



RESPONSIBLE BUSINESS CONDUCT:
UNDERSTANDING HUMAN RIGHTS DUE DILIGENCE

By Ariel Meyerstein, PhD

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Meyerstein joined USCIB after practicing for several years as a lawyer handling international disputes, including international commercial and investment treaty arbitration. He holds a PhD in Jurisprudence & Social Policy and has published several articles and book chapters on various aspects of human rights law, including war crimes, refugees, transitional justice and the integration of human rights into financial sector risk assessment processes. He teaches corporate sustainability and business and human rights at Fordham University School of Law and has been an invited expert speaker at various multilateral organizations and academic institutions. He has also led CLE seminars on integrating human rights due diligence into corporate compliance.

Ariel Meyerstein is also a member of the [Ethical Alliance Advisory Council](#). The Advisory Council provides thought-leadership guidance and works towards shaping the direction of the [Ethical Alliance](#). Created by [ethiXbase](#), the Ethical Alliance is a global anti-corruption community of over 40,000 professionals dedicated to stamping out corruption, increasing corporate transparency and enhancing ethical business dealings.



INTRODUCTION

In a world where supply chains are increasingly complex and spanning multiple regions, cultures and legal environments, the potential for a multinational company’s reputation to be “tainted” by illegal or unethical conduct is immense. The range of issues that are now capable of giving rise to potential risk range from long-standing international and domestic legal requirements, such as anti-money laundering, fraud, bribery, and corruption – to regulatory risks tied to social, governance or environmental norms which are embedded in international human rights and environmental law, as many recent high profile cases aptly demonstrate.

This paper seeks to explore how human rights and labor concerns have emerged as a distinct set of risks beyond the traditional focus areas of ethics and compliance. It also details how leading global frameworks can provide guidance on responsible business conduct and recommends that more thought be given to integrating human rights due diligence within existing know your customer (KYC) compliance processes, including anti-money laundering (AML), anti-bribery and corruption (ABC) compliance processes and sanctions checks.

▶ WHAT IS RESPONSIBLE BUSINESS CONDUCT?

While the FIFA corruption scandal made global headlines, a lesser-known shadow has also been cast over FIFA – and by extension, its corporate sponsors, as a result of allegations of forced labor and human trafficking in the construction of the venues and infrastructure to support the 2022 World Cup in Qatar. There has been far less coverage by mainstream media of the “specific instance” procedure initiated against FIFA by the Building and Wood Workers’ International (BWI) union with the National Contact Point (NCP) in Switzerland of the OECD Guidelines for Multinational Enterprises. This specific instance alleged that FIFA has failed to identify and prevent systemic human rights violations such as confiscation of passports, widespread discrimination, non-payment of wages, lack of freedom of association and unsafe working conditions for migrant construction workers in Qatar building the World Cup stadiums and facilities.

This specific instance’s allegations encompass issues of what is now commonly referred to as “responsible business conduct” that go far beyond traditional compliance issues and the cognizance of a typical AML and ABC compliance professional. However, domestic regulatory efforts are increasingly catching-up to these global norms: witness the California Supply Chains Transparency Act of 2010, conflict minerals legislation passed in the U.S.

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as part of the 2010 Dodd-Frank Act, the UK Modern Slavery Act passed in 2015, as well as the EU-wide Non-financial Reporting Directive (to be implemented by the end of 2016 in each EU Member State), and other due diligence and disclosure laws under proposal in France, Switzerland and elsewhere.

At the same time, socially responsible investment is rapidly growing more sophisticated and mainstream, with new tools now in investors’ hands for getting more granular information about companies’ performance on social compliance issues. These trends suggest that responsible business conduct issues – once the sole provenance of responsible sourcing teams and CSR professionals – will likely become integral considerations for compliance and legal teams as well. The coming challenge for companies will be how to integrate these historically divergent functions as they balance disclosure demands, the operational need to continuously improve imperfect and challenging conditions in their supply chains and increasing legal risk for lackluster disclosure and performance.

