



The Commodity Trading Sector

Guidance on Implementing the UN Guiding Principles on Business and Human Rights



Schweizerische Eidgenossenschaft
Confédération suisse
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Swiss Confederation

Federal Department of Foreign Affairs FDFA



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Federal Department of Economic Affairs,
Education and Research EAER
State Secretariat for Economic Affairs SECO

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Federal Department of Foreign Affairs FDFA
Directorate of Political Affairs
3003 Bern
Switzerland
Phone: +41 (0)58 462 30 50
email: pd-ams@eda.admin.ch
www.fdfa.admin.ch

Federal Department of Economic Affairs, Education and Research EAER
State Secretariat for Economic Affairs SECO
3003 Bern
Switzerland
Phone: +41 (0)58 463 12 75
email: afin@seco.admin.ch
www.seco.admin.ch

The Swiss Government mandated the Institute for Human Rights and Business (IHRB) to produce this Guidance.



Foreword by FDFA/SECO

“Business, labor and civil society organizations have skills and resources that are vital in helping to build a more robust global community” as Kofi Annan once stated.

In this spirit the key 2013 Background Report on Commodities of the Swiss Federal Council recommended that the Federal Department of Foreign Affairs (FDFA) and the State Secretariat for Economic Affairs (SECO) develop practical guidance for the commodity trading sector together with stakeholders from the industry and the civil society.

The Federal Council expects companies based and/or operating in Switzerland to act responsibly in accordance with international Corporate Social Responsibility (CSR) standards and to fulfil their responsibility to respect human rights in all of their business activities, wherever they operate. This expectation has been set out in the Federal Council’s *Position Paper on Corporate Social Responsibility* (2015) and *National Action Plan for the implementation of the United Nations Guiding Principles on Business and Human Rights* (UNGPs; 2016).

Since 2015, the FDFA and SECO have engaged with companies involved in commodity trading, NGOs and the canton of Geneva as well as through public consultation to elaborate a guidance document on human rights due diligence. This collaborative approach is exemplary. It has greatly helped to promote a common understanding of responsible business conduct among all key actors in Switzerland and we strongly believe it will contribute to further promoting responsible practices of the commodity trading sector in Switzerland and beyond. The objective of this Guidance is to support companies in implementing human rights due diligence for their own activities and along their supply chain, based on the UNGPs. The Guidance is consistent with and draws on the relevant OECD Guidances. It recalls the fundamental responsibility of all business enterprises to respect human rights, enshrined in the UNGPs and the *OECD Guidelines for Multinational Enterprises* that companies “should avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved”. This Guidance is not legally binding, neither is it intended to replace existing industry standards. However, it seeks to be as globally applicable as possible and serves as a tool for the commodity trading sector as a whole in developing a shared practice of responsible trading which is consistent with international standards.

The challenge now is to make all companies active in commodity trading aware of the Guidance and foster effective implementation. This will involve a range of efforts by the industry, alongside civil society and government. We are committed to working with all actors to support broad dissemination and implementation.



Pascale Baeriswyl
State Secretary
Federal Department of Foreign Affairs FDFA



Marie-Gabrielle Ineichen-Fleisch
State Secretary
State Secretariat for Economic Affairs SECO

Contents

Foreword by FDFA/SECO	3
Introduction	5
About This Guidance	6
1.1 Background	6
1.2 Definition of Commodity Trading	7
1.3 Objectives of the Guidance	8
1.4 Scope of the Guidance	10
1.5 Structure of the Guidance	11
Human Rights and Commodity Trading: Key Concepts	12
2.1 Understanding Potential Human Rights Impacts	12
2.2 Defining the Corporate Responsibility to Respect and Human Rights Due Diligence	14
Putting Respect for Human Rights into Practice	19
3.1 Developing a Policy Commitment and Embedding Respect for Human Rights into Management Systems	19
3.2 Identifying and Assessing Human Rights Impacts	26
3.3 Preventing and Mitigating Adverse Impacts	38
3.4 Tracking Performance	45
3.5 Communicating Performance	48
3.6 Providing for or Cooperating in Remediation When Appropriate	52
Conclusions and Next Steps	57
Annex 1: Key Terms and Definitions	58
Annex 2: Additional Resources	60
Annex 3: Evolving State Expectations on Company Due Diligence and Public Reporting	62

Introduction

Guidance Aim

This Guidance is intended to help representatives of commodity trading firms to implement the *UN Guiding Principles on Business and Human Rights* (UNGPs) in their company systems and cultures. It also provides a tool for the sector as a whole in developing a shared practice of responsible trading consistent with international standards relevant for the respect of human rights. This Guidance is not legally binding and is not intended to replace existing standards.

Methodology

The Federal Department of Foreign Affairs (FDFA) and the State Secretariat for Economic Affairs (SECO) mandated the Institute for Human Rights and Business (IHRB) to work with all representatives from different stakeholder groups to develop guidance for the commodity trading sector on implementing the UNGPs.

The development of the Guidance has been informed by a Mapping Study published by IHRB in March 2017. This Guidance has been prepared by IHRB in consultation with the project multi-stakeholder Advisory Group.¹ The Swiss Government thanks members of the Advisory Group for their valuable insights and comments.

¹ Advisory Group Members are representatives of the following organisations: Cargill, Glencore, Swiss Trading and Shipping Association, Bread for All, Public Eye, SWISSAID, Canton of Geneva, Swiss Federal Department of Foreign Affairs and Swiss State Secretariat for Economic Affairs.

About This Guidance

1.1 Background

The 2013 *Background Report on Commodities* of the Swiss Federal Council highlighted the economic importance of commodity trading for Switzerland. Based on a recommendation in the *Background Report*, the Federal Department of Foreign Affairs (FDFA) and the State Secretariat for Economic Affairs (SECO) in 2015 mandated the Institute for Human Rights and Business (IHRB) to work with stakeholders to develop guidance for the commodity trading sector² on implementing the *United Nations Guiding Principles on Business and Human Rights* (UNGPs).³

The FDFA and the SECO in consultation with industry and civil society representatives agreed steps for a process that would produce (1) a Mapping Study providing an overview of human rights issues associated with commodity trading based on perspectives from company representatives and other stakeholders as well as a review of existing reports and relevant information from civil society, academic experts and other actors (published in March 2017),⁴ (2) followed by the development of this Guidance for the industry on implementing the UNGPs (this Guidance). This is the first guidance document developed in a national context with a specific focus on commodity trading and human rights.

In addition to developments in Switzerland, a number of initiatives and related research relevant to commodity trading have been launched or continued in recent years. The most significant activities in this respect involve the Organisation for Economic Co-operation and Development (OECD). For example, OECD initiatives concerning responsible supply chains of minerals and agricultural products are widely acknowledged as important reference points for responsible business practices in these areas.⁵ The *OECD Due Diligence Guidance for Meaningful Stakeholder Engagement in the Extractive Sector* also provides valuable information for a broader range of companies, including those active in commodity trading. The OECD has also released general due diligence guidance for responsible business conduct, which is intended to apply to all sectors.⁶ This Guidance, specifically tailored for the context of commodity trading, is aligned with those mentioned above developed by the OECD.

2 For context see 2013 “Background Report: Commodities, Report of the interdepartmental platform on commodities to the Federal Council”. Recommendation 11, p.45, available at: <http://www.news.admin.ch/NSBSubscriber/message/attachments/30136.pdf>

3 See full text of the UNGPs at http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf.

4 “The Swiss Commodities Trading Industry: A Mapping Study Informing the Development of Guidance on Implementing the UN Guiding Principles on Business & Human Rights” (the “Mapping Study”), available at https://www.ihrb.org/uploads/reports/IHRB%2C_The_Swiss_Commodities_Trading_Sector_-_A_Mapping_Study%2C_Mar_2017.pdf

5 The “OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-risk Areas” applies to companies involved in mineral resources trading, and has been incorporated in several regulations as well as by mandatory industry schemes such as the London Bullion Market Association (LBMA) Responsible Gold Guidance.

6 See <http://www.oecd.org/investment/due-diligence-guidance-for-responsible-business-conduct.htm>. OECD Guidance Documents are available at: <http://mneguidelines.oecd.org/sectors/>

1.2 Definition of Commodity Trading

Physical commodities are commonly referenced in three broad categories - energy (e.g. oil and petroleum and gas), metals and minerals (e.g. iron ore, copper, aluminum, gold), and agricultural and other “soft” commodity products (e.g. coffee, cocoa, wheat, soybeans, cattle).⁷

For the purpose of this Guidance, commodity trading is broadly understood as the process of sourcing (procuring), buying, transporting, storing, transforming and selling physical commodities, including the management of associated risks, as well as operating physical assets in this context (see Box 1). Commodity trading firms and companies are understood to refer to any business enterprises performing a commodity trading activity.

Box 1 - General Descriptions of Activities Performed by Commodity Trading Companies

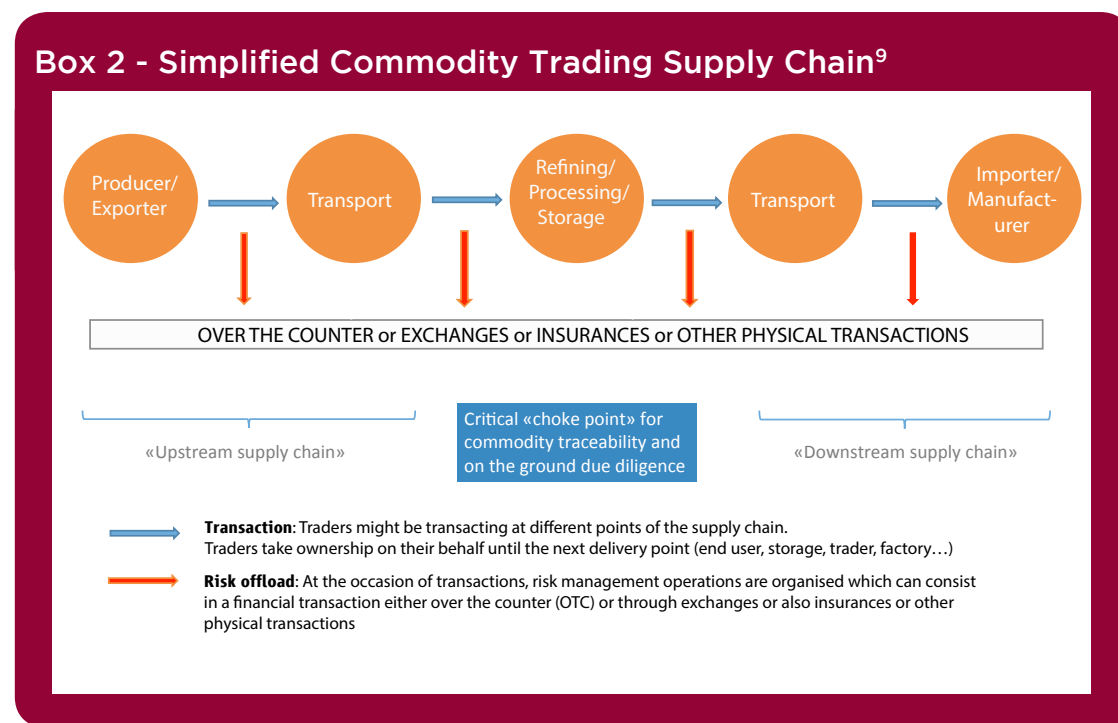
Buying	Purchasing commodities from suppliers (state-owned enterprises or private companies, other traders or commodities exchanges).
Transporting	Moving commodities from point of purchase to multiple locations (by sea, road, rail, river, pipeline etc.)
Storing	Accumulating and maintaining purchased commodities for later sale or use (storage on land, on vessels etc.)
Transforming	Blending, crushing, mixing or otherwise changing commodities for further use (in wet or dry storage facilities, refineries, smelters or other facilities etc.)
Selling	Transferring ownership of commodities to other actors within the supply chain.

Firms engaging in commodity trading vary greatly in scope, scale, size and organisational form, ranging from micro-enterprises to large diversified multinationals. Some are very specialised, trading one or a few commodities purchased from or sold to multiple actors, others trade a broad set of commodities within or across commodities categories. They also differ in their involvement in the supply chain. Some companies active in trading participate in the production of commodities (upstream), in transportation and storage (midstream), while others are also participating in processing material into final products, or even retailing (downstream). Finally, they display different organisational forms, with most companies being privately owned, while others are listed companies.⁸

⁷ Broadly speaking, physical commodities come in two forms. Primary commodities are either extracted or captured directly from natural resources. They come from farms, mines and wells. As natural products that come out of the ground, the quality and characteristics of primary commodities vary widely. Secondary commodities are produced from primary commodities to satisfy specific market needs. Crude oil is refined to make gasoline and to produce metals. There may be minor variations in quality depending on how a secondary commodity is produced.

⁸ See IHRB Mapping Study p.10.

Commodity trading companies are typically viewed as intermediaries between the producers of commodities, those who process commodities (such as refineries and smelters) and other traders and end-users (e.g. manufacturers, wholesalers: see Box 2 below).



The sector works closely with a broad range of actors, from those directly involved in commodity production (a number of traders directly pursue extractive and production or agricultural activities) to firms that transport commodities to end users.¹⁰

The commodity trading sector also works closely with actors who support their activities, including financial institutions, insurance companies, inspection firms, certification providers and others, for example transportation and storage providers.

1.3 Objectives of the Guidance

This Guidance provides analysis and examples relevant to applying the UNGPs to the specific context of commodity trading. It is intended to help representatives of commodity trading firms to implement the UNGPs in their own systems and company cultures. The Guidance should also be useful to those who are interested in promoting respect for human rights in

⁹ Source: L'association suisse du négoce de matières premières et du transport maritime - STSA.

¹⁰ Physical commodities need to undergo various transformations before reaching the consumer. These transformations can be of different nature and occur in space, in time and in form. Firms trading commodities engage in spatial transformations by transporting the commodities from where they are produced to where they are transformed and/or consumed. Since the timing of production and consumption of commodities is often at mismatch, firms engaging in commodity trading also perform transformation in time, namely through storage. Finally, in order to be suitable for final consumption, commodities also need a transformation in form, through processing, that is also sometimes performed by companies active in commodity trading. See Craig Pirrong, 2014 "The Economics of Commodity Trading" Trafigura.

the commodity trading sector, including industry associations, civil society organisations and governments.

The Guidance summarises what the UNGPs expect of all companies, regardless of their area of activity or size. It also includes illustrative examples, current practices and recommendations for action. These are intended to help readers understand the broad concepts presented and suggest possible steps that may assist in undertaking human rights due diligence, with particular focus on the characteristics of and challenges associated with commodity trading.

The Guidance also provides additional resources (e.g. links to existing reports, toolkits etc.) that can support efforts in this area. It does not propose a set management system but instead acknowledges that companies require flexibility when implementing the UNGPs in their own circumstances. The various sections of the Guidance can also be referred to independently during the on-going process of implementation. The Guidance is not intended to be legally binding and examples are provided for illustration.

