

# Use of Voluntary Sustainability Initiatives in the Mining Sector to Demonstrate Due Diligence

Mining, Minerals, and Metals (M3) Partnership<sup>1</sup>

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This paper explores how Voluntary Sustainability Initiatives (VSIs) for the mining sector can be used to demonstrate that companies have appropriate due diligence systems and processes in place, to ensure that due diligence has been carried out, and to verify due diligence. While VSIs and related verification processes are not a substitute for rule of law and the role of government in establishing requirements and oversight, they can serve as a complementary tool for due diligence.

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## Introduction

Requirements for due diligence are increasingly common in Voluntary Sustainability Initiatives (VSIs) for the mining sector as well as in legal frameworks. VSIs can be used to demonstrate that companies have due diligence systems and processes in place, and that due diligence has been carried out.

Complexities arise when realising that “due diligence” does not have a uniform definition recognised by all, that the due diligence process itself follows a variety of methods, and that not all VSIs for the mining sector follow the same approach in how they define and conduct due diligence. This may create inconsistencies and a lack of harmonisation between due diligence processes and can also create doubt as to whether, and to what extent, due diligence on supply chains is carried out.

This paper explores inconsistencies in approaches to due diligence for the mining sector and discusses advantages and challenges related to alignment with Organisation for Economic Co-operation and Development (OECD) Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas (CAHRAs).<sup>2</sup> The paper will describe how VSIs for the mining sector and related assessments, while not a replacement for rule of law and the role of government oversight, can be a complementary tool to demonstrate due diligence.

## Defining Due Diligence

Due diligence is the processes through which enterprises identify, prevent, mitigate, and account for how they address their actual and potential adverse impacts.<sup>3</sup> The OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from CAHRAs defines due diligence as “an on-going, proactive and reactive process through which companies can ensure that they respect human rights and do not contribute to conflict.”<sup>4</sup>

### **The OECD 5-Step Framework for Risk-Based Due Diligence in the Mineral Supply Chain<sup>5</sup>**

1. Establish strong company management systems.
2. Identify and assess risk in the supply chain.
3. Design and implement a strategy to respond to identified risks.
4. Carry out independent third-party audit of supply chain due diligence at identified points in the supply chain.
5. Report on supply chain due diligence.

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<sup>2</sup> OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas, Third Ed. 2016. <https://www.oecd.org/daf/inv/mne/OECD-Due-Diligence-Guidance-Minerals-Edition3.pdf>.

<sup>3</sup> OECD Guidelines for Multinational Enterprises. 2011 at Chapter II – General policies, para. 10. <https://www.oecd.org/daf/inv/mne/48004323.pdf>.

<sup>4</sup> OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas, *supra* note 2.

<sup>5</sup> *Id.* at Annex I.

The OECD 5-Step Framework summarized in the table above is broadly accepted as good practice. However, the meaning of “due diligence” often remains unclear.<sup>6</sup> This lack of clarity can perpetuate the incorrect view that implementing due diligence processes is sufficient to discharge businesses’ responsibility to respect human rights. An early guide on the human rights due diligence process produced by IPIECA, the global oil and gas industry association for environmental and social issues, demonstrates this concern.<sup>7</sup> It asserts that “human rights due diligence processes are not a legal requirement, but rather a good industry practice to manage potential issues and impacts associated with business operations.”<sup>8</sup>

The lack of clarity regarding due diligence creates confusion regarding when businesses that infringe human rights can be said to have breached their responsibility to respect human rights and, therefore, to have a responsibility to provide a remedy within the scheme established by the United Nations Guiding Principles on Business and Human Rights.<sup>9</sup> This confusion concerns the standard of conduct that can determine the extent of businesses’ responsibility to respect human rights. If due diligence, understood as a standard of conduct, applies, then a business is under this interpretation only responsible for adverse human rights impacts that result from its failure to act with reasonable diligence. On this interpretation, a business enterprise does not breach its responsibility to respect human rights if it has acted diligently in its attempt to avoid causing adverse human rights impacts but, due to unfortunate or unforeseen events, it has in fact caused serious adverse human rights impacts.<sup>10</sup> Such adverse human rights impacts can be addressed through VSIs and verification processes as a complement to legislative approaches.

