

Beyond Ethics: Relevance of Human Rights and International Human Rights Standards

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Presentation Outline

- 1) **The context**
- 2) **Business responsibility to respect human rights**
- 3) **From paper to practice**

1. The Context

- All businesses are required to follow applicable local regulations
- There are also expected to behave ethically
- However, businesses are increasingly expected (or required) to follow **international human rights standards**

The context Continued ...

- The Human Rights Council **unanimously endorsed** the UN Guiding Principles on Business and Human Rights (UNGPs) in June 2011



- Soft standards but highly influential in practice

- The UNGPs apply to **all business enterprises** and covers **all human rights**

- 31 Principles are organised around **Three Pillars:**
 - I. State *duty* to protect human rights

 - II. Business *responsibility* to respect human rights

 - III. Access to *effective* remedy

➤ UNGPs' influence on laws and policies:

- ❑ EU Non-financial Reporting Directive (2014)
- ❑ UK Modern Slavery Act (2015)
- ❑ Chinese Due Diligence Guidelines for Responsible Mineral Supply Chains (2015)
- ❑ French Duty of Vigilance Law (2017)
- ❑ Indonesian Ministerial Regulation for Fishing (2017)
- ❑ Australian Modern Slavery Act (2018)
- ❑ India's National Guidelines on RBC (2019)
- ❑ Dutch Child Labour Due Diligence Act (2019)
- ❑ Proposed mandatory HRDD regulation in EU (2021)

2. Business Responsibility to Respect Human Rights

- All business enterprises have a responsibility to respect all “internationally recognised human rights”
- This is an independent and complementary responsibility

- Business responsibility to respect means:

- **Avoid infringing** on the human rights



- **Address adverse** human rights **impacts**



Typology of Business-related HRs Impacts

- Enterprises may create adverse human rights impacts in different ways
- They may **cause**, **contribute** to or be **directly linked** to such risks [Principle 13]

Business responsibility Continued ...

- Corporate response to adverse HRs impact varies as per the nature of their involvement with such harm:

