highly contextual. The second was that a State's ability to fulfill the expectations in UNGP Principle 10 will largely be a function of the role of that State in the multilateral institution. That role, in turn, might depend on the place of the State within the (informal) hierarchy of States generally and within particular institutional settings. The third was that the relative autonomy of multilateral institutions would likely affect the quality and success of State engagement under UNGP Principle 10.

With those considerations in mind, Türkelli considers the contextualization of UNGP Principles 8-10 under international economic and human rights law.¹¹³ With respect to the first, Türkelli notes the aspirational nature of the expectations, in light of the political realities of State power in relations with other States and with multilateral institutions. And yet, that also accords with the approach of the SRSG in crafting the UNGP.¹¹⁴ Türkelli notes that the extent of influence may be a function of wealth, development, and power. And yet it might be argued that UNGP Principle 10 seeks, aspirational at least, to equalize these to some extent through its focus on capacity building in and through multilateral institutions. With respect to the second, Türkelli noted that the obligations of States in multilateral institutions with respect to human rights extends to the conduct of the business enterprises under their dominion. That certainly would be a plausible reading of UNGP Principle 10 and UNGP Principle 1. Türkelli also correctly noted that the obligation of States respecting multilateral institutions was to ensure that such institutions, as instrumentalities of the community of States comply with international human rights law in their own operations, something that is plausibly implied by though not explicitly stated in either the Principles' Black letter or commentary. Lastly, Türkelli also notes that the role of independent accountability mechanisms remains substantially unexplored—though their use is not forbidden.

11.5 Conclusion

UNGP Principles 8-10 appear to have as their principal object the mapping of coherence structures and methods onto the field of human rights impacts on economic activity across the broad spectrum of public managerial and regulatory authorities, centered on and through the State. In the process UNGP Principles 8-10 also mapped the

¹¹¹ Discussed Chapter 3.1.

¹¹² Türkelli, 'Guiding Principle 10: States as Members of Multilateral Institutions,' pp. 81-83.

¹¹³ Ibid., pp. 82-83.

¹¹⁴ Discussed Chapter 3.2.

complexities of polycentric and complex dynamic systems,¹¹⁵ systems that, as has become clear in the discussion above, tends to leak out both in hybrid institutions and through the realities of fields of regulation that are both intensely public, private, and mixed. The object is singular—to ensure policy coherence. Note that the object was not to achieve legal coherence. The focus was on policy; and from policy would flow streams of law and regulation on the public side of regulation, market expectations and contract on the public side, and compliance oriented nudging on both sides. One is told in the UNGP Principles 8-10 that the focus is on institutions that shape business practice; that shaping can be actualized through any number of methods that constitute the smart mix of measures that was already introduced as the palette of States in meeting their duty to protect human rights (and later on a different palette for business enterprises to meet their responsibilities to respect human rights).

At the center of this coherence universe is the State. The State must order its own house (UNGP Principle 8); it must ensure that this ordered house has space enough to ensure that the State's outbound relations do not inhibit its ability to ensure order in all of its external and internal relations (UNGP Principle 9); and it must carry this tidiness outward to its participation in multilateral enterprises. Taken together, what UNGP Principles 8-10 is to sketch out the framework for a coherence among centered on States and tied to the entire global apparatus of institutions that shape business practice. That coherence framework is grounded in human rights—at a minimum the international legal obligations of States transposed into the State and carried outward into its external relations and its participation in the institutions from which global human rights norms (and ultimately such norm sin legally binding form) originate

The circle is complete, conceptually at least. Drawing together the first ten principles of the UNGP the framework of the State duty to protect human rights, and the essence of its function as a “common reference point” (UNGP Principle 10(c) Commentary) emerges more clearly. The State duty has three pole stars, two centers of attraction around which it is possible to rationalize the otherwise more anarchic interventions of international law and norms. *The first is grounded in law.* The bedrock of the State Duty is the mandatory fulfillment by a State of its binding international legal obligations, including those touching on the human rights impacts of economic decisions (UNGP Principle 1). States may broaden the scope of their duty to protect if they choose; States may embed them in their domestic legal orders as they choose. But at a minimum States must fulfill their international law commitments—or avoid making them in the first place. The extent to which States choose to interpret their international legal obligations, and the way in which they choose fulfill these obligations domestically and in their interactions with others, is entirely a matter of politics (and politics is a powerful instrument) and the operation of the techno-administrative systems within which States may choose to operate.

