



Connecting Business and Human Rights and Anti-Bribery and Anti-corruption

A Submission to the UN Working Group on Business and Human Rights from Control Risks
1 March 2020

Introduction and summary

This submission responds to a call from the UN Working Group on Business and Human Rights for input to a forthcoming report on the links between the Business and Human Rights (BHR) and Anti-Bribery and Corruption (ABC) agendas. We agree with the Working Group's view that there are indeed close links between the two agendas, and that practitioners in both fields have much to learn from each other. We are delighted to share our experience.

In this submission we draw on our combined international experience with a particular focus on Question 4 in the list of suggested topics outlined by the Working Group, namely:

How can anti-corruption compliance and human rights due diligence be better coordinated within companies as part of an overall approach to responsible business conduct? What are examples of good practice?

The main theme of the submission is “What can human rights practitioners learn from their anti-corruption colleagues?” The key points include:

- ▶ Companies should address both human rights and anti-corruption as part of a combined corporate responsibility/business ethics agenda.
- ▶ Treating corporate responsibility as a unified whole makes more efficient use of resources, and the involvement of both internal and external stakeholders can help boards build better, more resilient and more valuable businesses.
- ▶ In the anti-corruption field, legal and regulatory reform has been an important – but not yet sufficient – driver or change. We attach particular importance to the UK Bribery Act's requirement that companies should institute “adequate procedures” to prevent corruption. We note that the UK government's *Guidance* to the act is principle-based, and we think this is a helpful approach that is also applicable to human rights.
- ▶ Both anti-corruption and human rights due diligence require an ethical approach that goes well beyond existing – and perhaps future – legislation. We believe that companies' ultimate reference points should be expressed in terms of ethics as well as compliance.
- ▶ Company frameworks should also be “risk-based” in the sense that companies need due diligence strategies that identify the core issues requiring closer scrutiny, and greater resources. The broad principles of a risk-based approach apply both to anti-corruption and human rights.
- ▶ Governments and businesses need to work together to address systemic challenges, also involving civil society. Both in the anti-corruption and in the human rights fields, there is a clear need for multi-stakeholder initiatives including a focus on specific sectors.

About Control Risks

Control Risks is a specialist risk consultancy that helps create secure, compliant and resilient organisations. We work with a wide range of companies on all aspects of business integrity from the board room to the frontline, and from policy formulation to problem-solving. Our headquarters is in London, and we have a network of international offices in every region and almost every time zone. We have extensive first-hand experience of helping companies operate ethically in both developed markets and complex emerging economies.

We follow international legal developments on business integrity, human rights and ethical issues very closely. We contribute to 'thought leadership' through our research, briefing papers, participation at specialist conferences and – most importantly - through our engagement with clients. Control Risks has been a signatory to the UN Global Compact since 2007 and our most recent [Communication on Progress](#) is available on our website.

The main author of this submission is John Bray, a UK national who is based in our Singapore office. He has drawn on input from Control Risks colleagues across our international network.

1. A unified corporate responsibility agenda

We regard anti-corruption and human rights not so much as separate fields but rather as part of a combined corporate responsibility agenda. This agenda is variously defined as “Responsible Business Conduct” (the OECD’s preferred term), “ESG”, (Environmental, Social, Governance, the term favoured in the investment community), “Corporate Responsibility”, “Business Ethics” and “Business Integrity”.

Each field and sub-field will have its specialists but, regardless of terminology, we believe that company boards should see corporate responsibility as a unified agenda that amounts to more than the sum of its components. Control Risks itself has a [Code of Ethics](#) that addresses and summarises a range of corporate responsibility topics. It addresses both human rights and anti-corruption, and includes the sentence that “Business Integrity goes beyond compliance with the law, and involves the application of our core values”. We have separate, complementary policies that go into [anti-corruption and anti-bribery](#) and [human rights](#) in greater detail.

As will be seen below, we believe that many of the strategies that companies adopt to prevent corruption can also be applied to the human rights agenda. Treating corporate responsibility as a unified whole makes more efficient use of resources, and the involvement of both internal and external stakeholders can help boards build better, more resilient and more valuable businesses.

2. Governments, law and policy

State responsibilities

The *UN Guiding Principles on Business and Human Rights* rightly emphasise states’ responsibility to “respect, protect and fulfil human rights and fundamental freedoms” as well as the requirement for business enterprises to “comply with all applicable laws and to respect human rights”. We note that the UN Working Group on Business and Human Rights’ 2018 [report on human rights due diligence](#) states that “It is the job of Governments to address governance gaps and market failures.” Similarly, we welcomed the main theme of the [2019 UN Forum on Business and Human Rights](#): “Time to act: Governments as catalysts for business respect for human rights”.