Caused

- Cease the action
- Provide for/cooperate in remediation

Contributed to

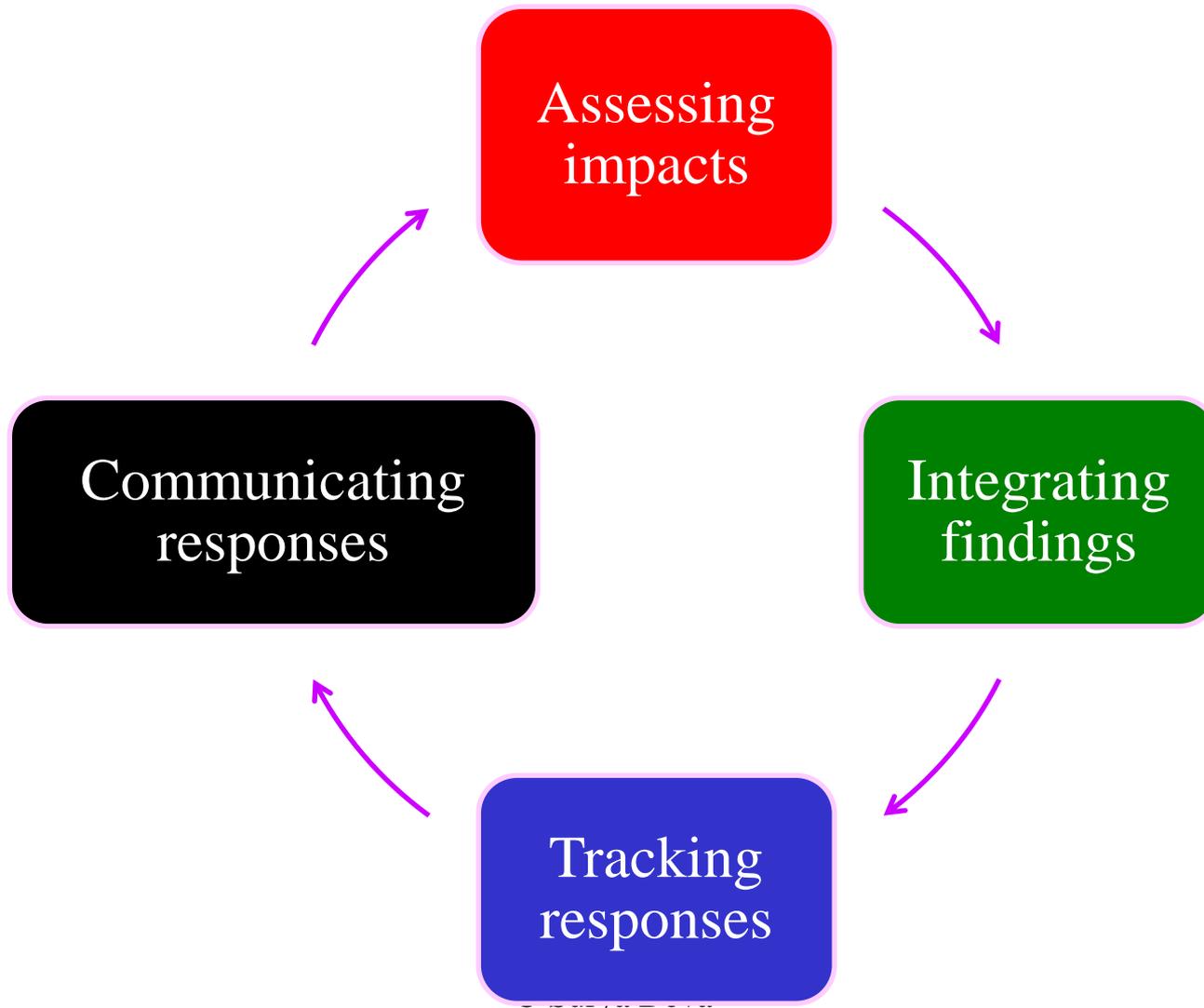
- Cease the action & use leverage
- Provide for/cooperate in remediation

Directly linked to

- Use/build leverage to mitigate the risk

- Businesses are expected to adopt the following *policies and processes* to discharge their responsibility to respect HRs:
 - 1) Declare a **policy commitment** to respect human rights [Principle 15(a) → 16]
 - 2) Conduct **human rights due diligence** [Principle 15(b) → 17-21]
 - 3) Put in place processes to enable **remediation** of any adverse human rights impacts [Principle 15(c) → 22]

HRDD Steps



Business responsibility Continued ...

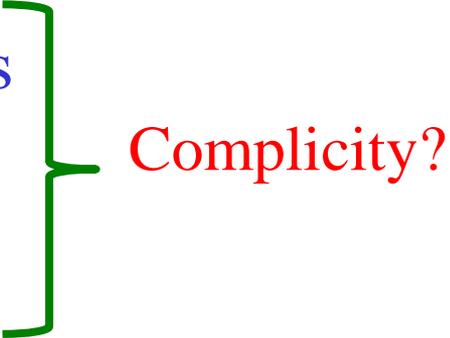
- In April 2020, the EU Commissioner for Justice Didier Reynders announced that the European Commission will introduce a **human rights and environmental due diligence** legislation in 2021



- In addition to regulators, big companies will face increasing pressures from diverse sources



3. From Paper to Practice

- How human rights may become directly relevant for Aero-Space and Defence industries:
 - ✓ Who is manufacturing certain parts and under what conditions?
 - ✓ Supply of “dual use” products or services
 - ✓ Operations in conflict zones
- 
- Complicity?