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► UNDERSTANDING HUMAN RIGHTS DUE DILIGENCE

Human rights due diligence is the process of identifying and seeking to prevent and mitigate adverse human impacts. Human rights due diligence was the primary tactical recommendation to companies to emerge from the mandate of the UN’s Special Representative on Business and Human Rights, whose recommended global soft law framework – the [UN Guiding Principles on Business and Human Rights](#) – was unanimously endorsed by the Human Rights Council in 2011.

Former UN Secretary-General’s Special Representative for Business and Human Rights, Professor John Ruggie, purposefully modelled human rights due diligence on traditional corporate due diligence process to make it easier to understand and integrate into business policies and operations. That said, there is a fundamental difference between the two diligence processes: while traditional due diligence serves to protect

companies from enterprise risks, human rights due diligence is primarily aimed at protecting actual or potential victims of adverse human rights impacts from harm. It is argued that [the identification and remediation of “salient” human rights risks does tend to also protect businesses from substantial enterprise risks as well](#), particularly in the form of the reputational impact and possible consequent financial impact on an organization should it be found to be in breach of human rights within its supply chain.

Once the Guiding Principles were endorsed, the Member States of the Organization for Economic Cooperation and Development (OECD) agreed to update their Guidelines for Multinational Enterprises (MNE) – the only government-backed set of corporate responsibility recommendations globally – with a human rights chapter that also integrates a risk-based human rights due diligence approach.

Both the MNE Guidelines and the UN Guiding Principles apply to all business enterprises, regardless of their size, structure or ownership and call for companies to respect internationally recognized norms regardless of what national law in a particular jurisdiction might call for. That is, a national law no longer sets a ceiling on the expectations of corporate conduct.

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Overview of Leading Global Frameworks on Responsible Business Conduct

UN Guiding Principles on Business and Human Rights

The leading global framework on responsible business conduct is the [UN Guiding Principles on Business and Human Rights](#), which were formulated in 2011 to provide clarification to governments about their duties to protect human rights and to articulate consensus around a corresponding responsibility of companies to respect human rights. The Guiding Principles have been [endorsed by a wide range of multilateral organizations, integrated into a variety of other global norms](#) and are now being implemented domestically by dozens of countries through [National Action Plans](#).

OECD Guidelines for Multinational Enterprises

The other leading global framework on responsible business conduct is the MNE Guidelines which are the most comprehensive and only government-backed instrument on responsible business conduct in existence today. Even though governments' commitments to the Guidelines are binding, the Guidelines are not legally enforceable in any direct way and enterprises abide only on a voluntary basis. Still, many of the norms and standards on human rights, labor standards, environmental laws and anti-corruption included in the Guidelines are already regulated by international or national laws.

These guidelines cover the conduct of companies based in adhering countries (all 34 OECD countries and an additional 12 non-OECD adhering countries). Because the Guidelines' recommendations apply to company conduct both at home and abroad, they cover much more territory than just these 46 countries.

One of the primary distinguishing characteristics of the Guidelines is their network of over 40 [National Contact Points](#) (NCPs) in adhering jurisdictions. NCPs are offices established by the adhering governments to promote and implement the Guidelines among the businesses domiciled in their territories. With these NCPs, individuals and/or organizations can file "specific instances" against any enterprise that fails to observe the recommendations of the Guidelines either in their country of jurisdiction or while operating abroad, which includes allegations involving the activities of business partners in their supply chains. This offers a unique grievance mechanism for those adversely impacted by corporate conduct that has [been utilized over 360 times since 2000](#), mostly by NGOs and labor unions. The allegations raised in these proceedings have been based in [over 100 countries](#).

The NCPs' specific instances are not legal proceedings, but rather, a process that affords a company the opportunity to come to an amicable mediated resolution of the alleged grievances. Nevertheless, beyond an agreed core of procedural guidelines, the powers and processes of NCPs varies by jurisdiction: most only strive for a mediated result, while others have the power to make factual findings about the company's conduct and make recommendations for how to bring their conduct in conformity with the OECD Guidelines' recommendations.

