

ENVIRONMENTAL RESPONSIBILITY THROUGH SUPPLY CHAINS

Insights from Latin America



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Brief Summary

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

This is important to: 1) protect ecosystems, even if there are no immediate impacts on human rights; 2) prevent human rights violations resulting from environmental contamination caused by corporations; 3) increase the likelihood of holding corporations accountable and provide victims access to justice and remedies.

On the basis of experience from working closely together with communities living near mining sites, the authors have identified various ways how to implement environmental due diligence on the ground. This can be useful both in drafting legislation and considering its practical implementation. Thus, this document may serve as a valuable reference for policymakers, companies, and NGOs working in this field. Our findings are particularly relevant for the upcoming EU supply chain legislation (Sustainable Corporate Governance Initiative), the regulatory framework for batteries, the development of a OECD Practical Tool on Environmental Due Diligence in Minerals Supply Chains among others. Thus, this analysis is a contribution to a debate about environmental due diligence that has long been neglected.

The study especially highlights the importance of independent, participatory and transparent Environmental Impact Studies alongside the strengthening of independent community monitoring, which it also defines. Moreover, it lays out why European due diligence legislations should refer to European and international standards instead of only referring to existing standards at the place of extraction. It highlights relevant jurisdiction in Latin America in the context of large scale projects, human rights and the environment and pinpoints relevant aspects to consider in the context of implementing environmental due diligence - making it effective without unintended consequences. Finally, it concludes with concrete recommendations for the European Union, international organizations and companies well as governments at the place of extraction.

ENVIRONMENTAL RESPONSIBILITY THROUGH SUPPLY CHAINS - Insights from Latin America

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INTRODUCTION

■ Unfortunately, neither contaminated drinking water and traces of heavy metals found in blood samples of people who live near mines, as in the Espinar case in Peru, or the increased incidence of cancer near the Cerro Matoso mine in Colombia are new nor are they rare occurrences.

Another possible consequence of copper mining is the deforestation of thousands of hectares of biodiverse forests, which produces changes in the local climate and an irreversible loss of species, as was the case in the Intag Valley in Ecuador (Zorrilla and Sydow, 2021).

While a lively debate on human rights due diligence for companies has taken place in recent years, many questions remain unanswered about how to create environmental due diligence to prevent cases like these. The purpose of this publication is to help answer such questions, specifically from the perspective of Latin American civil society, by using the example of metal mining.

Mining, as well as other economic activities—particularly extractive ones—cause enormous harm to the environment and human health, both in nearby areas and on a global scale. In Europe, car manufacturing and mining equipment industries, among others, use minerals extracted from Latin America in their products, although they do not extract them directly. For many years, these companies justified their practices by distancing themselves from the impacts of mining, despite the fact that they purchase such minerals—in many cases, at very low costs that do not reflect the ecological or social costs of such extractions. However, there are many possibilities and tools available for businesses—depending on their size and their place in the supply chain—to demand their compliance with the protection of human rights and the environment. Specifically, the debate regarding mining's long-term impact on the environment and human health has been largely neglected thus far. It is time for this to change, as there are processes that give hope in this regard.

In Europe, certain legislative initiatives will require companies to consider the ecological impacts of their supply chains through compliance with binding due diligence. Among these are the Legislation on Supply Chain announced by Commissioner Reynders (*Sustainable Corporate Governance Initiative*) in 2020 and legislation regarding batteries. Additionally, a process called *Practical Tool for Environmental Due Diligence in Minerals' Supply Chains* has been initiated by the Organization for Economic Co-operation and Development (OECD), which could strengthen the implementation of environmental due diligence while providing orientation on how to regulate it within individual countries. However, there are still some legal gaps about guidelines in this field; numerous questions about how to create environmental due diligence legislation that really minimizes negative impacts on affected populations and ecosystems remain unanswered.

Environmental Due Diligence and Related Regulations

In recent years, there has been a lively debate regarding the concept of due diligence in human rights matters derived from the 2011 Guiding Principles of the United Nations on Business and Human Rights. These principles were incorporated into the OECD Guidelines for Enterprises that same year. Both provide a framework for companies to implement due diligence in all their global operations, including 1) identifying and assessing potential and actual impacts on human rights; 2) integrating and applying assessment results of such impacts; 3) following up and supervising the application of measures to prevent and mitigate impacts; 4) communicating the necessary measures to prevent and mitigate such impacts.

Unfortunately, due to its non-binding character, in many countries the UN Guiding Principles have not led to further obligations for companies to prevent human rights violations in their supply chains. However, several countries have passed binding due diligence laws that oblige companies to assess and mitigate human rights risks in their supply chain¹. But quite often these only cover specific risks such as child labour or financing conflicts, without remedial mechanisms for those affected; to date, there are only a handful of due diligence laws centred on human rights and the environment.

In France, there is a law (*Loi de vigilance*²) that includes vague requirements regarding the environment. The proposed regulation of batteries in Europe includes the monitoring of environmental risks as does the planned *Sustainable Corporate Governance Initiative* that intends to address these environmental risks at the same level. What has not yet been clarified and decided is what these would specifically imply for companies. The 2011 OECD Guidelines and those of 2018 already deal with environmental issues but are still quite vague regarding environmental risks³. This document aims to gather key elements for the implementation of environmental due diligence, using the mining sector as an example, from the perspective of civil society. The goal is to guide the creation of legislation and other tools in regard to environmental due diligence.

1. An array of legislation regarding due diligence can be observed. Some are just centred on one aspect, such as child labour (the Netherlands) or labour under conditions of slavery (United Kingdom and Australia), while others, such as the legislation in the European Union or in the United States on conflict minerals, are focused on certain minerals and risks, as well as the worst forms of child labour, forced prostitution, financing armed groups, and so on.

2. *Loi de vigilance*. At: <https://vigilance-plan.org/the-law/>

3. Specific guidelines such as those of the OECD on agriculture are much more accurate for the sector: (<https://www.oecd.org/governance/guia-ocde-fao-para-las-cadenas-de-suministro-responsable-en-el-sector-agricola-9789264261358-es.htm>)

The concept of due diligence in human rights (UN, 201; OECD, 2011, 2018) does not solve everything; it has its weak points too, and many more measures are needed to minimize economic activity impacting the environment and human rights. However, it is fundamental to hold companies responsible in order to minimize impacts, and due diligence embedded in the UN Guiding Principles and the OECD Guidelines are currently the main regulatory mechanisms regarding companies and human rights⁴.

The Need for Additional Binding Environmental Due Diligence

Additional to human rights due diligence, environmental due diligence is fundamental because regulations that focus on human rights consider environmental harm only when such harm affects those rights. For example, the dumping of toxic waste that directly results in deaths or illnesses. An explicit environmental component (environmental due diligence) in legislation on human rights due diligence should help prevent:

1. **The destruction of biodiversity, climate change, and other environmental damage not directly or immediately related to human rights abuse.** For example, when a mine deforests thousands of hectares, it generates changes in the local climate and can result in the extinction of fauna species, an effect foreseen in the Llorimagua project in Itang, Ecuador (Sydow, J. and Zorrilla, C., 2021).
2. **Accumulated environmental destruction, such as the continued contamination of a river or soil, becoming abusive—in practice, a rights violation because of noncompliance with environmental standards,** even if human rights have not been affected. This view allows for stronger prevention of both harms and violations while making it easier to demonstrate accountability on the part of companies as it is not necessary to demonstrate human rights violations or impacts on health (for example, as caused by contamination) but as a result of their noncompliance with and violations of environmental requirements and standards. This difficulty is evident in the case of Cerro Matoso, Colombia (Heinz, R., Sydow, J., 2021).

While the authors stress that it is crucial to improve access to rights for those affected through legislation on due diligence and that it is important for this type of legislation to consider the whole supply chain, this study intends to support and provide specific recommendations for environmental due diligence. The authors chose the mining sector for this analysis because its activities generate among the highest environmental impacts and has been associated with numerous human rights violations. However, many of the recommendations included here can be applied to other sectors.

It is important to point out that the authors of this report have direct experience with communities in the field and know the challenges of protecting human rights and the environment. They present some

key recommendations for environmental due diligence to have the desired impact in the field. This report shows the crucial importance of independent environmental impact and monitoring studies while arguing that, in many cases, there is no legal or institutional framework to guarantee such studies. Also addressed are access to information and civil society, community participation as well as recommendations on how to implement these two factors—human rights and environment—in the context of environmental due diligence. This report also contains relevant aspects that could eventually help in the design of public policies and/or regulations to help prevent negative social or environmental impacts. Finally, this report analyses relevant legal instruments in the Latin American context, such as the Escazú Agreement and the jurisprudence by the Inter-American Court of Human Rights in the Expert Opinion 23/17, reflecting upon what such documents imply for European actors.

In the first chapter, Andrés Ángel, then scientific advisor for the Inter-American Association for Environmental Defence (Asociación Interamericana de Defensa del Ambiente, AIDA), addresses the importance and characteristics of environmental impact studies in the framework of due diligence. In the second chapter, the independent consultant Pavel Aquino and Fabiola Vargas, of the NGO Andean Communications and Development Centre [Centro de Comunicaciones y Desarrollo Andino - CENDA], introduce the importance of independent community monitoring as well as recommendations to strengthen it. In the third chapter, Aquino provides an example of the relaxation of environmental standards in Peru, stating why it is important to have environmental due diligence that abide to international standards and cannot be just compromised by commercial interests. In the fourth chapter, Juan Diego Espinosa, a researcher at the Business and Human Rights Resource Centre, emphasizes the Inter-American Court of Human Rights' competence in environmental due diligence. In the fifth chapter, Ángel highlights what must be considered to avoid negative impacts in due diligence and how to make it more effective. Finally, the authors provide a summary with recommendations for different actors, emphasizing the need for local voices to be heard. With this document, we would like to initiate a dialogue with the European context on these matters.

4. For this reason, we see the potential of changing something regarding the companies' behaviours and impacts. It is true that one more useful method to protect the environment is lowering commodities extraction. This also requires lowering the number of products, and that these products can be used for longer periods, and supporting the economy of recycling.

5. Environmental issues in the human rights scope are highlighted by the special rapporteurs on human rights and a healthy environment, including the global implications to life, in general, and to human life, in particular, resulting from the destruction of nature.



1. The Role of the Environmental Impact Assessment

■ Andrés Ángel

1.1. Relationship Between Environmental Impact Assessment and Due Diligence

As mentioned above, due diligence can be defined as “the process that businesses hold to identify, prevent, mitigate or account for actual and potential adverse impacts in their own activities, their supply chains and other trade relations” (OECD, 2018). That is, it can be understood as a group of actions, operational frameworks, a methodology, and context or conduct guidelines upon which companies that intend to develop activities in a given territory—or are already doing so—should base their behaviour. As a framework, due diligence entails many tools and procedures that need to work together, which is -in the end- what makes it materialise. If we speak of environmental due diligence, environmental assessment instruments, and amongst them, especially Environmental Impact Assessment, the latter has a central role that will be discussed below.

For two reasons, there is a growing need for mandatory environmental due diligence tools, particularly in the extractive sector:

1. **Emerging environmental impacts:** the growing demand for renewable, nonconventional energy (wind power, photovoltaic or solar energy, etc.) is generating a shift from fossil fuel extraction to the mining of materials such as lithium, copper, rare earth elements (REE), and so on (London Mining Network, 2019). This transition may actually worsen environmental impacts with unforeseeable consequences (e.g., ocean mining, Andean Salt lake mining, REE in the Amazon).
2. **Conflict exacerbation:** the largest deposits of several critical and strategic elements are found in the Global South. Some of these places are characterized by weak governance and high levels of corruption. Because of this and other factors, such projects often result in environmental conflicts, leading serious environmental destruction and human rights violations.