Box 3 - The UN Guiding Principles on Business and Human Rights

The UNGPs were unanimously endorsed by the UN Human Rights Council in 2011. They are based on the three pillars of the UN “Protect, Respect and Remedy” Framework:

- **PILLAR I.** The State duty to protect against human rights abuses by third parties, including businesses, through effective policies, legislation, regulations and adjudication;
- **PILLAR II.** The corporate responsibility to respect human rights, meaning that companies should avoid infringing on the rights of others and address negative impacts with which they are involved; and
- **PILLAR III.** The need for greater access to effective remedy for victims of business related human rights abuses, through both judicial and non-judicial means.

Since this Guidance is intended for the commodity trading sector, it focuses primarily on those aspects set out in Pillar II of the UNGPs relating to the corporate responsibility to respect human rights; and Pillar III references to business involvement in operational-level non-State grievance mechanisms for individuals or communities who may be adversely impacted by business activities. The Guidance draws on a range of existing resources and implementation tools.

The following sections cover the key “human rights due diligence” steps expected of companies in the UNGPs. They range from setting out a commitment to respect human rights to identifying and addressing human rights risks, to providing remedy where actual harms occur. The UNGPs make clear that States’ obligations and companies’ responsibilities are independent of each other. However, where governments are unwilling or unable to meet their own human rights obligations, this potentially increases the risks of corporate involvement in adverse human rights impacts.

It should also be noted that, like in other sectors, some companies involved in commodity trading are likely to have a range of existing policies and processes that are relevant to respecting human rights, as well as an established corporate culture or set of values that guide company actions. These should all be considered as part of efforts to ensure implementation of the UNGPs. The overall aim is to ensure that company policies and processes include human rights due diligence as set out in the UNGPs and focus on risks to individuals and communities (also referred to as “rights holders”).¹¹

Finally, the Guidance recognises that implementing respect for human rights across a company’s activities and business relationships is a significant challenge. Embedding the UNGPs into company operations requires ongoing commitment, resources and engagement, including with external stakeholders. Implementation of the UNGPs is therefore a process of continuous improvement and this Guidance reflects learning from existing practices, research and consultation with relevant stakeholders that will continue to evolve based on further experience.

1.4 Scope of the Guidance

Human rights content - the Guidance addresses corporate respect for all internationally recognised human rights, which at a minimum are those expressed in the International Bill of Human Rights and the International Labour Organization’s Declaration on Fundamental Principles and Rights at Work. This includes the human rights of workers and the rights of individuals or groups facing risks of heightened vulnerability or marginalisation, such as women, children and indigenous peoples.

Companies’ activities and business relationships - the Guidance applies to commodity trading firms’ own activities and to their business relationships with third parties. “Business relationships” in the UNGPs 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.”¹² For example, in the context of commodity trading, this may include financial institutions, certification providers, State owned enterprises (SOE), producers, shipping and other transportation providers.

Companies of all sizes - the Guidance is meant to be applicable to all companies working in the commodity trading sector of various sizes and with varying types of ownership and structure. The UNGPs note that small and medium-sized companies may have less capacity as well as more informal processes and management structures than larger companies, and therefore policies and processes will take different forms. Nevertheless, all companies can be involved in severe adverse impacts requiring corresponding measures regardless of

¹¹ In general terms, all human beings are considered to be “rights-holders” under the Universal Declaration of Human Rights and other international human rights standards. The term “duty-bearers” refers to those actors who have particular obligations or responsibilities to respect, protect and fulfill human rights. The term “duty-bearers” is most commonly used to refer to State actors. Specific groups of rights-holders, such as indigenous peoples, may have particular entitlements in relation to specific duty-bearers. A rights-based approach also considers rights-holders as active agents in the realisation of human rights.

¹² See Commentary to UNGP 13.

their size.¹³ Wherever possible, attention is given in the Guidance to approaches that may be more appropriate for smaller companies in the sector.

Global applicability - the Guidance was developed through a process involving Swiss based stakeholders,¹⁴ but seeks to be as globally applicable as possible given the issues involved and the nature of the activities of the sector. The Guidance should be useful for trading firms that also operate outside of Switzerland and should encompass any efforts by the sector with respect to corporate responsibility.

1.5 Structure of the Guidance

The Guidance is divided into the following parts:

- **Part 1: About this Guidance** - Provides definitions, objectives and scope of the Guidance.
- **Part 2: Human Rights and the Commodity Trading Sector: Key Concepts** - Provides a brief overview of international human rights standards, defines the concept of corporate human rights due diligence as set out in the UNGPs, and discusses potential human rights impacts linked to the commodity trading sector as well as issues relating to business relationships and stakeholder engagement.
- **Part 3: Putting Respect for Human Rights into Practice** - Explores each of the core elements of the corporate responsibility to respect as set out in the UNGPs and provides examples and recommendations of relevance to commodity trading firms.
- **Annexes** - The annexes provide definitions of key concepts and additional resources for further information.

¹³ See Commentary to UNGP 14.

¹⁴ See IHRB Mapping Study p.7.

Human Rights and Commodity Trading: Key Concepts

2

2.1 Understanding Potential Human Rights Impacts

Human rights are internationally agreed standards aimed at securing dignity and equality for all people. These rights apply to every human being without discrimination. At the international level, they include the rights contained in the “International Bill of Human Rights” which is comprised of the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights. These instruments, beginning with the Universal Declaration adopted by the United Nations in 1948 in the aftermath of the second World War, set out a range of rights and freedoms including the rights to life, to freedom of expression, to privacy, to education and to favourable conditions of work.

Under international human rights law, States have a legal obligation to respect, protect and fulfil the rights contained in specific treaties they ratify. This includes the obligation to protect individuals and groups from abuses caused by or involving third parties, including business enterprises.

Human rights also include labour rights set out in the International Labour Organization’s (ILO) Declaration on Fundamental Principles and Rights at Work which addresses freedom of association and collective bargaining, forced labour, child labour and non-discrimination. In addition, potentially vulnerable or marginalised individuals and groups (such as children, indigenous peoples and women) are the subject of specific international instruments that help provide clarity on how human rights apply to them¹⁵ (See Annex 2 for a list of relevant instruments).

Over recent decades, a growing number of companies have become involved in understanding and addressing the human rights issues linked to their operations. The UNGPs recognise that companies of all sizes and in all industry sectors can adversely impact their employees and the workers in their supply chains as well as the communities around the operations.

15 https://www.ohchr.org/Documents/Publications/HRT_2_0_EN.pdf

Determining the human rights impacts associated with the commodity trading sector is challenging given, for example, the diversity of the sector, the complex and varied supply chains associated with specific commodities and the numerous business relationships involved. Box 4 provides a brief illustrative overview of potential adverse human rights impacts associated with different activities involving commodities.¹⁶

Box 4 - Illustrative Examples of Potential Adverse Human Rights Impacts Associated with Commodity Trading

Buying	Purchasing commodities from producers with adverse human rights impacts at the point of production or extraction e.g. unfair working conditions, activities taking place in absence of adequate community consent, child and forced labour, health and safety abuses, discrimination of migrant workers, resettlement of communities without Free, Prior and Informed Consent (FPIC), abuses of public/private security forces infringing workers', indigenous peoples', and communities' rights.
Transporting	Impacts associated with moving commodities from one location to another: unsafe road transportation practices, impacts arising from shipping, e.g. unfair labour standards, conditions of migrant workers, unsafe working conditions in the vessels; environmental issues such as discharge of pollutants and waste.
Storing	Failure of products storage, e.g. oil contamination of surrounding land, dust emissions from concentrate storage compromising clean water and health standards. Activities taking place in absence of adequate community consent, including forced resettlement of communities to build storage facilities. Abuses of public/private security forces infringing workers', indigenous peoples', and communities' rights.
Transforming	Human rights impacts arising from transforming commodities, e.g. unsafe working conditions in smelters and refineries, forced resettlement of communities to build transforming facilities, activities taking place in absence of adequate community consent, emission of health damaging pollutants into the air, impacts on water.
Selling	Impacts associated with the sale of products whose improper transformation or use is found to contribute to serious health related harms to people, e.g. copper concentrate with a high content of mercury, residues of pesticides in agricultural products.

As can be seen from Box 4 above, adverse human rights impacts can be found all along the value chain of commodity trading, as in any other economic sector. For example, purchases of a commodity may be associated with producers implicated in labour standards abuses such as child and forced labour. Commodities may also be linked to negative effects on community health and safety, and to adverse impacts associated with community resettlement.

¹⁶ For additional information see also the IHRB Mapping Study p.15.

The movement of commodities is another area where trading activities may be associated with human rights abuses. For example, impacts on rights of workers who may be involved in moving commodities from one location to another, such as those working in shipping¹⁷ or warehousing, are relevant in this context. Storage infrastructure for commodities, such as tank terminals, may also be associated with adverse impacts, such as fuel leaking from storage tanks adversely impacting public health.

Human rights impacts are closely related to operating contexts and the practices of business partners. As the UNGPs make clear, these factors will shape the policies, processes and practices needed in order to prevent and address adverse human rights impacts. In States where governance is weak, in situations where administrative and corporate practices lack transparency and in cases where States fail to meet their duty to protect human rights for any reason, the responsibility of companies to respect human rights does not change. However, it is likely to be more challenging for companies to exercise that responsibility.

Some industry sectors have developed joint initiatives to address the challenging governance, transparency and human rights related issues they may face. In most cases, these initiatives involve the participation of civil society and governments. In the extractives sector, the Voluntary Principles on Security and Human Rights¹⁸ guide companies in maintaining the safety and security of their operations within an operating framework that encourages respect for human rights. Commodity specific initiatives, although not focusing primarily on the UNGPs, are also relevant in this context (such as the International Cocoa Initiative¹⁹ and the iTSCI Programme²⁰).

2.2 Defining the Corporate Responsibility to Respect and Human Rights Due Diligence

The second pillar of the UNGPs “protect, respect, remedy” framework is the corporate responsibility to respect human rights. As UNGP 11 states, “business enterprises should respect human rights. This means that they should avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved.”

The corporate responsibility to respect human rights as set out in the UNGPs contains a number of key concepts summarised in Box 5. Part 3 of this Guidance provides further details on these concepts and examples for each step of the due diligence process in the context of the commodity trading sector.

Implementing the corporate responsibility to respect human rights requires a process of ongoing due diligence. Human rights due diligence processes help companies understand human rights risks, how these risks may change over time and how to address them.

17 See for example: An introduction and commentary to the UNGPs and their implementation in the maritime environment, available at <http://www.humanrightsatsea.org>.

18 See <http://www.voluntaryprinciples.org/>

19 See <http://www.cocoainitiative.org/>

20 See <http://www.itsci.org/>

Box 5 - Key UNGPs Concepts²¹

Human Rights Due Diligence	Human rights due diligence is an on-going risk management process that a reasonable and prudent company needs to follow in order to identify, prevent, mitigate and account for how it addresses its negative human rights impacts. It includes four key steps: assessing actual and potential human rights impacts, integrating and acting on the findings, tracking responses, and communicating how impacts are addressed.
Business Relationships	Business relationships refer to those relationships a company has 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. They include business relationships in its value chain, beyond the first tier, and minority as well as majority shareholding positions in joint ventures.
Leverage	Leverage is an advantage that gives power to influence. In the context of the UNGPs, it refers to the ability of a company to effect change in the wrongful practices of another party that is causing or contributing to a negative human rights impact.
Communication	Communication is a regular sharing of information through – for example – public corporate sustainability reports including dedicated human rights reporting sections.
Remedy	Where a company identifies that it has caused or contributed to adverse impacts, it should engage in remediation, by itself or in cooperation with other actors. Remediation is the process of providing remedy. Remedies can take various forms including apologies, provisions to ensure the harm cannot recur, restitution or rehabilitation etc.

Human rights due diligence is not a one-off event but should instead be an ongoing process (see Box 6 below).

As John Ruggie, the former Special Representative of the UN Secretary-General on business and human rights and author of the UNGPs has noted with respect to due diligence:

“ This concept describes the steps a company must take to become aware of, prevent and address adverse human rights impacts... The due diligence process should consider three sets of factors: the country contexts in which the organization operates, the potential and actual human rights impacts resulting from the organization's activities, and the relationships connected to those activities (such as with business partners, suppliers, State agencies and other non-State actors). How far or how deep this process must go will depend on circumstances.²² ”

²¹ Part 3 of this Guidance provides further details on each of these concepts.

²² See report of the UN Special Representative, A/HRC/8/5, 7 April 2008

Box 6 - Human Rights Due Diligence

UNGP 17 defines the parameters of the concept of human rights due diligence:

In order to identify, prevent, mitigate and account for how they address their adverse human rights impacts, business enterprises should carry out human rights due diligence. The process should include assessing actual and potential human rights impacts, integrating and acting upon the findings, tracking responses, and communicating how impacts are addressed. Human rights due diligence:

- (a) should cover adverse human rights impacts that the business enterprise may cause or contribute to through its own activities, or which may be directly linked to its operations, products or services by its business relationships;
- (b) will vary in complexity with the size of the business enterprise, the risk of severe human rights impacts, and the nature and context of its operations;
- (c) should be ongoing, recognizing that the human rights risks may change over time as the business enterprise's operations and operating context evolve.

Note: The Commentary to UNGP 17 provides additional explanation and guidance including that human rights due diligence can be included within broader enterprise risk management systems, provided they go beyond managing material risks to the company to include risks to rights-holders.

UNGP 18 clarifies that this process should “draw on internal and/or independent external human rights expertise and involve meaningful consultation with potentially affected groups and other stakeholders as appropriate to the size of the business enterprise and the nature and context of the operation.”

As noted in the UNGPs Reporting Framework²³, an initiative which provides guidance for companies to report on human rights issues, human rights due diligence is “an ongoing risk management process...in order to identify, prevent, mitigate and account for how [a company] addresses its adverse human rights impacts. It includes four key steps: assessing actual and potential human rights impacts; integrating and acting on the findings; tracking responses; and communicating about how impacts are addressed.”

To be effective and consistent with the UNGPs, human rights due diligence should address adverse human rights impacts that firms ‘cause’ or ‘contribute to’ or which are ‘directly linked’ to operations through business relationships.²⁴ The way a company is related to adverse impacts will determine the type of action it is required to take in response.

As UNGP 13 states, companies should avoid causing or contributing to adverse human rights impacts through their own activities, as well as “*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.*”²⁵

²³ See <http://www.ungpreporting.org/>

²⁴ UNGPs 17 (a), 19 (b)(i), 22 and related commentaries.

²⁵ UNGP 13 (b).

Box 7 provides brief illustrative examples of relevance to commodity trading which are explored further in Part 3 of the Guidance.

Box 7 - Commodity Trading and Human Rights Responsibilities²⁶

An enterprise '**causes**' an adverse impact if its operations, products or services directly 'remove or reduce' a person's (or group of persons') ability to enjoy a human right. For example, a trading company can cause an adverse impact if it discriminates against women or racial minorities in its hiring practices, if it violates labour rights on vessels the company or a subsidiary owns or if communities are negatively affected by a storage or transforming facility the company or a subsidiary owns.

