

STUDY

AN EXAMINATION OF INDUSTRY STANDARDS IN THE RAW MATERIALS SECTOR

*HOW STANDARDS CONTRIBUTE TO
COMPANIES' FULFILMENT OF THEIR
HUMAN RIGHTS AND ENVIRONMENTAL DUE
DILIGENCE OBLIGATIONS, AND HOW THEY
ENSURE EFFECTIVENESS ON SITE*



Rebecca Heinz, Johanna Sydow & Florian Ulrich

Pursuant to the UN Guiding Principles on Business and Human Rights (UNGPR) and the statutory regulations pertaining to due diligence, companies in the processing industries also bear responsibility for human rights risks in their downstream supply chains. Besides, more and more national and international regulatory approaches, like the proposal for a European Corporate Sustainability Due Diligence Directive, address due diligence obligations for environmental risks. This is of great relevance for the mining and raw materials sector, which is linked to a considerable degree with environmental degradation and acute violations of human rights.







Voluntary standards and other industry initiatives for the extraction of raw materials have established themselves increasingly in recent years as an instrument with which companies can implement their due diligence obligations. Yet, the existing standards are marked by a series of systematic, content-related and methodological shortcomings. This paper provides a first assessment of the methodological robustness of the various standards in the raw materials sector. In a first step, we defined the methodological requirements placed on raw materials standards. Following this, we analysed to what extent the selected standards address these requirements.

This study shows that the industry initiatives contribute to very different extents towards implementing due diligence obligations, and our findings suggest that they can never be applied as a sole instrument to this end. This means that:

- 1 Purchasing companies cannot outsource their responsibility for human rights and environmental due diligence to standards.**
- 2 Clear definitions and minimum criteria must exist for standards and certification systems.**
- 3 There must be clear and transparent communication about where the limits of their applicability lie in terms of fulfilling the legally stipulated due diligence obligations.**

This study provides some initial points of reference for defining minimum criteria when industry standards are to be used as one of several instruments for the implementation of due diligence obligations.

Results at a glance

	ASI	COPPER MARK	IRMA	ICMM
Standard-Governance	The standard actively involves rights holders and can therefore potentially address human rights risks with its criteria.	The standard does not involve rights holders.	The standard actively involves rights holders and can therefore potentially address human rights risks with its criteria.	The standard does not involve rights holders. 
The standard has a certification system	The standard has a certification system with clear requirements and on-site audits.	The standard has a certification system with clear requirements and on-site audits.	The standard has a certification system with clear requirements and on-site audits.	The standard carries out no checks as part of certification process. 
Third-party audits are carried out in a conclusive manner.	The <u>third-party audit</u> is not suited to adequately record HR and environmental risks or to communicate these transparently in the audit.	The <u>third-party audit</u> is not suited to adequately record HR or environmental risks or to communicate these transparently in the audit.	The <u>third-party audit</u> is potentially suited to adequately record and transparently communicate HR and environmental risks in the audit.	No on-site audit 
Corrective Action Plans	<u>Corrective Action Plan</u> is not suitable to ensure enforcement of its own requirements.	<u>Corrective Action Plan</u> does not specify whether the standard criteria have been fulfilled	<u>Corrective Action Plan</u> is suitable to ensure enforcement of its own requirements.	No assessment of the implementation 
Grievance mechanism	GM partially UNGP-compliant	GM not UNGP-compliant	GM not UNGP-compliant	No grievance mechanism 
Overall evaluation	Standard is not suited to implementing its criteria and thus secure its effectiveness on site.	Standard is not suited to implementing its criteria and thus secure its effectiveness on site.	Standard is suitable to only a limited degree in terms of implementing its criteria and thus securing the efficacy on site.	Standard does not have a certification framework and does not check the implementation of its criteria 