If environmental due diligence intends to establish behavioural guidelines to address these and other matters, the accurate impacts’ diagnosis is an **indispensable** requisite. This diagnosis is generally gathered in the environmental impact assessment (EIA); thus, environmental due diligence and the EIA are intimately linked. In fact, both share many of the same intentions. Both EIA processes and due diligence seek to identify, address, and deal with the negative

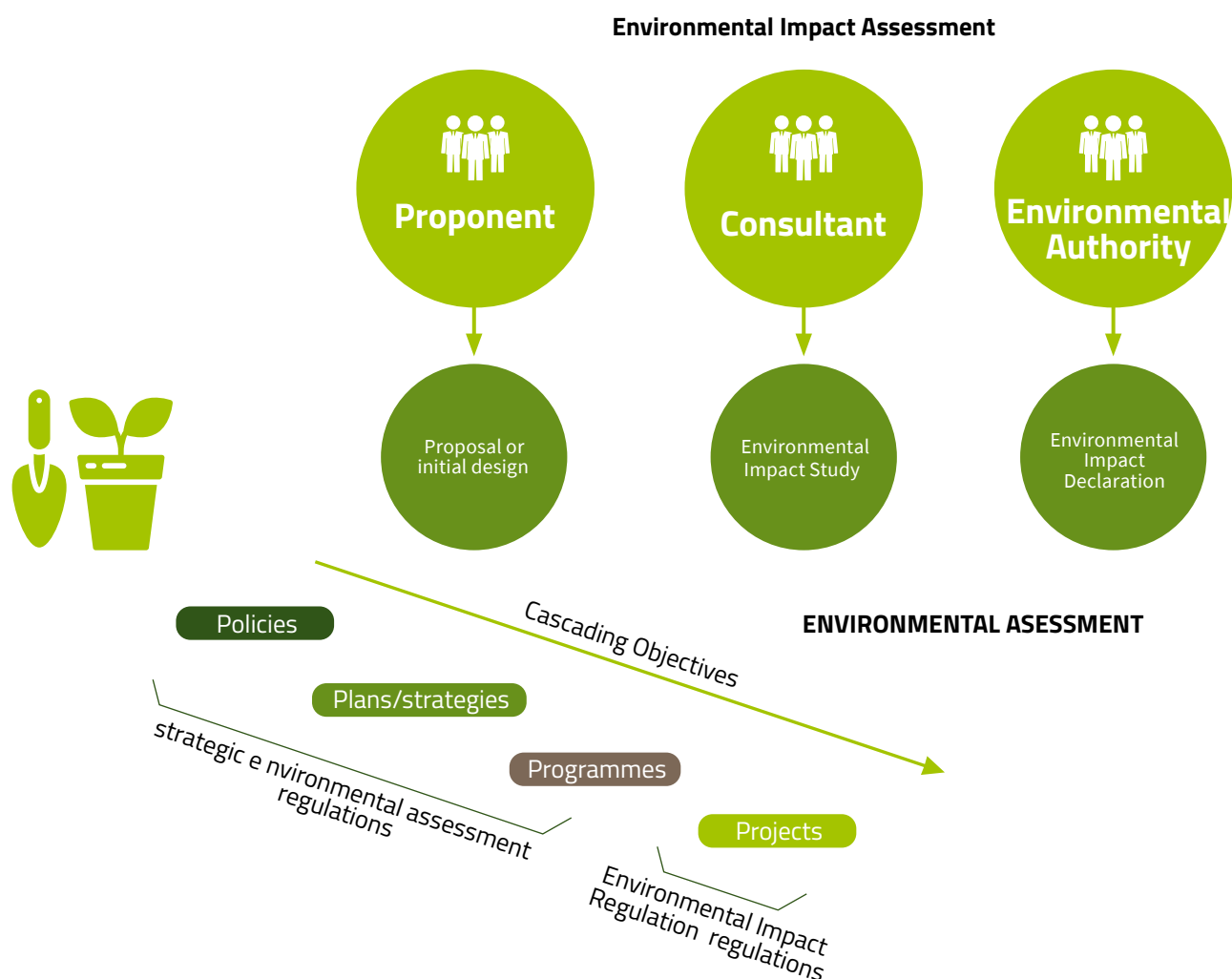
consequences of activities as well as to identify risks or effects and propose relevant actions⁶. On the other hand, due diligence, as a process, incorporates the element of risk identification of actual or potential effects and adds the establishment of prevention and mitigation actions and the design of follow-up and reporting activities. In environmental matters, parallels between environmental impact assessment and such steps are unavoidable.

This process evolves permanently; it involves a high degree of uncertainty and is specific to each context, timeframes, and type of intervention. For this reason, each country where raw materials are extracted has different ways to perform the environmental impact assessment both in its design (terms of reference, standards, development times, and actors involved), and names for the instruments, even though many of them have been inspired by the United States’ National Environmental Policy Act⁷. It is worth mentioning that environmental impact assessment uses a variety of tools that, in turn, respond to different scales.

From the perspective of strategic environmental assessment (SEA) defined as the “systematic process for evaluating environmental implications of a proposed policy, plan or program that provides means for looking at cumulative effects at the earliest stage of decision-making, alongside economic and social considerations” (European Union, 2020), to specific instruments such as the European Commission proper evaluation, [n.d.] — in certain protected areas in the EU — to the environmental impact study (EIS) that constitutes a core instrument produced by companies to describe the scale of each proposal, determine the impact size, importance, and other characteristics, and propose the corresponding mitigation measures. The EIS also informs the relevant environmental authority and general public of the diagnostic results so that the former may issue the Environmental Impact Declaration (EID) and the latter can supervise the Environmental Impact Assessment process.

⁶ In the case of the environmental impact study, this refers to the environmental management plan (EMP)

⁷ National Environmental Policy Act (NEPA)

Figure 1 Relationship between Environmental Impact Assessment and Strategic Environmental Impact Assessment

1.2 Environmental Impact Assessment in Latin America

In Latin America, however, there are certain institutional, regulatory, and capacity-building characteristics in the EIA process that may complicate the task of effective due diligence. It is important to note that due diligence is not a palliative in processes with unacceptable impacts—for example, in perpetual impacts on water quality. In these cases, due diligence is simply not enough to support responsibility or sustainability in any mining project.

Following is a summary of the characteristics identified along with descriptions and recommendations to resolve them. Additionally, we will elaborate on each of the descriptions.

Table 1. Requirements for Environmental Impact Assessments

CHARACTERISTICS	DESCRIPTION	RECOMMENDATIONS
Possibility to perform independent analysis	There is insufficient independent technical follow-up or infrastructure or equipment to perform it.	Increase civil society's support to national scientific initiatives (international foundations, think tanks, NGOs). Individual countries should support the formation of expert networks and independent laboratories.
Capacity to perform complex assessments	Institutions lack technical capacity to assess all risks or impacts.	Countries must guarantee teams of professionals in all relevant areas to perform complex assessment and provide stability.



CHARACTERISTICS	DESCRIPTION	RECOMMENDATIONS
Capacity to perform complex assessments	Institutions lack technical capacity to assess all risks or impacts.	Countries must guarantee teams of professionals in all relevant areas to perform complex assessment and provide stability.
Conflict of interest	The design of assessment processes does not guarantee independence amongst actors.	The process should be modified to guarantee economic independence at the financing, design, and assessment stages of the EIS. Companies have to reveal conflicts of interest with assessors in case their identities are made known.
Publication and information	There are barriers to information access on EIAs (documents, annexes, cartographic information, etc.).	All reports on environmental and social impact studies (EIS), their annexes, and any other relevant information for independent analysis must be proactively published and disseminated by companies and governments.
Insufficient standards	In many jurisdictions, standards are inferior, even compared to recommendations by the World Health Organization (WHO).	Countries should adopt environmental standards with stronger scientific foundations. Companies should inform the State when such standards are inadequate and guide themselves according to the most rigorous international standards or those of the countries where the company headquarters are located.
Participation	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).

Possibility to Perform Independent Analyses

Independent technical accompaniment is indispensable to contrast information data from the EIA. Although there are some efforts in the regions with initiatives for community monitoring, independent EIS review, technical concepts on specific themes such as conceptualization, integrated economic estimates, financial analysis, and so on, it is also true that these cannot address all cases in all countries.

All—not just some—EIS of projects in the extractive sector are likely to present extremely high complexities due to their scale, the nature of their impacts, and the specific vulnerabilities of affected natural ecosystem matrixes (water, air, soil, etc.). This implies the need for high-level expertise in their analysis. There are a few NGOs and consultant firms devoted to this task, but not in all areas. Therefore, it is essential to decentralise scientific support, form new expert groups, and manage collaboration with universities and think-tanks in all countries of the region.

It is also vital to start a dialogue with companies, governments, and civil society organizations about the need to have independent laboratories⁸ and to consider their role in the EIA process from the very beginning. In Latin America, there are few examples of independent environmental laboratories. Amongst the most important—because of their scientific activity and reports on risks of harm to people's health and ecosystems—are the Mercury and Environmental Chemistry Laboratory (Laboratorio de Mercurio y Química Ambiental or LAMQ) in Madre de Dios, Perú; the Amazonian Centre of Scientific Innovation (Centro de Innovación

Científica Amazónica), (2018); and the Unique Digital Platform of the Peruvian State (Plataforma Digital Única del Estado Peruano), 2021.

Capacity to Perform Complex Assessments

In weak or failed States, it is quite common for agencies, ministries, and other environmental authorities to perform EIA without qualified professionals capable of providing expert opinions in all areas when they deal with complex or large-scale projects. In some cases, certain impacts are undervalued and in other authorities resort to third parties with the necessary expertise to perform such evaluation. This, however, does not prevent conflict of interests from happening as it depends on which contractor is chosen.

In Colombia, for example, the EIA process in the large-scale underground gold mining project known as “Soto Norte” showed that the environmental authorities did not have the necessary expertise on “hydrogeology, hydrology, geotechnics, geochemistry and ecology applied to moorland ecosystems” (ANLA, 2019); that is, almost all the relevant areas needed for a comprehensive impact analysis of this large-scale project. To compensate for this, the authorities contracted a university with strong links to the country's mining sector to perform the analyses. After requesting additional information, the author read the report resulting from this contract and did not find significant differences regarding decision-making criteria between this report and the previous compliance analysis.

8. It could be possible to replicate successful experiences such as the LAMQA and the Amazonian Centre of Scientific Innovation as well as Wake Forest University in Peru.

Given the financial precarity of regulatory and environmental organizations in developing countries, particularly in those of the environmental sector, they usually do not have the means to develop many projects or initiatives or to establish institutions to regulate extractive sectors. This is why professionals in these organizations are usually at a disadvantage, even compared to other colleagues in the public sector.

...the Mining Group reviewed information related to the professional profile of this organization's public officers and contractors and verified that there were **no available professionals or experts in areas of hydrogeology, hydrology, geotechnics, geochemistry, and ecology applied to paramo (moorlands) ecosystems**. This leads us to conclude that both staff and service-provision contractors are insufficient. It is therefore necessary to hire suitable professionals with the required experience to support the development and execution of specialized environmental assessment in areas of **hydrogeology, hydrology, geotechnics, geochemistry, and ecology applied to paramo ecosystems** for the aforementioned project...

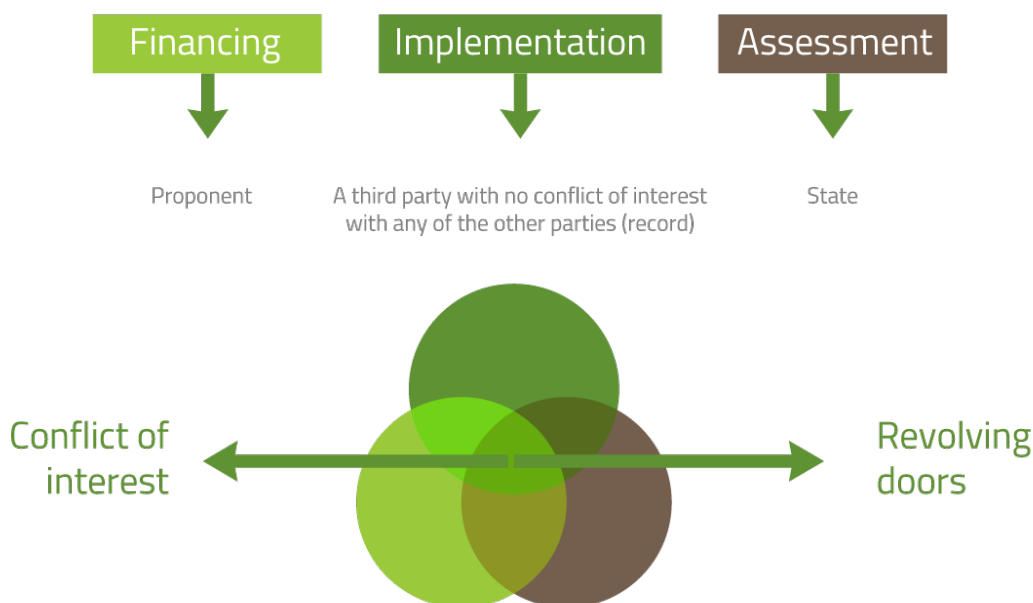
Excerpt from the contract signed between the ANLA (National Agency for Environmental Licensing) and the National University of Colombia, in which they state the absence of qualified staff to assess impacts described in the EIA of a large-scale gold mining project. Source. ANLA, Inter-administrative contract 1089, 2019

Conflicts of Interest in the Environmental Assessment Process

One of the biggest obstacles in a proper environmental impact diagnosis and validation is the lack of independence. This phenomenon is not exclusive to Latin America, and it happens due to regulatory weaknesses in the assessment scheme. There are three basic instances that need to be independent in the EIA process: EIS financing, implementation, and assessment, which results in the final decision recorded at the EID.

