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**Practical Definitions of Cause, Contribute,
and Directly Linked to Inform Business
Respect for Human Rights**

Discussion Draft

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in collaboration with Enodo Rights

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EXECUTIVE SUMMARY

This discussion paper advances concrete and practical definitions of the involvement terms—*cause*, *contribute*, and *directly linked*—under the OECD Guidelines for Multinational Enterprises (“Guidelines”) and the UN Guiding Principles on Business and Human Rights (“Guiding Principles”) (together, “Guidance”). The Guidance sets forth non-binding principles and standards that are not designed to create or define legal liability for businesses.¹ The Guidance provides an authoritative and comprehensive voluntary framework for businesses to respect human rights.

The involvement terms are critical parameters of this framework: they shape the expected scope of due diligence and remedy under the Guidance. In particular, companies that *cause* an adverse human rights impact are expected to cease, prevent, and remedy the impact. Companies that *contribute* to an adverse human rights impact are expected to cease, prevent, and remedy the impact to the extent of their contribution. In such cases, companies should also use or seek leverage to mitigate any remaining adverse impact. Unlike *cause* and *contribute*, however, *directly linked* involvement does not bring any expectation of remedy; companies *directly linked* to adverse human rights impacts are expected only to use or seek leverage to mitigate the adverse impact. As a result, adherence to these parameters implicates serious reputational risks for companies across sectors. Increasingly, these same parameters indirectly affect significant legal and financial business risk. A precise and shared understanding of the involvement terms is therefore essential to bring certainty to businesses and stakeholders alike regarding the scope of voluntary corporate commitments to respect human rights.

In the past few years, the practical implications of the involvement terms have been explored by authoritative institutions, including the OECD and the UN Office of the High Commissioner for Human Rights (OHCHR). But the focus thus far has been on examples to illustrate how business may be involved in adverse human rights impacts.² The logic uniting and distinguishing those examples remains largely unexplored. And, to the extent definitions have been suggested, the reasoning underlying them has not been disclosed.³ The result is uncertainty regarding how businesses should structure human rights due diligence and when they should engage in remediation, increasing the risk to businesses for failing to align their activities with the Guidance. We seek to address that uncertainty.

¹ GUIDELINES at 3 (“The *OECD Guidelines for Multinational Enterprises* are recommendations addressed by governments to multinational enterprises operating in or from adhering countries. They provide non-binding principles and standards for responsible business conduct in a global context consistent with applicable laws and internationally recognised standards. The *Guidelines* are the only multilaterally agreed and comprehensive code of responsible business conduct that governments have committed to promoting.”).

² See, e.g., U.N. Office of the High Comm’r for Human Rights, *The Corporate Responsibility to Respect Human Rights: An Interpretive Guide* 18 (2012), http://www.ohchr.org/Documents/Publications/HR.PUB.12.2_En.pdf [hereinafter *Interpretive Guide*]; OECD, *Guidelines for Multinational Enterprises* 32 (2011), <http://www.oecd.org/daf/inv/mne/48004323.pdf> [hereinafter *Guidelines*].

³ OECD, *Due Diligence Guidance for Responsible Business Conduct (Draft 2.1)* (2016), <http://mneguidelines.oecd.org/OECD-Due-Diligence-Guidance-Responsible-Business-Conduct.pdf> [hereinafter *Draft Due Diligence Guidance*].

Building on the Guidance and authoritative commentary, this discussion paper suggests definitions that enable businesses practically to anticipate when they are, or might be, involved with a particular adverse human rights impact. We illustrate the implications of these definitions with case studies to demonstrate how any company can differentiate between *cause*, *contribute*, and *directly linked* involvement. Crucially, the definitions and case studies not only suggest when a business is actually or potentially involved in adverse human rights impacts, but also when businesses are *not* involved with adverse impacts, so they can tailor their due diligence appropriately. We have devised practical definitions with a view to making them precise enough to enable constructive stakeholder engagement and program development, while still flexible enough to be used in diverse business contexts.

I. Structure

This Executive Summary provides a high-level overview of our reasoning, results, and practical implications. Our definitions, analysis, and case studies in this draft are for discussion purposes only. We do not here take any definitive positions on the issues raised in this paper. Rather, we aim to participate in a considered discussion of the involvement terms, which we hope will assist in resolving issues of concern to all those interested in the discipline of business and human rights.

The analysis behind our proposed definitions of *cause*, *contribute*, and *directly linked* is largely set forth in the Annex. We welcome questions and encourage all interested stakeholders to assess and critique the reasoning underlying our definitions in the Annex.

II. Method

We began this research in May 2016 to assist in crafting the OECD's Due Diligence Guidance for Responsible Business Conduct ("Draft Due Diligence Guidance"). The process has involved extensive review and analysis of guidance from the OECD Secretariat, National Contact Points, and the OHCHR, as well as from relevant legal and social science sources. Since October 2016, we have also shared drafts and engaged with leading business and human rights experts from civil society and the private sector to refine our reasoning.

We hope to engage with businesses and stakeholders over the next few months on the issues raised in this discussion draft. To that end, the manner of interpreting the involvement terms is as important as their definitions. Our approach is grounded in the interpretive framework of the Guidance itself. Our aspiration is neither to ossify the Guidance, nor to transform it into a mechanical, check-the-box exercise.

Nonetheless, we seek to address our concern that leaving the involvement terms undefined invites arbitrary or quixotic interpretation, which risks compromising the legitimacy and credibility of business and human rights as a discipline. An effective definition should allow objective observers to determine when a company is involved with an adverse impact, and, just as importantly, when it is not. Our

analysis proceeds in two stages: *first*, we consider the ordinary meaning of *cause*, *contribute*, and *directly linked*, including in the context of the natural and social sciences, and analogous legal contexts, particularly with respect to civil injuries and human rights abuses; and *second*, we consider the meaning of the involvement terms with reference to the context and object and purpose of the Guidance itself.

This approach leads us to definitions of each of the involvement terms specifically linked to the Guidance, which we have tested for consistency with decisions of OECD National Contact Points and prior interpretive guides released by authoritative institutions. Finally, we demonstrate how our proposed definitions might work in practice, with practical tests of involvement illustrated with representative case studies.

A. Note on Omissions

While it is beyond the scope of this paper, one issue that warrants careful study is the meaning of *omission*. Under the Guidance, businesses may be involved in human rights impacts through actions or *omissions*, but the term is undefined.⁴ The OECD has recently proposed a definition in the Draft Due Diligence Guidance, but it appears to foster uncertainty by leaving material questions unanswered:

Carrying out due diligence provides the knowledge and tools to avoid adverse impacts to the greatest extent possible. Thus, where due diligence shows or would have shown that action was necessary to prevent or mitigate an adverse RBC impact, and that action was not taken, then this would be an omission under the *Guidelines*. In addition, the *Guidelines* set out specific recommendations for actions expected of enterprises. Failing to take these actions would be considered an “omission” under the *Guidelines*.⁵

The proposed definition raises two practical challenges: overbreadth and circularity. The risk of overbreadth flows from the reference to “action ... necessary to prevent or mitigate” an impact. If *any* failure to act when one has the power to “prevent or mitigate” an adverse impact could constitute involvement in that impact, leverage would determine business responsibility for human rights: a powerful company would by virtue of influence alone be in a position to curb, or attempt to curb, abuses by the state where it operates—no matter their relationship to the business’s products, operations, or services. We do not believe that is the intent of the Guidance. As John Ruggie has noted regarding the limits of business responsibility:

[C]ompanies cannot be held responsible for the human rights impacts of every entity over which they may have some influence, because this would include cases in

⁴ Guiding Principles, Commentary to Guiding Principle 13 at 15.

⁵ OECD, Due Diligence Guidance for Responsible Business Conduct (Draft 2.1) 28 (2016), <http://mneguidelines.oecd.org/OECD-Due-Diligence-Guidance-Responsible-Business-Conduct.pdf> [hereinafter Draft Due Diligence Guidance].

which they were not a causal agent, direct or indirect, of the harm in question. Nor is it desirable to have companies act whenever they have influence, particularly over governments. ***Asking companies to support human rights voluntarily where they have influence is one thing; but attributing responsibility to them on that basis alone is quite another.***⁶

The related circularity challenge arises from the fact that if involvement in the proposed definition depends on the scope of due diligence a business conducts, a critical component of due diligence guidance becomes circular: a company is expected to conduct due diligence on adverse human rights impacts with which it is involved; a company is involved with adverse human rights impacts on which it fails to conduct due diligence. Such a definition would preclude a company from ever conducting due diligence of sufficient scope and rigor to align with the Guidance, for an integral component of appropriate due diligence would be to consider impacts on which due diligence had *not* been conducted.

These challenges are serious, practical, and immediate. The proposed definition leaves an essential component of the practical scope of expected due diligence unsettled—without a definition of *omission* that is prior to, and independent of, the scope of due diligence, we are unable to tell exactly what “due diligence ... would have shown” if conducted appropriately. We would thus encourage the OECD to develop more concrete guidance regarding when businesses have a duty to act to prevent or mitigate adverse human rights impacts, so that they may tailor their due diligence accordingly.

III. Key Findings

Our broad-based research and analysis suggests that none of the involvement terms is as clear as many presume. Even *cause*, the term considered most obvious, has been subject to extensive debate in the natural sciences, social sciences, and the law. In each discipline, experts have found that it is often impossible to say definitively that a particular event results from a particular act or omission. The consensus is thus that *impact on the probability* of an event should determine whether an act or omission is the event’s *cause*—both prospectively and retroactively. In practice, *contribution* becomes much harder to separate out from *cause*, as both fundamentally bear on risk. The analytical challenge is even more difficult with *directly linked*, which has no clear antecedents in the disciplines we considered. To understand *directly linked*, we therefore rely on the structure and objectives of the Guidance, drawing on the analogous legal concept of vicarious liability to understand the term’s proper scope.

The following observations animate our definitions:

1. Rather than falling on a continuum, the involvement terms are better understood as founded on two distinct bases: risk and benefit. *Cause* and *contribute* involvement turn

⁶ Protect, Respect And Remedy: A Framework for Business and Human Rights: Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie, H.R.C., 8th Session, at ¶ 69, U.N. Doc. [A/HRC/8/5](#) (2008)(emphasis added).

on a company's effect on the risk of an impact. *Directly linked* involvement turns on the benefit a company derives from an adverse human rights impact.