### **The Origins of Due Diligence**

The OECD was established in 1961 as a forum for governments to share experiences and seek solutions to common economic and social problems. The OECD, with input from governments, policy makers, and civil society, is establishing standards to address a range of social, economic, and environmental challenges.<sup>11</sup>

OECD due diligence guidance is widely considered to be international good practice. The OECD Due Diligence Guidance for Responsible Business Conduct<sup>12</sup> provides practical support to enterprises on the implementation of the OECD Guidelines for Multinational Enterprises by sharing due diligence recommendations and how implementing these recommendations can help enterprises avoid and address adverse impacts related to workers, human rights, the environment, bribery, consumers and corporate governance that may be associated with their operations, supply chains, and other business relationships.<sup>13</sup>

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<sup>6</sup> Bonnitcha J. and McCorquodale R. The Concept of ‘Due Diligence’ in the UN Guiding Principles on Business and Human Rights. 2017. <https://academic.oup.com/ejil/article/28/3/899/4616670>.

<sup>7</sup> *Id.* quoting IPIECA, Human Rights Due Diligence Process: A Practical Guide to Implementation for Oil and Gas Companies. 2012.

<sup>8</sup> Bonnitcha J. and McCorquodale R., *supra* note 6.

<sup>9</sup> United Nations Guiding Principles on Business and Human Rights. 2011.

[https://www.ohchr.org/sites/default/files/documents/publications/guidingprinciplesbusinesshr\\_en.pdf](https://www.ohchr.org/sites/default/files/documents/publications/guidingprinciplesbusinesshr_en.pdf).

<sup>10</sup> Bonnitcha J. and McCorquodale R., *supra* note 6.

<sup>11</sup> OECD. About. <https://www.oecd.org/about/>.

<sup>12</sup> OECD Due Diligence Guidance for Responsible Business Conduct. 2018. <https://www.oecd.org/investment/due-diligence-guidance-for-responsible-business-conduct.htm>.

<sup>13</sup> *Id.*

In order to promote the effective observance of the OECD Guidelines for Multinational Enterprises, the OECD has developed specific sectoral guidance which helps enterprises identify and address risks in particular sectors. The sectoral guidance aims to establish a common understanding among governments, businesses, civil society, and workers on due diligence for responsible business conduct, and to enable businesses to build supply chain resilience, manage uncertainty, and drive long-term value. OECD due diligence guidance has been negotiated and adopted by governments in the minerals, extractives, agriculture, financial and garment and footwear sectors.

The OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from CAHRAs was developed to provide detailed recommendations to help companies respect human rights and avoid contributing to conflict through their mineral purchasing, decisions, and practices. This Guidance is for use by any company potentially sourcing minerals or metals from CAHRAs. It is global in scope and applies to all mineral supply chains.<sup>14</sup>

OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from CAHRAs refers specifically to the reasonable investigation undertaken by a business to identify and assess risks related to CAHRAs. These are outlined in Annex II of the guidance and include gross human rights violations, torture, forced or compulsory labour, war crimes, support to non-state armed groups or public or private security forces, bribery, and fraudulent misrepresentation of the origin of minerals, money laundering and non-payment of taxes.<sup>15</sup>

### **Due Diligence and OECD Alignment**

The process of OECD alignment determines whether an initiative's requirements for companies and the activities it undertakes are aligned with the specific recommendations of the OECD due diligence framework.<sup>16</sup> OECD Alignment Assessments<sup>17</sup> have been created to evaluate the alignment of industry or multi-stakeholder initiatives with the recommendations of OECD due diligence guidance. An initiative's standards and implementation are assessed against detailed criteria of due diligence using an assessment tool, for example the OECD Due Diligence Alignment Assessment Tool<sup>18</sup> for the minerals sector. Each criterion is linked to recommendations from specific OECD due diligence guidance. Initiatives are evaluated as being fully, partially, or not aligned against each due diligence criterion, contributing towards an overarching alignment score. In addition to evaluating alignment of these essential characteristics of due diligence and the due diligence framework, Alignment Assessments also evaluate collaboration within and between initiatives and the governance of each initiative.

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<sup>14</sup> OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas, *supra* note 2.

<sup>15</sup> *Id.*

<sup>16</sup> OECD Alignment Assessments of Industry and Multi-Stakeholder Programmes: Alignment of Multi-Stakeholder or Industry Initiatives with OECD Due Diligence Guidance, <http://mneguidelines.oecd.org/industry-initiatives-alignment-assessment.htm>.

<sup>17</sup> See OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas: Alignment Assessment of Industry Programmes with the OECD Minerals Guidance. 2018. <https://mneguidelines.oecd.org/Alignment-assessment-of-industry-programmes-with-the-OECD-minerals-guidance.pdf>.

<sup>18</sup> OECD Due Diligence Alignment Assessment Tool, <https://mneguidelines.oecd.org/OECD-Due-Diligence-Alignment-Assessment-Tool.xlsm>.