While governments may act as catalysts, they cannot carry responsibility for the entire human rights agenda. Nevertheless, they play an essential role – which cannot be replaced by business – in defining overall governance structures and framing legislation.

Legal reform as a driver for change

In the anti-corruption world, legal and regulatory reform has been an important – but not yet sufficient – driver for change. Among our clients, the most significant legislation in this respect includes the extra-territorial US Foreign Corrupt Practices Act (FCPA), the UK Bribery Act and, to a lesser extent, the equivalent laws introduced by other OECD states. Guidance issued by the US Department of Justice and the Securities and Exchange Commission, for instance the 2012 [Resource Guide to the US Foreign Corrupt Practices Act](#) emphasises the need for risk assessment and due diligence. The UK Ministry of Justice [Guidance](#) on the Bribery Act likewise includes “Due Diligence” as one of its four principles. The [Anti-Corruption and Ethics and Compliance Handbook for Business](#), jointly published by the OECD and the UN Office for Drugs and Crime (UNODC) includes risk assessment and due diligence case studies among its examples of good practice.

Effective enforcement is essential if extra-territorial legislation is to be meaningful and the anti-corruption NGO Transparency International has rightly highlighted uneven enforcement among OECD countries in its series of [Exporting Corruption](#) reports. However, in our view the number of prosecutions is only one indicator of the impact of extra-territorial anti-corruption laws. In the case of the UK Bribery Act we attach particular importance to the requirement that companies should apply “adequate procedures” to prevent bribery, including risk assessment.

In our view, international experience concerning anti-corruption legislation points to a few lessons that apply to the business and human rights agenda:

- ▶ **A narrow definition.** The first is that the offence of bribery is narrowly defined. The FCPA and the 1997 OECD Anti-Bribery Convention apply to bribes to foreign officials to secure a business advantage. The UK Bribery Act is broader in that it applies to bribes paid to anyone, whether in the public or the private sector, to induce improper performance of a “relevant function or activity”. These definitions make it easier to enforce the laws and to bring prosecutions. However, these legal wordings cover no more than a fraction of the misdeeds that might be included in a broader definition of corruption such as “illegal, bad, or dishonest behaviour, especially by people in positions of power” ([Cambridge Dictionary](#)).
- ▶ **Principle-based.** Second, however, the UK Bribery Act’s adequate procedures requirement and the accompanying guidance are principle-based rather than providing companies with detailed prescriptions on how exactly they should conduct their compliance programmes, including due diligence. In some business circles, the lack of detailed prescriptions has been a source of irritation because people would prefer to identify precise “pass marks” that will define whether they are compliant. In our view, a principle-based approach is the only viable way forward because there are so many variations in the challenges that companies face according to their size, sector and geographical location.
- ▶ **Political will and social attitudes.** Third, the anti-corruption agenda is still evolving, and its future development depends on a range of factors that go well beyond the niceties of legal drafting. As noted above, the implementation of existing laws is uneven. Tighter implementation will require a combination of greater political will and social change.

Applying the lessons of anti-corruption experience to the business and human rights agenda, we suggest the following:

- ▶ We note the ongoing international discussions concerning a proposed legally binding UN treaty on business and human rights. However, we suggest that the most concrete legal advances in the short and medium terms are likely to be those that address specific problems rather than the wider universe of human rights, similar to how anti-bribery legislation addresses only one aspect of “corruption”. These could include – for example – laws concerning working conditions, recruiting practices, environmental safeguards and non-discrimination.
- ▶ We believe that the principle-based adequate procedures approach has made an important contribution to the anti-corruption agenda. It is helpful that, on the one hand, the requirement for adequate procedures to prevent bribery is now enshrined in UK law. On the other hand, the nature of those procedures – including the details of

due diligence requirements – is not narrowly defined. We believe that the UK Modern Slavery Act 2015 represents an early stage of a similar evolution in the development of human rights-related adequate procedures.

- ▶ The formal enactment of legislation should be seen as a milestone in the reform process, but not its endpoint. Legal reform needs to be accompanied by wider political and social change if laws – whether concerning anti-corruption or human rights – are to have real effect.

This leads to a further set of observations concerning the limitations of a purely legal approach to due diligence. Compliance-driven due diligence investigations are a staple part of Control Risks' consultancy across the world. The tasks that we are asked to complete are often narrowly defined according to strict legal requirements. To paraphrase, we may be asked to “answer the question and nothing but the question”. The “question” in this sense typically refers to precisely defined legal prescriptions and not to wider ethical issues or even to political risk. As a commercial consultancy, we need to be sensitive to our clients' expectations, but this approach is often less than ideal.

