



Should I stay or should I go?

Exploring the role of disengagement in human rights due diligence

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The two most authoritative international normative standards for responsible business conduct – the UN Guiding Principles on Business and Human Rights (UNGPs) and the OECD Guidelines for Multinational Enterprises – indicate that companies have a responsibility to avoid infringing on human rights. They stipulate that companies should seek to prevent or mitigate adverse human rights impacts to which they contribute or are linked by a business relationship. In order to meet this responsibility, companies should conduct human rights due diligence. In practice this means that companies should engage with business partners and use their leverage to prevent, mitigate and remediate adverse impacts. However, if these efforts fail, companies are faced with the question whether, when and how to end the business relationship connecting them to the adverse impact. In these circumstances, the decision on whether or not to disengage from a problematic business relationship becomes a key consideration within the human rights due diligence process. This adds a new degree of significance and complexity to the age-old question put so succinctly by *The Clash: Should I stay or should I go?*¹

The term disengagement can refer to either the process or the act of withdrawing from a business relationship. In this paper, disengagement is understood as the decision-making

process ultimately leading up to the act of terminating a business relationship. While the UNGPs and OECD Guidelines clearly refer to disengagement as an option for addressing adverse human rights impacts, key questions about when and how companies should consider terminating relationships that connect them to adverse impacts remain unanswered. Similarly, questions about the current practice of disengagement remain. It is unclear whether acts of disengagement are currently informed by careful consideration of the human rights impacts associated with this decision. And the prospect of disengagement appears to be underutilized in the human rights due diligence process, even though it can be a powerful tool for preventing and mitigating human rights impacts by incentivizing a business partner to improve its human rights performance.

Drawing primarily on the UNGPs and OECD Guidelines, as well as interviews with eight recognised experts in the field (see acknowledgements), this discussion paper aims to explore the role of disengagement in the context of human rights due diligence. Its primary purpose is to identify key questions that justify further in-depth exploration, thereby laying the foundation for further research and the development of practical guidance for companies, rights-holders and others stakeholders, including policymakers, on how companies can effectively and responsibly use

disengagement to prevent and mitigate adverse human rights impacts.

The structure of the paper is as follows: the section 'Disengagement in international standards' extracts and analyses what the existing normative guidance says about terminating business relationships and how far that gets companies, rights-holders and other stakeholders in thinking about disengagement. The following section seeks to go beyond the norms and draws on insights provided by the experts to explore a number of important practical disengagement questions that are left unanswered by the norms but which companies and their stakeholders face on a daily basis. The paper concludes with a brief summary of the existing normative guidance and a list of areas requiring further exploration and research.

Disengagement in international standards

The UN Guiding Principles and the OECD Guidelines are the most authoritative and broadly accepted standards containing (some) guidance on disengagement, and thus provide a useful starting point for exploring the matter further. The UNGPs and the latest version (2011) of OECD Guidelines were developed in tandem and are largely harmonized – including on issues related to disengagement – though some minor differences do exist.

The OECD Guidelines² refer to disengagement as a measure of “last resort”, thereby stressing the importance of engagement with business partners as the preferred means for multinational enterprises to prevent and mitigate adverse impacts that they may contribute to or are directly linked to by a business relationship (see Box 1). The term disengagement does not appear in the UNGP. Instead, they speak of “ending the relationship”. Like the OECD Guidelines, the UNGPs elaborate on the responsibility of a company firstly to engage with a business partner and use its leverage over business partners in order to address adverse impacts. If the company lacks leverage and is unable to increase it, the company should consider “ending the relationship” (see Box 2).³

The concept of *leverage* is thus a crucial factor in both the UNGPs and the OECD Guidelines when it comes to both mitigation efforts as well as the decision to disengage from a business relationship. Both standards consider leverage to exist when a company “has the ability to effect change in the wrongful practices of an entity that causes a harm”.⁴ In the scenario where a multinational enterprise is contributing to or is directly linked to an adverse impact, its primary responsibility is to “take the necessary steps to cease or

Box 1: The OECD Guidelines on Disengagement

“Appropriate responses with regard to the business relationship may include *continuation of the relationship* with a supplier throughout the course of risk mitigation efforts; *temporary suspension of the relationship* while pursuing ongoing risk mitigation; or, as a last resort, *disengagement with the supplier either after failed attempts at mitigation*, or where the enterprise deems *mitigation not feasible*, or because of the *severity of the adverse impact*. The enterprise should also take into account potential social and economic adverse impacts related to the decision to disengage.”

