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Due diligence through a human rights lens

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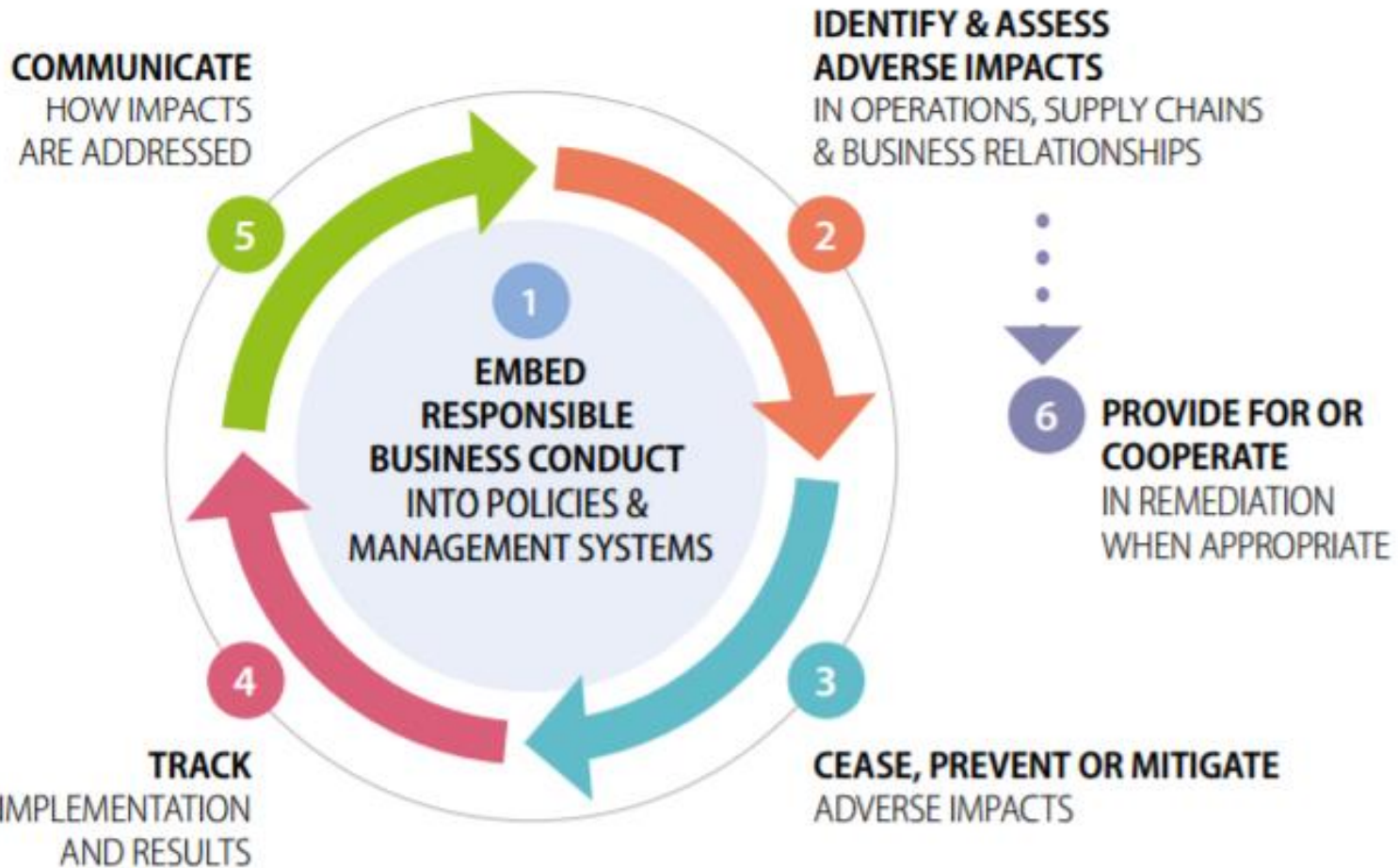
19 October 2023



The fourth day will focus on due diligence and reporting regulation, inspired by recent trends in global governance and EU law.