2. From the perspective of the Guidance, knowledge and foreseeability are not implicated in the question of whether a company is involved with an adverse human rights impact. Because the Guidance does not create liability directly, fault in any legal sense does not come into play. A business may be involved with an adverse impact even if no one could have foreseen that impact. Conversely, a business may not be involved with an impact even if it knows of, or ought to have known of, the impact.
3. Remoteness is crucial to delineating the scope of business responsibility to respect human rights. There is a distinction between increasing the probability of legitimate business activity *A* and increasing the risk of adverse human rights impact *x* flowing from *A*. If *A* could reasonably have been performed without *causing* or *contributing to* *x*, a third party that facilitates *A* does not necessarily *cause* or *contribute to* *x*.

IV. *Cause and Contribute*

A. Interpretation

Cause and *contribute* ordinarily mean, respectively, “to make happen or bring about” and “to help make happen or bring about.” In the context of business impacts on human rights, the difficulty lies in practically making such determinations. Questions of causal complexity are commonplace when considering responsibility for adverse human rights impacts. For instance, when three companies simultaneously pollute a community's water supply, it may be very difficult—even impossible—to determine as a matter of fact whether any one of them brought about—or even helped to bring about—the adverse impact on any individual's right to health. Similarly, when a factory fire leads to the death of workers, it is very difficult to parse as a factual matter whether government failures, auditor negligence, factory-owner indifference, or inadequate monitoring by the purchaser brought about the adverse impacts on workers' rights.

The challenge for a practical definition of *cause* and *contribute* is to enable businesses and stakeholders to determine when a business act or omission can be deemed to bring about a particular impact against a backdrop of factual uncertainty. Such a definition should be consonant with the object and purpose of the Guidance, which is voluntary and remedial rather than binding and punitive. The Guidance does not create or define liability for business enterprises. Rather, it seeks practically and voluntarily to “promote positive contributions by enterprises to economic, environmental and social progress worldwide.”⁷ The definition of *cause* and *contribute* should advance these ends by encouraging businesses voluntarily to engage in human rights due diligence, which is at the heart of the Guidance.

⁷ Guidelines at 3.

B. Definitions

Based on our analysis of the ordinary meaning of the terms in the context of the Guidance, we propose the following definitions of *cause* and *contribute*:

- A business **causes** an adverse human rights impact when its activities (including omissions) materially increase the risk of the specific impact which occurred *and* would be sufficient, in and of themselves, to result in that impact.
- A business **contributes to** an adverse human rights impact when its activities (including omissions) materially increase the risk of the specific impact which occurred *even if* they would not be sufficient, in and of themselves, to result in that impact.

These definitions can also be used on a prospective basis, by replacing “which occurred” with “which may occur.” Thus, for instance, a business **potentially causes** an adverse human rights impact when its activities (including omissions) materially increase the risk of a specific impact which may occur *and* would be sufficient, in and of themselves, to result in that impact.

C. Practical Application

The implication of our definitions of *cause* and *contribute* is that, in conducting practical human rights due diligence, a business should consider the effect of its activities on the risk of a particular adverse impact. The business ought not seek scientific precision—in many cases illusory—regarding whether the adverse impact has resulted or will result from its activity.

The three-stage inquiry for impact or risk assessment would be:

1. Is there an actual or potential adverse human rights impact?
2. If so, do the company’s activities (including omissions) materially increase the risk of that impact?
3. If so, would the company’s activities (including omissions) in and of themselves be sufficient to result in that impact?

If the answer to all three questions is “yes,” then the business causes, or may cause, an adverse human rights impact and is expected to take appropriate measures to cease, prevent, and remedy the impact. If the answer to the first two questions is “yes” and the answer to the third is “no,” the business is contributing, or may contribute, to an adverse impact and should take appropriate measures to cease, prevent, and remedy its contribution; it should also exercise its leverage to mitigate any remaining impact to the greatest extent possible.⁸

⁸ Guidelines at 24.

D. Case Studies: Cause and Contribute

The case studies below serve a narrow end: to illustrate the practical meaning of our preliminary definitions of *cause* and *contribute*—for discussion purposes alone. The rights articulated in the following examples draw on the rights referenced in the Guidance and are not intended to be discussions of the status of such rights under national or international law. In light of the continuing discussion of the definition of *omission*, we also assume no relevant omissions in the examples below.

Example 1: A European apparel manufacturer’s wholly owned foreign subsidiary posts notices in the workplace threatening retaliation against workers who join a union.

- i. *Is this an actual or potential adverse human rights impact?*
 - Yes, the threat “removes or reduces”⁹ the ability of individuals to enjoy freedom of association and right to collective bargaining. The threat of retaliation constitutes the adverse impact.
- ii. *Do the manufacturer’s activities materially increase the risk of this adverse impact?*
 - Yes, under the Guidelines, the foreign subsidiary is considered part of the “multinational enterprise,”¹⁰ such that its conduct in issuing the threat is attributable to the manufacturer.
- iii. *Are the manufacturer’s activities sufficient to result in the adverse impact?*
 - Yes, the threat of retaliation constitutes the adverse impact.

Recommendation: The company is causing an adverse impact on human rights and is expected to cease, prevent, and remedy the impact.

Example 2: To ensure prompt delivery of its order, a major European apparel manufacturer encourages a supplier who has been facing labor-relations issues at one of its factories to threaten retaliation against all workers who are members of a union. The supplier follows the suggestion.

- i. *Is this an actual or potential adverse human rights impact?*
 - Yes, the threat removes or reduces the ability of individuals to enjoy freedom of association and the right to collective bargaining.¹¹ The threat of retaliation constitutes the adverse impact.
- ii. *Do the manufacturer’s activities materially increase the risk of this adverse impact?*
 - Yes, the encouragement coming from a major manufacturer materially increases the risk that the supplier will issue the threat.

⁹ Interpretive Guide at 15.

¹⁰ Guidelines at 12.

¹¹ Interpretive Guide at 15.

iii. *Are the manufacturer's activities sufficient to result in the adverse impact?*

- No, the encouragement alone would not result in any abridgement of workers' rights. Ultimately, the supplier would need to act on that encouragement.

Recommendation: The company is contributing to an adverse impact on human rights and is expected to cease, prevent, and remedy the impact(s) to the extent of its contribution; it is also expected to exercise its leverage over the supplier to mitigate any remaining impact.

Example 3: A multinational bank lends to a food and beverage company to build a factory in an emerging economy. The company retains forced labor in building the facility.

i. *Is this an actual or potential adverse human rights impact?*

- Yes, forced labor adversely impacts, among others, the right to liberty, the right to be free from slavery or servitude, and the right to be free from inhuman or degrading treatment.

ii. *Do the bank's activities materially increase the risk of this adverse impact?*

- No, the loan itself does not increase the risk of this specific impact. The loan may have materially increased the likelihood that the facility would be built. But that does not mean that the loan affected the risk that the facility would be built with forced labor.

Recommendation: The bank is not causing or contributing to an adverse impact. As discussed in the next section, however, it may nonetheless be directly linked to the adverse impact, in which case it should exercise its leverage over the company to mitigate the impact.

Example 4: A pharmaceutical company markets an over-the-counter painkiller by making misleading claims about its health benefits.

i. *Is this an actual or potential adverse human rights impact?*

- Yes, the misleading claims about the drug's effects adversely affect, among others, the right to health—specifically, an individual's right to make informed choices about his or her health.

ii. *Do the company's activities materially increase the risk of this adverse impact?*

- Yes, by making misleading claims, the company materially increases the risk that consumers will make health decisions based on false information.

iii. *Are the company's activities sufficient to result in the adverse impact?*

- Yes, the making of misleading claims is sufficient to result in consumers making poorly or falsely informed decisions regarding their health.

Recommendation: The company is causing an adverse impact. It should cease, prevent, and remedy the impact.

Example 5: A pharmaceutical company distributes an over-the-counter painkiller to pharmacies with clear, accurate, and detailed information about the benefits and adverse effects of the product. One of the pharmacies repackages the drug in smaller quantities, without sharing any of the relevant health information, to sell to socioeconomically disadvantaged consumers.

- i. *Is this an actual or potential adverse human rights impact?*
 - Yes, the failure to inform consumers about the drug's effects adversely affects, among others, the right to health—specifically, an individual's right to make informed choices about his or her health.
- ii. *Do the company's activities materially increase the risk of this adverse impact?*
 - No, the pharmaceutical company's activities only materially increased the likelihood that consumers would have access to the drug. There was nothing in the manner of distribution that necessarily increased the risk that consumers would not be properly informed about the drug's effects.

Recommendation: The company is not causing or contributing to this adverse impact. As discussed in the next section, however, it may be directly linked to the adverse impact, in which case it should exercise its leverage over the pharmacy to mitigate the impact.

Example 6: An oil and gas company begins development of a project in a relatively peaceful and well-governed region. The project results in significant in-migration. As the population of the surrounding areas doubles, violent crime skyrockets and public forces are unable to protect the security of the most vulnerable inhabitants, particularly women and children.

- i. *Is this an actual or potential adverse human rights impact?*
 - Yes, the failure to protect individuals from violent crime adversely impacts, among others, the right to security of the person.
- ii. *Do the company's activities materially increase the risk of this adverse impact?*
 - No, by building the project, the company only materially increased the likelihood of in-migration. But that does not mean that the company materially increased the risk of security failures. Given the operating context, in-migration was not necessarily or strongly correlated¹² with security failures. The project's development is too remote from the impact to be considered as bearing on the specific risk.

Recommendation: The company is not causing or contributing to this adverse impact. (As discussed below, depending on its arrangement with the government, the company may nonetheless be directly linked to these adverse impacts.)

¹² Correlation is distinct from foreseeability. As a factual matter, an unforeseeable event may still be the inevitable consequence of a particular action. Mesothelioma, for instance, was necessarily and strongly correlated with asbestos exposure arguably before the disease was the foreseeable result of asbestos exposure.

Example 7: An oil and gas company begins development of a project in a post-conflict region where ethnic tension is high and violence is endemic. The project results in significant in-migration. As the population of the surrounding areas doubles, violent crime skyrockets and public forces are unable to protect the security of the most vulnerable inhabitants, particularly women and children.

- i. *Is this an actual or potential adverse human rights impact?*
 - Yes, the failure to protect individuals from violent crime adversely impacts, among others, the right to security of the person.
- ii. *Do the company's activities materially increase the risk of this adverse impact?*
 - Yes, by developing the project, the company materially increased the likelihood of in-migration. Given the operating context, significant in-migration was necessarily and strongly correlated with violent crime and security failures. Thus, in increasing the likelihood of in-migration, the project itself materially increased the risk of these specific adverse human rights impacts.
- iii. *Are the company's activities sufficient to result in the adverse impact?*
 - No, project development alone is not sufficient to result in violent crime or the failure of security forces to protect individuals.

Recommendation: The company is contributing to an adverse impact on human rights and is expected to cease, prevent, and remedy the impact(s) to the extent of its contribution; it is also expected to exercise its leverage over the government and others to mitigate any remaining impact.

