Chapter five: Process

Business is about cooperation: with staff, customers, partners, suppliers, and with governments and communities. Cooperation makes business possible but – like any variable that cannot be controlled – it creates an element of risk. Cooperation is therefore about risk management.

The nature of a cooperative relationship will depend on what each party wants from the other. Like managing risk, building relationships is a process.

Finally, cooperation presumes satisfaction, that each party provides what the other wants. When that is not the case, mechanisms are required to address the disagreement. Resolving disputes and providing remedy is a process too.

The Three ‘Rs’
1. Understand Risk.
2. Build Relationships.
3. Provide Remedy.

Companies take for granted that risk management is about managing legal, financial and reputational risk to the company; that relationships are based on mutual economic value; and that the law is the final arbiter in disputes. In high-risk countries, however, these assumptions do not always hold and can become barriers to, rather than parameters of good practice. Risks are more acute and more diverse. Business relationships may be conditioned by compelling personal and political interests. And law is subject to manipulation.

Companies need a more sophisticated approach, especially under the ‘Respect’ framework. Risk must be understood also in terms of a company’s ability to respect human rights – because companies have a duty to consider human rights but also because doing this protects them from certain risks. Many companies have been caught up in expensive and disruptive situations that damage their reputation, precisely because they have interpreted risk too narrowly.

Understanding risk in broader terms will also promote better relationships, particularly with local communities. Real or perceived abuse or neglect of neighbouring communities generate many of the problems and much of the discontent that companies encounter. This is not coincidental. Companies have insufficiently appreciated that their operations create risks for and harm others. A lingering assumption that communities should be grateful for the benefits that investment brings can blind companies to how individuals experience its impact. Companies may view their relationships with a community in transactional terms, – in terms of job opportunities and other benefits – but the community’s perception may be quite different. People are not (just) economic entities.
Companies prefer tangible outcomes (negotiation followed by a signed agreement that delivers specific outcomes) and are less at ease with intangible values like trust, dignity or respect. A company’s engagement with local communities needs to give importance to such values: in this sense the process of creating a relationship is a means but also an end.

Providing remedy is no less important. Grievance mechanisms are the most widely used instrument. They track potential risk and can fulfil an early warning function. They also help to strengthen relationships, by demonstrating a company’s interest in the concerns of the local population and providing tools to address them. Remedies offer the best route for resolving a dispute before it escalates; but they too present dilemmas in high-risk countries.

Establishing sound processes in these three areas is not an indulgence, because process is what connects a company to its social context. When it is done well, process offers a way to prevent and mitigate harmful impacts; done badly, it simultaneously increases risk and blinds a company to its presence. It requires time, effort, patience and resources – all commodities in relatively short supply – but repays the investment many times over.

**Understanding risk**

Risk assessments are standard practice for most companies; the ‘Respect’ framework simply expands their scope. They need to encompass human rights risks to others and by others, specifically those with whom a company has relationships. They do not need to be distinguished from impact assessments. Negative impacts can usefully be understood as risks, and vice versa. A company should avoid creating new procedures: it is better to consolidate what exists, and to create a continuous analytical process running throughout an operation’s activity.

Human rights risks are subject to the same principle. A company needs to consider whether it should separate human rights from other risk factors in its risk assessment processes. On one hand, a stand-alone human rights assessment is visible and evidence of a company’s commitment. On the other, it may suggest that human rights are not integral to a company’s operations but a secondary task farmed out to consultants. One underlying purpose of the ‘Respect’ framework is to bring human rights into the centre, rather than add layers to the periphery.

If human rights are not understood as part of everyone’s responsibility, they will not be anyone’s. Allocating responsibility for human rights assessments to an individual within the company, however senior, will marginalise them. Since human rights risks cut across departments and functions, each department must have responsibility for analysing human rights risks within its area of competence. This may require support and training, because staff may not be familiar with human rights or the duties they impose in relation to external actors. As discussed in the previous section, companies will benefit if they create a forum for discussion of human rights risks and policies; but devolution of analysis combined with centralisation of findings is the most sustainable approach.
Risk needs to be understood by those who are responsible for preventing or mitigating particular impacts. External consultants have a useful role to play but only where specialist expertise is needed or capacity is limited (initial assessments for major acquisitions, for example, or risk mapping by smaller companies). Consultants have value when they support staff, but should not do their jobs.