In most countries, proponents are allowed to directly hire organizations to perform the ESIA. In other words, there is a relationship of economic dependence between those characterizing the project area, estimating impacts and proposing mitigation measures and those interested in the ESIA's approval. This generates an obvious conflict of interest. In terms of assessment, public officers in weak or failed States-such as those of this region tend to work either for the environmental authorities or for the consultant firms developing the EIS or directly for the proponents, due to the lack of job security in the public sector. In other words, there is a serious, almost generalized problem with a *revolving door* that adds to the absence of spaces for independent professional training in corporations and consultant firms in this sector.

Figure 2. Proposal for the EIA process for an EIS, regarding financing sources, implementation, and assessment.



Source: the author



As mentioned above, some consultancies hired to fill technical vacuums in environmental official institutions—universities, think-tanks, consulting firms—have or have had close contractual relationships with the proponent companies headquarters or are close to the sector and are interested in their approval because of the increase in environmental monitoring activities that will be contracted in the near future in this scenario.

For this reason, it is very important that a record of their activities and design of objectives and transparent criteria to contract their services exists. On the issue of conflict of interest, companies should have a more proactive role so that should they know the assigned people to assess the process, they would report if any of them have had any contractual relationship with that company, its headquarters, corporate group, subsidiaries, and so on. This does not exclude, of course, due initial verification on the part of the State.

In many of the universities region—both public and private—it is common for faculties or schools in the areas of mining engineering, soil sciences, and so on, to derive significant funding from mining companies through contracts, collaborations, or agreements (research projects, hiring researchers who work for those universities, etc.). Naturally, all of this requires that there be a good relationship between the mining sector and the universities. While these hiring processes to offer services to external third parties or to provide expert opinions in public processes are legitimate legal activities and correspond to the knowledge areas covered by researchers in these institutions, the serious risk of conflicts of interests cannot be ignored because the more projects are approved, the more opportunities for future contracts and sources of income for universities will happen.

This would, obviously, not be the case if dubious processes were rejected by environmental authorities, hence urgent mechanisms need to be found to avoid this risk, via independent expert audits, technical expert opinions, or the hiring of international experts in these instances⁹.

Publications and Information About EIA Processes

This is a point that has seen improvement in some countries of the region but still requires further development. Despite existing laws in many countries calling for public, transparent information¹⁰, the fact that many of them have signed and ratified the Escazú Agreement, and that environmental information generated through the EIA processes is considered of public interest due to its potential implications for human life and health and, ecosystems, there are many barriers to access such information.

These barriers can be overcome by the proactive, timely, and quality divulgation of information. First, data must be shared and published at the very moment it is received by those performing studies pertaining to a project instead of waiting for someone to request it. Processes of requesting public information are not the most efficient in this region and the time it takes, along with associated costs, makes it difficult for citizens to control. In the case of EIS, complete information should—at the very least—be uploaded onto the respective environmental

authority website as soon as it is submitted by its author. Companies seeking transparency, best practices, and environmental due diligence (EDD) should also publish complete information that includes annexes, models, and processed or unprocessed forthcoming databases on their websites for open consultation. In some countries (Colombia, for example), this only happens in specific cases by agencies or ministries when there is a special interest in the projects (ANLA n.d.). In others, such as Peru, information is usually available, mainly regarding larger types of projects (Ministry of Energy and Mining, n.d.).

The authors of this document consulted websites from various companies with projects in the EIA process or in different operational stages in various Latin American countries. Typically, such sites have executive summaries, basic information about deposits (reserves), and promotional, informational videos on the process of social management, none of which show detailed environmental information that would allow for an impact analysis or the respective and complete EIS¹².

On the other hand, “timely” refers to the timeframes regulated to acquire complete information available to the public so that civil society actors may intervene in the process as per the established terms. Finally, quality contains various components such as having complete information in digital files that can be edited, reused, and processed to facilitate the validation of results.

It could be thought that this theme is only pertinent to States, but in an EDD context, if there is no legal impediment to doing so in the corresponding jurisdictions, companies should proactively publish documents in the EIA process as well as annexes with the aforementioned characteristics for public scrutiny. It would even be desirable that—along the supply chains—such information be an indispensable requisite to consider whether involved actors observe and apply EDD.

Insufficient Standards and Lax Regulations

In the current context, the proponents adapt the EIS to the requirements of each jurisdiction in which they would like to carry out their projects. This means that they abide by the guidelines of the environmental authority in the country in which they are about to operate, which is, in principle, positive. However, one must consider that in weak or failed States, environmental standards are usually very lax or at least more permissive in absolute terms than in countries of the Global North.

A scenario like this implies that companies developing projects in these jurisdictions only have to abide by a fraction of the standards that they must observe in other countries, and, in fact, this is what happens in practice. This is the case of various water and air pollutants whose values exceed those recommended by the World Health Organization (WHO) in many countries. In Colombia, for example, allowed concentrations of PM10 exceed the WHO regulations, and it is projected that even for 2030 they will continue to do so (Ministry of Environment and Sustainable Development, 2019).

9. This does not mean that academic institutions cannot sign contracts with companies or the government. They could still participate in other stages of the process such as project design, prospection, exploration, and so on, and on studies to assess mining potential in individual countries, the characterization of deposits, geochemical analysis, amongst others.

10. For example, Chile: Law 20-285, 2009; Colombia: Law 1712, 2014; Ecuador: Law 24, 2004; Peru: Law 27-806.

11. Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean, signed and ratified by Antigua and Barbuda, Argentina, Bolivia, Ecuador Guyana, Mexico, Nicaragua, Panama, Saint Vincent and the Grenadines, Saint Kitts and Nevis, Saint Lucia, and Uruguay.

12. For example, Fruta del Norte Project, Ecuador (Lundin Gold): <https://bit.ly/3jbWWKs>; Gramalote Project, Colombia, (Anglogold Ashanti): <https://bit.ly/2SuTyqc>.

Abiding by stricter environmental quality standards than those stated in the norms is something evidently voluntary. The problem is that if national regulations are not enough to protect people's health and ecosystems, as it is the case, possible legal actions can be seriously limited or even impeded should risks become real and cause harm. From the perspective of due diligence and considering reference values in specialized organizations such as the WHO—supported by the best scientific evidence available—it would be desirable for companies to abide by such standards and not by those in each jurisdiction.

Finally, it is crucial for individual countries to set clear definitions of environmental liability as well as accurate impact typologies that include sufficient descriptions of their associated costs. In this regard, the concept of *impacts in perpetuity* (A. Ángel, 2019) can help provide estimates of associated costs of certain types of impacts and their prolonged duration. In many countries, the absence of such concepts conceals serious ecological and economic harms that result from mining activity. It is important to emphasize that due to the significance of such impacts, in some cases (like that of not being able to demonstrate that water treatment will not be required in perpetuity) projects should simply not be permitted.

1.3. Community Participation

Citizen participation is fundamental in the context of EIA and, consequently, in the EDD. Such participation should begin even before the exploration stage. In many countries in the region, the environmental licence, which would provide for community participation, is not required for the exploration stages. It is common knowledge that determining mineral deposits requires extended campaigns to gather information—including geologic and geomorphologic cartography, ecological characterisation, and the use of geophysical methods along with massive efforts to collect samples that include hundreds of thousands of perforations to establish—for instance—the gold concentration in a significant number of places and depths within the area of interest.

At this point, a very relevant factor needs to be pointed out when analysing the evolution of environmental conflicts. The decision to perform surveys and explorations in search of minerals and to request mining licences is not only associated with projects with reasonable expectations to be successful, but also with financial speculation based on hoarding large amounts of concessions and the publications of reserve reports, which are usually not so accurate or contain insufficient scientific evidence. This practice of increasing companies' stock value has been favoured by lax regulations to request mining concessions and has sometimes been accompanied by immense corruption scandals and alliances between the private and public sectors to commit crimes, as denounced by the former Colombian Minister of Mining and Energy, Carlos Rodado Noriega, in the corruption case known as “mining titles carousel” or the “mining piñata” (Pardo, A., 2011).

The vast majority of mining concessions requested with the hidden purpose of speculating are never developed as projects. In some cases, this is because the deposits are simply not sufficiently prospective; in others, it is because the companies lack the financial means to develop them, and in still others, it is due to conflicts in the use of soil or their location in areas of special protection or environmental interest. These processes usually have three main outcomes: the increase in the companies' stock values, orphan environmental liabilities¹³ and environmental conflicts.

To better understand the impact scale of exploration in these types of projects, we can use large-scale perforation campaigns as an example. These produce hundreds of thousands of linear meters of accumulated rock samples¹⁴ that are then analysed to define the deposit blocks model¹⁵ and determine the best design for extraction. Such campaigns generate disturbances in the activities of inhabitants of their area of influence; they have the potential to create significant impacts in the local hydrogeologic regimes, and can continue for many years during the exploration stage. All these activities do not count on a robust environmental regulatory instrument in many jurisdictions—as already mentioned—nor do they imply community participation.

Another recurring phenomenon in Latin America is the misuse of participation in social activities to justify project approval. For example, the use of attendance lists for workshops, seminars, and information meetings organized by proponents have been used as evidence of citizenship participation and their implicit acceptance of the project.

Hence, it is very important to highlight that citizenship participation consist of two elements that cannot be equated nor exchanged with one another. The first consists of effective communication or project-related information by the proponent as well as its translation into non-technical language and native languages, truthfully reflecting what is stated in the original document, where they present the uncertainties associated with each identified risk and the estimations performed¹⁶. The second has to do with the indispensable requisite of social license, that is, the free prior and informed consent (FPIC) process for the execution of the project by communities in such projects' areas of influence. It is important to remember that Article 6th of the Indigenous and Tribal Peoples Convention of the International Labour Organization states the need to “consult the peoples concerned, through appropriate procedures and in particular through their representative institutions, whenever consideration is being given to legislative or administrative measures which may affect them directly” (ILO, 1989).

In recent years, a clear example of the need for local participation in environmental decisions in Latin America has taken the form of popular, community election processes (referenda, popular consultation, etc.) on extractive projects requested by civil society organisations.

13. Waste, remainders, or post-mining exploitation products without a visible accountable individual or whose responsible agent cannot manage such waste or remainder.

14. The great majority of large-scale mining projects define the boundaries of deposits through extensive perforation campaigns. Some examples are the mining project in Buriticá, Colombia (Zijin-Continental Gold, 2021) and the Soto Norte mining project, also in Colombia, which gathered geological information from multiple campaigns executed by several companies, and which had participated in simultaneous explorations in the sub-basin of the Suratá River, Province of Santander.

15. Tridimensional estimate on the location of materials of economic interest in a deposit, divided by concentration of previously determined volume units.

16. This effort should also be intercultural, with language being one of its key components. If distinct linguistic communities inhabit an area of project influence, such information must be shared in the native languages of these communities.



Although these mechanisms must go through strict and prior scrutiny to be approved and carried out by judiciary authorities, there are often lawsuits afterwards—initiated by the extractive companies in agreement with public institutions such as ministries and agencies that regulate the extractive sector—on the grounds of principles of coordination among different levels of governance (local, regional, national).

In some cases, the judiciary authorities have denied permission for certain consultations to take place (*El Comercio*, June 30, 2021) due to interpretations of their constitutionality, formulation, or grounds, or other legal considerations, although one should consider that judges' decisions may be influenced by the development of previous processes. In others, high courts have issued sentences with provisions on the decision-making competence among the different levels of government that are unfavourable to the local level. Such is the case of sentence SU-095/18 of the Constitutional Court in Colombia. In others, judicial bodies have declared null and void administrative acts that accept the decisions of such consultations, leaving them without effect (Caracol Radio, 2021).

There have been attempts by states to overcome this situation, with strategies that can be sometimes positive, other times, negative. An example is the coordination and concurrence process that is currently being held by the National Mining Agency in Colombia (ANM). This process involves visits by this organization to municipalities to deal with the issue of permitted soil uses and to offer general information on existing concessions and mining requests, which, in principle, is something very positive.

However, when the authors of this document reviewed data, there were 385 minutes and only 74 of them had held certified public hearings¹⁷. The remaining minutes recorded meetings with municipal authorities, which clearly affect the right to participation. A very important point is that in all the minutes examined, coordination meetings counted on the participation of the mining authority (ANM) and, occasionally, with municipal mining authorities but not with other interested parties, such

as representatives from regional or national environmental authorities and representatives from other economic sectors or ministries/agencies, even though environmental and land/territorial planning issues were discussed, as reflected in the minutes. It is not convenient for just one sector to hold meetings with local authorities—behind closed doors—to discuss issues related to land usage, restrictions, environmental determinants, and so on.

