The need for comprehensive human rights and environmental due diligence legislation

We believe businesses must be held accountable for identifying and resolving any human rights abuses or environmental harm in their value chains, and we advocate for this to be standard for all companies.

Chocolate is a sweet treat enjoyed by billions of people. But it hides a bitter truth; forests are cut down to make room for increased planting and children are working illegally on cocoa plantations under hazardous conditions. This is not an unknown problem but neither legal challenges nor voluntary self-regulation has adequately addressed the problem. Only legislation mandating oversight of supply chains, with clear standards and penalties for non-compliance, will make companies confront the problems embedded in cocoa supply chains: widespread deforestation that directly contributes to climate change and rampant poverty that prevents millions of hardworking farmers from earning a living wage.

This is something that the large multinational chocolate companies, both European and American know and support. Beginning at the end of 2019, they have called for government regulation and legislation. In fact, the chocolate companies were directly involved in the enactment of the EU's environmental due diligence directive supporting its coming into force.

Legislation should build upon recognized international frameworks including the UN Guiding Principles on Business and Human Rights (UNGP), the OECD Guidelines for Multinational Enterprises and the OECD Due Diligence Guidance for Responsible Business Conduct, making them legally enforceable. Due diligence legislation should also be aligned with national and regional efforts, such as ARS-1000 (series of African standards for sustainable cocoa). The cocoa sector offers a good example as to how this might be done:

Legislative Principles in cocoa

1. Define cocoa as a high-risk sector with no exemptions, meaning all companies regardless of size, including SMEs, should be in scope.

2. Address environmental degradation and deforestation, as well as child labor, forced labor, and recognize a living wage and living income as Human Rights. In particular "the right to an adequate standard of living" should require companies to look at their purchasing practices and the price they pay for cocoa.

3. Provide a reporting framework with a set of mandatory elements to enhance sector transparency and alignment on efforts and progress.

4. Require that effective sanctions are put in place, with civil liability regimes and access to justice. This includes victims being guaranteed access to remedies.

5. Enact clear, transparent civil penalties to be levied against offending companies for non-compliance.

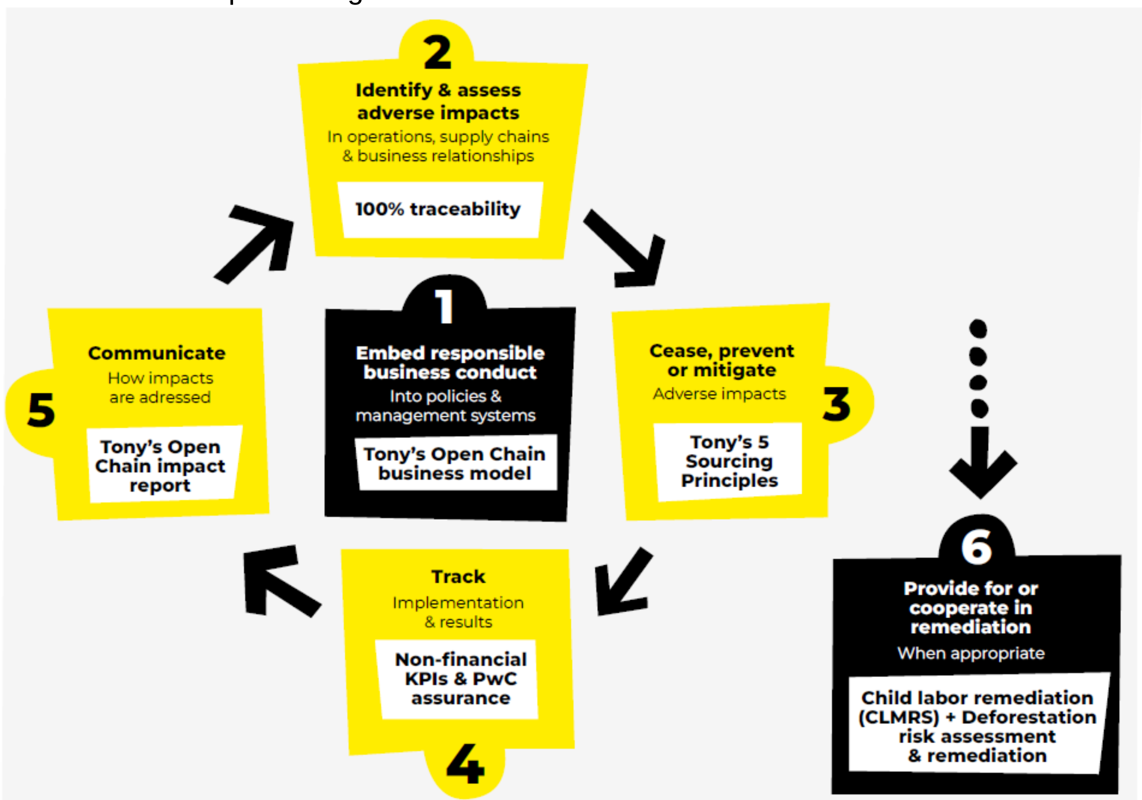
The cost of due diligence

Companies that are opposed to additional costs of effective due diligence, have probably been avoiding such duties. While turning a blind eye and keeping their customers in the dark, they have been profiting from unethically based cost savings for too long. Such neglectful behavior by companies and their suppliers has inflicted harm on people and their environment and must be identified, reported, prevented and remediated.

