

The UNGP's 2nd Pillar as Soft Public and Harder Private Law



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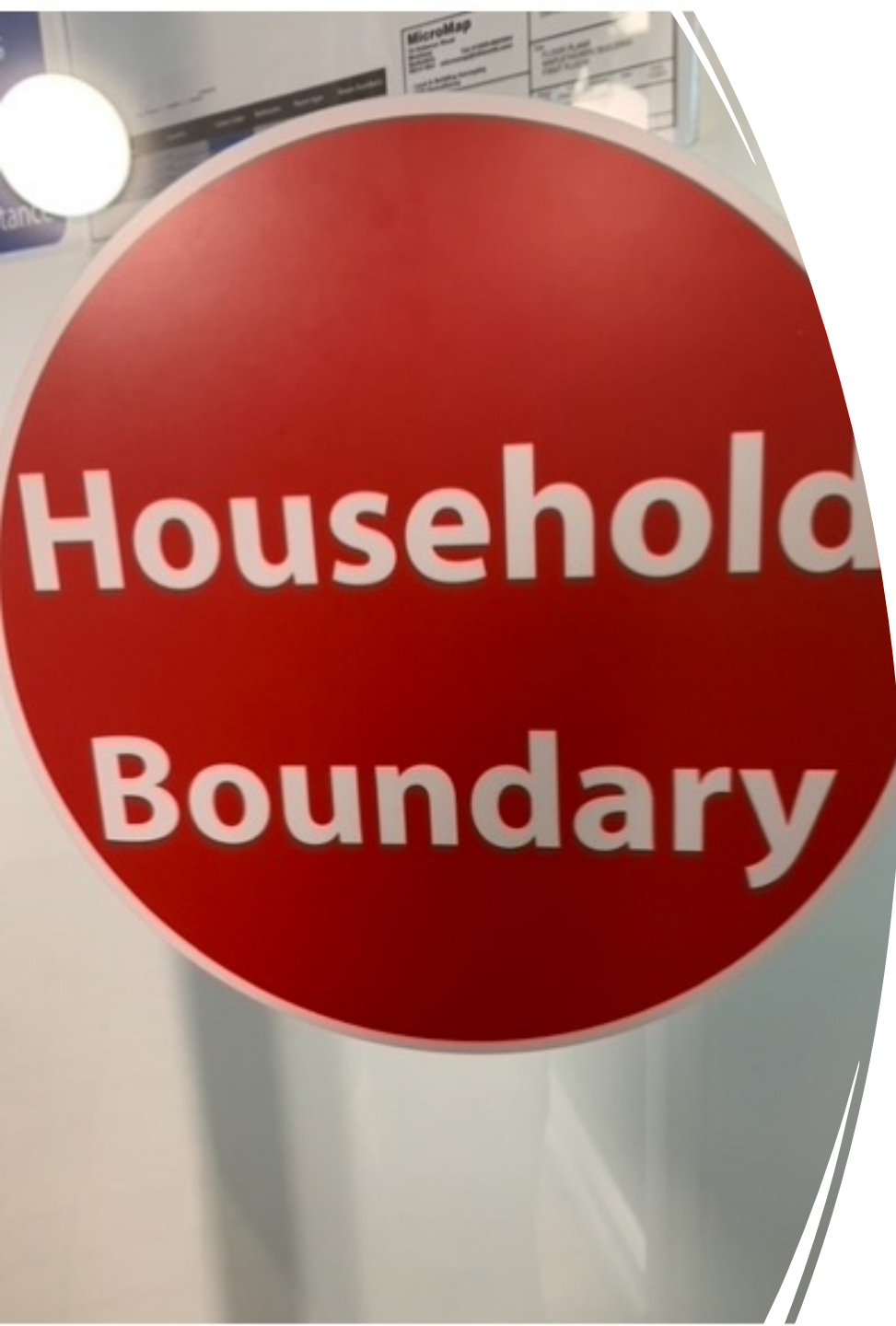
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Problematic of the UNGP

- Alignments
 - Public administrative apparatus and markets institutions
- Coordination
 - States and enterprises
- Transpositions
 - *Value* in economic relations
 - *Duty* in social relations





