

# Environmental responsibility through supply chains

Insights from Latin America

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# Executive summary

■ This study emphasizes the importance of binding legislation for businesses to comply with environmental aspects along their supply chains, in addition to human rights.

Particularly, it highlights the importance of mandatory environmental due diligence in addition to with human rights. This is important in order to: 1) protect ecosystems, even if there are no immediate impacts on human rights, 2) prevent human rights violations resulting from environmental pollution caused by corporations 3) increase the likelihood of holding corporations accountable in this context. When accompanying communities living near mining sites, the authors identified various ways to approach environmental due diligence on the ground. This can be useful both in drafting legislation and considering its practical implementation. Thus, this document can be a valuable reference for policy makers, businesses and NGOs working in this field. Our findings are particularly relevant for the upcoming EU supply chain legislation, the regulatory framework for batteries, the regulations for responsible supply chains, and the OECD guidance (*OECD Practical Tool on Environmental Due Diligence in Minerals Supply Chains*), among others. This analysis is a contribution to a debate about environmental due diligence that has been neglected for a long time.

On one hand, the document reviews **environmental impact assessments** as an instrument for due diligence and for corporate responsibility along their supply chains. On the other hand, it emphasizes that the usefulness of this and other environmental management tools depends on its technical quality, its independence and on community participation, although these conditions are rarely given at the same time.

Following this, the authors propose measures to achieve independence and to improve the quality of environmental impact assessments, resulting in standards that may be more demanding than those set and implemented by States at their convenience. For example, criteria developed in assessment instruments should be enforced by those enterprises purchasing minerals from mining companies along the supply chain, in the framework of environmental due diligence. Finally, the document identifies major differences amongst national

legislations and points out the fact that most of them do not have standards of quality (See also Annex 1).

Regarding **independent monitoring**, the document examines a great variety of approaches to monitoring impacts from mining operations, highlighting the importance of independence. Very often, impacts on the environment – such as pollution of drinking water or soil – are not denounced or are minimized by businesses, a situation that leads to serious human rights violations. In this respect, independent community monitoring in Latin America has become an indispensable environmental management tool for communities and indigenous peoples to oversee, control and monitor environmental pollution caused by extractive activities. The document elaborates on how serious this situation has become due to the absence of supervision and control by public organizations over mining corporations, amidst a severe credibility crisis as communities do not trust such public entities. Hence the need to promote and sustain independent supervision in the context of binding environmental due diligence.

Independent monitoring has many benefits: It continuously generates data, allowing communities to become aware of their environmental situation and to track changes. It empowers communities in those cases where businesses submit technical information limiting community participation in processes such as prior consultation or when companies do not comply with their own control and follow-up processes. The scientific data can help communities to denounce the problems and start legal processes. It promotes a horizontal dialogue amongst the actors in the territories and, consequently, helps prevent conflicts and incentivizes businesses to act more responsibly and accordingly to their environmental commitments.

At the same time, empowering local communities plays an important role in preventing harm to the environment, resulting human rights violations and conflicts. It should be promoted in the context of



Photo by: Fabiola Vargas

environmental due diligence. Independent supervision faces a variety of challenges and must follow certain criteria in order to achieve the benefits mentioned above. This document describes the specific supervision criteria and gives recommendations on how to promote this important environmental protection measure in the context of mining activities. According to the authors, the European Union should assess which measures to take in order to support independent community monitoring within the supply chain. An independent monitoring should be carried out during the entire cycle of an extractive/economic activity. In the case of mining and hydrocarbon activity, it comprises the stages of exploration, operation, closing/abandonment, and the implementation of environmental liability management.





Considering the **need for international binding reference standards**, after exploring the importance of community monitoring and recommendations, Pavel Aquino discusses the massive flexibilization in the context of environmental standards in the specific case of arsenic and cadmium in Peru in recent years. He points out that there has been more pollution while the State remained inactive. We believe that it is important for the European Union to establish binding environmental due diligence considering international or European standards so that the highest possible standards are maintained in such a way that these are not made flexible by businesses or governments. It should prevent regression in environmental legislation.

Regarding the **possible challenges and negative impacts of environmental due diligence**, it is important to maintain close cooperation with those in the affected territories not only to find the best possible solution, but to avoid undesirable negative effects. In the first place, the document reiterates that environmental due diligence does not substitute environmental impact assessments, neither in terms of the social license nor any other tool that contributes to generate a responsible process. Due diligence is a process is a condition that has to be carried out and maintained without interruption



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throughout the entire duration of any project and that can be lost when any of its constituent elements fails.

