

Human rights fitness of the auditing and certification industry?

A cross-sectoral analysis
of current challenges
and possible responses

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External auditing, certification and human rights—Putting the problem into context*

Discussion about mandatory human rights due diligence (HRDD) for corporations is currently on the political agenda of at least 12 European Union member states as well as EU institutions.¹ The EU Commission has announced an HRDD law and the European Parliament has formulated specific requirements for it.² After France, Germany has now also passed a corporate supply chain law (*Lieferkettengesetz*) that will come into force in 2023.³

Highly debated is the question of whether such HRDD laws should contain civil liability for companies, and if so, for which companies. While some commentators say an HRDD law without liability would lack any teeth and is therefore unacceptable, others can only conceive of including liability if audits and certification schemes function as the practical instruments to “resolve” the issue of mandatory HRDD. Initially overwhelmed by the challenges of seemingly vague human rights language, companies now hope to outsource the work of doing human rights risk assessments, correctional action plans and progress reports by hiring external auditors and certifiers. This discussion about civil liability and outsourcing artificially narrows the focus of the broader debate on mandatory HRDD down to one of many possible enforcement mechanisms—liability—and the attempts to alleviate its impact.

Are auditing and certification firms fit to respect and protect human rights?

Whether audits and certification schemes can deliver on the expectations placed on them is one of the central questions this study seeks to answer. On the one hand, it asks whether auditing and certification processes are themselves fit to respect human rights and, on the other, whether they are fit to audit and certify the human rights practices of others.

This study examines four exemplary cases from different sectors⁴ that show how audits and certification schemes can actually increase human rights risks. Moreover, they demonstrate that substandard audits and certifications are not just outliers, but rather common across the auditing and certification industry, due to structural deficits in state regulation and governance of the industry (see Chapter II and the detailed case studies in the appendix).

* The author wishes to thank ECCHR trainee lawyers Teresa Amigo, Matthieu Binder and Annabell Brüggemann, and ECCHR senior consultant Ben Vanpeperstraete for their amazing help with researching and drafting, particularly the case studies. Further thanks go to (in alphabetical order): Daniel Crampton, Steve Gibbons (Ergon Associates), Dr. Carola Glinski (University of Copenhagen), Dr. Thomas Grützner (Latham & Watkins), Dr. Hannes Hoffmeyer (Datenschutzzkanzlei.de), Friedel Hütz-Adams (Südwind Institut), Dr. Raoul Kirmes (DAkKS), Prof. Genevieve LeBaron (University of Sheffield), Dr. Miriam Saage-Maaß (ECCHR), Dr. Katharina Spieß (German Federal Ministry for Economic Cooperation and Development), Julia Thimm (Tchibo), Prof. Dr. Gerhard Wagner (Humboldt University Berlin), and again Ben Vanpeperstraete (ECCHR) for their extremely valuable critical review and input. Further thanks for their generosity in sharing their expertise in in-depth research interviews go to (in alphabetical order): Madeleine Koalick (independent), Jutta Krawinkel (independent), Markus Löning (Löning—Human Rights and Responsible Business), Franzis Wimmer (amfori), and a member of the certification industry.

¹ Business and Human Rights Resource Centre, Mandatory Human Rights Due Diligence, www.business-humanrights.org/en/big-issues/mandatory-due-diligence/ (accessed 21 December 2020).

² www.europarl.europa.eu/doceo/document/TA-9-2021-0073_EN.html (accessed 6 April 2021).

³ www.bmas.de/DE/Service/Presse/Meldungen/2021/lieferkettengesetz-beschlossen.html (accessed 28 June 2021).

⁴ Case studies 1, 2 and 4 are based on ECCHR’s analysis of first-hand information and secondary sources in the context of specific legal intervention projects, while case study 3 is based on desk research. The overall study is based, in addition, on legal research on the liability of auditing and certification bodies, a literature review, and interviews with experts in the fields of auditing, certification, management consulting, human rights and law.

The study also considers the question of whether and how auditing and certification firms are currently liable to injured parties for faulty performance that contributes to human rights abuses (Chapter III). The study then goes one step further to ask about prevention: What would it take for the auditing and certification industry to become human rights compliant? Here, the study not only considers the role of private actors, but also the role of the state in guaranteeing human rights. If the state entrusts the exercise of its human rights protection duties to private auditing and certification providers, it must ensure that the private service providers effectively fulfil their intended public protection purpose. This would require addressing the structural deficits identified in the case studies (Chapter IV). To this end, the study concludes by offering practical proposals for action for legislative and political decision-makers at both the national and EU levels (Chapter V). Only when these deficits are successfully addressed does the question arise as to whether audits and certifications are suitable instruments with which a company can fulfil, and prove that it has fulfilled, its human rights due diligence obligations.

1 External audits and certificates as instruments in human rights due diligence processes?

As a general rule, audits and certificates cannot constitute or replace genuine human rights due diligence management. At best, they can serve as selective diagnostic tools.

At stage 1 of an HRDD process (identify and assess), internal or external audits can contribute to a human rights risk assessment and the development of corrective action plans, which may orient the second stage (act). However, audits often do not or cannot cover the entire range of possible risks. For many issues—such as free, prior and informed consent (FPIC), customary land rights, freedom of association, a living wage or sexual harassment—most experts would agree that audits constitute an inadequate review method. These issues all require an analysis that can take into account historical context, multi-actor perspectives and open conflicts, and often involve questions of legal pluralism or contradictions in law, as well as uncertainties as to the available evidence base. Such requirements go beyond what audits can offer.

At stage 2 (act), the responsibility to adopt adequate measures in response to identified human rights risks will always belong to the company, including in relation to its suppliers and business partners. An example of such a measure might be the decision to work only with suppliers that can show certificates certifying their due diligence in relation to specific human rights risks. For instance, retailers will often

Auditing/Audit

With the term auditing we refer to the on-site review of products, services, or processes as to whether or not they are in conformity with a given norm or standard. Auditing is a diagnostic tool and audits are the resulting reports. The term conformity assessments is broader, including audits and other forms of review, as well as certification. Management system conformity is usually examined through audits.⁵ For the purposes of this study, we refer to external auditing and audits, i.e. audits that are conducted by a third party.

Certification/Certificate

By certificate we refer to a statement by an objective third party that confirms and declares the conformity of a given product, service, process or person with a given standard.⁶ Certification, i.e. the process to produce a certificate, can be based on an audit, whereas the audit investigates and documents the facts relevant for the question and criteria of conformity. The certificate attaches an assurance of reliability to the subject of certification and is aimed at a third-party audience, such as consumers, business partners or public authorities. Certification can be legally required or voluntary, and publicly or privately regulated.

⁵ www.asq.org/quality-resources/auditing

⁶ www.unescap.org/sites/default/files/3%20-%20Introduction%20to%20Conformity%20Assessment%20and%20ISO%20CASCO.pdf

demand an SA8000 certificate from their suppliers to show acceptable labor standards at the production site. Or supermarkets will request a large portion of their exotic fruits to be certified by a sustainability or fair-trade label like Rainforest Alliance, UTZ or Fairtrade International. These certificates are usually based on external, not internal, audits at the supplier level. Such measures can help companies avoid being directly linked to human rights violations committed by their business partner—if such certificates are reliable. Ensuring their reliability is ultimately the responsibility of the company within its HRDD process. But a supplier certificate is not a measure that helps improve a human rights situation, as such. In fact, convincing empirical evidence of the positive impacts of audits and certificates on companies' human rights performance is hard to come by. However, companies should work towards such improvements within their possible scope of action (UNGP No. 19).

At stage 3 (track), the UNGPs recognize (internal and external) progress audits as one among a range of tools to track impact.⁷ In particular, they can help follow up on the degree of implementation of the initial audit's corrective action plans. The limitations of when they can be used are the same as those discussed for stage 1.

At stage 4 (account), a reliable documentation system is a key pre-condition. Audits should feed information into a company's accounting process, but ultimately, it is up to the company to ensure comprehensive documentation and effective communication to authorities, stakeholders and the public as part of its HRDD management, including the findings and outcomes of audits.

Before looking at the potential of audits and certificates as tools within an HRDD process, we should first examine when audits and certificates might themselves become risk factors for human rights. The case studies conducted for this study show: when audits and certificates are used in human rights risk sectors, such as product or building safety, and do not themselves meet the highest possible quality and integrity standards, they can increase or even trigger risks to human rights.

Companies' responsibility to respect human rights

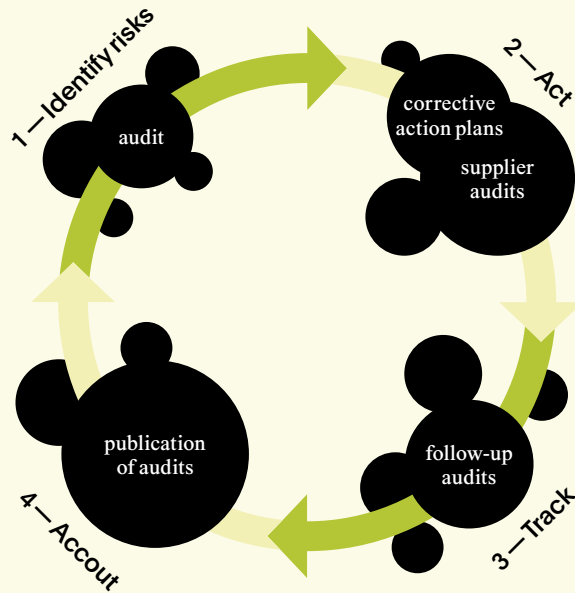
A company's responsibility to respect human rights consists, according to the UN Guiding Principles on Business and Human Rights (UNGP), of three elements: an internal policy to respect human rights, a human rights due diligence (HRDD) process, and mechanisms for remediation. HRDD describes a management process—which bears some resemblance to the well-known general risk management cycle by W. Edwards Deming—that consists of four continuous and interrelated stages, including:

- 1 Human rights risk assessment: identify and assess (Guiding Principle No. 18)
- 2 Adoption of measures in response: act (Guiding Principle No. 19)
- 3 Tracking of the measures' effectiveness: track (Guiding Principle No. 20) and
- 4 Accounting, e.g. through documenting and reporting: account (Guiding Principle No. 21)

Beyond these general principles, the UNGPs point out that what a company must do concretely depends on the severity and likelihood of human rights impacts within the associated business, as well as on the size of the company and its leverage.

⁷ UNGP 2011 No. 20, Commentary.

Auditing and certification in a HRDD process



Human rights-related fields in which auditing and certification are used

- Occupational health and safety
- Product safety
- Building safety
- Sustainability
- Fair trade
- Environmental management
- Supply chain management
- Supply chain tracking
- Compliance management
- Social audits, labor rights
- Private security services

Related fields of activity

- Training for auditors and certifiers
- Corporate/management consulting
- Policy advice
- Expert opinions
- Standard-setting
- Accreditation

2 Auditing and certification in the field of human rights

The auditing and certification sector continues to develop and diversify. It now includes production processes, the quality and safety of products and their life cycles, internal management and compliance, environmental management, labor rights, occupational health and safety (OHS), and supply chain management, among others. In the functioning of globalized economies, external auditing and certification plays a particularly important role. It can help to increase trust in the conformity of a product or service, or even in the integrity of a company, with expected or standardized characteristics in a situation where globalized production and sourcing processes no longer allow trust to be built in the same way it was before globalization, when clients knew and directly dealt with producers. In this sense, certification, in its role as a gatekeeper, contributes to the design, development and management of transnational supply and production chains, and hence, to the operation of the globalized economy and trade.⁸

In the functioning of globalized economies, external auditing and certification plays an important role

Accordingly, it is not surprising that the auditing and certification industry has demonstrated particularly dynamic development in fields related to human rights in recent years, as globalization and digitalization have caused consumers and clients to take an increasing interest in the social and ethical aspects of production processes elsewhere.

Privatization alleviates the state's burdens—but creates new problems for others

Social, labor and OHS audits are an important field in the auditing and certification sector. The privatization of labor inspections has helped relieve the state's monitoring burden associated with its duty to protect human rights, and has, in turn, facilitated the implementation of austerity measures and deregulation. However, the case study of RINA illustrates some of the pitfalls of this development. Today, private actors involved in such audits range from NGOs (such as Social Accountability International) to multi-stakeholder initiatives (such as the Better Cotton Initiative), and industry initiatives (such as amfori), as well as technical certifiers (such as TÜV Rheinland) and corporate governance and financial auditors (such as KPMG). These private actors not only conduct audits, but some also set the applicable standards for such audits, accredit auditors and grant certificates.

Actors in the auditing and certification sector

- 1 Non-governmental organizations
- 2 Multi-stakeholder initiatives
- 3 Industry initiatives
- 4 Technical certifiers
- 5 Financial auditing companies
- 6 Internal auditors

⁸ Verfassungsblog, Matthieu Binder, Die Haftung von Zertifizierungs- und Prüfunternehmen als gebotener Bestandteil eines effektiven Lieferkettengesetzes, www.verfassungsblog.de/die-haftung-von-zertifizierungs-und-pruefunternehmen-als-gebotener-bestandteil-eines-effektiven-lieferkettengesetzes/ (accessed 17 December 2020); Wagner (2018), 134.

Conflict minerals was one of the first industries to see human rights regulation. Even here, auditing and certification hold a firmly established place in assessing compliance with such regulations,⁹ as a number of initiatives have developed to help track and certify conflict mineral supply chains. The case of *Rihan v. Ernst & Young Global Ltd & Others*¹⁰ shows, however, how vulnerable this business is to corruption. In this case, the corruption reached up to the highest management levels in the Ernst & Young Group and involved the same auditing firm that has also recently come into disrepute for similar reasons in relation to the Wirecard scandal.¹¹

The **private security sector** also developed a human rights auditing scheme quite early on with the International Code of Conduct for Private Security Service Providers (2010).¹² The International Code was one of the earliest multi-stakeholder initiatives, even predating the UNGPs,¹³ which it later endorsed and aligned itself with.¹⁴ However, academic research has raised serious questions about the effectiveness of the International Code's approach, pointing out problems with its human rights methodology and training, as well as the robustness of its oversight systems.¹⁵

In the **agro-industrial sector**, there are a number of certification schemes covering a variety of issues, from ecological considerations to sustainability, ethical trade, social criteria and labor rights. The Roundtable for Sustainable Palm Oil's certification scheme is one of the seemingly most ambitious—and heavily criticized—of such schemes. It aspires to cover a large range of human rights-related issues, such as land tenure, labor rights, ensuring a living wage, customary and indigenous rights, and the protection of human rights defenders,¹⁶ as well as procedural considerations like access to information, transparency and grievance mechanisms. Our case study on the RSPO scheme reviews its approach and illustrates some of its major challenges.

Human rights-related auditing and certification schemes—for the purpose of this study—are not only those that explicitly claim to deal with human rights, but all of those that factually touch upon them. This can also include aspects like facility safety, accessibility, environmental management, or product safety, to name but a few.

Auditing firms not only play a role in executing governance, but also in shaping it. According to a study by the political scientists Luc Fransen and Genevieve LeBaron, “[b]ig audit firms engage in a variety of informal and covert influencing practices and are shown to promote an agenda of incremental soft-law labor governance, opposing concrete performance targets, binding public regulation and an independent watchdog role for civil society.”¹⁷ These seem to be ideal criteria for positive market development from an auditing firm's perspective. Hence, it is no surprise that, first preceding and then coinciding with a trend towards binding HRDD regulations in a number of countries, e.g. on modern slavery, child labor or conflict mineral supply chains, related auditing services like social and supply chain audits have come to account for a growing share of what we call human rights-related auditing and certification.

⁹ EU Regulation 821/2017 on conflict minerals supply chain due diligence.

¹⁰ *Rihan v. Ernst & Young Global Ltd and Others* [2020] EWHC 901 (QB), judiciary.uk/wp-content/uploads/2020/04/Rihan-v.-EY-Global-Ltd-and-others-Approved-Judgment-17-April-2020.pdf (accessed 17 December 2020). An internal whistleblower discovered that the auditor had covered up significant non-compliance of a gold refiner who was audited according to the “Good Delivery List” (GDL) gold trade standard of the Dubai Multi Commodities Centre (DMCC) and the London Bullion Market Association (LBMA). The court found that Ernst & Young, as the defendant parent auditing company, had breached its audit duty of care by ensuring that the negative findings of its subsidiary were obscured in the published audit report.

¹¹ According to an investigative report by the *Financial Times*, Ernst & Young had disregarded information by an internal whistleblower about financial irregularities at Wirecard. By covering this up, Ernst & Young might, subject to further investigations, have contributed to what resulted in a large-scale fraud by this financial service provider. *Financial Times*, Olaf Storbeck, Whistleblower warned EY of Wirecard fraud four years before collapse, where EY is also accused of having disregarded warnings by a whistleblower, 30 September 2020, www.ft.com/content/d5103236-2799-4eab-bb71-afad7b703ae4 (accessed 17 December 2020).

¹² MacLeod and DeWinter-Schmitt (2019), 58.

¹³ www.icoca.ch/ (accessed 17 December 2020).

¹⁴ ICOCA Annual Report 2017–2018, 12, Available for download at: www.icoca.ch/en/resources (accessed 17 December 2020).

¹⁵ MacLeod and DeWinter-Schmitt (2019).

¹⁶ Ecological aspects are included in the certification criteria (see principle 7), but not with a human rights-based perspective, e.g. water source preservation, soil and diversity preservation, emissions reduction, etc.

¹⁷ Fransen and LeBaron (2019), 260.