'**Contributing to**' an adverse impact involves an activity that causes, facilitates or incentivises another entity to cause an adverse impact. An example would be a trading company recommending to a storage facility provider to hire a private security company with a track record of known abuses of human rights which is found to commit violence against right holders protesting against the resettling plan to expand the terminal.

Human rights impacts '**directly linked**' to business operations are understood to cover adverse impacts associated with business relationships, for example in the enterprise's supply chain. Examples include buying or selling commodities that involved adverse human rights impacts (e.g. child/forced labour) at the point of production or during transportation.

The Commentary to UNGP 19 notes that:

- *"Where a business enterprise **causes or may cause** an adverse human rights impact, it should take the necessary steps to cease or prevent the impact".*
- *Where it **contributes, or may contribute** to an adverse impact, "it should take the necessary steps to cease or prevent its contribution and use its leverage to mitigate any impact to greatest extent possible".*
- *"Where a business enterprise has not contributed to an adverse human rights impact, but that impact is nevertheless directly **linked** to its operations, products or services by its business relationship with another entity, the situation is more complex. Among the factors that will enter into the determination of the appropriate action in such situations are the enterprise's leverage over the entity concerned, how crucial the relationship is to the enterprise, the severity of the abuse, and whether terminating the relationship with the entity itself would have adverse human rights consequences."²⁷*

²⁶ See "OECD Due Diligence Guidance for Responsible Business Conduct" pp. 70-72.

²⁷ Commentary to UNGP 19.

As the Commentary to UNGP 19 also points out, a business enterprise’s “appropriate action” with respect to a business relationship depends in part on “the extent of its *leverage* in addressing the adverse impact.” Leverage in the context of the UNGPs is defined as the ability of a company to “effect change in wrongful practices of an entity that causes harm.”²⁸ In other words, leverage is the ability to influence the behaviour of others.

Part 3 of this Guidance provides further details on each step of human rights due diligence in the context of the commodity trading sector and discusses the key concepts of mapping business relationships, use of leverage and addressing stakeholder groups.

28 Commentary to UNGP 19.

Putting Respect for Human Rights into Practice

3

Part 3 of this Guidance provides further discussion and practical actions for commodity trading firms on how to put the corporate responsibility to respect as set out in the UNGPs into practice within their operations and as part of their business relationships.

Each section in Part 3 includes brief explanations (“Purpose”) followed by recommended steps for companies (“Key actions”) consistent with the essential elements of the corporate responsibility to respect human rights (see Box 8 below). This includes illustrative examples and relevant industry sector practices as well as other sources as appropriate.

Box 8 - Essential Elements of the Corporate Responsibility to Respect Human Rights

1. Developing a Policy Commitment and Embedding Respect for Human Rights into Management Systems (UNGP 16)
2. Identifying and Assessing Human Rights Impacts (UNGP 18)
3. Preventing and Mitigating Adverse Impacts (UNGP 19)
4. Tracking Performance (UNGP 20)
5. Communicating Performance (UNGP 21)
6. Providing for or Cooperating in Remediation When Appropriate (UNGP 22)

3.1 Developing a Policy Commitment and Embedding Respect for Human Rights into Management Systems

Purpose

A policy statement approved by the highest levels of the enterprise expresses a company’s commitment to meet the responsibility to respect human rights and to embed that commitment into the company’s culture (see Box 9 below).

Box 9 - UNGP 16

As the basis for embedding their responsibility to respect human rights, business enterprises should express their commitment to meet this responsibility through a statement of policy that:

- (a) is approved at the most senior level of the business enterprise;*
- (b) is informed by relevant internal and/or external expertise;*
- (c) stipulates the enterprise's human rights expectations of personnel, business partners and other parties directly linked to its operations, products or services;*
- (d) is publicly available and communicated internally and externally to all personnel, business partners and other relevant parties;*
- (e) is reflected in operational policies and procedures necessary to embed it throughout the business enterprise.*

This commitment is a message “from the top” that respect for human rights is a core value for the company: it sets expectations for the behaviour of personnel, business partners and other relevant parties linked to the company’s activities and provides information on how the company will implement its human rights commitments.²⁹

Key actions

The following steps should guide actions to develop a policy commitment and embed respect for human rights:

- i. Define the content of the policy commitment
- ii. Develop the policy commitment
- iii. Communicate the policy commitment
- iv. Align internally with the policy commitment
- v. Apply the policy commitment to business relationships

i. Define the content of the policy commitment

Mapping existing company policies, such as those relating to health and safety and human resources, is an important preliminary step in defining a human rights policy commitment.

A company’s stated commitment to respect internationally recognised human rights³⁰ can be integrated into existing high-level policies that guide the business, such as a Code of Conduct or Business Principles, or it can be a stand-alone policy document.

The Commentary to UNGP 16 notes that the term “statement” is used generically to “describe whatever means an enterprise employs to set out publicly its responsibilities, commitments, and expectations”, including towards personnel, business partners and others who are directly linked to the company’s operations, products or services.

29 The Business and Human Rights Resource Centre manages a webpage that links to statements by companies that explicitly refer to human rights: see <https://business-humanrights.org/en/company-policy-statements-on-human-rights>

30 “understood, at a minimum, as those expressed in the International Bill of Human Rights and the principles concerning fundamental rights set out in the International Labour Organization’s Declaration on Fundamental Principles and Rights at Work.”. See UNGP 12.

As contents of statements will vary, the following elements may also be included:

- a commitment to conduct on-going human rights due diligence, perhaps specifying key steps and phases of activities when risks are assessed;
- the most severe human rights risks identified for the company as a whole and its approach to addressing them;
- the company's commitment or approach to engaging, receiving complaints and/or consulting with potentially affected stakeholders concerning its human rights related policies and practices;
- the company's commitment to provide for or cooperate in remediation.

ii. Develop the policy commitment

Senior management should drive policy development. Involving cross functional personnel (e.g. procurement, logistics, compliance, health and safety, external affairs etc.) in the process of policy development helps build understanding, know-how and a sense of common purpose to gather information on human rights risks the company is facing. The way a company develops its policy will of course depend on a range of factors including its size, activities, locations of operations and other relevant issues.

A company's human rights policy commitment should also be informed by external expertise. Consultations with external experts (independent human rights organisations, national human rights institutions, UN/ILO experts etc.) and affected stakeholders during the policy development process contribute to identifying the human rights risks at stake. Various institutions such as the UN Global Compact have developed publicly available authoritative guides to help companies, including small and medium-sized enterprises, develop their human rights policy commitment³¹ (see Box 10 below). Also of relevance in this context, the OECD has developed a model supply chain policy for a responsible global supply chain of minerals from conflict-affected and high-risk areas.³²

Box 10 - SMEs and Human Rights Policy Statements³³

In developing a human rights policy specific to their needs and situation, small and medium-sized enterprises (SMEs) could check that their human rights policy statement:

- gives overall responsibility for the policy to a senior figure in the company (such as the CEO or CFO);
- commits the company to respecting human rights in line with international standards;
- takes steps³⁴ to understand the human rights issues that might be relevant (human rights focus);
- involves colleagues from all departments or teams; and
- includes consultations with their stakeholders,³⁵ whenever possible to those that may be affected by company activities.

31 See for example United Nations Global Compact, A Guide for Business: How to Develop a Human Rights Policy (2011), at: http://www.ohchr.org/Documents/Publications/DevelopHumanRightsPolicy_en.pdf

32 See Annex II – "OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas".

33 See United Nations Global Compact, A Guide for Business: How to Develop a Human Rights Policy (2011) p.26.

34 See Section 3.2 on identifying and assessing adverse human rights impacts.

35 See Box 26.

In the case of smaller commodity trading firms, the UNGPs Interpretive Guide notes that “it may be sufficient to provide a policy note to staff, highlighting the responsibility to respect human rights and key issues for their attention (for example, non-discrimination), what this means for staff practices and what accountability there will be (including the consequences for breaches).”³⁶

iii. Communicate the policy commitment

The policy commitment should be approved at the highest level of the enterprise, made publicly available and internal systems of accountability should be clear. Management can contribute to embedding the responsibility to respect human rights in the company’s culture by setting clear expectations and sending consistent messages.³⁷ Where managers and CEOs fail to make commitments clear over time, companies risk that their policies are perceived at the operational level as not being an important priority for all staff.

The company’s human rights policy should be communicated internally to all personnel and externally to all business partners as well as to people who may be affected by the company’s operation.³⁸ In the case of commodity traders who typically engage with numerous suppliers and service providers, it is also critically important to clearly communicate the company’s human rights policy externally across the value chain. The policy commitment can be disseminated by posting the relevant documents online, by adding references to the commitment into contracts with third parties or engaging in internal or external conversations. It is important to identify the most effective way to disseminate to target audiences (e.g. access to internet, level of literacy etc.).³⁹

iv. Align internally with the policy commitment

The overarching policy commitment should be integrated into relevant internal policies and procedures. For example, the implications of the policy commitment should be further elaborated by other departments (e.g. Health and Safety; Security; Legal compliance and Procurement/Contracting). To be useful, the policy statement must inform the activities of all parts of the company. Regular internal discussion and reporting ensure consistency between different departments. The company should work towards coherence with other policies to ensure consistency and develop a formal process on how to respond to situations where the policy is not observed.

Thought leadership from the CEO / Board / Senior Management and trainings that involve all staff are useful means to align at different levels within the company. Oversight and responsibility for the implementation of the policy should be assigned to relevant senior management.⁴⁰ The ultimate accountability for human rights commitments lies at senior management level and as such, it is recommended that policy commitments are formally supported by governance structures at the highest level of the organisation.

36 See OHCHR, the Corporate Responsibility to Respect Human Rights - an Interpretive Guide , p. 29. Available at: https://www.ohchr.org/Documents/Publications/HR.PUB.12.2_En.pdf

37 See UK Equality and Human Rights Commission, Business and Human Rights a Five Step Guide for Company Boards, 2016. Available at <https://www.equalityhumanrights.com/en/publication-download/business-and-human-rights-five-step-guide-company-boards>

38 See UNGP 16 (d) and Part 3 Section 5 of this Guidance concerning communication.

39 See UNGPs Reporting Framework, p.33.

40 See “OECD Due Diligence Guidance for Responsible Business Conduct” p.23.

v. Apply the policy commitment to business relationships

The principles set out in the human rights policy statement should form an integral part of a company's way of doing business with all partners. This means that managers should take every opportunity to discuss the company's human rights policy with counterparts and set out expectations regarding human rights in collaborative initiatives as well as in the formal agreements or documentation with business relationships (e.g. collaborations around supplier codes of conduct, joint venture contracts, side letters to investee entities etc.). In this way, respect for human rights can be better leveraged⁴¹ and made a clear priority in all company activities. See Boxes 11, 12, 13, 14 and 15 for specific examples in the context of commodity trading business relationships.

Box 11 - Example - Commodity Trading Company Supplier Contract Anti-Slavery Clause

In relation to anti-slavery and human trafficking laws, a trading company added the clause below to a contract with a supplier:

"In performing its obligations under this contract, the Supplier shall: (a) comply with all applicable anti-slavery and human trafficking laws, statutes, regulations in force; and (b) comply with the Company Supplier Code of Conduct (incorporated by reference and found on the company website). The Supplier warrants that neither the Supplier nor any of its officers, employees or other persons associated with it: (a) has been convicted of any offence involving slavery and human trafficking; and (b) having made reasonable enquiries, so far as it is aware has been or is the subject of any investigation, inquiry or enforcement proceedings by any governmental, administrative or regulatory body regarding any offence or alleged offence of or in connection with slavery and human trafficking. The Company may terminate this contract with immediate effect by giving written notice to the Supplier if the Supplier acts in breach of the Company Supplier Code of Conduct."

Box 12 - Example - General Compliance Cause

When engaging with counterparties, a large trading company includes the following general compliance clause:

"Each Party warrants, represents and undertakes to the other that it will comply with all applicable laws, rules and regulations including without limitation sanctions, anti-corruption, anti-money laundering and tax laws and that it will take all appropriate steps to respect human rights, consistent with the United Nations Universal Declaration of Human Rights and the United Nations Guiding Principles on Business and Human Rights in performing this contract.

Each Party has policies and procedures in place that seek to ensure compliance with applicable laws and regulations relating to the prevention of fraud, corruption, money laundering, sanctions and human rights violations."

⁴¹ See discussion of the concept of leverage in Part 3.3 of this Guidance.

Box 13 - Example - Supplier Code of Conduct

One trading company active in the agricultural sector (the “Company”) expects its suppliers to act in accordance with a supplier code of conduct. The code covers the following topics:

Legal and Ethical Compliance

Expectation from suppliers to have in place policies and procedures to conduct their business in compliance with all applicable laws, rules and regulations including antitrust laws, applicable sanction regimes in bribery, corruption, money laundering or other fraudulent practices.

Human Rights and Labour

Expectation that suppliers ensure that slavery and human trafficking are not taking place anywhere in their supply chains or in any part of their business and comply with international human rights and labour standards. Zero tolerance for violence, harassment or abuse in the suppliers’ operations and for discriminatory policies.

Supply Chain Responsibility

Expectation from suppliers to have in place enhanced levels of control and transparency to assist the Company in the commitment to provide traceability throughout the supply chain. The Company expects suppliers to engage in and be supportive of sustainability commitments to improving the quality of farmers’ yields, quality of product and, in turn, their income.

Environment

The company expects its suppliers to comply at a bare minimum with environmental laws, to hold required permits and commit to improve environmental practices and minimise the environmental impact of their operations through, amongst others: (i) efficient use of natural resources; (ii) the responsible use of water and energy resources and maintenance of air quality; (iii) proper recycling or disposal of waste; (iv) practices to avoid adverse impacts in relation to pesticides and deforestation.

Health and Safety

Suppliers should adhere to local health and safety laws and work towards safeguarding the health and safety of their employees. The Company may assess compliance with the code at any time it has a business relationship with the supplier, and any violations of this code may lead to termination of the business relationship. The code is being reviewed on a regular basis. Suppliers are notified of any important change and the latest version is available on the Company’s website.

Box 14 - Example - Applying Human Rights Commitments to Commodity Purchase Agreements

When engaging with a supplier producing commodities, a trading company included in the contractual agreements expectations with regards to human rights.

The company included the terms of the Code of Conduct that reflects human rights standards in contracts (e.g. zero tolerance for suppliers' human rights abuses, in relation to both their people and the communities in which they work). By incorporating the Code of Conduct into the agreement, the trading company thus made compliance with the Code a contractual obligation.

Terms also included the right to terminate business in the event of serious, repeated or unaddressed breaches, and a requirement for effective grievance mechanisms for workers to be in place.

To ensure the effectiveness of these provisions, the parties also agreed monitoring of these provisions through:

- internal monitoring systems of the supplier,
- on-the-ground assessments/audits by the trading company, or
- third party on-the-ground audits by specialised auditing firms.