Consequently, it is recommended not to initiate any project or to source from it, if there are solid and demonstrable issues regarding the quality of ESIA about citizens participation in the environmental impact assessment review or in the assessment or issuance of the Declaration of Environmental Impact on behalf of the environmental authorities, just to mention an example at the environmental licensing stage. Additionally, it is important to apply binding environmental due diligence with a differential focus according to actors' different capacities. Bigger companies have the capacity to comply with all the requirements in binding environmental due diligence in a short time while artisanal miners may require more time and support in the transition, considering these differences guarantee equitable application of the norm. The document indicates that the Environmental Due Diligence must count on the participation of multiple actors to allow for deliberation and permanent supervision in order to minimize the probability of failure. Also, it is important to mention that environmental due diligence must include the inability for some projects to be carried out due to the scale and importance of its eventual impacts.

Another chapter, included in the document deals with **environmental human rights and guarantees for due diligence legislation processes**. There are general judiciary and governance standards in the Inter- American of Human Rights System for States and companies –within due diligence– to implement the necessary corrective measures to mitigate, reduce or eliminate environmental risks in their operations, supply chains and trade relations and to avoid human rights abuse or violations. The European legislation could catalyze and strengthen the Inter American efforts in this respect.



# Recommendations



- 1. The European Union should implement circular economy action plans, take more measures to reduce the use of primary metals and establish goals for the absolute reduction in natural resources.

In the first place, it has been acknowledged that the best measure to reduce mining impacts on the environment and human rights is to decrease the use of raw materials, because such mining projects generally imply permanent impacts at human time scale. The starting point for environmental corporate due diligence would be to assess what influences raw material consumption and to take measures to reduce the use of metals, minerals, etc., in the whole product cycle. In this sense, the European Union should assess its policies and impact on the climate and natural resources and begin to establish goals and

clear measures to limit the consumption of natural resources in absolute terms. It is important to implement an ambitious circular economy action plan. This would imply imposing additional taxation on raw materials and resources coming from direct extraction, disincentivize the use of cars for private transport, instead of simply replacing fuel powered cars with electric cars and other similar steps. In general, it also implies a progressive and sustained reduction in the consumption of raw materials coming from direct extraction sites and its support to their progressive reduction while they increase the life span and the reutilization of products.

- 2. It is important that regulations regarding supply chains in Europe include sanctions, civil liability and that they demand risk analyses along the entire supply chain.

Legislation on due diligence produced so far by some members of the EU such as Germany, France and the Netherlands are very important first steps in the right direction. However, the laws approved so far have important deficiencies. For example, the Supply Chain Law in Germany only covers the largest businesses and restricts due diligence regarding indirect suppliers. This means that companies do not have the obligation to prevent the risks associated with the initial stages of their supply chain, for example, in mines, but rather only have to act when they have an infringement notification. Additionally, the German law does not establish independent due diligence obligations in matters of environment and only marginally reinforces the rights of those affected, as the law lacks the regulation of civil liability.

The process to pass a supply chain law in Europe offers,

therefore, a great opportunity to correct deficiencies in national legislations and to impose binding due diligence obligations in matters of human and environmental rights in their supply chains upon all European corporations. For this to happen, the law needs to combine the strong aspects found in the different national legislations and: a) apply norms to small and medium-size business sectors with high human rights risks; b) cover the entire value chain without restrictions or scope; c) define obligations to independent due diligence related to the protection of environment and climate (see recommendations starting with No. 3 below); d) foresee public control mechanisms and sanctions in case of infringements; e) foresee a civil liability regime in cases of noncompliance with due diligence; f) include effective participation rights and inclusion of interested parties with legitimate interest.

- 3. It is important for the European Commission to include environmental due diligence in their supply chain regulation based on European and international standards, not just national or local standards.