LME	RSI	RMI	VPSHR	
The standard does not involve rights holders. 	The standard does not sufficiently involve rights holders.	The standard does not involve rights holders.	The standard actively involves rights holders and can therefore potentially address human rights risks with its criteria.	Standard-Governance
The standard carries out only one audit of the information submitted in the self-disclosure as part of the certification process. 	The standard has a certification system with clear requirements and on-site audits.	The standard has a certification system with clear requirements and on-site audits.	The standard carries out no checks as part of certification process. 	The standard has a certification system
No on-site audit 	The <u>third-party audit</u> is limited in its suitability for adequately recording and transparently communicating the HR and environmental risks in the audit.	The <u>third-party audit</u> is not suited to adequately record HR risks to communicate these transparently in the audit. Environmental risks are not addressed at all.	No on-site audit took place 	<u>Third-party audits</u> are carried out in a conclusive manner.
No assessment of the implementation 	<u>Corrective Action Plan</u> are limited in their ability to drive enforcement of its own requirements.	<u>Corrective Action Plan</u> is not suitable to ensure enforcement of its own requirements.	No assessment of the implementation 	Corrective Action Plans
No grievance mechanism 	GM not UNGP-compliant	GM not UNGP-compliant	No grievance mechanism 	Grievance mechanism
Standard does not have a certification framework and does not check the implementation of its criteria 	Standard is not suited to implementing its criteria and thus secure its effectiveness on site.	Standard is not suited to implementing its criteria and thus secure its effectiveness on site.	Standard does not have a certification framework and does not check the implementation of its criteria 	Overall evaluation

RECOMMENDATIONS FOR ACTION

RESPONSIBILITY FOR COMPLIANCE WITH DUE DILIGENCE CANNOT BE OUTSOURCED TO INDUSTRY INITIATIVES

THE RESULTS OF THE ANALYSIS CONFIRM THAT THE RESPONSIBILITY FOR IMPLEMENTING HUMAN RIGHTS AND ENVIRONMENTAL DUE DILIGENCE MUST NEVER BE OUTSOURCED TO INDUSTRY STANDARDS. ACCORDINGLY, LEGAL REGULATIONS MUST EXPLICITLY AND CLEARLY SPECIFY THAT THE RESPONSIBILITY FOR THE IMPLEMENTATION OF HUMAN RIGHTS DUE DILIGENCE LIES WITH THE COMPANIES.

The findings of this study are of special relevance with respect to the implementation of the German and the design of the European supply chain legislation, as well as for the EU Battery Regulation. All these envisage a certain role for industry initiatives when it comes to compliance with due diligence. The results of the analysis confirm, however, that the responsibility for implementing human rights and environmental due diligence must never be outsourced to industry standards. Our findings show that none of the initiatives analysed is able to ensure that the member companies

fulfil the requirements of the respective standard. Accordingly, legal regulations must explicitly and clearly specify that the responsibility for the implementation of human rights and environmental due diligence lies with the companies. This is also what the UNGPs demand.

Public authorities that inspect the adequate implementation of due diligence obligations must not rely solely on certifications. Instead, they should go beyond that and check and examine what measures – over and above certification – can be taken.

Develop minimum legal requirements for standards and industry initiatives

IN CASE THAT STANDARDS, INDUSTRY INITIATIVES, CERTIFICATIONS OR MULTI-STAKEHOLDER DIALOGUES ARE ASSIGNED A ROLE IN THE IMPLEMENTATION OF DUE DILIGENCE, IT IS IMPERATIVE THAT LEGISLATORS SET DOWN CORRESPONDING QUALITY CRITERIA AS DEFINED IN THIS STUDY AS MINIMUM REQUIREMENTS.

If industry standards are to play a role within the scope of due diligence legislation, it is important to keep sight of their general limitations and to never equate a certification or the membership in an industry initiative with the implementation of due diligence obligations. At the same time, standards do require minimum requirements. These must, among other things, ensure that the content criteria of the standards are actually implemented locally – and in the interest of the affected stakeholders³². This task should be performed by government bodies with the involvement of right holders, civil society, trade unions and for environmental concerns local environmental organisations³³.

Our analysis also shows that there are startling weaknesses and that the quality assurance measures differ among the standards examined. There is also no uniform definition as to what might be understood by standard, industry initiative, certification, or multi-stakeholder dialogue – or details about how these might be delimited from one another.³⁴ As soon as these are assigned a role in the implementation of due diligence, it will be vital to define what constitutes certification by a standard as well as lay down minimum requirements for certification. It is imperative that legislators set down the corresponding quality criteria as defined in this study as minimum requirements. On top

³¹ So far, there is the private standard ISEAL, which sets quality standards for standards, but which does not go far enough with its requirements. Moreover, such a review of standards should not be outsourced either.