Certifiers seek to shape markets by exerting political influence

In Germany, while a political debate on the question of HRDD regulation is in full progress, certifiers are not only developing their portfolios accordingly, but they can also be found trying to influence the development of the market itself through lobbying. For example, VdTÜV, the German Association of Technical Inspection Agencies,¹⁸ has spoken out in favor of mandatory human rights and environmental due diligence. Yet, in the same breath it explained that it would be of central importance to provide legally regulated, unified standards as well as mandatory third-party conformity assessments as the central tool to ensure conformity and compliance with these standards.¹⁹

Further activities in which the TÜV group is active include social audits in accordance with the SA8000 standard (TÜV Rheinland) and corresponding training courses offered by the TÜV Academy. Last but not least, TÜV has helped with the standard-setting of new, globalized standards, such as the unified ISO standard on chain of custody (ISO 22095).²⁰ Prior to this unified standard, chain-of-custody standards only existed for specific sectors, such as timber (ISO 38200), for which an EU regulation also exists (Reg. (EU) 995/2010), or cocoa (ISO 34.101). This new standard is not human rights-specific, but is relevant for the question of traceability in all human rights and environmental due diligence processes that involve product supply chains.

In conclusion, two trends are apparent: the auditing and certification sector in human rights-related fields (1) is growing, particularly alongside the development of legal norms and regulations; and (2) is increasingly diversifying, with existing firms expanding their portfolios, but also with new specialized actors entering the field.

If mandatory HRDD standards are established and oblige companies to demonstrate their compliance, companies will have to show, and courts will have to decide and judge, whether a company has done enough to manage its human rights risks. Audits and certificates assessing human rights due diligence issues will likely develop into a central tool to make life easier for both companies and state authorities. This development is counterproductive. We would, in particular, warn against establishing audits as an obligatory component of new mandatory HRDD norms, because the auditing and certification sector has too often turned out to be a risk factor.

¹⁸ “TÜV” is a brand that stands for Technischer Überwachungsverein (Technical Inspection Association). Historically formed as an independent association in the 19th century, the TÜV soon came to replace state inspections in various technical fields. Today, there exist various inspection companies under this brand name, the largest being TÜV SÜD, TÜV NORD and TÜV Rheinland. VdTÜV is a federation that represents and supports the interests of its members, mainly TÜV companies, through lobbying and advocacy, www.vdtuev.de/verband/; www.tuvsud.com/de-de/ueber-uns/geschichte (accessed 17 May 2021).

¹⁹ VdTÜV, p. 4-5.

²⁰ VdTÜV, So werden Lieferketten nachvollziehbar, www.vdtuev.de/pressemitteilungen/nachvollziehbare-lieferketten (accessed 17 December 2020).

3 When auditing and certification go wrong

Auditing and certification can go terribly wrong, as a number of tragic cases in recent years have shown.

In 2010, it was revealed that the French company **Poly Implant Prothèse (PIP)** had been using industrial rather than medical-grade silicone as the filling for its breast implants since 2001. The implants had been certified by TÜV Rheinland as complying with medical product safety regulations in accordance with the European regime for medical device safety. Thousands of patients suffered serious health impacts, including possibly related cancer or heightened risk of cancer as a result of these unsafe products and required follow-up surgeries²¹ (see case study 3).

In 2012, more than 260 workers were killed and more than 60 wounded in the factory fire at **Ali Enterprises**, a textile supplier for German retailer K&M. An SA8000 certificate for the supplier issued by the Italian certifier group RINA had only months before certified the factory's occupational health and safety conditions as in order, without pointing out numerous obvious fire safety deficiencies²² (see case study 1).

Auditing and certification can go terribly wrong, as a number of tragic cases in recent years have shown

In 2013, more than 1,000 workers were killed when a factory building at **Rana Plaza** in Bangladesh collapsed. Also here, Bureau Veritas and TÜV Rheinland had certified the supplier's worksite just months before, but overlooked obvious safety deficiencies in the building, as well as the presence of child labor.²³

In 2015, the **Fundão Mining Dam in Mariana**, Minas Gerais, collapsed in Brazil, killing 20 people and polluting entire rivers. Just a few months before, the Brazilian certification company VOGBR had issued a declaration of stability for the dam. This is not a certificate in the strict sense, but comparable in effect, as it provides external expert assurance of stability in accordance with Brazilian regulations on dam safety.²⁴

In 2019, another mining dam collapsed in **Brumadinho**, also in Minas Gerais, Brazil, killing 272 people and polluting another river. Four months earlier, the German certification company TÜV SÜD had signed a stability declaration for the dam, although the dam had continuously shown stability problems over many months²⁵ (see case study 2).

Other certification schemes like the Rainforest Alliance, RSPO (see case study 4) and others have also come under criticism for numerous reports of human rights violations at certified companies.²⁶

²¹ German Federal Court of Justice, Bundesgerichtshof, zur Haftung der "Benannten Stelle" gegenüber Patientinnen im Zusammenhang mit dem Austausch von Silikonbrustimplantaten des französischen Herstellers PIP, 27 February 2020, www.bundesgerichtshof.de/SharedDocs/Pressemitteilungen/DE/2020/2020023.html (accessed 17 December 2020).

²² ECCHR, Nach Fabrikbrand in Karatschi: Verfahren gegen Prüfdienstleister in Italien, www.ecchr.eu/fall/nach-fabrikbrand-in-karatschi-verfahren-gegen-pruefdienstleister-in-italien/ (accessed 17 December 2020).

²³ Clean Clothes Campaign (2019), 4.

²⁴ www.g1.globo.com, Polícia Federal lista falhas da Samarco com barragem rompida, www.g1.globo.com/espírito-santo/desastre-ambiental-no-rio-doce/noticia/2016/06/pf-lista-falhas-que-levaram-barragem-da-samarco-romper.html (accessed 17 December 2020).

²⁵ ECCHR, The safety business: TÜV SÜD's role in the Brumadinho dam failure in Brazil, www.ecchr.eu/en/case/the-safety-business-tuev-sueds-role-in-the-brumadinho-dam-failure-in-brazil/ (accessed 17 December 2020).

²⁶ LeBaron (2018) studied ethical certifications, such as Fairtrade, Rainforest Alliance, UTZ and others, and found that not only are labor abuses, including violence and debt bondage, widespread in the tea and cocoa sectors, but also that labor standards set by these schemes are so notoriously violated that she concludes that the investigated certified plantations did not fare any better in terms of labor conditions than non-certified plantations. On RSPO, see for example: Environmental Investigation Agency/Grassroots, Who watches the watchmen 2: The continuing incompetence of the Roundtable on Sustainable Palm Oil's (RSPO) assurance systems, November 2019, www.eia-international.org/wp-content/uploads/WWTW2-spreads.pdf (accessed 17 December 2020).

4 Private auditing and certification and the state's duty to protect

While there is no doubt that in all of these cases the prime responsibility lays with the operating company, it is also clear that substandard or false certificates invisibilize risk situations and thereby impede the necessary interventions for protection. This is true for certificates across different sectors, whether they explicitly address human rights questions or not, as long as their subject matter actually relates to human rights risks. Given that relevant parts of the corporate sector as well as political stakeholders place high hopes in the auditing and certification industry to help deal with the challenges of mandatory HRDD, it is time to unmask the seeming blessings of this solution and call on regulators and policy makers to take urgent action. As the drafting of HRDD legislation progresses, the auditing and certification sector must also be addressed. It undermines the substance of HRDD laws if auditing and certification companies offer deficient and low-quality “solutions” for a duty that companies cannot outsource: the duty to undertake human rights due diligence across all of a company’s operations and business relations.

Legislators must ensure that the auditing sector does not create human rights risks

Ensuring compliance with this duty is also a responsibility of the state. Austerity measures and a “lean state” paradigm may have led states to privatize monitoring and outsource it to auditing and certification firms. Yet, the state has a duty to protect human rights, as stipulated in national constitutions and international human rights law. When privatizing and contracting out the delivery of services, it must therefore exercise effective oversight (UNGP No. 5). Its compliance with this duty to protect depends—in the case of privatization—on the extent to which the state is able to ensure that private control effectively fulfils its purpose.²⁷ Legislators and policymakers must therefore act to ensure that the auditing and certification sector neither creates nor exacerbates human rights risks, thereby undermining the substance of HRDD laws in practice.

5 Challenges of transnational governance

This is of particular importance in transnational supply chains, where state control of compliance with HRDD across borders, especially outside the EU, is not always possible and, when it is, is very costly.²⁸ Here, states often have no extraterritorial competence to control, whereas private auditors and certification companies can offer a transnational service that covers an entire supply chain.²⁹ In fact, the auditing and certification sector is often transnationally organized with a network of subsidiaries, agents and subcontractors distributed domestically and abroad.

For states to fulfil their duty to protect, they must ensure that such sometimes extraterritorial services do not undermine the HRDD regulations that apply to domestically domiciled or active companies. This could include requirements for quality standards and limits of admissibility for external audits and certifications in human rights-related fields. Given the limits of regulatory reach beyond EU borders, such rules should address not only auditing and certification firms, but they should also directly address the domestic company whose HRDD obligations are concerned. If a company hires extraterritorial auditing and certification services to implement or demonstrate elements of its HRDD, then the company should be able to show that these services comply with such human rights requirements. Four exemplary case studies form the basis of this report’s analysis.

²⁷ Glinski and Rott (2018), 85-86.

²⁸ Glinski and Rott (2018), 103; Glinski (2019), 165.

²⁹ The German National Contact Point for the OECD Guidelines for Multinational Enterprises in its final statement in *ECCHR et al. v. TÜV Rheinland AG et al.* (26 June 2018), pointed out that “developing ways of enhancing and improving how social audits are being conducted can help make the OECD Guidelines more effective,” www.oecdwatch.org/complaint/ecchr-et-al-vs-tuv-rheinland-ag/ at: 12 (accessed 30 April 2021).

Summaries of case studies

- 1 The case of voluntary **social audits and certification** in the textile manufacturing industry (certifier RINA, SA8000 certificate for socially acceptable workplace practices, Bangladesh)
- 2 The case of regulated **technical audits and stability declarations** in the mining industry (certifier TÜV SÜD, stability declaration according to national mining regulations, Brazil)
- 3 The case of regulated **product safety audits and CE certificates** for medical devices (certifier TÜV Rheinland, certificate according to EU regulation, France and Germany)
- 4 The case of voluntary **sustainability audits and certification** for palm oil plantations (multiple international and local certifiers, certification under the RSPO scheme, Indonesia)

The full case studies can be found in the annex to this study.

For comparability, they follow a unified format and analyze the following questions:

- 1 What are the human rights violations at stake?
- 2 Who are the involved actors and what are their relationships, and what are the applicable laws and standards?
- 3 What would a proper human rights due diligence (HRDD) process carried out by the auditing or certification entity have looked like?
- 4 Would an adequate HRDD process have helped minimize the human rights risks?
- 5 What other risk factors existed that an HRDD framework is unlikely to address?
- 6 Are there solutions available in other sectors?

Case study 1: Labor conditions (RINA, SA8000)

This case identifies elements of the auditing and certification process of workplace safety and labor conditions that led to a false audit and, hence, the issuing of an unjustified certificate that contributed to the deaths of hundreds of people from a factory fire.

Problems: Severe deficiencies in the applied methodology and a lack of effective quality assurance by the certifier and accreditor

A Human rights due diligence

In a proper human rights due diligence process, an auditor must first identify sector- and country-specific human rights risk factors. Occupational health and safety deficiencies are well-known risks in the garment sector, including the presence of highly flammable fabrics in over-crowded and poorly secured factory buildings. In Pakistan, working conditions, general fire and building safety, as well as the lack of public oversight of workplace health and safety conditions are country-specific risk factors. Such known risks should motivate auditors to adapt their auditing methods to address these risks, for example through unannounced site visits or off-site interviews with workers.

B Quality management and methodological issues

In this case, there was a general problem of the audit failing to comply with the required standard. The auditor should have identified and reported numerous deviations from the applicable SA8000 standard, such as those related to fire exits, fire extinguishers, maintenance of safety equipment, safety training, avoidance of overcrowding and prohibited child labor. By not reporting them, these deficiencies were effectively covered up.

The case of Ali Enterprises

After the Italian certifier RINA issued an SA8000 certificate for the Ali Enterprises factory based on an audit report full of omissions and inconsistencies, and despite obvious deficiencies in building and fire safety, the building burned down. As a result, 258 people were killed, dozens were injured, and many families were left without their main breadwinners.

Despite all of these deficiencies, the certifier RINA still issued the SA8000 certificate, which indicates a serious disconnect between the actual auditing and certification, as well as a significant loss of quality control by the certifier.

Without an effective system of quality assurance in place, the certificate cannot fulfil its purpose, namely to ensure the protection of workers' rights, health and safety. Only when deficiencies are detected can the auditing and certification process be used to work towards improvements. If violations consistently lead to the suspension or withholding of the certificate, it is likely to incentivize improvements in working conditions. In fact, the strong market position of SA8000 allows the certifier to exert considerable leverage over the audited company.

Quality assurance is the responsibility of the certifier. Nevertheless, certifiers should also be effectively monitored to ensure that they meet and maintain impeccable standards of quality and integrity, not only at the time of their accreditation, but continuously. Oversight of certifiers can be achieved through public accreditation systems or other state mechanisms.

C Integrity management

When a clearly deficient audit is not detected and a certificate is then issued on such an unreliable basis, one can presume that the two-person (or dual control) principle was either not used or was ineffective. This basic certification industry principle places the responsibility for certification on the shoulders of a person other than the on-site auditor, as the former is thought to be structurally better shielded than the latter from influence by the audited company.

Adequate payment for auditors is another condition that can shield them from undue influence and prevent superficial, poor-quality performance. Anonymous industry sources have denounced the fact that payment standards in the social auditing sector are often too low to allow for the investment of time and expertise needed to properly conduct the audits. Commissioning companies, such as European and other importing brands, are urged to improve their pricing policies in this regard to allow for better auditing quality and to counteract the current race to the bottom in a very competitive social auditing market.

D State governance, public participation and access to remedy

In Pakistan, state labor inspections have effectively been replaced by policies that incentivize the obtaining of SA8000 certificates through public subsidies, rather than actually improving working conditions. This has been criticized as creating a structural risk for courtesy audits. State measures should not seek to unburden public administration at the cost of losing all oversight capacity over legal compliance. The state's responsibility to protect human rights means that the state itself must always apply human rights due diligence when adopting new laws and policies in human rights-related fields like labor and workplace conditions.

A robust joint and several liability regime for auditing and certification companies could motivate the industry to improve its performance. Instead, in a recently concluded complaint procedure before the Italian National Contact Point of the OECD Guidelines for Multinational Enterprises, RINA rejected any liability or responsibility in the case and also refused to enter into an agreement to help improve its certification system as well as its own human rights due diligence.³⁰

³⁰ Italian National Contact Point for the OECD Guidelines for Multinational Enterprises, Final statement in *ECCHR et al. v. RINA et al.* (2020), www.pcnitalia.mise.gov.it/attachments/article/2035928/Final%20Statement%20RINA_DEF.pdf (accessed 16 December 2020).

Case study 2: Dam failure (TÜV SÜD)

This case identifies elements of the auditing process that led to a false stability declaration being issued, which contributed to the disastrous consequences of the dam failure.

Problems: Lack of human rights risks analysis and deficiencies in managing conflicts of interest

A Human rights due diligence

A review of evidentiary materials in public investigations into this case indicates that the auditor did not conduct a human rights risk analysis and did not identify risk factors.

Evidence suggests that the certifier issued the stability declaration with full knowledge of the dam's instability, based on the manipulation of the standard minimum safety factor to cover up the insufficiency of the measured values. In this way, false formal compliance with the legal requirement for stability certificates was achieved. Such conduct has been diagnosed as “normalization of norm deviance,” in which deviations from standards are dissociated from real risks and urgency, and are instead analyzed and treated with the aim of establishing formal regulatory compliance.³¹

Had the auditor applied a human rights risk analysis, it likely would have saved lives, especially because the dam had a long, well-known history of instability and the dam operator had repeatedly failed to implement recommendations for stabilizing measures. The auditor could have also identified additional risk factors, for instance by drawing parallels to the Fundão dam failure at Mariana in 2015, by recognizing vulnerability to undue influence by its client, the market-dominating mine operator Vale, as well as considering the high corruption index for Brazil and the mining sector more generally. Such a risk analysis should then have motivated TÜV SÜD to apply more robust quality and integrity control, as one would expect a reliable auditor and certifier to be able to detect and prevent its staff from issuing false stability declarations, and to contribute its due share to minimizing the risks of a dam break.

B Quality management and methodological issues

Evidence suggests that applicable international standards for dam safety were not observed,³² and that the standard minimum safety factor was deliberately manipulated. There are further indications that the auditor did not carry out any on-site visits and neither collected raw data independently nor double-checked the reliability of the raw data provided by the client. The auditor also presumably did not observe the two-person principle.

The case of Brumadinho

After a Brazilian subsidiary of TÜV SÜD issued a stability declaration for a tailings dam, despite repeated information and warnings about its instability, the dam broke in January 2019. As a result, a huge wave of tailings slur killed 272 people and contaminated the Paraopeba river and other sources of drinking water in the region.

³¹ Business and Human Rights Resource Center, Claudia Müller-Hoff, Was the Brumadinho dam failure caused by a “normalisation of deviance”?, 29 May 2020, www.business-humanrights.org/en/was-the-brumadinho-dam-failure-caused-by-a-normalisation-of-deviance (accessed 16 December 2020).

³² The Brazilian national industry standard ABNT/NBR 13028/2018 for mine tailings dams, in the version in place at the time, declared international standards applicable.

C Integrity management

The mine operator, as the primary beneficiary, selected, hired and paid TÜV SÜD for the audit and stability declaration. There is also evidence that suggests the client negotiated, if not pressured, for a positive result by suggesting that the contract with the auditor could be terminated and awarded to a competitor, a practice that the client, Vale, is known to have employed in similar cases in the past.

