

Chapter Four: Respecting Human Rights Throughout the Business Relationship Cycle

Selecting and Starting the Relationship

Setting expectations and communicating them to business partners

Corporate values and business principles are the foundation of efforts to integrate human rights in business relationships.

One of the most consistent messages to emerge from the research is that corporate values strongly shape the selection and content of business relationships, especially ones that are strategic and commercially significant. When companies adopt human rights values, a key step is the development of a human rights policy statement, as recommended in the Guiding Principles. Unsurprisingly, company policies and codes of conduct that reference international human rights standards were the most common tool that companies used to communicate their expectations to business partners. Companies rarely ask business partners to adhere to international standards without making reference to their own policies. Respondents recognised that one of the key challenges for companies is to “translate” their corporate values into language that shows how they can be applied in business relationships.

A second clear message is that companies are increasingly working with their business partners to consolidate their value chains and build long-term value for all parties. This is especially true of their relations with large and important partners. This creates an opportunity to share values. Embedding human rights in this process is one way to communicate expectations and integrate human rights in business relationships. At the same time, nearly all businesses highlighted the difficulties of working with partners whose capacity, resources, or understanding of the operational and legal implications of those values is limited. Several noted that more “mature” values, like safety and quality, have been successfully established by a variety of means (training, broader capacity building, incentives), demonstrating that it is possible to change partners’ approaches and ultimately influence their values.

While their codes of conduct for suppliers commonly make explicit reference to human rights, only a few of the companies surveyed have explicit statements on human rights expectations with regard to other types of business relationships.

Some companies apply specific policies or codes in particular business relationships. In most cases, these concern supply chains, and include codes of conduct for suppliers. Others do not have separate codes of conduct but expect business partners to respect their business principles and apply the company’s policies or their equivalent, thereby applying to partners standards which the company applies to its own operations. A few companies specifically extend their corporate policies to joint ventures; in most instances, these companies distinguish between majority- and minority-owned joint ventures and apply corporate policies more strictly to the former. In the case of mergers and acquisitions, the research suggested that companies that become the majority owner normally expect acquisitions to adopt their core principles and policies, setting transition periods and deadlines to ensure alignment and compliance.

Companies tend to focus on particular human rights that are relevant to their industry or business relationships. They are starting to adopt a wider perspective on human rights and business risks.

Usually starting with a desk-based assessment of risk, companies tend to focus initially on selected rights that they consider to be especially relevant to their operations and relationships. Policies that explicitly target business relationships, such as supplier codes of conduct, reflect this pragmatic approach: they tend to establish standards of conduct with regard to particular rights that are deemed most relevant to the relationship. Though codes are often based on broader international human rights standards, their operational language implicitly focuses on specific rights. For instance, supplier codes of conduct commonly refer to the eight core ILO conventions (such as those relating to forced and child labour). They often adopt ILO definitions and requirements on specific rights (though not always fully) and make reference (not necessarily consistently) to underlying ILO or other human rights standards. Some companies include a wider range of human rights in their business partner codes – community issues, for example, or equal rights protection for lesbian, gay, bisexual and transgender individuals. Several companies noted that they adopt highly general language and principles to avoid having to revise company and supplier codes at very frequent intervals or whenever new issues arise, which would require repeatedly securing the support and consent of senior managers.

At the same time, the research highlighted that business relationships and associated human rights issues are highly dynamic, often requiring companies to respond with flexibility and look outside the formal terms of their codes or policies. Companies are addressing this problem operationally and procedurally rather than by reforming their codes, again because they do not wish to regularly revise their standards. Companies warned that it was important to avoid a “box ticking” approach to risk-management, because it is likely to overlook local contextual factors (some of which may be influenced by the conduct of business partners) or external factors (regional or country issues), and this may expose companies to the accusation that they pick and choose rights they find it convenient to respect.

All Versus Some Human Rights: Finding the Balance

A key message of the Guiding Principles is that businesses can have an impact on a wide range of human rights.⁵⁶ Rather than defining that set of rights, the Guiding Principles take a practical approach: they suggest that businesses should carry out human rights due diligence, focusing on those rights that are most relevant to their particular context, operations, and partners, and prioritising action with respect to impacts that are likely to have the most severe effects.⁵⁷ This means that businesses can concentrate first on the rights that are most relevant (to their context, sector, operations and relationships) while working out an appropriate timeframe and

56 Guiding Principle 12.

57 Guiding Principle 17.

approach to other relevant but less severe impacts. Recognising that human rights situations are dynamic, the Guiding Principles call for a correspondingly dynamic system of regular assessment.⁵⁸

Companies are balancing the need to focus on all human rights, with the need to be specific and focused in different ways:

- **Codes of conduct and policy.** Some companies make a broad commitment to the International Bill of Rights while others focus on a narrower and more specific set of rights.
- **Assessments.** The practice of some companies is to take a broad approach to assessment, shaped by circumstances on the ground. Other companies audit against a specific code of conduct as part of their due diligence.
- **Contracts.** Some companies insert specific provisions on human rights in their contracts, while others use much broader language. Some companies require compliance with a specific policy or code, while others focus on procedures (regular assessments, or management systems) to oversee human rights.

Because not all business partners understand or value the language and content of human rights, companies adopt a variety of communication strategies to discuss human rights with their business partners.