³² In the context of the Conflict Minerals Regulation, based on the OECD Alignment Assessment Tool, standards must fulfil certain requirements to be seen as a recognized system for implementation. In the context of the German and the emerging European Supply Chain Act, as well as the Battery Regulation, however, public regulation and the establishment of criteria is still lacking.

³³ As such the industry initiative ICMM does not carry out any onsite certification of its members.

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of this, there must be clear communication at all times about what part of the supply chain a standard covers and what function it fulfils in the due diligence process. Companies should also report about what step in their due diligence and what part of the supply chain they use the respective standard for.

Regarding the minimum requirements concerning the quality of the certification system, special attention should be paid to how the

standards involve the rights holders in developing the standard and in monitoring (audit and grievance mechanism) as well as in governance, how they assert their criteria vis-à-vis companies, and how they achieve transparency in the certification process and its results. For environmental concerns, environmental organisations also need to be included in these processes.

This study has developed the following quality criteria:

Involvement of rights holders, civil society, and trade unions

- ⊗ Involvement of rights holders (e.g., communities, trade unions and all other actors who might be affected by a company's activities) and, if applicable, civil society in developing the content of the standard criteria and/or in revising the standard criteria
- ⊗ Involvement of rights holders and, if applicable, civil society in governance of the standards, that is, they must hold positions on equal terms in the governance committee
- ⊗ Explicit involvement of rights holders and, if applicable, civil society in the audit process. This means, in concrete terms:
 - ⊗ Mandatory *onsite audits* of potential human rights violations and environmental damage caused by the operating sites at all certified operating sites
 - ⊗ Qualitative surveys of rights holders (external and internal) taking into consideration local factors (culture, language) and methodological requirements explicitly required by the standard
 - ⊗ Rights holders are notified in due time about audits and unidentified actors are also explicitly given the opportunity to contribute their perspective to the audit
 - ⊗ Protected spaces and/or trustworthy framework conditions are created where interviews with rights holders can be held
- ⊗ Effective involvement of rights holders in the monitoring, implementation, and development of the Corrective Action Plans

RECOMMENDATIONS FOR ACTION

Quality assurance and promotion of independence of certification by the standard

- ⊗ The standard initiative checks the audit results by reviewing the audit report before issuing the certificate
- ⊗ The standard defines criteria for the professional competence of the auditors and trains them accordingly
- ⊗ Audit teams must be diverse
- ⊗ The standard initiative commissions the certification service provider directly and carries out a suitability evaluation
- ⊗ Requirements are set down to avoid conflicts of interest between certification service providers and the company to be certified (among other things, exclusion of parallel contracting)
- ⊗ Rotation of audit teams
- ⊗ Audits are financed independently of the company

Grievance mechanism

- ⊗ The standard demands that companies introduce an effective grievance mechanism and has its own effective grievance mechanism in line with the effectiveness criteria of the UNGPs (see details in the box below)

Effective enforcement

- ⊗ The certificate is not issued until all non-conformities have been remedied
- ⊗ Binding, clear, and appropriate deadlines are issued for implementing the CAPs
- ⊗ Exclusion of suspension of the company when CAPs are not fulfilled within a clear and reasonable deadline