V. *Directly Linked*

A. Interpretation

Directly linked is rather more complex than the other involvement terms. As with *cause* and *contribute*, *directly linked* involvement does not create or define liability for business enterprises. Unlike *cause* and *contribute*, *directly linked* involvement does not bring any expectation of remedy, which suggests attenuated risk creation or a different type of involvement altogether. We have found no identically phrased precedent in the social sciences or law to ground a definition of the term.

Considering the terms *directly* and *linked* separately suggests that the ordinary meaning of *directly linked* is “a connection formed, or a bond created, without intervention.” The challenge under the Guidance has two prongs in this context: (i) to identify what type of connection or bond is relevant; and (ii) to identify what would constitute intervention so as to break the bond.

The challenge is complicated by the definition of *business relationship*, which is both integral to *directly linked* involvement and turns on the same term: “Business relationships’ include relationships with business partners, entities in its supply chain, and any other non-State or State entity ***directly linked*** to its business operations, products or services.”¹³ The recursive structure of *directly linked* under the Guidance raises two questions about *linked* and *directly*, respectively:

1. What kind of non-causal connection could equally explain (i) the relationship between a business and a state or non-state entity and (ii) the relationship between a business and an adverse human rights impact?
2. What kind of non-causal connection could pass through intermediaries while remaining direct?

The Guidance itself and authoritative commentary do not expressly answer either of these questions. But the remedial objectives and overarching structure of the Guidance provide a path to the answer.

B. Definition

Based on our analysis of the ordinary meaning of the term in the context of the Guidance—with specific reference to the analogous concept of vicarious liability—we propose the following definition of *directly linked*:

- A business is ***directly linked to*** an adverse human rights impact when it has established a relationship for mutual commercial benefit with a state or non-state entity, and, in performing

¹³ Guidelines at 33 (emphasis added).

activities within the scope of that relationship, the state or non-state entity materially increases the risk of the impact which occurred.

The cornerstone of this definition is *for mutual commercial benefit*. The *link* underpinning a business's responsibility to conduct due diligence and seek leverage to avoid or mitigate an adverse human rights impact, even when it has not *contributed* to it, is the benefit the business derives from the adverse impact. *Directly* then conditions the type of benefit provided and received through the value chain rather than the number of intermediaries through which it passes. *For mutual ... benefit* is essential to avoid capturing "extremely loosely connected associations,"¹⁴ such as might extend, for instance, from infrastructure projects to all who rely on them. That is, for a *business relationship* to exist, there must be a mutual, albeit general, intention between the businesses to benefit one another's operations, products, or services. Lastly, *commercial* is essential to avoid capturing the activities of a state acting in a public capacity (as opposed to when it is conferring a private benefit).

C. Practical Application

The three-stage inquiry for impact or risk assessment would be:

1. Does the business have a relationship for mutual commercial benefit with the state or non-state entity?
2. Does the benefit provided by the state or non-state entity retain consistent form as it is transmitted to the company's products, operations, or services?
3. When acting to provide the benefit that is the object of the relationship, did the state or non-state entity materially increase the risk of the adverse human rights impact which occurred or may occur?

If (and only if) the answer to all three questions is "yes," the business is directly linked to the adverse impact and is expected to exercise or seek leverage to prevent or mitigate the impact to the extent possible.

D. Case Studies: Directly Linked

The case studies below serve a narrow end: to illustrate the practical meaning of our preliminary definitions of *directly linked*—for discussion purposes alone. The articulation of rights in the following examples draw on the rights referenced in the Guidance and are not intended to be discussions of the status of such rights under national or international law. In light of the continuing discussion of the definition of *omission*, we also assume no relevant omissions in the examples below.

¹⁴ OECD, Due Diligence in the Financial Sector: Adverse Impacts Directly Linked to Financial Sector Operations, Products or Services by a Business Relationship 11 (2014), <https://mneguidelines.oecd.org/global-forum/GFRBC-2014-financial-sector-document-1.pdf> [hereinafter Due Diligence in the Financial Sector].

Example 1: A pension fund invests through an asset manager in a multinational steel producer; the steel producer is involved in a joint venture which causes or contributes to land rights violations. [NB: This fact-pattern closely tracks the allegations in Lok Shakti Abhiyan et. al. vs POSCO, ABP/APG and NBIM¹⁵, which was considered by the Norwegian National Contact Point (NCP) and decided in 2013. We assume, for illustrative purposes alone, that there was in fact an adverse human rights impact in the circumstances; no such determination was made by the NCP.]

- i. Does the pension fund have a relationship for mutual commercial benefit with the joint venture?
 - Yes, the pension fund's commercial interest is a return on its investment; in exchange, the joint venture receives the direct and indirect benefits of increased steel producer share price.
- ii. Does the benefit provided by the joint venture retain consistent form as it is transmitted to the pension fund's products, operations, or services?
 - Yes, the benefit is monetary, i.e., profit. This benefit is transmitted as financial returns via the steel producer and the asset manager to the pension fund.
- iii. When acting within the scope of the mutually beneficial relationship, did the joint venture materially increase the risk of an adverse human rights impact?
 - Yes, the entirety of the joint venture's operations may be considered as directed to the end of profit, the very benefit sought by the pension fund; the joint venture's adverse impact on land rights thus occurred within the scope of the relationship.

Recommendation: The pension fund is directly linked to the joint venture's adverse impacts on land rights. It should use or seek leverage to mitigate the construction company's adverse impact.

Example 2: A pension fund invests through an asset manager in an industrial products company. The industrial products company retains a construction company that relies on forced labor.

- i. Does the pension fund have a relationship for mutual commercial benefit with the construction company?
 - Yes, the pension fund's commercial interest is a return on its investment in the industrial products company. The construction company's provision of infrastructure to the industrial products company advances this interest. Similarly, the pension fund's financial benefits to the industrial products company flow to the construction company in the form of ability to pay or possible future demand.
- ii. Does the benefit provided by the construction company retain consistent form as it is transmitted to the pension fund's products, operations, or services?
 - No, the benefit provided by the construction company is of goods and services to the industrial products company. To the extent a benefit accrues to the pension fund's

¹⁵ Lok Shakti Abhiyan et. al. vs POSCO, ABP/APG and NBIM, Final Statement of Norwegian National Contact Point (May 27, 2013), http://www.oecdwatch.org/cases/Case_262.

products, operations, or services, it is monetary. Such a benefit is, at most, indirectly tied to the original benefit provided by the construction company.

Recommendation: The pension fund is not directly linked to the construction company's use of forced labor. (Note: This conclusion would change if the industrial products company's activities had materially increased the risk that the construction company would use forced labor.)

Example 3: A mining company enters into a concession agreement with the Ministry of Mines under which the government agency will lay down railway tracks for minerals to be transported to the nearest port. Under the direction of the Ministry of Mines, when building the railway, public security forces arbitrarily arrest and detain without charge protestors who objected to the railway's path.

- i. *Does the mining company have a relationship for mutual commercial benefit with the government agency?*
 - Yes, the mining company's commercial interest is the development and commercialization of the mine, which the railway facilitates; the Ministry of Mines benefits through the revenues conferred by the mine's development and commercialization.
- ii. *Does the benefit provided by the Ministry of Mines retain consistent form as it is transmitted to the mining company's products, operations, or services?*
 - Yes, the government's development of the railway is a good that benefits the mining company's operations by facilitating transport. This benefit is delivered as-is to the mining company.
- iii. *When acting within the scope of the mutually beneficial relationship, did the Ministry of Mines materially increase the risk of an adverse human rights impact?*
 - Yes, the use of security to forge and protect the railway's path is one of the activities incidental to the development of the railway. The act of the public security forces constitutes a violation of, among others, the right to liberty and security of the person, and the right to be free from arbitrary arrest and detention.

Recommendation: The mining company is directly linked to the public security forces' violations of human rights. It should use or seek leverage to mitigate the security forces' adverse impact.

Example 4: A mining company enters into a concession agreement with the Ministry of Mines to develop a mine in Province Q. Independently of this arrangement, the Ministry of Infrastructure builds a dam in neighboring Province Y. The dam will provide electricity throughout the country, including to the area around the proposed mine. The Ministry of Infrastructure does not consult with affected indigenous groups before rerouting the water sources on which they rely.

- i. *Does the mining company have a relationship for mutual commercial benefit with the Ministry of Infrastructure?*
 - No, the mining company's commercial interest is the development and commercialization of the mine. The Ministry of Infrastructure's project is in its non-commercial capacity, to provide a public benefit, not to provide a commercial benefit to the mine specifically or the mining industry in general.

Recommendation: The mining company is not directly linked to the Ministry of Infrastructure's failure to seek free, prior, and informed consent.

Example 5: A venture capital firm takes a minority stake in a mining company that has entered into a concession agreement with the Ministry of Mines under which the government agency will lay down railway tracks for minerals to be transported to the nearest port. Under the direction of the Ministry of Mines, when the railway is being built, public security forces arbitrarily arrest and detain without charge protestors who objected to the railway's path.

- i. *Does the venture capital firm have a relationship for mutual commercial benefit with the Ministry of Mines?*
 - Yes, the venture capital firm's interest is a return on its investment in the mining company, which the railway construction facilitates; the Ministry of Mines benefits through the infusion of capital into the mining company, to enable the mine's development.
- ii. *Does the benefit provided by the Ministry of Mines retain consistent form as it is transmitted to the venture capital firm's products, operations, or services?*
 - No, the development of the railway is a good that benefits the mining company's operations by facilitating transport; the benefit received by the venture capital firm from the mining company is monetary. The railway construction thus only indirectly benefits the venture capital firm.

Recommendation: The venture capital firm is not directly linked to the public security forces' human rights abuses.

Example 6: A food and beverage company sources its cocoa through a broker who in turn relies on a local cocoa distributor who purchases the cocoa from thousands of small-holder farms. One of those farms relies on child labor for cocoa farming.

- i. *Does the food and beverage company have a relationship for mutual commercial benefit with the farm that relies on child labor?*
 - Yes, the food and beverage company's interest is obtaining cocoa for its products, which the farmer provides; the farmer receives financial remuneration from the food and beverage company, albeit via the distributor.

- ii. *Does the benefit provided by the farmer retain consistent form as it is transmitted to the food and beverage company's products, operations, or services?*
 - Yes, the benefit provided by the farmer is a good, cocoa, which feeds into the food and beverage company's products.
- iii. *When acting within the scope of the mutually beneficial relationship, did the farmer materially increase the risk of an adverse human rights impact?*
 - Yes, the farmer relied on child labor in providing the cocoa, the very purpose of the relationship.