The Guiding principles on business and human rights (UNGP, 2011)

- UNGP 15. In order to meet their responsibility **to respect human rights**, business **enterprises** should have in place policies and processes appropriate to their size and circumstances, including :
 - (a) **A policy commitment** to meet their responsibility to respect human rights;
 - **(b) A human rights due diligence process to identify, prevent, mitigate and account for how they address their impacts on human rights;**
 - (c) Processes to enable **the remediation** of any adverse human rights impacts they cause or to which they contribute.
- States have a duty to protect human rights and in doing so give guidance to businesses on appropriate methods, **including human rights due diligence, and how to consider effectively issues of gender, vulnerability and/or marginalization, recognizing the specific challenges that may be faced by indigenous peoples, women, national or ethnic minorities, religious and linguistic** Commentary on UNGP3 (General State regulatory and policy functions)
- The business enterprises' responsibility to respect human rights includes
 - (a) Avoid causing or contributing to adverse human rights impacts through their own activities, and address such impacts when they occur;
 - (b) 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.



**OECD
Guidelines for
Multinational
Enterprises
on
Responsible
Business
Conduct Due
Diligence
2023 edition**

Risk-based due diligence and stake-holders' engagement

Carry out risk-based due diligence, for example by **incorporating it into their enterprise risk management systems**, to identify, prevent and mitigate actual and potential adverse impacts as described in paragraphs 12 and 13, and account for how these impacts are addressed. The nature and extent of due diligence depend on the circumstances of a particular situation. RBC guidelines Part. I.ch.2 (11)

Human rights due diligence can be included within broader enterprise risk management systems, provided that it goes beyond simply identifying and managing material risks to the enterprise itself **to include the risks to rights-holders**. RBC guidelines Part I, ch IV (50) **Commentary on Chapter IV: Human Rights**

Enterprises can have an impact on virtually **the entire spectrum of internationally recognised human rights**. In practice, some human rights may be at greater risk of adverse impacts than others in particular industries or contexts, and therefore will be the focus of heightened attention. However, situations may change, so all rights should be the subject of periodic review. RBC guidelines Part I, ch IV (45)

Enterprises should pay special attention to any **particular adverse impacts on individuals**, for example human **rights defenders**, who may be at heightened risk due to marginalisation, vulnerability or other circumstances, individually or as members of certain groups or populations, including **Indigenous Peoples**. RBC guidelines Part I, ch IV (45)

Engage meaningfully **with relevant stakeholders or their legitimate representatives** as part of carrying out due diligence and in order **to provide opportunities for their views to be taken into account** with respect to activities that may **significantly impact** them related to matters covered by the *Guidelines*. The RBC guidelines Part. I.ch.2 (15)

The scope of businesses' responsibility

A value chain is a series of consecutive steps that go into the creation of a finished product, from its initial design to its arrival at a customer's door. The chain identifies each step in the process **at which value is added**, including the sourcing, manufacturing, and marketing stages of its production.

The scope of a company's responsibility to respect human rights under the UNGPs encompasses impacts across its full value chain including downstream business relationships. Moreover, a company can: -

- “Cause” downstream impacts on human rights – for example, by selling faulty products or failing to protect consumers or end-users' privacy. –
- “Contribute” to downstream impacts – for example, via acts or omissions in product design, sales or marketing of products and services. –
- Be “linked to” downstream impacts via business relationships such as those with private or public sector customers. [mandating-downstream-hrdd.pdf \(ohchr.org\)](#)

For the purpose of these Guiding Principles a business enterprise's "activities" are understood to include **both actions and omissions**;

and its "business relationships" are understood to include relationships with business partners, entities **in its value chain**, and any other non-State or State entity **directly linked** to its business operations, products or services

UNGP 13, Commentary

OECD-FAO Guidance for Responsible Agricultural Supply Chains (2016)

A five step approach

<https://www.oecd.org/daf/inv/investment-policy/rbc-agriculture-supply-chains.htm>

Engagement with indigenous peoples - Implementing FPIC (p.80)

Indigenous peoples' rights

UNDRIP (2007)

Article 18

Indigenous peoples have the right to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision-making institutions.

Article 19

States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.

Article 32

2. States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources. https://www.un.org/development/desa/indigenouspeoples/wp-content/uploads/sites/19/2018/11/UNDRIP_E_web.pdf

Indigenous peoples' rights

Article 6 ILO C 169 Indigenous and Tribal Peoples Convention

1.1. In applying the provisions of this Convention, governments shall:

1. (a) consult the peoples concerned, through appropriate procedures and in particular through their representative institutions, whenever consideration is being given to legislative or administrative measures which may affect them directly;
2. (b) establish means by which these peoples can freely participate, to at least the same extent as other sectors of the population, at all levels of decision-making in elective institutions and administrative and other bodies responsible for policies and programmes which concern them;
3. (c) establish means for the full development of these peoples' own institutions and initiatives, and in appropriate cases provide the resources necessary for this purpose.