Box 15 - Example - Applying the Commitment to Agreements with Shipping Companies

When engaging with ship owners, or their appointed representatives (e.g. vessel management companies), a commodity trading company should adapt its agreements to ensure that the rights and freedoms of those working on-board are duly respected. For example, the contract could explicitly include the following requirements for ship owners:

1. Compliance with the requirements of the applicable ILO labor convention (2006 ILO Maritime Labor Convention).
2. In support of the above-mentioned convention, develop / deploy as follows:
 - decent on-board working and living conditions agreements, to be signed by both the seafarer and the ship-owner, or a representative of the ship-owner;
 - monthly pay, in full and in accordance with the employment agreement and any applicable collective agreement;
 - 14-hour work limit in any 24-hour period, 72 hours in any seven-day period;
 - payment of repatriation costs in case of illness, injury, shipwreck, insolvency, sale of ship etc.;
 - specific requirements for living accommodation and recreational facilities – including minimum room sizes, and satisfactory heating, ventilation, sanitary facilities, lighting etc.
3. Access to prompt medical care for seafarers when on board and in port.

3.2 Identifying and Assessing Human Rights Impacts

Purpose

The initial step in conducting human rights due diligence is for a company to identify and assess any actual or potential negative human rights impacts with which it may be involved.⁴² UNGP 18 makes clear that this process should draw on internal and/or external human rights expertise and involve meaningful consultation with stakeholders (see Box 16).

Box 16 - UNGP 18

In order to gauge human rights risks, business enterprises should identify and assess any actual or potential adverse human rights impacts with which they may be involved either through their own activities or as a result of their business relationships. This process should:

- (a) draw on internal and/or independent external human rights expertise;*
- (b) involve meaningful consultation with potentially affected groups and other relevant stakeholders, as appropriate to the size of the business enterprise and the nature and context of the operation.*

Identifying and assessing impacts should be an ongoing process. It is essential to provide a true picture of a company's human rights risks over time and to translate into practice its responsibility to respect human rights.

Key actions

According to the Commentary to UNGP 18, the process of assessing actual and potential adverse human rights impacts typically includes:

- assessing and conducting research on the human rights context prior to a proposed business activity, where possible;
- identifying who may be affected, paying particular attention to individuals from populations who may be vulnerable or marginalised and bearing in mind different risks that may be faced by women and men;
- cataloguing the relevant human rights standards and issues identified;
- projecting how the proposed activity and associated business relationships could have adverse human rights impacts on individuals and specific populations.⁴³

⁴² Note: according to the "OECD Due Diligence Guidance on Responsible Business Conduct" (p.9), this exercise includes the operations of all the entities within an enterprise group, parent and local entities, including subsidiaries.

⁴³ See Commentary to UNGP 18.

The following steps guide actions to identify and assess adverse human rights impacts:

- i. Develop an assessment approach
- ii. Understand operating contexts
- iii. Review business relationships
- iv. Draw on expertise
- v. Consult affected stakeholders

i. Develop an assessment approach

An assessment should lead to a coherent overview and identification of actual and potential human rights impacts associated with a company's own activities and its business relationships. The assessment should be ongoing and repeated on a regular basis, in particular when there is a significant change in activities or in the context of operations, such as:

- prior to a new activity or relationship;
- prior to major decisions or changes in the operation (e.g., origination, trading and processing of new commodities, new business relationships with service providers, a merger/acquisition that brings new products and services to the enterprise);
- in response to or in anticipation of any contextual changes (e.g., rising social tensions in the countries where commodities originate); and
- periodically throughout the life of an activity or relationship.⁴⁴

Some companies develop stand-alone processes and internal capacity to identify and assess their human rights impacts. Others integrate human rights considerations into existing risk management systems and processes (e.g. health, environmental or social impact assessments, 'Know Your Customer' - KYC processes etc.). Others seek external expertise in undertaking human rights assessments of suppliers. These assessments are based on publicly available data, NGO reports, governmental and legal documents as well as 'on-the-ground' assessments in some cases.

In the context of commodity trading, company departments involved in activities such as compliance, auditing and security assessments would provide helpful information and help build shared responsibility for addressing current and potential human rights impacts.

Whatever approach is used, it is critical that the assessment process should focus "beyond simply identifying and managing material risks to the company itself to include risks to rights-holders".⁴⁵ Engaging directly and meaningfully with a range of stakeholders is an important part of ensuring that the company is fully considering all of the human rights implications of its activities (see further discussion on consultation with affected stakeholder in Section v below).

⁴⁴ Commentary to UNGP 18.

⁴⁵ Commentary to UNGP 17.

Companies cannot “pick and choose” the human rights impact they would like to assess. They can and should prioritise and address the risks where severity of impacts is greatest (most salient impacts) and impacts with which they are most likely to be involved.⁴⁶

ii. Understand operating contexts

The process of buying, transporting, storing, transforming and/or selling physical commodities, as well as managing assets, often involves engaging in business relationships in a wide range of operating contexts. From a human rights perspective, locations experiencing high levels of poverty and marginalisation of groups within society must constitute one important contextual consideration. Others would include appearing on international sanctions lists, areas experiencing political instability, corruption, lack of State respect for rule of law and access to remedy, and systematic disregard for international standards, such as those on worker rights or child labour.

When operating in high-risk contexts, the responsibility to respect human rights does not change and higher attention, efforts and resources are needed at every step, whether a company is sourcing commodities or is involved in operations. Box 17 provides a definition of conflict affected and high-risk areas.⁴⁷

Box 17 - Definition of Conflict Affected and High-Risk Areas⁴⁸

The OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas provides the following definitions:

Conflict areas are identified by the presence of armed conflict, widespread violence, including violence generated by criminal networks, or other risks of serious and widespread harm to people. Armed conflict may take a variety of forms, such as a conflict of international or non-international character, which may involve two or more states, or may consist of wars of liberation, or insurgencies, civil wars.

High-risk areas may include areas of political instability or repression, institutional weakness, insecurity, collapse of civil infrastructure and widespread violence. Such areas are often characterised by widespread human rights abuses violence and violations of national or international law.

When identifying high-risk contexts in particular, traders should rely on human rights data and maps (some freely available online) developed by specialised providers.⁴⁹

⁴⁶ See Box 38.

⁴⁷ See also London Bullion Market Association Responsible Gold Guidance criteria to define high-risk supply chains p.7. Available at <http://www.lbma.org.uk/responsible-sourcing>

⁴⁸ “OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas”, p.13.

⁴⁹ See for example the Human Rights and Business Country Guide hosted by the Danish Institute for Human Rights, available at: www.hrbcountryguide.org. The Universal Human Rights Index Database provides access to country-specific human rights information based on reports from UN human rights mechanisms, available at: uhri.ohchr.org. See also the ILO reports on the application of conventions and recommendations: <http://www.ilo.org/public/libdoc/ilo/P/09661/>

iii. Review business relationships

The responsibility to respect human rights extends to business relationships. Business relationships in the UNGPs are understood to include a company's "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".⁵⁰

Mapping the full range of business relationships which a commodity trading company is involved with is a key step in effective human rights due diligence consistent with the UNGPs.

Box 18 below indicates different approaches a company can adopt to start its mapping process.⁵¹

Box 18 Approaches to Mapping Business Relationships			
Where to start	GEOGRAPHY	BUSINESS UNITS	ACTIVITY/SUPPLY CHAIN
Rationale	Some companies find it necessary to make a geographical distinction in the mapping of business relationships because the nature of the relationships and activities is very different in each case.	Some companies find it helpful to map business relationships involved in particular business units.	Commodity trading companies engage in business relationships with a broad range of actors across the supply chain in the various activities they conduct.
Examples	1. Countries experiencing violent conflict 2. Countries facing governance challenges including corruption, weak / non-independent judicial systems.⁵² 3. Countries included on international economic sanctions lists.⁵³	Risk management Compliance Health & Safety Logistics Technology Finance	Buying Transporting Storing Transforming Selling

50 See Commentary to UNGP 13 and Box 5 of this Guidance. See also the "OECD Guidance for Responsible Business Conduct", p.26, which states: "Obtain, when appropriate and feasible, relevant information about business relationships beyond contractual relationships (e.g. sub-suppliers beyond 'tier 1')". See also the Interpretive Guide, p.5: business relationship is understood to include "relationships in its value chain, beyond the first tier, and minority as well as majority shareholding positions in joint ventures". For a concrete example of due diligence obligations and business relationships, see also the "OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas" Gold Supplement, p. 67, which recommends different due diligence for the three possible sources of gold and gold-bearing material.

51 See Shift, Business and Human Rights Impacts: Identifying and Prioritizing Human Rights Risks, 2014.

52 Sources of information include, for example: "Freedom in the World Report 2017", Amnesty International Country Profiles, Human Rights Watch Annual Report. Available at: https://freedomhouse.org/sites/default/files/FH_FIW_2017_Report_Final.pdf, <https://www.amnesty.org/en/countries/>, https://www.hrw.org/sites/default/files/world_report_download/wr2017-web.pdf

53 For example, see SECO list of sanctions and embargoes. Available at: https://www.seco.admin.ch/seco/en/home/Aussenwirtschaftspolitik_Wirtschaftliche_Zusammenarbeit/Wirtschaftsbeziehungen/exportkontrollen-und-sanktionen/sanktionen-embargos.html

Box 19 provides an example from the sector. The mapping is based on the company's identified activities across the supply chain: sourcing, storing, blending and delivering. For each activity, the company provides a list of what it terms "direct relationships" (where it has total control, e.g. majority-owned mines, subsidiaries and group-owned terminals) and "indirect business relationships" (where it exercises influence to various degrees). Examples of indirect business relationships include State-owned oil refiners, marketers and producers, third-party-owned vessels leased in part or in full on a time charter or voyage charter basis and third-party-owned rail, vessels, barges, trucks and pipelines leased on a short- or long-term basis.

Box 19 – Example - Mapping Business Relationships

One company trading energy and hard commodities included in its responsibility report a visual representation of the business relationships with which the company is involved

Activity	SOURCE	STORE	BLEND	DELIVER
Direct Relationships	Majority owned mines	Group-owned oil storage and metals and minerals warehousing		Group-owned transport assets
Indirect Relationships	Oil producers, refiners and marketers (State-owned or privately owned).	Third party-owned oil storage and minerals and metals storage		Rail network and pipeline providers (State-owned or privately owned)
	Mining companies, smelters and marketers (State-owned or privately owned)	Oil storage on third party-owned vessels		Oil and petroleum consumers Metals and minerals consumers

Reviewing business relationships as part of due diligence as set out in the UNGPs does not automatically and fully absolve a company from liability for causing or contributing to human rights abuses. Nor does it suggest that a company has to assess the human rights performance of every entity with which it has a relationship, but it does mean assessing the risk that those entities may harm human rights when acting in connection with the company's own operations.⁵⁴

In reviewing business relationships, traders can make their own assessment of the human rights risks associated with their suppliers. An assessment of a supplier should at least include the reviews of:

- the operating context and the potential human rights risks of the suppliers;
- the human rights policies and due diligence procedures of the suppliers;
- the publicly available information on the suppliers (media articles, civil society reports and other public documents).

⁵⁴ See Commentary to UNGP 17 and UNGPs Interpretive Guide p.41.

The scope of the reviews will turn on the nature of the supplier's work, the jurisdiction it operates in, as well as the nature of the business relationship that the company has with the supplier.

If trading companies lack the internal capacity to undertake such assessments, they should seek external expertise in carrying out human rights assessments of suppliers. These assessments are typically based on media articles, civil society, United Nations, governmental or other public reports (see Section iv below).

Commodity trading firms sometimes use Know-Your-Customer (KYC) processes to screen customers, producers, other business partners and suppliers. The challenge is to ensure both that human rights risks are incorporated into such processes and that these steps are consistently applied to all counterparts. Box 20 provides an example of related due diligence procedures in the banking sector.

Box 20 – Example - Due Diligence Procedures Developed by a Bank

An international bank has developed a sustainability risk management process for lending that consists of five steps: risk determination, assessment, approval, monitoring and reporting.

The second step of the bank's sustainability risk management process is the assessment of the client's sustainability performance by means of due diligence procedures. These procedures are divided into low, medium and high risk transactions.

Due diligence of high-risk transactions consists of a thorough sustainability risk assessment to assess whether the client's sustainability performance meets the bank's standards for high-risk transactions (as defined in the bank's sector-specific and cross-sectoral sustainability policies).

For high-risk transactions, due diligence involves in-depth assessment based on specific tools and methods developed for the relevant business activity or type of client. This includes assessment of the client's capacity, commitment and track record for managing the ESE (environmental, social and ethical) risks of the transaction within the country context.

It should also look at the client's various mitigation measures for addressing ESE impacts; including adoption by the client of good international standards and the client's supply chain management. Furthermore, it should review, where applicable, principles related to corporate transparency, accountability and stakeholder engagement. Managing ESE impacts should be understood to include human rights and engagement with rights holders.

Global efforts relating to anti-money laundering and counterterrorism financing (AML-CTF)⁵⁵ and politically exposed persons (PEPs) could also be relevant in this context if due diligence consistent with UNGPs is integrated into company processes.

⁵⁵ See for example The United Nations Global Counter-Terrorism Strategy A/RES/60/288 available at http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/60/288

Acquiring complete knowledge of the origin and chain of custody of commodities traded is an on-going challenge. This may be particularly the case where a long supply chain is involved or when a produced or extracted commodity is collected from multiple points, aggregated by agents and shipped. The key point is to adopt a progressive approach aimed at continuous improvement. This means that companies should be able to demonstrate a clear willingness to map human rights risks in their supply chains and increase their knowledge over time. See Box 21 for illustrative examples of current trading practices and Box 22 for human rights due diligence responsibilities in the context of the Incoterm rules.

Box 21 – Example - Current Practice in the Commodity Trading Sector and Due Diligence Scenarios

High level scenarios:

1. Commodity Futures Exchanges - In cases when a seller and a buyer are matched by a commodity futures exchange, the parties involved are typically unable to undertake prior due diligence on the other party, including supply chain due diligence. Enterprises could, as part of their policy commitment to the UNGPs, individually and collectively encourage exchanges to include due diligence as part of the contract specification. Exchange deliveries are typically treated as low risk (with respect to performance), but these should be treated as higher risk for human rights due diligence.
2. Commodity Brokers - In cases when a seller and a buyer are matched by a commodity broker, that broker will typically be given a “permitted counterparties” list by its client that includes all the parties with whom that client is prepared to be matched. That list will contain only the names of companies that passed the client’s KYC processes and had credit limits put in place in respect of it. Commercially reasonable due diligence for inclusion on a permitted counterparties list can include human rights due diligence provisions.
3. Seller/Buyer Relationships - In cases when a seller and a buyer form a relationship outside a market (exchange, trading platform or network of brokers) due diligence will depend in part on what is achievable prior to the first transaction. Clauses should be included in contract terms that permit a termination of the contract in the event that a code of conduct is found to have been breached. This may allow time for a buyer to conduct more due diligence between the time of entering into the contract and the time of performance of the contract. Where the relationship is to be continued over time, it is usual to conduct more comprehensive due diligence, for example reviewing or requesting (if not publicly available) code of conduct or policies, Health, Safety, Security, Environment (HSSE) records, sustainability reports (if applicable) and additional checks on the company and its management from different systems and sources a company has access to, including resources on the ground.
4. Spot Supply Contracts - In cases when a seller and a buyer enter into a spot supply contract where the commodities are already in transit (for example on board a vessel) then it is likely that the seller will give no opportunity for due diligence other than to supply required documents (quality and quantity certificates, origin certificate, etc). Enterprises should treat these types of purchases as high-risk as it is difficult to verify the accuracy of the certificates or to conduct further due diligence. New digital technologies are being developed in an effort to address these concerns. Industry-wide action will be required to address these high-risk practices.⁵⁶

⁵⁶ See for example: “World Economic Forum, Blockchain Beyond the Hype”, available at: <https://www.weforum.org/whitepapers/blockchain-beyond-the-hype>

Box 22 – Incoterms and Human Rights Due Diligence

Many commodities sale and purchase contracts use the International Chamber of Commerce (ICC) Incoterms to describe some of the contractual rights and obligations of the buyer and the seller. Incoterms are the official rules of the ICC for the interpretation of trade terms. Contracts may incorporate Incoterms to a greater or lesser extent, depending on the level of customization desired by the buyer and seller.