Investigations against TÜV SÜD's Brazilian subsidiary furthermore suggest that the auditing company had a conflict of interest due to a parallel engagement. At the time, it was also negotiating a consulting contract involving the same dam—a contract significantly more valuable than the auditing assignment, and one that required a positive stability declaration.

Another element that exposed the auditor to risk of undue influence by the client was the fact that Vale is the second-largest mining company worldwide, with operations in over 30 countries. In Brazil, according to government data, it operates about 18 percent of all tailings dams,³³ and thereby holds a dominant position as a client in the Brazilian market for independent auditing services, especially as there is no strict separation between auditing and consulting.

D State governance, public participation and access to remedy

Public authorities had no capacity to exercise effective oversight. They received the stability declaration, but not the underlying audit report and, hence, could not review and verify the accuracy of the stability declaration. This was a result of recent reforms to streamline the public sector, which included the establishment of an electronic reporting system, the contracting out of dam stability monitoring and control to private auditors, and a gradual reduction of qualified staff within the National Mining Authority (ANM). At the time of the dam failure in Brumadinho, the mining authority in Minas Gerais had six staff members available for dam safety questions. Meanwhile, there were 345 tailings dams in Minas Gerais, out of which 45 were built using the particularly risk-prone upstream method. Hence, even if the authority had received all of the relevant information, it would probably not have had the capacity to review it and intervene in time. The Brazilian Federal Audit Court (Tribunal de Contas da União) found in 2015, on the occasion of the previous dam failure at Mariana (Minas Gerais), that the mining authority was particularly vulnerable to fraud and corruption due to the downsizing of its technical team.³⁴

The audit reports were not accessible to the public or to relevant interested stakeholders, nor was a grievance mechanism offered by the auditor or the issuer of the stability declaration. Making audit reports, or at least parts of them, publicly accessible can contribute to improving their quality. They should, however, follow a standardized format to avoid them being “cleansed” of relevant information. Furthermore, such reports are very technical in nature and require appropriate engineering expertise to interpret. Thus, one may question if public access would have allowed for public scrutiny in this case. It should not fall upon civil society to fulfil such a monitoring role without resources or capacity when this is actually a state's responsibility under its duty to protect.

Case study 3: Breast implants (TÜV Rheinland)

This case identifies elements of the certification process that led to false certification, which contributed to the human rights violations of thousands of patients.

Problems: Lack of human rights due diligence and risk analysis, and methodological weaknesses that ignored human rights risk factors

³³ Nogueira, Spring, Plumb, Vale misled public on dangerous dams, prompting Brazil probe, in: Reuters Graphics, www.graphics.reuters.com/VALE-DISASTER/0100B29R1CC/index.html (accessed 19 December 2020).

³⁴ G1.globo.com, CPI de Brumadinho propõe indiciamento de 14 funcionarios da Vale e da TÜV SÜD, www.g1.globo.com/mg/minas-gerais/noticia/2019/07/02/relator-da-cpi-de-brumadinho-pede-indiciamento-de-12-funcionarios-da-VALE-e-da-tuv-sud.ghtml?utm_source=push&utm_medium=app&utm_campaign=pushg1 (accessed 12 October 2020).

A Human rights due diligence

Auditing and certification companies' human rights due diligence processes should include the question of whether the audit or certificate directly or indirectly serves to protect the interests of third parties, such as end users, workers or neighbors. For product or facility safety certificates, this question can generally be answered in the affirmative, as the European Court of Justice has found for the case of medical devices.³⁵ This implies that all certification processes—not just those explicitly offering human rights certificates—must develop a human rights due diligence approach with a view to protecting these rights, in this case the health and integrity of those receiving the implants. The current EU regulation on medical devices does not regulate this question and therefore human rights competence is not among the qualifications required for certifiers of medical devices.

In this case, the client PIP had failed to comply with requirements on several occasions. This should have prompted TÜV Rheinland to intensify the control density, for example through double-checking information, sample-taking or follow-up visits, but it did not. Again, this could be qualified as a case of “normalization of norm deviance,” in which the certifier facilitates formal regulatory compliance—even when the facts suggest otherwise—and loses sight of the real risk implications for people's health.

The case of PIP breast implants

For many years, TÜV Rheinland issued CE certificates for breast implants, even though the products did not comply with the legal requirements, given that the producer PIP used industrial instead of medical-grade silicone, which the auditor failed to detect.

As a result, affected women suffered serious health damage, including potentially cancer, with several having to undergo surgeries.

B Quality management and methodological issues

Unannounced visits at the production site and testing of the final product were possible according to the applicable medical devices regulation, but optional. TÜV Rheinland did not make use of these options or look at PIP's relevant business documentation, despite recurring non-conformities in the past. Given that these decisions were within the auditor's discretion, by law the auditor was not at fault. However, its approach was counterproductive. From a quality insurance perspective, the previous incidents of non-conformities should have motivated TÜV Rheinland to intensify its control density, especially because implants are classified as high-risk products under the EU regulation. Unannounced visits, testing of the final product and a review of business documentation would have made it very likely that TÜV Rheinland would have detected the ongoing serious—and fraudulent—irregularities. Yet, it did not and, as a result, a CE certificate was granted that should never have been issued. Thus, the market and the end users were not protected.

C Integrity management

Again, in this case, it was the interested party itself, the manufacturer PIP, that selected, contracted and paid TÜV Rheinland. This put the auditor's independence at risk, especially because PIP had a dominant market position as one of the biggest producers of breast implants.³⁶ TÜV Rheinland had been auditing and certifying the company's products for 13 consecutive years. More frequent rotation of auditors could have helped strengthen the auditor's independence.

D State governance, public participation and access to remedy

The audit reports, results and applied methodology were not made publicly accessible. Thus, civil society groups and relevant stakeholders were not able to monitor the auditor's work. At the time, there was also no public registry with information about implant complications, which could have alerted the state authorities and motivated them to investigate and intervene earlier.

³⁵ ECJ, *Elisabeth Schmitt v. TÜV Rheinland LGA Products GmbH*, Judgement of 16 February 2017, C-219/15, breast implants OLG Zweibrücken), paras. 50-53.

³⁶ *Le Figaro*, Hayat Gazzane, La trajectoire troublante de Poly Implant Prothèse, 24 December 2011, www.lefigaro.fr/societes/2011/12/24/04015-20111224ARTFIG00307-la-trajectoire-troublante-de-poly-implant-prothese.php (accessed 19 Dezember 2020).

This precarious information base shows a weakness in the governance structure for medical device production. It also means that an auditor should apply extra caution in its analysis of particularly high-risk products like medical implants and adopt an intensive control density approach. If the state reduces its own oversight role in favor of private auditing and certification companies, it must make clear that these private firms are not only performing a privately contracted task, but they are fulfilling a task in the public interest with respectively higher due diligence expectations attached.

Case study 4: Palm oil plantations (RSPO scheme)

This case study highlights a number of elements of the certification process that call into question the reliability of this certification scheme.

Problems: Disparity between overly ambitious standards and methodological weaknesses (checklist approach), and a pervasive lack of monitoring and quality assurance, including the absence of an effective grievance mechanism

A Human rights due diligence

The RSPO standard has strong human rights content, especially in chapters four and six of its “Principles and Criteria,” which include customary rights, the indigenous right to free, prior and informed consent (FPIC), the rights of human rights defenders, and labor rights, including the right to a living wage. A full understanding of how the exercise and restriction of such rights are reflected in practice on the ground requires specially qualified auditors. A common criticism of RSPO is that its accredited auditors often lack such human rights qualifications and even a full understanding of the RSPO standard’s requirements. Human rights due diligence of auditing and certification companies includes providing staff with relevant training to enable them to apply a human rights-specific methodology.

The case of RSPO labels for sustainable palm oil

RSPO is a multi-stakeholder initiative that has developed a standard and accredits auditors to certify sustainable palm oil production. The standard includes environmental, social, human rights, anti-corruption and other criteria. However, many certified production sites are denounced for human rights violations and numerous other non-conformities with the standard, without remediation.

B Quality management and methodological issues

While insufficiently trained auditors already raise doubts about the RSPO accreditation scheme, the quality of the standard itself is also questionable. Studies have reported that up to 60 percent of RSPO audits were substandard, had a checklist mentality, without interviews or site visits, or involved cover-ups, i.e. fraudulently misrepresenting situations on plantations.³⁷ A closer look at the standard’s criteria sheds some light on the problem. For example, Criteria 4.4 states: “use of the land for oil palm does not diminish the legal, customary or user rights of other users without their Free, Prior and Informed Consent.”³⁸ This is an impact-oriented rather than a process-oriented criterion, which requires appropriate impact indicators. The RSPO indicators require documentation showing identification and assessment of demonstrable legal, customary and user rights, as well as documentation of agreement-making processes that show compliance with FPIC standards. For that, an auditor would largely have to rely on written documents produced by the state (on recognized rights) and by the audited company (on

³⁷ Profundo (2018), 59; see also Environmental Investigation Agency/Grassroots, Who watches the watchmen, November 2015, www.eia-international.org/report/who-watches-the-watchmen/ (accessed 17 December 2020), 6; Environmental Investigation Agency/Grassroots, Who watches the watchmen 2: The continuing incompetence of the Roundtable on Sustainable Palm Oil’s (RSPO) assurance systems, November 2019, www.eia-international.org/wp-content/uploads/WtW2-spreads.pdf (accessed 17 December 2020), 12-13, 20.

³⁸ RSPO, Principles and criteria for the production of sustainable palm oil (2018), www.rspo.org/resources/certification/rspo-principles-criteria-certification (accessed 19 December 2020). FPIC refers to Free, Prior and Informed Consent, a collective and individual right of indigenous and tribal communities, as enshrined in the UN Declaration on the Rights of Indigenous Peoples, and in ILO Convention No. 169.

agreement-making processes). However, particularly in relation to land use rights and consultation processes, these are often not the most reliable sources.

Auditors should be required and enabled to independently identify all potentially affected land users, especially those whose use claims are not documented and who are therefore particularly vulnerable. Consultation processes (FPIC) are also frequently contested and are often not regulated or are poorly implemented. So, assessing whether usage rights and consultation rights have been respected requires engaging with multiple sources and, in particular, with the people potentially affected, i.e. the rights-holders. It also requires elements like unannounced site visits and contractually securing the rights for such visits. Yet, the RSPO scheme does not offer auditors the necessary methodological guidance, training or (financial) resources for that.

Indeed, we would even argue that such rights are not auditable at all, as they require consideration of historical context and multi-actor perspectives, as well as often addressing open local conflicts, legal pluralism or contradictions in law, and uncertain availability of evidence.

C Integrity management

The RSPO scheme prohibits parallel engagement with auditing companies and requires an engagement disclosure declaration to avoid conflicts of interest. It further prohibits clients from canceling contracts as long as non-conformities persist, and requires the rotation of auditors after three years.³⁹ However, studies have shown that instances of non-compliance with RSPO requirements bore practically no consequences, and that complaint procedures were inefficient and certification bodies were not suspended.⁴⁰ In some cases, auditors were allowed to assess complaints for companies they had certified, which constitutes a conflict of interest.⁴¹ Recent reform initiatives, meanwhile, have yet to prove their effect.

D State governance, public participation and access to remedy

The RSPO scheme is voluntary and, hence, potentially has little leverage over its members or certification clients. It depends on the scheme developing its own leverage capacity, for example by offering attractive membership benefits and making access to them conditional on compliance with the scheme. Yet, for RSPO, the opposite effect has been criticized, namely a tendency among RSPO members to quit their membership rather than resolve complaints. This, in turn, has discouraged RSPO from sanctioning members over complaints in order to minimize its risk of losing members.⁴²

Either way, in a voluntary certification regime, improving deficiencies in human rights compliance depends on private negotiations between the scheme and its members or certification clients. Yet, human rights should not be negotiated. They should, according to the UN Guiding Principles, be the responsibility of all companies to respect.

Finally, the effectiveness of a certification system ultimately depends on how effective its complaint mechanism is. In the case of RSPO, there is no public registry of audit reports or compliance violations, which limits the ability of civil society and stakeholders to detect problems. RSPO's complaint mechanism has been criticized for failing to properly address the complicity of auditors in compliance violations, and for being lengthy and lacking transparency.⁴³ As a result, it is unsuitable for providing remedy to those affected.

³⁹ RSPO, Supply chain certification systems for accreditation and certification bodies (2020) www.rspo.org/publications/download/e93ae07bdabafb2 (accessed 19 December 2020), Chapter 5.

⁴⁰ Environmental Investigation Agency/Grassroots, Who watches the watchmen 2: The continuing incompetence of the Roundtable on Sustainable Palm Oil's (RSPO) assurance systems, November 2019, www.eia-international.org/wp-content/uploads/WWtW2-spreads.pdf (accessed 17 December 2020), 12.

⁴¹ Environmental Investigation Agency/Grassroots, Who watches the watchmen, November 2015, www.eia-international.org/report/who-watches-the-watchmen/ (accessed 17 December 2020), 14-15; Profundo (2018), 8 and 61.

⁴² Environmental Investigation Agency/Grassroots, Who watches the watchmen 2: The continuing incompetence of the Roundtable on Sustainable Palm Oil's (RSPO) assurance systems, November 2019, www.eia-international.org/wp-content/uploads/WWtW2-spreads.pdf (accessed 17 December 2020), 13, 20.

⁴³ Environmental Investigation Agency/Grassroots, Who watches the watchmen 2: The continuing incompetence of the Roundtable on Sustainable Palm Oil's (RSPO) assurance systems, November 2019, www.eia-international.org/wp-content/uploads/WWtW2-spreads.pdf (accessed 17 December 2020), 12-13, 20.

Benchmarks for human rights-related auditing and certification

	Social audit	Technical audit	Product safety	Environmental certificate
Human rights due diligence				
Has the auditor or certifier established an HRDD policy and HRDD processes?	NO	NO	NO	NO
Are HRDD policies and processes accreditation criteria?	NO	NO	NO	NO
Are auditors and certifiers qualified in human rights?	N/A	N/A	N/A	N/A
Do those affected have access to whistleblower protection and grievance mechanisms in line with the UNGPs?	NO	NO	NO	NO
Quality assurance				
Is there state or state-authorized accreditation and oversight?	NO	PARTIAL	PARTIAL	NO
Does the applicable standard include transparency, stakeholder engagement and public participation?	NO	PARTIAL	PARTIAL	NO
Methodological issues				
Are the scope and methods used transparent?	YES	NO	NO	NO
Are human rights-specific methods used?	NO	NO	NO	N/A
Does the standard include process and impact criteria, as well as corresponding indicators?	N/A	N/A	N/A	NOT SUITABLE
Are trade unions, civil society and (potentially) affected parties actively involved?	NO	N/A	N/A	NO
Integrity management				
Are auditors selected, hired and paid independently of the interested party?	NO	NO	NO	NO
Are parallel engagements prohibited and disclosure of business or financial relationships required?	N/A	YES	YES	YES
Is the two-person principle required?	YES	NO	YES	YES
Are termination protection and rotation rules in place?	N/A	N/A	NO	NO
State governance, public participation and access to remedy				
Does the state play an active role through standard-setting, accreditation, regulation, oversight, sanctions and support?	NO	MINIMAL	YES	NO
Are there robust liability rules with procedural safeguards in place?	NO	NO	NO	NO
Are audit reports/corrective action plans publicly accessible through public registries or disclosure?	NO	NO	NO	NO

Summary findings

The sectors examined in the case studies all share the same five problematic issues, which not only concern auditing and certification companies, but also levels of standard-setting, accreditation and control, and the role of the state more generally. These are, in brief:

- 1 **Auditing and certification providers lack human rights policies and HRDD processes in their own operations and business relations** in all sectors studied. The cases show how a lack of understanding of the human rights perspective in their own operations, and a lack of normative specifications in this regard led to mistakes in their work and probably directly contributed to human rights violations of others, in some cases with disastrous consequences.
- 2 **There are deficiencies in quality and quality assurance.** Voluntary certification regimes may lack the necessary expertise or public interest representation, but also the necessary motivation for robust compliance monitoring. Deficiencies in the quality of standards and methods can translate directly into increased human rights risks, for example, when the result is a factually false certificate. Even where certification standards are regulated by law, a number of quality and methodological deficiencies occur when oversight schemes are too weak.
- 3 **Deficiencies in methodology** often stem from a lack of understanding of human rights as a concept, and a lack of professional qualification among auditors, certifiers and accreditors, but also from a lack of accountability and oversight. These deficiencies include auditors' non-compliance with specified methodological standards, the manipulation of results, and superficial processes that fail to detect serious violations.
- 4 **In all cases studied, there were deficiencies in integrity management.** While integrity management is a core issue for auditing and certification firms in financial or compliance auditing, the same actors do not necessarily transfer these standards to other, less-regulated fields of activity, such as social and labor audits. The same is true for voluntary schemes. Even in state-regulated sectors, obvious integrity deviations were detected, due to a structural lack of transparency as well as low oversight and monitoring capacities of accreditation bodies and state authorities.
- 5 **There is a general lack of public oversight and corrective tools.** There is no robust oversight by public authorities or state-authorized accreditation bodies. Civil society and public interest stakeholders cannot exercise a monitoring role if they have no public access to relevant information. Complaint mechanisms for affected persons, where they exist, are neither efficient nor provide effective remedy. Liability could be a relevant corrective tool, if robust enough, and form part of a governance regime through which the state could ensure its duty to protect.

The following chapter will examine whether and under what conditions auditing and certification companies are liable towards affected third parties when substandard audits and false certificates contribute to human rights violations.

III

Overview and analysis of current legal liability issues in Europe

Liability arguments are usually based on a “contribution” model: inadequate auditing—be it through failure to detect or report problems or a false certificate—invisibilizes existing problems and thereby contributes to the failure to take corrective action.