RECOMMENDATIONS FOR ACTION

Transparency

- ⌚ **Transparent and differentiated presentation of the audit process and audit results:**
 - ⌚ The audit results are prepared in a way that is comprehensible and detailed
 - ⌚ They reflect the perspectives of the different stakeholders questioned and a differentiated discussion takes place concerning how and why a company has or has not fulfilled the criteria
 - ⌚ The audit reports reflect the positions and views expressed in the interviews, and handle these without violating personal rights
- ⌚ **Transparency as well as understandable and detailed preparation of the results and processes of the Corrective Action Plans (CAPs) specifying**
 - ⌚ what non-conformities must be addressed within what timeframe and how
 - ⌚ where and how rights holders were included and how the CAPs are implemented
- ⌚ **Transparency in cases of grievances and in grievance procedures:**
 - ⌚ Grievances are documented and communicated publicly. Those reporting grievances are anonymised
 - ⌚ The document is easy to find on the standard's website and its presentation is plausible and understandable, i.e., grievances are discussed and clearly positioned in the context of human rights violations and the measures taken
 - ⌚ Information is provided concerning the degree of implementation of the measures and/or to what extent remedies have been achieved
- ⌚ **Transparency about what levels of the supply chain are covered by the certification and what instruments were used for this**

RECOMMENDATIONS FOR ACTION

REQUIREMENTS FOR GRIEVANCE MECHANISMS (GM) SPECIFIED IN ACCORDANCE WITH THE EFFECTIVENESS CRITERIA OF THE UNGPS

The standard requires an effective GM according to the UNGP effectiveness criteria from the companies

- ⊗ The standard requires a grievance mechanism in accordance with the UNGP effectiveness criteria and derived concrete implementation requirements for companies from it.

The standard initiative GM is legitimate and predictable

- ⊗ The grievance process is managed by an independent panel of experts and not by the standard initiative itself
- ⊗ The case can be challenged by all parties
- ⊗ Grievances concerning particularly serious allegations of HR violations are escalated, i.e., dealt with quickly
- ⊗ The standard is withdrawn from companies if they fail to comply with the negotiated remedy

The GM in the standard initiative is accessible

- ⊗ The grievance mechanism can be used by all potentially affected parties
- ⊗ Potential users are made aware of the grievance mechanism
- ⊗ Digital accessibility of the GM (visible application on homepage and presentation adequate for the target group and in different languages)
- ⊗ Analogue accessibility and oral submission of grievances is possible
- ⊗ Language barriers are addressed and removed

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The grievance mechanism in the standard initiative is balanced, i.e., addresses power and information asymmetries

- ④ The standard initiative covers the costs of the grievance procedure on a pro rata basis for the claimants (potentially affected groups of stakeholders) in order to ensure the execution of a grievance procedure
- ④ Support for the grievance process by providing information and expertise
- ④ There is a procedure for anonymous grievances
- ④ Claimants may be represented in the proceedings by a third party (e.g., lawyers, NGOs)

The grievance mechanism in the standard initiative is based on exchange and dialogue

- ④ Rights holders (i.e., potential users of the GM) were involved in the development of the GM
- ④ Rights holders (i.e., potential users of the GM) are involved in the evaluation and further development of the GM

What is more, the minimum requirements must of course also address the content of the standards, something which this study does not deal with, however. For example, all standards relating to the extraction of raw materials must refer specifically to human rights, UNGPs, humanitarian law, and environmental standards. Another aspect that must also be ensured in this context is the concrete and meaningful formulation of requirements for content. In this way, they can be translated into audit criteria, among other things, and can be queried in the audit. Inaccurate standard criteria lead to a situation where audits are not meaningful in terms of the information they present.

Those standards covering environmental criteria should furthermore address the burden of right holders to claim their rights resulting out of the need for technical knowledge and equipment for assessing environmental degradation. Those specifics for environmental criteria could not be systematically addressed by this study. However, one suitable approach to cope with this burden is a substantiated inclusion and support of community-monitoring. Sydow et al. (2021) provide valuable insights in this regard.

Another problem arises if the audit reports are shown to be insufficiently transparent and if they have insufficiently detailed breakdowns (see

RECOMMENDATIONS FOR ACTION

STANDARDS MUST CONTRIBUTE TOWARDS TRANSPARENCY IN THE DEEPER-LEVEL SUPPLY-CHAIN (NAME AND LOCATION), WHEN THEY CERTIFY COMPANIES IN THE DOWNSTREAM RAW MATERIALS SUPPLY CHAIN

Quality requirements). This means companies that use standards as a due diligence instrument would only be able to record and assess potential human rights risks to an inadequate extent. This is especially relevant when standards (like ASI, *Copper Mark*, RMI, RSI) that include the deeper-level supply chain in their certification do not create any transparency about the supply chain

itself. This, however, is vital if companies are to be able to adequately record and address supply chain risks. That is why standards must contribute towards transparency in the deeper-level supply-chain (name and location), when they certify companies in the downstream raw materials supply chain.