While the proceedings are supposed to be confidential, the fact that the specific instance is being considered and its final result are typically known. This means that the initiation of a specific instance can be a considerable reputational event for companies, making proactive avoidance of such accusations through careful human rights due diligence a key priority.

As the most accepted business and human rights frameworks today, both global frameworks call for companies to anticipate human rights impacts not only in their own operations, but also those resulting from the conduct of their third party business partners to which they may be directly linked.

► CHALLENGE 1: INTEGRATING HUMAN RIGHTS DUE DILIGENCE INTO EXISTING PROCESSES AND STRUCTURES

Getting Started

Human rights due diligence has several steps:

- scoping actual and potential human rights impacts based on severity of harms,
- conducting in-depth human rights impact assessments,
- taking appropriate action in response to the findings of the impact assessments,
- integrating the findings back into overall organizational policies and procedures and;
- publicly disclosing all of the above steps

Conducting human rights due diligence is just one aspect of the broader work companies need to undertake to integrate and implement these frameworks into their operations. The Guiding Principles call on companies to integrate the results from their human rights due diligence “across relevant internal functions and processes, and take appropriate action.” To do so effectively, [Guiding Principle 19](#) requires that “(i) Responsibility for addressing such impacts is assigned to the appropriate level and function within the business enterprise; (ii) Internal decision-making, budget allocations and oversight processes enable effective

responses to such impacts.” The Commentary to Guiding Principle 19 observes that such “horizontal integration” of specific human rights impact assessment findings will only be effective if a company already has a human rights policy commitment “embedded into all relevant business functions” to ensure that the assessment findings are “properly understood, given due weight, and acted upon.”

This is the key place where human rights due diligence can be integrated with existing KYC, AML and ABC compliance functions. In addition to embedding human rights due diligence into new client and supplier on-boarding and in [M&A processes](#), organizations need to identify where embedding responsibility for human rights due diligence outcomes will reside within their organizational structures and cultures, or it will remain a paper exercise without follow-through. While various models have been explored – [from a central command to more diffuse approaches](#) – there are also [a number of pitfalls to avoid](#), and one central ingredient for effective integration is ensuring board oversight of the topic in the C-suite and board levels.

All of this, however, is easier said than done, as diversified functions across companies often work in isolation from one another and even, in some instances, [potentially at cross-purposes, as others have argued](#).

Integration With Other KYC Processes

The process of uncovering and addressing human rights risks in supply chains are closely parallel to the well-known KYC processes of AML and ABC compliance professionals. These parallel requirements include risk-based due diligence, dissemination of policies, imbedding human rights concerns in contract clauses with suppliers and conducting periodic reviews of working conditions. However, the substantive content of what constitutes a violation is far murkier than anti-money laundering and anti-corruption statutes, and moreover, these impacts are significantly harder to uncover and remedy than traditional compliance audits. Another significant difference, as noted, is that human rights due diligence focuses not immediately on enterprise risk, but rather, on risk of adverse impacts on human rights by enterprise conduct or that of its business partners.

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Integrating human rights due diligence into other diligence processes is also recommended because of the links that have been uncovered [between corruption, money laundering and human rights impacts](#), particularly human trafficking and human smuggling.

As the U.S. Department of State’s [Trafficking in Persons Report 2015](#) noted, “The demand for cheap labor and weak rule of law, coupled with high unemployment in developing countries, fosters the phenomenon of trafficking in persons. These factors are compounded where corrupt officials facilitate irregular migration by accepting bribes or false documentation.” The risks are particularly high when [third-party labor brokers](#) are involved. Some have hypothesized that corrupt payments to facilitate labor recruitment could constitute Foreign Corrupt Practices Act (FCPA) violations, though there has yet to be any prosecutions under such theories of liability. Financial institutions in particular, [have been warned of the risks of unknowingly facilitating human trafficking and human smuggling](#) by the U.S. Department of the Treasury, making the importance of such due diligence to human rights impacts and not just enterprise risk, abundantly clear.