Source: OECD Guidelines, 2011, Commentary on Chapter 2, paragraph 22 (emphasis added).

prevent its contribution and use its leverage to mitigate any remaining impacts to the greatest extent possible”.⁵

Under certain circumstances, the OECD guidelines clearly indicate that companies should consider (temporary) disengagement as a part of risk mitigation. Factors that are part of the decision to disengage include:

- the success or failure of previous attempts at mitigation;
- the general feasibility of mitigation, and;
- the severity of the impact (meaning that companies should more quickly disengage from relationships linking them to severe adverse impacts).

There is no clear-cut definition of *severe* human rights violations, but acknowledged factors for determining severity include scale and scope (i.e. how grave the impact is and how many people are affected), and the (ir)remediable nature of the impact (i.e. can the impact be “undone” or the situation restored to a state equal to or better than before the impact occurred?).⁶

The UNGPs and the OECD Guidelines both consider the extent to which a business relationship is *crucial* to the company a key factor in the decision to disengage. “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”.⁷ The standards also align when it comes to stressing the importance of considering the potential adverse social and environmental impacts of the disengagement itself prior to taking the decision.

Box 2: The UNGPs on ending a business relationship

“If the business enterprise has *leverage* to prevent or mitigate the adverse impact, it should exercise it. And if it lacks leverage there may be ways for the enterprise to increase it. *Leverage may be increased* by, for example, offering capacity-building or other incentives to the related entity, or collaborating with other actors. 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. 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.”

Source: UNGPs, 2011, Pillar II, The Corporate Responsibility to Respect Human Rights, Section B Operational Principles, Human Rights Due Diligence, Commentary paragraph 19 (emphasis added).

Figure 1: UNGP decision matrix on addressing adverse impacts caused by a business relationships

	Have leverage	Lack leverage
Crucial business relationship	<p>A</p> <ul style="list-style-type: none"> Mitigate the risk that the abuse continues/recurs If unsuccessful 	<p>B</p> <ul style="list-style-type: none"> Seek to increase leverage If successful, seek to mitigate the risk that the abuse continues/recurs If unsuccessful, consider ending the relationship** or demonstrate efforts made to mitigate abuse, recognizing possible consequences of remaining
Non-crucial business relationship	<p>C</p> <ul style="list-style-type: none"> Try to mitigate the risk that the abuse continues/recurs If unsuccessful, take steps to end the relationship* 	<p>D</p> <ul style="list-style-type: none"> Assess reasonable options for increasing leverage to mitigate the risk that the abuse continues/recurs If impossible or unsuccessful consider ending the relationship*

* Decisions on ending the relationship should take into account credible assessments of any potential adverse human rights impact of doing so.

** If the relationship is deemed crucial, the severity of the impact should also be considered when assessing the appropriate course of action.

Source: UN OHCHR, 2012, The Corporate Responsibility to Respect Human Rights: An Interpretative Guide, p.50.

The Interpretative Guide on the UNGPs produced by the UN Office of the High Commissioner for Human Rights (OHCHR) provides a useful visualisation of the decision-making logic that could potentially lead a company to disengage from a business relationship that is causing an adverse human rights impact based on the degree of leverage the company has over the business partner and how “crucial” the business relationship is to the company.

Beyond the norms: Exploring key practical questions for the role of disengagement in due diligence

The guidance provided by the OECD Guidelines and UNGPs provides a useful overarching framework, but it remains rather abstract and leaves many practical questions as to exactly how companies can use (the prospect of) disengagement effectively and responsibly to avoid, mitigate, and remediate adverse impacts. Examples of such questions are: What exactly is a “crucial” relationship? When are “reasonable options” for increasing leverage exhausted? How does one know when mitigation is “not feasible”? How does one measure and evaluate potential adverse impacts from disengagement itself? These practical questions are faced by companies and their stakeholders on a daily basis but remain unanswered by the normative standards. This section seeks to go beyond the norms to explore a number of key practical questions and considerations related to disengagement.

Can the prospect of disengagement be effectively employed in the due diligence process to increase leverage to prevent or mitigate an adverse impact?