Recommendation: The food and beverage company is directly linked to the farmer's adverse impact on human rights. It should use or seek leverage to mitigate the adverse impact.

Example 7: A food and beverage company sources its cocoa through a broker who, in turn, relies on a local cocoa distributor. The cocoa distributor retains a construction company to build a warehouse to store the cocoa. The construction company relies on trafficked labor to complete the project.

- i. *Does the food and beverage company have a relationship for mutual commercial benefit with the construction company?*
 - Yes, the food and beverage company's interest is obtaining cocoa for its products, which the construction company helps to preserve; the construction company receives financial remuneration from the cocoa distributor, which is made possible by the food and beverage company's demand.
- ii. *Does the benefit provided by the construction company retain consistent form as it is transmitted to the food and beverage company's products, operations, or services?*
 - No, the benefit provided by the construction company is the warehouse; the benefit received by the food and beverage company is cocoa. While the warehouse contributes to the preservation of cocoa, it only indirectly benefits the food and beverage company.

Recommendation: The food and beverage company is not directly linked to the construction company's adverse impact on human rights.

Example 8: An electronics manufacturer sources component parts of its products from various subcontractors. One of those subcontractors makes transistors that require gold. It purchases the gold from a broker who acquires the gold from a mining company operating in a conflict zone. In seeking to protect the mine's resources, the mining company's private security forces violently abuse unarmed protestors.

- i. *Does the electronics manufacturer have a relationship for mutual commercial benefit with the gold mining company?*
 - Yes, the electronic manufacturer's interest is obtaining the constituent parts for its products; gold is one of these parts; the mining company receives financial remuneration for its gold via the broker.
- ii. *Does the benefit provided by the gold mining company retain consistent form as it is transmitted to the electronics manufacturer's products, operations, or services?*
 - Yes, the benefit provided by the mining company is a good, which feeds as gold into the electronics manufacturer's products.
- iii. *When acting within the scope of the mutually beneficial relationship, did the mining company materially increase the risk of an adverse human rights impact?*
 - Yes, the provision of security is incidental to the extraction of gold to feed into the electronics manufacturer's supply chain. The violent abuse of unarmed protestors constitutes, among others, an adverse impact on the right to security of the person.

Recommendation: The electronics manufacturer is directly linked to the mining company's adverse impact on human rights. It should use or seek leverage to mitigate the adverse impact.

Example 9: A technology company with a proprietary, subscription-based surveillance program licenses its technology to a private intelligence company. The intelligence company is retained by a government security agency to identify dissidents, whose rights the government then abuses through arbitrary arrest and indefinite detention without charge.

- i. *Does the technology company have a relationship for mutual commercial benefit with the government security agency?*
 - Yes, the technology company's product was developed and licensed specifically to enhance surveillance for a defined class of customers. The technology company benefits financially from the intelligence company's licensing, which is facilitated by the government's retainer.
- ii. *Does the benefit provided by the government agency retain consistent form as it is transmitted to the technology company's products, operations, or services?*
 - Yes, the benefit provided by the government is financial; this benefit remains financial as it is transmitted to the technology company via the intelligence company.
- iii. *When acting within the scope of the mutually beneficial relationship, did the government agency materially increase the risk of an adverse human rights impact?*
 - Yes, the arrest and detention of the alleged dissidents is incidental to the use of the surveillance software, which is squarely within the scope of the indirect relationship between the government and the technology company.

Recommendation: The technology company is directly linked to the government's violation of human rights. It should use or seek leverage to mitigate the adverse impact.

ANNEX: DETAILED ANALYSIS

We share the analysis below to be transparent about our reasoning and to facilitate constructive stakeholder engagement. The analysis is preliminary and for discussion purposes only. In the pages that follow, we explain in detail our interpretive approach and how we arrived at each of our proposed definitions.

I. Objectives

A common response during our civil society engagement over the last few months was skepticism about the need for, or value of, precise definitions of the involvement terms. That skepticism flowed chiefly from concerns that the nature of the Guidance did not allow for rigorous or precise interpretation and/or that developing precise definitions would transform business and human rights into a mechanical, check-the-box exercise divorced from the spirit of the Guidance. Rather than undermining the spirit of the Guidance, we believe that definitions are essential to advance rigorous and legitimate respect for human rights in a quickly hardening risk environment. In particular, precise definitions serve three ends: (i) to facilitate constructive stakeholder engagement; (ii) to promote accountability and consistent non-financial disclosure; and (iii) to encourage businesses to embrace respect for human rights against a backdrop of mounting legal risk.

First, a chief virtue of the Guidance is the framework it provides for effective engagement between businesses and stakeholders. The Guidance enables companies and stakeholders to discuss the scope of business responsibility using a shared language. The shared language is the foundation of credible human rights due diligence, remedy, and grievance mechanisms. Credibility, in turn, depends on a common interpretation of core terms. If businesses and affected stakeholders do not agree on what human rights mean, they will hardly be able to resolve grievances effectively. Similarly, leaving the meaning of the involvement terms to the eye of the beholder risks eroding the trust of stakeholders and businesses alike.

Second, the Guidance increasingly shapes corporate accountability through voluntary initiatives and legally binding measures. The Corporate Human Rights Benchmark and the Reporting Assurance Framework Initiative, among others, will shape stakeholder and market perception of how well particular businesses respect human rights. And compliance with the EU Non-Financial Reporting Directive will require companies to report in line with standards directly or indirectly derived from the Guidance. Against this backdrop, relatively precise definitions are critical to ensure consistency, which underpins any reasonable accountability. If Company A interprets the involvement terms narrowly and Company B interprets them broadly—and neither is explicit about its interpretation—their non-financial disclosures will not be comparable. The challenge is all the greater where (as is common) different individuals and functions within the company interpret the involvement terms inconsistently.

Third, uncertainty regarding the involvement terms' meaning risks undermining good faith corporate commitment to respect human rights. While the Guidance is formally voluntary, the risks of non-

compliance are increasingly serious. Public decisions of OECD National Contact Points, for instance, can affect legal, financial, and reputational risks. At the same time, courts across the world are hearing more lawsuits related to adverse human rights impacts in far-flung jurisdictions. And investors, financiers, and other stakeholders seek increasing transparency regarding corporate human rights policies, due diligence, and remediation. These manifold pressures are mutually reinforcing: the more public representations businesses make about their respect for human rights, the greater the legal and financial risks they face for failing to implement the Guidance. Without precision regarding what respect for human rights means, companies will be (reasonably) wary of making such commitments in the first place. Against this backdrop, certainty is essential to encourage companies to embrace respect for human rights as an integral business pursuit.

Certainty is elemental in the context of the involvement terms. While the Guidance is notably practical in recognizing that salience and various contextual factors may shape how a company responds to adverse impacts with which it is involved, the scope of involvement itself is not flexible. A company is either involved with an adverse impact—and thus expected to respond accordingly—or not. Involvement determines which particular adverse human rights impacts any particular company should aim to foresee and address. And involvement determines how the company should address those impacts once identified. Recognizing when a business is involved with an impact, and how, must precede any accommodation for circumstance and resource limitations. In other words, involvement is fundamentally an issue of principle, not context. That principle should inform how companies practically and legitimately structure their human rights policies, due diligence processes, and remediation processes.

II. Interpretive Approach

While the Guidance offers an authoritative framework for businesses to respect human rights, many of its terms are subject to interpretation.

As voluntary instruments, the effectiveness of the Guidance lies in the willing acceptance of businesses, governments, international organizations, civil society, and affected stakeholders. Such consent depends on a shared ability to discern the meaning of the expectations from the text. The Guiding Principles' own interpretive guidelines focus on the text, taken in the context of the whole:

These Guiding Principles should be understood as a coherent whole and should be read, individually and collectively, in terms of their objective of enhancing standards and practices with regard to business and human rights so as to achieve tangible results for affected individuals and communities, and thereby also contributing to a socially sustainable globalization.¹⁶

¹⁶ U.N. Office of the High Comm'r for Human Rights, United Nations Guiding Principles on Business and Human Rights at 1 (2011) http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf.

Accordingly, in interpreting the involvement terms, we examine the ordinary meaning of the relevant terms in their context, before refining that meaning with reference to the objectives and purpose of the Guidance. We also rely on the following interpretive maxims derived from the Guidance:

- *Treat the Guidelines and the Guiding Principles as synonymous.* The human rights section of the Guidelines is “consistent with the Guiding Principles on Business and Human Rights: Implementing the United Nations ‘Protect, Respect and Remedy’ Framework.”¹⁷
- *Endeavor to practical results, with an eye to ensuring voluntary respect for human rights.* We derive this maxim from two aspects of the Guidance: (i) the Guiding Principles provide that they should not “be read as creating new international law obligations”;¹⁸ and (ii) the Guidelines refer to themselves as “non-binding principles and standards for responsible business conduct in a global context.”¹⁹
- *Privilege consistency with international human rights law.* While the Guidance is not law, it repeatedly emphasizes its consistency with national and international law. The Guiding Principles should not be read “as limiting or undermining any legal obligations a State may have undertaken or be subject to under international law with regard to human rights.”²⁰ Similarly, the Guidelines provide that their requirements are “consistent with applicable laws and internationally recognized standards.”²¹

III. Cause and Contribute

The involvement terms *cause* and *contribute* are distinct, but they are interwoven throughout the Guidance. There is a good reason for this close relationship: for practical reasons, the distinction between the two terms is inherently inconstant and permeable. Indeed, in the Guidance itself, “contribution” is derived from “cause.”²² We therefore consider the meaning of both involvement terms together before deriving their independent definitions.

[hereinafter Guiding Principles]. While the Guidance is non-binding, this approach is reminiscent of the approach under the Vienna Convention on the Law of Treaties, which likewise focuses on the good faith interpretation of the text of a treaty, in accordance with the ordinary meaning given to the terms in context and in light of its object and purpose. Vienna Convention on the Law of Treaties art. 31(1), May 23, 1969, 1155 U.N.T.S. 331.

¹⁷ Guidelines at 3.

¹⁸ Guiding Principles at 1.

¹⁹ Guidelines at 3.

²⁰ Guiding Principles at 1.

²¹ Guidelines at 3.

²² See, e.g., Guidelines at 23 (in the context of due diligence aimed at identifying adverse impacts, “contribution” means “an activity that causes, facilitates, or incentivises another entity to cause an adverse impact.”).