Human rights are not a specialist topic. Assessing human rights risk does not therefore have to be a specialised process, conducted and reported in specialised language. Indeed, the opposite is more appropriate. What matters is to identify and address problems. Complicated language can push human rights to the margins. So long as company standards are informed by human rights, it is better to articulate them in terms that are familiar to those who are responsible for their implementation. Standards do not have to be diluted but described simply.

This echoes a point made previously about communities. It is widely accepted that dialogue and communication with communities needs to be conducted in a culturally appropriate and accessible way. This applies to assessments of human rights risk. Little is gained from using formal human rights language if it is not understood by those who are being consulted. From a company perspective, too, strategies designed to identify problems and mitigate impact will not be useful if discussion of them turns into an argument about whether any given right has been abused, infringed, neglected or insufficiently respected.

The question of language finds its most practical expression in the debate about risk assessment methodologies (see box). Some of these focus on human rights, others on high-risk countries.

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**Risk assessment resources**


Methodology should not be a primary concern. Which one to use depends on the needs of the individual company. Some companies have included human rights risks in their risk analysis and social and environmental impact assessments for a long time, even if they have not done so formally. Those with well developed internal methodologies will do better to enrich the system they have rather than adopt a new one. Ultimately, methodologies are as good as those who use them and the advantages of a familiar, consistent and sustainable company methodology will usually outweigh the merits of starting anew.

This presumes, of course, that the company’s approach is properly configured to pick up impacts and associated risks. This is far from certain, especially in high-risk countries where many issues will be unfamiliar or not included in a company’s traditional mandate. In such environments, company risk analyses often suffer from limitations of design or practice that undermine their value.

This is true of the different types of assessment carried out (political risk analysis, security threat assessments, Environmental and Social Impact Assessments) and the relationships between those who conduct them (Security department, External Relations department, etc.). It is not a problem that different departments undertake their own analysis but their perspectives must be pulled together. In addition, at different levels of a company, staff may perceive risk differently. What may appear to be a major human rights risk at headquarters may seem appropriate to an in-country manager who is under pressure to get a project underway. Risks are not only poorly collated but may be differently understood.24

Assessment processes may also be narrowly framed – in terms of purpose and scope, or for reasons of confidentiality or timing. As noted earlier, assessments are relationship-building tools. Beyond the question of their rights, people like to be consulted over issues that affect them and like to feel their opinions matter. Understanding a risk assessment purely as an extractive, fact-finding exercise damages relationships. It is also a question of transparency. Some parts of a risk assessment will need to remain confidential, but much does not and should not. Wherever possible, companies need to validate their findings and conclusions with those whom their activities affect.

Impact should determine the scope of an assessment rather than, for example, geographical proximity. Since impacts, and those impacted, evolve over time, this means that assessment is inevitably an iterative process, which should continue through the lifespan of a project (see diagram25).

74 Bickham, 2011.
Restricting participation, on geographical grounds or more arbitrary criteria such as perceived opposition, can create resentment. Risk assessments need to be inclusive and expansive as well as impact-orientated. They also need to be continuous. While it is sensible to assess at critical points in a project’s development, regular tracking of developments and concerns is vital.

It has been argued that a comprehensive approach to risk assessment will generate information that will increase a company’s liability. This assumes that not knowing reduces risk, which is questionable under the ‘known or should have known’ interpretation of complicity. Ignorance is not necessarily a valid defence — certainly if the only way of ‘not knowing’ is to avoid questions that might produce uncomfortable information. Deliberately limiting the scope of an assessment cannot be a sound strategy for defending the company’s interest or against charges of complicity. Risk and impact assessment processes are essential tools for anticipating, preventing and mitigating harmful human rights impacts. They are a requirement under the ‘Respect’ framework, but particularly in high-risk countries, too often they lack rigour.

76 For a full discussion and rejection of this argument, see John F Sherman III and Amy Lehr, Human Rights Due Diligence: Is it too Risky? Working Paper No 55, Corporate Social Responsibility Initiative, Harvard University, 2010.
Human rights risk and impact assessments: key considerations

**Continuous.** Assessment should continue through the life of a project (even if fixed point assessments remain important as milestones).

**Integrated.** Human rights considerations should be a core feature of assessment processes, not separate analyses.

**Devolved.** Individual departments (security, human resources, contracts, external relations, legal, etc.) should have responsibility for assessing human rights risks in their domain.

**Harmonised.** Their separate analyses should be brought together and integrated (for example through a Risk Task Force).

**Baseline.** Companies need to establish a baseline description of conditions, if they wish to properly identify their impacts. This will also help to set and communicate responsibilities (of the company, government, etc.).