Environmental due diligence can not only be based on the regulations from countries where the extraction of raw materials takes place; it has to be related to international and European agreements<sup>1</sup>. It is the authors' opinion that in Latin America, the EIA processes and the regulations are too lax and do not guarantee environmental quality, transparency, participation, among other characteristics. Current legislation does not facilitate a real risk analysis regarding ecosystems and human rights in the context of a project. Due to this situation, many human rights violations and breaches of environmental standards cannot be prevented as effectively as a State should or could with a proper EIA. This implies not allowing mining operations where serious impacts to the

ecosystems or to human health are identified or in cases where the businesses do not have reasonable and sufficient evidence about what impacts they may generate. Additionally, in many countries where extractions are carried out, permitted pollution levels are too high or such limits are non-existing (as is the case of emissions, for example).<sup>2</sup> Moreover, in the face of external debt in many countries – increased in the context of the current pandemic – States are observed to lower standards, requirements or environmental procedures in order for mining projects to start to operate faster<sup>3</sup>. Thus, we face the risk of increasing human rights violation and the destruction of ecosystems. Environmental due diligence with reference to international and European standards could help reduce this risk. Additionally, many regulations and local standards are not met and there is little control on the part of States. For this reason, regulation should increase the pressure to act, beginning with the supply chain.

<sup>1</sup> Krebs, David. 2021. Environmental Due Diligence in EU Law. Umwelt Bundesamt. <https://www.umweltbundesamt.de/publikationen/environmental-due-diligence-in-eu-law>

<sup>2</sup> Heinz, R. & Sydow, J. 2021. Warum umweltbezogene Sorgfaltspflichten in Rohstofflieferketten wichtig sind: Der Fall von Cerro Matoso, Kolumbien. Germanwatch. <https://germanwatch.org/de/19845>

<sup>3</sup> See decree 151 in Ecuador

- 4. In order to secure responsible business conduct in the supply chain, it is necessary for the EU supply chain regulations to ensure that companies consider the weaknesses in processes of environmental impact studies in each jurisdiction where they extract raw materials and that they take all possible measures to improve its quality.

Because of the close relation between the EIA processes and environmental due diligence, the quality of the former strongly influences the latter. Without solid EIA processes we cannot speak of environmental due diligence. To guarantee responsible business conduct along the supply chain, it is necessary that the EU demands a solid risk assessment along the whole supply chain from businesses (buyers in the supply chain) and that companies consider the weaknesses in the EIA process in each jurisdiction where they extract or source raw materials. We recommend the following measures:

- Proactively publishing the results of environmental impact studies both by states and companies, all annexes and databases in an editable and reusable format in a timely manner, in order to allow for deep technical analysis within reasonable timeframes, as a condition for European businesses to establish trade relationships with corporations extracting raw materials. This would help increase transparency in environmental licensing processes in a significant manner and would deepen the debates around the impacts of such projects.
- Regulations should relate both to the upstream and the downstream supply chain. This implies that a European business, which sells machinery to a mining company must perform a risk analysis regarding the EIA process, ensuring that they comply with the aforementioned criteria in order to assess risks. Additionally, corporations must verify that all mitigation measures regarding EIA are being implemented.
- Businesses in the supply chain should identify the EIA methodologies within their risk analysis and together with suppliers analyse ways to demand and strengthen such criteria (participation, transparency and independence) in the framework of the EIA.
- A criterion for independence of EIA should be that the financing of the EIA is covered by the proponent, but the selection and hiring of who carries out the EIA should be done through an objective and public selection. Probably, the resources could be administered through fund of exclusive dedication.
- Businesses and the EU should have an active role in calling on States to solve these and other deficiencies in the EIA process and commit to using highest international standards as guidelines, both in human rights and in the mitigation of risks and prevention of irreversible ecological impacts.

- 5. It is very important for the EU, international organizations, international cooperation and indirectly businesses on the Latin American side to strengthen independent monitoring of businesses, stressing the importance of community participation.

In many cases, states are perceived to be absent in the monitoring of environmental impacts for mining businesses and there is a deep crisis of loss of trust in public institutions in many states where extractive activities are performed in Latin America. For that reason, independent monitoring in Latin America has turned into an indispensable environmental management tool for communities and for the indigenous peoples so that they can supervise, control and monitor environmental pollution caused by corporate extractive activities.

It is important to strengthen public institutions monitoring and, at the same time, to facilitate the possibility for communities to have their own monitoring process and to get involved in independent monitoring scenarios promoted by the states. Independent monitoring can be fundamental for the protection of nature and human rights. We see in the current context that this is necessary to strengthen it in the context of binding environmental due diligence. Following our recommendations on how to do this:

#### EU regulation on supply chains:

- In case a business in the supply chain identifies in its risk analysis the absence of independent monitoring in an extractive project and the need or desire of the communities to carry out one, they should demand the business performing the extraction to support the initiation of an independent monitoring process.
- Businesses should use all available information from community monitoring for risk analysis, from their international standard frameworks of the United Nations Guiding Principles, UNGPs and the OECD and acknowledging the cultural diversity in the of the members that will take part in independent monitoring, incorporating local knowledge and independent monitoring management with a differential gender and ethnic focus.