Household Boundary

And its Expression in Legalities

- Public Law
 - Hard law versus soft Law versus guidance
 - A 1st Pillar problem
- Private Law
 - Contract versus ownership versus compliance
 - A 2nd Pillar problem
- Jurisdiction and its conflicts
 - Subject matter PLUS personal
 - Enforcement of judgments
 - A problem of transnational law

From Problemmatique to Action Pathways

- Consider the aligning structures of the UNGP as a whole
 - General principles
 - “End of the beginning” narratives
- Examine the core structural regulatory framework for the three pillars
 - Regulatory silos
 - Risk cabins
- Consider the interlinkages
 - Structural
 - Regulatory





Crossing the Streams/Fording the River

UNGP 3 Pillar Structure



- ***State duty to protect***
 - Grounded in *public law* and structured within systems of administrative oversight
- ***Corporate responsibility to respect***
 - Grounded in markets and *private law* guided by *international norms* and legal compliance principles;
- ***Remedial pillar***
 - Grounded in the critical role of state based judicial mechanism within a constellation of administrative, legislative or other appropriate mechanisms.

Chapeaus--The UNGP General Principles



- Grounded in recognition of:
 - (a) States' **existing obligations** to **respect, protect and fulfil** human rights and fundamental freedoms;
 - (b) The role of business enterprises as **specialized organs of society** performing specialized functions, required to **comply** with all applicable laws and to respect human rights;
 - (c) The need for rights and obligations to be matched to **appropriate and effective remedies** when breached.
- **Apply to all States and to all business enterprises**, both transnational and others, regardless of their size, sector, location, ownership and structure.
- **Should be understood as a coherent whole** and should be read, individually and collectively, **in terms of their objective** of enhancing standards and practices with regard to business and human rights so as to achieve tangible results for affected individuals and communities, and thereby also contributing to a socially sustainable globalization.
- **Should NOT be read as creating new international law obligations**, or as limiting or undermining any legal obligations a State may have undertaken or be subject to under international law with regard to human rights.
- Should be implemented in **a non-discriminatory manner**,



From Structure to Potential

The Hard Law – Soft Law—Administrative Guidance Divide

• **State Duty Pillar**

- Hard law core
 - (1) Domestic legal orders;(2) incorporated International Treaty obligations
- Soft Law edges
 - (1) International Norms; (2) private law;(3) compliance regimes

• **Corporate Responsibility Pillar**

- Soft law core
 - Framework of indirectly applicable international (treaty) law obligations
- Hard law edges
 - Rulemaking within production chains based on contract or ownership or relationship

• **Remedial Pillar**

- Hybridity under the management of the state
 - (1) State based judicial mechanisms; (2) State based non-judicial mechanisms; (3) Non-state based judicial (and non judicial) mechanisms



Masks of Complexity



Explore
Danza del Diablo; Ciudad de Panamá

- The 2nd Pillar framed around primacy of ***international norms*** WITHIN OPERATIONS
 - *Soft law; hard norms* (the UNGP itself etc.)
 - *Hard law; soft norms* (International Law binding on states)
 - *Law from remedies*: widening the portal to remedial organs for individuals (judge made regulation through deep webs of interconnected decision-making)
- ***Transposition Mechanics***:
 - Primacy argument is not strictly a matter of public law
 - Alignment of (1) compliance regimes, (2) market pressure, and (3) private law
 - The framing is built into the operations of economic collectives that are themselves, in some respects, a ***nexus of contracts and control relationships***.
 - **MARKETS: *International norms: Soft on the outside*** (with respect to states); ***hard on the inside*** of production chain management (with respect to private law)
 - **STATES: *From contract to compliance***: regulation through data and disclosure based disclosure regimes.
 - **INDIVIDUALS**: the rise of human rights and sustainability ***torts***.