Another finding was the absence of references to the social and ecological impacts of mining and the many positions in favour of mining¹⁸. This portrays an imbalanced perception of this economic activity that may mislead municipal authorities, which is a matter of concern, considering that the minutes include agreements on the areas where a mining project in each municipality could eventually develop. Such agreements could be misused as a legal precedent, should an environmental conflict caused by a mining project take place, precisely to argue for the existence of coordination and concurrence and then to allow them to take place.



Photo credit: Andres Angel

1.4 Conclusions

- Due to the close relationship between EIA and environmental due diligence (EDD), the quality of the former strongly influences the latter. Without solid EIA processes, EDD cannot occur in any case. To guarantee accountability on the part of the supply chains it is necessary for the UE to demand that its companies (purchasers in the supply chain) and companies with activities in these territories consider the weaknesses in the EIA process in each jurisdiction where raw materials are being extracted.
- Ideally EIS financing should be covered by the proponent, but the selection and contracting of the organization implementing EIS documentation should be executed through objective public selection. Such funds should be administered via an exclusive allocation fund.
- Given the huge governability and governance issues in the Latin American region and the very high numbers of environmental conflicts, environmental licences for mineral and oil resource exploration should be a *sine qua non* prerequisite that is part of binding environmental due diligence.
- Proactive publication of the results of environmental impact studies, their annexes, and databases—in editable and reusable formats—must be a condition for all European companies to establish trade relationships with companies extracting raw materials. This would help to significantly increase transparency in environmental licencing processes.
- Effective environmental due diligence cannot exist if the EIA is weak or if it includes serious failures, as evidenced in the region. The same applies to environmental due diligence if companies do not assume an active role in calling on the states to resolve such failures and to make efforts to use the best international standards as a guide, both in relation to human rights and risk mitigation and the prevention of irreversible ecological impacts.

17. Equivalent to just 19.2 percent of the total.

18. No references were found regarding the description of mining risk and impacts. However, there were favourable comments to mining activity such as "The ANM team highlights its interest in promoting mining that builds the nation locally, is responsible to the environment, endorsed by local organizations, authorities, and inhabitants, and that contributes to the region's economic and social development." (ANM, 2020)

2. Independent Monitoring

■ Pavel Aquino and Fabiola Vargas

2.1. Background to Understand Independent Monitoring

Altering the environmental quality of natural continental and coastal water bodies, as well as affecting the quality of the air, soil, flora, and fauna, amongst other issues—due to economic activities—directly violates the human rights of local inhabitants, consisting mainly of communities living within the area of influence of extractive activities in Latin America. This chapter includes several considerations on independent monitoring, understood as an exercise that arises from the initiative of historically affected communities. Such communities have been abandoned by the State; therefore, it is necessary to define proposals intended to promote, implement, develop, and improve this citizenship right we explain here.

First, to talk about independent monitoring, we need to understand that environmental pollution is a huge local problem expanded, at both the regional and global levels, and results from the interaction with various chemical, physical, and biological agents coming from different emission sources, mainly related to extractive companies. Such elements may impact different environmental components, lay waste to farmland, turning it into barren land. For example, the loss of agricultural soil in peasant communities with high levels of heavy metals such as cadmium, lead, and arsenic directly affect their use for agriculture and livestock grazing, the two most important subsistence activities in Latin America. The reports from the Organization for Economic Co-operation and Development (OECD, 2016) alerted that in Chile and Peru economic growth has led to an increase in air pollutants and emissions of particulate matter and gases.

According to the World Air Quality Report (Air Visual and Greenpeace, 2018), five Latin American countries appear at the top of the fifty worst countries in air pollution indexes. Peru is the first from Latin America, with a rating of 21, followed by Chile. We also need to underline the importance of water resources for Latin American peoples; in fact, there are already serious hydric stress problems in the region. Despite the fact that the region contains 31 percent of the world's drinking water, weak hydric governance has led to a high degree of economic insecurity, especially in Mexico, Brazil, Colombia, Chile, Peru, and the Caribbean (Cárdenas, Luis Lujan, 2020).

Regarding this situation, the World Program for Water Assessment (Andean Development Corporation-CAF Inter-American Development Bank, 2015) has raised concerns regarding poor management, corruption, lack of institutions, and bureaucratic inertia in basic services providing water and sanitation. This situation has been exacerbated by a clear weakness in institutional oversight.

Generally, the most critical problems in Latin America are not limited to the environment but include effects on the health of indigenous peoples and local populations in the vicinity of extractive activities. Such is the case of mining in Peru: in May, 2021, Amnesty International presented a research report by Human Rights without Frontiers and the University of Saint-Louis Missouri. Researchers found that inhabitants

of the K'ana indigenous community in the province of Espinar, Cusco, Peru, have high levels of metals and toxic substances in their bodies (arsenic, manganese, cadmium, lead, and mercury) and pointed out that the Peruvian government has failed to guarantee the right to health. These indigenous communities are located in the area of influence of the Antapaccay Expansion Tintaya- Integration Corocchohuayco mining project, which belongs to the Anglo-Swiss multinational Glencore.

Additionally, we warned that the impact of mining activities on the quality of water in rivers and lakes has affected subsistence activities of indigenous people, as was the case of the Uru people, known as the “people of the water” who have lost their means of subsistence (fishing on the disappeared Poopó Lake in Oruro, Bolivia). Some indigenous communities refer to themselves as farm-miners (agromineros). As they have not been able to contain the damage to their lands inflicted by mining activities they have been forced to abandon agriculture and move solely into mining, transportation, or informal trade—a situation that has fractured their ancestral customs.

Consequently, the origins and processes to develop independent monitoring in Latin America are driven by multiple contexts and circumstances, but the main reason behind negative environmental impacts are extractive industries.

2.2 What is Independent Monitoring in Latin America?

Although there is no single, recognized definition of independent monitoring, it may be understood as an integrated process of civil society's participation (particularly of local communities) and that of other actors affected or likely to be affected by any economic activity. Monitoring contributes to creating verification mechanisms to assess environmental impacts on physical (water, air, or soil quality), biologic (flora and fauna), and social factors caused, in this case, by mining activity. It also involves the systematic recollection of monitoring data, their analysis and reporting, aiming at identifying and correct causes and the resolution of known problems.

2.3. Why is Independent Monitoring Important?

In general, community monitoring is important due to its local nature. This condition lends it credibility because if monitors renounce their duty to supervise and denounce, the resulting contamination will affect them as well. Monitoring appears with the actions initiated by individuals that live, work, or survive in the zone where environmental conditions should be monitored.

These individuals know their surroundings and establish monitoring priorities and strategies in order to supervise mining operations. This helps avoid or generate warnings regarding the reduction of possible environmental pollution. Community members performing independent monitoring also aspire to increase citizenship participation and trust, thus complementing functions that should be performed by governmental organizations but are often lacking due to the institutional failure to exert real environmental control on the extractive sector.



2.4. Benefits of Independent Community Monitoring

- Gathering data over a sustained period of time allows communities to be aware of the environmental situation and to record changes.
- It is a tool to counteract highly technical information presented by some companies, aiming at not only characterize the project but in some cases to limit community participation in processes such as FPIC or prior consultation. Independent Community Monitoring is also helpful if companies fail to comply internally with due control and monitoring.
- This becomes a tool for environmental control facing cumulative impacts not so clearly distinguishable in the short term, allowing the identification of modifications or alterations in the mid and long terms, regarding physical, biological, and sociocultural environmental features. Examples of this are the impact of metal sediments on soil or altered water quality in basins due to leakage in tailings or dumps. Other situations included here are variations in river flow, colour, smell, turbidity, the presence of strange materials, and other characteristics.
- Ideally, these become an important source of data before tribunals, even though their validity is a pending issue in many jurisdictions. Data can also be used to support allegations in international advocacy.
- It allows communities to choose how to combine their ancestral knowledge, uses, and customs with technical procedures.
- It allows for the strengthening of local and community capacities based on conceptual foundations and simple methods.
- It promotes a horizontal dialogue with actors in the territories, thus preventing conflicts.
- It encourages companies to act more responsibly in relation to their environmental commitments.

2.5 Which Aspects are Necessary for Independent Community Monitoring?

For successful independent monitoring, it is essential that participants be trained and constantly provided with technical assistance. In Latin America, there are various organizations that perform proper independent monitoring and are supported and trained by specialized NGOs, environmental consultants, and universities. Such is the case of the community transparency monitoring system in Alumbraera (Argentina); environmental auditors in the Salar de Olaroz (Argentina); the environmental defence committee in the municipalities of Colquechaca and Pocoata (Bolivia); water quality community monitors in the Poopó subbasin (Bolivia); the COSAC collective (Bolivia), hydric resource defenders in Donoso (Panama); the participatory environmental monitoring committee in Orcopampa (Peru), and the Caserío de Juprog, Chipta and Cinco Troncos unified committee (Peru)¹⁹.

Independent monitoring exists because of the need to comply with obligations and commitments taken on by the extractive companies in the framework of the formulation and approval of environmental impact



Photo credit: CENDA

Studies processes, even though its implementation is weakly required by the relevant authorities. Some other elements add to the existence for such monitoring:

- Conflicts and negotiations between companies and affected communities, accompanied by NGOs, such as the case of the Poopó basin in Bolivia, with Glencore subsidiaries, mining cooperatives, and communities in the zone, accompanied by Andean Communication and Development Centre (CENDA).
- Agreement between a company and neighbouring communities (not in a conflict situation). An example is the experience of environmental committees in the mining project La Granja, Rio Tinto in Peru.
- An autonomous initiative by the community, State, or company, possibly motivated by an independent study performed by NGOs, universities, or independent organizations, as in the case of Bolivia, with the Environmental Defence Committee in the municipalities of Colquechaca and Pocoata, and Peru, with its Espinar defence committee.

The dynamics usually taking place in independent monitoring are characterized by three features:

1. Leaders in the communities and other local actors participate voluntarily in independent monitoring controlled by the companies, as observed in Peru and Colombia.
2. Monitoring performed by state organizations with civil society participation, such as roundtable dialogues promoted by various governmental organizations, as in Argentina and Peru.
3. The autonomous constitution of social environmental surveillance and monitoring committees consisting of environmental monitors elected in ancestral or peasant community assemblies, such as the experience with the indigenous federation's environmental surveillance on oil extraction, in the region of Loreto, Peru, the forest community surveillance in the Ucayali region without binding effects, in Peru, and the water quality community monitoring groups in mining-affected contexts in Bolivia.

19. [NT] Monitoreo del Sistema de Transparencia Comunitaria en Alumbraera (Argentina); Veedores Ambientales en el Salar de Olaroz (Argentina); Comité de Defensa del Medioambiente en los Municipios de Colquechaca y Pocoata (Bolivia); Monitores comunitarios de la calidad del agua en la subcuenca Poopó (Bolivia); Colectivo COSAC (Bolivia); Defensores de los Recursos Hídricos en Donoso (Panamá); Comité de Monitoreo Ambiental Participativo de Orcopampa (Perú); y Comité Unificado del Caserío de Juprog, Chipta y Cinco Troncos (Perú).

It is very important to consider that independent community monitoring is not only biophysical but also social, political, and cultural and that it "... requires openness, a good disposition to listen to different points of view, an acceptance of the roles of participants and their systems of knowledge and the ability to give credit when needed ..." (COA, 2008 p. 6).

Additionally, independent community monitoring processes not only imply sampling and data analysis but also control activities to enforce domestic environmental quality standards (EQS)²⁰ or international reference standards when these controls do not exist.

The general scheme of the independent community monitoring is shown in Figure 3.

There are institutional experiences of participatory monitoring such as those performed by the national water authority in Peru, an organization responsible for hydric resource management; they perform participatory monitoring incorporating inhabitants in the hydrographic basin, following five stages (see figure 4) that allows them to validate and, especially, to legitimate water monitoring, ensuring that its results serve as a basis for further water management actions in the monitored area. These experiences allow us to conclude that it is possible to work together in water monitoring processes with local communities who should receive full support from the private sector, unconditionally respecting their independence.

Figure 3. General Independent Monitoring Scheme



Source: Percan 2010.²¹

Figure 4. Participatory monitoring process in the surveillance of water resources by the National Water Authority



Source: National Water Authority, Peru (2012)²²

20. The Peruvian General Environment Act No. 28661 defines EQS and LMP as follows: "Environmental quality standard (EQS) is the measure that establishes the concentration or degree levels of elements, substances, or physical, chemical, and biological parameters in air, water, and soil, as recipient bodies that do not pose significant risks for human health or the environment. Depending on the defined parameter, concentrations or degrees will be expressed in maximum or minimum values or ranges". "Maximum permitted levels (MPL) is the measure of the concentration or degree of elements, substances, or physical, chemical, and biological parameters, characterizing an effluent or emission whose excess may cause health issues or damage the wellbeing of human beings and their environment. Compliance is legally binding and enforced by the Ministry of the Environment and organizations conforming the National Environmental Management System. Criteria to determine surveillance and sanctions will be established by said ministry (Government of Peru, 2017)".