2.2. The consultations carried out in application of this Convention shall be undertaken, in good faith and in a form appropriate to the circumstances, with the objective of achieving agreement or consent to the proposed measures.

Indigenous peoples' rights

Article 16 ILO C 169 Indigenous and Tribal Peoples Convention

- 1.1. Subject to the following paragraphs of this Article, the peoples concerned shall not be removed from the lands which they occupy.
- 2.2. Where the relocation of these peoples is considered necessary as an exceptional measure, such relocation shall take place only with their free and informed consent. Where their consent cannot be obtained, such relocation shall take place only following appropriate procedures established by national laws and regulations, including public inquiries where appropriate, which provide the opportunity for effective representation of the peoples concerned.

https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:55:0::NO::P55_TYPE,P55_LANG,P55_DOCUMENT,P55_NODE:REV,en,C169,/Document

The drafting of EU Corporate sustainability due diligence directive

The Danish Institute for Human Rights (July 2023)

Substantive due diligence:

What is required in order to undertake due diligence to the standard expected under the CSDD Directive should be **sufficiently certain to enable companies to understand** their obligations and **other stakeholders**, such as civil society organisations (CSOs) and Supervisory Authorities established **to supervise compliance, to be able to monitor the efforts** of companies

The substantive due diligence obligations should encourage to the greatest extent possible a risk-based approach to due diligence, requiring companies **to develop appropriate measures which are context specific and designed to be effective**. Every possible effort should be taken to avoid a checkbox compliance approach.

<https://www.humanrights.dk/publications/state-play-eus-corporate-sustainability-due-diligence-directive-five-key-takeaways>

The drafting of EU Corporate sustainability due diligence directive

The Danish Institute for Human Rights (July 2023)

Extent of due diligence obligation:

It is vital that the scope of due diligence that a company is required to undertake include impacts which arise in the downstream part of the value chain. Omitting downstream activities can lead to severe human rights impacts not being properly considered by a company and would substantially exclude sectors where the downstream value chain may carry more severe human rights risks than the upstream supply chain.

The use of a company's products or services is a critical component to be considered in order for a company to properly identify and address the impacts that their products and services may have after they leave the company. The requirement to consider the impacts which may arise from the sale, composition, design or commercialisation of a product or service is one means **by which these use considerations can be incorporated into a company's due diligence** and should be included in the final CSDD Directive.

The drafting of EU Corporate sustainability due diligence directive

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Stakeholder engagement:

Stakeholder identification **Who?**

Affected stakeholders: include individuals, groups and communities whose rights or legitimate interests may be affected (also referred to as “rightsholders) and their “legitimate representatives” and “credible and experienced organisations” working on the protection of the environment.

Vulnerable stakeholders, a subcategory of individuals that are particularly exposed to adverse impacts, such as indigenous peoples, and whose interests demand particular attention in stakeholder engagement processes

What: Engagement with stakeholders and particularly with rightsholders should be embedded throughout the due diligence process requiring not only engagement in order **to properly identify impacts and determine appropriate measures**, but also **proactive communication and the provision of relevant information.**

Documents "a" human rights perspective on due diligence

- **Committee on the Rights of the Child**
- **General comment No. 16 (2013) on State obligations regarding the impact of the business sector on children's rights**
- https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CRC%2FC%2FGC%2F16&Lang=en

- **Committee on Economic, Social and Cultural Rights**
- **General comment No. 24 (2017) on State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities**
- https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=E%2FC.12%2FGC%2F24&Lang=en

CESCR Gen Comment 24 (2017) on State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities

11. The present general comment addresses the States parties to the Covenant, and in that context it only deals with the conduct of private actors — including business entities — **indirectly**. In accordance with international law, however, **States parties may be held directly responsible for the action or inaction of business entities:**

- (a) if the entity concerned is in fact **acting on that State party's instructions** or is under its control or direction in carrying out the particular conduct at issue,³⁰ as may be the case in the context of public contracts;³¹
- (b) when a business entity is **empowered under the State party's legislation** to exercise elements of governmental authority³² or if the circumstances call for such exercise of governmental functions in the absence or default of the official authorities;³³ or
- (c) if and to the extent that the State party **acknowledges and adopts the conduct as its own**.³⁴