A similar point will apply to human rights due diligence, but even more so. As is often pointed out, human rights due diligence is concerned with impacts on people, including a wide range of internal and external stakeholders, and not just potential risks to the company. The need to avoid adverse impacts applies also to the anti-corruption agenda: bribe-paying has a corrosive social impact. This point is not new, but it could be stressed more strongly in business anti-corruption circles. Both anti-corruption and human rights due diligence require an ethical approach that goes well beyond existing – and perhaps future – legislation. A narrow legal approach will not be sufficient.

“Beyond compliance”

In our internal discussions and – increasingly - in our discussions with clients, we often discuss the overlaps and distinctions between “ethics” and “compliance”. The purpose of risk management is not simply to shield companies and their reputations but also to assess responsibility across their value chains taking full account of potential impacts on external parties.

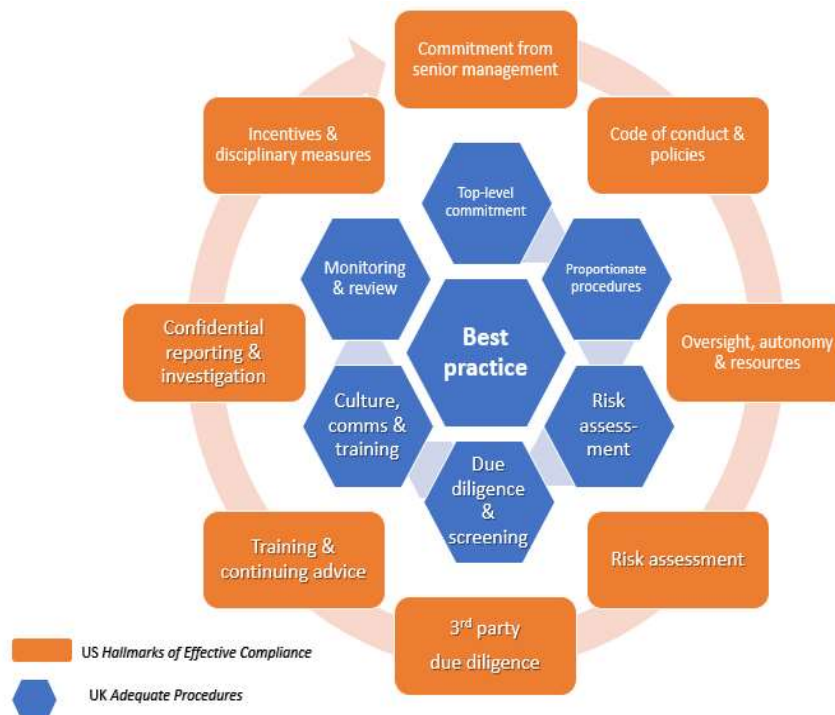
We are still learning how best to articulate this point to different client audiences, but we believe that companies' ultimate reference points should be expressed in terms of ethics as well as compliance. Legal compliance is essential, but it does not solve all problems or address all kinds of risks. A narrow emphasis on legal compliance may not be sufficient to enable frontline managers – or their board-level colleagues – to address complex problems under pressure. Illustratively, it is a positive sign that the US-based [Society of Corporate Compliance and Ethics](#) includes both “compliance” and “ethics” in its title.

In South-East Asia, we have recently been conducting a series of “Ethical Mindfulness” training workshops for one of our clients (who came up with the title). The workshops are designed to complement compliance training, and address the question “what should we do?” rather than simply “what does the law require?” We intend to incorporate this approach across our anti-corruption and human rights engagements.

3. Implementation challenges and opportunities

Frameworks

Turning now to policy implementation, we believe that similar management frameworks can be applied to both anti-corruption and human rights. In our work with clients, we often use the diagram below. This is based on the *Resource Guide to the US Foreign Corrupt Practices Act* and the UK *Guidance on the Bribery Act* that we mentioned above. It illustrates the common principles that apply to both laws, even if the language is slightly different. Crucially, both laws emphasise the need for senior management comment, risk assessment and monitoring.



A similar model can be applied to other kinds of policy implementation. Illustratively, but not surprisingly, the US Department of the Treasury's Office of Foreign Assets Control (OFAC) advocates a [framework](#) for compliance with US sanctions policy that is strikingly similar. "Circular" models of policy implementation and constant reinforcement are widely applied in the field of anti-fraud. The model is equally applicable to human rights.