A. Key Cause and Contribute Provisions

1. Guidelines

States have the duty to protect human rights. Enterprises should, within the framework of internationally recognized human rights, the international human rights obligations of the countries in which they operate as well as relevant domestic laws and regulations:

1. Respect human rights, which means they should avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved.
2. Within the context of their own activities, avoid causing or contributing to adverse human rights impacts and address such impacts when they occur.
3. Seek ways to prevent or mitigate adverse human rights impacts that are directly linked to their business operations, products or services by a business relationship, even if they do not contribute to those impacts.
- ...
6. Provide for or cooperate through legitimate processes in the remediation of adverse human rights impacts where they identify that they have caused or contributed to these impacts.²³

“[C]ontributing to” an adverse impact should be interpreted as a substantial contribution, meaning an activity that causes, facilitates or incentivizes another entity to cause an adverse impact and does not include minor or trivial contributions (emphasis added).²⁴

2. Guiding Principles

Guiding Principle 13: The responsibility to respect human rights requires that business enterprises:

- (a) Avoid causing or contributing to adverse human rights impacts through their own activities, and address such impacts when they occur;²⁵

²³ Guidelines at 31.

²⁴ Guidelines at 23.

²⁵ Guiding Principles at 14.

*Guiding Principle 22: Where business enterprises identify that they have caused or contributed to adverse impacts, they should provide for or cooperate in their remediation through legitimate processes.*²⁶

B. Ordinary Meaning

1. Dictionary Meaning

Our interpretation begins with the ordinary meaning of the terms. The Oxford English Dictionary defines the verb *cause* as to “make (something, typically something bad) happen;” *contribute* is defined as to “help to cause or bring about.”²⁷ The meaning of *contribute* thus is a derivative of *cause*. In sum, the dictionary meaning of *cause* is “to make happen or bring about”; *contribute* is, accordingly, “to help to make happen or bring about.”

The practical challenge in operationalizing this definition is how to identify when an action has, in fact, brought about a particular impact.

2. Social Science Meaning

The definition of cause as productive agent—*i.e.* that which makes or brings about an effect—has been adopted and explored in some detail in sociology. Cause in this sense has four characteristics:

1. *Adequacy*: If *x* causes *y*, “occurrence of *x* is adequate for occurrence of *y*.”
2. *Invariability*: If *x* causes *y*, “upon occurrence of *x*, *y* will occur without exception.”
3. *Uniqueness of bond*: If *x* causes *y*, “the existence of *y* follows (not necessarily in time) in a unique and unambiguous way from the existence of *x*.”
4. *Continuity of action between cause and effect*: If *x* causes *y*, there is an “absence of gaps in causal lines.”²⁸

In other words, at the level of pure theory, *x* can be said to cause *y* if, and only if, (i) *x* is *sufficient* to result in *y*, (ii) *x* *always* results in *y*, (iii) *only x* results in *y*, and (iv) *x* *directly* results in *y*, without any intervening causes. If these four conditions are met, we may safely say that *x* causes *y*, or that “*x* produces *y*.”²⁹

²⁶ Guiding Principles at 24.

²⁷ OXFORD ENGLISH DICTIONARY (2d ed. 1989).

²⁸ WSEVOLOD W. ISAJIW, CAUSATION AND FUNCTIONALISM IN SOCIOLOGY 32-33 (reprt. 2010).

²⁹ *Id.* at 32.

This definition may be too rigid in practice. Social impacts are frequently the result of myriad factors. Identifying with precision which factor brought about a particular human rights impact—and to what degree—is a herculean task. Indeed, the complexity of causal uncertainty is well-recognized in the social sciences: “Despite a growing interest in causal mechanisms in the social sciences . . . there is little consensus in the literature about what causal mechanisms are.”³⁰ The challenge has also been recognized in the physical sciences: “Causation may be important, both in science and in everyday life, and yet not the sort of thing we should expect to find in physics.”³¹

The issue is the difficulty of separating causation from correlation. It may be straightforward to note that one event happened before another; it is more difficult to determine whether the earlier event brought the later event into being. In social contexts—where cultural, institutional, and individual factors may bear on any particular impact—separating causal signal from noise is a challenge no matter the number of data points. “Problems involving causal inference have dogged at the heels of statistics since its earliest days. Correlation does not imply causation, yet causal conclusions drawn from a carefully designed experiment are often valid.”³²

Sociologists thus generally deploy *cause* in terms of likelihood: “The concept of causality is most often used in a probabilistic way in sociology.”³³ The question is not whether presumed cause *x* meets the four formal criteria of productive causation. Rather, the question is whether presumed cause *x* increases the likelihood of effect *y*: “the core idea of such approaches . . . is that a cause [*x*] must raise the probability of its effect [*y*] with respect to some suitably specified set of background conditions *B_i*.”³⁴

In other words, the ordinary meaning of *cause* in sociology is increasing the likelihood of a particular effect. *Contribute* accordingly means helping to increase the likelihood of a particular effect.

³⁰ Tullia G. Falletti & Julia F. Lynch, *Context and Causal Mechanisms in Political Analysis*, 42 *Comp. Pol. Stud.* 1143, 1148 (2009).

³¹ CAUSATION, PHYSICS, AND THE CONSTITUTION OF REALITY 2 (Huw Price & Richard Corry eds., 2007).

³² Paul W. Holland, *Statistics and Causal Interference*, 81 *J. Am. Stat. Ass’n* 945, 945 (1986).

³³ RAYMOND BOUDON & FRANCOIS BOURRICAUD, *A CRITICAL DICTIONARY OF SOCIOLOGY* 62 (Peter Hamilton trans., Univ. of Chicago Press 1989) (1982). See also JUDEA PEARL, *CAUSALITY: MODELS, REASONING, AND INFERENCE* 1 (2nd ed. 2009) (“[P]robability theory is currently the official mathematical language of most disciplines that use causal modeling, including . . . sociology . . . In these disciplines, investigators are concerned not merely with the presence or absence of causal connections but also with the relative strengths of those connections and with ways of inferring those connections from noisy observations.”); Isaji at 41 (“ascertaining causation is a matter of degree of possibility (probability included) that all the characteristics of the causal bond are present. The more the variables within a system are limited and the more their correlative relation to each other is defined, the more probability there is that a variable will be a productive cause of a state of the system in which it appears.”).

³⁴ James Woodward, *Causal Models in the Social Sciences*, in *PHILOSOPHY OF ANTHROPOLOGY AND SOCIOLOGY* 157, 175 (Stephen P. Turner & Mark W. Risjord eds., 2007).

3. Meaning in Analogous Legal Contexts

The legal context is another candidate to illustrate the ordinary meaning of *cause* and *contribute*, particularly when speaking of social impacts. Across legal systems, *cause* and *contribute* are used to establish fault and determine liability for private and public wrongs. Notwithstanding the voluntariness of the Guidance, the legal definitions of these terms are therefore instructive when understanding their ordinary meaning in the context of business responsibility for human rights.

a. Conditio sine qua non

The dominant test of causation in most legal systems is the *conditio sine qua non* test.³⁵ This formulation literally means “condition without which the damages would not have occurred.” That is, causation is established by considering a hypothetical alternative reality in which the allegedly wrongful act did not occur. If the injury would nonetheless have occurred, the wrongful act is not the cause of the injury. If the injury would not have occurred, the allegedly wrongful act is considered a *conditio sine qua non*, or the cause in fact. In common law jurisdictions this test is usually called the *but for* test. The test applies beyond private wrongs and appears to be the default approach to causation applied by the European Court of Human Rights:

When ruling on the ‘causal connection’ under art 41 of the [European Convention on Human Rights], the Court seems to employ ‘the *conditio sine qua non*’ test without, however, mentioning the test by name.

The ‘*conditio sine qua non*’ test entails the question of whether the harmful result would also have occurred but for the damaging event (ie the violation of the Convention). Should the answer be negative (‘No, the harmful result would not have occurred in the absence of the damaging event.’), then causation between harm and event is established. Should the answer be positive (‘Yes, the harmful result would also have occurred in the absence of the damaging event.’), causation is missing.³⁶

b. Limitations of *conditio sine qua non*: causal complexity

In theory, the *but for* test has an appealing simplicity. It has limitations, however, in contexts of causal complexity.³⁷ Such contexts are common in the realm of business and human rights. Take the example of several unrelated businesses who each release pollutants into a municipal water supply. The pollutants released by any one of the businesses would be sufficient to render the water undrinkable and dangerous to health. In such a scenario, each business would be able to argue that it is not the *conditio*

³⁵ Cees van Dam, *European Tort Law* 310 (2d ed. 2013).

³⁶ Markus Kellner & Isabelle C. Durant, *Causation*, in *TORT LAW IN THE JURISPRUDENCE OF THE EUROPEAN COURT OF HUMAN RIGHTS* 449, 457 (Attila Fenyves et al. eds., 2011) (citation omitted).

³⁷ Van Dam at 289-290.

sine qua non of any adverse human rights impact—but for its actions or omissions, the pollutants would still have been released by others, any one of which would have been sufficient to result in the harm.

Courts have addressed this type of evidentiary complexity by unshackling the formality of the *but for* test. In such scenarios, several European jurisdictions would hold each business that could have caused the adverse human rights impact responsible for the entire injury.³⁸ In other words, if a company’s wrongful actions would have been sufficient to result in the injury—even if it cannot be determined whether the injury would have occurred *but for* those actions—courts are willing to deem the company the cause in fact of the injury. For example, in French law, each business would be considered liable unless it could prove that the actions of a third party caused the adverse impact in question.³⁹

A second type of causal complexity is where a series of actions, omissions, or events result in an adverse impact. In a famous English case, *Bonnington Castings v. Wardlaw*, an employee sued his employer after contracting pneumoconiosis.⁴⁰ The disease was shown to be the cumulative result of two sources, even one of which would place fault on the employer.⁴¹ The House of Lords held that the employee did not have to prove which source had been the more probable cause of his disease. Instead, it was sufficient if he proved that the action for which the employer might be at fault had “materially contributed” to the development of the disease.⁴² Any more than minimal contribution would be material.⁴³ That is: an action or omission that makes a non-negligible contribution to an injury may be deemed the *cause* of that injury.

The principle of causation as contribution was taken further in *McGhee v. National Coal Board*.⁴⁴ As with *Bonnington Castings*, the case concerned industrial disease. Unlike *Bonnington Castings*, in *McGhee* one of the potential causes, for which the company could not be faulted, might have been sufficient by itself to result in the injury; the other potential cause, for which the company could be faulted, might not in fact have made a difference to the plaintiff’s injury.⁴⁵ The court nonetheless found that the company caused

³⁸ *Id.* at 329-332.

³⁹ *Id.* at 331 (“If a collective *faute* is established, the defendants may prove that the conduct of a third party (including the victim) yields an external cause (*cause étrangère*) which was unforeseeable and unavoidable (*imprévisible et irrésistible*). If they cannot prove this, they are bound *in solidum*, which means that they are each fully liable towards the victim but each has a right of recourse towards the other tortfeasor(s).”) (citation omitted).