Respondents identified various strategies that companies employ to start conversations on the subject of human rights with business partners. Companies:

- **Use company policies to open the door.** Companies highlight human rights references in their policies. This is an effective approach if companies have incorporated human rights in their policies, but cannot be a leverage point for companies that have not.
- **Highlight the business opportunity.** Companies present human rights as a positive business opportunity that helps to retain and increase business.
- **Take a Trojan Horse approach.** Companies initially raise less controversial sustainability issues with business partners, such as environmental protection or health and safety, before introducing social sustainability and eventually human rights.
- **Identify shared interest in a well-functioning business environment.** Companies note key problems in the business environment that companies should work together to eliminate or reform, because they cause operational delays or have other financial impacts, or generate risks (of legal non-compliance or reputational harm, for example). Several respondents said this tactic has been effective on corruption issues, because business partners do not want to imply that they do not care about corruption. This might be an effective approach to human rights abuses that are widely condemned, such as child or forced labour.

- **Emphasise leadership.** Companies make the argument that, if the business partner wants to be seen as a leader in its sector or country, it should pursue a sustainable approach that includes respect for human rights.
- **Demonstrate their own commitment.** A company leads by example, showing that it asks partners to do no more than it expects of itself.
- **Reference Multistakeholder Initiatives (MSI) or third party standards like the Equator Principles.** This approach provides effective leverage over business partners that are committed to, or are required to comply with, third party standards.
- **Build creatively on culturally relevant concerns.** One respondent used concerns about and the need to prevent potential protests as a reason for providing longer-term consultation and better resettlement in line with human rights.
- **Turn human rights from a “red” to a “green” flag.** Companies explain to business partners that giving attention to human rights can tap into employees’ values about how they want the company to behave; the effect is to transform human rights into a positive opportunity rather than a signal of problems in operations.

Almost all the companies noted that, in discussions with business partners, it is important to communicate clearly and establish expectations of the relationship early on. This avoids surprises later, improves the capacity of both sides to address the issues, and gives the parties time to work on problems as their relationship is formalised and becomes operational.

An increasing number of actors influence company expectations, including customers, business partners, multistakeholder initiatives, investors and governments.

Many of the companies noted that they are questioned more often about their human rights approach when they meet business partners and customers. Where companies have competing policies or codes, it can lead to a “battle of standards” in which companies compete to refer to their code in contracts. Some companies regularly benchmark their standards against peers to avoid this. These trends remind management that a company is increasingly required by its own customers to show that human rights issues are important to it.

Companies involved in the project recognised that legislation may help to set standards within a country, but law is not likely to begin replacing individual codes or contracts unless it is enforced robustly by government. Local content requirements can play a significant role in determining who a business must choose as a business partner. Local content rules requiring compliance with national human rights legislation can provide incentives for compliance by local business partners they might otherwise not have had.

Multistakeholder Initiatives (MSIs) and Business Relationships

The number and range of MSIs that address human rights continue to expand, signalling that collective approaches can help solve some of the broader societal challenges that companies face when they seek to address human rights in the context of their business relationships. MSIs serve a number of functions. They:

- **Set expectations.** This is increasingly true for businesses working in certain sectors (the Roundtable on Sustainable Palm Oil, the Kimberley Process) or contexts (Voluntary Principles on Security and Human Rights), or on specific issues (the Extractive Industries Transparency Initiative).
- **Build practice on due diligence.** MSIs enable companies to pool their experience of dealing with human rights challenges in specific sectors and particular relationships. This learning can help clarify the concept and practice of due diligence, create benchmarks, etc.
- **Influence the content of contracts.** Whether or not compliance with MSI requirements is mandatory for those who join them, companies are adopting MSI requirements in some of their contracts with companies involved in the same MSI and with business partners. MSIs are helping companies to resolve some of the challenges that arise when they allocate operational responsibilities across business relationships, and define the (human rights) duties of their business partners.
- **Remediation.** The next challenge is to think more deeply, in the context of the UN PRR Framework, about what MSIs can do to improve access to remedies. Can they develop models? What processes for doing so are appropriate? Some MSIs have already started down this path.

Understanding the issues – Assessing human rights impacts in business relationships

Few companies have internalised or operationalised the idea that they should consider all human rights, rather than a selected number, in their human rights assessments.

The research indicated that, when assessing prospective business relationships, companies take a range of approaches to internationally recognised human rights.

- Some systematically and methodically examine and discuss the relevance of each right to their business and their business partners.
- Some consider only those human rights that are typically relevant to their business sector.
- Some compile and consider a checklist of relevant issues.
- Some select a sub-set of rights, on the grounds that it is too hard, too confusing or simply impractical to consider all human rights.

All companies participating in the research agreed that companies are on a learning curve that may gradually lead them to address a broader range of rights, through sharing best practice, participating in multistakeholder initiatives or peer industry associations, attending learning events, and sometimes by “getting their fingers burned” as one respondent noted.

Respondents identified three areas where methods for assessing business relationships, in context, are likely to evolve.

- More detailed assessments of and for business partners who operate from or in higher risk countries or sectors.
- More detailed requirements around human rights being developed to screen business partners – such as pre-qualification criteria in procurement, and self-assessment criteria.
- Additional requirements in contracts, for example, that might require business partners to conduct periodic assessments themselves.

Transactional Due Diligence and Human Rights Due Diligence

Human rights due diligence shares many core functions with transactional due diligence. They both:

- Enable partners to identify red flags early.
- Highlight issues that partners need to address (prevent or manage).
- Identify opportunities for partners to improve performance.
- Help to establish the cost of relevant preventive and mitigation actions.