Implementation challenges

The challenges are also similar across all these fields. They include:

- ▶ Ensuring that the compliance and ethics function has significant resources.
- ▶ Communicating the company's ethical values across all levels of the company from senior headquarters management to the operational frontline across different geographies. In our experience, frontline employees often do not fully understand their ethical responsibilities.
- ▶ Ensuring that due diligence is not seen as a "one-off" but rather that it is reinforced through a continuous process of monitoring.
- ▶ Integrating commercial and ethical benchmarks when defining employees' targets and objectives.
- ▶ Developing a risk-based due diligence process that is both efficient and meaningful. "Risk-based" in this case means designing a due diligence framework that helps identify the issues that require closer scrutiny, and greater resources. The broad principles of a risk-based approach apply both to anti-corruption and human rights. It is important to take full account of the wider political and social context. At the same time, it is essential to evaluate the potential impacts of specific sectors and types of commercial project.

We strongly endorse the point made by the UN Working Group on Business and Human Rights in its 2018 [report](#) to the UN General Assembly (A/73/163) that "The responsibility to carry out human rights due diligence applies regardless of any 'business case' argument." Nevertheless, to make a similar but slightly different point, it is helpful if managers can give concrete examples showing how their companies' ethical principles and commercial objectives are aligned. A recent example from our own experience concerns the work of our local health and safety specialist in Iraq. The disciplined application of health and safety standards is both an ethical and a compliance requirement: he

has also been able to demonstrate that they make the business more efficient. Ideally, a similar approach can be applied to both anti-corruption and human rights.

Digital opportunities

The application of emerging digital technologies is a growing theme in our consultancy. In the anti-corruption and anti-fraud fields, digital analytics make much it easier to recognise patterns of improper financial payments. Until now, we have not ourselves used these tools in relation to business and human rights investigations but we understand that banks are doing so, for example when looking for patterns that could point to payments related to human trafficking.

4. Addressing systemic problems

The greatest current and future challenge is the need to address systemic problems that contribute both to high levels of corruption and human rights vulnerabilities. This leads back to our earlier observation on the complementary roles of states and companies. States have the primary duty to protect human rights, including by drafting and enforcing appropriate legislation. Companies have a responsibility to respect human rights. More than that, they typically have knowledge and experience that is not readily available to States. However, on their own they do not have the capacity to address systemic problems that lead to repeated patterns of corruption.

Both in the anti-corruption and in the human rights fields, there is a clear need for multi-stakeholder initiatives, also involving civil society. The [Basel Institute on Governance](#) has particular expertise on anti-corruption collective action, and we recommend that the Working Group consult them if it has not already done so.

Sector-specific approaches

In our observation and experience, the most promising avenues for multi-stakeholder engagement are likely to be sector-specific. Notable existing examples include:

- ▶ The [Extractive Industry Transparency Initiative](#) (EITI) is well known for its focus on the governance of the extractive sectors. It by no means solves all the integrity-related problems associated with these sectors. However, by promoting greater transparency in financial reporting by both states and companies, it creates conditions that make it harder to conceal large-scale corruption.
- ▶ The [Marine Anti-Corruption Network](#) is industry-led (the Danish shipping company Maersk played a key role in its early stages) but works closely with – for example – the Danish Ministry of Foreign Affairs as well as host governments in Nigeria, Indonesia and now India. It now has more than a hundred member companies.
- ▶ On a smaller scale, the [curbingcorruption.com/](#) website is a civil society initiative led by a small group of individuals that synthesises research on corruption and counter-corruption in a series of key commercial sectors, starting with construction and public works, and continuing to education, fisheries and others.
- ▶ In Myanmar, the [Myanmar Centre for Responsible Business](#) (MCRB) is a donor-funded civil society organisation that works with both local and international business as well as providing policy recommendations to government, for example on draft legislation. The MCRB has likewise adopted a sectoral approach through its [Sector-wide Impact Assessments](#) on the oil and gas, tourism, ICT, mining and oil palm sectors. These assessments apply a “human rights lens” to environmental and social impact assessment. They are intended to provide a foundation upon which individual companies can build with their own due diligence assessments.

The reference to the MCRB brings our submission full circle because its responsible business mandate encompasses both anti-corruption and human rights. To reiterate, we believe that both should be part of a combined government, business and civil society agenda. While there are differences in detail, common methodologies apply to both. The broad principles are well-established. The application of those principles will be most effective where there is a step-by-step multi-stakeholder approach to particular problems in specific sectors and geographic locations.