The second is grounded in politics and discretionary action. These are built around a broad set of coordinated expectations (the “should” standard) specified in more detail in UNGP Principles 2-10. The State is expected to set out expectations around the meaning, purpose, and conduct of economic activities (UNGO Principle 2): The State is expected to exercise a reasonable political discretion in deploying its arsenal of legal and political mechanisms to meet both its legal expectations and the expectations it has built around economic activity, at least with respect to adverse human rights impacts (UNGP Principle 3), and with its smart mix of measures. The State is expected to organize its own business dealings, whether in the form of state engagement in economic activity directly or indirectly, or through its necessary contracting for goods, services, and labor, to be mindful of both its legal expectations and the expectations its has elaborated for those engaged in economic activity (UNGP Principle 4). The State is expected to exercise oversight where it contracts for services, especially those traditionally provided by the State (at least in this current stage of historical development), and more generally with

¹¹⁵ Cf., Paul D. Aligica, Vlad Tarko, ‘Polycentricity: From Polyani to Ostrom, and Beyond,’ (2012) 25(2) Governance 237-262.

its procurement (UNGP Principles 5–6). States are expected to exercise more robust guidance for the business enterprises over which it has some authority to set expectations (UNGP Principle 2) where those enterprises are operating in conflict-affected areas (UNGP Principle 7).

The third is grounded in the ordering premise of normative and linguistic coherence. States are expected to ensure that human rights is valued appropriately—and decisively where it touches on the State’s binding international legal obligations, in the fulfillment of the mandates of their institutional apparatus (UNGP Principle 8). States are expected to ensure that its external relations that touch on economic activity can be aligned with its domestic obligations to avoid incoherence (or in this case walls) between the domestic human rights based operations of the State and that applicable to external actors (UNGP Principle 9). States are expected to fulfill (at a minimum) their binding legal obligations under international law (emerging from UNGP Principle 1) and their expectations (emerging from UNGP Principle 2) in all of their participation within, in and through multilateral institutions, including with respect to the further development of common approaches to capacity, operations, and sensibilities among States and within the operations of the multilateral institutions themselves (UNGP Principle 10).

Taken together, one gets a good sense of the framework, the language, and the underlying ordering, that together is constituted as the State duty to protect human rights. Nonetheless this ecology of coherence is quite porous, and within its framework quite flexible. The UNGP 1st Pillar State Duty is a collection of minima and a construction of a common language within which that minima may be engaged with and developed—in any direction, as long as it accords with whatever passes for human rights law or norms in any stage of historical development. That, of course, is the essence of the principled pragmatism at the heart of the UNGP project, one built into the language and the operations of the system itself. While principled pragmatism has always irritated legal absolutists on the one side and markets-individual-autonomy purists on the other, the SRSG’s travaux Préparatoire make unavoidable the connection between principled pragmatism and the structures and operation of the UNGP. The SRSG, and political actors (civil society, states, and other social collectives) may have, and sometime share visions of what the ideal state of business and human rights ought to be. The UNGP is broad enough to embrace that, but not to compel any particular vision other than the simplest one—that human rights (however defined) must play a significant role in the bundle of expectations around which economic activity is ordered, and that adverse impacts on human rights ought to be a significant factor in determinations of welfare maximizing decisions about what sort of economic activity to pursue at a micro and a macro level.

At the same time, one has a better grasp of a possible meaning that SRSG Ruggie intended when he referenced the UNGP Project as the “end of the beginning.” What the State Duty pillar provides is a framework, a common language (adverse impacts, duty, due diligence, international legal obligations, “should”, and the like), and through its travaux Préparatoire a sense of direction, one that more effectively centers human rights within the traditional expectations and practices of economic activities, especially as undertaken by autonomous aggregations of capital created for that purpose by States. To those ends, the State Duty Pillar provides a baseline of sorts, and what appears to be an invitation for robust engagement in a political project beyond that minima. That baseline includes terms the definitions of which are left open, expectations the nature of which remain undefined, and the pull of coherence across the political project that is the distinct marker of the State Duty. It is in this sense fitting, that the last three principles of the State duty, considered in this Chapter serve as the sort of summing up of the rest. Beyond that are the political agendas, aspirations, and strategies of the principle actors in the field of business and human rights along with affected stakeholders.