Transactional Due Diligence	Human Rights Due Diligence
✓ Timing. At the start of a relationship.	✓ Timing. Throughout the relationship.
✓ Scope. Investigation of potential risks to the business from the relationship.	✓ Scope. Investigation of potential risks to people from the relationship.
✓ Scale. Depends on the potential risk to the business.	✓ Scale. Depends on the risk and severity of potential or actual human rights impacts on people.
✓ Response. Often stops at the point of identifying corrective action.	✓ Response. Includes management of the potential and actual impacts identified. Management in turn includes: the response; its integration in company operations; tracking and communicating results.

Company checks on business partners touch on human rights, but rarely do so explicitly.

Almost all the respondents make inquiries of various kinds into prospective partners' past and present performance with respect to certain social issues. These routinely cover corruption and may cover human rights, but rarely examine human rights separately. Instead, companies tend to integrate human rights inside other inquiries into EHS, criminal history and legal compliance, and searches for pending or threatened litigation on labour, health and safety or discrimination issues. The Guiding Principles make clear that a company is responsible for its involvement with adverse human rights impacts that are generated by operations, products or services associated with its business relationships; it is not responsible for its business partners or for actions they take that have no link to the company. At the same time, it is clear that a business partner's track record is an important indicator of a partner's commitment and capacity to address human rights issues.

Several respondents noted that they might use the internet to check a business partner's record on specific human rights issues. Most would use the Business and Human Rights Resource Centre's web site⁵⁹ to do so, but respondents generally felt that more sources should provide relevant and reliable human rights information about companies. Some commercial sources of related information were cited but these were too limited in many markets and not always accurate, requiring companies to turn to bespoke research or third party commercial providers. Even less information is publicly available on smaller companies, especially from developing countries that lack a well-functioning press. Respondents felt this problem reflected the state of social research, which is still not fully accessible or understandable to non-specialist researchers; and human rights are even less so. The nature of social issues and human rights issues make many traditional forms of quantitative risk assessment unrealistic; but engineers, scientists, finance analysts and business managers may not be comfortable if they are invited to assess social and human rights impacts on the basis of information derived using inherently qualitative methodologies.

On the other hand, firms from developed countries that operate in countries with well-developed economies and legal systems have well-established arrangements for assessing the record of business partners and significant customers on bribery, corruption and money laundering. Many companies apply detailed Know Your Customer (KYC) assessments to assess business partners, benchmarking them against international law (on corruption and sanctions) and national criminal and labour law. Some are beginning to tweak their KYC and supplier assessments to cover certain human rights issues. The benefit of using these systems is that they are likely to be well integrated and accepted within the company.

59 <http://www.business-humanrights.org>.

Companies generally assess the human rights impacts of operations, products or services with which they are involved through their business relationships, and the track record of business partners.

Some companies indicated that they clearly understood it was necessary to look at the potential outcome of business relationships: at the impacts of operations, products, or services associated with a business relationship; at their actual or potential effect on human rights; and at the company's link to those impacts and effects. The clearest example came from extractive companies. They typically conduct environmental and social impact assessments, which may cover certain human rights impacts of their larger operations. Many of these are undertaken with business partners.

Country assessments of human rights risk are frequent in only a few kinds of business relationships (suppliers, customers, joint ventures). Large transactions tend to receive more attention.

Several respondents assess the risks of doing business with partners based or operating in certain countries; they mainly assess larger projects and more significant partners. As the Guiding Principles recognise, context is important. Some of the companies consulted operate in many countries or regions and have acquired in-house expertise on country risk. Many seem to use other sources of analysis relevant to human rights to help them build a picture of potential human rights concerns (political economy studies and indexes on security, political risk and corruption).

Companies described a wide variety of responses to countries that are considered challenging because of their governments' attitudes to human rights, or because of conflict or post-conflict concerns. Some companies require a potential target company to end their operations in countries of concern before the acquisition is completed. Others are prepared to do business in challenging environments if they feel they can make a positive impact in association with local business partners.

Companies undertake a range of actions to prevent and mitigate human rights impacts that are associated with their business relationships.

Companies use different techniques to prevent their business relationships from giving rise to human rights abuses. They:

- Screen out problematic partners or operations before they enter any relationship.
- Pre-qualify suppliers on company criteria, to ensure that those who obviously do not or will not meet company standards are not contracted.
- Require partners to divest from problematic operations before they are acquired or become a joint venture partner.

Certain types of relationship (for example, those with security forces) involve higher risk, and these are often processed specifically, via integrated screening programmes, contractual provisions, monitoring, and reporting. Certain human rights issues (child labour, often forced labour) are considered "no go" areas. They are screened out directly, or dealt with by imposing immediate corrective action or introducing specific material breach clauses in relevant contracts.

Many companies said that assessment processes should identify specific mitigation steps that will bring a business partner's operations up to standard, or address the concerns identified. In many cases, these mitigation steps could be incorporated in an action plan. While such an approach is consistent with a strategy that seeks to address human rights by building upon and leveraging internal systems, in many cases the responsibility for following up on human rights mitigation steps is spread across different departments and several action plans, and without a specific person being assigned responsibility for follow up. Added together, these limitations mean that companies sometimes assess and respond to some but not all of the human rights impacts that are linked to their business relationships.

How often and under what circumstances companies involve outside stakeholders to assess the human rights impacts of their business relationships varies by industry and type of relationship.

Companies that manage and develop projects with a large physical footprint, like those working in the extractive sector, generally apply a developed methodology on environmental and social impact assessments that are usually interactive and consultative. Apart from these processes, it is unclear when and how businesses involve external stakeholders in their assessments of business relationships (even the more significant ones). Some respondents stated clearly that consultation on human rights issues is a responsibility of the local business partner. Others may involve country experts in their reviews. But none (with the exception noted above) said that they made use of specific procedures to consult local stakeholders about their business relationships or to take stakeholders' views into account when they assessed the impact of their business relationships on human rights.