Affected persons may consider causes of action based on (1) tort or (2) the concept of contractual protection for third parties.

1 Tort

Tort law provides for compensation to a person who has suffered damage as a result of another person having breached a duty of care towards the claimant. Whether such a duty of care exists and has been breached is a central question, especially in the auditing and certification sector. The European Court of Justice decided, for example, that various EU directives on the monitoring of financial institutions and on deposit insurance protect the third-party interests of end consumers,⁴⁴ as it decided that the EU directive on medical devices in place at the time protects patients who use these devices.⁴⁵

Yet, the court had to refer the question of liability back to the national level. In the medical device case, the German Federal Court of Justice recognized that the German statute based on this directive also protects the interests of patients. From this, the court derived a duty of care that certifiers of CE conformity owed not only to producers, but also to patients. However, the court did not have to resolve whether there had also been a breach of duty in this particular case.⁴⁶ In a parallel French proceeding, the appeals court recognized a breach of duty of care by the certifier.⁴⁷

In contrast, tort liability may be excluded. For example, in the case of financial audits, the German Commercial Code stipulates that auditing bodies are only liable vis-à-vis the audited company or third companies that might be affected. This implicitly excludes liability towards individuals whose human rights have been affected (*argumentum e contrario*).⁴⁸

Legal scholar Gerhard Wagner has pointed out how this regulation, rather than encouraging due diligence towards third parties, encourages the opposite. If a financial auditor is liable to the audited entity for a negligently negative audit report, but is not liable to an affected person for a negligently positive audit report, this means that the law affords more encouragement to exercise due diligence in favor of the audited entity, which incidentally offers the prospect of subsequent contracts, and less encouragement to apply due diligence in favor of those potentially injured in their human rights. As Wagner puts it, there are more incentives not to detect possible shortcomings than to detect them.⁴⁹

The duty of care of auditing and certification companies towards potentially affected third parties should therefore not be subject to interpretation, but for clarity and coherence, should be explicitly established in law.

⁴⁴ ECJ, *Peter Paul and Others v. Bundesrepublik Deutschland*, Judgement of 12 October 2004, C-222/02, para. 38; Wagner (2018), 133.

⁴⁵ ECJ, *Elisabeth Schmitt v. TÜV Rheinland LGA Products GmbH*, Judgement of 16 February 2017, C-219/15, breast implants OLG Zweibrücken).

⁴⁶ German Federal Court, judgement of 27 February 2020, VII ZR 151/18, para. 33 (Breast Implants-II, OLG Nürnberg).

⁴⁷ Legal Tribune Online, *Französisches Gericht verurteilt TÜV zu Schadensersatz*, www.lto.de/recht/nachrichten/n/pip-skandal-tuev-rheinland-schadensersatz-gericht-frankreich/ (accessed 17 February 2021)

⁴⁸ German Federal Court, judgement of 6 April 2006, III ZR 256/04, para. 13ff. Even if, as some authors (see Rack, Part 2 (2016) 328f) argue, financial auditors were also always supposed to consider the public interest, this is not really reflected in para. 317 HGB (German Commercial Code), and consequently para. 321 sec. 2 HGB (German Commercial Code) only requires reporting internally, not publicly, because where public interests are not protected, public control is also not needed.

⁴⁹ Wagner (2018), 136; Wagner (2014), 319.

This demand is also backed by the UN Guiding Principles on Business and Human Rights. According to the commentary on Guiding Principle No. 30, multi-stakeholder and industry-driven HRDD schemes risk their legitimacy if they do not provide grievance mechanisms for accountability that also provide remediation, otherwise they could risk their legitimacy.⁵⁰ In other words, the UNGPs expect such schemes to acknowledge duties of care and accountability towards third parties.

The duty of care of auditing and certification companies towards potentially affected third parties should be established in law

2 Contractual third-party protection

Contractual third-party protection gives persons who are not part of a contractual relationship (third parties) and who suffer damage as a result of such a relationship, a right of compensation and reparation against the contracting parties. Under German law, this concept is not statutory, but established by jurisprudence, following the normative interpretation of an actual agreement in light of the principle of good faith.⁵¹

However, this route is usually denied in auditing and certification cases due to a lack of foreseeability: auditing and certification companies are often unable to assess how wide the circle of potentially affected parties may be. And so, it is argued that if this circle is very wide, it would result in an unmanageable risk for the auditing and certification companies, which contracting parties would not have intended under the principle of freedom to contract.⁵² This argument seems plausible in relation to processes or mass-produced goods, but is less convincing in the case of auditing and certification of, for example, a dam or a factory, where the number of potentially affected persons living or working in or in direct proximity to the site is usually determinable.

In the above-mentioned case of certification (CE marking) of medical devices, the German Federal Court of Justice (BGH)⁵³ rejected the existence of liability towards patients under the contractual third-party protection concept. Despite recognizing the regulation of CE markings as protective of patients, it argued that the specific contractual interests of the parties, i.e. the manufacturer PIP and the certifier TÜV Rheinland, was not to certify a certain quality standard of the product for the end user, but rather to ensure the product's compliance with the requirements necessary to enter the EU market. Accordingly, the interpretation of the contract did not support a third-party protective element nor the corresponding liability.

3 Governance through civil liability?

This short analysis shows that there is currently no robust liability regime for auditing and certification companies vis-à-vis affected persons. In transnational constellations, the situation becomes even more opaque, as under the EU's regime of private international law, the applicable law in many such cases will be foreign law.⁵⁴

⁵⁰ UNGP 2011 No. 30, Commentary.

⁵¹ Glinski and Rott (2018), 88, referencing German Federal Court, judgement of 14 June 2012, IX ZR 145/11, reported in [2012] NJW 3165, 3167.

⁵² Hoffmeyer (2015), 335f.

⁵³ German Federal Court, judgement of 27 February 2020, VII ZR 151/18.

⁵⁴ Regulation (EC) 593/2008 (Rome I) for contractual and Regulation (EC) 864/2007 (Rome II) for non-contractual obligations, respectively.

And so the question arises as to whether the introduction of such a liability regime would resolve all of the identified deficiencies of auditing systems? This would mean laying the burden of monitoring and controlling auditing and certification companies entirely upon the shoulders of affected persons, which would be unrealistic, unfair and ineffective. Especially in transnational constellations, those affected cannot be expected to regularly file cross-border legal claims against bad audits and false certificates, particularly given the numerous challenges in doing so. Such challenges include short statute of limitation periods, the burden of proof, strict rules on legal standing and civil procedure's high level of formalization, not to mention the often-precarious safety conditions on the ground, lack of access to resources, lawyers, translation, etc. In addition, those affected by human rights violations often belong to social groups that are already structurally excluded and marginalized.⁵⁵

However, it is necessary to establish civil joint and several liability of auditing and certification companies for causing and contributing to human rights violations, and to create the procedural conditions necessary to afford affected parties with effective access to legal remedies. Yet, this is not sufficient as a corrective mechanism for all of the shortcomings identified. Many are beyond the individual sphere of influence of auditing and certification companies, such as poor standard quality or inadequate methodological guidelines. Other factors are likely to be ignored as long as they are voluntary or do not seem economically worthwhile—such as off-site interviews with workers, unannounced site visits or better payment schemes. Here, state regulation will have to set the necessary standards.

Whether the state fulfils its duty to protect depends on the extent to which it is able to ensure that privatized control effectively fulfils its public purpose

It is not only in transnational constellations that the state increasingly uses private auditing and certification to alleviate its burden of oversight and control. The examples in the case studies include the mining sector in Brazil, labor inspection in Bangladesh and Pakistan, and CE marking of medical devices in the European Union. Other examples include the EU's environmental audit scheme, audits for conflict minerals and the timber supply chain,⁵⁶ the auditing and certification of sustainable biofuel,⁵⁷ and in Germany, the regular car safety inspections colloquially referred to as “the TÜV.”⁵⁸

As mentioned earlier, the state has a duty to protect human rights. By delegating tasks to private actors, it cannot eliminate or outsource this duty, only the implementation of relevant activities. Whether the state fulfils its duty to protect depends on the extent to which it is able to ensure that privatized control effectively fulfils its public purpose.⁵⁹ The following chapter develops proposals for better regulation and oversight of the auditing and certification industry.

⁵⁵ The workers at the Ali Enterprises factory came from poor and disenfranchised social strata. The dam break in Brumadinho left many families without their sole bread winner and also left indigenous communities and those depending on informal subsistence economies with the least possibilities to achieve remedy. In the breast implants case, those affected were women. In the RSPO case study, those affected by the false certification of palm oil production were mostly landless, indigenous, or marginalized rural communities, (often seasonal) agricultural workers and child workers.

⁵⁶ Article 6ff Regulation (EU) 2017/821 on conflict minerals supply chain due diligence, and Article 8ff Regulation (EU) 995/2010 against illegal timber harvesting, respectively.

⁵⁷ European Court of Auditors (2016).

⁵⁸ Glinski and Rott (2018), 93, referencing Berlin Regional Court, 53 S 229/66, 28 April 1967, reported in [1967] NJW 1663, 1664; and, for English law, the case of *Perret v Collins*, [1998] EWCA Civ 884, cited at 94.

⁵⁹ Glinski and Rott (2018), 86.

IV

What needs to change? A cross-sectoral analysis and concrete proposals for action

Based on the findings from the case studies, we have clustered specific proposals for action under the following headings:

- 1 Human rights due diligence
- 2 Quality assurance
- 3 Methodological issues
- 4 Integrity management
- 5 State governance, public participation and access to remedy

1 Human rights due diligence

Both TÜV cases in this study have illustrated how a mere regulatory compliance approach that loses sight of the context and meaning of human rights risks can lead to a “normalization of norm deviance,” which implies inadequate risk management and can potentially lead to serious and irreparable human rights violations and harm. Therefore, a human rights perspective should be introduced into human rights-related fields in which auditing and certification are used.

Auditors and certifiers do not perceive themselves as being active in risk areas

A Anchor HRDD in corporate policies and processes and as accreditation criteria

All companies, including auditing and certification firms, are called upon to install policies and processes for human rights due diligence and to provide for remediation where needed. This is the key message of the UN Guiding Principles on Business and Human Rights. Ten years after the introduction of the UNGPs, however, there has been no substantial progress in this regard for auditing and certification companies. Auditors and certifiers do not perceive themselves—and are not perceived by others—as being active in risk areas. For example, they do not themselves engage in mining, industrial manufacturing, or pharmaceutical or agro-industrial production. Nor are they considered part of a “supply” chain in the sense that they do not supply or purchase products. The case studies illustrate how both of these blind spots are misconceptions. But the UNGPs are clear: no business is exempt.

It is therefore urgent to establish mandatory human rights due diligence laws that cover auditing and certification companies, regardless of their size, and which extend into their business relationships, particularly with respect to subsidiaries, agents and subcontractors.

Furthermore, both policies and processes for implementing HRDD should be established as mandatory conditions for accreditation and monitoring of auditing and certification firms in human rights-related fields. They should also, as foreseen under UNGP No. 4, be required for access to public procurement procedures and foreign trade and investment promotion.

B Build capacity in human rights

Auditors, certifiers and accreditation bodies should be required to offer staff members training in human rights methods in addition to their existing specialized expertise, insofar as this is relevant in their respective fields.⁶⁰ This is necessary because internal risk assessment, e.g. of financial or compliance risks, cannot simply be “extrapolated” to human rights risks,⁶¹ even if certain risk management principles from these classical fields are relevant and have certainly inspired the UNGPs’ HRDD concept. One cannot solely rely on quantitative and metric indicators to capture human rights risks, as one must also include external actors within the scope of protection. This requires adopting a human rights perspective and applying specific methods. Human rights-specific methodological elements include, for example:

- 1 A focus on rights-holders
- 2 Stakeholder engagement
- 3 A focus on risks to and violations of rights, rather than just on economic damages
- 4 Consideration of risks of irreparable harm rather than risks of compensation costs
- 5 Context and process analysis and a multi-actor perspective
- 6 Establish whistleblower protection and grievance mechanisms in line with the UNGPs

Grievance mechanisms are necessary not only for complaints against an improperly audited producer, but also against auditors and certifiers who do not observe professional standards of quality and integrity. They should be established at the level of an accreditation body or a public authority. Studies have shown that private complaint mechanisms are often unsatisfactory and inefficient.⁶²

Mechanisms should offer complainants active protection against reprisals

Grievance mechanisms should meet the standards of UNGP No. 31.⁶³ In particular, they should be accessible. In this sense, it would not be sufficient to provide access via the company’s website, for example under a non-specific subheading and in only one language.⁶⁴ It is also important that such mechanisms offer complainants active protection against reprisals where necessary. Moreover, they must handle complaints in a speedy, predictable and transparent procedure that includes relevant access to information for complainants. Even in proceedings concerning specific audits, access to the relevant audit reports has been denied on the grounds that they were contractually agreed to be exclusive property of the audited entity or the commissioning party.⁶⁵ Such contractual clauses are not in line with a transparent grievance mechanism and should hence be inadmissible. Freedom of contract cannot be limitless when it affects the human rights protection of third parties.

⁶⁰ MacLeod and DeWinter-Schmitt (2019), 75; Clean Clothes Campaign, Fig Leaf for Fashion—How social auditing protects brands and fails workers, Summary Briefing (2019), www.cleanclothes.org/file-repository/figleaf-for-fashion-brief.pdf (accessed 19 December 2020), 9. See also OECD, OECD due diligence guidance for responsible supply chains of minerals from conflict-affected and high-risk areas (2013), www.oecd.org/corporate/mne/GuidanceEdition2.pdf (accessed 19 December 2020), 50 and 109, on requiring auditors to show competences in relation to, amongst others, the social, cultural and historical contexts of the conflict-affected areas of mineral origin or transport, including relevant linguistic abilities and culturally appropriate sensitivities for conducting audits.

⁶¹ MacLeod and DeWinter-Schmitt (2019), 75.

⁶² Terwindt and Armstrong (2019), 254ff (on BSCI); HWW/ICN/SOMO, Case closed, problems persist: Grievance mechanisms of ETI and SAI fail to benefit young women and girls in the South Indian textile industry, Juni 2018, www.somo.nl/problems-persist-in-south-india-textile-industry/ (accessed 17 December 2020), 12ff (on SAI/SA8000); Environmental Investigation Agency/Grassroots, Who watches the watchmen 2: The continuing incompetence of the Roundtable on Sustainable Palm Oil’s (RSPO) assurance systems, November 2019, www.eia-international.org/wp-content/uploads/WwtW2-spreads.pdf (accessed 17 December 2020), 12 (on RSPO).

⁶³ UN Guiding Principle No. 31 establishes the criteria for non-judicial grievance mechanisms, including the necessity for a legitimate, accessible and transparent grievance mechanism.

⁶⁴ DAKKS offers a complaint mechanism only on the German version of its website, under the heading “Organisation,” while the English version does not provide a specific page, www.dakks.de/content/organisation (accessed 17 December 2020).

⁶⁵ MacLeod and DeWinter-Schmitt (2019), 76; Terwindt and Armstrong, 256f.

C Grievance mechanisms must offer remediation

Most importantly, grievance mechanisms should not only receive complaints, but also offer remediation when the respondent auditor or certifier may have caused or contributed to a human rights violation (UNGP No. 22). The German government's current draft supply chain law⁶⁶ (as of May 2021) falls considerably short of these standards. For example, in the case of the Brumadinho dam failure, if it can be shown that the false stability declaration contributed to preventing the immediate evacuation of the affected population, this may be considered a contribution to a human rights violation, which would oblige the auditing company to provide remediation to those affected.

The more seriously and thoroughly grievance mechanisms are designed and handled, the more fruitful they are as a source of performance tracking and evaluation for the auditing and certification companies themselves.

The same is true for whistleblower mechanisms. In practice, whistleblower protection is probably even more important than standard grievance mechanisms, as it is aimed at people with insider knowledge who can more easily detect deficiencies, whereas affected persons often do not even know who the auditor or certifier is, much less what an accreditor does. From their perspective, the management of the operating company on site is the actor with immediate power to improve their conditions and, hence, the more obvious target for a complaint, whereas auditing and certification companies are likely not perceived as having the potential to directly influence conditions on site.

However, it should be noted that grievance mechanisms cannot replace or render redundant the need for a robust liability scheme. Corporate grievance mechanisms are meaningful because they reflect a company's responsibility to respond to identified problems, they can potentially offer speedy and pragmatic solutions, and they can serve as a complement to a company's risk analysis and impact-tracking processes. However, it is up to the state, under its duty to protect, to offer legal liability remedies in response to rights-holders affected by human rights violations who have a legal right to obtain effective remedy.

HRDD for auditors and certifiers

Stage 1 (identify and assess)

Does the subject of review affect human rights risks? What factors could impair the reliability of the audit/certification?

Stage 2 (act)

Measures in response to such risks could be staff trainings, adaptation of methods, use of additional sources, etc.

Stage 3 (track)

Inquire regularly about the impact of such measures and adjust and improve them when and where necessary. Learn the lessons.

Stage 4 (account)

Document this process and communicate to interested stakeholders, especially (potentially) affected parties.

Effective grievance mechanisms help corroborate the risk analysis, track the impact of measures, engage in dialogue on appropriate measures, and account to relevant stakeholders.

⁶⁶ Available for download at: www.bmas.de/DE/Service/Gesetze-und-Gesetzesvorhaben/gesetz-unternehmerische-sorgfaltspflichten-lieferketten.html (accessed 6 April 2021).