21. PERCAN [Peru-Canada] was a technical assistance collaboration between the governments of Canada and Peru to reform mineral resource management in Peru, channeled by the Canadian International Development Agency (CIDA) to the Ministry of energy and mines in Peru, between 2008 and 2011. The figure above is based on the one designed by Renée Ménard in Percan (2010): "Guidelines for the Implementation of Participatory Environmental Monitoring and Surveillance".

22. The national water authority is the organization responsible for hydric resource management in Peru; figure 3 is based on a presentation on water quality participatory monitoring by Ing. Klaus Holzner from the office of quality hydric resource management, October 10, 2012.



However, as populations in Latin America often do not trust authorities, independent monitoring in Latin America has become an indispensable tool for communities and indigenous peoples to identify, control, and monitor the environmental contamination caused by the mining industry. This situation is worsened by the absence of public organizations that supervise and audit environmental performance in mining companies and the very high levels of corruption in public institutions. We believe that it is important to promote and enhance environmental due diligence because of the role that it has in the protection of the environment and surrounding communities. This topic will be elaborated in the following chapters.

2.6. Challenges in Independent Monitoring

- A. Integrating the array of needs around independent monitoring. There is a great variety of spaces and participants to develop independent monitoring. They can be identified by the number of members, resources, representation, and their contractual status with companies and the government, among others. This diversity provides an opportunity, considering the differences that exist in various territories and the diversity of ancestral and local knowledge of their inhabitants. But this factor can be, in turn, challenging when defining the implementation of independent monitoring, turning them into organic institutions able to call for participation before relevant authorities.
- B. Improving levels of representation. Independent monitoring does not always count on enough community representation internally or may lose credibility with the population for an actual or suspected relationship with dependence on extractive companies (via funding and other types of support). The latter issue may generate community mistrust regarding information resulting from independent monitoring as well as tensions and conflicts within the community.
- C. Generating sustainability mechanisms for developing autonomous independent monitoring. The rigour demanded in analytic trials, as well as the accreditation of such trial methods, generates dependence on financial resources to sustain independent monitoring. To date, it has not been possible to identify clear, sustainable, and independent funds to cover independent monitoring budgets in the long run. In the case of Peru, the still active monitoring committees receive funding from some mining companies or receive support from international cooperation, which creates dependence and uncertainty about their sustainability. In Bolivia, these groups are financed by NGOs and research institutes such as CENDA, because these organizations count on these funds to develop environmental research and environmental monitoring. In addition to identifying financial sources, there is also little clarity regarding possible forms and rules of the game needed for efficient implementation and for reducing dependence and co-optation risks.
- D. Defining social and environmental objectives of extractive companies. There is a lack of transparency and knowledge regarding obligations that these companies have as well as difficulties in understanding their environmental management instrument,

because this requires expert technical assistance for communities to understand the technicalities in the environmental impact study (EIS). Likewise, affected communities do not have clear information about the agreements and commitments made over time by the companies regarding their activities. New commitments should be monitored and compromises resulting from the EIS defined and differentiated during independent monitoring. In this way, all commitments are monitored and supervised, while monitoring objectives remain clear.

- E. Strengthening political and governmental advocacy levels. Most government authorities do not involve or invite community members when performing environmental auditing or surveillance activities.
- F. Pressures on capacity building. Communities urgently need to develop technical monitoring capacities due to judiciary processes that require technical evidence regarding impacts caused by mining activities. This condition generates highly disproportionate demands on communities as court decisions determine further actions to be taken by State institutions. It is important to keep in mind that the burden of the proof is still on the party that generates or may generate harm—that is, companies.



Photo credit: CENDA

2.7. Features and Actions to Perform Successful Independent Community Monitoring

As mentioned above, there are several relevant aspects related to terms of independent monitoring. These have been grouped by theme with their corresponding challenges. Some opportunities and recommendations will be elaborated below.

Table 2. Technical pillars, challenges, and sustainability factors and/or opportunities and recommendations regarding independent community monitoring

TECHNICAL PILLAR	IMPORTANT FEATURES	OPPORTUNITIES / RECOMMENDATIONS
Array of needs regarding independent monitoring	Availability of economic resources for training, mobilization, purchasing supplies and equipment, etc.	Establishing State funds to support independent monitoring (with its own agenda and autonomy from the Executive)
Representativeness	Representativeness and credibility before communities by actors performing monitoring	Ensuring community participation and the democratic election of representatives to perform monitoring
Sustainability, impartiality, and transparency	Sustainability mechanisms that allow for the independent autonomous monitoring to take place	- Ensuring financial independence in monitoring activities - Consider monitoring led by community members - Establishing scholarships and programs to enhance monitoring in communities
	Monitoring team consolidation and monitors' commitment	
	Preventing biases when financing comes from extractive companies	Limiting participation of monitored companies only to financial support provided by third parties
Government and political advocacy	Response to State weakness	- Generating spaces for debate among community members, public actors, and businesses - Promoting national and international advocacy processes based on community monitoring data and other evidence gathered by the communities - Promoting the simplification of administrative processes related to environmental claims and opening more spaces for public organizations to attend communities
	Capacity to finance long and complex processes and sort out enormous State bureaucracy	
	Preventing the criminalization of defenders and/or monitors	



TECHNICAL PILLAR	IMPORTANT FEATURES	OPPORTUNITIES / RECOMMENDATIONS
Institutional and scientific legitimacy	Technical and scientific support	• Institutionalising monitoring committees through their accreditation by laboratories or scientific and academic institutions • Comparing data with national and international standards • Recognising plurality in the communities' ancestral practices and systems of knowledge. • Creating real-time databases that are accessible to the population • Strengthening training for monitors and data gatherers
	Data validity for legal processes	• Consolidating independent monitoring as a requisite in each country • Validating and comparing data gathered with local regulations • Recognising homologated case-by-case data in strategic litigation as part of baseline studies

With the purpose of offering some concrete proposals to both officials and companies, we will elaborate on some of the previous recommendations aimed at improving independent community monitoring practice. Following are the most relevant:

A. Strengthen Independent Community Monitoring Representativeness

- States should enhance the formal structuring of organizations of independent monitoring initiatives to establish permanent communication with relevant governmental organizations. This would formalise mechanisms with rotating participation and democratic elections among their participants, defining clear functions among members to perform monitoring processes, ensuring diversity and the full participation of people trusted by the communities.

B. Promote Sustainability, Impartiality, and Transparency

- Both the state and companies should guarantee independence when funding monitoring activities. It is advisable for public organizations and international cooperation to establish environmental funds with resources from companies, States, NGOs, and international cooperation to cover the costs of these initiatives with a transparent and efficient administration.

This includes payment to monitors dedication of time, permanent scientific consultancy, the purchasing of sampling equipment and its frequent calibration, delivery and analysis of lab samples, and so on.

- Independent monitoring must always be led by community members along with authorities in charge of environmental surveillance. Companies should only assume the role of supporting the process when necessary.
- The State (directly or with resources from the companies) should establish scholarships or other incentive programs involving secondary school, technical, and university students in monitoring, as well as sharing the results in their communities, as a requisite to access academic benefits.

C. Promote Political and Government Advocacy

- Governmental organizations in Latin America should promote meeting spaces for independent monitoring committees to diagnose local community priorities. These priorities should be considered and responded to in coordination spaces created with public organizations and private companies.

D. Institutionalize Independent Community Monitoring

The National Basins Plan in Bolivia includes among its strategies the implementation of quality monitoring systems in water bodies in strategic basins, involving participatory monitoring and environmental surveillance by civil society organisations.

To respond to this strategy, in 2015 the Vice-ministry of hydric resources and irrigation, together with the NGOs CENDA and Agua Sustentable, worked on the conformation of monitoring systems in Poopó, Pazña, and Antequera, all located in the Poopó Lake basin. In contrast to other cases, civil society was prioritized here; prior to this joint effort, the Vice-ministry used to define all the elements in the monitoring system. Whereas here participatory work was implemented.

Because of the enhancement of water community groups, the main change in this scenario was that municipal officials began to perform water quality control—together with members of the civil society organizations whose monitoring teams and capacities to

control reliable data generation resulted in the beginning of compliance with the rights established in the Regulations in Matters of Hydric Pollution (Law 1333, Bolivia) (CENDA, 2017).

- Civil society organizations (directly) or the State (through the management of public funds financed by companies) should provide the necessary resources for monitoring committees to function. This can be performed by allotting a percentage of the ground or surface rent, or mining title payments, to said entities.
- Civil society organizations should facilitate the necessary calibration of monitoring equipment in independent laboratories. Additionally, public organizations must promote scientific and technological innovation for better control and surveillance and adapt knowledge to the needs of the communities.
- Authorities that promote participatory or independent monitoring should acknowledge the organizational and cultural diversity of all independent monitoring members, incorporating ancestral and local knowledge in their management. Moreover, they should use alternative technologies and knowledge to improve outcomes in monitoring activities.
- In case a community implements independent monitoring, they should know that, technically, such processes must be performed before, during, and after (closure and abandonment of) the mining activity, allowing for proper planning and sustainability of the entire process with the participation of community members.
- Independent monitoring must be performed throughout the entire extractive/economic activity's cycle. In the case of mining or oil activity, it includes the exploration, extraction, and closure/abandonment stages, as well as the environmental liability that could have been generated.
- There must be recognition of and support to independent monitoring on the part of authorities and companies.
- State and civil society organizations should promote the constitution of independent monitoring networks with resources for their technical support and capacity building to duties of

coordination, training, exchange of best practices, amongst other issues.



Photo credit: CENDA

- Some independent organizations (such as Global Water Watch) could define criteria for certification and technical accompaniment of independent monitors. This can be accompanied by public organizations working with cooperation agencies that may provide training, logistics, and other requirements to reach such certification.
- A national, regional, and local database of independent monitors or their organizations should be created. If possible, public access to data published on digital platforms should be enabled.



Photo credit: CENDA



E. Strengthening Independent Monitors

- Training and technical assistance by international organizations, independent universities, inter alia, should be provided so that independent monitoring can fully perform its duties.
- These institutions should help create and share guidelines or protocols that facilitate adequate independent monitoring performance. State and company participation should be defined by the communities.
- The financing mechanisms mentioned in the second point in point d) could apply to this purpose.

F. Legal Validity of Monitoring Data

- Independent monitoring should be consolidated as a governmental requirement in each country to control those performed by companies or to identify when such monitoring is not carried out.
- The State, with the participation and consent of civil society—especially communities and independent experts—should issue norms to control independent community monitoring, generate quality standards, and provide them with legal validity so that these can be used in litigation.

The Poopó basin is one of the most polluted in Bolivia due to mining activities. Both State and transnational private companies, as well as cooperatives extract several tin, silver, lead, zinc, and other deposits. Given to the lack of control and compliance with current regulations by mining businesses, most rivers in the zone are polluted (CENDA, 2014).

In this scenario, the active participation of democratically elected members from ancestral indigenous organizations was promoted. They were trained in the use of portable water quality analysis kits and in the interpretation of results, with a focus on the co-participatory care for basins. With practice and periodic data generation, community water quality monitoring became a citizenship science tool for legal cases to be submitted before the State bodies and the mining companies. The implementation of improvements in water treatment since 2018 resulted in better living conditions for the population.

“Monitoring is important for us, precisely because—where we live—communities are affected by mining pollution. We have been denouncing this situation, but nobody pays attention. With time, CENDA could implement these monitoring plans for the community; we now have more capacity to monitor. Workshop after workshop, we have learned to monitor water because it is necessary to know about water quality, what elements are polluted, and based on this, we have the necessary documentation to file complaints.”

Abel Machaca, Water Monitor, October 15, 2014

3. An Example of the Need for Binding International Reference Standards

■ Pavel Aquino

Relaxation of Environmental Standards Promoted by Private Investment in Latin America

Environmental standards help protect ecosystems and human health, which are usually affected by the mining industry. In Latin America, each country has defined its standards by generally following those issued by the WHO, the United States Environmental Agency, or the European Union, amongst others. Nevertheless, some countries have decided to modify and/or update their standards, but instead of adhering to environmental requirements, they have made certain parameters more flexible, particularly those closely related to the mining industry, (SERVINDI, 2014) such as arsenic, cadmium, and mercury concentrations.