Involving a Range of Stakeholders and Experts

Companies may involve a range of stakeholders in their human rights due diligence processes.

- **Commercial and contracted services.** A number of companies use commercial or contracted services in their human rights due diligence, usually to help them assess country risk.
- **Advisors: lawyers, consultancies, accountants.** A number of law firms are developing expertise in human rights law and practice in order to improve their advice to clients on these issues. With a burgeoning business and human rights services/consultancy market ranging from specialised consultancies to large accounting firms, companies have access to other experts as well to assist them in their due diligence.
- **National Human Rights Institutions (NHRIs).** Many NHRIs focus increasingly on business and human rights issues, and some are able to handle public complaints about business activities. The International Coordinating Committee

of NHRIs adopted The Edinburgh Declaration in 2011, which provides NHRIs with specific guidance on business and human rights issues.⁶⁰

- **Civil society.** Businesses interact with civil society on many levels: from one-off consultations to long-term association; through bilateral relationships and multilateral collaboration (in MSIs, for example); on a spectrum from cooperation to confrontation; on projects, themes and broader societal issues (such as economic policy). Some Non-Governmental Organisations (NGOs) now have considerable experience in this field (on working conditions in supply chains, for example), while at the same time a much wider range of NGOs is now engaging on business issues and highlighting the impacts of business on human rights.⁶¹
- **Governments and embassies.** A number of governments are increasingly equipping themselves with policies and staff to deal with business and human rights issues. The European Union has invited its 27 member states to develop specific national action plans on business and human rights. Some governments provide specific training to enable their embassies to deal with company requests to intervene on their behalf with host governments.
- **UN expertise.** The UN Working Group on Business and Human Rights is composed of five independent experts appointed to promote the effective and comprehensive dissemination and implementation of the Guiding Principles.

Several UN Special Rapporteurs (SRs) on human rights are beginning to incorporate and build on the Guiding Principles, exploring their implications and providing guidance on their application to their mandates.

- The **SR on the human right to safe drinking water and sanitation** released a report on private sector participation in water and sanitation provisions, and continues to consider the role of businesses.⁶²
- The **SR on the Right to Food** produced a set of guiding principles on human rights impact assessments of trade and investment agreements, and actively reviews the impact of agribusinesses and large-scale acquisitions of land.⁶³
- The **SR on Indigenous Peoples** produced a report focusing on the extractive industries and is considering developing further guidance.⁶⁴
- The **SR on the promotion and protection of the right to freedom of expression and opinion** released a report that examined key trends and challenges with respect to the internet, including private sector impact.⁶⁵

60 At: http://www.ohchr.org/Documents/AboutUs/NHRI/Edinburgh_Declaration_en.pdf.

61 At: <http://www.business-humanrights.org/>.

62 At: <http://www.ohchr.org/EN/Issues/WaterAndSanitation/SRWater/Pages/PrivateSector.aspx>.

63 At: <http://www.srfood.org/>.

64 At: http://www.ohchr.org/Documents/Issues/IPeoples/EMRIP/Session5/A-HRC-EMRIP-2012-2_en.pdf.

65 At: http://www2.ohchr.org/english/bodies/hrcouncil/docs/17session/A.HRC.17.27_en.pdf.

There is an emerging practice of calculating the costs and benefits of addressing human rights in business relationships.

Different approaches to costing human rights risks emerged in the research. Some companies:

- Identify the cost of bringing business partners up to company standards.
- Calculate the cost of delays and other negative effects of human rights problems associated with a business partner.
- Cost only those human rights issues that could lead to legal liability. Some respondents felt that costing based on reputational risk is too ambiguous.
- Doubt the ability to cost the risk of involvement in human rights problems when many business partners are still developing an understanding of human rights.
- Push back on costing human rights because they are values, and non-negotiable.

Some respondents said their companies are starting to quantify the longer-term benefit of preventing human rights abuses, and applying those benefits internally to justify cost outlays. In one case involving a large infrastructure project employing many migrant workers, the company required all contractors to provide housing to a certain standard and specified working conditions. This increased its costs, but these were recouped by measurable falls in illnesses and accidents and increased output. Other respondents noted a trend in procurement practices: companies are figuring out how they can incentivise the company's human rights requirements in their procurement processes. The result is that price is no longer the only driver (though it often remains the primary one). When it assesses suppliers, for example, one company weights the risk of child labour separately from price.

Human rights issues are rarely deal breakers in business relationships. However, several respondents noted that corruption as well as health and safety issues can be deal breakers in a variety of different relationships.

Formalising the Relationship

Despite the challenges, companies increasingly see advantages in including human rights concepts and language (in some form) in contracts with business partners.

Respondents noted that the insertion of references to human rights in contracts generates several operational challenges. For example, human rights may be seen as "too imprecise to withstand the scrutiny of lawyers". Discussion revealed that more work needs to be done to connect the content of human rights to business operations, because both the business and the human rights communities hold misconceptions about how businesses can have an impact on particular rights. A number of companies have done or are now doing research in this area (in some cases with the Danish Institute for Human Rights). Others have not yet started the journey.

Respondents identified several benefits from including human rights in contracts with business partners. Doing so:

- Clarifies the expectations of business partners and the company.
- Gives policy commitments teeth, reducing the risk that policies become a communications exercise.
- Provides companies with leverage for managing human rights issues if they arise. Contract provisions are less about termination and more about being able to require action “if something goes wrong”.
- Provides a legal basis for termination on human rights grounds, recognising that it may be impossible to terminate a business association on such grounds in the absence of a contractual provision that foresees this possibility.
- Creates incentives for business partners to address human rights.
- Identifies processes for prevention, mitigation, response and remediation.
- Makes it possible to address explicit complicity concerns.
- Makes clear that the business partner is expected to share responsibility for human rights issues that arise, and any liability associated with them.