Introduce laws pertaining to auditor liability

A LIABILITY REGULATION FOR AUDITING AND CERTIFICATION WOULD BE AN IMPORTANT PREREQUISITE TO EFFECTIVELY ADDRESS THE SYSTEMIC RISKS OF STANDARDS

At the present time there are only insufficient liability regulations for auditing and certification. A liability regulation would be an important prerequisite to effectively address the systemic risks of standards. These result from the financial dependencies that arise in connection with the complex business relationships between the standard, the auditor, and the companies. When inadequately executed audits – like the one for the Brumadhino Dam in Brazil, for example – lead to a loss of life and immense damage to people and nature, auditors cannot currently be held liable. Usual business practices do not provide for any con-

sequences in such or similar cases and bear the risk of audit results being unjustifiably favourable (Binder, M. 2020). As the evaluation of the audit requirements has shown, the existing standards do not have adequate measures in place to prevent this inherent systemic risk (the company to be certified commissions the audit itself, except for RMI). However, this problem cannot be addressed by the standard alone, and legislators must create the legal foundations for it. The introduction of statutory auditor liability could contribute to improvements, as it would make it risky for auditors to issue unjustifiably favourable reports.³⁵

³⁴See also: https://www.ecchr.eu/fileadmin/Publikationen/Studie_Zur_Haftung_von_Sozialauditor_innen_FES_ECCHR.PDF

RECOMMENDATIONS FOR ACTION

Companies must:

Know and communicate the limitations of and possibilities offered by standards

The study has shown that no industry initiative can secure the implementation of its own requirements. At the same time, it has also shown that the initiatives cover different areas of the supply chain, and that they have different strengths and weaknesses in terms of asserting their requirements. When using industry initiatives to support the implementation of due diligence, it is vital to have an awareness of the potentials and limitations of industry standards and to see where they can provide support, but

also be aware of what they are unable to do. In their communications, companies should report about the fulfilment of the due diligence, about what they use the initiatives for, as well as explain what measures they undertake to support the standards in the execution of their due diligence. Furthermore, companies should always reflect and transparently report on what aspects of due diligence they use certification for and what exactly is certified (see also Quality criteria and Chapter 2).

Undertake additional measures

Due to the systemic risks inherent in the standards (e.g., because of business relationships between auditors, the standard, and the company to be certified), companies must take further measures to fulfil their due diligence. Companies that use certification as an instrument for the implementation of human rights due diligence should therefore, on the one hand, place special focus on the comprehensibility, plausibility and informative value of standards and their certification systems when selecting a standard. As the present study shows, standards have different approaches to ensure

the implementation of their criteria vis-à-vis certified companies. On the other hand, companies should take additional measures to do justice to their due diligence obligations. This includes, for example, comparing the audit report of a certified supplier with their own risk analysis and/or comparing the involvement of rights holders so that they can evaluate the credibility of the certification. What is more, companies should include further data sources in their risk analyses, including media reports, NGO reports, and data from community monitoring for example.

DUE TO THE SYSTEMIC RISKS INHERENT IN THE STANDARDS, COMPANIES THAT USE CERTIFICATION AS AN INSTRUMENT FOR THE IMPLEMENTATION OF HUMAN RIGHTS DUE DILIGENCE SHOULD TAKE ADDITIONAL MEASURES TO DO JUSTICE TO THEIR DUE DILIGENCE OBLIGATIONS

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Authors Rebecca Heinz
Johanna Sydow
Florian Ulrich

www.germanwatch.org
E-Mail: info@germanwatch.org

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Bonn office Dr. WernerSchusterHaus
Kaiserstr. 201
D53113 Bonn
Telephone +49 (0)228 / 60 4920
Fax +49 (0)228 / 60 49219

Berlin office Stresemannstr. 72
D10963 Berlin
Telephone +49 (0)30 / 57713280
Fax +49 (0)30 / 577132811

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