For example, in 1969, the first environmental quality standards for water were passed in Peru under Supreme Decree No. 261-69 AP. Among the parameters regulated was arsenic²³, with a maximum value in water of 0.2 mg/L. Twenty years later, after a long period of consultations and discussions, the State modified this parameter to meet a more rigorous standard, defining the value of 0.05 mg/L, in 2008. This measure guaranteed better protection of water quality and thus human health. However, in 2015 the Peruvian state modified the former environmental water standard for arsenic with a more flexible 0.2 mg/L—four times the previous concentrations. This decision was made despite serious criticism by civil society groups concerned over the relaxation of these environmental regulations. At that time, these changes were known as the “environmental paquetazo” [cheating]; Mora, C. (2015), implemented to promote private investment. Currently, this relaxed value still remains, as observed in Figure 5.

Another example of relaxed standards can be observed in the parameters for cadmium, which were increased five times. In other words, the standard was 100 percent more flexible for arsenic contamination than the previous standard, as seen in Figure 6.

The relaxation of environmental standards approved by the Peruvian government have, in practice, favoured mining companies previously subject to more demanding control measures on polluting substances. It should also be mentioned that such relaxation was motivated by business interests. A specialized team of independent journalists (CONVOCA) identified many companies that benefited from this as they no longer had to pay fines for violating environmental standards (CONVOCA, 2015). According to the National Ombudsman’s Office (2021), Peru has the highest concentration of socio-environmental conflicts, representing 65 percent of all conflicts nationally. In fact, the data from the ministry of energy and mining in Peru (represented in Figure 7) shows for instance, that the Mining Company Volcan, operating in a polymetallic mine in the central region of Peru, permanently violated such QES for arsenic. This was established when comparing their environmental monitoring on arsenic with the 2008 regulation. However, according to the new, relaxed QES, this company was no longer violating environmental standards.

Figure 5 Peruvian Historic Standard Variation of Environmental Quality for Water - Arsenic²⁴ for Irrigation

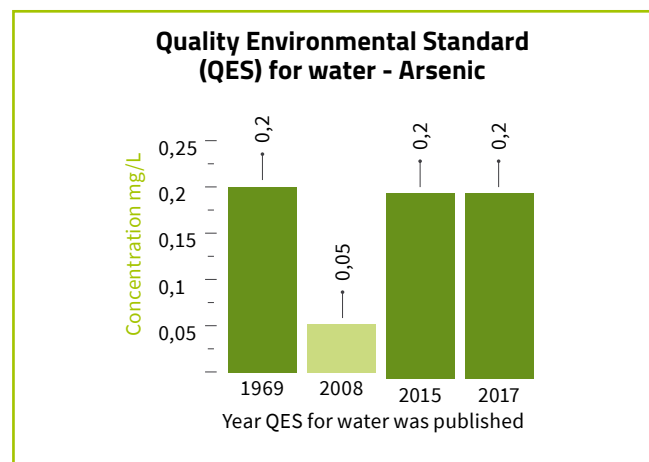


Figure 6 Relaxation of the Quality Standard for Water - Cadmium

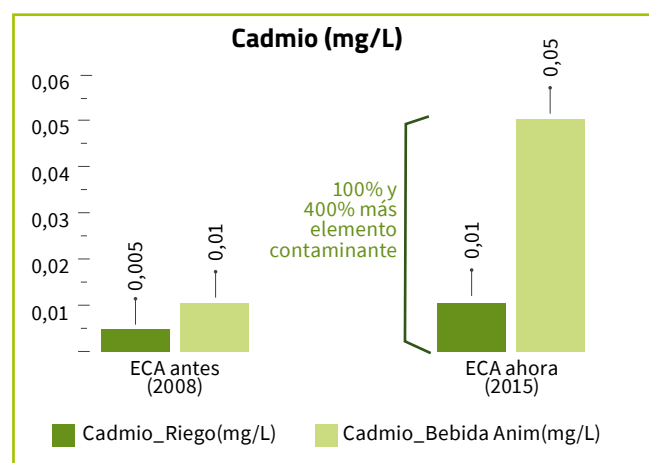
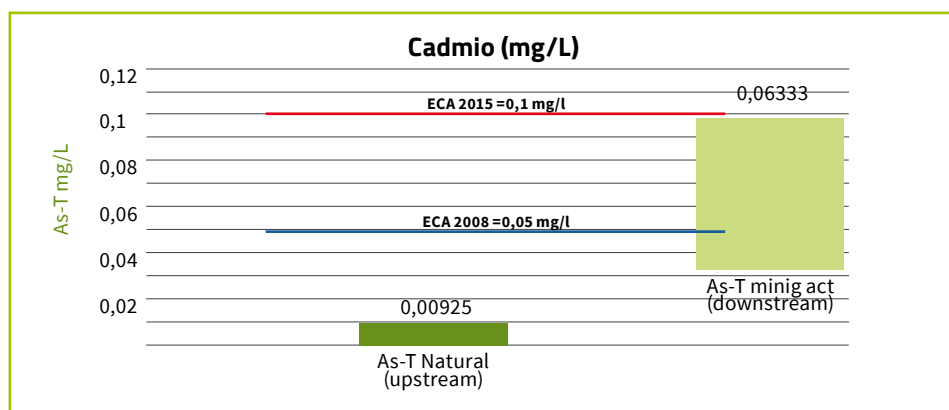


Figure 7 Comparison: Stricter QES (2008) vs Flexible QES (2015) for arsenic in a mining business in Peru



23. In large doses, arsenic is poisonous to human beings. Lower levels of inorganic arsenic produce stomach and intestinal irritation. Ingesting small quantities of inorganic arsenic reduces the production of white and red globules, which generates fatigue, cardiac arrhythmia, and neurological damage. According to the US Environmental Protection Agency and the World Health Organization's International Agency for Research on Cancer, arsenic is considered a carcinogenic substance (US-EPA 207, IARC, 2007).

24. This figure was made based on Peruvian legislation approved in different times: Supreme Decree N° 261-69 AP (1969); Supreme Decree N° 002-2008-MI-NAM (2008); Supreme Decree N° 015-2015MI-NAM (2015) and Supreme Decree N° 004-2017 MINAM (2017).



Consequently, we believe it is very important for the European Union to establish binding environmental due diligence related to international or European standards to maintain the most demanding environmental standards and to prevent companies or governmental initiatives from tampering with them. In other words, to avoid environmental regression.

4. Environmental Human Rights & Safeguards for the Legislation Process on Due Diligence

■ Juan Diego Espinosa

4.1 Introduction

Approaching environmental issues in business projects, works, or activities implies a thorough understanding of an array of permissions, concessions, licences, and environmental authorizations subject to different environmental management, control, and sanctioning instruments by authorities (and tribunals), as per domestic jurisdictions. For this reason, due diligence in environmental issues must be seen from the perspective of a complex network with different emphases and dimensions²⁵. This refers to the principle of the State's duty, as main guarantor, to legally ensure each and every individual the full and free enjoyment of their human rights. In other words, the State should act with due diligence.

Due diligence can also be defined as the specific behaviours countries demand from companies. In this regard, the UN Guiding Principles on Businesses and Human Rights and the OECD Guidelines²⁶ on the duty to protect human rights (including environmental ones) have already been considered. Therefore, due diligence is a State obligation in the framework of soft law,²⁷ which is an issue that is becoming relevant in the field of international Human Rights Law. Soft law is particularly useful as an operational principle for companies' responsibility to respect human rights, with characteristics specific to the economic sector in which they operate, irrespective of their size, but acknowledging the fact that the activities and supply chains of larger companies like, transnationals, can have broader impacts on these rights.

The European Union has become a point of reference in this matter. The European Parliament's resolution that the European Commission legislate due diligence in supply chains has made it more likely for such regulation to have positive effects on the environment. This is because several international frameworks, especially the Inter-governmental Panel on Climate Change, have pointed out that it is impossible to sustain life on the planet if the environment is not respected. In Latin America, indigenous peoples are particularly sensitive to this issue given their long-held belief in a close relationship between nature and human life.

Consequently, outlining the extent of environmental due diligence in this broader interpretation framework implies the need to insist on the link between human rights, environment, and development.

However, as reflections in previous chapters have suggested, regulatory, fiscal, and judicial weaknesses in environmental impact assessment as well as environmental information systems in Latin America make it difficult to guarantee human rights and a healthy environment. We are facing contradictory judiciary bodies that do not communicate with each other or that prioritize the right to investment and private property over collective and environmental rights, among other aspects. In other words, it is mainly a matter of reviewing the State dimension of due diligence as a condition for regulatory norms to which companies should adhere. At the same time, these regulations must be questioned given the absence of a proactive role on the part of companies to abide to due diligence standards (which should be even higher) in order to guarantee social, economic, and environmental rights are respected, such as rights of access to information and participation in environmental matters to prevent impacts on basic rights.

To elaborate on this discussion, the tensions between the implication of European legislation on due diligence and the possibilities to implement it in Latin America, particularly regarding companies whose headquarters are in Europe, allows us to contrast the progress and contributions taking place in Latin America. For example, it is worth noting that in the Inter-American System of Human Rights (IASHR) there have been several judicial decisions and expert opinions by the Inter-American Human Rights Court (IAHR Court), as well as thematic reports, public hearings, protection measures, and recommendations adopted by the Inter-American Human Rights Commission (IAHRC), interpreting the American Convention on Human Rights (ACHR) that allow for the identification of a series of general legal and public management standards, necessary for the executive power to implement on this matter. These could improve environmental protection as well as that of communities inhabiting territories that are in conflict due to the creation or expansion of economic projects.

25. In corporate environmental law both environmental norms and civil trade law, also require due diligence processes.

26. OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas: <http://mneguidelines.oecd.org/mining.htm>

27. From the progressive and incremental focus, soft law contributes to the development of international regulations. Additionally, the OECD Guidelines for multinational corporations, for example, are binding for member States and should be applied to companies; hence, the volunteer nature of such an instrument is relative or partial. In the same manner, rules, frameworks, declarations, guidelines, resolutions, codes of conduct, and action plans are usually considered to orient public policy. Thus, there is a margin for application of these voluntary rules, without overlooking the differential possibilities of judicial application (national or international legal standards), which is not insignificant because they can be taken as additional criteria for the administration of justice.

4.2 Progress and Contributions from Latin America

The Inter-American Commission on Human Rights (IACHR), with its Special Rapporteur on Economic, Social, Cultural, and Environmental Rights (REDESCA, for its Spanish acronym) has recommended that countries in the region “adopt legislation that enforces special binding dispositions on the duty of business due diligence in matters of human rights” (IACHR, 2019), assigning companies the duty to:

[...] have appropriate due diligence policies and procedures in the area of human rights within their operations, corporate structures, and supply chains In particular, they should create appropriate safeguards to respect the rights to prior and informed consultation and consent as to the self-determination of indigenous and Afro-descendant peoples as well as the right to a healthy environment. (IACHR, 453-1).

This recommendation is central when analysing environmental conflicts arising from collectively owned territories inhabited by peasant farmers, indigenous peoples, and those of African descent in Latin America. In those territories, environmental legislation has even established national parks, now overlapping with their traditional and ancestral uses and with extractive projects such as oil, gas, coal, metal mining, agribusiness, or energy, particularly with hydroelectric power plants that cause forced displacement of the population and the loss of traditional livelihoods.

Similarly, highlighting the reports of the UN Special Rapporteur on human and environmental rights, the IAHR-C has stated that one of the contexts that deserves special attention in the Americas, regarding companies and human rights, is environmental harm and degradation, as this requires countries to ensure “through their institutional and normative institutions that private actors do not undermine efforts against climate change and take responsibility for environmental harm generated, be it at the locally or transnationally” (IACHR, 2019, par. 49) and to:

[...] ensure that companies avoid causing or contributing to a negative impact on human rights through environmental damage in general and, climate change, in particular. Companies must face these consequences when they arise and exercise due diligence, including environmental adaptation and mitigation measures, to prevent infringements upon human rights directly related to operations, products, or services provided in the context of their commercial relationships that cause harms to the environment (IACHR, 2019, par. 250).

It is also worth mentioning that the IAHR Court acknowledged that the human right to healthy environment intrinsically protects nature²⁸ and its components “such as forests, rivers and seas, as legal interests in themselves, even in the absence of certainty or evidence of a risk to individuals” (IHR Court, 2017). This jurisprudential argument is relevant in climate action considering the legitimate concern of European organizations²⁹ regarding how insufficient it would be to demonstrate a causal nexus between serious environmental harm and impacts on other rights³⁰.