CESCR

- The CESCR Gen Comment 24 – the obligation to respect
 - 12. The obligation to respect economic, social and cultural rights is violated when States parties prioritize the interests of business entities over Covenant rights without adequate justification, or when they pursue policies that negatively affect such rights... Indigenous peoples' cultural values and rights associated with their ancestral lands are particularly at risk.³⁶ States parties and businesses should respect the principle of free, prior and informed consent of indigenous peoples in relation to all matters that could affect their rights, including their lands, territories and resources that they have traditionally owned, occupied or otherwise used or acquired.³⁷
- The obligation to protect – due diligence
 - 16. The obligation to protect entails a positive duty to adopt a legal framework requiring business entities to exercise **human rights due diligence in order to identify, prevent and mitigate the risks of violations of Covenant rights**, to avoid such rights being abused, and to account for the negative impacts caused or contributed to by their decisions and operations and those of entities they control on the enjoyment of Covenant rights.⁴³ States should adopt measures such as **imposing due diligence requirements** to prevent abuses of Covenant rights in a business entity's supply chain and by subcontractors, suppliers, franchisees, or other business partners.
- The obligation to fulfil
 - 23. The obligation to fulfil requires States parties to take necessary steps, to the maximum of their available resources, to facilitate and promote the enjoyment of Covenant rights, and, in certain cases, to directly provide goods and services essential to such enjoyment

CESCR Indigenous Peoples

- The CESCR Gen Comment 24 – the obligation to respect
12...Indigenous peoples' cultural values and rights associated with their ancestral lands are particularly at risk.³⁶ **States parties and businesses should respect the principle of free, prior and informed consent of indigenous peoples** in relation to all matters that could affect their rights, including their lands, territories and resources that they have traditionally owned, occupied or otherwise used or acquired.³⁷
- The obligation to protect – due diligence
17. States parties should ensure that, where appropriate, **the impacts of business activities on indigenous peoples specifically** (in particular, actual or potential adverse impacts on indigenous peoples' rights to land, resources, territories, cultural heritage, traditional knowledge and culture) are **incorporated into human rights impact assessments**.⁴⁴ In **exercising human rights due diligence**, businesses **should consult and cooperate in good faith** with the indigenous peoples concerned through indigenous peoples' own representative institutions in order to obtain their free, prior and informed consent before the commencement of activities.⁴⁵ Such consultations should allow for identification of the potentially negative impact of the activities and of the measures to mitigate and compensate for such impact. They should also lead to design mechanisms **for sharing the benefits derived from the activities**, since companies are bound by their duty to respect indigenous rights to establish mechanisms that ensure that indigenous peoples share in the benefits generated by the activities developed on their traditional territories.
- The obligation to fulfil
24. This obligation also requires directing the efforts of business entities towards the fulfilment of Covenant rights... consistent with the Universal Declaration of Human Rights and with the right to enjoy the benefits of scientific progress stipulated in article 15 of the Covenant,... States parties should also recognize and protect the right of indigenous peoples to control the intellectual property over their cultural heritage, traditional knowledge and traditional cultural expressions.

The extraterritorial obligation to protect

30. The extraterritorial obligation to protect requires States parties to take steps to **prevent and redress infringements** of Covenant rights that occur outside their territories **due to the activities of business entities over which they can exercise control**, especially in cases where the remedies available to victims before the domestic courts of the State where the harm occurs are unavailable or ineffective.

32. Whereas States parties would not normally be held directly internationally responsible for a violation of economic, social and cultural rights caused by a private entity's conduct (exceptions in para. 11 of the present general comment), a State party would be in breach of its obligations under the Covenant where the violation **reveals a failure by the State to take reasonable measures that could have prevented the occurrence of the event**. The responsibility of the State can be engaged in such circumstances even if other causes have also contributed to the occurrence of the violation,⁸⁰ and even if the State had not foreseen that a violation would occur, *provided such a violation was reasonably foreseeable*. 81

The extraterritorial obligation to protect – due diligence

33. ...Corporations domiciled in the territory and/or jurisdiction of States parties should be required to act with due diligence **to identify, prevent and address abuses to Covenant rights by such subsidiaries and business partners,** wherever they may be located.

Appropriate monitoring and accountability procedures must be put in place to ensure effective prevention and enforcement. Such procedures may include imposing a duty on companies to report on their policies and procedures to ensure respect for human rights, and providing effective means of accountability and redress for abuses of Covenant rights.