These rules typically deal with the responsibility of the buyer and the seller for delivery and payment, export and import formalities, contracts of carriage and insurance, the transfer of risk of loss or damage to the goods, the division of costs, the giving of notices, documentation, inspections of the goods, packing and markings.

Incoterms do not include specific references to human rights due diligence. The buyer and seller should agree express contractual terms with respect to human rights due diligence responsibilities regardless of the Incoterm rules they agree on.

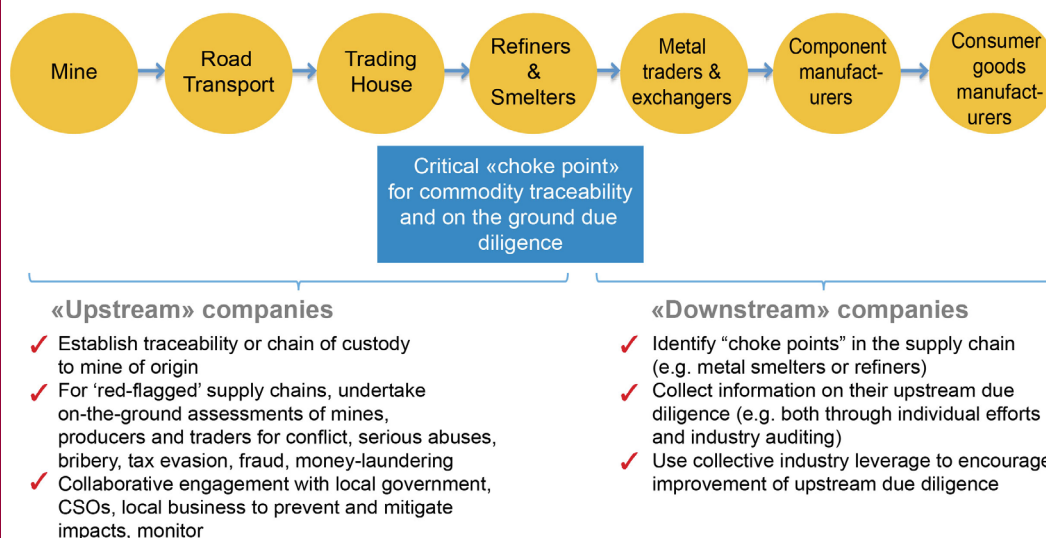
For more information on the Incoterms rules: see <https://iccwbo.org/publication/incoterms-rules-2010/>.

Box 23 below outlines due diligence recommendations according to the *OECD Due Diligence Guidance for Responsible Mineral Supply Chains from Conflict Affected and High-Risk Areas*, for traders operating at different levels of the metal supply chain. This Guidance recommends a whole of the supply chain approach, meaning that implementation of due diligence takes many different forms depending on the company's position in the supply chain. The reference to "choke point" highlights the point in the supply chain where the

Box 23 – Example of Simplified Metal Supply Chain and Due Diligence Recommendations

"Whole of Supply Chain" due diligence

e.g. simplified metal supply chain (adapted from OECD)



mineral undergoes a significant transformation and where there are relatively few actors involved. For most minerals, this would be the smelter or refiner. This Guidance calls for entities in these choke points to undergo third party audits.

The Commentary to UNGP 17 acknowledges that carrying out due diligence on every individual relationship may be impossible in some circumstances. In such cases:

“...business enterprises should identify general areas where the risk of adverse human rights impacts is most significant, whether due to certain suppliers’ or clients’ operating context, the particular operations, products or services involved, or other relevant considerations, and prioritise these for human rights due diligence”.

This would include, for example, minerals sourced from suppliers in an area known for human rights abuses, such as violence against vulnerable minorities, as well as discrimination of women or child labour. Companies should map the likely structure of their supply chains to pinpoint higher risk suppliers or general areas of risk and then move onto more detailed, iterative investigations on specific stages or suppliers using a risk-based approach.⁵⁷

Small or medium-sized enterprises with a large number of business relationships may face resource constraints in carrying out effective human rights impact assessments. They should look to existing resources such as public information on risks in certain supply chains.⁵⁸ They should also work with their industry associations to obtain technical assistance as appropriate.

iv. Draw on expertise

Engaging with internal or external experts helps companies assess in an accurate way their human rights impacts. For large commodity trading companies, internal expertise may include individuals working in business departments responsible for compliance or health and safety.

Examples of external expertise may include written sources of guidance and information (including by organisations specialising in environmental and social impact assessments), National Human Rights Institutions, academia, local civil society actors, consultants (see Box 24 below) or any publicly disclosed sector-wide impact assessments.⁵⁹

Consulting external experts as part of ongoing assessment processes constitutes a credible alternative in situations where small and medium-sized enterprises may find it difficult to have direct access to affected stakeholders (see below).

57 See “OECD Due Diligence Guidance for Responsible Business Conduct”, p.17.

58 See for example <https://www.verite.org/commodity-atlas/> and <http://www.responsible sourcingtool.org/visualizerisk>

59 See for example IHRB sector wide impact assessment of the mining sector in Colombia <https://www.ihrb.org/focus-areas/commodities/report-sector-wide-impact-assessment-of-the-mining-swia-in-colombia>

Box 24 – Example - Independent Human Rights Impact Assessment by External Experts

A commodity trading company was considering a long-term offtake agreement with a mining company for a commodity produced at a specific location with a high risk of human rights abuses. The trading company commissioned experts to conduct a human rights impact assessment. The experts studied the current systems in place at the site, reviewed relevant documentation including on human rights risks and due diligence and conducted interviews with the mining company management as well as with affected stakeholders, relevant national and local authorities, experts and NGOs.

The human rights impact assessment highlighted a number of areas where the mining company's operations at this site caused significant adverse impacts on the local population. Based on the assessment, the trading company set out a number of actions for the mining company to undertake before entering into the agreement. These included, for example, putting in place appropriate wastewater treatment facilities to address water pollution around the site which adversely impacted the community's access to clean drinking water.

v. Consult affected stakeholders

As part of efforts to identify and assess actual or potential adverse human rights impacts, the UNGPs state that companies should undertake “meaningful consultation with potentially affected groups and other relevant stakeholders, as appropriate to the size of the business enterprise and the nature and context of the operation.”⁶⁰

Affected stakeholders are individuals whose human rights may be impacted by a company's operations, products or services.⁶¹ Engaging with these individuals helps companies build mutual understanding of the human rights risks at stake and find effective ways to address them.

Box 25 - Commodity Trading and Affected Groups

Commodity trading may include potential adverse impacts on a range of affected groups including:

- Employees/contractors/workers (including migrant workers)
- Local producers and their workers
- Local communities
- Indigenous people
- Vulnerable and marginalised groups
- Supply chain/contractor workers
- Human rights defenders⁶²

⁶⁰ UNGP 18 b.

⁶¹ See Section 2.4 of this Guidance.

⁶² “Human rights defender” is a term used to describe people who, individually or with others, act to promote or protect human rights. See <https://www.ohchr.org/EN/Issues/SRHRDefenders/Pages/Defender.aspx>

The UNGPs *Interpretive Guide* states that stakeholder engagement/consultation is an “ongoing process of interaction and dialogue between an enterprise and its potentially affected stakeholders that enables the enterprise to hear, understand and respond to their interests and concerns, including through collaborative approaches.”⁶³ Such engagement helps build constructive relationships based on good faith with employees, local communities, civil society actors and others and should be part of a company’s efforts to “assess its impact and to gain feedback on how effectively it has responded to impact.”⁶⁴ Box 26 below provides an example of how a commodity trading company could integrate stakeholder engagement into its corporate responsibility strategy.

Box 26 - Example - A Five Step Approach to Stakeholder Engagement⁶⁵

The following five step approach provides an example of stakeholder engagement that a commodity trading company may apply to its operations:

1. The company’s top managers set an initial overall vision of reaching out broadly to all external stakeholders about its new corporate code of conduct and related issues, including the challenging task of engaging local stakeholders in countries where commodities the company trades are produced. The top managers also called for a review of the company’s past stakeholder engagement policies and actions. This review asked questions such as:
 - What lessons did we learn from any previous attempts to engage stakeholders?
 - Did these efforts provide helpful information or fulfill other company objectives?
 - Were the formats for our past engagement appropriate for those involved?
 - Did we seek feedback to determine if we addressed stakeholders’ concerns/expectations?
 - Which internal stakeholders need to be involved? How?
2. The company’s top managers appointed an in-house cross functional team to undertake an initial stakeholder mapping process designed to identify and prioritise the company’s external stakeholders followed by proposals for appropriate engagement mechanisms. This process involved:
 - Brainstorming a list of stakeholders, including everyone who had an interest in the company’s activities today and who may have one in the future. Where possible, the process involved identifying individuals and organisations by name in the country where the company is based as well as in countries where a significant portion of commodities traded are produced.
 - Analysing whether those stakeholders identified had information, expertise and broad legitimacy and the extent to which they were willing to participate in engagement activities.
 - Prioritising those individuals/organizations where company engagement objectives could be best achieved and where issues of relevance and concern seem most aligned with stakeholder issues and priorities.

Box 26 Continued below

⁶³ UNGPs Interpretive Guide, p.8.

⁶⁴ UNGPs Interpretive Guide, p.62.

⁶⁵ Adapted from BSR’s Back to Basics: How to Make Stakeholder Engagement Meaningful for Your Company, 2012, available at: https://www.bsr.org/reports/BSR_Five-Step_Guide_to_Stakeholder_Engagement.pdf

Box 26 Continued

3. After completing the mapping, the in-house team proposed a number of initial activities to test stakeholder engagement, which involved:
 - organising face-to-face meetings with interested external stakeholders at the company's headquarters to discuss social and environmental performance and;
 - preparing online outreach initiatives involving webinars for interested external stakeholders on specific topics.
4. Top managers approved the plan and agreed to participate in the face-to-face meetings. These invitation-only events were held at a local conference centre and the initial participant limit was set at 30. The online webinars were organised with assistance from an external facilitator and each focused on supply chain issues in the four main commodities traded by the company. Producers of commodities identified with support from an external facilitator took part in 2 of the webinars.
5. At the end of the initial engagement events, the in-house team prepared a report for top managers outlining main concerns raised by participants as well as proposed plans for follow-up actions. Top managers agreed to the proposed next steps including semi-annual stakeholder engagement events organised by the in-house team. In an effort to align with good practice, the in-house team agreed to review their past efforts and plan future engagement in the context of the UNGPs and relevant resources including the *OECD Due Diligence Guidance for Meaningful Stakeholder Engagement in the Extractive Sector*.

A number of industry focused and market specific tools have been developed to assist companies in carrying out effective consultations with stakeholder groups. For example, in 2017 the OECD published *Due Diligence Guidance for Meaningful Stakeholder Engagement in the Extractive Sector*.⁶⁶ This detailed guidance is noteworthy in that it aligns with the UNGPs and includes indicators and assessment criteria for stakeholder engagement, much of which is relevant to other industry sectors.

Mapping affected stakeholders is the first step in any consultation process. Instruments such as the IFC's *Good Practice Handbook on Stakeholder Engagement*⁶⁷ and the *UN Global Compact Guidance on Stakeholder Engagement*⁶⁸ provide helpful support. The process should be ongoing (i.e. not only engaging when there is a need such as an accident) and should be characterised by two-way communication that involves input and feedback. It necessitates attention to any barriers—linguistic, cultural, gender or other—that stakeholders may face in speaking openly to the company's representatives. It requires sensitivity to cultural differences and perceived power imbalances, where these exist. Meaningful consultation involves taking stakeholder views into account in decision-making (see Box 27 below for a summary of the OECD definition of meaningful stakeholder engagement).

66 See <http://mneguidelines.oecd.org/stakeholder-engagement-extractive-industries.htm>

67 See <http://documents.worldbank.org/curated/en/579261468162552212/Stakeholder-engagement-a-good-practice-handbook-for-companies-doing-business-in-emerging-markets>

68 See <https://www.unglobalcompact.org/engage-locally/manage/engagement>

Box 27 - Meaningful Stakeholder Engagement

The OECD *Guidelines for Multinational Enterprises* note that stakeholder engagement involves “...interactive processes of engagement with relevant stakeholders through, for example, meetings, hearings or consultation proceedings.”

Effective stakeholder engagement is characterised by:

- two-way engagement (parties freely express opinions, share perspectives, listen to alternative viewpoints);
- good faith (engaging with genuine intention to understand and address adverse impacts);
- responsive engagement (follow through on outcomes including remedies where appropriate);
- on-going engagement (dialogue continues throughout the lifecycle of an operation/not a one-off endeavour).

Where commodity trading companies have no nexus with local communities or affected stakeholders around the commodities’ production/extraction site, they should as a first step use their available leverage with the producers they purchase commodities from to engage with affected individuals, communities, stakeholders and others.

Some smaller commodity trading companies may find it difficult to identify or contact relevant stakeholders and address related human rights concerns. They could consider creating a complaints system open to employees as well as external persons as one way of identifying potential adverse impacts and those involved. They could also take steps to speak regularly with local community members on their own and via their representative industry associations where they operate as well as respected civil society organisations in order to better identify affected stakeholders and potential impacts.⁶⁹

3.3 Preventing and Mitigating Adverse Impacts

Purpose

All companies are expected to take practical steps to address potential human rights risks and adverse impacts they identify during assessment processes. Having effective systems in place to respond to human right risks and impacts through its activities⁷⁰ means a company will be more likely to manage such situations and reduce actual adverse impacts on people.