**Process-orientated.** Include intangible outcomes. Values like trust and respect are important and risk assessments should reflect this in their design and implementation.

**Accessible.** Those implementing an assessment and those consulted by them should be at ease with its framework and language. If formal human rights language is unhelpful, do not use it. What matters is identifying the problems not how they are described.

**Inclusive.** Speak to all relevant constituencies. Where this is genuinely not possible (women in certain situations, some critics of government, etc.) identify third parties who can access them or representatives who can speak for them.

**Comprehensive.** Examine all issues and relationships; include external parties.

**Focus on impacts.** Understanding impacts is the main purpose of assessments. Make sure the terms of reference are appropriate (e.g., avoid artificial geographical boundaries, etc.).

**Validate.** Be transparent whenever possible, respect confidentiality where necessary. Reflect back the findings of assessment to those who were consulted and have an interest.
Building relationships

Strong relationships are not a requirement under the ‘Respect’ framework. It is not necessary to get along with an institution, group or individual in order to respect rights. Positive relationships do nevertheless make many things easier, and negative ones can have damaging consequences.

Companies need no advice on managing their business relationships. No company will last long without proven strategies for working with its partners, contractors and suppliers, not to mention its clients and customers. To a lesser extent, this is also true of political relationships. Companies may not always feel comfortable dealing with governments and government agencies, and senior managers may not be attuned to the way political decisions are made, but they recognise their importance. In high-risk countries, relationships with government representatives but also with other business partners are especially likely to have political implications (see previous sections), but the fundamentals do not change.

The greater problem lies in a company’s social rather than economic or political relationships. Companies are driven by economic imperatives and this is at the heart of their often contentious relationship with local communities. Many companies have proved to be socially inadequate – clumsy and insensitive. Some find it hard to conceive of their relationships except in terms of mutual economic advantage, and making the leap from contracts to rights can be equally difficult.

Engagement

Resources


Companies need to understand the nature of their relationship with communities. It is not just another negotiated contract; they are not a non-profit form of business partner. The difference is due partly, of course, to the character and culture of the community in question, but primarily to the fact that large projects have a profound impact on their lives, and these impacts are not only economic but cultural. They bear on relationships, personal security, livelihoods and status.

The balance of those impacts will often be positive, but that is not enough to establish good relations. Companies that have succeeded in building strong relations with neighbouring communities have recognised this and adapted accordingly.

There are links here to the ‘Respect’ agenda, not simply because good relations are built around mutual respect, but because of its emphasis on impacts. ‘Stakeholder’ is a convenient term but is misplaced when used to refer to local communities. It conveys the impression that people are defined by their relationship to the company and reinforces the perception that what is good for the company must also be good for the people. First and foremost, local populations are impacted by the company. This is how they need to be approached – with the respect due to those whose lives are being or are about to be fundamentally changed.

How an individual or group perceives a company’s impacts (and any measures it takes to mitigate them) will determine whether the company is judged to be respectful of human rights. If people feel abused or neglected by the company, regardless of whether the allegations are fair, the company will be condemned. In this sense, strong relationships with local communities, based on respect, are essential because they will shape how the company is judged.

Relationships most commonly break down because the company is perceived not to have engaged (see Communities). Companies fail to engage in high-risk countries for several reasons.

Risk. Managers fear the company will be sucked into local disputes and become embroiled in wider grievances.

Cost. Engagement requires time and resources. It may delay the project.

Messiness. Managers find people unpredictable; there are lots of them and they all want different things.

Unnecessary. Managers consider that social policy and social issues are a government responsibility and not the project’s business.

Each point has some truth, but they are largely irrelevant to policy because, even if engaging is risky, messy and expensive, not engaging is riskier and more expensive still. A company cannot separate its interests from those whose lives its activities affect. This is at the core of the ‘responsibility to respect’.

From a company perspective, this implies engaging from the outset, bringing a respectful attitude, suitably qualified people, and commitment. Companies need to discuss with
communities the changes they bring, and not just to secure the ‘consent’ they seek. This seems a small point but it has very significant implications – for relationships, and negotiation of agreements. One is about mutual respect, the other mutual gain. Economic and political relationships can be constructed around the second, social relationships require the first.

Companies also need staff with the right skills, cultural awareness and languages. Although consultants can be of value, it is always unwise to contract out relationships. Though a company may seek the help of (particularly local) organisations when it cannot access specific constituencies, it needs to ensure that its relationships are direct. (Consultants can of course be effective if they are embedded for a period within the company, for example to help develop an effective internal team.)