Moreover, the Inter-American criteria regarding on business and human rights about the human right to a healthy environment establishes that:

[...] companies, in the context of their activities and commercial relations, should bear in mind and respect the right to a healthy environment and the sustainable use and conservation of ecosystems and biological diversity This includes ensuring and respecting, at minimum, all environmental laws in effect and inter-national standards or principles on the subject; launching due diligence processes regarding the impact of the environment and the climate on human rights; ensuring access to environmental information, processes for participation and accountability, and effective reparation to victims for environmental degradation (IAHR-C, par. 46).

These standards had been highlighted in the IACHR 2015 report on indigenous peoples, African-descent communities, and natural resources; concerning the protection of human rights in the context of extraction, use, and development of mining, oil activities, regarding the duty to prevent, mitigate, or suspend negative impacts on human rights, stating that the “traditional environmental approach is insufficient” and, therefore:

[...] specific impacts of a given project should also be assessed in light of general international human rights standards, including an evaluation of the concrete rights which can be affected, undermined, or otherwise restricted. In other words, the main concern of the IACHR is that criteria and procedures to ensure a human rights-oriented analysis of the impact are included in the decision-making process (IACHR, 2015, par. 89).

In a similar manner, the IAHR Court established in the case of the Saramaka People vs. Surinam that “one of the factors that should be dealt with by the social environmental impact study is the cumulative impact generated by two existing projects and those to be generated by other projects being proposed” (IAHR Court, 2008, par. 41).

Those weaknesses regarding environmental impact assessment already mentioned in previous chapters are also correlated to the Inter-American context. Thus, the IACHR has expressed concern regarding surveillance and auditing duties in matters of extractive, and development activities: “the lack of supervision in the application of existing norms may create serious problems with respect to the environment that translate into violations of those human rights protected by the American Convention” (IACHR, 2015, par. 98)

The IACHR has explained that,

[...] compliance with the duty of prevention is closely linked to the existence of a coherent system of supervision and control in host countries to encourage the various actors involved to avoid infringement of the rights of the population in the area in which they operate. This duty of prevention and supervision is also applicable to the countries of origin for the activities of its companies and nationals abroad, during the implementation of extractive activities (IACHR, 2015, par. 98).

This duty should include, according to the IACHR, the obligation of prior impact assessment to allow for relevant authorities to,

[...] have information on specific concerns of potential human rights impacts that may guide the effective fulfilment of the duty of supervision and control. It also considers that these effects on the environmental legislation is one of the most relevant. However, with respect to environmental concerns, as noted above, while many countries in the region have a normative and institutional apparatus in place that requires compliance with certain

28. This is in line with constitutional developments in the region (Bolivia and Ecuador) and recent decisions made by supreme constitutional tribunals in Argentina, Brazil, and Colombia, among other countries.

29. See Krebs, D. *Environmental Due Diligence in EU Law Considerations for Designing EU (Secondary) Legislation*, German Environment Agency. Text 97/2021.

30. This comes from a restricted vision of the human right to a healthy environment.



environmental parameters for the approval or authorization of activities that may affect the environment, only a few contain adequate and effective mechanisms to continuously monitor these activities throughout the project implementation. The IACHR is concerned due to information received about the lack of action by countries to effectively implement the existing provisions and, where appropriate, impose sanctions or corrective action against noncompliance, as well as the lack of mechanisms to conduct periodic assessments (IACHR, 2015, par. 103).

On the other hand, REDESCA has highlighted the relevance of an instrument resulting from debates on the application of Principle 10th of the Rio Declaration, in line with the Sustainable Development Goals (SDGs) at the Inter-American context, known as the Regional Agreement on Access to Information³¹, Public Participation, and Access to Justice in Environmental Matters in Latin America and the Caribbean, adopted in 2018 and known as the Escazú Agreement³². This instrument, promoted by the Economic Commission for Latin America and the Caribbean (ECLAC), the primary organization addressing issues related to development, constitutes an attempt to implement Principle No. 10 of the Rio Declaration on Environment and Development.

This agreement that came into effect in 2020—after being ratified by twelve countries in the Americas—incorporates the principles of non regression, progressivity, and *pro-persone* (as some experts have stated, the latter would require conventionality control with regard to the ACHR), as interpretative criteria adding to the extended doctrine and jurisprudence developed by the IACHR and the IAHR Court to guarantee the protection of human environmental rights.

In this scenario, it is relevant to emphasize that due diligence methodology, process, and tools, as defined by the Organization for Economic Co-operation and Development (OECD), are key in consolidating the rights of access to environmental matters, although this is not an end in itself, nor does it necessarily guarantee that human rights are not violated, as this scenario involving multiple actors has confirmed. For example, the duty to guarantee mechanisms for effective participation and access to information³³ is emphasized as a fundamental right protected by art. 13 of the ACHR and art. 4 of the American Declaration on which the IAHR Court has stated in the case *Claude Reyes and others vs Chile* that the State authorities were governed by: “the principle of maximum disclosure, establishing a presumption that all information requested is accessible subject only to a narrow system of exceptions.” In the application of that principle, this same document states that, “the access to information law should, to the extent of any inconsistency, prevail over other legislation” (IAHR Court, 2006).

Moreover, the IACHR has stated that when the exercise of people’s fundamental rights depends on their access to relevant public information, the State must provide it in a timely, accessible, and comprehensive manner, even if this implies displaying information related to activities by private companies (IACHR, 2015, par. 114) because, according to this Commission,

[...] one of the major obstacles that individuals and communities face when trying to access justice for human rights violations related to companies is the lack of information on their activities, structure, and impact, as well as the options for redress. It is common for people living in affected areas to lack basic information about the business activities carried out locally and the potential risks to their lives. The lack of information on corporate operations can make it very difficult for affected people or communities to gather the necessary evidence to take legal action. It can also make it challenging to establish the causal links between corporate operations and the negative impacts on human rights that they suffer. Therefore, the failure to obtain or disclose information affects the right to an effective remedy (IACHR, 2015, par. 115).

Consequently, the Commission has stated, “access to information is a prerequisite for public participation in decision-making and for individuals to monitor and respond to public and private sector action (IACHR, 2015, par. 115). On the other hand, public participation is protected by art. 23 of the American Convention of Human Rights (ACHR), which establishes that all citizens must enjoy the right “to take part in the conduct of public affairs, directly or through freely chosen representatives” and, in Article XX of the American Declaration (right to vote and participation (IACHR, 2015, par. 115).

4.3 Dialogue with International and European Instruments

These regional contributions by the inter-American system also dialogue with other international instruments at the global level. For example, in the European framework, the Aarhus Agreement³⁴ stands out; this instrument precedes and is similar to Escazú. Additionally, there are other standards within the universal human rights system such as those developed by the Special Procedures of the Human Rights Council, with a focus on the multiple reports by the Special Rapporteurs on Human Rights and the Environment or the Committee on Economic, Social, and Cultural Rights (CESCR), a treaty body for the International Covenant on Economic, Social, and Cultural Rights (ESCR Covenant), with relevant contributions³⁵.

European legislation seeking to regulate corporate environmental and human rights due diligence faces important challenges in Latin America, a region characterised by the judicialization of public policy. In terms of its process dimension, it would be expected for such legislation to contribute to materialising Inter-American standards for companies and countries to implement all the corrective measures necessary to mitigate, reduce, or eliminate environmental risks in their operations, supply chains, and commercial relations. That is, to implement—in an effective and sustained manner—the principle of precaution, aiming to strengthen it if the European Union demands effective due diligence compliance.

Furthermore, beyond technical environmental parameters³⁶, mandatory in human and environmental rights due diligence would contribute

31. A contextual and situated analysis of the national security clause as a possible scenario to deny access to environmental information deserves attention, as the arbitrary use of the figure of public interest by States in the region to impose extractive projects to the detriment of environmental human rights.

32. As for its entry into force, the European Union could promote with Latin American countries, the ratification of this instrument at the diplomatic level to ensure better conditions for due diligence in the supply chain.

33. It is important to clarify that this is closely related to the Universal Declaration of Human Rights, art. 19, and with the International Covenant on Civil and Political Rights (art. 19) stating that freedom of expression includes the right to “look for, receive, and share information;” hence, the contributions by the IACHR Special Rapporteur for the Freedom of Expression are relevant as well.

34. Henry Jiménez-Guanipa from RICEHD has pointed out that the guarantee to access to justice in Aarhus “are only intended for cases of violations of rights directly related to access to information and participation. Contrarily, Escazú not only guarantees the same assumptions, but extends them to “any other action or omission adversely affecting or that could affect the environment”. (art. 8), which opens the possibility to invoke other principles of environmental law such as in *dubio pro natura* and in *dubio pro aqua*, already cited in a very innovative manner at the Supreme Court of Justice in Argentina in the *Majul Julio Jesús vs. the Municipality of Pueblo General Belgrano and others s/ environmental protection measure*” (Jiménez-Guanipa, 2020).

35. See: Special Rapporteur on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment. Report A/HRC/31/52. 2016 and A/HRC/37/59.

2018; The UN Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health Report A/HRC/32/23. 2016; CESCR. General Observation 24. 2017. Human Rights Committee, General Observation 36, 2018.

36. Quality environmental standards are mentioned in other chapters..

to strengthening project follow-up and monitoring, as well as works and activities with environmental impact, from the perspective of its impacts on the livelihoods of local communities. This impact perspective is one of the biggest weaknesses in the region in matters of environmental management because, as pointed out by the IACHR, it is important to “recall that actions aimed at protecting the right to a healthy environment not only mean a formal recognition of this right, but should also be accompanied by compliance and effective application of its content (IACHR, 2019, par. 243)³⁷.

Because of the inefficiency of judicial resources³⁸, it would be expected that due diligence as a process also contributes other elements to litigations seeking to promote prevention of irreversible environmental and ecological harm, transparency in licensing processes, or ecosystem restoration and/or community redress. Also, regarding due diligence as a tool, this could help judiciary bodies to interpret and create solutions that may offer an integrated view of environmental human rights and that favour the implementation and implementation of judicial decisions related to company operations.

4.4 Conclusions

In a consultation sponsored by the Heinrich Böll Stiftung undertaken to support the strengthening of IACHR's REDESCA, Diana Murcia, consultant to the Business and Human Rights Resource Centre (BHRRC) has stated:

[...] communities use judicial action thoughtfully; they frequently resort to administrative, constitutional, and legal action and exhaust such spaces. Each one of the processes may take years to resolve and, in many cases, receive negative verdicts. When they receive a favourable decision, they face difficulties in its implementation, as authorities rarely follow-up on the decisions that benefit affected individuals and communities. But when it comes to favourable decisions for companies, they proceed diligently to force displacement to the detriment of affected communities (Murcia, 2020).

Thus, State and company action should prevent environmental impacts and avoid incurring human right abuses or violations, based on the assumption that due diligence is relevant in the Latin American context and could consolidate a higher degree of coherence between business practices and State public policies on environmental matters—with Inter-American environmental due diligence standards, for example, in terms of the National Action Plans on Business and Human Rights.

In summary, strengthening the binding component of inter-American due diligence criteria through the incorporation of these new perspectives in the current discussions taking place in the European Union could mean transcending the discourse of “voluntary actions”, regarding business and human rights, promoting the integrated use of due diligence processes related to environmental human rights, and establishing—through additional and reinforced requirements—the obligation for companies to promote environmental and human right due diligence, particularly those referred to the supply chains in mining and other goods extracted from community territories in Latin America.



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37. IACHR, 2019. *Report on Businesses and Human Rights: Inter-American Standards*. November 1.

38. In matters of environmental due diligence, Jiménez-Guanipa rightly points out that “judicial taxes, lawyers' honoraria, expert costs, sureties and guarantees constitute a list of possible impediments for citizens to have access to environmental justice (Jiménez Guanipa, H. 2020).



5. Possible Challenges and Negative Impacts in Environmental Due Diligence

■ Andrés Ángel

As pointed out by the BHRRC, human rights due diligence is mandatory. Companies cannot choose whether to respect human rights or not; therefore, they should define protocols to prevent any violation from happening and take immediate action should any violation occur. Considering the close relationship between the health of ecosystems and people, a self-evident truth repeatedly articulated by the Inter-American Court on Human Rights is: “there is an undeniable relationship between the protection of the environment and the realization of other human rights³⁹”.

It is also evident that not guaranteeing the right to a healthy environment in binding environmental due diligence requirements would significantly increase the risk of impeding the effective exercise of other fundamental rights, in the context of extractive projects. The first challenge is to acknowledge this link and to establish mandatory environmental due diligence as a priority.

However, it is important to underline that certain elements need to be considered for due diligence to be implemented. First, it is necessary to reiterate that binding environmental due diligence is not a substitute for the EIA process, nor does it entitle companies to acquire social license or substitute any other tool that helps generate responsible processes. On the contrary, as environmental due diligence provides a framework within which all companies should operate, each of these processes is a *sine qua non* part of environmental due diligence.