“Well-known” human rights concerns (notably forced and child labour, and security issues) are often referenced in contracts, directly or via references to company policies or codes of conduct.

Work on the right to life illustrates that an international human rights standard can be “translated” into contractual terms (see box below). This approach is an example of treating potential gross human rights abuses as an issue of legal compliance, including through contractual provisions.

Translating Human Rights into Contracts

The **Voluntary Principles on Security and Human Rights (VPs)** were developed by an MSI that involved selected governments, businesses and civil society organisations. The MSI aimed to provide companies with guidance in maintaining the safety and security of their operations while ensuring respect for human rights and fundamental freedoms. Several aspects of the VPs process are of interest to other types of business relationship, even in the absence of a formal MSI.

- It brought the private sector, civil society, and governments together around the table to address a particularly challenging business relationship (working with security forces).
- It developed tools that help companies to apply relevant principles.⁶⁶

66 At: http://www.voluntaryprinciples.org/files/VPs_IJT_Final_13-09-11.pdf.

- It highlighted the importance of clarifying what is expected of security providers, by Memorandum of Understanding (MOU) or contract.
- It demonstrated that at least some human rights (the right to life, freedom from torture, freedom from arbitrary detention) can be translated into specific documented steps, (including requirements around monitoring performance), which can be included as contractual provisions.

How the Right to Life is Incorporated into a Contract

The VPs set out several performance standards for private security contractors that can be imported into contracts. They include:

- **Use of lethal weapons.** Prohibited as a rule; their use requires justification complemented by a detailed listing of the types of weapon permitted, rules on the use of force, training requirements, and notification of incidents.
- **Incident reporting.** Sets out the procedure a contractor must follow to report to the authorities and to the company.
- **References to international law enforcement principles.** These include the VPs, but also the UN Code of Conduct for Law Enforcement Officials.
- **Compliance certification.** Shows that contractor employees have been trained.
- **Specification of standards of training and supervision.**
- **Violations.** Provides the right to remove security personnel from a project if they are responsible for violating rights or procedures established for the protection of human rights.

When human rights are included in contracts, companies use different reference points and different legal techniques.

Respondents reported that references to human rights in contracts include:

- General references to internationally recognised human rights standards such as the Universal Declaration of Human Rights (UDHR).
- References to specific human rights, such as labour rights.
- References to their own policies or codes of conduct, which in turn reference international human rights standards.
- References to substitute terms, such as health and safety or social performance.
- Process requirements that require integration of human rights in the business partner's management system.
- References to MSI or lenders' requirements that relate to performance, monitoring, reporting or other considerations relevant to the business relationship.

The companies consulted use various contracting techniques to address human rights issues in business relationships. They:

- Structure options to ensure that business partners give attention to key issues in the business relationship (see in particular Chapter 5: Joint Ventures). They might assign responsibility for human rights oversight to operational or management committees, establish internal reporting requirements, or give human rights management responsibility to a designated joint venture partner.
- Establish covenants requiring compliance with the outcomes of assessment processes. These might require business partners to comply with action plans on prevention, mitigation, monitoring and reporting measures that result from an environmental and social impact assessment or human rights assessment or on-going compliance audits.
- Impose reporting requirements for major security and human rights incidents.
- Provide contractual incentives for good human rights performance.
- Insert representations and warranties on human rights issues. These might require business partners to demonstrate that they comply with national labour laws, and have no past or current legal claims against them with regard to human rights issues.
- Impose closing conditions that require specific information on areas of human rights risk, or actions on unresolved human rights issues, before closing occurs.
- Impose differentiated contract clauses, according to the identified risk the business partner or business relationship poses. Where the risk is considered higher, the contract obligations are more detailed.
- Breach of contract clauses for human rights abuses. These define specific human rights abuses as material breaches; the most common are child labour and forced labour.

Companies are using various techniques inside and outside contracts to make human rights more specific.

Respondents had different views on the degree to which references to human rights in contracts should be specific. It was emphasised that texts need to be specific enough to provide business partners with guidance, and clear enough to be legally enforceable, but flexible enough to deal with unforeseen human rights issues. Flexibility may be especially important in longer-term contracts and relationships that may last for long periods, but there are risks in using very general language that does not provide specific guidance to the parties. One way to achieve specificity is to refer to more explicit laws or principles known to and accepted by both partners; another is to provide detail in other documents relevant to managing the relationship, such as operational procedures.

Some companies and some industries include human rights in the operating procedures relevant to the business partnership, rather than or in addition to the contract. Standards and guidance on how to meet human rights standards can be more detailed and precise

at this level. Nevertheless, if they do not use understandable and implementable language, such texts may not be “owned” by the business partner’s operating units. According to several respondents, operational targets, accompanied by measurement and reporting that are built into binding operational procedures, can provide feedback on business partners’ performance. Such an approach also gives business partners something precise to benchmark themselves against and an incentive to demonstrate they are performing well.

Seeking “ways to honour the principles of internationally recognised human rights”⁶⁷ when faced with conflicting national requirements are rarely dealt with in contracting.