⁴⁰ *Bonnington Castings v. Wardlaw*, [1956] 613 (HL) 614 (appeal taken from Scot.).

⁴¹ *Id.* at 622.

⁴² *Id.* at 620.

⁴³ *Id.* at 621 (“I do not see how there can be something too large to come within the *de minimis* principal but yet too small to be material.”). See also J.F. CLERK & W.H.B. LINDSELL, CLERK & LINDSELL ON TORTS § 2-30 (21st ed. 2014) (noting that, in *Bonnington*, “[a]nything which did not fall within the principle *de minimis non curat lex* would constitute a material contribution.”).

⁴⁴ *McGhee v. Nat. Coal Board*, [1972] 3 All E.R. 1008 (HL) (appeal taken from Scot.).

⁴⁵ See generally *Id.*

the injury because it had made the risk of injury more probable.⁴⁶ In other words, a material increase in risk can be considered a “substantial contribution,” which may be treated as the cause in fact of the resulting injury.⁴⁷

The European Court of Human Rights has relied on an analogous concept of *cause* to delineate a government’s responsibility to protect human rights. *Tatar v. Roumanie* concerned a mining company whose operations produced cyanide-contaminated tailings water. Plaintiffs brought suit after a dam had breached, releasing the tailings water into the local environment. The court found that, even though plaintiffs could not prove *sine qua non* causation, the “existence of a serious and substantial risk” was sufficient to impose on the Romanian government an obligation to adopt measures to protect human rights:

[T]he existence of a serious and substantial risk to the health and well-being of the applicants, even if scientific certainty was lacking, is enough to impose on the state the positive obligation to adopt reasonable and adequate measures capable of protecting the rights of those individuals to respect for their private and home life, and, more generally, to enjoy a healthy and protected environment.⁴⁸

c. Limitations of *conditio sine qua non*: overreach

In addition to its potential to be too restrictive, the *conditio sine qua non* approach inherently risks being unfairly expansive. In a series of contingent events leading to an injury, each is arguably a *conditio sine qua non* of the injury. A car accident at 12:02 pm arguably would not have occurred *but for* the misplaced keys, which led to a ten-minute delay, which forced an alternate route, which led to a distracted left turn, which led to the injury. That is: misplacing keys could be considered a *conditio sine qua non* of the accident in the same way as the distracted left turn.

Courts have addressed this limitation by introducing the concept of remoteness, which carves out a zone of risk created by any action. In *Carslogie S.S. Co Ltd v. Royal Norwegian Government*, one ship caused substantial damage to another. En route to the repair dock, the damaged ship sustained further damage from a storm that it would not have encountered *but for* the original accident. The House of Lords held that, as a legal matter, the accident did not cause the storm damage, as it “was not in any sense a consequence of the collision, and must be treated as a supervening event occurring in the course

⁴⁶ *Id.* at 1016 (finding liability because plaintiff “has, after all, only to satisfy the court of a probability, not to determine an irrefragable chain of causation . . .”). See also Clerk & Lindsell § 2-31 (noting that *McGhee* stands for the proposition that a claimant need only “show that the defendants’ breach of duty made the risk of injury more probable even though it was uncertain whether it was the actual cause.”).

⁴⁷ Clerk & Lindsell § 2-41 (citation omitted).

⁴⁸ Dinah L. Shelton, *International Decision: Tatar c. Roumanie*, App. No. 67021/01...*European Court of Human Rights*, Jan. 27, 2009, 104 Am. J. Int’l L. 247, 252 (2010), citing *Tatar v. Romania*, App. No. 67021/01 ¶ 107, Eur. Ct. H.R. (2009) (discussing ECHR finding of state responsibility even where inconclusive scientific data makes causation somewhat uncertain).

of a normal voyage.”⁴⁹ In other words, the storm damage was not within the zone of risk created by the defendants’ negligence.⁵⁰ (This legal requirement that the result be within the zone of risk created by the presumed cause echoes the “continuity of action” element of sociology’s definition of *cause*.)

4. Summary of Ordinary Meaning

The ordinary meaning of *cause*—particularly as it applies in contexts relevant to business and human rights—is to increase the likelihood of a particular effect. That is: *x* causes *y* if *x* materially (*i.e.*, non-negligibly) increases the risk that *y* will occur. Accordingly, *x* contributes to *y* if *x* helps to materially increase the risk that *y* will occur. Implicit in both concepts is a limited zone of risk that can be attributed to *x* and into which *y* can fall.

C. Meaning in Light of Guidance’s Object and Purpose

The ordinary meaning of *cause* and *contribute* must be considered against the object and purpose of the Guidance. The Guidance is remedial, not punitive; it does not create or define liability for business enterprises. Rather, it seeks to “promote positive contributions by enterprises to economic, environmental and social progress worldwide.”⁵¹ In the human rights context, the objectives are best understood through the lens of remedy rather than fault: “These Guiding Principles are grounded in recognition of . . . [t]he need for rights and obligations to be matched to appropriate and effective remedies when breached.”⁵² This end is consonant with the ends of international human rights law more generally, *i.e.*, to restore the individual to a situation as close as possible to the position he or she would have enjoyed had the violation not occurred.⁵³

The remedial purpose illuminates the meaning of *cause* and *contribute*. As the *Interpretive Guide* notes, where a business may *cause* or *contribute* to an adverse human rights impact, “it should cease or change the activity that is responsible, in order to prevent or mitigate the chance of the impact occurring or

⁴⁹ *Carslogie S.S. Co Ltd v. Royal Norwegian Government* [1952] AC 292 (HL).

⁵⁰ Clerk & Lindsell § 2-99 (noting that, in *Carslogie*, “[t]he storm damage was not within the risk created by the defendants’ negligence.”).

⁵¹ Guidelines at 3.

⁵² Guiding Principles at 1.

⁵³ DINAH SHELTON, REMEDIES IN INTERNATIONAL HUMAN RIGHTS LAW 315 (2d ed. 2005). See also *Factory at Chorzow* (Ger. v. Pol.), Judgment, 1928 P.C.I.J. (ser. A) No. 13, at 47 (Sept. 13) (“reparation must, as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability have existed if that act had not been committed”) (emphasis added); Octavio Amezcua-Noriega, *Reparation Principles under International Law and their Possible Application by the International Criminal Court: Some Reflections*, ¶¶ 6, 15 (2011) UNIV. OF ESSEX TRANSITIONAL JUSTICE NETWORK, http://www.essex.ac.uk/tjn/documents/paper_1_general_principles_large.pdf (“An important consequence of the principle of proportionality is that reparations are not punitive in nature. This is so regardless of the gravity of the breach. Reparations should exclusively be aimed at remedying the damage committed through the wrongful act, and not conceived as an exemplary measure. . . . [R]eparation measures should *neither enrich nor impoverish the victim of a human rights violation*, as they are intended to eliminate the effects of the violations that were committed.”) (emphasis added) (citations omitted).

recurring.”⁵⁴ That is, a business’s ability to shape the “chance of the impact occurring” informs whether it has caused or contributed to an impact. A business that cannot shape the “chance of the impact occurring” cannot be said to *cause* or *contribute* to that impact.

The difference between *cause* and *contribute* lies in the degree of prospective influence over the risk. “[W]here a business enterprise causes or may cause an adverse human rights impact, it should take the necessary steps to cease or prevent the impact.”⁵⁵ If a business causes an adverse impact, it is presumed to exercise such control over the “chance of the impact occurring” that it has the ability to “cease or prevent the impact.”⁵⁶ No such presumption exists with “contribution,” in which case a business is expected to “take the necessary steps to cease or prevent its contribution and use its leverage to mitigate any remaining impact to the greatest extent possible.”⁵⁷

The Guidelines specify that, notwithstanding this difference, contribution must pass a threshold level of importance to warrant a response:

‘Contributing to’ an adverse impact should be interpreted as a substantial contribution, meaning an activity that causes, facilitates or incentivises another entity to cause an adverse impact. An enterprise can also contribute to an adverse impact if the combination of its activities and that of another entity result in an adverse impact.⁵⁸

This qualification parallels the threshold of “material” contribution or increase in risk in multi-cause legal contexts. In other words, a business may contribute to an adverse impact even if the business itself does not have the ability to “cease or prevent the impact” as long as its activities have a material bearing on “the chance of the impact occurring.”⁵⁹

D. Note on Knowledge and Foreseeability

The discussion above has not touched on knowledge or foreseeability. Rather, we have focused only on cause in fact. This is not the sole determinant of liability in law. Courts in both civil and common law jurisdictions further condition liability on the concept of foreseeability. The European Court of Human Rights, for instance, has held that an actor will not be liable for harm “that even a particularly prudent, knowledgeable and experienced person at the height of the current state of scientific knowledge would

⁵⁴ Interpretive Guide at 18.

⁵⁵ Guiding Principles, Commentary to Guiding Principle 19 at 21.

⁵⁶ Interpretive Guide at 18; Guiding Principles, Commentary to Guiding Principle 19 at 21.

⁵⁷ Guiding Principles, Commentary to Guiding Principle 19 at 21.

⁵⁸ Org. for Econ. Co-Operation & Dev., OECD-FAO Guidance for Responsible Agricultural Supply Chains 20 (2016), <https://mneguidelines.oecd.org/OECD-FAO-Guidance.pdf>.

⁵⁹ Interpretive Guide at 18.

not have had to foresee because of its complete improbability.”⁶⁰ Neither knowledge nor foreseeability fall within the ordinary meaning of *cause*; the role of these related concepts is largely to negate fault rather than to identify the action or omission that brought about an event.

As the Guidance is not liability creating, fault in a moral sense is not relevant. Indeed, foreseeability is expressly discounted as an element of causation in the Guidance: “even with the best policies and practices, a business enterprise may cause or contribute to an adverse human rights impact that it has not foreseen or been able to prevent.”⁶¹ *Cause* and *contribute* under the Guidance are therefore independent of knowledge or foreseeability. This is also consonant with the purpose of the Guidance, which is to encourage companies to engage in human rights due diligence across their value chains. Were knowledge or foreseeability material to determining a company’s involvement with—and thus responsibility to address—an adverse human rights impact, the effect would be a disincentive for companies to conduct rigorous due diligence in the first place.

E. Definitions

The practical meaning of *cause* and *contribute* based on ordinary usage in analogous contexts and the object of the Guidance turns on increasing the risk of a particular effect. In both cases, that increase in risk must be “substantial” or “material,” *i.e.*, not negligible. The best way to understand the difference between *cause* and *contribute* thus lies not in the impact on risk but in the sufficiency of the underlying activity to bring about the adverse impact. Based on these principles, we propose the following definitions:

- A business **causes** an adverse human rights impact when its activities (including omissions) materially increase the risk of the specific impact which occurred *and* would be sufficient, in and of themselves, to result in the impact.
- A business **contributes to** an adverse human rights impact when its activities (including omissions) materially increase the risk of the specific impact which occurred *even if* they would not be sufficient, in and of themselves, to result in the impact.