Human Rights Due Diligence: Intersections with Ethics and Compliance

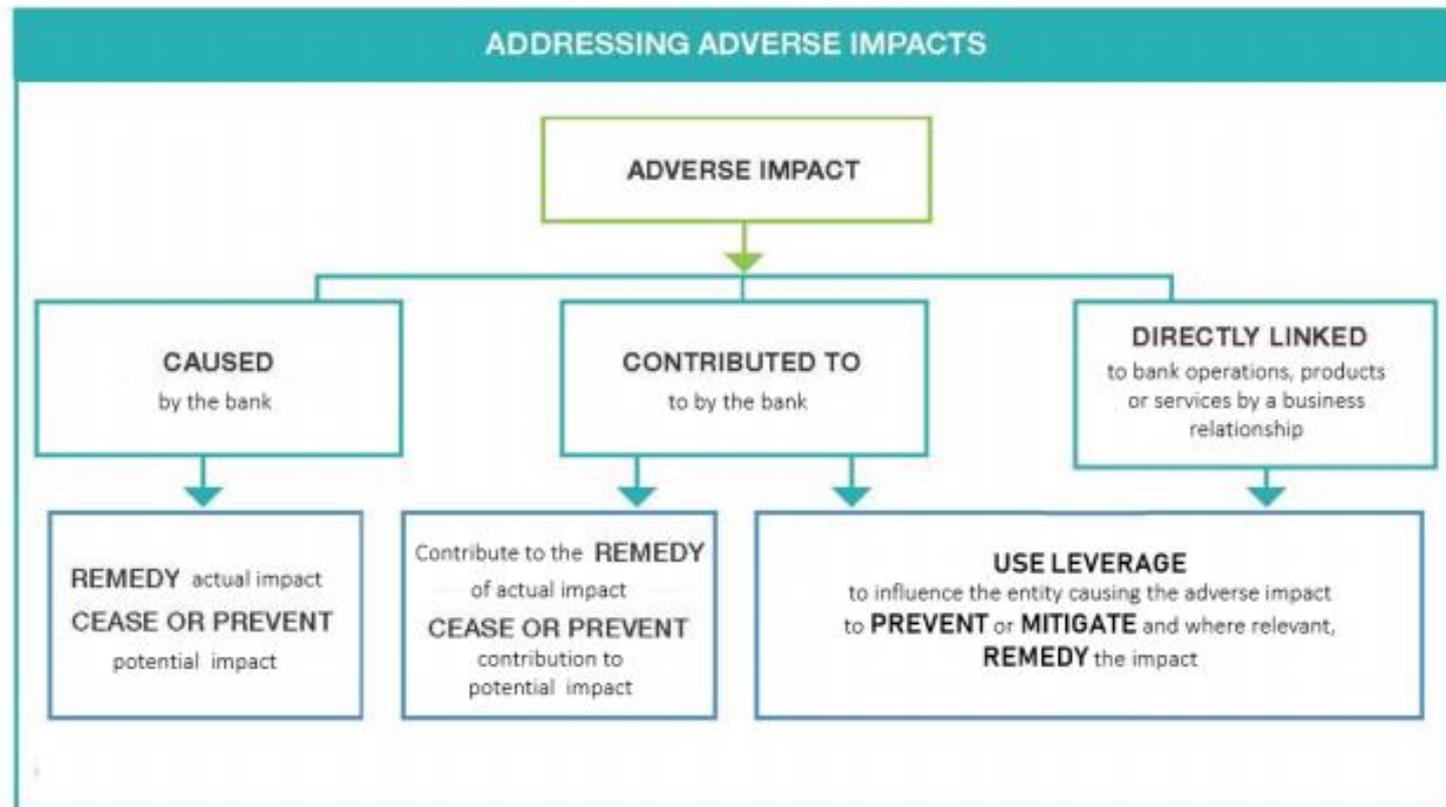
International Forum on Business Ethical Conduct for the Aerospace and Defense Industry (Nov. 4, 2020)

Ariel Meyerstein, PhD
SVP, Sustainability & ESG
Citigroup



Human rights due diligence vs. other ethical compliance

- Even if only “directly linked” need to use/increase “leverage” to improve human rights outcomes.
- Only re-evaluate or exit the business relationship if leverage not effective and no prospect for increasing leverage, either bilaterally or in concert with others. *This is the opposite behavior prescribed by both anti-bribery/corruption or sanctions regimes.*
- Also, while potentially informative to human rights due diligence, corruption risk profiles are too narrow to capture all potential human rights impacts and formal sanctions programs historically have had very high bar for abuse (and are impeded by geopolitics)



Businesses should avoid complicity in human rights impacts

Even if not technically “contributing” to impacts, businesses should avoid complicity in human rights or the appearance of complicity.