The company’s commitment also needs to be open-ended. This links to the distinction between relationship and consent. Consent is not ‘fixed’ in time, unlike an agreement or contract with another business or with government. A contract can be written on stone, consent is written on water. Technically, communities that sign an agreement cannot revoke their consent if the company has met its promises; but they will withdraw good will. A company is likely to be punished if it assumes that its social relationships are defined by a contract, let alone end at the moment of signature.

A company needs to act in ways that are inclusive, fair, appropriate and open. Excluding people, deliberately or unintentionally, is likely to incite grievances against the company and possibly provoke intra or inter-community tension. If companies focus on impacts they can identify those who should be included and differentiate between them fairly by scale and nature. Such an approach can secure the consent the company seeks and create the relationship of trust, respect and dignity that communities desire.

**Social investment**

Social investment is the second key mechanism for building relationships. Social investment is essentially a form of strategic philanthropy. Companies support projects that bring communities benefit. In turn, they benefit from increased support in those communities and a more positive public image, and have the satisfaction of doing something good.

Social investment has increasingly acquired wider significance, however. Internationally, it is perceived as the repayment of a ‘debt’ to society (an obligation) or a contribution

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77 Agreements with governments in high-risk countries may not prove all that fixed either.

78 See also Ruggie’s analysis: “Clearly, companies may undertake additional commitments voluntarily or as a matter of philanthropy. Moreover, some have developed new business opportunities by offering goods and services more closely aligned with basic needs, as in bottom-of-the-pyramid strategies and other types of inclusive business models. These are worthy endeavours that may contribute to the enjoyment of human rights. But what it is desirable for companies to do should not be confused with what is required of them. Nor do such desirable activities offset a company’s failure to do what is required, namely to respect human rights throughout its operations and relationships.” Ruggie, 2009, para. 62.
From Red to Green Flags: The corporate responsibility to respect human rights in high-risk countries

to broader development objectives. Locally, it is viewed as a source of much-needed support or a right (in the sense that local people believe they are entitled to benefit from a company’s presence). For companies themselves, it has become an instrument of risk mitigation as well as a demonstration of their commitment to social progress.

As its significance has increased, so has the attention paid to it. The real purpose and value of social investment have been criticised. Some consider that it diverts attention from the harmful impacts of investment, while others argue that it is frequently ineffective, unsustainable and a source of competition and conflict.79

Resources


The main problem is that companies have yet to work out what social investment is really for, beyond the general sense that it should do some good and *en route* benefit the company. Some companies have identified global priorities (for example, education) which are reflected in their local social investment strategies. Others leave allocation to the discretion of local managers; or insist on a proper process of consultation to identify appropriate projects. While the third approach is clearly most likely to be effective and sustainable, it is not an easy process to get right.

Yet doing it well is a requirement. Even though companies do not have a formal duty to invest in social programmes, their projects have impacts for which companies are responsible. This creates potentially awkward scenarios. For example, if a company chooses to build or redevelop a school or clinic, it has a duty to make sure that the service it funds is effective and sustainable. A poor service would prejudice access to the rights to education or health (since users would be deprived of a service they once had).

79 For a more detailed discussion, see Frynas (op.cit), and Luc Zandvliet and Mary. B. Anderson, *Getting it Right: Making Corporate-Community Relations Work*, CDA Collaborative Learning Projects, Greenleaf Publishing, 2009.
In other words, any social investment project triggers responsibilities which the company need not have incurred.

This is an argument for avoiding social investment, or doing it carefully; or rethinking what social investment is for. Development is an arduous process in high-risk countries, even for professional agencies, and companies which finance development projects need to have a clear strategy and purpose. If companies invest sensibly to mitigate impacts on local communities, their social policies acquire strategy and purpose; they can support surrounding communities; and their framework will ensure fairness while managing expectation.

### Building relationships: key considerations

**Recognise** the social character of a company’s relationship with surrounding communities. Respecting human rights is as much about ‘how’ as ‘what’.

**Commit** to an open-ended process. Relationships need to last as long as the project, not just until ‘consent’ is obtained.

**Recruit** staff with appropriate skills, attitudes and ethnic, religious, linguistic balance.

**Design** a process that is inclusive (of all impacted groups), fair in terms of benefits (judged by impact), culturally appropriate, and open (regular and transparent communication).