2 Quality assurance

A Establish state accreditation and oversight

The integrity and reliability of certification systems are central to their ability to fulfil their main function of assessing conformity with normative criteria and, hence, ensuring fair and safe business.⁶⁷ In fulfilling its duty to protect, the state could ensure this objective through state-regulated accreditation and public oversight for quality and integrity assurance.⁶⁸

In relation to accreditation, there should be legally defined minimum accreditation criteria for quality assurance. Beyond the human rights-specific criteria mentioned above, these can include procedures for assessment, sampling and raw data management, monitoring, documentation, and public accessibility of review results and sanctions. To ensure independence and integrity, a number of tools are available, such as assurances of financial and personal independence, liability insurance, the two-person rule and the prohibition of parallel engagement (separation of auditing and other services like consulting).⁶⁹

Some authors also suggest a regulated pay scheme for auditing and certification, as is common for certain professions where ensuring quality and integrity is in the public interest.⁷⁰ This would be applicable at least to certifiers operating from the home country of regulation and would respond to numerous complaints that fierce market competition leads to a race to the bottom in pricing and, consequently, also in quality, because more thorough audits are more time and resource intensive.

For transnational auditing processes, mutual recognition of accreditations internationally should be specifically agreed upon in human rights-related fields of certification,⁷¹ as is already common practice in other fields of certification, in order to ensure a level playing field of quality assurance internationally.

In relation to oversight, the inefficiency of private systems is exemplified in both the RINA and RSPO case studies. Audit reports or results were not available and effective grievance mechanisms were not in place. Suspension was not used as a sanction, nor was legal liability recognized. In both schemes, there have been insider complaints about low pay for auditors, which directly impacts the methodology used, e.g. there is often not enough (paid) time for unannounced visits or off-site interviews and engagement with stakeholders.

Public oversight of auditors and certifiers should also be legally established for human rights-related sectors

In terms of public oversight, the Brumadinho case study offers a negative example, where mining sector reforms in Brazil introduced an electronic, semi-automated information and reporting system and staff resources in the mining authorities were drastically reduced. As a result, the mining authority was not able to review stability declarations or monitor the quality of the underlying audit assessments.

Another example is certification of sustainable biofuels through voluntary schemes under the European Renewable Energy Directive 2009/28/EC (RED). Here, the European Court of Auditors criticized in 2016 that after such certification schemes were initially recognized by the commission (comparable to accreditation), there was no follow-up supervision or oversight procedure in place, and so the commission could not ensure that the schemes actually continued to apply the required certification standards.⁷²

⁶⁷ Verfassungsblog, Matthieu Binder, Die Haftung von Zertifizierungs- und Prüfunternehmen als gebotener Bestandteil eines effektiven Lieferkettengesetzes, www.verfassungsblog.de/die-haftung-von-zertifizierungs-und-pruefunternehmen-als-gebotener-bestandteil-eines-effektiven-lieferkettengesetzes/ (accessed 17 December 2020); Klinger, Hartmann and Krebs (2015), 273.

⁶⁸ MacLeod and DeWinter-Schmitt (2019), 75-77; Verfassungsblog, Matthieu Binder, Die Haftung von Zertifizierungs- und Prüfunternehmen als gebotener Bestandteil eines effektiven Lieferkettengesetzes, www.verfassungsblog.de/die-haftung-von-zertifizierungs-und-pruefunternehmen-als-gebotener-bestandteil-eines-effektiven-lieferkettengesetzes/ (accessed 17 December 2020); Klinger, Hartmann and Krebs (2015), 273.

⁶⁹ See also accreditation standards ISO 17021, for audit and certification of management systems, and ISO 17065, for bodies certifying products, processes and services.

⁷⁰ See, for example, the German Law on the Remuneration of Lawyers (Rechtsanwaltsvergütungsgesetz, RVG) for the legal profession, or the German fees regulations for the medical profession (Gebührenordnung für Ärzte, GOÄ) (Klinger, Hartmann and Krebs (2015), 274).

⁷¹ Klinger, Hartmann and Krebs (2015), 275.

⁷² This issue was addressed in the new Renewable Energy Directive (Recast) 2018/2001/EU (RED II).

In response to the balance sheet falsification scandal involving the German company Wirecard—a scandal that exposed weaknesses in auditing and state oversight—the German government drafted a Financial Market Integrity Strengthening Act. In it, both the independence of auditors and the supervisory structures and powers of state authorities are strengthened “in favor of a more state-supervised balance sheet control process,” including the extension of criminal and administrative liability to auditors.⁷³

Public oversight of auditors and certifiers should also be legally established for human rights-related sectors, with an effective oversight mandate and the necessary powers and procedures to ensure auditors and certifiers are accountable. Oversight tools should include a transparency registry where audit reports—including audit scope, applied methods and results—and corrective action plans are accessible to stakeholders like trade unions, civil society organizations, and rights-holders, as well as to state authorities. Powers to sanction, suspend or prohibit activities, as regulated for example for EU environmental audits and statutory audits,⁷⁴ should complement this toolbox. The oversight bodies’ responsibilities should be defined by national law and may fall to the same accreditation bodies.⁷⁵

B Set internationally recognized standards and methods

Standards and standard-setting procedures must be reliable and credible. Standard-setters must be legitimized through their institutional authority, mandate and competence, as well as through transparent, credible processes. Private initiatives have sought to achieve this through a multi-stakeholder approach. Civil society, and trade unions in particular, should of course play a central role, both in human rights standard-setting processes and in dealing with grievance mechanisms.

A standard’s recognition also depends on the method of standard setting. Current models range from internationally recognized private expert standardization (e.g. ISO) to multi-stakeholder (e.g. FLO) or business-led initiatives (e.g. BSCI), to state or EU regulation. While the ISO system, for example, has gained international acceptance, it is traditionally used for technical standards, where consultations happen among large communities of experts. In the field of corporate social responsibility, ISO has not produced any accreditable standards. The ISO 26000 guidance contains a list of principles of corporate social responsibility, but is explicitly not a certifiable standard.

In contrast, where EU regulation has developed EU-wide standards, such as CE marking for medical devices or supply chain auditing rules for timber and conflict minerals (Commission Delegated Regulation (EU) No 363/2012 and Commission Regulation (EU) 2017/821, respectively), such processes usually show a broader degree of stakeholder engagement and consultations with a stronger degree of transparency and public participation through the legislative process. The model of CE marking was therefore proposed as a model for the regulation of the ILO core standards.⁷⁶

Yet, in unregulated markets, private standard-setters are just as exposed to market competition as auditors and certifiers. This means their “products,” i.e. standards, must be competitive in terms of price and the effort required to implement them. This may lead them to compromise on quality. Therefore, some level of regulatory protection is needed here. While the state can act as a standard-setter itself, it should at least legally set minimum criteria for acceptable standards.

**In the garment sector, extensive analysis shows:
it is practically impossible for producers to respect labor rights**

Standards should be based on internationally recognized human rights standards, in particular the UN Guiding Principles on Business and Human Rights and the ILO conventions. They should

⁷³ Gesetzentwurf der Bundesregierung für ein Gesetz zur Stärkung der Finanzmarktintegrität (FISG), 16 December 2020, www.bmjv.de/SharedDocs/Gesetzgebungsverfahren/DE/Finanzmarktintegritat.html (accessed 17 February 2021).

⁷⁴ Paras. 16, 17 of the German Environmental Audit Law (UAG), and Article 30ff of Directive 2006/43/EC on statutory audits of annual accounts and consolidated accounts, respectively.

⁷⁵ See, for example, the German Auditing Regulation (Wirtschaftsprüferordnung) and Commercial Code (Handelsgesetzbuch) for financial audits; and para. 2(3) of the German Accreditation Body Act (Akkreditierungsstellengesetz, AkkStG) for medical device certifications.

⁷⁶ Löttsch and Fifka (2020).

comprehensively address the respective topic in each case and offer meaningful and verifiable impact and process indicators, as well as methodological guidance. They should also be regularly reviewed and updated. These criteria would need to apply to state, interstate and private standards, whether mandatory or voluntary. In terms of scope, standards often cannot be universal, but need to be adapted to specific regional contexts or sector-specific conditions. Nevertheless, they should cover all relevant questions in the fields they address. For example, for supplier or supply chain audits, standards should include a review of the sourcing parties' pricing, purchasing and sourcing practices, and how these may contribute to violations. In the garment sector, there has been extensive analysis of how it is practically and economically impossible for producers to respect labor rights when sourcing parties pay prices that are too low or place orders that are too short-term.⁷⁷ Hence, the sourcing parties cannot be left out of the picture when certifying human rights due diligence in supply chains, whatever the sector. If an audit cannot deliver this, it has very limited value for assessing the audited company's HRDD.

An example in relation to scope requirements is biofuel certification under EU law (RED). The European Court of Auditors, in its 2016 investigation, criticized the fact that sustainability assessments did not include socioeconomic impacts, such as land tenure conflicts and displacement, forced/child labor, poor working conditions for farmers, and dangers to health and safety.⁷⁸ While the court qualifies these criteria as sustainability criteria, they are also human rights criteria and should be included in a sustainable biofuels standard as a consequence of human rights due diligence. In its report, the court recommended that these criteria be made mandatory. It found that because they were mentioned as optional in the relevant directive, they were rarely applied in practice.⁷⁹

Section 3 of this chapter (below) addresses questions related to quality of indicators and methodological minimum standards.

The scope of the audit, the methods applied and the results must be transparent

C Include process and impact-related criteria

Several interviewed experts⁸⁰ agree that standards in the human rights field must include not only process-related, but also performance or impact-related elements, unlike, for example, certifications of environmental management processes under ISO 14001:2015. These contain no specific performance requirements but look only at processes. This can lead to certification of both zero-emission and very strongly emitting companies, as long as both demonstrate adherence to a progressive improvement plan.

In the case of medical products, not only the production process but also the product needs to be reviewed (for example through regular sampling). If, in contrast, a standard relating to discrimination only sets out as a criterion that discrimination is prohibited,⁸¹ this only describes a policy, not the implementation process and certainly not whether the company manages to effectively implement this prohibition. It therefore contains neither process nor impact-related criteria and seems too limited and superficial for a human rights review.

The question of whether the CE marking regulation can therefore be a good model for certifying respect for labor rights (ILO core conventions), as proposed by lawyer Markus Löttsch and economist Matthias Fifka,⁸² merits further inquiry. Notably, the CE regulation does not cover quality assurance of the product,

⁷⁷ Clean Clothes Campaign, Fig Leaf for Fashion—How social auditing protects brands and fails workers, Summary Briefing (2019), www.cleanclothes.org/file-repository/figleaf-for-fashion-brief.pdf (accessed 19 December 2020), 7.

⁷⁸ European Court of Auditors, Special Report Nr. 18: The EU system for the certification of sustainable biofuels (2016), www.eca.europa.eu/Lists/ECADocuments/SR16_18/SR_BIOFUELS_EN.pdf (accessed 17 December 2020), 30ff.

⁷⁹ European Court of Auditors, Special Report Nr. 18: The EU system for the certification of sustainable biofuels (2016), www.eca.europa.eu/Lists/ECADocuments/SR16_18/SR_BIOFUELS_EN.pdf (accessed 17 December 2020), 31. Note that the new Renewable Energy Directive (Recast) 2018/2001/EU (RED II) has not taken this recommendation on board.

⁸⁰ One accreditor, one auditor, three human rights consultants, one social auditing organization.

⁸¹ RSPO, Principles and criteria for the production of sustainable palm oil (2018), www.rspo.org/resources/certification/rspo-principles-criteria-certification (accessed 19 December 2020), No. 6.2.

⁸² Löttsch and Fifka (2020).

but only a review of the production process, as was distinguished by the European Court of Justice in the breast implant case.⁸³ While there can be merit in conducting (internal or external) audits to monitor progressive improvement, such audits cannot be used as the sole basis for certifying HRDD implementation.

3 Methodological issues

A Create transparency around scope and applied methods

There are no universal solutions for what an audit should look like and what it should cover. Audits usually cover specific sectors (e.g. apparel) or topics (e.g. conflict minerals), or aspects (e.g. the sustainability or transparency of a supply chain) or certain parts (e.g. packaging or transportation) of the entire production and distribution process. To investigate human rights risks in a mining supply chain, for example, an auditor may need to pay particular attention to child labor in one country and water rights issues in another, depending on local circumstances.

The scope of the audit, the methods applied and the audit results must be transparent in order to allow conclusions to be drawn about the interpretation and reliability of the results, and to enable public monitoring. For example, the criterion of a “living wage” is used in several standards.⁸⁴ Considering how complex and unfinished discussions are about how best to determine living wages in different countries and sectors, an auditor will have a hard time assessing this criterion properly for an average fee of a few hundred dollars for a worksite audit. Similarly, an audit can hardly detect sexual harassment, illegal wage deductions or the suppression of employee organizations if it only works with announced visits or conducts employee surveys directly at the workplace, and if it exclusively relies on data and information provided by the management of the audited company itself, without corroboration from independent sources.⁸⁵ Information about the methods applied makes it possible to interpret the reliability of the audit results.⁸⁶

Where the scope of review, process and ownership of data are stipulated in private, confidential contracts, disclosure is usually denied with reference to trade secret principles.⁸⁷

Full transparency regarding audits’ scope, methods and results in relation to human rights questions are in the public interest and should be guaranteed. This implies some concessions as far as freedom of contract is concerned. The creation of internationally recognized standards with solid methodological guidance could help. Alternatively, audits could be contracted through public procurement, with all terms and conditions publicly disclosed.

B Use human rights-specific methodology

Checklist approaches are insufficient. Instead, methods must be adapted to the specific risks expected or identified in each field and case.

The case on breast implants raises the question of how much an auditor can really do when a producer acts in bad faith. Unannounced on-site visits are one possible response. They are obligatory, for example, in the field of organic production, labelling and control,⁸⁸ and recommended as obligatory for medical devices in the EU.⁸⁹ SA8000 certification also includes, to some extent, mandatory unannounced audits.⁹⁰ There are practical challenges, though, to the feasibility of such visits, for example in very remote production sites, and there are also limits to what they may reveal. Experts have explained, for example, that it is very difficult to detect child labor on a smallholder plantation, even through unannounced visits.

⁸³ Wagner (2018), 138.

⁸⁴ For example, in RSPO and SA8000.

⁸⁵ Terwindt and Saage-Maaß (2016), 7; see also O’ Rourke (2000) and Anner (2012).

⁸⁶ Terwindt and Saage-Maaß (2016), 7.

⁸⁷ MacLeod and DeWinter-Schmitt (2019), 76; Terwindt and Armstrong, 256f.

⁸⁸ Commission Regulation (EC) 889/2008, Article 65 IV.

⁸⁹ EC recommendation 2013/473/EU (Annex III).

⁹⁰ SAAS, Unannounced SA8000 Audits, www.saasaccreditation.org/UnannouncedSA8000Audits (accessed 21 December 2020). Whether this could hamper the development of a trustful relationship and, hence, willingness to share internal information with the auditor is not relevant here. Instead, the auditor has an obligation of independence. (Rott, (2017), 1148 (quoting Advocate General Sharpston from her final pleadings in Schmitt/TÜV Rheinland, ECLI:EU:C:2016:694 = PharmR 2016, 449 Rn. 51). In that sense, to announce visits can be counter-productive, as it could make the detection of irregularities more difficult.

Thus, in addition to defining and complying with minimum methodological standards, the methods applied must be adapted to the risks that are found or expected. In high-risk regions or sectors, methods need to be more thorough and elaborate. In Pakistan, for example, building and fire safety cannot be assessed without a site visit and off-site worker interviews. In several of the case studies there had been a historical record of violations, but it did not motivate the auditors to intensify their inspections. The cases of the dam failure in Brazil and the breast implants in France clearly show that several violations had gone unattended for years, without relevant consequences in the subsequent audit and certification processes, although auditors in both cases had the means to intensify their inspections and the certifiers had the power to deny the desired certificates. Where there are specific indications, such as denunciations by whistleblowers or a previous track record of violations, an auditor should be required to intensify controls and not rely on presumed compliance or good faith of the company being audited.

Methodological guidance by the standard-setter is important for such questions, and a set of minimum methodological standards, including criteria for intensifying control density of inspections, should be mandatory.

Such minimum standards must also be accompanied by necessary adjustments in auditing conditions. Training and fees must be adequate to enable auditors to invest the necessary time and expertise into a thorough auditing process. Pay schemes should, therefore, not be negotiated privately, but based on good practice guidance or regulation.

C Actively involve trade unions, civil society organizations and rights-holders

Studies have shown that the active involvement of worker representatives in complaint systems can raise the level of detection of irregularities.⁹² These representatives' unique expertise lies in the fact that they are permanently on site and often have long-term perspective and access to informal sources of information to which an external auditor would hardly have access. The same can be true for civil society organizations (CSOs) and (potentially) affected rights-holders, for example, when it comes to assessing the situation of local water and land use rights or the repression of human rights defenders. In many cases, such stakeholders are more than just witnesses. Trade unions, for instance, play an important role "in organizing workers and building up collective power to enable workers to demand fair working conditions."⁹³ CSOs and rights-holders play an important role in negotiating conflicting interests, managing social conflict

Good practice example: the Bangladesh Accord⁹¹

The Bangladesh Accord on Fire and Building Safety was a direct response to the Rana Plaza factory collapse in Bangladesh that bears tragic similarities with the Ali Enterprises factory fire in Pakistan. It is a legally binding agreement between transnational companies in the fashion industry ("brands") and international and national trade union federations with the aim of working towards a safe and healthy garment and textile industry in Bangladesh.

The agreement, which expired in May 2021, covers local factories producing ready-made garments, home textiles as well as fabric and knitwear accessories. The Bangladesh Accord is limited in scope to building and fire safety (occupational health and safety), but experts confirm the transferability of the Accord to other areas of labor and human rights beyond occupational health and safety. Its main features include the following:

- 1 Inspections are carried out by independent auditors of the Accord
- 2 If supplier factories show defects and do not remedy them within a set period, the client brand must promptly issue a warning. If the factory still does not comply, the business relationship must be terminated
- 3 Fire safety trainings are carried out by independent experts with all workers in all supplying factories.
- 4 Audit reports are published
- 5 Brands are responsible for financing the above measures and activities
- 6 There is an independent grievance mechanism for workers to make complaints against factories
- 7 A binding arbitration clause regulates disputes between signatories of the Accord

⁹¹ www.bangladeshaccord.org (accessed 21 June 2021).