IV. Directly Linked

Directly linked is rather more complex than the other involvement links. Unlike *cause* and *contribute*, we have found no identically phrased precedent in the social sciences or law to ground a definition of the term. Nonetheless, the context and objectives of the Guidance provide a structural foundation to identify the contours of *directly linked* involvement. Indeed, while it has unique features, *directly linked* bears a familial resemblance to the established legal concept of vicarious liability. Considering the two

⁶⁰ Franz Bydlinski, *Methodological Approaches to the Tort Law of the ECHR*, in *TORT LAW IN THE JURISPRUDENCE OF THE EUROPEAN COURT OF HUMAN RIGHTS* 29, 75 (Attila Fenyves et al. eds., 2011).

⁶¹ Guiding Principles, Commentary to Guiding Principle 22 at 24.

concepts in tandem in the specific context of the Guidance illuminates the underlying objectives and proper scope of the term.

A. Key *Directly Linked* Provisions

1. Guidelines

States have the duty to protect human rights. Enterprises should, within the framework of internationally recognized human rights, the international human rights obligations of the countries in which they operate as well as relevant domestic laws and regulations:

...

3. Seek ways to prevent or mitigate adverse human rights impacts that are directly linked to their business operations, products or services by a business relationship, even if they do not contribute to those impacts.⁶²

2. Guiding Principles

Guiding Principle 13: The responsibility to respect human rights requires that business enterprises:

...

- (a) Seek to prevent or mitigate adverse human rights impacts that are directly linked to their operations, products or services by their business relationships, even if they have not contributed to those impacts.⁶³

B. Ordinary Meaning

The Oxford English Dictionary defines “directly” as “straightforwardly” or “without changing direction or stopping” or “with nothing or no one in between.”⁶⁴ It defines the verb “link,” of which “linked” is the past participle, as “make, form, or suggest a connection with or between.”⁶⁵ These definitions suggest that the ordinary meaning of “directly linked” is “a connection formed, or a bond created, without intervention.”

⁶² *Id.* at 31.

⁶³ Guiding Principles at 14.

⁶⁴ OXFORD ENGLISH DICTIONARY 705 (2d ed. 1989).

⁶⁵ OXFORD ENGLISH DICTIONARY (2d ed. 1989).

The challenge under the Guidance has two prongs in this context: (i) to identify what type of connection or bond is relevant; and (ii) to identify what would constitute intervention so as to break the bond.

C. Meaning in Light of Guidance's Object and Purpose

Under the Guidance, Company A's *directly linked* involvement with an adverse human rights impact turns on a three-stage test. *First*, there must exist a *business relationship* between Company A and Entity B. "Business relationships' include relationships with business partners, entities in its supply chain, and any other non-State or State entity directly linked to its business operations, products or services."⁶⁶ *Second*, Entity B must *cause* or *contribute to* an adverse human rights impact.⁶⁷ *Third*, Entity B must *cause* or *contribute to* that adverse impact while acting within the scope of its *business relationship* with Company A: "When looking at business relationships, the focus is not on the risks the related party poses to human rights *in general*, but on the risks that it may harm human rights *in connection with the enterprise's own operations, products or services*."⁶⁸

This structure is difficult. The definition of *business relationship* makes the concept *directly linked* integral to the definition of *directly linked*. The complication, however, is also the source of insight. *Directly linked* plays two distinct roles in the Guidance: (i) it establishes the scope of the relevant business relationship between Company A and Entity B; and (ii) it establishes the relationship between Company A and the adverse human rights impact. That the same term is used for both types of relationships suggests that the two are of the same kind: the relationship between Company A and Entity B is of the same type as the relationship between Company A and the adverse human rights impact. That type of relationship is independent of cause: Company A may be *directly linked to* adverse impacts even if it has "not contributed to those impacts."⁶⁹ Thus, actors who *cause* or *contribute to* an impact do not break the link between the business and the adverse impact.

A subsidiary challenge raised by the Guidance concerns the scope of *directly* under the above constraints. The *Interpretive Guide* specifies that *business relationships* include "indirect business relationships ... beyond the first tier."⁷⁰ In other words, a business may be *directly linked* to an adverse human rights impact through an *indirect business relationship* in its value chain. As the OECD has explained:

⁶⁶ Guidelines at 33.

⁶⁷ Due Diligence in the Financial Sector at 6 ("However let's imagine that Company B's operations, products and services are **directly linked** to Company C, an entity that is **causing** or **contributing** to an adverse impact within the scope of Company A's supply chain. In that case Company A is still considered to be **directly linked** to the adverse impact.") (bold emphasis added).

⁶⁸ Interpretive Guide at 32 (emphasis in original).

⁶⁹ Guiding Principles at 14.

⁷⁰ Interpretive Guide at 5.

“Although the due diligence provisions of the Guidelines do not extend to extremely loosely connected associations, direct linkages are not limited to first-tier or immediate business relationships.”⁷¹

These elements of the Guidance raise two questions about *linked* and *directly*, respectively:

1. What kind of non-causal connection could equally explain (i) the relationship between a business and a state or non-state entity and (ii) the relationship between a business and an adverse human rights impact?
2. What kind of non-causal connection could pass through intermediaries while remaining direct?

The Guidance itself and authoritative commentary do not expressly answer either of these questions. But the remedial objectives and overarching structure of the Guidance provide a path to the answer.

As discussed above, the Guidance seeks to “promote positive contributions by enterprises to economic, environmental and social progress worldwide.”⁷² In the human rights context, the objectives are best understood through the lens of remedy rather than fault: “These Guiding Principles are grounded in recognition of ... [t]he need for rights and obligations to be matched to appropriate and effective remedies when breached.”⁷³ *Directly linked* involvement should be understood against these ends. In service of global social progress and remedy, the Guidance imposes on business a responsibility to address adverse human rights impacts, even when that business has not *caused* or *contributed* to the adverse impact. The responsibility is independent of fault. This structure is analogous to the legal concept of vicarious liability, to which we now turn.

D. Vicarious Liability

Vicarious liability is a form of no-fault legal liability in which an entity can be held accountable for the acts of an employee or business partner irrespective of whether the entity itself caused the injury.⁷⁴ While the precise parameters of vicarious liability vary by context, and have evolved since their initial emergence in Roman law, one “root-idea” underpins its various formulations: “that A is doing work in concert with B, whether on equal terms or on terms of subordination. In each case the persons concerned are carrying on an undertaking in common and in concert.”⁷⁵ That is, while A and B may be independent entities, they share an enterprise; when that enterprise results in injury, they share liability irrespective of fault.

⁷¹ Due Diligence in the Financial Sector at 11.

⁷² Guidelines at 3.

⁷³ Guiding Principles at 1.

⁷⁴ Paula Giliker, *Vicarious Liability in Tort: A Comparative Perspective* 22 (2010).

⁷⁵ T. BATY, *VICARIOUS LIABILITY* 7-8 (1916).

Vicarious liability thus conceived turns on two elements—business relationship and wrongdoing in the scope of that relationship.

Business relationship. In the most common form of vicarious liability regime, an employer or partner typically is held liable for the wrongful acts of an employee or partner.⁷⁶

Wrongdoing in the scope of the relationship. Vicarious liability applies only to those harms that occur within the scope of the business relationship. In other words, no vicarious liability exists where the harm is unrelated to the relationship in question.⁷⁷

The contours of vicarious liability are readily discerned in the structure of *directly linked* involvement. The differences between the concepts lie in the breadth of relevant relationships and depth of resulting responsibility. *First*, vicarious liability traditionally applies to a narrow class of undertakings in concert, particularly employment and partnership arrangements. *Business relationships* under the Guidance, by contrast, are much broader in scope: “direct linkages are not limited to first-tier or immediate business relationships.”⁷⁸ *Second*, and related, vicarious liability imposes legally enforceable penalties on those found so liable. Under the Guidance, however, while a business is expected to address adverse human rights impacts to which it is directly linked, it is not expected to provide a remedy.⁷⁹

1. Justification for Vicarious Liability

There is arguably no single definitive or comprehensive justification for vicarious liability.⁸⁰ Three main principles have been advanced by courts and commentators: deterrence, compensation, and fairness.

Deterrence. The deterrence rationale for vicarious liability turns on moral and economic justifications. The moral case presupposes control, as in the employment context.⁸¹ That is,

⁷⁶ See JENNY STEELE, *TORT LAW: TEXT, CASES, AND MATERIALS* 564 (2007).

⁷⁷ See, e.g., CODE CIVIL [CIVIL CODE] art. 1384(5) (Fr.) (« Les maîtres et les commettants [sont responsables] du dommage causé par leurs domestiques et préposés dans les fonctions auxquelles ils les ont employés. »).

⁷⁸ Due Diligence in the Financial Sector at 11.

⁷⁹ Guiding Principles, Commentary to Guiding Principle 22 at 24-25 (“Where adverse impacts have occurred that the business enterprise has not caused or contributed to, but which are directly linked to its operations, products or services by a business relationship, the responsibility to respect human rights does not require that the enterprise itself provide for remediation, though it may take a role in doing so.”).

⁸⁰ SIMON DEAKIN, ANGUS JOHNSTON, AND BASIL MARKENESINIS, *MARKENESINIS AND DEAKIN’S TORT LAW* 665-66 (6th ed. 2008) (“Though the theoretical justifications of vicarious liability vary, this is not a problem that has often worried the English courts. Lord Pearce’s remark that the doctrine of vicarious liability has not grown from any clear logical or legal principle but from social convenience and rough justice is typical of their pragmatic approach to the question. Perhaps it should also be taken to suggest that, although no single theory can explain the rule, its basis cannot be dismissed entirely.”).