Though the OECD Guidelines refer to disengagement as a “last resort”,⁸ companies may be able to employ the prospect of disengagement at earlier stages in a business relationship in order to increase leverage over the business partner and make efforts to address adverse impacts more effective. Having the prospect of disengagement on the table from the beginning of – and throughout – the business relationship can potentially increase the company’s chances of successfully addressing adverse impacts without having to completely disengage from a relationship. Indeed, it seems logical that any serious attempt to engage a business partner to address adverse impacts would include the prospect of disengagement if the partner refuses or fails to adequately address the impacts; otherwise there is likely little incentive for the partner to respond to the engagement. However, in order for the prospect of disengagement to be effective, it must be credible. One of the experts interviewed for this paper suggested that the reason that social auditing in supply chains has largely failed to deliver concrete improvements

on the factory floor is that the prospect of disengagement – if corrective action plans are not followed – has generally not been credible; he emphasised, “You have to be prepared to walk away, otherwise engagement is not credible!”

There is a wide range of actions that companies can potentially take to ensure that the prospect of disengagement is (perceived as being) credible. Such actions include incorporating disengagement terms in contracts and undertaking incremental disengagement (e.g. temporary suspension of the relationship) during continued mitigation efforts. Indeed, the prospect of disengagement is both particularly important and potentially particularly effective in generating leverage in the contracting phase, both for new contracts and contract renewal. For example, by including in contracts with business partners clear provisions for identifying, addressing and monitoring potential adverse impacts, along with clear provisions for a process of disengagement if adverse impacts are not addressed, companies can “front-load” a leverage hook that makes the prospect of disengagement more credible.

The duration of a contractual relationship is thus an important factor companies should consider in determining how credible the prospect of disengagement may be. As the end date of a contract nears, the possibility of non-renewal adds to credibility and could potentially be used to create leverage. On the other hand, if a company is legally/contractually bound to a relationship for an extended period of time, a threat of disengagement is not likely to increase leverage because it is not credible.

How exactly does the severity of a (potential) adverse impact influence the disengagement decision-making process?

The UNGPs state “that 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 practice, this gets at the idea that the more severe the impact, the more effort a company should be putting into exerting its leverage, including using strong and clear language about the potential threat of termination if the impact continues. However, an important question that remains unanswered by the norms is whether companies have a responsibility to immediately disengage from a relationship in certain situations, such as those involving extremely severe impacts (i.e. a high degree or combination of scope, scale and irremediability). Situations involving a broad range of gross human rights violations require a rapid response from the company, and in these situations serious consideration of immediate disengagement is likely justified. Immediate disengagement may be appropriate in situations in which the business partner has committed a deliberate and irremediable violation of a human right. Impacts on enabling rights such as freedom of association

and collective bargaining can also be considered to have an increased scope as they facilitate the enjoyment of other rights.

Although the severity of (potential) adverse impacts influences how a company prioritises which issues to address first, the company is also responsible for preventing, mitigating and remediating impacts that may not necessarily qualify as the most “severe”.

Under what circumstances are business relationships truly “crucial” and how is the “crucial” nature of a relationship related to disengagement?

A key consideration in the decision to disengage mentioned both in the UNGPs and OECD Guidelines is how “crucial” a business relationship is to the company, but neither provide much guidance as to what exactly defines a “crucial” relationship. The UNGPs refer to products or services that may be “essential” and to those “for which no reasonable alternative source exists”. Beyond these criteria, a number of other factors are likely to play a role 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 going forward (e.g. contractual commitments);
- reputational interests (e.g. involvement in prestige projects, relationships with well-known business partners, etc).

Generally speaking, it will be easier for a company to disengage from a relationship that is not crucial to its business. Indeed, in the OHCHR’s depiction of the “UNGP decision matrix on addressing adverse impacts caused by a business relationships” (see Figure 1 above), the decision to “take steps to terminate the relationship” comes most quickly in box C, which refers to a situation where the relationship is not crucial (and leverage exists). On the other hand, it is reasonable to assume that it will be more “challenging” (i.e. economically painful) for a company to disengage from a relationship it considers crucial for its business. This fact also diminishes the credibility of the prospect of disengagement in such situations. An important remaining question to be answered would be whether there are – in reality – actually any business relationships that are absolutely crucial or that lack the possibility of being made less crucial over time.

How do companies, rights-holders and other stakeholders know if enough progress is being made on addressing adverse impacts to justify continued engagement or if the time has come to disengage?

In general, the UNGPs and OECD Guidelines indicate that if a (potential) adverse impact is identified, proactive and robust engagement with the business partner(s) to prevent, mitigate and remediate potential and actual adverse impact should be the first priority (though as discussed above there may be cases in which the severity of the adverse impact justifies immediate disengagement). The purpose of engagement is thus to achieve the successful prevention, mitigation and/or remediation of an adverse impact. The norms clearly state that if attempts at prevention/mitigation “fail”, the company should consider disengagement.