It is also worth mentioning that environmental due diligence is not a one-time task fulfilled as a requisite. It is a process and a condition that needs to be validated and maintained daily, without interruption, throughout the project’s lifespan, and can be lost when one of its



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constituent elements fails. Therefore, a mining project cannot begin with extraction if there are founded and demonstrable questions about the EIS quality, on the citizenship’s participation during the EIA, or the assessment and delivery of the IAD by the environmental authorities during the environmental licensing stage.

During the project implementation, any failure to report on the progress of the impact assessment, environmental monitoring data in different matrix indicators—including unforeseeable and involuntary violations—omissions in the periodic update of the environmental management plan, amongst other issues, should be considered breaches of the basic principles of environmental due diligence.

A third challenge appears when applying mandatory environmental due diligence standards to actors in their different capacities. It is important to highlight that a differentiated focus be established in order to guarantee equality in its application. Larger companies have sufficient capacities to abide to all the requirements defined in mandatory due diligence within a short timeframe, while smaller companies may require additional support in the transition.



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39. Consultative Opinion CO-23 (2017) par. 47; *Kawas Fernández vs. Honduras* (case 2009) par. 148, and others.

Ignoring this could create scenarios in which only the larger companies may develop their activities and trade with their products. Evidently, this is a decontextualized exercise regarding inequalities prevalent in failed or weak States and that affects smaller production units or modest companies. A negative consequence of mandatory environmental due diligence legislation could be the concentration of economic activities and its associated social impacts (company bankruptcy, loss of jobs, the generation of monopolies, etc.).

Moreover, it is just as important to attach an environmental aspect to the concept of human rights due diligence as to prevent environmental protection measures from not being implemented, which negatively impacts human rights. This means that environmental protection cannot generate the marginalisation of people inhabiting areas in proximity to extractive activities. In terms of identifying risk sources and other processes associated with due diligence, it is important to note that when performing such an analysis a wrong sense of security may be given to the interested parties. As presented above, due diligence does not include all possible impacts and is closely related to other instruments. It is crucial to recall this when providing expert opinions on the usefulness, sustainability, pertinence, opportunity, legal considerations, and other features in the project. This situation can occur when, for example, the EIA process chooses an incomplete validation methodology. For this reason, environmental due diligence must be performed by multiple actors to allow for permanent deliberation and surveillance in order to minimize possible failures.

An environmental due diligence should mean that mining extraction cannot take place in regions where the negative impact is significant.



6. Executive Summary

- This study emphasizes the importance of mandatory legislation for companies to comply with environmental aspects in addition to human rights along their supply chains.

This is important to: 1) protect ecosystems, even if there are no immediate impacts on human rights; 2) prevent human rights violations resulting from environmental contamination caused by corporations; 3) increase the likelihood of holding corporations accountable and to provide victims access to justice and remedies. By closely engaging with communities living near mining sites, the authors have identified various ways to implement mandatory environmental due diligence on the ground, using the experience of the mining sector. This can be useful both in drafting legislation and considering its practical implementation. Thus, this document may serve as a valuable reference for policymakers, companies, 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 long neglected.

On the 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, on its independence and on community participation, although these conditions are rarely achieved simultaneously. 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 established and implemented by individual countries to their benefit. For example, in the framework of environmental due diligence, criteria developed in assessment instruments should be enforced by those companies purchasing minerals from mining companies along their supply chain. Finally, this document identifies major differences among national legislations and points out that most of them do not

have standards of quality for environmental impact assessments.

Regarding **independent monitoring**, this 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 the contamination of drinking water or soil—are not denounced or are minimized by companies, which 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. This document elaborates on how serious this situation has become due to the absence of supervision and control by public organizations over mining corporations, resulting in a severe credibility crisis as communities do not trust such public entities. Hence there is a 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 track changes. It empowers communities in those cases where companies submit technical information limiting community participation in processes such as FPIC and prior consultation or when companies do not comply with their own control and follow-up processes. The scientific data can help communities denounce the problems and initiate legal processes. It promotes a horizontal dialogue among actors in the territories and consequently helps prevent conflicts and incentivises companies to act more responsibly and accordingly to their environmental commitments.

At the same time, empowering local communities plays an important role in preventing environmental harm that results in human rights violations and conflicts. Community empowerment should be promoted in the context of mandatory environmental due diligence. Independent



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supervision faces a variety of challenges and must follow certain criteria in order to achieve the aforementioned benefits. 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 adopt in order to support independent community monitoring, within the supply chains. Independent monitoring should be carried out throughout the entire cycle of an extractive/economic activity. In the case of mining and hydrocarbon activity, this cycle includes exploration, operation, closing/abandonment, and implementation of environmental liability management.

International binding reference standards are necessary. After addressing the importance of community monitoring recommendations, Aquino shows a recent massive relaxation of environmental standards in Peru pertaining to arsenic and cadmium. He points out that this has resulted in more contamination, without State-sanctioned consequences. 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 and not relaxed by companies or governments. This 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 local population of the territories not only to find the best possible solution but also to avoid undesirable negative effects. In the first place, the document reiterates that environmental due diligence is not a substitute environmental impact assessments, either in terms of obtaining social license or for any other tool that contributes to generating a responsible process. Due diligence is a process and a condition that has to be carried out and maintained without interruption throughout the entire duration of any project and that can be lost when any of its constituent elements fails.

Consequently, corporations should not start any project or to source from it, if there are solid and demonstrable issues regarding the quality of EIS about citizen participation during the EIA process or about the evaluation and issuance of the environmental impact statement by the environmental authority, just to mention one example at the environmental licensing stage. Additionally, it is important to apply mandatory environmental due diligence with a differential focus according to actors' different capabilities. Bigger companies have the capacity to quickly comply with all the requirements in binding environmental due diligence while artisanal miners may require more time and support in the transition. Considering these differences guarantees an equitable application of the norm.



Photo credit: CENDA

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

This document indicates that 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 their eventual impacts.



Recommendations



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

In the first place, it must be 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 on a human timescale. The starting point for corporate environmental due diligence would be to assess what influences raw material consumption and measures to reduce the use of metals, minerals, and so on, throughout the entire 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, disincentivizing 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 of the consumption of raw materials from direct extraction sites and increasing the life span of products or reusing them.

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

Due diligence laws passed by certain members of the EU, such as Germany, France, and the Netherlands, are very important first steps in the right direction. However, the laws approved thus far have significant deficiencies. For example, Germany's Supply Chain Due Diligence Act only covers the largest companies and restricts due diligence regarding indirect suppliers. This means that companies are not obliged to proactively address risks beyond the first tier of their supply chains—for example in mining—but must only take action when they have indications of possible breaches of duty by indirect suppliers. 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 of developing a supply chains law in Europe thus offers a great opportunity to correct deficiencies in national legislations and

to impose mandatory due diligence obligations upon all European corporations in matters of human and environmental rights in their supply chains. 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 on 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 mandatory environmental due diligence in their supply chain regulation based on European and international standards, not just national or local standards.

Environmental due diligence cannot only be based on regulations from countries where the extraction of raw materials takes place; it has to be related to international and European agreements⁴⁰. 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, or participation, among other things. Current laws do 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 they should or could be when EIA were executed properly. This implies not allowing mining operations where serious impacts to the ecosystems or to human health are identified or in cases where companies do not provide reasonable and sufficient evidence about what impacts they may create. Additionally, in many countries where extractions are

carried out, permitted pollution levels are too high or such limits are non-existent (as is the case of emissions, for example)⁴¹. Moreover, given the external debt of many countries—increased in the context of the current pandemic—they have lowered standards, requirements, or environmental procedures in order for mining projects to begin operations more quickly⁴². Thus, we face the risk of increasing human rights violations and the destruction of ecosystems. Environmental due diligence adhering to international and European standards could help reduce this risk. Additionally, many regulations and local standards are not met and individual countries exert little control. For this reason, regulation should increase the pressure to act from the supply chain.

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

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

42. See mining decree 151, Ecuador.

- 4. In order to guarantee responsible business conduct in the supply chain, it is necessary for 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 their quality.

Because of the close relationship between EIA processes and environmental due diligence, the quality of the former strongly influences the latter. Without solid EIA processes, we cannot speak of mandatory 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 companies acting in European territory (buyers in the supply chain) who should, in turn, 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 by States and companies, including all annexes and databases, in an editable and reusable format and in a timely manner, to allow for thorough technical analysis within reasonable timeframes, as a condition for European companies 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 downstream supply chain. This implies that a European company that sells

machinery to a mining company should perform a risk analysis regarding the EIS process, ensuring that they comply with the aforementioned criteria in order to assess risks. Additionally, corporations must verify that all mitigation measures regarding EIS are implemented.

- Companies in the supply chain should identify the EIS 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 EIS.
- A criterion for independence of EIS should be that the financing of the EIS is covered by the proponent, but the selection and hiring of those who perform the EIS should be carried out through an objective and public selection. The resources could perhaps be administered through funds exclusively dedicated to this.
- Companies and the EU should have an active role in calling on States to overcome these and other deficiencies in the EIA process and commit to using the most rigorous 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 companies in Latin America to strengthen independent monitoring of mining companies, emphasizing the importance of community participation.

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

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

EU regulations on supply chains:

- In case a company 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 one out, they should demand that the company performing the extraction support the initiation of an independent monitoring process.

- Companies should use all available information from community monitoring for risk analysis, employing the international standards of the United Nations (UNGPs) and the OECD and acknowledging the cultural diversity of independent monitoring participants in terms of local knowledge, gender, and ethnicity.

European and international organizations accompanying supply chain legislations:

- Secure independence in financing monitoring activities. It is recommended that public organizations promote the establishment of funds with resources derived from companies or States, nongovernmental 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 of public organizations in coordination with international organizations and cooperation agencies in order to facilitate training, logistics, and any other requirements to achieve such certification,
- Promote the creation of databases for independent monitoring, offering the public monitoring data in real time through digital platforms similar to already existing ones⁴³.

43. The Okanogan Highlands Alliance in Washington state, United States, created a database providing results in real time for water monitoring in the area of influence of the Buckhorn mine. Monitoring and results helped communities to understand the impacts on water quality. Available at: <http://database.okanoganhighlands.org/monitoring/>



- ▶ 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 address the needs of the communities.
- ▶ Create mechanisms so that data generated by independent

monitoring can be provided as evidence in court in case it is necessary to initiate 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 fulfill the functions of coordination, training, and exchange of best practices, among others. Crear mecanismos para que los datos generados por el monitoreo independiente sean reconocidos como evidencia ante las cortes en caso de que sea necesario impulsar procesos judiciales en el marco de conflictos ambientales.
- ▶ Contribuir a la conformación de una Red de Monitores Independientes con recursos para soporte técnico y de desarrollo de capacidades que cumpla funciones de coordinación, formación, intercambio de buenas prácticas, entre otros.

- 6. It is important within the OECD that the process of creating Practical tools for environmental due diligence in the supply chain consider the criteria proposed in chapters one (EIA) and two (community monitoring) and involve other civil society actors in countries where extraction is happening in the Global South.
- 7. Protection of environmental activists through the relationship between European environmental and human rights entities and instruments and supervision of the implementation of human rights and environmental standards within free trade treaties between the European Union, Colombia, Ecuador, and Peru.



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Organisations



Interamerican Association for Environmental Defense - AIDA

The Interamerican Association for Environmental Defense (AIDA) is a nonprofit organization that uses law and science to protect the environment, defend the human right to a healthy environment, and promote climate justice in Latin America. Understanding the social, legal, and political contexts of the region, our team applies its expertise in international law and science to the most serious environmental problems, bringing an innovative approach to those cases with the potential to set a powerful precedent in the defense of environmental rights.



BHRRC

The Business & Human Rights Resource Centre is an independent, international non-governmental organization dedicated to promoting human rights in business and to eradicating business-related abuses. We work in partnership with local and international social, environmental, development and human rights organisations, prominent academic institutions and human rights defenders, including within companies and governments. Since 2019 the BHRRC has an office registered in Colombia.



CENDA

CENDA is a non-profit institution that accompanies Bolivian communities in their strategies for self-management of territory and natural resources. It has promoted community monitoring of water quality in the Maylanco sub-basin (Cochabamba) and in the Poopó and Pazña-Antequera sub-basins affected by mining.



GERMANWATCH

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Grupo de Estudios sobre Extractivismo - GE2

The Group of Studies on Extractivism is a plural space made up of people mostly with technical training in biophysical issues, Latin American and with a public interest vocation whose objectives are to contribute to correct the asymmetries of information between different actors in the framework of extractive projects, to generate a community of independent professionals and to carry out research, communication, advocacy and internal training activities.

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