PROHIBIDO
BLASFEMIA

Consequences

- Spillover
 - Into the state's 1st Pillar duty
 - Legalization of 2nd Pillar itself
 - Through international legally binding instruments
 - National Law
- Transpositions
 - From HRDD to mHRDD
 - Embedded in ESG



Conversations between the Harder 1st and Softer 2nd Pillar

Duty Versus Responsibility

- Pillar 1--UNGP 1; 2

- “States **must protect** against human rights abuse **within their territory and/or jurisdiction**”
 - WHAT: “requires taking appropriate steps to **prevent, investigate, punish and redress** such abuse
 - HOW: “through effective **policies, legislation, regulations and adjudication**” (UNGP 1)
- **COMPLIANCE**: “States should set out clearly the expectation that all business enterprises domiciled in their territory and/or jurisdiction respect human rights throughout their operations.” (UNGP 2)

- Pillar 2--UNGP 11; 12; 14

- “Business enterprises **should respect** human rights.” (UNGP 11)
 - WHAT: “This means that they should **avoid infringing** on the human rights of others and”
 - HOW: “Should **address adverse human rights impacts with which they are involved.**”
- The responsibility to respect human rights requires that business enterprises (UNGP 12):
 - (a) **Avoid causing or contributing** to adverse human rights impacts through their own activities.
 - (b) Seek to **prevent or mitigate** adverse human rights impacts that are **directly linked** to their operations, products or services by their business relationships, **even if they have not contributed to those impacts.**
- The responsibility of business enterprises to respect human rights **applies to all enterprises regardless of their size, sector, operational context, ownership and structure** (UNGP 14):
 - May affect means through which enterprises meet that responsibility

Hard & Soft Legal Foundations

• Pillar 1—UNGP 3; 4

- States should:
 - (a) **Enforce laws that are aimed at, or have the effect of, requiring business enterprises to respect human rights**, and periodically to assess the adequacy of such laws and address any gaps;
 - * * *
 - (d) **Encourage, and where appropriate require, business enterprises to communicate** how they address their human rights impact (UNGP 3)
- States should take **additional steps** to protect against human rights abuses by business **enterprises that are owned or controlled by the State, or that receive substantial support and services from State agencies** such as export credit agencies and official investment insurance or guarantee agencies, including, where appropriate, by requiring human rights due diligence.

• Pillar 2—UNGP 11

- internationally recognized human rights – understood, at a minimum, as those expressed in the
 - **International Bill of Human Rights** and
 - The **principles concerning fundamental rights** set out in the International Labour Organization's Declaration on Fundamental Principles and Rights at Work

POLICY OPERATIONLIZATION

- PILLAR 1—UNGP 3; 5
 - States should:
 - * * *
 - (b) **Ensure that other laws** and policies governing the creation and ongoing operation of business enterprises, such as corporate law, **do not constrain but enable business respect** for human rights;
 - (c) **Provide effective guidance** to business enterprises on how to respect human rights throughout their operations;
 - (d) **Encourage, and where appropriate require, business enterprises to communicate** how they address their human rights impact (UNGP 3)
 - States should **exercise adequate oversight** in order to meet their **international human rights obligations** when they contract with, or legislate for, business enterprises to provide services that may impact upon the enjoyment of human rights.
- PILLAR 2—UNGP 15
 - Business enterprises should have in place policies and processes appropriate to their size and circumstances, including:
 - a) A **policy commitment** to meet their responsibility to respect human rights;
 - (b) A **human rights due diligence process** to identify, prevent, mitigate and account for how they address their impacts on human rights;
 - (c) Processes to enable the **remediation** of any adverse human rights impacts they cause or to which they contribute

The Soft Law of Policy Coherence

• Pillar 1—UNGP 6; 8; 9

- **PUBLIC LAW**: 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. (UNGP 8)
- **PRIVATE LAW**: States **should promote** respect for human rights by business enterprises with which they conduct commercial transactions. (UNGP 6)
- **INTER-STATE POLICY**: 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. (UNGP 9)

• Pillar 2—UNGP 15; 16

- In order to meet their . . . enterprises should have in place policies and processes . . . , including:
 - (a) A **policy commitment** to meet their responsibility to respect human rights;
 - (b) A human rights **due diligence process** to identify, prevent, mitigate and account for how they address their impacts on human rights;
 - (c) Processes to enable the **remediation** of any adverse human rights impacts they cause or to which they contribute
- As the basis for embedding their responsibility to respect human rights, business enterprises should express their commitment to meet this responsibility through **a statement of policy** that:
 - (a) Is approved at the **most senior level** of the business enterprise;
 - (b) **Is informed by** relevant internal and/or external expertise;
 - (c) Stipulates the enterprise's **human rights expectations** of personnel, business partners and other parties **directly linked to its operations, products or services**;
 - (d) **Is publicly available and communicated internally and externally** to all personnel, business partners and other relevant parties;
 - (e) Is reflected in **operational policies and procedures** necessary to embed it throughout the business enterprise.