Legislation should make companies 'pull' responsibility towards them **and not simply rely on third parties, such as certification schemes or auditors**, to undertake due diligence tasks on their behalf. As a Fairtrade certified company, we reiterate that while certification schemes are useful instruments, they are not a substitute for due diligence legislation. Corporate responsibility and corporate duty of care remains at the level of the companies and should not become a tick-box exercise. It should stimulate continuous efforts to address the risks of human rights abuses and environmental harm.

Applying the six steps of due diligence in cocoa (OECD Due Diligence Guidance for Responsible Business Conduct)

1. **Commit to responsible business conduct and explicitly adopt policies and management systems that integrate human rights & environmental considerations**. Including meaningful stakeholder engagement as a crucial part of its due diligence: an ongoing, regular process of safe interaction and open dialogues.



2. **Identify & assess potential and actual risks** on human rights, labor rights, and the environment that may be caused or contributed to by a company's activities.

3. **Deal with negative impacts** by taking appropriate measures to prevent or mitigate adverse impacts on human rights, labor rights and the environment.

4. Via **ongoing follow-up**, monitor and track the effectiveness of the measures taken to address adverse impacts and to identify new risks or impacts that may arise over time.

5. **Communicate** a company's due diligence efforts and progress to all relevant stakeholders, following a framework with mandatory general and sectoral KPIs, subject to independent third-party audits, to inform regulators, consumers, shareholders and stakeholders.

6. **Establish effective mechanisms for receiving & addressing complaints and grievances** related to a company's negative impact, including providing remediation or compensation where appropriate. Grievance mechanisms should provide routes through which impacted stakeholders can bring complaints and seek to have them addressed through non-judicial and judicial mechanisms. Companies are liable for any harm arising out of potential or actual adverse impacts (UNGP #17) Complicity within a value chain may arise when a business contributes to adverse impacts caused by other parties. Non-compliance should result in a reversal of proof in the scope of civil liability cases: the business will have to bear the burden of clarifying its relationship with the entities involved and show that it took all reasonable and proportionate measures to prevent the harm from occurring.

No sanction should lead to divestments that affect farmers or workers, prevent remedies or cause stopping activities. Non-compliant companies should be sanctioned and held liable under the new law. Penalties specified in the legislation should be proportionate and dissuasive, in order to help ensure that the due diligence obligations drive real change in the sector. The legislation should also require companies to provide for or cooperate with remediation mechanisms. It should also provide for independent grievance and complaints mechanisms.

Blanket **import bans are not the solution** because they disincentivize engaged companies from improving the situation and force them to divert activities away from whole countries and sectors. For instance, Tony's Chocolonely intentionally focuses on producer countries, such as Côte d'Ivoire and Ghana, where abuses still take place so that the situation can be improved. However, well-designed measures allowing for import controls and possible import bans can be effective to prevent irreparable harm; ineffective preventive and remediation efforts; and to guarantee the compliance of mandatory human rights & environmental due diligence rules. This is especially relevant when high risk countries or sectors are involved. Risk-based border controls should also allow third parties to point out elevated risks of non-compliance based on 'substantiated concern'.

Conclusion

Comprehensive and mandatory Human Rights and Environmental Due Diligence legislation is urgently needed to solve the pressing global challenges of climate change and poverty, and for countries to meet their obligations under the UNGPs and associated international frameworks. Businesses *must* play their part by taking responsibility for and remediating human rights violations or environmental harm in their entire value chains. But business action is not enough. Governmental policy must also be enacted in this area via legislation. Such legislation should be rooted in the aforementioned international frameworks and:

- Be broad in scope, to cover both human rights and environmental degradation and deforestation.
- Be broad in coverage, to include all companies, large and small - especially in high-risk sectors like cocoa.
- Have a robust and transparent process, with companies mandated to use clear, understandable and publicly accessible reporting, including checks on key human rights and environmental issues, to facilitate scrutiny by the media, NGOs, consumers and the financial community.
- Recognize the importance of meaningful stakeholder engagement in the due diligence process.
- Introduce dissuasive financial penalties and include a clear path to access to justice and remediation when harms are caused or contributed to by companies.
- Protect a living wage as a human right, as recognized by the United Nations.

Cocoa season 2023/24

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For more information about Tony's Chocolonely, please see the latest Annual Fair Report and Tony's Open Chain Impact Report