European and international organizations as well as development cooperation institutions accompanying supply chain legislations:

- Secure independence in financing monitoring activities. It is recommended that public organizations promote the establishment of funds with resources coming from businesses or states, non-governmental and international cooperation organizations, with transparent and efficient fiduciary administration.
- Facilitate the definition of criteria for certification and technical accompaniment for independent monitors, counting on the support from public organizations in coordination with international organizations and cooperation agencies so as to facilitate training, logistics and any other requirement's to achieve such certification (European Union, international organizations).
- Promote the creation of databases for independent monitoring, offering the public monitoring data in real time, through digital platforms,
- similar to already existing ones<sup>4</sup>.
- Some independent organizations such as Global Water Watch could define criteria for certification and technical assistance for independent monitors as a step to achieve data accreditation, should it be needed in legal processes.

Latin American governments and local institutions:

- Promote the formal constitution of initiatives for independent monitoring, implementing revolving participation mechanisms and democratic elections for its members, according to criteria from the communities involved.
- Promote spaces for encounters between independent monitoring groups and public organizations in order to diagnose priorities for local communities and consider these in subsequent actions.
- Promote technological and scientific innovation that can contribute to address the needs of the communities.
- Create mechanisms so that data generated by independent monitoring can be recognized as evidence in court, in case it is necessary to start judicial processes in the context of environmental conflicts.
- Contribute to the formation of an independent monitoring network with resources for technical support and for capacity building to fulfil the functions of coordination, training, exchange of best practices, among others.

■ 6. It is important within the OECD that the process of creating practical tools for environmental due diligence in the supply chain considers the criteria proposed in chapters one and two and it involves other civil society actors in countries where extraction is happening in the Global South.

■ 7. The protection of environmental defenders has to be strengthened, through the relations between environmental European instruments and those of human rights, with a special supervision of the treaties of free commerce between the European Union, Columbia, Ecuador, and Peru.

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<sup>4</sup> The Okanogan Highlands organization in Washington State in the USA created a database that offers real time data related to water monitoring that helped the general public to understand impacts in water quality. This is available at: <http://database.okanoganhighlands.org/monitoring/>

## Annex 1) Features/Description/Recommendations regarding Environmental Impact Assessments

FEATURES	DESCRIPTION	RECOMMENDATIONS
<b>Possibility to perform independent analysis</b>	There is not sufficient independent technical follow-up nor infrastructure or equipment to perform it.	Increase support to national scientific initiatives from the civil society (international foundations, think-tanks, NGOs). The States must support the formation of expert networks and independent laboratories.
<b>Capability to perform complex assessments.</b>	Institutions lack technical capacity to assess all risks or impacts.	States must guarantee teams of professionals in all relevant areas to perform complex assessment and provide stability.
<b>Conflict of interest</b>	The design of assessment processes does not guarantee independence amongst actors.	The process must be modified to guarantee economic independence at the financing, design, and assessment stages of the ESIA. Businesses have to inform about conflicts of interest with assessors, upon displaying their identities.
<b>Publication and information</b>	There are barriers to information access on EIAs (documents, annexes, cartographic information, etc.)	All Environmental and Social Impact Assessment (ESIA) reports, their annexes and any other relevant information for independent analysis must be published and publicized proactively by businesses and States.
<b>Insufficient standards</b>	In many jurisdictions, standards are inferior, even compared to the World Health Organization (WHO)'s recommendations.	States must adopt environmental standards with stronger scientific foundation. Businesses must inform the State when such standards are inadequate and guide themselves by the best international standards or by those from the countries where the business headquarters are located.
<b>Participation</b>	There are no guarantees for participation in decision-making stages. Information is poor and unilateral.	Implement binding consultation mechanisms with local communities in project decision-making. (States).  Implement proactive information and consultation programs from the beginning of the planning stage. (Businesses)



## ENVIRONMENTAL RESPONSIBILITY THROUGH SUPPLY CHAINS - Insights from Latin America

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