69 See “My Business and Human Rights: A guide to human rights for small and medium-sized enterprises”, at: <https://business-humanrights.org/sites/default/files/documents/SME-BHR-guide-EU.pdf>

70 Activities include both actions and omissions (see Commentary to UNGP 13).

Potential impacts should be addressed through prevention or mitigation. To identify the best ways to address potential impacts, a company first needs to understand the nature of its involvement:

- Where the company is at risk of causing an impact, it should take the necessary steps to prevent the impact from occurring.
- Where the company is at risk of contributing to an impact, it should first take steps to avoid this contribution. Where it does not control those who may contribute to the impact, it should use its leverage with them to mitigate the remaining risk.
- Where a negative impact may be directly linked to the company's operations, products or services through a business relationship, even without a contribution by the company itself, it should use whatever leverage it has to mitigate the risk that the impact occurs.⁷¹

Actual impacts – those that have already occurred – should be a subject for remediation (see UNGP 22 and Section 3.6 of this Guidance).⁷²

Findings from impact assessments should be communicated across all relevant internal company functions and processes and should lead to appropriate integration and follow up actions.

Box 28 - UNGP 19

In order to prevent and mitigate adverse human rights impacts, business enterprises should integrate the findings from their impact assessments across relevant internal functions and processes, and take appropriate action.

(a) Effective integration requires that:

- i. responsibility for addressing potential human rights risks relating to business activities is assigned to the appropriate level and function within the company;*
- ii. internal decision-making, budget allocations and oversight processes enable effective responses to potential impacts.*

(b) Appropriate action will vary according to:

- i. whether the company causes or contributes to an adverse impact, or whether it is involved solely because the impact is directly linked to its operations, products or services by a business relationship;*
- ii. the extent of its leverage in addressing the adverse impact.*

Key actions

The following general steps can help companies in preventing or mitigating adverse human rights impacts:

⁷¹ See Commentary to UNGP 19. See also Section 2.2 of this Guidance on human rights responsibilities (cause, contribute, link) and actions to prevent and mitigate adverse impacts.

⁷² See Commentary to UNGP 17.

- i. Develop a response plan
- ii. Prioritise responses based on the severity of impacts
- iii. Use leverage with business partners

i. Develop a response plan

Developing a plan can begin simply, for example, by designating an individual or team within the company to take responsibility for addressing specific human rights risks identified during impact assessment processes. It is important to note that effective responses often require ongoing collaboration with a range of internal and external stakeholders, from workers to governments to business partners.

Those leading on response planning within a company can then develop action plans that contain, for example:

- discussing human rights risks within the company and developing solutions;
- reporting on progress internally and externally;
- consulting affected stakeholders, in particular in the case of risks associated with high-risk contexts and/or severe impacts;⁷³
- engaging external experts to provide support on addressing specific challenges.

ii. Prioritise responses based on severity of impacts

Potential risks that are most severe (in terms of threats to human health and safety, risks to vulnerable groups etc.) should be prioritised for action (see Section iii).⁷⁴ The UNGPs make clear that severity is judged by the scale, scope or irremediable nature (i.e. irreversibility) of the impact.⁷⁵

These criteria should help a company in understanding, for example in the case of its business relationships, that its largest contractors or suppliers may in fact not be the most urgent in terms of effective responses. Instead, focus should be placed on those business relationships where potential adverse impacts to people in any location may be most severe.

The purpose of prioritising risks is in large part linked to recognition that in some cases a company will not have the resources or knowledge necessary to address at once all adverse impacts identified. It is important to stress, however, that such prioritization does not suggest that all impacts identified do not need to be addressed. In fact companies will likely need to address a range of risks at the same time given the often-interrelated nature of human rights related concerns.

⁷³ See Box 27 on Meaningful Stakeholder Engagement.

⁷⁴ See also “OECD Due Diligence Guidance on Responsible Business Conduct” (p.17): “In the case of prioritising risks to human rights, the severity of a potential adverse impact, such as where a delayed response would make the impact irremediable, is the predominant factor in prioritising responses”.

⁷⁵ See Commentary to UNGP 14.

iii. Use leverage with business partners

The Commentary to UNGP 19 states that:

*“Where a business enterprise contributes or may contribute to an adverse human rights impact, it should take the necessary steps to cease or prevent its contribution and use its leverage to mitigate any remaining impact to the greatest extent possible. **Leverage is considered to exist where the enterprise has the ability to effect change in the wrongful practices of an entity that causes a harm.**”*

In other words, “leverage” is essentially about a company’s ability to get another organisation to take actions to address its own negative impacts on human rights. A common example concerns a company’s supplier which may be found to have abused the rights of its workers. How can the company positively influence its supplier in such a case?

Box 29 below highlights different categories of leverage and Boxes 30 and 31 consider how commodity traders may use business contracts as a form of leverage in business relationships.

Box 29 - Categories of Leverage

A Shift Project⁷⁶ publication proposes five categories of leverage:

1. **Traditional commercial leverage:** leverage that sits within the activities the company routinely undertakes in commercial relationships. Specific means may include: contracts; audits; bidding criteria; questionnaires; incentives.
2. **Broader business leverage:** leverage that a company can exercise on its own but through activities that are not routine or typical in commercial relationships. Specific means may include: capacity building; presenting a unified voice from each business department; referencing international or industry standards;
3. **Leverage together with business partners:** leverage created through collective action with other companies in or beyond the same industry. Specific means may include: driving shared requirements of suppliers; bilateral engagement with peer companies.
4. **Leverage through bilateral engagement:** leverage generated through engaging bilaterally and separately with one or more other actors, such as government, business peers, an international organization or a civil society organization. Specific means may include: engaging civil society organizations with key information; engaging multiple actors who hold different parts of a solution.
5. **Leverage through multistakeholder collaborations:** leverage generated through collaborative action, collectively with business peers, governments, international organizations and/or civil society organizations. Specific means may include: driving shared requirements of suppliers; using convening power to address systemic issues.

76 Shift, “Using Leverage in Business Relationships to Reduce Human Rights Risks”, 2013, available at <https://www.shiftproject.org/resources/publications/leverage-business-relationships-reduce-human-rights-risk/>

Box 30 – Business Contracts as an Example of Leverage

Human rights due diligence requirements should be an integral part of contracts and address questions such as:

- who has responsibility in the relationship for addressing human rights risks and reflecting this in legal agreements?
- what expectations are set to ensure prevention and mitigation of adverse human rights impacts?
- how will such steps be monitored (e.g. through internal monitoring systems of the producer, through on the ground assessments by the trader, or through third part on-the-ground audits by specialised auditing firms) and discussed with business partners over time?

Box 31 - Example - Leverage Together with Business Partners

Revolving credit is a line of credit where the customer pays a commitment fee and is then allowed to use the funds when they are needed.

A trade finance bank and a trading company active in the chocolate value chain recently announced the extension of the trading company's revolving credit facility. They communicated that the applicable credit margin would be linked to the company's sustainability performance and rating, thus encouraging the company to improve its sustainability performance.

The trading company's sustainability programme includes four targets that it expects to achieve by 2025 and that address the biggest sustainability challenges in the chocolate supply chain: child labour, farmer poverty, its carbon and forest footprints and sustainable sourcing.

In terms of assessing the performance of business partners, the UNGPs stress that a company should prioritise those relationships where the severity and likelihood of potential human rights impacts is greatest.⁷⁷ This prioritisation might focus on suppliers/contractors:

- active in locations where there are known human rights risks, such as limits on the right to form and join a trade union or poor enforcement of labour laws;
- with a known track record of poor performance on human rights;
- providing key products or services that themselves pose risks to human rights (for example safety or health hazards);
- lacking capacity to assess human rights risks and how to address them.

⁷⁷ Commentary to UNGP 17.

The Commentary to UNGP 19 makes clear that where a company does have the ability to prevent or mitigate an adverse impact caused by its business partner, it should do so. This is often most effectively achieved early in a business relationship, for example in contractual requirements, and as part of wider collaborations with other initiatives and actors.

If, as is often the case, it lacks the ability to make a positive change in the performance of a business partner, the company should make efforts to increase its leverage wherever possible. A common example of this kind involves providing capacity-building or other forms of support to the business partner to improve its performance, such as engagement programmes with farmers and growers to support farm productivity and promote certification. Providing such support may often be most appropriate in cooperation with other actors including other companies, NGOs, trade unions and/or governments where appropriate.⁷⁸

In other cases, commodity trading companies might lack leverage to impose human rights due diligence clauses (e.g. gold traders/refiners seeking to influence practices of multinational mining companies). As the Commentary to UNGP 19 states, “There are situations in which the enterprise lacks the leverage to prevent or mitigate adverse impacts and is unable to increase its leverage. Here, the enterprise should consider ending the relationship, taking into account credible assessments of potential adverse human rights impacts of doing so.” (see Box 32 below for OECD guidance on disengagement from business relationships).

The Commentary to UNGP 19 provides further guidance which warrants quoting in full:

“ Where the relationship is ‘crucial’ to the enterprise, ending it raises further challenges. A relationship could be deemed as crucial if it provides a product or service that is essential to the enterprise’s business, and for which no reasonable alternative source exists. Here the severity of the adverse human rights impact must also be considered: the more severe the abuse, the more quickly the enterprise will need to see change before it takes a decision on whether it should end the relationship. In any case, for as long as the abuse continues and the enterprise remains in the relationship, it should be able to demonstrate its own ongoing efforts to mitigate the impact and be prepared to accept any consequences – reputational, financial or legal – of the continuing connection. ”

The commentary to UNGP 19 also points out that a company should be prepared to accept consequences to its reputation, finances or legal situation for continuing in business relationships with organisations involved in severe human rights impacts.

78 See Commentary to UNGP 19.

Box 32 – Disengagement With a Supplier

How should a commodity trading company think about disengaging from a business relationship when it finds that it lacks leverage to prevent or mitigate adverse human rights impacts associated with the actor involved? When does it make sense to terminate a specific business relationship due to concerns over human rights performance?

There are a range of cases in which commodity traders may face such questions. For example, a commodity trader may discover that one of its business partners is involved in major abuses of basic labour standards concerning workers involved in producing a commodity which it buys on a regular basis. What should be done in such a case, in particular, when it is clear that there is limited or no ability to influence the business partner's practices over time?

Equally important, companies must also take into consideration the issue of potential adverse impacts resulting from disengagement including loss of jobs for workers or other local economic impacts and seek to prevent or mitigate those potential impacts in cases where it is decided to disengage.⁷⁹

The UNGPs and *OECD Guidelines for Multinational Enterprises* suggest that disengagement with a supplier is a last resort, either after failed attempts at mitigation or where the enterprise deems mitigation not feasible, or because of the severity of the adverse impact. The UNGPs and OECD Guidelines also note that determining how “crucial” a business relationship is to a company should be part of decisions concerning disengagement.

In this context, the UNGPs refer to products or services that may be “essential” and to those “for which no reasonable alternative source exists” but a number of other factors are also relevant in determining whether a business relationship can be considered crucial, including:

- volumes and relative proportion of the supply or investment for the company considering disengagement;
- duration of the relationship, both in the past and in terms of contractual commitments going forward;
- reputational interests.

The OECD Guidelines offer the example of “temporary suspension” of a relationship as a potential step during risk-mitigation efforts. Other potential disengagement steps could include scaling back purchase volumes or terminating parts of a multi-faceted relationship. Commodity trading companies will need to assess in such cases whether incremental disengagement strategies may be useful in increasing leverage over specific business partners and whether these or other steps may assist the company in making a business relationship less “crucial” over time.

Annex II to the *OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas* includes a series of cases where implementers of the Guidance commit to immediately suspend or discontinue engagement with upstream suppliers where they identify a reasonable risk that they are sourcing from, or linked to, any party committing serious abuses. These include:

“Immediately suspend or discontinue engagement with upstream suppliers where the company identifies a reasonable risk that they are sourcing from, or linked to, any party providing direct or indirect support to non-State armed groups.”

79 For more information, see Should I stay or should I go? Exploring the role of disengagement in human rights due diligence. Available at <https://www.somo.nl/should-i-stay-or-should-i-go-2/>

3.4 Tracking Performance

Purpose

Tracking the effectiveness of responses to adverse human rights impacts is a key step which companies should take to verify whether human rights risks identified are being addressed in operations and business relationships.

A well-functioning tracking system enables a company to analyse its response and to understand human rights trends and patterns, which can highlight recurrent problems across the company requiring further attention. It also helps disseminate the right information and good practices to anticipate and improve the management of actual and potential risks across the company's operations as well as establishing internal accountability and driving improvement. Furthermore, a tracking system serves as the basis to properly disclose and communicate what the company is doing to meet the responsibility to respect human rights.

It should be noted that processes or systems may already be in place within a company to track certain human rights risks given the evolving requirements of some stock exchanges, banks and governments on issues such as health and safety standards or ethical and compliance requirements. Such systems provide a potentially useful framework through which a company's leading human rights risks can be mapped and gaps in tracking can be identified.

Box 33 - UNGP 20

In order to verify whether adverse human rights impacts are being addressed, business enterprises should track the effectiveness of their response. Tracking should:

- (a) be based on appropriate qualitative and quantitative indicators;*
- (b) draw on feedback from both internal and external sources, including affected stakeholders.*

Key actions

The Commentary to UNGP 20 notes that "individuals from groups or populations that may be at heightened risk of vulnerability or marginalization" require special consideration as part of a company's tracking efforts. The Commentary also emphasises that "tracking should be integrated into relevant internal reporting processes" and existing tools including "performance contracts and reviews as well as surveys and audits, using gender-disaggregated data where relevant" should be utilised. Finally, the Commentary suggests that "operational-level grievance mechanisms can also provide important feedback on the effectiveness of the business enterprise's human rights due diligence from those directly affected." Consulting and engaging with staff members also helps improve and develop efficient tracking tools (see Box 34 below).

Box 34 - Incorporating Staff Perspectives and Tracking Performance

In order to build support for its corporate responsibility agenda and to validate its understanding of the human rights at risk through the company's activities and business relationships, an international commodity trading company engaged its traders and operators in a series of 'deep-dive' workshops.

Employees exchanged experiences and compared perspectives on risk and responsibility.

The workshops identified, among others:

- opportunities for training improvements, such as informing new staff as to corporate responsibility expectations and accountabilities;
- a divergence in views and understanding on specific physical/operational risks across the supply chain and how such risks could be mitigated either directly, or through business relationships e.g. exploring/exerting leverage;
- varied awareness and/or an appreciation of actual incidents, what could be learned from them and how systems and procedures could be adapted to reduce the likelihood of reoccurrence.

The following general steps can help companies in tracking their human rights performance:

- i. Develop indicators and identify trends/patterns of recurring problems
- ii. Incorporate stakeholder perspectives
- iii. Track through business relationships

i. Develop Indicators and identify trends/patterns of recurring problems

Depending on the issues to be addressed, companies identify and use indicators to track their performance. Large companies also consider the issues that can be best tracked at the local level and how to connect this information with data measured at headquarters. To develop their tracking system, commodity trading companies can draw on existing and widely accepted indicators adopted on other issues related to human rights such as health and safety, compliance and environmental management.⁸⁰

Quantitative indicators are helpful where human rights risks arise, for example, from potential environmental harm associated with commodities products such as deforestation, soil pollution and water depletion. Indicators can also be associated with well-established standards that measure health and safety performance.

⁸⁰ See for example GRI G4 Sustainability Reporting Guidelines (superseded by GRI standards), at: <https://www.globalreporting.org/standards/gri-standards-download-center/>. Examples of indicators developed by companies in other sectors include human and workplace rights complaints from employees concerning: child labor, discrimination, forced labor, freedom of association, retaliation, safe and healthy workplace, work hours and wages, workplace security.