**Focus** on winning trust.

**Align** social investment strategies with impact mitigation responsibilities.

### Providing remedy

Rigorous risk assessment and strong local relationships will help to attenuate, but will not eliminate grievances. Legitimate grievances need resolving and even unsubstantiated ones can benefit from an airing. It is increasingly recognised that a company is responsible for providing remedies to people inside and outside the company who have been harmed as a result of its activities.

Formal grievance mechanisms have been given considerable attention. The Special Representative has identified a set of principles to guide their development: legitimacy, accessibility, predictability, equitability, rights-compatibility and transparency. He adds that these should be operationalised by means of dialogue and engagement; a company should not act as adjudicator.\(^8\) Several other models have also been put forward (see box).

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\(^8\) Ruggie, 2010.
From a company perspective, if dispute resolution mechanisms are trusted they can provide an informal, inexpensive means to achieve redress and resolve grievances. Advantages include the possibility of resolving an issue locally, at an early stage; resolving inadvertent errors; establishing local goodwill; and pre-empting the need for costly and time-consuming legal cases.\(^{81}\) Secondarily, they provide companies with an additional tool for anticipating risk and tracking performance on human rights issues.

They bring complications as well. The mechanisms themselves are not a problem; but in high-risk countries many people do not have access to justice and a company grievance mechanism may be the only means of remedy available. In so far as a complaint is against the company, this is straightforward. It is less so when the complaint is not against the company but a third party with whom the company has an association. In such circumstances, companies may find themselves drawn into disputes from which they have no clear exit.

Grievance mechanisms do not (and should not) have the force of a judicial process; they presume that parties are willing to reach a resolution. Complaints can legitimately be made against parties with whom a company is associated; for example, allegations of sexual harassment, intimidation, or corruption should be investigated. But cooperation by the third party, or the authorities, may be absent.

Assuming the third party (a contractor or supplier, for instance) is one over whom the company has some influence, a company’s responsibilities would extend to the threat of termination of the contract. This would be a last resort and would presumably depend upon a number of factors, including the severity of the allegation, the balance of evidence or the weight of cumulative complaints.

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81 Bickham, 2011.

**Resources**


The investigation might raise difficult issues of confidentiality, or put the complainant at risk of retribution. And the difficulties increase further when the grievance is directed at a government representative or agency. The company responsibility remains to investigate but how far does this extend? A mechanism designed to catch and resolve issues informally may quickly become the source of a dispute between the company (innocent of the alleged offence) and the authorities.

Underlying the problem is the judicial system. Corruption in the legal process, including investigating authorities, creates a minefield for companies. Allegations of criminal behaviour must be referred to the judicial process; grievance mechanisms clearly should not displace legal mechanisms. Yet referral to the courts may bring no remedy; worse, it may provoke abuse, for example if the complainant is bullied or the alleged offender is tortured or mistreated, or, alternatively, bribes his way out. In meeting its responsibilities, a company may become an unwitting party to an abuse that could be more serious than the original offence.

The dilemma is familiar: how can companies meet their responsibilities if these are partly determined by the actions of others? If neither the company’s grievance mechanism nor the judicial process provide justice, where is remedy to be found?

A company has a responsibility to do what it can. If it can resolve a grievance informally, this should be done. If it concerns a third party, a company should persuade the third party to provide a remedy. If that fails, it should consider terminating its contract. If the allegation is of a criminal nature or concerns a government agency, it should defer to the relevant authorities but should monitor the process (or request other organisations to monitor the process) and seek assurances that the process will be pursued fairly. If there is a credible risk (a risk that needs to be determined in consultation with independent parties) that referral will lead to further abuse, a company should consider circumventing official channels in favour of an alternative form of remedy.

**Providing remedy: key considerations**

**Establish** a grievance mechanism according to best practice principles.

**Encourage** staff and local communities to raise concerns through the grievance mechanism.

**Resolve** genuine complaints against the company through negotiation, apology and compensation (as appropriate).

**Pressure** partners and suppliers to investigate and address complaints directed towards them and keep informed of progress and resolution.

**Take** appropriate action against partners and suppliers (including possible termination of contract) according to severity of allegation, balance of evidence and weight of cumulative allegations.

**Assess** the integrity and effectiveness of judicial mechanisms.

**Monitor** progress and outcome of complaints addressed through judicial mechanisms.

**Avoid, in extremis**, deferring to judicial mechanisms if there are substantial and credible risks of abuses being committed by officials.