⁹² Anner (2012), 621f.

⁹³ Terwindt and Saage-Maaß (2016), 8.

and protecting social peace. This is not only important for a company to consider when organizing its HRDD process, but also for auditors in the auditing process. Audits develop corrective action plans and recommend specific measures for mitigation, remediation and structural improvement. This is where the perspectives and negotiation power of worker representatives, CSOs and rights-holders should be actively engaged, in order to develop measures that can achieve acceptance and sustainability for company management as well as for the workforce and neighboring communities.

However, because of their particular importance in defending potentially conflicting interests, such civil society stakeholders are often vulnerable to retaliation that could come in many forms, ranging from layoffs to stigmatization or social pressure. Therefore, involving them also requires ensuring their protection. This requires procedural transparency and fairness, but also offering anonymity and safe space where needed, and a sensitivity and preparedness to react to—often unforeseen—security incidents.

4 Integrity management

In this section, integrity management refers to the safeguarding of independence, the management of conflicts of interest, and the avoidance of courtesy certificates. All of the case studies in this report display the vulnerability of auditing and certification companies in this respect, even in voluntary schemes.

A Ensure independence in selection, hiring and payment

Often it is the audited company or another party with direct interest in the outcome of the audit that selects and contracts the auditor and certifier and pays for the audit and certificate. This can compromise the independence of the auditor and certifier and exposes them to a structural risk for conflicts of interest.⁹⁴ It is an incentive for lower control density, especially where there is a high level of market competition. This practice should therefore be outlawed. In Brazil, following several dam collapses, proposals to improve dam stability governance are now being discussed. Possible elements include the selection of certifiers through public procurement, and their payment from a public fund based on contributions by mining operators, as well as some form of parliamentary or similar public oversight.⁹⁵ An alternative would be selection and payment through an independent body and associated fund.

Often it is the audited company itself that selects,
contracts and pays the auditor

B Prohibit parallel engagement and require independence declarations

The case of the Brumadinho dam failure shows how parallel engagements—e.g. auditing and consulting—can impede the independent judgement of auditors and certifiers. The prohibition of parallel engagements is standard good practice and partially regulated in the more traditional auditing and certification sectors. In the case of statutory audits of public interest entities,⁹⁶ for example, EU law prohibits statutory auditors and other members of the body or network from providing certain non-auditing services, such as consultancies, internal audits or legal services, to the auditing client or its controlled and controlling companies during an ongoing engagement.⁹⁷ It also obliges statutory auditors to declare

⁹⁴ Glinski and Rott (2018), 116; Klinger, Hartmann and Krebs (2015), 275.

⁹⁵ Interviews with expert from the Center for Operational Support to Prosecutors of Environmental issues (CAOMA) at the Public Ministry in Minas Gerais, June 2019; and with expert from the Research Group for Environmental Studies, GESTA, at Federal University Minas Gerais (UFMG), Brazil (June 2019); see also Klinger, Hartmann and Krebs (2015), 275.

⁹⁶ Such as capital market-oriented companies, credit institutions and insurance companies.

⁹⁷ Article 5 Regulation (revised) 537/2014 on specific requirements regarding statutory audit of public-interest entities. Similarly provided for under the German government's new draft legislation for a Financial Market Integrity Strengthening Act, 16 December 2020, www.bmjv.de/SharedDocs/Gesetzgebungsverfahren/DE/Finanzmarktintegritaet.html (accessed 17 February 2021).

in writing that they themselves, the auditing firm and partners, officers and managers conducting the statutory audit are independent of the audited entity.⁹⁸ This should also include the absence of any business or financial relations with the audited entity.⁹⁹

C Adopt the two-person rule

Another basic principle for ensuring the quality and integrity of a certification—and therefore included in ISO standards 17021 and 17065 on the “certification of certifiers”—is the two-person rule, requiring the personal and functional separation between the auditor who performs the review and the certifying body that decides on the issuance of the certificate. In this way, it lays the responsibility for the certification decision upon the shoulders of a person who is structurally better shielded from the influence of the audited company than the on-site auditor. However, the rule only makes sense if the certifier actually performs a plausibility check of the audits, otherwise, the “second leg” of the rule fails, even if two people are formally involved. The rule should therefore be mandatory for the accreditation of human rights-related auditing and certification services.

D Introduce termination protection and rotation rules

Both termination rights of a client, as in the dam break case, and very long-term relationships with the same client, as in the breast implants case, endanger the independence of auditors and certifiers.¹⁰⁰ Statutory audit regulation has responded to this with termination protection and rotation rules, which could serve as a model for human rights certification. According to this model, termination during and shortly after the auditing process is only permitted for good cause and not in response to negative audit findings.¹⁰¹ Rotation is required after a maximum of 10 years for certification bodies and after a maximum of seven years for auditors.¹⁰² We suggest slightly shorter rotation periods of five years maximum for both external (audit company) and internal (individual auditor) rotation.

Recommended elements to fulfil a state’s duty to protect

- 1 mandatory quality and integrity management
- 2 standard setting (minimum criteria)
- 3 accreditation
- 4 oversight
- 5 guidance and practical support
- 6 incentives
- 7 public access to information
- 8 access to effective remedy
- 9 good liability rules

⁹⁸ Article 6 sec. 2 Regulation (revised) 537/2014 on specific requirements regarding statutory audit of public-interest entities.

⁹⁹ See the audit principles of independence, competence and accountability, in: OECD (2013), 50 and 109.

¹⁰⁰ Rack, Part 1 (2016), 287.

¹⁰¹ See for example, in German law: para. 318 I, III, VI Commercial Code; Rack, Part 1 (2016), 287.

¹⁰² See for example Article 17 of EU Regulation (revised) 537/2014, on statutory audits of public-interest entities, and under German law, para. 318 Ia Commercial Code. Strengthening of the principle is also envisaged under the German government’s new draft legislation for a Financial Market Integrity Strengthening Act, 16 December 2020, www.bmjv.de/SharedDocs/Gesetzgebungsverfahren/DE/Finanzmarktintegritaet.html (accessed 17 February 2021).

E Apply anti-corruption standards and best practices

In general, extensive regulations and best practices in the field of anti-corruption may also serve as inspiration for HRDD integrity management, e.g. it is established good practice to:

- 1 “set the tone from the top” through expressing commitment and exemplary conduct at the highest management level
- 2 conduct an integrity risk analysis in each specific field and region of auditing activity
- 3 define guidelines and processes and monitor their implementation; guidelines should include a code of conduct that is binding on each staff member and should contain rules for dealing with conflicts of interest, for engagement with business partners, and for contractual safeguard design (e.g. on termination rights)
- 4 train staff members and promote a culture of open communication
- 5 ensure continuous monitoring, review and improvement
- 6 include internal and external whistleblower systems¹⁰³

These principles are widely acknowledged and proven by compliance and anti-corruption experts. Hence, they should also become established practice in the auditing and certification industry, including in human-rights related fields. Once HRDD becomes mandatory, compliance officers in companies, and especially in auditing and certification firms, can be expected to broaden their perspective accordingly, to apply the same best practices to integrity and corruption risks related to human rights as elsewhere. Explicit official guidance by governments in this regard would certainly increase the likelihood.

5 State governance, public participation and access to remedy

The case studies show that handing over governance tasks to private certifiers carries human rights risks that need to be counteracted through effective oversight, control and accountability. The state’s duty to protect means that such control and oversight are the state’s responsibility. To fulfil this responsibility, the state may assume the roles of regulator for mandatory quality and integrity assurance systems, standard-setter, accreditation body, oversight authority, as well as offer auditors and certifiers guidance, incentives and practical assistance with implementation. It should furthermore ensure public access to information, such as audit reports, audit results and corrective action plans, as well as access to effective remedy.

Liability and access to legal remedy are necessary elements of a robust oversight system

¹⁰³ See for example: OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, www.oecd.org/daf/anti-bribery/ConvCombatBribery_ENG.pdf (1997), Transparency International, Business Principles for Countering Bribery—A multi-stakeholder initiative led by Transparency International (2013), www.transparency.org/en/publications/business-principles-for-countering-bribery#; ICC Rules for Combating Corruption (2011), www.iccwbo.org/publication/icc-rules-on-combating-corruption/; OECD, Good Practice Guidance on Internal Controls, Ethics, and Compliance (2010) www.oecd.org/daf/anti-bribery/44884389.pdf (all accessed 21 December 2020); as well as ISO 37001 on Anti-bribery management systems and ISO 19600 on compliance management systems.

A Develop robust liability regimes

Liability and access to legal remedy are necessary elements of a robust oversight system. Not only do affected people have a right to effective remedy, but liability rules can also mobilize affected rights-holders and, in particular, organized civil society and trade unions, to play an important role in ensuring effective oversight of auditing and certification companies.

The current liability rules do not provide legal certainty—not for the affected parties and not for auditing and certification companies. Hence, auditing and certification companies should be covered by the legislative proposals on mandatory human rights due diligence that are currently being developed in various countries and in the EU.

In order to investigate how different types of state regulation may potentially steer corporate conduct, LeBaron and Andreas Rühmkorf empirically compared the UK Bribery Act (2010) and the UK Modern Slavery Act (2015). Based on their findings, they concluded that the best results in the sense of demonstrable private governance and genuine compliance were achieved through the UK Bribery Act, which establishes extraterritorial criminal liability along the supply chain and does not allow exemptions (safe harbors) from liability rules, but instead provides a legal defense if the defendant can show that they had adequate due diligence procedures in place. In contrast, they found that the UK Modern Slavery Act amounted “to little more than an endorsement of existing voluntary CSR reporting without any legally binding standards” or enforcement measures. Hence, instead of strengthening public or private governance, it reinforces private practice with no safeguards whatsoever against randomness.¹⁰⁴

This shows that the way in which public regulation is designed is important for its level of effectiveness. Mandatory HRDD must establish liability for causing a human rights violation *and* for situations in which a company negligently or intentionally contributes to a human rights violation that occurs along its supply chain. This is crucial because the auditing and certification industry increasingly works transnationally with its own “supply chains” of subsidiaries, subcontractors and agents.

Supply chain diversification must not become a justification to escape accountability

At the same time, principal companies remain accountable for their HRDD management, whether or not they use audits and certificates in the process. The HRDD liability regime should be designed in an integrated manner to reflect the distribution of tasks between different actors along the supply chain. The supply chain should not be used to disperse responsibility.

Audited companies, auditing and certification entities, as well as Europe-based principal companies should be jointly and severally liable in the event of fault, to avoid any company escaping liability because it is only one element in the chain and does not have sole control over the full business chain. Supply chain diversification, as one of the core principles on which the globalized economy is based, must not become a justification to escape accountability.

Liability of Europe-based principal companies should not be limited by safe harbor rules or by an assumption that an external audit or certificate may exempt them from liability. Instead, if they have adequate human rights due diligence procedures in place, this may serve as a defense argument that courts will have to evaluate on a case-by-case basis. To this end, criteria should be set out in law to provide clarity, orientation and legal certainty.

Whether audits and certificates can be qualified as adequate elements of an HRDD process, in this sense, should also be set out in law. Of course, foreign auditing and certification companies operating abroad do not necessarily fall under national or European regulations. Yet, the European company that relies on them should be able to show, if it wishes to rely on such audits or certificates as elements of adequate HRDD process, that the audits and certificates comply with a list of legally defined criteria regarding human rights, quality and integrity, as they are discussed in this study.

¹⁰⁴ LeBaron and Rühmkorf (2017).

Furthermore, liability regimes need to be procedurally supported to provide affected parties, who often find themselves in disadvantaged positions, effective access to justice.

Some necessary procedural elements are:

- 1 Human rights-sensitive rules for a broad understanding of legal standing, including representative, group and class actions
- 2 Rules to ease the burden of proof, e.g. through access to information and disclosure rights, rebuttable presumptions and reversing the burden of proof
- 3 Financial assistance to plaintiffs where needed
- 4 Statutes of limitation should be open to extension for transnational constellations and plaintiffs in structurally disadvantaged conditions, such as rural residence or precarious living conditions, low level of education or income, limited access to communication or transportation, belonging to a particularly vulnerable group, as well as situations of insecurity and conflict

Yet, litigating compensation claims should always remain a last resort. Given the severe, sometimes irreparable consequences of grave human rights violations, prevention must be the primary goal.

The aforementioned study on the UK Bribery Act shows how criminal liability provisions can work as preventive mechanisms, as they may motivate companies to take the respective task much more seriously. In its draft legislation to strengthen financial market integrity, the German government also relies on increased criminal and regulatory liability of companies and auditors. However, such provisions would have to use sufficiently strict language to avoid developments like those that occurred under the aforementioned UK Modern Slavery Act or the European non-financial reporting provisions. In both cases, the resulting statements and reports are so general and unspecific that it is impossible for authorities or civil society stakeholders to understand the level of compliance with HRDD or its impact.

Prevention must be the primary goal

B Provide public access to audit reports for relevant stakeholders and establish public registries

Trade unions and civil society experts have demanded access to site-specific audit reports, corrective action plans, and the disclosure to relevant stakeholders of an audit's scope and methods, so as to enable monitoring and intervention by workers, rights-holders and the public.¹⁰⁵

Indeed, there is currently a trend towards more publicly accessible information in Europe and beyond. After the breast implant scandal in France, the new Regulation (EU) 2017/745 (which came into force in May 2021) introduces extensive changes into the medical devices certification regime. It establishes an obligation for member states to provide a publicly accessible Europe-wide database for medical devices, which is to include producers, certification bodies, product-specific information and, in some cases, audit report results. Also new are a review mechanism to monitor conformity assessment by certification bodies and stricter rules for their monitoring and for clinical studies. It aims to enhance overall transparency and to provide better access to information for the public and healthcare professionals, to avoid multiple reporting requirements and to facilitate the flow of information between producers, certification bodies and state authorities.¹⁰⁶

¹⁰⁵ Clean Clothes Campaign, Fig Leaf for Fashion—How social auditing protects brands and fails workers, Summary Briefing (2019), www.cleanclothes.org/file-repository/figleaf-for-fashion-brief.pdf (accessed 19 December 2020), 12; Terwindt and Saage-Maaß (2016), 9.

¹⁰⁶ Consideration No. 44. Also, see Annex VI of the new EU Directive (revised) 2015/1513/EU on Renewable Energy.

Similarly, for sustainable biofuels certification, the revised Renewable Energy Directive 2015/1513/EU introduced detailed annual reporting duties and publication requirements for private certification schemes after an investigation of the European Court of Auditors recommended requiring more transparency.¹⁰⁷ Recently in Brazil, following the Brumadinho dam failure, the mining authorities' electronic document registry for dam management (SIGBM) was made accessible online to the public.¹⁰⁸ However, as mentioned earlier, it is questionable whether public access in this or similarly technical fields is an appropriate measure to counteract the state's lack of oversight capacity.

Any regulatory measure relating to public access to information will need to take into account the challenges posed by the principle of freedom to contract and data ownership stipulations, which will have to be reconciled with the public interest needs for transparency, equality of means and due process in matters concerning the protection of human rights. The above examples show that this is possible.

¹⁰⁷ Article 18 (5) sub 2 and (6) sub 2 of EU Directive (revised) 2015/1513/EU; European Court of Auditors (2016), para. 77; Glinski (2019), 181.

¹⁰⁸ ANM lança sistema público de monitoramento de barragem de mineração, 1 March 2020, www.anm.gov.br/assuntos/barragens/sigbm-publico; access via app.anm.gov.br/sigbm/publico (accessed 21 December 2020).

V

Conclusions and recommendations

In conclusion, this study finds that audits and certificates can actually increase human rights risks in a wide variety of sectors. Faulty audits and certificates are not rare. The reasons for this are structural deficits in state regulation and governance of the auditing and certification industry. At the same time, the industry is growing considerably, especially in the context of the discussion on corporate human rights due diligence. Many actors question the extent to which these duties can also be “outsourced” to private providers of auditing and certification services.

The duty of human rights due diligence cannot be outsourced

The results of the study suggest that the complete outsourcing of human rights due diligence, the existence of liability exemptions (“safe harbors”), as well as the mandatory introduction of audits or certificates in legislative proposals on human rights due diligence, are not advisable. The duty of human rights due diligence cannot be outsourced; there is no way around the application of appropriate human rights due diligence in one’s own operations and business relationships. Companies should therefore internalize their human rights due diligence as a policy and as a process. Indeed, it “should be embedded from the top of the business enterprise through all its functions, which otherwise may act without awareness or regard for human rights,”¹⁰⁹ which could itself be a risk factor for liability.

The selective use of audits and certificates as part of a due diligence process is certainly a possibility. However, this should not be done until remedial action has been taken to address the structural deficiencies that have so far stood in the way of reliable, quality auditing and certification practices that comply with human rights.

Deficiencies in current human rights-related auditing and certification schemes have been identified in five focus areas:

- 1 The absence of **human rights policy and HRDD** in auditing and certification firms as well as a lack of understanding of what a human rights perspective is and how it impacts their own work
- 2 Deficiencies in **quality assurance**, including weaknesses in the accreditation and oversight of auditing and certification firms, and in the quality of standard-setting in human rights-related sectors
- 3 Deficiencies in **methodology** that often stem from a lack of understanding of human rights as a concept and a lack of professional qualification in human rights among auditors, certifiers and accreditors, but also from a lack of accountability and oversight
- 4 Absent or insufficient **integrity management**, largely due to a lack of regulation, but also due to the lack of effective oversight, resulting in a situation in which basic integrity principles are notoriously violated and conflicts of interest impair the reliability of certificates and certification firms
- 5 Finally, deficiencies in **state governance, public participation and access to remedy**, which result in gaps in states’ compliance with their duty to protect

¹⁰⁹ UN Guiding Principle No. 16, Commentary.