⁸¹ NEIL HAWKE, *CORPORATE LIABILITY* § 3-04 at 69 (2000) (“[liability] is founded on an assumption of control by the employing individual or company”). See also *Reedie v. The London & Nw. Ry. Co.* [1849] 4 Exch. 244, 154 ER 1201

vicarious liability helps ensure that businesses are held accountable for and “internalize” the costs of the risks that they create, thereby most efficiently minimizing risk of injury to others.⁸² The economic justification turns on incentivizing the party best positioned to mitigate risks to others: “the employer has the *opportunity* to increase standards of safety, for example through better procedures for selecting employees and for their supervision. Therefore, it is best if there is an *incentive* for him or her to do so, through liability for the employee’s tort.”⁸³

Compensation. As with deterrence, the compensation principle is built on moral and economic justifications. The former is focused on justice for the victim: when someone is injured due to the fault of a person who has insufficient resources to pay, the injured person should be able to seek compensation from another person who, although not at fault, has a relevant connection to the cause of the injury.⁸⁴ Thus, the “pragmatic” basis for employer liability for employee wrongs “is that employers . . . can best afford to bear the cost of compensating injured third parties.”⁸⁵ The economic justification, by contrast, highlights the societal efficiency of distributing such losses widely, as corporations are able to do through insurance and pricing.⁸⁶

Fairness. Fairness requires that the party to a joint enterprise that benefits from the actions of a wrongdoer should bear the cost of any injury sustained by a third party arising from a wrong committed in the course of that labor.⁸⁷ Courts have long relied on principles of fairness to impose vicarious liability, noting that, for example, “those who set in motion and profit from the activities of their employees should compensate those who are injured by such activities even when performed negligently.”⁸⁸ In other words, businesses should assume the risks that they create, and from which they benefit, in the course of their activities.⁸⁹

(“[t]he party employing has the selection of the party employed, and it is reasonable that he who has made the choice of an unskilled or careless employee . . . should be responsible for any injury resulting [from activities undertaken in the course of employment]”).

⁸² Steele at 565. See also *Bazley v. Curry*, [1999] 2 S.C.R. 534, ¶ 32 (“[e]mployers are often in a position to reduce accidents and intentional wrongs by efficient organization and supervision”).

⁸³ Steele at 566.

⁸⁴ QUEENSLAND LAW REFORM COMMISSION, VICARIOUS LIABILITY, Report No. 56 at 11 (Dec. 2001) [hereinafter Report No. 56].

⁸⁵ Vivienne Harpwood, *Modern Tort Law* 353 (7th ed. 2009).

⁸⁶ Report No. 56 at 10 (citation omitted).

⁸⁷ P.S. ATIYAH, *VICARIOUS LIABILITY IN THE LAW OF TORTS* (1967).

⁸⁸ *Viasystems (Tyneside) Ltd. v. Thermal Transfer (N.) Ltd.*, [2006] QB 510, para. 55. See also *Bazley v. Curry*, [1999] 2 S.C.R. 534, para. 30 (under vicarious liability theory, “a person who employs others to advance his own economic interest should in fairness be placed under a corresponding liability for losses incurred in the course of the enterprise”) (citation omitted).

⁸⁹ Hawke § 3-04 at 69 (“The responsibility of the individual (or company) for acts or omissions of an employee from which a benefit accrues forms the basis of vicarious liability where the plaintiff has suffered loss . . .”).

While they cannot be applied directly and as-is, these underlying principles can help illuminate the Guidance's objectives in imposing responsibility on businesses for *directly linked* involvement. *First*, deterrence is consonant with the Guidance's express objective of "enhancing standards and practices with regard to business and human rights so as to achieve tangible results for affected individuals and communities, and thereby also contributing to a socially sustainable globalization."⁹⁰ That is: no-fault responsibility for *directly linked* involvement encourages businesses to adopt measures—including policies and due diligence processes—to minimize the risk of adverse human rights impacts by third parties.

Second, fairness aligns with the structure of the three involvement links. There are two types of fairness rationale underpinning vicarious liability: (i) a business should bear the risks it creates; and (ii) a business should not benefit from wrongs to others.⁹¹ Under the Guidance, *cause* and *contribute* involvement address risk creation. The gap remaining is benefit. Drawing on the fairness justification for vicarious liability to animate the purpose of *directly linked* ensures that the Guidance comprehensively "promote[s] positive contributions by enterprises to economic, environmental and social progress worldwide."⁹²

2. Understanding *Directly Linked* through Vicarious Liability

The principle of fairness addresses the two ambiguities raised by the structure of *directly linked* in the Guidance.

Link. *What kind of non-causal connection could equally explain (i) the relationship between a business and a state or non-state entity and (ii) the relationship between a business and an adverse human rights impact?*

Fairness is the logic best suited to both types of link: a company may be expected to address adverse human rights impacts that it does not *cause* or *contribute to* when it benefits, or is deemed to benefit, from them. Benefit establishes the link between Company A and Entity B to constitute the business relationship. Benefit similarly establishes the link between Company A and adverse impact x. The *Interpretive Guide* adds support for this interpretation by noting that a business's "value chain"—the fulcrum of *directly linked* responsibility—"encompasses the activities that convert input into output by *adding value*."⁹³ That is, Company A is *directly linked* to an adverse impact that it did not cause or contribute to when (i) its products, services, or operations benefit, or are deemed to benefit, from a relationship with Entity B, and (ii) its products, services, or operations benefit, or are deemed to benefit, from adverse impact x *caused* or *contributed to* by Entity B in the course of that relationship.

⁹⁰ Guiding Principles at 1.

⁹¹ Steele at 565.

⁹² Guidelines at 3.

⁹³ Interpretive Guide at 8 (emphasis added).

Direct. *What kind of non-causal connection could pass through intermediaries while remaining direct?*

Fairness is also best placed to explain what kind of connection could pass through intermediaries while remaining direct. The Guidance makes clear that the link between Company A and Entity B/adverse impact x can be direct even if it comes from “indirect business relationships in [Company A’s] value chain.”⁹⁴ To be meaningfully *direct*, however, the link must nonetheless remain connected to Company A’s products, services, or operations “straightforwardly ... without changing direction or stopping.”⁹⁵ Any proposed link based on influence or proximity of relationship would necessarily come at the expense of *directly*, because it could not explain the possible directness of indirect relationships.

By contrast, considering *link* through the lens of fairness enables us to endow *directly* with practical meaning. Given the structure of the Guidance, the qualifier must act to condition the type of benefit, not the manner of its travel. That is, even as it passes through intermediaries, a benefit may be *direct* if it remains of the same type from origin to destination. Or, to adopt the terms of the *Interpretive Guide*: for it to be direct, the *kind* of value added must remain consistent as it traverses the value chain. If the original benefit provided by Entity B is a good, such as agricultural produce, it should remain a good when ultimately adding value to Company A’s products, services, or operations. Similarly, if the original benefit is financial, such as profits for shareholders, the ultimate benefit enjoyed by Company A should similarly be financial. Otherwise, the benefit to Company A’s products, operations, or services would not be “straightforward” and “without stopping”; it would be indirect.

3. Vicarious Liability and the Scope of a *Business Relationship*

Deploying fairness to understand direct linkage suggests that a *business relationship* depends on three elements: (i) a benefit to a company’s products, operations, or services (ii) of a specific and constant type (iii) transmitted with or without intermediaries from a state or non-state entity to a business. But these criteria remain incomplete; benefit without qualification would cast the net far too wide. Businesses benefit from an array of technology, infrastructure, and laws that enter and shape the public domain. Benefit alone would capture the activities of all state and non-state entities who provide these, as well as the adverse human rights impacts they *cause* or *contribute* to in so doing. But the Guidance does not expect businesses to address all adverse human rights impacts from which they might benefit: “the due diligence provisions of the Guidelines do not extend to extremely loosely connected associations.”⁹⁶

While benefit animates the meaning of *directly linked*, deterrence animates the term’s natural limits. The Guidance specifies that, where a business is *directly linked* to an adverse impact through a business relationship, it should “use its leverage to influence the entity causing the adverse human rights impact

⁹⁴ Interpretive Guide at 5.

⁹⁵ OXFORD ENGLISH DICTIONARY 705 (2d ed. 1989).

⁹⁶ Due Diligence in the Financial Sector at 11.

to prevent or mitigate that impact.”⁹⁷ In other words, when a business is *directly linked* to an adverse impact via a business relationship, it is expected to be in a position where it has, or is reasonably able to attain, leverage. This tracks the deterrence rationale underpinning vicarious liability; the difference is that, in the Guidance context, the existence of a *business relationship* does not depend on control. Still, a precondition for being *directly linked* to an adverse impact is the reasonable prospect of leverage over the entity causing or contributing to the impact. Otherwise, deterrence would be a chimera.

This qualification imposes mutuality on relevant *business relationships*. The Guidance defines leverage as “an advantage that gives power to influence.”⁹⁸ For leverage to exist in a *business relationship*, the party over which influence is to be exercised must benefit in some way from the party that is asked to exercise its influence. In other words, just as the business must benefit from the state or non-state entity, so must the state or non-state entity benefit from the business. For the purposes of the Guidance, therefore, a *business relationship* between Company A and Entity B only exists if they are engaged in an enterprise *for mutual commercial benefit*.

E. Definition

Considering the meaning of *directly linked* in the context of the Guidance’s object and purpose suggests that the concept serves a distinct purpose from *cause* or *contribute*. The latter involvement terms underpin business responsibility based on increase in the risk of an impact. By contrast, *directly linked* responsibility is independent of the business’s effect on the risk of a particular impact. That is: rather than lying on the same continuum as *cause* and *contribute*, *directly linked* lies on a distinct pillar—benefit rather than risk. The scope of a business’s *directly linked* involvement with an adverse impact turns fundamentally on the nature of its relationship with the state or non-state entity causing or contributing to the adverse impact. We endeavor to capture the parameters of that relationship in our proposed definition:

- A business is ***directly linked to*** an adverse human rights impact when it has established a relationship for mutual commercial benefit with a state or non-state entity, and, in performing activities within the scope of that relationship, the state or non-state entity materially increases the risk of the impact which occurred.

The cornerstone of this definition is *for mutual commercial benefit*. The *link* underpinning a business’s responsibility to conduct due diligence and seek leverage to avoid or mitigate an adverse human rights impact, even when it has not *contributed* to it, is the benefit the business derives from the adverse impact. *Directly* then conditions the type of benefit provided and received through the value chain rather than the number of intermediaries through which it passes. *For mutual ... benefit* is essential to

⁹⁷ *Id.* at 33.

⁹⁸ Interpretive Guide at 7.

avoid capturing “extremely loosely connected associations,”⁹⁹ such as might extend, for instance, from infrastructure projects to all who rely on them. That is, for a *business relationship* to exist, there must be a mutual, albeit general, intention between the businesses to benefit one another’s operations, products, or services. Lastly, *commercial* is essential to avoid capturing the activities of a state acting in a public capacity (as opposed to when it is conferring a private benefit).

⁹⁹ OECD, Due Diligence in the Financial Sector: Adverse Impacts Directly Linked to Financial Sector Operations, Products or Services by a Business Relationship 11 (2014), <https://mneguidelines.oecd.org/global-forum/GFRBC-2014-financial-sector-document-1.pdf> [hereinafter Due Diligence in the Financial Sector].