Human Rights



Due Diligence



Corruption



Money Laundering

▶ CHALLENGE 2: PRIORITIZING HUMAN RIGHTS IMPACTS

“Similar to KYC, AML and ABC compliance functions, human rights due diligence should be initiated “as early as possible in the development of a new activity or relationship, given that human rights risks can be increased or mitigated already at the stage of structuring contracts or other agreements, and may be inherited through mergers or acquisitions.”

The challenge for companies of all sizes is how to prioritize the variety of human rights impacts to which they might be connected to some degree and to determine the appropriate action to take upon learning of such impacts. According to the Guiding Principles, prioritization must be based on the severity of actual or potential adverse impacts to rights holders. To aid the process of human rights due diligence, [Guiding Principle 18](#) recommends that business enterprises “draw on internal and/or independent external human rights expertise” and “involve meaningful consultation with potentially affected groups and other relevant stakeholders.” Similar to KYC, AML and ABC compliance functions, human rights due diligence should be initiated “as early as possible in the development of a new activity or relationship, given that human rights risks can be increased or mitigated already at the stage of structuring contracts or other agreements, and may be inherited through mergers or acquisitions.” Severe human rights impacts, such as human trafficking and forced labor, have been uncovered in

[many industries and commodity supply chains](#) and conflicts with local communities have been shown to [impose considerable business costs in the extractive sector](#), so there are very few high-impact businesses that should not be doing initial scoping of potential impacts.

Human rights due diligence also adheres to normal reasonableness standards of other business processes: the commentary to the Guiding Principles recognizes that “where business enterprises have large numbers of entities in their supply chains it may be unreasonably difficult to conduct due diligence for adverse human rights impacts across them all. If so, business enterprises should identify general areas where the risk of adverse human rights impacts is most significant, whether due to certain suppliers’ or clients’ operating context, the particular operations, products or services involved, or other relevant considerations, and prioritize these for human rights due diligence.” Similarly, the stakeholder engagement conducted to inform human rights due diligence should be “appropriate to the size of the business enterprise and the nature and context of the operation.”

▶ CHALLENGE 3: RESPONDING TO HUMAN RIGHTS IMPACTS (WHERE TRADITIONAL COMPLIANCE AND HUMAN RIGHTS DUE DILIGENCE DIVERGE)

“Appropriate action” in response to discovered or potential adverse human rights impacts will be determined based on the business’ degree of involvement in the impacts. The scope of responsibility to act varies with whether the business