While several respondents insert international corruption and environment requirements in their contracts, or apply their own global standards on environment or marketing that might go further than national law, only one company interviewed requires its business partners to comply with the eight core ILO standards when faced with inadequate national law. Though precedents are in place in other areas of law, few companies yet address human rights issues in their contracts when national law is inadequate. The Guiding Principles call on companies to seek ways to honour the principles of internationally recognised human rights when faced with conflicting national requirements. However, contracts are not the only instrument available, and companies may be working with business partners in other ways to address gaps in national law or conflicts between national law and international human rights law. What is important is that such problems are understood and proactively managed. Global Framework Agreements with trade unions are an example of how this Guiding Principle may play out in practice (see Chapter 11: Conclusion and Ten Themes for the Next Five Years).

Companies are creating leverage with business partners to address human rights issues but it is often not through the contract alone that they create meaningful commitment to change.

Companies need to be creative when they establish incentives for good human rights performance. Contracts provide a formal incentive to address human rights issues, but several respondents noted that contracts are not the only tool and by themselves are often insufficient. Business partners often need additional incentives to “do the right thing”, because ignoring or violating contractual provisions can be an attractive option for partners who seek a quick profit, particularly in markets with poor local enforcement of laws. Companies will therefore often need to do more than refer to human rights in contracts: it may be necessary to include specific incentives and disincentives, perhaps combined with capacity building, that make compliance possible and non-compliance costly.

67 Guiding Principle 23.

Creating Leverage to Address Human Rights Issues

The Guiding Principles can assist companies in establishing and making use of leverage in their business relationships as part of meeting their responsibility to respect human rights. Under the Guiding Principles, the responsibility to respect is determined by a company's impacts, not by its leverage. Leverage can be an important consideration when discharging responsibility but does not determine it. If a company lacks sufficient leverage to persuade its business partners to reform when they are responsible for harmful human rights impacts, the answer is that leverage must be increased or other choices made about the relationships, not that responsibility is diminished.⁶⁸ Examples of creating leverage include:

In the market

- Use leadership or dominant market position to impose requirements.
- Consolidate relationships to increase leverage with a reduced number of business partners.
- Exclude certain types of companies from business relationships.
- Rely on requirements that banks and investors impose on business partners as conditions of access to finance.

In the contract

- Insist that company policies are respected.
- Structure the terms of relationships to ensure that partners give specific attention to human rights issues.
- Create contractual incentives and disincentives for good human rights performance.
- Use standard form contracts that contain human rights requirements.

With other partners

- Develop Multistakeholder Initiatives to address human rights challenges.
- Participate in industry initiatives that address human rights issues.

With governments

- Work with government to create business opportunities to respect human rights (for example, the ILO Better Work Initiative).
- Support legislation that requires business partners to respect human rights.

Companies are using contractual provisions to address human rights issues in the value chain beyond their immediate business partner.

In practice, some companies are applying their policies and procedures beyond their direct business partners and first tier suppliers or contractors. Several contractually require their suppliers and contractors to include the company's policies and procedures in their own sub-contracts, thereby cascading these further down the supply chain. Another company extends its contractual requirements on human rights to all companies that are in a group with its clients. Other companies impose certain requirements – on health and safety for example, or on any party that enters one of its work sites (whether or not there is a contractual relationship). Finally, several companies noted the work being done in the OECD and elsewhere to address key human rights problems associated with long supply chains.⁶⁹

Standard Form Contracts

Many companies use industry-specific standard form contracts as a starting basis for contracting with business partners. These standard form agreements offer an obvious opportunity to address human rights issues across a whole sector, provided governing bodies can be persuaded that human rights are a material issue for the industry. Examples include:

- **International Federation of Consulting Engineers (FIDIC).** Its standard form for contracting with Multilateral Development Banks includes clauses on compliance with labour rights and other human rights.⁷⁰
- **International Bar Association (IBA) Model Mining Development Agreement Project.**⁷¹ This contract draws from 50 mine development agreements, and provides representative language for each contract provision, supplemented with example clauses from existing agreements. Its headings include human rights provisions and examples on: Social Acceptability; Social Impact Assessment and Action Plans; the Parties Commitment to Protecting Human Rights; Fair and Economical Project Operation; and security and human rights.

69 At: http://www.oecd.org/document/36/0,3746,en_2649_33765_44307940_1_1_1_1,00.html.

70 Conditions of Contract for Construction For Building And Engineering Works Designed By The Employer, Multilateral Development Bank Harmonised Edition, June 2010, General Conditions.

71 At: <http://www.mmdaproject.org/>.

Managing the Relationship

Building the capacity of business partners to manage human rights issues can be an important mitigation strategy.

A number of companies highlighted their capacity building programmes for important suppliers, service providers, franchisees and Small and Medium-sized Enterprises (SMEs). A number of factors determine which business partners may benefit from capacity building: it is a crucial relationship for the company, local content rules that require local partnerships with companies who may not yet meet the company's standards, partners that use the company's brand, and in some cases, a broader interest in building capacity in local and regional markets because of the company's long term interest in the market. Companies benefit from building the capacity of business partners to address issues relating to the environment, health and safety and human rights because it reduces risks. Business partners benefit because they get access to potential new partners with similar requirements.

For certain business relationships, companies have systems in place to track performance against company codes or contractual requirements.

The most commonly used model for tracking the performance of supply chain partners against specified codes of conduct was developed 20 years ago.⁷² Broadly speaking, it has evolved but has not changed dramatically, and companies involved in the research, like many others, use a fairly standardised approach to monitoring suppliers. For more significant suppliers, franchisees, and in some cases customers, companies often use a combination of self-assessment and reporting, company monitoring, and third party verification to monitor compliance. Almost all monitor against a company or industry code of conduct, rather than a particular human rights standard. Failures of compliance are drawn together in a corrective action plan tied to contractual provisions that require the company concerned to implement it, usually escalating to potential termination if suppliers or other business partners do not follow up on corrective actions.