Companies should also develop information gathered including perspectives of affected stakeholder groups (see Section ii below). In certain situations, qualitative indicators are necessary to provide an accurate interpretation of quantitative ones. A classic example is a low number of complaints raised through a company grievance mechanism. Qualitative indicators gathered through interviews, surveys or other mechanisms are critical in determining whether there is in fact an effective reduction of accidents (the quantitative indicator) or instead if the indicator points to a lack of trust in the grievance mechanism on the part of staff or other affected individuals.

ii. Incorporate stakeholder perspectives

Customers, staff and affected stakeholders might have different views on how a company is managing human rights risks. Instruments to collect information from external stakeholders include:

- engagement with members of staff through workshops to identify their perspectives of risks to people across the company's supply chain;
- collaboration with trade unions and/or NGOs locally or at the global level;
- joint fact finding or monitoring programmes in cooperation with external experts;
- external advisory panels to provide periodic reviews of company performance;
- identification of partners that communities will trust to provide independent assessments of company efforts to address adverse impacts;
- dialogue with communities in the form of face-to-face meetings or perception or feedback surveys.

Sharing information about the tracking system and sharing information to assess a company's implementation progress on specific commitments enables further dialogue and potential for developing collaborative approaches between the company and its stakeholders.

Customers, staff and other stakeholders can offer valuable perspectives on the effectiveness of a company's human rights due diligence and may raise questions or concerns that would not be highlighted without such engagement.

At the local level, companies may seek feedback on their human rights performance through their own internal grievance mechanisms. This could involve for example community hotlines or other anonymous complaint mechanisms through which those directly affected can raise concerns about how they are or may be harmed.

iii. Track through business relationships

Where commodity trading companies have established a large number of business relationships, it will be difficult to track and affect change with all of them. As discussed in Section 3.2iii, the projected severity of impacts should be prioritized (for instance, monitor the purchase of materials from locations identified as 'high-risk' with regards to human rights and tracking the performance of contractors responsible for safely handling environmentally harmful materials).

Human rights performance monitoring and reporting requirements should be agreed upon with suppliers and contractors. Systems for auditing suppliers are common in many industries, although the effectiveness of the audit paradigm to track human rights risks is subject to limitations. For example, audits are viewed as falling short in terms of:

- not always identifying key issues due to their static and brief nature;
- failing in some cases to point out root causes of repeated adverse human rights impacts;
- being unsuccessful at producing a full picture of problems in specific settings as those interviewed as part of audits may not feel comfortable in sharing criticisms or concerns.⁸¹

Consequently, some companies and some sectors are working towards alternative approaches that seek to recast their relationship from control to partnerships, with the objective to address the root causes of adverse human rights impacts that usually involve building supplier capacity. Such partnership strategies usually involve developing long term relationships aimed at building supplier capacity to meet mutually agreed performance standards in specific areas.

3.5 Communicating Performance

Purpose

All companies are expected to explain to their stakeholders how they are putting human rights commitments into practice. Communicating accurately and transparently about these actions is a vital part of effective human rights due diligence consistent with the UNGPs.

Communicating human rights performance involves disclosing clear and complete information to a variety of stakeholders including workers, local communities where the company may do business and other groups that may have particular interests in the company's activities, as well as to governments and wider society as relevant.

A company will be better placed to build trust in its human rights due diligence efforts if it communicates openly not only about achievements and progress but also about the challenges it faces in responding to adverse impacts and how it is seeking to address such issues.

Communication may take many forms and can bring multiple benefits for companies. These benefits include providing an opportunity for constructive dialogue with a range of stakeholders, demonstrating transparency and goodwill as a partner and gaining wider legitimacy in society. It may also be appropriate for communication to take place across a number of different channels, for example annual or sustainability reports, company websites, at the enterprises' premises, direct dialogue with stakeholders etc. It is important that the information is published in a way that is easily accessible, and when relevant, in the local language or languages.

⁸¹ For further information, see for example *From Audit to Innovation: Advancing Human Rights in Global Supply Chains*, published by Shift. Available at: <https://www.shiftproject.org/resources/publications/audit-to-innovation-advancing-human-rights-global-supply-chains/>

Box 35 - UNGP 21

(...) In all instances, communications should:

- (a) be of a form and frequency that reflect an enterprise's human rights impacts and that are accessible to its intended audiences;*
- (b) provide information that is sufficient to evaluate the adequacy of an enterprise's response to the particular human rights impact involved;*
- (c) in turn not pose risks to affected stakeholders, personnel or to legitimate requirements of commercial confidentiality.*

Companies should be aware that the UNGPs highlight the role of States in providing guidance to business enterprises on how to respect human rights throughout their operations, including with respect to communication.⁸² Soon after the UNGPs were endorsed, some governments including Switzerland engaged with stakeholders to develop National Action Plans as a means to implement the UNGPs.⁸³

States encourage reporting and increasingly require reporting on corporate social responsibility, including human rights performance (see Annex 3 for examples). Corporate transparency and public reporting requirements such as disclosing lists of suppliers (where possible), manufacturing locations and payments to governments are also relevant in terms of respect for human rights and due diligence expectations as set out in the UNGPs. The UNGPs also encourage States to ensure that financial reporting requirements clarify that human rights impacts in some instances may be “material” or “significant” to the economic performance of companies.⁸⁴

Key actions

The UNGPs make clear that communication can take many forms, including:

- in-person meetings with stakeholders;
- online dialogues;
- consultations with affected stakeholders;
- formal public reports.⁸⁵

UNGP 21 states that communication should be of a form and frequency that reflects an enterprise's human rights impacts and that are accessible to its intended audiences.

82 See UNGP 3 (c).

83 See link to existing National Action Plans: <https://business-humanrights.org/en/un-guiding-principles/implementation-tools-examples/implementation-by-governments/by-type-of-initiative/national-action-plans>

84 See Commentary to UNGP 3.

85 See Commentary to UNGP 21.

It is important to stress that the UNGPs take a broad approach to how a company should communicate about its human rights performance. The value of face-to-face dialogue between company representatives and all stakeholders is listed alongside more traditional notions of communication such as formal corporate reporting.

Communicating in ways that are relevant, accurate, timely and appropriate to different stakeholders involves considerable effort on the part of any company. This is most notable for companies who need to engage directly with local communities affected by their operations. Doing so effectively requires a commitment to regular exchange of information and ongoing meaningful dialogue in ways that do not pose risk to individuals (see Box 36 below).

Box 36 - Communication and Confidentiality

Some kinds of information about how human rights impacts are being addressed could pose risks to affected stakeholders or personnel. This may be because they would reveal, by implication, the identity either of a complainant or of individuals responsible for actions that are judged harmful, making them the potential targets of retaliation.

Publicising information about discussions with a Government, police or security forces aimed at halting or preventing harmful action against individuals might jeopardise that process. However, care should be taken that blanket assumptions about such risks do not become an easy justification to avoid sharing information that can legitimately be made public.

The legitimate requirements of commercial confidentiality would typically extend to information crucial to negotiations regarding a significant business transaction, for the duration of those negotiations. They would also include information legally protected against disclosure to third parties.

With respect to corporate reporting, the Commentary to UNGP 21 notes that this field has evolved in recent years, from reliance on traditional annual reports and corporate responsibility/sustainability reports to greater use of periodic online updates as well as integrated reports containing financial and non-financial information. The point is that no one size fits all but efforts to communicate should be ongoing, easily accessible, provide sufficient information to evaluate the adequacy of a company's due diligence efforts response and address stakeholder questions and concerns (see Box 37 below).⁸⁶

All companies should report formally in cases of severe human rights impacts, whether due to the nature of the business operations or operating contexts. In such cases, in particular, reporting should cover topics and indicators concerning how the company identifies and addresses adverse impacts on human rights. Communications should also convey all the facts necessary for those affected to make informed decisions concerning their interests.

⁸⁶ See also "OECD Due Diligence Guidance on Responsible Business Conduct", p.33.

Box 37 - Communicate How Impacts are Addressed

The *OECD Due Diligence Guidance for Responsible Business Conduct* recommends companies to publicly report information on their due diligence processes, with due regard for commercial confidentiality and other competitive or security concerns.

Information should include:

- Responsible Business Conduct (RBC) policies;
- information on measures taken to embed RBC policies into policies and management systems;
- the enterprise's identified areas of significant risks;
- the significant adverse impacts or risks identified, prioritised and assessed, as well as the prioritisation criteria;
- the actions taken to prevent or mitigate those risks, including where possible estimated timelines and benchmarks for improvement and their outcomes;
- measures to track implementation and results and the enterprise's provision of or co-operation in any remediation.

The above information should be published in a way that is easily accessible and appropriate.

For human rights impacts that the enterprise causes or contributes to, the OECD Guidance requires companies to be prepared to communicate with impacted or potentially impacted rights holders in a timely, culturally sensitive and accessible manner.

UNGP 21 notes that independent third party verification of a company's human rights reporting can strengthen its content and credibility. Sector-specific indicators can provide helpful additional detail.

Companies should look to existing good practice guidance in disclosing timely and accurate information on human rights performance. A growing number of companies (beyond the commodity trading sector) use the Global Reporting Initiative (GRI) criteria to shape their communications on human rights performance. The GRI provides specific guidance for a number of sectors of relevance to commodity trading including mining and metals, oil and gas and financial services.⁸⁷ Companies are also increasingly starting to use the UNGP Reporting Framework, developed by Shift and Mazar and supported by the UN Working Group on Business and Human Rights (see Box 38 below).

87 See <https://www.globalreporting.org/information/sector-guidance/sectorguidanceG4/Pages/default.aspx>

Box 38 - THE UNGPs Reporting Framework⁸⁸

The UNGPs Reporting Framework is divided in three parts addressing a company's:

- internal governance of its commitment to respect human rights;
- approach to defining the focus for its reporting and;
- managing salient human rights issues.

The concept of “salient human rights issues” as set out in the Reporting Framework does not appear in the UNGPs, although it has become accepted language for describing such issues. It is a helpful framing which seeks to assist companies in assessing potential human rights risks to people, not the business, and those risks which are the most severe as a result of the company's activities or business relationships.

The Reporting Framework stresses that:

“Salient issues are therefore not only the issues on which companies should focus their reporting, but also the priority human rights issues for risk management. Using ‘salience’ means that reporting changes from being a resource drain on companies – an exercise in chasing down data for an external communications exercise – to being an investment in putting in place processes that enable the company to manage key risks to people and to the business.”⁸⁹

3.6 Providing for or Cooperating in Remediation When Appropriate

Purpose

Where a company identifies that it has caused or contributed to adverse impacts, the responsibility to respect human rights requires active engagement in remediation, by itself or in cooperation with other actors.

Remediation is the process of providing remedy. Remedies can take various forms including apologies, provisions to ensure the harm cannot recur, restitution or rehabilitation, financial or non-financial compensation, or punitive sanctions (whether criminal or administrative).⁹⁰

Putting in place a system for remediation shows awareness that negative human rights impacts may occur despite best efforts to avoid them and shows readiness to respond quickly and effectively.

⁸⁸ See <http://www.ungpreporting.org>

⁸⁹ See further discussion of salient human rights issues at: <https://www.ungpreporting.org/resources/salient-human-rights-issues>.

⁹⁰ See Commentary to UNGP 25.

Box 39 - UNGP 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.

Key actions

The following actions should be considered by companies that act to provide for or cooperate in remediation:

- i. Enable remediation for involvement in harms
- ii. Design effective operational grievance mechanisms

i. Enable remediation for involvement in harms

A company should provide for or cooperate in ensuring effective remedy where it has caused or contributed to a negative human rights impact. In cases where a company has not directly caused or contributed to an impact⁹¹, but there is a direct link through the business relationship, it is not required to provide remediation itself (although it may still choose to do so). However, the company still has a responsibility to use its leverage with business partners involved to seek to prevent or mitigate the risk of such impacts continuing or recurring.⁹²

If a company contests allegations that it has caused or contributed to an adverse impact, it will not be obligated to provide for remediation itself unless and until it is required to do so (for instance, by a court).⁹³

Remedy can take place through judicial processes or through non-judicial processes. It may also be provided through an “operational-level grievance mechanism” (see Section ii below). Complainants should be free to choose which available channels they wish to use. Considerations on the effectiveness of courts and on the complexity of the administrative mechanisms of a State affect the choice of options for addressing human rights impacts. The *UNGPs Interpretive Guide on the Corporate Responsibility to Respect Human Rights* lists a series of mechanisms that may exist and be appropriate for providing remediation if a company cannot or should not do so itself:

- the courts;
- State ombudsman or complaints offices;
- a labour standards office;
- a National Contact Point (in the context of the *OECD Guidelines for Multinational Enterprises*);⁹⁴

91 See Section 2B of this Guidance for examples of responsibilities in the commodity trading sector.

92 See Commentary to UNGP 22.

93 See “UNGPs Interpretive Guide” p.66-67.

94 See <http://mneguidelines.oecd.org/ncps/> and for the National Contact Point of Switzerland www.seco.admin.ch/ncp

- a national human rights institution (NHRI);
- any other State-administered or statutory body empowered to take on this kind of role;
- local, traditional mechanisms used by indigenous or other communities;
- a multi-stakeholder initiative (if complaints involve a supplier or contractor to more than one of its corporate members);
- complaint mechanisms of labels or standards.⁹⁵

ii. Design effective operational grievance mechanisms

Box 40 - UNGP 29

To make it possible for grievances to be addressed early and remediated directly, business enterprises should establish or participate in effective operational-level grievance mechanisms for individuals and communities who may be adversely impacted.

A company grievance mechanism at the operational level (e.g. at headquarters, storage facilities, refineries) facilitates the identification of grievances and allows them to be addressed as early as possible. Operational level grievance mechanisms contribute also to the management of emerging global legal risks.

Such operational-level grievance mechanisms can be a tool that individuals such as workers or external groups may use to raise concerns about adverse impacts and to seek remedy. These mechanisms can provide opportunities for affected people to receive remedy sooner and to address their concerns before they escalate or lead to otherwise preventable harm. Operational-level grievance mechanisms should not preclude access to judicial or other State-based processes, or undermine the role of legitimate trade unions. Specific “effectiveness criteria” set out in the UNGPs should guide the design and operation of these mechanisms (see Box 41 below).

Box 41 - UNGPs Effectiveness Criteria for Non-Judicial Grievance Mechanisms

Any mechanism addressing human rights grievances should be:

- legitimate – for example trusted by stakeholder groups;
- accessible – known and accessible in particular to those facing barriers to access;
- predictable – clear timeframes and clarity on processes and outcomes;
- equitable – fair and reasonable access to information, advice, expertise;
- transparent – regular and sufficient information on the mechanism’s performance;
- rights-compatible – consistent with internationally recognized human rights standards;
- based on dialogue and engagement – consultation in addressing and resolving grievances;
- a source of continuous learning – identifying lessons and preventing future grievances.

⁹⁵ Ibid. p.65.