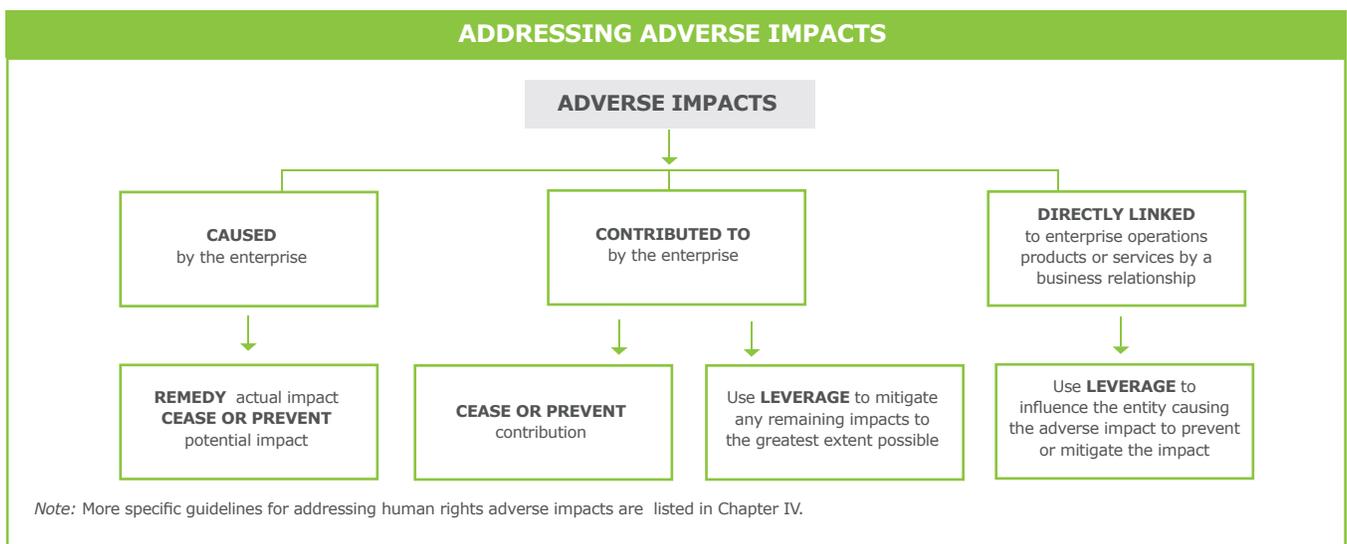
is itself causing or contributing to the impacts (in its own operations or those of business relationships) or where it is not causing the impacts but is nevertheless “directly linked” to the impacts. Significantly, while it is tempting and perhaps naturally seen as more strategic to focus on high-leverage situations and then determine what, if any, impacts are occurring pursuant to them, the Guiding Principles do not call for that; to the contrary, businesses are supposed to first determine where their impacts might be and then determine the scope of their leverage to address them and whether they should seek to increase that leverage or sever the business relationship(s) implicated.

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When issues are discovered in a company’s own operations (that it is causing or contributing to) the organization is expected to prevent, mitigate and remedy these impacts. By contrast, when actual or potential adverse human rights impacts are discovered within an organization’s supply chain but the company is not itself directly causing or contributing to those impacts, companies have a far more complex role to play. They should seek to exercise whatever leverage they have to influence their third party business partners to prevent, mitigate or remedy those impacts. The company may collaborate in providing remedy, but is not expected to provide remedy itself [see Figure 1 from [OECD Guidelines Guide](#)].

In the language of the MNE Guidelines, “[t]his is not intended to shift responsibility from the entity causing an adverse impact to the enterprise with which it has a business relationship.” (MNE Guidelines Ch. 2, para. 12). When an enterprise cannot increase its leverage to a point where it can help to prevent or mitigate the adverse impacts, it needs to consider severing its business

Figure 1: OECD Guidelines for Multinational Enterprises - Responsible Business Conduct Matters



relationships, keeping in mind the significance of the relationship to its overall business activities and the potential adverse impacts caused by severing the relationship – both very tricky calculations. This focus on remediation and seeking to increase leverage to improve outcomes is distinct from traditional compliance, where violations instigate quick action to cut ties and insulate the company from further involvement with suspicious activity.

Applying Leverage

Returning to the example of FIFA, we can examine how the process of leverage can play out in the real world. As allegations of human trafficking and forced labor have emerged surrounding the construction of the Qatar 2022 World Cup stadiums, some of the World Cup’s sponsors, such as Coca-Cola, were not causing or contributing directly to the adverse human rights impacts, but they were nevertheless directly linked to them through their sponsorship. And while Coca-Cola and others do not have sufficient leverage by themselves to dictate the business practices of the construction companies operating in Qatar or the implementation of labor laws by the Qatari government, these sponsors can seek to expand their leverage.

One way of doing so is through public advocacy to bring further attention and pressure on the matter and to [reform the processes for bidding on mega sporting events](#). This has been done in the past by Olympic sponsors, including Coca-Cola, GE, AT&T, Dow, Panasonic and Samsung, [who engaged with the International Olympic Committee in advance of the 2014 Sochi Winter Olympics over discrimination of LGBT individuals in Russia](#).