In some cases, however, the “success” or “failure” of engagement efforts may not be immediately apparent. Progress on mitigation and remediation may sometimes be incremental rather than immediate. Impacts may be partially prevented, and partially not. The norms do not offer much guidance on how companies, rights-holders and other stakeholders can measure and decide whether enough progress is being made to justify continued engagement, or if the time has come to pull the disengagement trigger because prevention/mitigation is no longer feasible.

In a sense, it is logical that no generally-applicable time limit for addressing impacts is provided as “progress” is likely to be very context-specific. Nevertheless, there seem to be a number of process and outcome-related considerations that are relevant here.

Experts interviewed for this paper emphasised that if prevention/mitigation is deemed to be feasible, it is important that the company develop a SMART (specific, measurable, agreed upon, realistic and time-bound) engagement or corrective action plan that clearly includes the prospect of terminating the relationship if targets for preventing, mitigating, or remediating impacts are not met within the timeline. In this regard, the credibility or “realistic” nature of the corrective action plan is crucial, and may require the company to invest (additional) resources in the relationship. One expert interviewed for this paper stressed, “Corrective action plans that are unrealistic or not genuine must not be used to avoid or postpone disengagement”. If a company decides to remain in a business relationship associated with an adverse impact, it should be able to publicly demonstrate that its own on-going efforts to mitigate the impact are feasible, and be prepared to accept the consequences of the continuing connection.

As mentioned above, if the adverse impact in question is considered to be “severe”, progress to address the impact will need to be made more quickly – and thus the timing for meeting improvement targets shorter. A number of other

circumstances may also justify employing a shortened timeline, for example situations in which:

- enabling rights are impacted;
- rights have been repeatedly violated;
- continued engagement poses a significant risk of exacerbating the adverse impact.

The OECD Guidelines clearly state that companies have a responsibility to consider immediate disengagement if mitigation is “not feasible”, but they do not provide guidance on what “feasible” means in practice in this regard. Nevertheless, one can imagine a number of situations in which mitigation is not feasible, such as:

- all realistic possibilities for increasing leverage have been exhausted and abuse continues;
- prevention measures were explicitly ignored / impacts were deliberately caused.

This is clearly one of the bigger questions that require further exploration, including into the quality of existing engagement practices (eg. how genuine and realistic can current engagement efforts be considered?) and examples of past disengagement decision making processes (eg. which steps have companies taken before they arrived at a disengagement decisions, how have stakeholders been involved? etc).

Are there situations in which incremental or phased disengagement is appropriate and/or effective?

If so, what types of “steps” can companies take to incrementally disengage from a relationship?

The OHCHR UNGP interpretive guide speaks of taking “steps” to terminate a relationship, but is not explicit about what exactly such “steps” might be.⁹ The OECD Guidelines offer the example of “temporary suspension” of a relationship during risk-mitigation efforts, but this is only one possibility and may not be available in every situation. If the aim of incremental disengagement is to increase leverage to address impacts, other potential disengagement steps or increments that could be contemplated include placing no new orders, scaling back purchase volumes or the amount of the investment, terminating parts – but not all – of a multi-faceted relationship, etc. In this regard, there remain a number of interesting questions to explore. For example, what different types of disengagement are being practiced (effectively) by investors and companies? Have certain incremental disengagement strategies been more effective or successful than others at increasing leverage? Another question would be whether incremental disengagement could be used as a strategy to make a relationship less “crucial” over time (see above point on “crucial” relationships).

How does disengagement affect the responsibility to provide remedy for harms, particularly in the “contributing” responsibility scenario?

The UNGPs and OECD Guidelines state that if a company contributes to an adverse impact, it is responsible for remediating the impact to the extent of its contribution. Experts seem to agree that the company’s responsibility to remediate those impacts to which it contributed remains even if the company disengages from the relationship through which it contributed to the impact.

How does a company disengage responsibly?

The UNGPs and OECD Guidelines encourage companies to consider the potential adverse social and environmental impacts of the disengagement itself prior to taking the decision, but many practical questions remain about how to identify and mitigate these potential impacts and how they should be weighed against the (potential) impacts caused by the business partner. Potential adverse impacts from disengagement include things like loss of jobs for workers, loss of tax revenues, and other potential local economic impacts resulting from a hasty departure. They could also include things like the sale of (a stake in) an operation to a less responsible company, which could result in more severe impacts on workers, communities or the environment.