- The UN Guiding Principles note that complicity is understood and viewed by stakeholders in both legal and non-legal terms; non-legal complicity is a matter of perception and reputation judged by third-parties whether a court has jurisdiction or there is a credible legal claim
- **National laws:** Most national jurisdictions prohibit complicity in the commission of a crime; a number of countries extend this to business enterprises. Civil actions can also be based on an enterprise’s alleged contribution to a harm.
- **International law:** Weight of jurisprudence is that aiding and abetting standard is **knowingly providing practical assistance or encouragement that has a substantial effect on the commission of a crime.**
 - Cause/contribute = acts **and** omissions
 - What did you know? When did you know it? What could a reasonable party have done to make impacts less likely to occur?
- **Importance of human rights due diligence (HRDD):**
 - Conducting appropriate human rights due diligence should help business enterprises address the risk of **legal claims** against them by showing that they took every reasonable step to avoid involvement with an alleged human rights abuse.
 - **However, HRDD, by itself, will not automatically and fully absolve businesses from liability or reputational risks related to for causing or contributing to human rights abuses.**

Need vigilance across value chain (upstream and downstream)

- **Sales to government entities – national/sub-national (military/other law enforcement):**
 - Engaged in active conflicts – internal or international?
 - Compliance with international humanitarian law – treaty ratification and track-record; targeting of civilians, disproportionate use of force
 - Compliance with international human rights law – freedom of expression, assembly, privacy rights, arbitrary detention, rule of law, freedom from torture
 - Guiding Principles: responsibility to respect human rights “exists independently of States’ abilities and/or willingness to fulfill their own human rights obligations [...] and above compliance with national laws and regulations protecting human rights.”
- **Product misuse:** product designed for legal purposes, applied in unlawful ways either by known customer or third-party
 - **Need to know your customer/retail value chain** – consider immediate and potential country context in which product could be sold/used and what other third-parties could get their hands on them: criminals, terrorists, or repressive states.
 - **Dual use goods in focus already, but risks go beyond export controls:** EU definition: “goods, software, and technology normally used for civilian purposes but which may have military application, or may contribute to the proliferation of Weapons of Mass Destruction (WMD),” e.g., electronics, computers, policing and security equipment, construction tools and equipment, sensors and lasers.
- **Supply chain due diligence:** forced labor and other working conditions, including human trafficking, environmental impacts of production processes.

Challenges and opportunities

Fragmentation of retail chains

- Control over product use varies with sales channels – direct sales, joint ventures or intermediaries
- More fragmented value chains mean less management oversight of customers, clients and other end users grows more challenging – hard to know to whom they are selling, for what purposes, and whether products or parts of products will be re-purposed or re-sold

Lack of control after sale

- Once a product or service is sold, especially in an open market, a company's ability to control or oversee that product or service may be diminished
- Dual-use items subject to export controls: authorizing state or government rather than the company maintains final oversight and control over the sale, distribution and/or marketing of the good or service. States often look at export controls in terms of political, geopolitical or national security contexts, which do not necessarily include considerations of human rights
- Resale, reuse, or repurpose of any product or service, especially if that product or service is distributed to a secondary purchaser, particularly if sold on the black market or the dark web

Be proactive: enhance leverage by improving visibility and opportunities to limit impacts: assess business model, develop legal or technological controls:

- Re-evaluate controls over value chain – does current structure allow company to meet responsibility to respect or creates a situation with insufficient control?
- Where sales are carried out through third-parties, use contracts to commit these third parties to take measures to prevent and/or reduce the risk of product misuse
- Technology: embed responsibility in product design – make products safer and limit their functionality in the wrong hands; identify ways to track and disable technology if sold into wrong hands



Business at OECD (BIAC) – IOE practical guide on
connecting the anti-corruption and human rights
agendas