Companies appreciate that dynamic situations require dynamic and regular assessment and tracking, but this is not always widely embedded in actual practice.

Some business relationships described in the research are structured around management systems that require a regular review of the operating environment as well as company performance against management system requirements, such as JVs. These periodic scans provide opportunities and tools for assessing human rights issues as well. Other companies regularly update risk profiles for their business partners and projects. If a company is not in a position to prompt its business partners to update their assessments, it may be in its own interest to do so; and again, human rights risks can be included in such exercises.

72 Ergon Associates, Background Paper for the World Development Report 2013, "Private Sector Voluntary Initiatives on Labour Standards," (2012), At: http://siteresources.worldbank.org/EXTNWDR2013/Resources/8258024-1320950747192/8260293-1320956712276/8261091-1348683883703/WDR2013_bp_Private_Sector_Voluntary_Initiatives.pdf.

Respondents identified different ways in which their companies ensure that regular assessments and tracking or monitoring of their business relationships can evolve based on the changing context:

- **Regular overview of trends.** As part of their regular monitoring, companies periodically take a broader look at impacts inside and outside the business partner's facilities, to capture trends and changes in the environment.
- **Grievance mechanisms.** Sound operational-level grievance mechanisms can flush out key concerns from stakeholders and can provide important feedback to the business partner on the effectiveness of its human rights due diligence. In some circumstances, companies require that their business partners share updates with them on complaints submitted via the business partner's grievance mechanism.
- **Periodic review and benchmarking.** These exercises are designed to identify emerging issues, and assess new problems, benchmark the actions of peers, grievances, and customer and investor demands.
- **Reporting.** Joint venture agreements often establish a self-contained monitoring system, which reviews compliance with the JV's operating procedures. These agreements often require companies to report directly to shareholders, sometimes on specific topics such as corruption or EHS.

Social Compliance Versus Human Rights Due Diligence

As one respondent noted:

"Social compliance is different from due diligence so in that sense the UN Guiding Principles are a game changer. All that a social compliance audit is going to do is tell you where something is at in a given moment. If I am about to enter a relationship, I do have to do a social compliance audit and they are useful as a simple checklist. This gives us data points – but it is other forms of interaction that drive change. Sometimes we are relying on audits as the change mechanism and have not analysed what generates change in behaviour. An audit itself is not the drive for improvement. Human rights due diligence is more work and a different quality of work, but it is likely to be more effective as it goes beyond simple compliance, beyond the four walls of the business and lasts through the entire business relationship."

Companies often respond more urgently to severe human rights impacts, and expect business partners to prevent or mitigate severe impacts before addressing other issues.

A number of companies are beginning to focus on human rights as they prioritise *among* relationships building on the key concept in the Guiding Principles of prioritising based on risks to people rather than risks to companies. Some respondents reported that they are trying to operationalise the concept. This work is most apparent in relationships where

partners have the longest experience of human rights: suppliers and service providers. Several companies are applying a combination of criteria (country risk, sectoral analysis, capacity) to rank suppliers and identify those that need special attention. (See Chapter 8 on Suppliers and Service Providers.)

As to prioritising responses to potential and actual human rights impacts *within* relationships, this also seems to have come furthest with suppliers and contractors for large projects. To help them to manage such issues, and to respond quickly and appropriately, many companies use colour-coding or similar systems to track significant human rights concerns, non-compliance of suppliers over time, and trends in compliance.

Crisis or media attention can also drive prioritisation, as several respondents noted, with problems at small, second tier or even third tiers business partners quickly becoming a top priority for the company. In such cases, the issues prioritised are not always the most significant ones from a human rights point of view. Crises and media coverage can have a number of longer-term effects. They impress on senior and line managers that human rights are under scrutiny in more and more places; increasingly making human rights material from a company risk management point of view, and causing companies to consider a wider range of human rights risks that are reasonably foreseeable – given the sector or the country context.

Communicating with external stakeholders about human rights in business relationships is not yet common practice.

MSI initiatives like the Fair Labour Association (FLA) and the Ethical Trading Initiative (ETI) regularly interview workers at supplier facilities as a part of their monitoring. This practice preceded but is in synch with the Guiding Principle that calls on companies to include feedback from external stakeholders, including affected groups, when they track performance. Many of the companies involved in the research have compliance auditing in partner facilities that presumably builds on these models. It was unclear whether interaction with workers and other stakeholders was a part of monitoring in other types of relationships.

Companies applying the Guiding Principles' "knowing and showing" approach should be able to demonstrate to those who are affected by their activities that they have acted to address negative impacts. "Showing" can include a range of actions, including formal reporting where appropriate.⁷³ A number of companies report on their supply chain relationships without disclosing the identity of specific partners. (This trend is apparent in apparel industry reporting.) One company reports on core customers. The Global Reporting Initiative (GRI) includes two indicators on business relationships.⁷⁴ Companies in the GRI report on both in a range of ways and in varying detail. For the GRI Indicator

73 Guiding Principle 21.

74 Version 3.1 of the GRI Sustainability Reporting Guidelines includes two indicators on business relationships.

HR 1,⁷⁵ some respondents report on supplier contracts that contain human rights clauses but do not report on any other types of investment agreements. With respect to GRI Indicator HR2⁷⁶ some companies supply detailed statistics on their assessments and audits and improvement plans, while others match their (existing and goal-setting) compliance levels against their human rights screening criteria.

Establishing grievance mechanisms and providing access to remedies for negative human rights impacts in business relationships is a work in progress.