Just as with any business decision, the UNGPs and OECD Guidelines expect companies to conduct due diligence on potential adverse impacts of disengagement. That is, they should identify potential adverse human rights impacts resulting from the decision to disengage and seek to prevent or mitigate those potential impacts. With proper and genuine due diligence, a company can avoid causing or contributing to adverse impacts by its disengagement. As with the entire due diligence process, (potentially) affected rights-holders and other stakeholders should be meaningfully involved in the decision making process around disengagement. This means they should be well-informed both about the engagement efforts to be able to assess its credibility and quality, as well as about the decision-making process related to disengagement. However, some of the experts interviewed for this paper emphasized the importance of companies to refrain from using self-selected “stakeholders” to justify a self-serving decision (not) to disengage.

Summary and conclusions

This discussion paper has explored the role of disengagement in due diligence processes aimed at preventing, mitigating and remedying adverse human rights impacts. The paper sought to identify key questions and provide a solid foundation for further research and the development of practical guidance for companies, rights-holders and others stakeholders, including policymakers, on how companies can effectively and responsibly use disengagement to prevent, mitigate and remediate adverse impacts.

A brief analysis of the most relevant international normative standards related to responsible business conduct – the UNGPs and the OECD Guidelines – reveals that while they do provide a useful framework for exploring the issues, the norms do not provide a clear-cut, universally-applicable answer to The Clash’s question of *Should I stay or should I go?* The norms indicate that companies should consider disengagement from a business relationship as an option if efforts to engage with a business partner do not result in the prevention, mitigation or remediation of an adverse impact. They indicate that companies should take the following factors and considerations into account when contemplating disengagement:

- the severity of the adverse impact;
- the effect/success of previous attempts to prevent, mitigate or remediate adverse impacts;
- (potential) leverage the company has over the business partner;
- the feasibility of prevention or mitigation;
- the potential adverse impacts caused by the disengagement itself;
- the significance of the business relationship (i.e. the extent to which a relationship could be deemed as crucial to the enterprise’s business);

- the fact that temporary disengagement/suspension of the relationship can increase leverage;
- if a company decides to remain in a business relationship associated with an adverse impact, it should publicly accept the consequences for this decision and demonstrate its own on-going efforts to mitigate the impact.

The section titled ‘Beyond the norms’ sought to explore several important practical disengagement questions left unanswered by the norms but which companies and their stakeholders face on a daily basis. This exploration provided useful insights into issues such as the importance of having the prospect of disengagement on the table early in a business relationship, how a credible prospect of disengagement can be effectively employed to increase leverage, how the severity of a (potential) adverse impact influences the disengagement decision-making process, how is the “crucial” nature of a relationship related to disengagement, how to decide whether enough progress is being made in order to justify continued engagement, and the importance of addressing potential adverse impacts related to the decision to disengage itself.

The exploration also helped to elaborate the key areas that require additional thought and investigation. Future research should focus on concrete experiences, best and worst practices, and lessons learned by companies, rights-holders, unions, NGOs, academics and policy-makers that have been involved in decision-making around disengagement. Such research is required in order to develop useful and practical guidance and recommendations on how disengagement can be effectively and responsibly employed to prevent, mitigate and remediate adverse human rights impacts. SOMO plans to continue this research and invites anyone with relevant expertise and/or interest to contact the authors and join the discussion.

Endnotes

- 1 Written by Joe Strummer and Mick Jones. Performed by The Clash. Courtesy of Epic Records/Sony Music Entertainment (UK) Ltd.
- 1 OECD Guidelines for Multinational Enterprises, commentary on Chapter 2, OECD (2011), available at <http://www.oecd.org/daf/inv/mne/48004323.pdf> [hereinafter OECD Guidelines].
- 2 United Nations Human Rights Office of the High Commissioner. Guiding Principles on Business and Human Rights. Implementing the United Nations “Protect, Respect and Remedy”, 2011 [hereinafter UNGPs], Principle 19.
- 3 OECD Guidelines, commentary on Chapter 2; UNGPs
- 4 OECD Guidelines, commentary on Chapter 4.
- 5 UNGPs, Principle 14.
- 6 UNGPs, Principle 19.
- 7 Note that the UNGPs do not use the term “last resort”.
- 8 UN OHCHR, 2012, The Corporate Responsibility to Respect Human Rights: An Interpretative Guide, p.50.

Colophon

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