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- The **officially recognized business voice** to the OECD
- We represent the **leading business and employers' organizations in OECD countries**, business organizations in selected non-member countries and international sectoral business organizations

OECD MNE Guidelines and practical guidance



- **Non-binding recommendations on responsible business conduct (RBC)** by governments to MNEs operating in or from adhering countries
- The **most comprehensive government-backed international RBC instrument** and a key international reference
- Practical guidance for enterprises in carrying out due diligence as foreseen by the MNE Guidelines by presenting plain language explanations
- Sectoral guidances for the **extractive, garment and footwear, minerals and finance sectors** as well as for **agricultural supply chains**

Connecting the anti-corruption and human rights agendas: A guide for business and employers' organizations

4 November 2020, WEBEX meeting
IFBEC Panel on Human Rights



Why connecting the human rights and anti-corruption agendas?



Corruption can be a driving factor behind human rights violations.

Corruption and human rights violations share similar root causes and thrive in similar environments.

They pose similar reputational, financial, operational, and legal risks to companies.

Aim of the guide

- (1) understand synergies and differences
- (2) contribute to emerging policy discussions
- (3) support anti-corruption and human rights experts in companies with practical tips and strategies
- (4) provide an overview of the resources that exist in the fields of anti-corruption and human rights

What the guide is not

- ✗ Not a prescriptive list of actions for how companies should link anti-corruption and human rights
- ✗ Not an attempt to formally merge the two agendas
- ✗ Not a reference point for any legislative initiative or binding legislation

What the guide offers

- ✓ Ideas for leveraging synergies, where feasible and desirable
- ✓ Raise questions for self-assessment which take into account individual company circumstances
- ✓ Recognition that there is ‘no one size fits all’ and need for tailor-made approaches

→ **A living document**

Differences

CORRUPTION

- Focus: criminalization, emphasis on the perpetrators
- Scope: can be limited to a number of clearly defined acts
- Approach: based on clear laws and standards
- Organization: legal compliance departments

HUMAN RIGHTS

- Focus: victim-centered perspective
- Scope: related to a vast number of areas of corporate practices and business relationships
- Approach: “responsibility to respect”
- Organization: sustainability, corporate responsibility, supply chains and/or labour teams

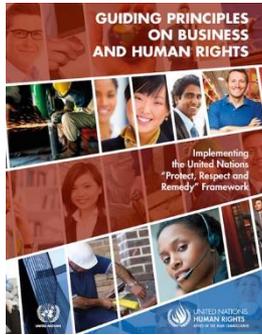
Towards a more coordinated approach

- develop a broader notion of business integrity/ethics
- facilitate information sharing and prevent a duplication of efforts

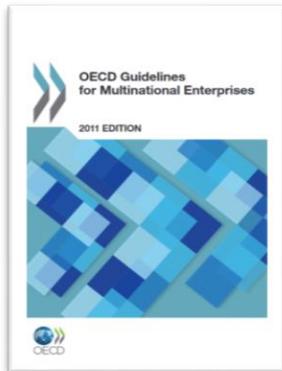
BUT:

- Company efforts can complement but cannot replace government efforts
- Companies cannot exercise complete oversight over all their suppliers

Building on existing guidance



- UN Guiding Principles on Business and Human Rights and the “Protect, Respect and Remedy” Framework
- OECD Guidelines for Multinational Enterprises
- OECD Due Diligence Guidance for Responsible Business Conduct
- OECD Good Practice Guidance on Internal Controls, Ethics and Compliance