Some companies have had feedback mechanisms for business partners in place for many years. They recognised, long before the Guiding Principles were drafted, that it was clearly in their interest to monitor the conduct of suppliers who are expected to comply with company codes of conduct. Most do this by establishing a specific hotline for workers at supplier facilities, or a more general hotline that is accessible in supplier facilities. Hotlines or web sites provide an accessible avenue for complaint; but whether they work in practice will often depend on conditions on the ground, in business partner facilities. As one respondent noted, if the hotline is next to the manager’s office, access can be illusory. Whistle blower protections, which many of the participating companies have in place, are a procedural guarantee that can improve the accessibility of operational grievance mechanisms.

Some hotlines deal only with breaches of company codes that business partners are contractually required to respect. Others have a wider mandate and address a broader range of concerns more in line with the Guiding Principles’ concept of operational-level grievance mechanisms. Where companies route all complaints to one number, it is crucial to ensure that staff who receive calls or e-mails are trained to identify those related to human rights and distinguish more serious concerns. Some companies have systems in place that appear to be closer to the Guiding Principles concept of an operational-level grievance mechanism, including an ombudsperson.

The Guiding Principles list several effectiveness criteria for non-judicial grievance mechanisms.⁷⁷ They note that a mechanism will not serve its purpose unless the people it is intended to serve know of it, trust it, and can use it. As one respondent noted, hotlines, websites and similar mechanisms will only work if grievances are consistently recorded, followed up and addressed in a predictable and credible manner, ensuring robust accountability. Where this occurs, such procedures start to meet the criteria set out in the Guiding Principles for effective operational-level grievance mechanisms.

75 HR1: Percentage and total number of significant investment agreements and contracts that include clauses incorporating human rights concerns, or that have undergone human rights screening.

76 HR2: Percentage of significant suppliers, contractors, and other business partners that have undergone human rights screening, and actions taken”.

77 Guiding Principle 31 sets out the effectiveness criteria for non-judicial grievance mechanisms. They should be: legitimate, accessible, predictable, equitable, transparent, rights-compatible, and a source of continuous learning. Operational level grievance mechanisms should be based on engagement and dialogue.

Assessing the quality and effectiveness of a grievance mechanism presents a further challenge. As a respondent noted, having fewer grievances over time may mean that the company and its business partners are performing better, but can also mean that stakeholders have learned not to trust the grievance mechanism because it does not provide results, is not timely, etc.

Operations that leave a larger footprint often engage more directly with surrounding communities, including in their approach to grievances. This is seen to be a way of resolving issues at the local level, before they develop into serious grievances that have effects on both the community and the company. One company involved in the research required regular reports on community grievances and their resolution, even though community engagement and grievances are a contractor's responsibility. It also provides capacity building support and guidances to contractors to improve their performance in this area. Companies that track patterns of complaint from their operations across the world can see which issues appear frequently, and which are specific to regions or communities, and adjust their responses accordingly. This underlines that grievance management contributes to continuous learning.

Ending or Renewing the Relationships

Companies recognise that terminating relationships on human rights grounds is an option when things go wrong, but that it is not always the best option from a business or human rights perspective.

In general, companies include certain human rights abuses (commonly, child and forced labour) as material breaches of contract – in order to have contractual leverage to require change. At the same time, most respondents made clear that, while companies impose contractual obligations to reinforce the seriousness of the issue, they believe that changes in practice are more often achieved by providing incentives (more business or access to new markets), appealing to corporate values (sustainability, leadership), and building capacity. Almost all the companies noted the practical and at times legal difficulties associated with termination, just as all valued the option that a contractual provision provides.

Some companies require their business partners to respond swiftly if they discover certain serious human rights abuses such as forced labour or a child in their employ or the employ of sub-contractors, or if they find that security personnel have violated human rights.

Companies may suspend relations with partners, or take over their operations, on human rights grounds, but usually do so in the course of dealing with broader concerns.

Partners in joint ventures and franchises, and major contractors that operate joint or shared management, usually retain step-in rights to take control, temporarily or permanently, if one of the parties repeatedly violates its contractual obligations. One

company said that it assumed temporary control in one case, where the business partner had been unable or unwilling to meet company requirements, including those regarding human rights.

Renewing business relationships can be an incentive for business partners to improve their human rights performance.

Several respondents noted that contract renewal (or opening new contracts with peer international companies that have similar requirements) can give partners an incentive to improve their ability to meet key sustainability requirements, including human rights requirements. Contractual penalties can work; but they often work better when a company reaps rewards from spending time, energy and money on building capacity. It appears that assessing performance on meeting human rights standards is often part of wider assessments of performance that occur when renewal negotiations take place.

Companies increasingly review human rights at the end of their relationships, when they consider their reputational legacy.

Some respondents indicated that they carefully considered the risk of reputational harm when they sold a business and would not sell assets to an enterprise that was disreputable or would run the project in a very different way.

Large projects and projects that have a visible legacy usually require a planned process of disposal, closing and departure. Human rights considerations increasingly appear in such processes. Respondents raised a number of legacy dilemmas – around products, service and projects – and suggested that companies should think about the long-term and unintended use of their products, services and projects, after they have surrendered control. (For further discussion, see Chapter 9 on Direct Customers.)

Communicating about termination of business relationships on human rights grounds can be complex in reality.

Transparency around breaches of contractual provisions on human rights that lead to termination is a trend to keep an eye on. Some companies are starting to report on breaches and terminations of business partners and to explain the reasons for them, but they do so without revealing the identity of the actual business partner. Such communications inform stakeholders that the company is tracking performance in certain business relationships, and taking action when necessary.