To address these problems, attention should be paid not only to auditing and certification bodies, but also to the levels of standard-setting, accreditation and control, and to the role of the state in general.

In light of the state's duty to protect human rights, it is not enough for national governments and the EU to provide incentives like practical guidance, training and consultation. It is also necessary for states to regain or ensure their control and oversight capacities through regulatory measures, for instance by:

A Mandatory HRDD and liability

Applying mandatory HRDD requirements to auditing and certification firms, including in the context of their business relationships.

In conjunction with this, HRDD also requires a **robust liability regime**, including:

- 1 Joint and several liability for auditing and certification firms and commissioning companies for causing and contributing to human rights violations
- 2 Procedural improvements in access to remedy
- 3 No safe harbors for commissioning companies, but possibly rules for defense arguments, particularly criteria for whether and when (international) audits and certificates may provide a justifiable legal defense. Such rules would ensure that foreign audits and certificates meet the same standards and conditions—ideally in line with those set out in this study—as domestic audits and certificates

Incentives for human rights due diligence could be created by making it a mandatory condition for access to accreditation, public procurement and trade and investment promotion. Ideally, the auditing and certification sector would be explicitly included in the legislative proposals currently under discussion in Germany and the EU.

B Requirements for standards and standard-setting

Establishing legal minimum requirements for standards and standard-setting for human rights-related certification to protect quality standards from unregulated market pressure. These would ideally include:

- 1 Standards based on internationally recognized human rights standards, particularly the UN Guiding Principles on Business and Human Rights and the ILO conventions
- 2 Standard-setting processes that follow minimum standards of legitimacy, transparency and stakeholder engagement
- 3 Standards that comprehensively cover their subject matter, including human rights criteria and the human rights impact of pricing policies, where relevant, as well as process and impact-related review criteria
- 4 Standards that offer meaningful and verifiable impact and process indicators, as well as guidance for a human rights-specific methodology that includes: a focus on rights-holders; stakeholder engagement; assessment of risks to and violations of rights rather than just economic damages; consideration of irreparable risks rather than compensation cost risks; as well as context analysis and a multi-actor process perspective
- 5 Minimum methodological standards that—as opposed to checklist approaches—include independent data management, rules for intensifying control density, transparency about the methods used, and whistleblower protection
- 6 Standards that include guidance for appropriate payment schemes for auditors
- 7 Required periodic review and updating of standards
- 8 Application of the above criteria to state, interstate and private standards, whether voluntary or mandatory

C Integrity assurance

Expanding legal standards to ensure the integrity and independence of individual auditors and certifiers as well as auditing and certification firms to cover all human rights-related auditing and certification services. These standards would ideally include:

- 1 Guarantees of independence; the separation of auditor and certifier; independent selection and payment; termination protection and rotation rules; prohibition of parallel engagements; and, more generally, best-practice standards developed in the field of anti-corruption
- 2 Respective accreditation processes that include these criteria as mandatory
- 3 Guidance and training to enable compliance officers and departments in auditing and certification firms to broaden their perspective to include human rights risks and impacts, and to apply best-practice standards in integrity and corruption risk management to these risks

D Public accreditation and oversight

Establishing state or state-authorized accreditation and public oversight for all human rights-related auditing and certification services, respectively equipped with the necessary mandate, authority and procedures to ensure that quality, integrity and accountability of external audits and certifications improve, especially in those sectors that are not yet or are only partially regulated or monitored, such as social or sustainability audits.

Accreditation criteria would ideally include:

- 1 Demonstrated human rights qualifications of auditors and certifiers
- 2 Demonstrated active involvement of trade unions, CSOs and rights-holders, as well as a responsive framework for their protection from all forms of reprisals
- 3 The existence of whistleblower protection and UNGP-compatible grievance mechanisms

In addition, mutual recognition of such state or state-authorized accreditations would need to be ensured internationally. Public oversight would ideally include:

- 1 The mandate, authority and procedures to investigate, sanction, suspend or prohibit the activities of an auditing or certification entity
- 2 The provision of access to information—such as to audit reports, audit scope, applied methods and results, as well as corrective action plans—through, for example, a public registry, along with the necessary adjustments to freedom of contract rules

VI

Annex: Case studies

The case studies referred to in the main body of this study are further elaborated in this annex. They are based on publicly available sources that are referenced accordingly.

For better comparability, they all follow the same set of research questions:

- 1 What are the human rights violations at stake?
- 2 Who are the involved actors and what are their relationships, and what are the applicable laws and standards?
- 3 What would a proper human rights due diligence (HRDD) process carried out by the auditing or certification entity have looked like?
- 4 Would an adequate HRDD process have helped minimize the human rights risks?
- 5 What other risk factors existed that an HRDD framework is unlikely to address?
- 6 Are there solutions available in other sectors?

Regarding the stages of an HRDD process, we refer to the general four-stage concept of the UN Guiding Principles on Business and Human Rights (UNGPs) as described in Chapter I of this study. Applied to the auditing and certification sector, these are, in general terms:

Stage 1 (identify and assess): Prior to and continuously throughout an assignment, auditors and certifiers must undertake a risk assessment. First, they must determine whether their subject of review is directly or indirectly related to human rights risks. This may be the case, for example, if the subject of review is a potentially health-damaging product or activity. Poor data availability, the absence of trade unions or the presence of high corruption risks can also be risk factors in the sense that they can potentially compromise the reliability of the auditing or certification results. The risk analysis should also cover supply chains, as well as subsidiaries, subcontractors and agents.

Stage 2 (act): Auditing and certification firms must take appropriate measures in response to these risks. Depending on the situation and risk analysis, this might include ensuring relevant staff training, adapting methods, corroborating data or consulting with trade unions, stakeholders and experts. Such measures should also cover the auditing and certification firms' subsidiaries, subcontractors and agents, where relevant.

Stage 3 (track): As in any management process, auditing and certification firms should regularly track the impact and effectiveness of such measures and arrange for any necessary adaptations to the measures. Such tracking forms part of a continuous learning process.

Stage 4 (account): Auditing and certification companies—like any other company—need to document this process and be prepared to communicate about it with interested stakeholders and, in case of severe human rights risks, also the general public.

This four-stage process should also be complemented by complaint and grievance mechanisms that are transparent and easily accessible to stakeholders and, therefore, allow feedback from affected parties. This is also important for the auditing or certification company itself, as it helps identify risks, monitor the effectiveness of measures, address grievances and remediate adverse human rights impacts early and directly, thereby preventing harms from compounding and grievances from escalating.

Case study 1: Labor conditions (RINA, SA8000)¹¹⁰

A fire at the Ali Enterprises textile factory in Karachi, Pakistan, killed more than 250 people and injured over 30 more on 11 September 2012. Just three weeks before the fire, the Italian auditing firm RINA had awarded the factory—which mainly produced goods for the German retailer KiK—the international SA8000 certificate, which is supposed to guarantee safety and other workplace standards.

1 What are the human rights violations at stake?

- 1 workers' rights to life and a safe working conditions
- 2 workers' rights to employment that is freely chosen or accepted, and to protection against child labor
- 3 families' right to family life
- 4 the right to an adequate standard of living

2 Who are the involved actors and what are their relationships, and what are the applicable laws and standards?

Ali Enterprises was a textile factory in Karachi, Pakistan, that burned down, killing 258 people and injuring 32 more.

Kik Textilien und Non-Food Gmbh (KiK) is a German retail company and was the main buyer of the goods manufactured by the facility for years. It had visited the factory several times and commissioned a number of inspection reports over the years. As the supplier's main client, KiK knew or should have known about the factory's structural conditions and could have demanded improvements to fire safety measures.

RINA Services S.p.A (RINA) is an Italian company headquartered in Genoa, that issued the SA8000 certificate to the Ali Enterprises factory. It operates internationally as a provider of inspection, assessment and certification services, including technical and social audits and certifications in the energy, shipping, transportation, infrastructure and manufacturing sectors.¹¹¹ Since 2001, RINA has been accredited to carry out SA8000 certification by SAAS.

Regional Inspection & Certification Agency, Pvt. Ltd. (RI&CA) is the local subcontractor in Pakistan selected and contracted by RINA to perform the audit of the Ali Enterprises factory.

Social Accountability International (SAI) is a US-based non-governmental organization that develops, maintains and manages the SA8000 certificate. It is the standard-setter.

Social Accountability Accreditation Services (SAAS) is the accreditation agency of SAI. It was created in 2007 when SAI separated the accreditation functions and oversight of the auditing and certification bodies. SAAS became an "independently managed affiliate" of SAI. In 2017, SAI and SAAS re-integrated, and SAAS is now formally recognized as a "division" or "department" of SAI. In 2012, SAAS was responsible for accrediting RINA, empowering it to award the SA8000 certificate.¹¹²

The SA8000 certificate is considered one of the leading social certification standards for factories and organizations. The SA8000 standard is based on the principles of the Universal Declaration of Human Rights (UDHR), the International Labour Organization conventions, and applicable national laws and regulations.

¹¹⁰ Conducted with the support of Ben Vanpeperstraete.

¹¹¹ See ECCHR, Case report: RINA certifies safety before factory fire in Pakistan (2018), www.ecchr.eu/fileadmin/Fallbeschreibungen/CaseReport_Rina_Pakistan.pdf (accessed 19 December 2020).

¹¹² Clean Clothes Campaign, Fig Leaf for Fashion—How social auditing protects brands and fails workers, Summary Briefing (2019), www.cleanclothes.org/file-repository/figleaf-for-fashion-brief.pdf (accessed 19 December 2020).

The audit report by RI&CA has a variety of deficiencies and, as a whole, did not document the actual situation at the Ali Enterprises factory. Contrary to RINA's certification, the Ali Enterprises factory did not comply with the SA8000 standard.

First and foremost, there are indications that the auditors did not actually visit the factory. The report contained several inconsistencies and omissions regarding the number of buildings comprising the factory and regarding the wooden mezzanine, which did not conform to Pakistani building regulations. This was also the conclusion of the fire expert commissioned by the Italian prosecutor's office. The audit report failed to mention that the windows were barred, that the only emergency exit available on the second floor was permanently locked, and that another door leading to the roof of the burned Block A was also permanently locked. The report provided neither a site plan nor a description of the factory's various production departments. Instead, it mentioned building plans only in vague and general terms. Furthermore, according to a former worker, the photographs made available (and later deleted) by RINA on its website after the fire, which were allegedly taken during the auditors' visits, did not include any images of Block A.

The audit report stated that the factory's health and safety requirements were satisfactory. It claimed in detail that exits were accessible: that exit routes were kept free of any kind of obstruction and that the exits and emergency exits were kept unlocked.¹¹³ However, on the day of the fire, all of the factory's fire doors were locked except one. Rolls of fabric were stored on the floor and in the aisles.¹¹⁴ Furthermore, the audit report stated that there were two exits on each floor. As an animated visual reconstruction of the factory fire illustrates,¹¹⁵ the first and the second floors only had one emergency exit.¹¹⁶ The auditors also failed to report that the huge factory building did not have an external staircase for emergencies, as required by Pakistani law and the SA8000 standard.¹¹⁷ Instead, the building only had one main internal staircase.

The report also claimed that fire extinguishers were available in sufficient quantities, as per legal requirements. It also declared that a sufficient number of workers were trained in the use of fire extinguishers. In fact, there was only one fire extinguisher on the premises, which had failed to work in a previous fire and had not been refilled since.¹¹⁸

The fire safety training claimed in the audit report probably did not take place, given that the company responsible for issuing the training certificates does not exist. Even if the training had taken place as documented, it would have covered no more than ten workers, which is an insufficient number for a factory with 1,000 workers. RINA also submitted an evacuation training certificate, which the training scheme owner, SAI, later found out could not have taken place. Any serious evacuation training would have revealed that there were not enough emergency exits and escape routes, and that the existing exits were blocked. This further indicates that the audit did not include worker interviews and that the SA8000 accreditation mechanism does not sufficiently monitor methodological compliance.

Concerning the presence of a fire alarm system, the RINA audit report does not provide concrete information, as it should according to SA8000 requirements. Several witnesses testified that the Ali Enterprises factory did not have a functional alarm system. Indeed, the alarm system had not worked in a previous fire in April 2012, and none of the witnesses heard an alarm during the fire on 11 September 2012.¹¹⁹

¹¹³ As required by SA8000 Guidance—2008 Standard June 2013, Section 3 I.D., Health and Safety, subsection 14 and 16.

¹¹⁴ Inconsistent with the SA8000 Guidance—2008 Standard June 2013, Section 3 I.D., Health and Safety, subsection, 16.

¹¹⁵ Forensic Architecture, The Ali Enterprises Factory Fire, www.forensic-architecture.org/investigation/the-ali-enterprises-factory-fire (accessed 10 February 2021).

¹¹⁶ Which is inconsistent with SA8000 Guidance—2008 Standard June 2013, Section 3 I.D., Health and Safety, subsection 16.

¹¹⁷ As required by SA8000 Guidance—2008 Standard June 2013, Section 3 I.D., Health and Safety, subsection 16.

¹¹⁸ Which is inconsistent with SA8000 Guidance—2008 Standard June 2013, Section 3 I.D., Health and Safety, subsection 16.

¹¹⁹ Which is required by SA8000 Guidance—2008 Standard June 2013, Section 3 I.D., Health and Safety, subsection, 16.

The fire and building safety risks were further aggravated by the overcrowding of the building. According to the RINA audit report, 400 workers were working in the factory. Witness testimonies revealed that this number was far exceeded, however, and that around 1,000 workers were usually present in the factory.

It is therefore our contention that the RINA-mandated subsidiary (RI&CA) may not have visited the factory. The audit report by RI&CA had a variety of deficiencies and, on the whole, did not document the actual situation at the Ali Enterprises factory.

3 What would a proper human rights due diligence process carried out by the auditing or certification entity have looked like?

Stage 1 (identify and assess): Risk identification should build on known sector risks, which for the garment sector include occupational health and safety. The 2014 report of the Italian National Contact Point under the OECD Guidelines for Multinational Enterprises also listed “high flammability of fabrics” as a key sector risk in the textile supply chain.¹²⁰

Besides sector-specific risks, RINA’s management was or should have been well aware of the specific risks for fire and building safety in Pakistan. For the identification of adverse impacts on occupational health and safety, country-specific risks like the low quality of state inspections in Pakistan are particularly relevant. The audit report mentioned in its health and safety section that the factory is subject to annual inspection by the local labor department and that no issues of non-compliance had been raised in the latest inspection report. This contradicts the findings of trade unions and the press that state inspections are prohibited in Sindh province. Indeed, in its 2018 report, the ILO Committee of Experts notes “that ambiguities in the jurisdiction and issues relating to the scope of the labor laws, including the Factories Act, the Shops and Establishment Ordinance, and the Bonded Labour Act, result in workers being exempt in practice from protection through labour inspection.”¹²¹ Since RINA had certified 100 factories in Pakistan before the Ali Enterprises fire, it must be assumed that the company was aware of the absence of state inspections.

In addition to the sector and country-specific risks, there are also the risks of a hyper-competitive auditing market, conflicts of interest within the auditing structures, and weak anti-corruption and verification mechanisms.

Stage 2 (act): The relevant measures in response to such risks, from an auditor’s perspective, would have been to adapt the review methods to address these risks. A thorough technical inspection was not documented in the audit report. This would have required at least a floor plan, which was not presented in the audit report.

Under a proper HRDD framework, the nature and methodology of supplier assessments should correspond to the risks identified above and to the likelihood and severity of the (potential) adverse impacts of the company’s activities. The assessment methodology should be adjusted if the actual findings do not correspond to the risks expected based on the country or sector risk assessment. Lack of fire and building safety are salient human rights risks in the Pakistani textile sector that can lead to foreseeable irreparable damage, as this case shows.

¹²⁰ Italian National Contact Point for the OECD Guidelines for Multinational Enterprises, *Rapporto sulla condotta responsabile di impresa nella catena di fornitura del settore tessile-abbigliamento* (2014), www.newsfemcaveneto.it/MATERIALI/comparto%20tessile/Rapporto%20PCN%20Italiano%20tessile-abbigliamento%202.pdf, at 25 (accessed 17 December 2020).

¹²¹ Labour Inspection Convention (1947), No. 81, Direct Request (CEACR), adopted 2017, published 107th ILC session (2018), www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:13101:0::NO::P13101_COMMENT_ID:3343807 (accessed 23 December 2020).

The extent of RINA's human rights due diligence obligations would have encompassed a number of obvious improvements in the auditing methodology used by its subcontractors and its own auditors. For example, a more effective audit would have included unannounced visits. In addition, it would have required interviewing a sufficient number of workers outside of the factory in a context they considered safe, since interviews inside the factory always carry a high risk that interviewees will be selected with the help of management and that their answers will be scripted by management and/or that they will self-censor out of fear of reprisals, thus leaving out critical observations. SAI recommends, but does not require, interviewing away from the workplace. Given the prevalence of the risk that managers would coach workers to achieve desired auditing outcomes, it would also be recommended to arrange follow-up visits or investigations, even beyond the routine auditing schedule.

In addition to improving the methodology, an appropriate and necessary preventive measure for RINA would have been to refuse to approve the audit report and, subsequently, not to award the SA800 certificate.