The Hard & Soft Law of Diligence

- Pillar 1 UNGP 7; 9; 10 (Heightened Diligence and Compliance)
 - STATE TO STATE: 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. (UNGP 9)
 - STTE BUSINESS NEXUS: States **should promote respect for human rights** by business enterprises with which they conduct commercial transactions. (UNGP 6)

- Pillar 2—UNGP 17-22 (HRDD)
 - In order to **identify (UNGP 18), prevent, mitigate (UNGP 19) and account (UNGP 20)** for how they address their adverse human rights impacts, business enterprises should carry out human rights due diligence. The process should include **assessing actual and potential human rights impacts (UNGP 21)**, integrating and acting upon the findings, tracking responses, and communicating how impacts are addressed. Human rights due diligence:
 - (a) Should cover adverse human rights impacts that the business enterprise **may cause or contribute** to through its own activities, or which may be directly linked to its operations, products or services by its business relationships;
 - (b) **Will vary in complexity** with the size of the business enterprise, the risk of severe human rights impacts, and the nature and context of its operations;
 - (c) **Should be ongoing**, recognizing that the human rights risks may change over time as the business enterprise's operations and operating context evolve

The Law of Soft Interventions in Production

- Pillar 1—UNGP 7; 10
- **RULES BASED MULTILATERALISM** (the “common reference point” principle): 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 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. (UNGP 10)
- **CONFLICT ZONES**: Because the risk of gross human rights abuses is heightened in conflict-affected areas, **States should help ensure that business enterprises operating in those contexts are not involved with such abuses**, including by:
 - (a) **Engaging** at the earliest stage possible with business enterprises to help them identify, prevent and mitigate the human rights-related risks of their activities and business relationships;
 - (b) **Providing adequate assistance** to business enterprises to assess and address the heightened risks of abuses, paying special attention to both gender-based and sexual violence;
 - (c) **Denying access** to public support and services for a business enterprise that is involved with gross human rights abuses and refuses to cooperate in addressing the situation;
 - (d) Ensuring that their **current policies, legislation, regulations and enforcement measures** are **effective in addressing the risk of business involvement in gross human rights abuse**. [UNGP 7 (ESG)]
- Pillar 2—UNGP 23; 24
- **NUDGING AND COMPLIANCE**: 23. In all contexts business enterprises should:
 - (a) **Comply** with all applicable laws and respect internationally recognized human rights, wherever they operate;
 - (b) Seek ways to **honour the principles of internationally recognized human rights when faced with conflicting requirements**;
 - (c) **Treat the risk of causing or contributing to gross human rights abuses as a legal compliance issue** wherever they operate. (UNGP 23)
- **RISK ALLOCATION, PRIORITIZATION; BALANCING**: Where it is necessary to **prioritize actions** to address actual and potential adverse human rights impacts, business enterprises should **first seek to prevent and mitigate those that are most severe or where delayed response would make them irremediable**. (UNGP 24)

A traditional Chinese painting depicting a scene with a blue-skinned deity, a monk, and a child. The blue-skinned deity, likely a guardian deity, is shown in the upper left, wearing a crown and holding a staff. The monk, in the center, is dressed in brown and green robes, holding a staff and a small object. A child is visible in the lower center, holding a bottle. The background features a large, ornate structure, possibly a pavilion or a chariot, with intricate patterns and colors. The overall style is characteristic of traditional Chinese art, with fine lines and a rich color palette.