Involving external stakeholders in the design of the mechanism builds trust in the mechanism and may prompt its use as a channel to raise grievances early (see Box 42 below).

Box 42 - Benefits of Operational-level Grievance Mechanisms

The Commentary to UNGP 29 makes clear that operational-level grievance mechanisms should be accessible directly to individuals and communities who may be adversely impacted by a business enterprise.

Putting such a mechanism in place can help a company to:

- build and maintain a social licence in areas where it operates;
- identify, manage and monitor potential adverse impacts and risks in a timely manner, as well as positively address community concerns;
- avoid the potential for issues to escalate, be repeated or result in conflict or legal disputes;
- provide a platform for affected communities to raise concerns and communicate through an established and formal process and receive a formal company response;
- clarify organisational arrangements to record, review, escalate and resolve complaints and grievances through a systematic and transparent process;
- strengthen performance and ensure compliance with corporate codes, policies and principles as applicable to employees and contractors;
- ensure alignment with international principles and standards;
- refine and strengthen existing processes and agreements, for example, with joint venture partners and business relationships, to ensure they are in line with corporate expectations;
- integrate grievance management reporting systems with other corporate reporting systems.

For small and medium-sized companies, where resource constraints make it difficult to run a self-standing grievance mechanism, participation in an effective external mechanism led for example by an industry association or a multi-stakeholder group, such as a commodity roundtable which has developed its own grievance mechanism, is a potentially useful step (see Box 43 below).

BOX 43 - Remediation and Small and Medium-sized Enterprises

The European Commission guide⁹⁶ to human rights for small and medium-sized enterprises includes the following recommendation to enable remedy for those affected, in cases where an SME is directly involved in a negative impact:

“(...) you need to make an effort to stop such impacts and, if your company caused or contributed to it, find ways to correct the situation for the victim(s). Making right what went wrong could involve apologizing, financial or non-financial compensation or any other remedy that the victim and your business agree on as an appropriate response. It must also involve measures to ensure that the negative impact does not occur again. It is important to understand what those affected would view as effective remedy, in addition to your enterprise’s own view.”

How can small and medium-sized enterprises do this in practice?

- Be open: talk to individuals that feel affected by your business. This might help resolve complaints early and directly, limiting the problem both for your business and for the affected persons.
- Put in place a complaints system, where people who feel that they, or others, have been or will be negatively affected by your business may safely raise concerns. Alternatively, enable access to such a system administered by an outside organisation (for example, by an industry association or a multi-stakeholder group).
- Engage in collective bargaining and constructive relations with duly elected employee representatives.
- For individuals from outside the company, you could consider establishing a public email address or a phone line to handle complaints or feedback.

96 “My Business and Human Rights – A Guide to human rights for small and medium-sized enterprises” p.10.

Conclusions and Next Steps

This Guidance provides an overview of the *UN Guiding Principles on Business and Human Rights* (UNGPs) for commodity trading and offers analysis, examples and suggested actions that are applicable for all companies in the sector.

Recognising that each company is different, the aim of this Guidance is to help trading companies in their own efforts to “translate” respect for human rights into existing systems and company cultures. As companies continue their efforts to understand and apply the UNGPs in their operations, they should be continually asking questions such as:

1. What are the potential adverse impacts of our operations, for example, in terms of the well-being of our employees, local communities or other stakeholder groups that may be affected?
2. How much do we know about our value chain, where the commodities we are trading are produced and under what conditions in terms of labour standards or community impacts?
3. What steps should we take to learn more about human rights issues in consultation with all relevant stakeholders and the obstacles we face when doing so?
4. Who are our main business relationships and how much do we raise questions relating to their own social and human rights related impacts when we enter into or renew contracts or review performance?
5. Do we have the right systems, responsibilities and personnel in place to prevent or mitigate negative human rights impacts?
6. Do we use our leverage to prevent or mitigate negative human rights impacts by our business partners?
7. What do we do to increase our leverage?
8. How can we work more proactively together with other firms in our industry and through our respective industry associations to take collective action where appropriate, strengthen industry standards and codes of conduct, deliver awareness raising for our peers and engage more effectively with our stakeholders on human rights challenges?

Answering these and other questions and working to implement this Guidance will assist in addressing the wide range of human rights risks which commodity trading companies face given the sector’s global reach and the complexity of their operations.

The UNGPs provide an authoritative framework through which companies can prevent and mitigate adverse impacts on the rights of people. The challenge now for the commodity trading sector is to work with all stakeholders to shape a shared practice of responsible trading which is consistent with international human rights standards.

Annex 1: Key Terms and Definitions

Business relationships

Business relationships refer to those relationships a company has 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. They include indirect business relationships in its value chain beyond the first tier, and minority as well as majority shareholding positions in joint ventures.

Commodity trading

The definition used in the Terms of Reference for this initiative states that “Commodity trading is the process of buying, transporting, storing, transforming and/or selling physical commodities, as well as managing assets”.

Human rights due diligence

An on-going risk management process that a reasonable and prudent company needs to follow in order to identify, prevent, mitigate and account for how it addresses its negative human rights impacts. It includes four key steps: assessing actual and potential human rights impacts, integrating and acting on the findings, tracking responses, and communicating how impacts are addressed.

Human rights policy commitment

A statement approved at the highest levels of the business that shows it is committed to respecting human rights and is communicated internally and externally.

Human rights risks

A company’s human rights risks are any risks that its operations may lead to one or more negative human rights impacts. They therefore relate to its potential human rights impacts. In traditional risk assessment, risk takes account of both the consequences of an event (its “severity”) and its probability. In the context of human rights risk, severity is the predominant factor. Probability may be relevant in helping prioritize the order in which potential impacts are addressed in some circumstances. Importantly, a company’s human rights risks are the risks that its operations pose to human rights. This is separate from any risks that involvement in human rights impacts may pose to the enterprise, although the two are increasingly related.

Internationally recognised human rights

The *UN Guiding Principles on Business and Human Rights* define these – at the minimum – as the rights in the International Bill of Human Rights (meaning the *Universal Declaration on Human Rights*, the *International Covenant on Civil and Political Rights* and the *International Covenant on Economic, Social and Cultural Rights*) and the principles concerning fundamental rights set out in the International Labour Organization’s *Declaration on Fundamental Principles and Rights at Work*.

Know Your Customer (KYC)

KYC processes refer to the steps taken by a commodity trading company (or other business) to establish customer identity, understand the nature of the customer's activities (for the purpose of determining that the source of the customer's funds is legitimate) and assess related issues including money laundering risks associated with a customer as well as ongoing monitoring of the customer's activities.

Leverage

Leverage is an advantage that gives power to influence. In the context of the *UN Guiding Principles on Business and Human Rights*, it refers to the ability of a company to effect change in the wrongful practices of another party that is causing or contributing to a negative human rights impact.

Negative human rights impact

A negative human rights impact occurs when an action removes or reduces the ability of an individual to enjoy his or her human rights.

Potential human rights impact

A potential human rights impact is a negative impact that may occur but has not yet done so.

Stakeholder/affected stakeholder

Any individual who may affect or be affected by an organization's activities. An affected stakeholder refers here specifically to an individual whose human rights has been affected by a company's operations, products or services. A potentially affected stakeholder is an individual whose human rights may be affected by the company's operations, products or services.

Swiss commodity trading firms/companies

For the purposes of this Guidance, Swiss commodity trading firms/companies include any such firms/companies with some link with Switzerland, e.g. commodity trading firms with presence in Switzerland, including entities that serve as international or regional headquarters or branch offices or are otherwise conducting trading activities from Switzerland.

Tracking human rights performance

The process by which a company monitors and evaluates whether it has responded effectively to human rights risks and impacts.

Value chain

A business enterprise's value chain encompasses the activities that convert input into output by adding value. It includes entities with which it has a direct or indirect business relationship and which either (a) supply products or services that contribute to the enterprise's own products or services, or (b) receive products or services from the enterprise.

Annex 2: Additional Resources

International and Regional Human Rights Standards and Instruments

Instruments Setting Out Internationally-Recognised Human Rights

UN, International Bill of Human Rights, comprised of:

- The Universal Declaration on Human Rights: <https://www.ohchr.org/EN/UDHR/Pages/UDHRIndex.aspx>
- The International Covenant on Economic, Social and Cultural Rights: <https://www.ohchr.org/EN/ProfessionalInterest/Pages/CESCR.aspx>
- The International Covenant on Civil and Political Rights: <https://www.ohchr.org/EN/ProfessionalInterest/Pages/CCPR.aspx>
- ILO, 1998 Declaration on Fundamental Principles and Rights at Work: https://www.ilo.org/dyn/normlex/en/f?p=1000:62:0::NO:62:P62_LIST_ENTRIE_ID:2453911:NO

United Nations (UN) and International Labour Organization (ILO) Standards

In addition to the Declaration on Fundamental Principles and Rights at Work above, these include:

- C029 – Forced Labour Convention, 1930 (No.29)
- C087 – Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87)
- C097 – Migration for Employment Convention (Revised), 1949 (No. 97) and Recommendation No. 86
- C098 – Right to Organise and Collective Bargaining Convention, 1949 (No.98)
- C100 – Equal Remuneration Convention, 1951 (No.100)
- C105 – Abolition of Forced Labour Convention, 1957 (No.105)
- C111 – Discrimination (Employment and Occupation) Convention, 1958 (No.111)
- C138 – Minimum Age Convention, 1973 (No.138)
- C143 – Migrant Workers (Supplementary Provisions) Convention, 1975 (No. 143) and Recommendation No. 151
- C182 – Worst Forms of Child Labour Convention, 1999 (No.182)

All are available at: <https://www.ilo.org/dyn/normlex/en/f?p=1000:12000:0::NO::>

Guiding Principles on Business and Human Rights: https://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf

Key International Human Rights Instruments Applying to Potentially Vulnerable or Marginalised Groups

- The Convention on the Elimination of All Forms of Racial Discrimination
- The Convention on the Elimination of All Forms of Discrimination Against Women
- The Convention on the Rights of the Child
- The Convention on the Rights of Persons with Disabilities
- The Convention on the Protection of the Rights of All Migrant Workers and Members of their Families

All are available at: <https://www.ohchr.org/EN/ProfessionalInterest/Pages/CoreInstruments.aspx>

- The Declaration on the Rights of Indigenous Peoples: <https://www.ohchr.org/EN/ProfessionalInterest/Pages/UniversalHumanRightsInstruments.aspx>
- The Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities: <https://www.ohchr.org/en/professionalinterest/pages/minorities.aspx>

Key Resources on Business and Human Rights

- Business and Human Rights Resource Centre: <http://business-humanrights.org>
- ILO Help Desk for business on international labour standards: <https://www.ilo.org/empent/areas/business-helpdesk/lang--en/index.htm>
- Office of the United Nations High Commissioner for Human Rights (OHCHR), Interpretive Guide to the Corporate Responsibility to Respect Human Rights: <https://www.ohchr.org/Documents/Issues/Business/RtRInterpretativeGuide.pdf>
- Office of the United Nations High Commissioner for Human Rights, Human Rights Translated 2.0, A Business Reference Guide: https://www.ohchr.org/Documents/Publications/HRT_2_0_EN.pdf
- Office of the United Nations High Commissioner for Human Rights, List of Business and Human Rights Tools: <https://www.ohchr.org/EN/Issues/Business/Pages/Tools.aspx>
- European Commission. My Business and Human Rights: A guide to human rights for small and medium-sized enterprises: <https://business-humanrights.org/sites/default/files/documents/SME-BHR-guide-EU.pdf>

OECD Guidance

- OECD Guidelines for Multinational Enterprises <http://mneguidelines.oecd.org/mneguidelines/>
- OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas, Third Edition: <http://mneguidelines.oecd.org/>
- OECD Due Diligence Guidance for Meaningful Stakeholder Engagement in the Extractive Sector: <http://mneguidelines.oecd.org/>
- OECD-FAO Guidance for Responsible Agricultural Supply Chains: <http://mneguidelines.oecd.org/>
- OECD Due Diligence Guidance for Responsible Business Conduct: <http://www.oecd.org/investment/due-diligence-guidance-for-responsible-business-conduct.htm>

Annex 3: Evolving State Expectations on Company Due Diligence and Public Reporting

In recent years, a number of States have developed new regulations with respect to corporate due diligence and company reporting. The following examples are noteworthy⁹⁷:

European Union

The EU Regulation on Conflict Minerals⁹⁸ which will come into full force in 2021 sets out due diligence obligations for the so-called “upstream” part of the mineral supply chain, which includes those who import raw materials to smelting and refinery plants in the EU. For “downstream” companies, that use the refined forms of these metals and minerals in components and goods, the Commission carries out a number of measures including the development of reporting tools and standards to further boost due diligence in the supply chain, as well as setting up a transparency database.

The EU Directive on non-financial reporting⁹⁹ lays down the rules on disclosure of non-financial and diversity information by large companies. Under this directive, large companies have to publish reports on the policies they implement in relation to environmental protection, social responsibility and treatment of employees, respect for human rights, anti-corruption and bribery, diversity on company boards (in terms of age, gender, educational and professional background).

France

The French “Loi de Vigilance” (2016)¹⁰⁰ requires companies to adopt and report measures of reasonable vigilance designed to identify risks and prevent serious harm resulting from the activities of the stock company, the companies it controls directly or indirectly, subcontractors and suppliers with whom it has an established business relation, when those activities are linked to the relation.

⁹⁷ For additional information, see <http://bhrinlaw.org/key-developments>

⁹⁸ See <http://ec.europa.eu/trade/policy/in-focus/conflict-minerals-regulation/>

⁹⁹ <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32014L0095>

¹⁰⁰ See <https://www.legifrance.gouv.fr/affichTextedo?cidTexte=JORFTEXT000034290626&dateTexte=&categorieLien=id>

The Netherlands

The Dutch Child Labour Due Diligence Bill (2017)¹⁰¹ proposes issue-specific due diligence for companies selling in the Dutch market.

United Kingdom

The UK Modern Slavery Act (2015)¹⁰² requires disclosure of activities companies are undertaking to eliminate slavery and human trafficking from their supply chains.

United States

Section 1502 of the US Dodd Frank Act (2010)¹⁰³ requires persons to disclose annually whether any conflict minerals that are necessary to the functionality or production of a product of the person, as defined in the provision, originated in the Democratic Republic of the Congo or an adjoining country and, if so, to provide a report describing, among other matters, the measures taken to exercise due diligence on the source and chain of custody of those minerals, which must include an independent private sector audit of the report that is certified by the person filing the report.

101 See <http://www.bhrinlaw.org/key-developments/66-netherlands#child%20labour%20law>

102 See <http://www.legislation.gov.uk/ukpga/2015/30/contents/enacted>

103 See <https://www.sec.gov/spotlight/dodd-frank/speccorpdisclosure.shtml>



Schweizerische Eidgenossenschaft
Confédération suisse
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Swiss Confederation

Federal Department of Foreign Affairs FDFA



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Confederazione Svizzera
Confederaziun svizra

Swiss Confederation

Federal Department of Economic Affairs,
Education and Research EAER
State Secretariat for Economic Affairs SECO