For its part, FIFA has recently called on the Qatari government to speed-up its implementation of labor reforms related to migrant laborers and has [appointed Professor Ruggie to lead an independent review process](#) of all of its business

practices. Ruggie completed the report, entitled, [“For the Game. For the World.” FIFA and Human Rights](#) in April 2016, offering FIFA a set of forward looking recommendations on how to back-up its commitments with a shift in organizational culture and how to move from being insular to being more accountable and transparent to its range of external stakeholders.

It should be kept in mind, however, that most other situations of alleged involvement in business-related human rights impacts may not be as high-profile. This may make it harder to elevate the importance of the issue internally as well as to increase leverage to contribute to a remedy of adverse impacts with the help of other entities.

► CONCLUSION

Human rights due diligence is still relatively new to the vast majority of companies across the world. This means that as companies large and small begin integrating human rights due diligence into their business processes, they will need to work in a more interactive and supportive fashion with those in their business value chains to get to the information they need about potential adverse impacts and to figure out how to prevent or mitigate those impacts. The regulatory landscape is fast catching-up to these global norms, so now is the time to start creating the business processes that will insulate rights holders and companies from human rights related risks.

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▶ HELPFUL LINKS

OECD Guidelines for Multinational Enterprises

- Due Diligence Guidance in Multiple Sectors <http://mneguidelines.oecd.org>
- Guidelines Text & Commentary <http://mneguidelines.oecd.org/text/> & Responsible Business Conduct Matters Guide mneguidelines.oecd.org/MNEguidelines_RBCMatters.pdf
- Key Findings, National Contact Points from 2000 to 2015, *Implementing the OECD Guidelines for Multinational Enterprises* <https://mneguidelines.oecd.org/15-Years-of-the-National-Contact-Points-Highlights.pdf>
- National Contact Points <http://mneguidelines.oecd.org/ncps/>
- OECD Guidelines for Multinational Enterprises <http://mneguidelines.oecd.org>
- Specific Instances <https://mneguidelines.oecd.org/specificinstances.htm>

United Nations Guiding Principles on Business & Human Rights

- *Compliance and Sustainability Teams Should Work Together to Strengthen Corporate Ethics (BSR)* <http://www.bsr.org/en/our-insights/blog-view/compliance-sustainability-teams-work-together-strengthen-corporate-ethics>
- *Costs of Company-Community Conflict in the Extractive Sector* www.hks.harvard.edu/m-rcbg/CSRI/research/Costs%20of%20Conflict_Davis%20%20Franks.pdf
- *Embedding the Corporate Responsibility to Respect Human Rights within Company Culture* (Shift Project) shiftproject.org/sites/default/files/Embedding%20the%20Corporate%20Responsibility%20to%20Respect%20Human%20Rights%20into%20Company%20Culture.pdf
- *Focus Area - Sponsorship, Mega Sporting Events* www.megasportingevents.org/sponsorship.html#merchandise
- Intergovernmental organizations Embedding UN Guiding Principles <https://business-humanrights.org/en/un-guiding-principles/implementation-tools-examples/examples-of-uses-by-others/intergovernmental-organizations>
- National Action Plans <https://business-humanrights.org/en/un-guiding-principles/implementation-tools-examples/implementation-by-governments/by-type-of-initiative/national-action-plans>
- *Organizing the Human Rights Function within a Company* (UN Global Compact) https://www.unglobalcompact.org/docs/issues_doc/human_rights/Human_Rights_Working_Group/GoodPracticeNote_HumanRightsFunction.pdf
- UN Guiding Principles on Business and Human Rights www.ohchr.org/Documents/Publications/GuidingPrinciples-BusinessHR_EN.pdf
- *Understanding Salient Human Rights Issues* (Shift Project) <http://www.ungpreporting.org/key-concepts/salient-human-rights-issues/>
- *What Do Human Rights Have to Do With Mergers and Acquisitions?* (Shift Project) shiftproject.org/sites/default/files/Shift_M&Aarticle_Jan2016.pdf

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