Soft and Hard
Remedial
Measures

Semi-Firm: Compliance and Remediation

• Pillar 1—UNGP 25, 27

- As part of their duty to protect against business-related human rights abuse, **States must take appropriate steps** to ensure, through **judicial, administrative, legislative or other appropriate means**, that when such abuses occur within their territory and/or jurisdiction those affected have **access to effective remedy**. (UNGP 25)
- States should **provide effective and appropriate non-judicial grievance mechanisms, alongside judicial mechanisms**, as part of a **comprehensive State-based system** for the remedy of business-related human rights abuse. (UNGP 27)

• Pillar 2—UNGP 22, 29

- Where business enterprises **identify that they have caused or contributed** to adverse impacts, they should provide for or cooperate in their remediation through legitimate processes (UNGP 22)
- Business enterprises should establish or participate **in effective operational-level grievance mechanisms** for individuals and communities who may be adversely impacted (UNGP 29)
- Industry, **multi-stakeholder and other collaborative initiatives that are based on respect for human rights-related standards** should ensure that effective grievance mechanisms are available (UNGP 30)

Remedial Variegation

- **Administrative**
 - Protect systemic integrity
 - Compliance and accountability oriented
 - Institutionally focused
 - Punitive: civil fines , criminal etc.
 - Solidarity building: capacity building, guidance etc.
- **Breach Oriented**
 - Compensatory
 - human rights and sustainability torts with individual and measurable effects
 - Post facto
 - Injunctive
 - Ex ante
 - Prevent harmful acts
 - Ties back to compliance and supervision
- UNGP suggests interweaving of both tracks
 - Folds back to Pillars 1-2





Interweaving Hard and Soft Law in the UNGP

What is Going on Here?



- There are no clear divisions:
 - between hard and soft OR
 - between public and private law
 - Between regulatory and admirative (compliance; guidance; accountability) measures
- All 3 pillars are built on interaction between
 - national, international, public and private law,
 - together with administrative guidance and broad discretionary authority to meet objectives
- The UNGP as ***a framework for legal inter-penetration***
 - Vertical (internal and external):
 - Optimality through structural coupling and core functional autonomy
 - Horizontal (internal and external):
 - Encourages polycentric transnational (legal) ordering

UNGP as Aligned Parallel Risk-Reg Structures

- Reading Pillars 1-2-3 as interlinked interpenetrating institutional frameworks
 - Structural coupling among functionally differentiated institutional actors that together constitute the aggregated sum of human social relations
- Due diligence Runs through this
 - Pillar 1
 - Macro regulation; coordination; and guidance function within territories
 - Supra coordination through international institutions and private actors
 - Pillar 2
 - Micro regulation; coordination; and guidance function within the territories of global production
 - Supra coordination through transnational alignments with NGOs, IOs, and states
 - Pillar 3
 - State coordinated systems of interlocking remedial mechanisms (judicial, administrative, data-based accountability)



The Challenges



- Narrow view of the “legal”
 - Regulation: soft and hard
 - Non-regulatory measures: (1) administrative discretionary guidance subject to regulatory objectives; (2) markets guidance based on consumption
 - The new frontier: automated and machine based nudging regulation
- Silo approaches to regulation-management
- Zero Sum-ism
 - Oppositions
 - between state and market
 - between national and international
 - Between the territories of production and of politics
 - The problem of profit
 - The fear of valuation and tensions between tort and administrative approaches to remedies
- The risks
 - Return to the governance gaps pre-2011
 - The rise of the state and regulatory fracture (commodification of law in production)
 - The development of zones beyond regulatory reach
 - Coherence issues

The Governing Framing Ideology

- **Prevent-Mitigate-Remedy**

- Transposing public administrative culture sensibilities or embedding accountability and avoiding free riding
 - Governing risk and value in business decision making (administrative and process-centered)
 - endogenous
 - Imposing conduct rules and interdictions (traditional norms and command-prosecution-centered)
 - exogenous.

- **Central Contradiction between**

- Markets based bottom-up decisions and centrally planned or guided top down choices;
 - Issue of line drawing
- The ideology and construction of profit (public and private) as the foundational rationalizing premise
- Centralizing or privatizing standards and standard setting functions.
 - **State based public versus private and 3rd party**
 - **Tolerance of markets for private standards**
 - Eg NGO and for profit institutions
 - **Or markets for national public standards**
 - Eg German mHRDD



Questions/Discussion



Thanks!