## **Advantages of OECD Alignment**

### *Recognition as International Good Practice*

OECD due diligence guidance is widely considered to be international good practice for identifying and addressing risks. Alignment of initiatives with government-backed standards such as OECD have the potential to help promote comparability, improve the quality of initiatives, reduce inefficiencies and costs, and strengthen positive outcomes.<sup>19</sup>

### *Opportunity for Harmonization*

Companies using industry or multi-stakeholder initiatives can be multipliers for due diligence by playing a role in evaluating and benchmarking due diligence actions across companies. With an increase in regulatory pressure as well as investor and consumer demand, there has been growth in fragmentation of VSI schemes, frameworks, and initiatives addressing sustainability and ESG issues globally. A lack of harmonisation across initiatives has resulted in multiple and at times conflicting requirements on companies. By supporting the alignment of such initiatives with OECD due diligence guidance, the role of initiatives and VSI schemes as multipliers for due diligence could be strengthened and in turn improve the effectiveness and impact of company due diligence efforts. This can create a positive feedback loop to enhance the credibility and trust placed in initiatives, increase understanding of how companies and governments can use initiatives, and enable cross-recognition between initiatives where appropriate.<sup>20</sup>

### *Opportunity to Expand VSI Use as a Tool to Demonstrate Due Diligence*

Through credible verification using a VSI scheme aligned with the OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from CAHRAs, downstream and upstream suppliers and purchasers can be assured that materials have been sourced via an established management system in accordance with the OECD Five-Step Framework.

The terms 'downstream' and 'upstream' are used to indicate different stages of production processes and use in the mineral supply chain and in industry. In simple terms, upstream companies are those active in the stages from extraction up to (and including) smelting and refining. Downstream companies are those that process the output from smelters and refiners into semi-finished products and final products.

For companies that work upstream and in tier 1 of the supply chain, the due diligence process ensures that people they do business with are aware of their corporate policy and views on sourcing from CAHRAs. They have management systems in place, they have grievance mechanisms to demonstrate that due diligence is an ongoing process internally and externally, and they are active in monitoring who their suppliers are and where they are sourcing from. The risk assessment requirements then help to identify red flags, map adverse impacts, and manage identified risks.

Finally, companies' due diligence is reviewed by a third-party auditor which verifies that the OECD Five-Step Framework has been followed, and the information they have gathered, and the suppliers and

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<sup>19</sup> OECD Alignment Assessments of Industry and Multi-Stakeholder Programmes: Alignment of Multi-Stakeholder or Industry Initiatives with OECD Due Diligence Guidance, *supra* note 16.

<sup>20</sup> *Id.*

business partners they work with are not contributing to CAHRAs. Reporting annually to the public on their approach and implementation of OECD due diligence guidance further demonstrates how they are carrying out their due diligence and where suppliers and purchasers can look to become better informed on the efforts of their due diligence.

## **Challenges Related to OECD Alignment**

### *Cost and Complexity*

The alignment process is currently rigorous and costly; these factors can serve as barriers for VSIs with limited resources to dedicate to the process.

### *Limited Geographic Coverage*

OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from CAHRAs focuses on sourcing from CAHRAs, thus the obligation to carry out due diligence is limited geographically to CAHRAs only. For example, the European Union Conflict Minerals Regulation,<sup>21</sup> which is aligned with OECD due diligence guidance, under article 39, only covers business activities and operations in conflict-affected and high-risk areas (CAHRAs). This would automatically exclude raw materials originating from the South American lithium triangle (Argentina, Bolivia, Chile) as these are countries that are not present on the CAHRAs list. As OECD due diligence guidance becomes more accepted globally, this limited scope creates difficulties as expectations to apply it outside CAHRAs increase. These difficulties arise from trying to apply OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from CAHRAs in situations that are not fit for purpose in regions where there are environmental and social risks but where these risks are not captured by the list of Annex II risks defined in the guidance.

### *Limited Scope*

The scope of the due diligence regime under the OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from CAHRAs is limited. The scope could be expanded to be consistent with widely recognised international standards on the corporate responsibility to respect human rights and the environment, such as the United Nations Guiding Principles on Business and Human Rights,<sup>22</sup> the OECD Guidelines for Multinational Enterprises,<sup>23</sup> and the International Labour Organisation Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy.<sup>24</sup>

Development of the OECD Tool on Environmental Due Diligence in Mineral Supply Chains<sup>25</sup> is underway and offers a promising opportunity to begin to expand the coverage of due diligence to include a broader scope of issues.