Practical guidance – Questions for consideration

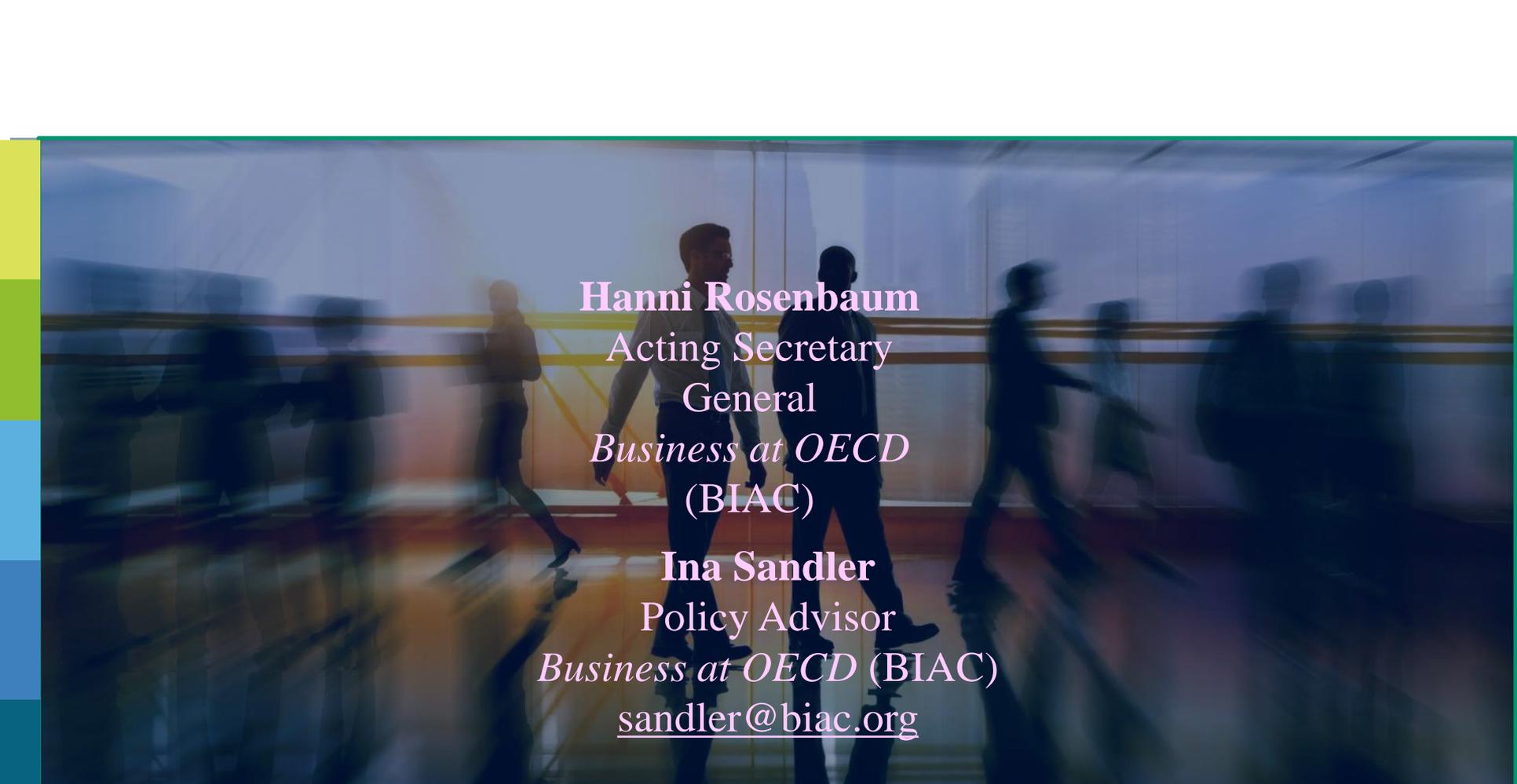
- 1. **Initial risk assessment**
- 2. Embedding human rights and anti-corruption in the **corporate culture**
- 3. Building on experiences and **existing structures**
- 4. Using synergies in **due diligence processes**
- 5. Establishing coordinated **training programs**
- 6. Considering **joint reporting mechanisms** where practical and appropriate
- 7. Supporting **internal reporting mechanisms**
- 8. **Reporting to external stakeholders**
- 9. Engaging in **cooperation and collective action**

Annex

Overview over **resources** that exist in the fields of anti-corruption and human rights:

- Key international standards
- Other related standards and guidance
- G20/B20
- Regional standards
- Practical guidance

Practical company examples



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