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<sup>21</sup> European Commission, *Conflict Minerals Regulation*. 2017. [https://policy.trade.ec.europa.eu/development-and-sustainability/conflict-minerals-regulation\\_en](https://policy.trade.ec.europa.eu/development-and-sustainability/conflict-minerals-regulation_en).

<sup>22</sup> United Nations Guiding Principles on Business and Human Rights, *supra* note 9.

<sup>23</sup> OECD Guidelines for Multinational Enterprises, *supra* note 3.

<sup>24</sup> International Labour Organization, *Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy*. 2017. [https://www.ilo.org/wcmsp5/groups/public/---ed\\_emp/---emp\\_ent/---multi/documents/publication/wcms\\_094386.pdf](https://www.ilo.org/wcmsp5/groups/public/---ed_emp/---emp_ent/---multi/documents/publication/wcms_094386.pdf).

<sup>25</sup> Umwelt Bundesamt (UBA), *OECD Tool on Environmental Due Diligence in Mineral Supply Chains*. 2021. <https://www.umweltbundesamt.de/en/oecd-tool-on-environmental-due-diligence-in-mineral>.

## Verification

VSI schemes that are partially aligned to the OECD Five-Step Framework do not always require an independent third-party audit to assess conformance with the standard. In some cases, a self-assessment is the assurance process used to evaluate conformance with the standards and therefore due diligence.

While a self-assessment is a useful tool enabling parties to determine and assess their own compliance with a standard, such approaches risk introducing bias into the evaluation and lack credibility with stakeholders and rights holders. An independent third-party audit provides a more objective approach to the audit process, while a self-assessment is subjective in nature and runs the risk of the standards and requirements not being correctly interpreted.

“Third party, independent, accredited certification” is considered to be the most credible form of assessment.<sup>26</sup> A third-party audit in the context of OECD due diligence is a process by which an independent third party verifies compliance with the five steps of the due diligence process. The auditor examines the activities, processes and systems used by a company to conduct supply chain due diligence. The auditor also makes recommendations to the auditee on where improvements to their due diligence practices could occur.<sup>27</sup>

## Lessons Learned

1. The term “due diligence” is often misunderstood. VSIs play a role in clarifying this term, broadening the scope of due diligence to a wider range of environmental and social factors and greater geographic coverage, and enhancing verification and transparency of information.
2. OECD due diligence guidance is widely considered to be an international good practice for identifying and addressing risks.
3. VSI alignment with OECD due diligence guidance has the potential to promote harmonization, enhance credibility, and increase use of standards to demonstrate due diligence practices.
4. The OECD alignment process is a costly and complex process. This serves as an obstacle for VSIs who may otherwise seek OECD alignment and related benefits, such as recognition under EU legislation, cross-recognition with other standards, and the increased trust of a range of stakeholders.
5. OECD due diligence guidance focuses on sourcing from CAHRAs, thus the obligation to carry out due diligence would be limited geographically to CAHRAs only. As OECD guidance becomes more accepted globally, the limited scope creates difficulties as expectations to apply it outside CAHRAs increase.
6. The scope of the due diligence regime under the OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from CAHRAs is limited. The scope could be expanded to be consistent with widely recognised international standards on the corporate responsibility to respect human rights and the environment. Development of the OECD Tool on Environmental

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<sup>26</sup> ISEAL, Assuring Compliance with Environmental Social and Environmental Standards: ISEAL Code of Good Practice v. 2.0. 2018 at p. 9. [https://www.isealalliance.org/sites/default/files/resource/2018-02/ISEAL\\_Assurance\\_Code\\_Version\\_2.0.pdf](https://www.isealalliance.org/sites/default/files/resource/2018-02/ISEAL_Assurance_Code_Version_2.0.pdf).

<sup>27</sup> European Commission, Due Diligence Explained. [https://ec.europa.eu/growth/sectors/raw-materials/due-diligence-ready/due-diligence-explained\\_en](https://ec.europa.eu/growth/sectors/raw-materials/due-diligence-ready/due-diligence-explained_en).

Due Diligence in Mineral Supply Chains is underway, presenting a promising opportunity to begin to expand the coverage of due diligence to include a broader scope of issues.

7. VSI schemes that are partially aligned to the OECD Five-Step Framework do not always require an independent third-party audit to assess conformance with the standard. In some cases, a self-assessment is the assurance process used to evaluate conformance with the standards and therefore due diligence. Self-assessments alone risk introducing bias into the evaluation and lack credibility with stakeholders and rights holders. Independent third-party audits are the most credible form of assessment.