RINA was in a position to stop or reduce the risk. Recognizing the crucial role of social audits for the garment sector in Pakistan, certification can make or break a factory's ability to continue operating, and thus can also lead to continuous violations of the workers' rights if certificates do not detect but rather conceal such violations. Auditing and certification firms, as private service providers subject to market competition, strive to achieve client satisfaction. At the same time, clients have a strong interest in obtaining SA8000 certification, as it is a precondition for entering Western markets. Market pressures may motivate auditors and certifiers to lower prices and then cut costs and skimp on thoroughness, or face pressure from clients to issue fake or favorable certificates. Anonymous sources denounce payment standards in the social auditing sector as often being too low to allow for the necessary investment of time and expertise in conducting audits. However, the market dependence of audited companies that require SA8000 certification could also be an opportunity for auditors and certifiers to exercise leverage and condition the certificate on full compliance with the standard. In contrast to such leverage, a government scheme exists in Pakistan to subsidize positive audits and SA8000 compliance certificates, which only further fuels risks in the certification process.

Stages 3 (track) and 4 (account): After implementing the necessary measures, RINA should have regularly assessed their effectiveness. It should have also documented this process and reported on any additional problems that were still encountered.

4 Would an adequate HRDD process have helped minimize the human rights risks?

RINA could have helped prevent hundreds of deaths if it had done its job properly. The audited factory had numerous visible deficiencies—barred windows, locked emergency exits and only one unobstructed exit in the building—that all impeded the exit of employees and made it a death trap for over 250 workers.

An audit report documenting the actual situation at Ali Enterprises would have made it difficult for the factory management to remain inactive about fire safety hazards, especially if it had been denied SA8000 certification. SAI states that a factory is ineligible for certification if and as long as the audit reveals major non-conformities with the SA8000 requirements. The factory must then implement a corrective action plan and undergo a follow-up audit. Only if the corrective action plan is implemented effectively will certification be granted.

The SA8000 standard can be considered the leading social certification standard and, thus, a strong door opener for Asian textile factories. Roberto Cavanna, the Managing Director of RINA at the time of the Ali Enterprises fire, stated in his affidavit that the SA8000 standard was a crucial requirement for access to Western markets. By certifying Ali Enterprises, RINA made a misleading statement that casts a heavy shadow on the credibility of the whole certification system and its capacity to contribute to a safer and fairer industry.

Given the importance of this certificate, it is highly likely that corrective action would have been implemented had it been required as a condition for such certification. Had KiK GmbH, the principal buyer from Ali Enterprises, been alerted to the factory's deficiencies, it would have had the opportunity to exert its influence and demand corrective action from the factory management to establish a functioning fire safety system and end child labor and excessive, forced overtime. Instead, the flawed audit report and unwarranted certificate gave the factory management an incentive to remain inactive regarding the factory's human rights violations and risks. RINA should have insisted that the auditing firm RI&CA make methodological improvements in response to its initial report, so as to better reflect the factory's actual state of conformity with the SA8000 standard.

RINA would have then had the opportunity to delay or deny SA8000 certification, conduct additional site assessments and recommend specific renovations to make the building safe. This may have prevented the fire altogether, or at least prevented it from spreading once it broke out, and may have allowed workers to safely exit the factory. A video simulation by Forensic Architecture shows how unobstructed functional exits, clear passages and a functioning alarm system would have saved the lives of many, if not all, of the workers.¹²² The audit report did not reflect any of these issues, however, and corrective action was not made a condition for obtaining the certificate.

RINA also had the option of collaborating with the main buyer, KiK, to exert more pressure on the factory management of Ali Enterprises. But of course, in order to react to the factory's actual safety hazards, a realistic audit report would have been the primary prerequisite.

¹²² Forensic Architecture (2018).

5 What other risk factors existed that an HRDD framework is unlikely to address?

A hyper-competitive market increases the risk of courtesy audits and certificates, as well as “quick and dirty” solutions at very low prices. Such audits cannot offer the same quality or reliability that those done according to proper standards require. When trying to keep prices low, time and resource-intensive methods like site-visits, obtaining corroborating interviews and stakeholder engagement, might be skipped.

In this case, the certification firm RINA’s failure to detect the low quality of the audit report indicates structural quality assurance problems, such as in the effective application of the two-person principle, which is intended to prevent unwarranted audits due to mistakes or favoritism. According to this principle, a second person is meant to substantively double-check the audit rather than simply providing a formal barrier between auditing and certification.

Where there is no liability, there is also little incentive to ensure the best possible quality. In a recently concluded complaint procedure before the Italian National Contact Point of the OECD Guidelines for Multinational Enterprises, RINA denied any liability or responsibility in the Ali Enterprises factory fire case and also refused to enter into an agreement to help improve the certification system and its own human rights due diligence.¹²³

Where the state is unable to exercise effective monitoring and control, quality and integrity control falls upon the shoulders of the accreditation system, which must be willing and able to ensure the credibility and reliability of the certification system. In this case, where Pakistan’s public subsidy system for SA8000 certificates is even counterproductive and encourages courtesy audits, it is even more important to ensure monitoring and control of the accreditor over the certifier and of the certifier over the auditor.

6 Are there solutions available in other sectors?

The two-person rule is a best-practice standard in certification and mandatory in regulated certification sectors. For example, in legally regulated certification schemes, accreditations must be periodically renewed and the performance of applicant certification bodies reviewed. Moreover, complaint systems allow for public participation in monitoring and control. Although the SA8000 scheme provides elaborate methodological guidance, its accreditation body SAAS does not appear to have ensured that its substantive and methodological standards were actually applied in this case.

¹²³ Italian National Contact Point for the OECD Guidelines for Multinational Enterprises, Final statement in *ECCHR et al. v. RINA et al.* (2020), www.pcnitalia.mise.gov.it/attachments/article/2035928/Final%20Statement%20RINA_DEF.pdf (accessed 16 December 2020).

Case study 2: Dam failure (TÜV SÜD)

In January 2019, a tailings dam broke in Brazil, killing 272 people, injuring more than 300 and affecting the livelihoods of many more. The entire Paraopeba river was contaminated, seriously affecting the drinking water supply of several million inhabitants. TÜV SÜD's subsidiary in Brazil had certified the dam's stability on several occasions, most recently in September 2018—each time despite positive knowledge that the dam was not stable. Publicly available evidence¹²⁴ suggests that TÜV SÜD engineers manipulated the normative minimum safety factor to cover up the fact that the measured values fell short of it. Consequently, neither the mine operator nor the mining authorities intervened to prevent the dam from bursting or to evacuate the population.¹²⁵

1 What are the human rights violations at stake?

- 1 right to life
- 2 right to health and physical integrity
- 3 right to family life
- 4 right to work and livelihood, right to adequate housing
- 5 right to water
- 6 right to a healthy environment

2 Who are the involved actors and what are their relationships, and what are the applicable laws and standards?

Vale was the mine operator who contracted TÜV SÜD Bureau de Projetos, a Brazilian subsidiary of the German-based group. Evidence suggests that an engineer, who according to public information was employed by a German subsidiary of the group, regularly travelled to Brazil and directly supervised the local engineering team in Brazil.

TÜV SÜD Group indirectly owns the Brazilian as well as the German subsidiary. *Lei 12.334 (2010)*¹²⁶ and *Portaria 70.389 (2017)*¹²⁷ are the standards that regulate the safety of mining dams in Brazil. Furthermore, a technical norm (ABNT/NBR 13028/2018), in the relevant version at the time, did not prescribe specific benchmarks, but instead required that international best-practice standards for mining dam safety be applied.

The Ministry of Mine's *Portaria 70.389* standard regulates, among other things, that:

- 1 For tailings dams, a stability declaration must be issued twice a year, one of them by an external auditor, who must be registered as a qualified engineer in Brazil
- 2 A stability declaration can only be issued on the basis of an audit report that contains the data, calculations and analyses necessary to establish whether or not a dam is stable. Based on that report, a stability declaration may or may not be issued
- 3 Mine operators and auditors are obliged to submit the stability declaration, but not the underlying audit report, electronically (via the "SIGBM" system) to the mining authority. This means that the mining authority has no basis for assessing the stability of the dam
- 4 The recommendations and, where applicable, deadlines contained in audit reports are obligatory for the mine operator and, if not complied with, can lead to the closure of a dam

In this case, the raw data that forms the basis for the audit was collected by the mine operator or subcontractors and transferred to the auditing firm. It is unclear whether the responsible auditors visited the site before signing the stability declaration.

¹²⁴ See in particular protocols and reports of various parliamentary investigations commissions, in particular of the Federal Chamber of Deputies, CPI—Rompiemento da barragem de Brumadinho, www2.camara.leg.br/atividade-legislativa/comissoes/comissoes-temporarias/parlamentar-de-inquerito/56a-legislatura/cpi-rompiemento-da-barragem-de-brumadinho (accessed 23 December 2020).

¹²⁵ ECCHR, The safety business: TÜV SÜD's role in the Brumadinho dam failure in Brazil (2019) www.ecchr.eu/en/case/the-safety-business-tuev-sued-s-role-in-the-brumadinho-dam-failure-in-brazil/ (accessed 23 December 2020).

¹²⁶ www.planalto.gov.br/ccivil_03/_ato2007-2010/2010/lei/l12334.htm (accessed 23 December 2020).

¹²⁷ www.antigo.anm.gov.br/portal/dnpm/documentos/portaria-dnpm-no-70-389-de-17-de-maio-de-2017-seguranca-de-barragens-de-mineracao/view (accessed 23 December 2020).

3 What would a proper human rights due diligence process carried out by the auditing or certification entity have looked like?

Stage 1 (identify and assess): Had the auditing firm undertaken an HRDD process, it would most likely have identified a number of potential risk factors, such as:

- 1 Both the mining industry and Brazil as corruption risk factors, thereby potentially compromising the quality of an auditing service and, thus, the safety of individuals, their human rights and the environment
- 2 The human rights risk analysis of the Brazilian subsidiary: a plausibility check would have revealed whether such an analysis had been carried out and whether it showed evident gaps, understanding that if the subsidiary's risk identification is insufficient, it could also apply to their risk management on the whole
- 3 The group's conflict of interest management: given that the German TÜV SÜD group had an engineer from its German subsidiary regularly visiting the team in Brazil, TÜV SÜD should have been able to detect that its Brazilian subsidiary had been contracted by Vale under two different and incompatible contracts, in one as an external auditor and in another as an internal consultant, with the latter contract holding a much higher economic value than the former. This situation constitutes a conflict of interest and increases the risk of compromising the quality of the audit and interfering with the safety management of the dam
- 4 Vale's dominant position as a contractor in Brazil's mining certification market and the resulting pressure on competitors like TÜV SÜD's subsidiary in this market
- 5 The well-known precedent of the Fundão dam failure in Mariana (2015), analyzed from an auditor's perspective, would have shown that there is a history of serious mining accidents and human rights violations in Brazil that coincide with the issuing of unjustified stability declarations by auditing companies. This would have demonstrated a heightened need to analyze the causes of this practice and to ensure its prevention

Stage 2 (act): TÜV SÜD should have adopted appropriate measures to mitigate the identified risks. In this specific situation, such measures could have included strengthening anti-corruption and anti-conflict-of-interest systems and training its own employees in charge of supervising foreign operations, at least where this included risk sectors or regions, such as mining and Brazil. In addition, TÜV SÜD should have ensured that such measures be adopted at the level of subsidiaries and it should have ensured specific intervention by the supervising engineer when confronted with the specific issue of insufficient stability indicators to prevent the issuing of a stability declaration.

Stages 3 (track) and 4 (account): The effectiveness of such measures should have been analyzed and the measures adjusted if necessary. Furthermore, TÜV SÜD should have documented this process and communicated it to relevant stakeholders.

4 Would an adequate HRDD process have helped minimize the human rights risks?

Not issuing a (false) stability declaration would have allowed and most likely led the authorities to order the evacuation of the region. This could have saved the lives of 272 people and the physical and mental integrity of many hundreds more.

At the same time, it is unclear whether, upon the non-declaration of stability, measures could have been adopted that would have stabilized the dam in time. After all, TÜV SÜD and other certifiers had alerted Vale months earlier about the need to stabilize the dam, and Vale, although legally required to implement relevant recommendations, was non-compliant before and after the issuing of the false stability declaration.

5 What other risk factors existed that an HRDD framework is unlikely to address?

TÜV SÜD's internal Code of Ethics prohibits corruption, but does not explicitly categorize false courtesy declarations as corruption, and does not help employees deal with the pressure they might face to issue such courtesy certificates.¹²⁸

Moreover, the two person-rule was not applied. It lays the responsibility for issuing a certificate—or in this case, a stability declaration—upon the shoulders of a person separate from the on-site auditor in order to reduce susceptibility to pressure. The relevant documents show, however, that the same responsible engineer signed the audit report and the stability declaration.

The applicable standard was clear. There was an unequivocal technical standard in place that responsible engineers were obliged by their professional ethics to abide by: the technical standard ABNT/NBR 13.028, which establishes conformity with established international engineering best practice.

Finally, the mining authorities had a structural weakness in that they did not have sufficient resources and capacities to undertake their own independent stability assessment. Hence, they faced severe limitations in fulfilling their duty to oversee dam safety.

6 Are there solutions available in other sectors?

The Brazilian system reflects a global tendency to deregulate sectors and to reduce the monitoring role of the state and shift it towards the private sector, the control capacities of which are too limited.

The two-person rule is in fact standard good practice in the traditional certification industry and therefore included in the ISO 17021 and ISO 17065 “certification of certifiers” standards, as well as in private accreditation standards, such as those from SAAS.

In some sectors, such as medical devices or sustainable biofuels certification, a public registry has recently been introduced. Also, for social and sustainability audits, CSOs and trade unions are demanding the publication of audit reports or parts of them. However, it is questionable whether the publication of the technical audit reports in this case would have helped to detect the problems because highly specialized engineering expertise is required to read these reports and civil society cannot be expected to fulfil this oversight role without resources, a role that neither the state nor the certification industry were willing to assume in this case.

¹²⁸ See TÜV SÜD, “Code of Ethics,” www.tuvsud.com/en/about-us/code-of-ethics, 16–17 (accessed 23 December 2020).

Nevertheless, several measures could help reduce the risk of conflicts of interest and prevent pressure from audited companies to issue courtesy declarations:

- 1 The establishment of a publicly organized system for the selection and payment of auditing and certification firms, such as a public fund based on contributions from the beneficiary companies¹²⁹
- 2 Limiting contractors' rights of termination as soon as the certifying activities are underway, e.g. under German law, public accountants can only be terminated with court approval¹³⁰
- 3 A regulated rotation system, as is common in financial auditing, to ensure that the same company is not audited by the same auditors and certified by the same certification company over a period of years¹³¹
- 4 Binding disclosure of past and present personal and economic relationships between the client or commissioning party and the auditor or certifier (both company and individuals), as well as the requirement of a personal declaration (with liability) by the specific auditor that no incompatible parallel contracts or negotiations exist, as is customary for statutory audits¹³²
- 5 Obligatory two-person rule, to be verified periodically as part of an accreditation and oversight process, as is already standard for certifiers under the ISO 17021 and 17065 accreditation standards
- 6 A public oversight body that can receive complaints and is equipped with powers to investigate, suspend accreditation and impose sanctions, and possibly a public register of auditors and certifiers with confirmed violations (e.g. a blacklist)

¹²⁹ As foreseen, for example, in the Bangladesh Accord. See Chapter III.

¹³⁰ See, for example, for statutory auditing in Germany, para. 318 I, III, VI Commercial Code.

¹³¹ For financial audits introduced through EU Regulation 537/2014 and the amended Directive 2014/56/EU.

¹³² Article 6 and Article 11 of EU Regulation 537/2014.

Case study 3: Breast implants (TÜV Rheinland)¹³³

For years, the French breast implant manufacturer Poly Implant Prothèse (PIP) used a cheaper industrial-grade silicone instead of the medical-grade silicone NuSil to fill the breast implants it produced. During each of the announced inspections by TÜV Rheinland, the certification company commissioned to certify the implants' safety, production was briefly switched to NuSil. The fraud was only discovered in the late 2000s through the intervention of the French supervisory authority after there had been increasing reports of breast implant ruptures and cancer in France and Germany. As a result, many patients had their implants removed because of (or out of concern about) health problems.¹³⁴ PIP's liability to the patients is beyond doubt, but was not effective due to PIP's insolvency. For this reason, the aggrieved patients have instead attempted to hold TÜV Rheinland liable, as the responsible certification company, in several proceedings before German and French courts.

1 What are the human rights violations at stake?

The affected human rights of the patients included the right to life, the right to health and the right to informed consent as part of their general right to self-determination.¹³⁵

2 Who are the involved actors and what are their relationships, and what are the applicable laws and standards?

Silicone breast implants are medical devices regulated under EU law, at the time by the *Medical Devices Directive 93/42/EEC*. According to this directive, medical devices could only be placed on the market if the conformity assessment procedure prescribed for the respective product in relation to health and safety had been carried out (CE marking). For the product class of the highest risk level (III) concerned here, the procedure specifically included the introduction of a quality assurance system on the part of the manufacturer, as well as an external audit to be contracted and financed by the manufacturer.¹³⁶ The directive required regular inspections and allowed—but did not oblige—unannounced visits. These visits could include examination of the product and review of the manufacturer's records if there was evidence of nonconformity.¹³⁷

In 1997, the *French company PIP* commissioned *TÜV Rheinland* as a certification body to carry out the relevant CE conformity testing and to monitor the obligations arising from it.¹³⁸ Until the French authorities discovered PIP's irregular use of the unsuitable but cheaper industrial-grade silicone, TÜV Rheinland audited and certified the CE conformity of PIP's silicone implants at regular intervals, including on-site inspections. Despite the fact that 38 deviations or anomalies were documented by TÜV Rheinland between 1997 and 2006, it announced every inspection weeks in advance¹³⁹ and did not inspect PIP's business records or order any product testing.¹⁴⁰ After the British Medical Devices Agency issued a warning regarding the tissue compatibility of PIP hydrogel implants, TÜV Rheinland refused to certify PIP's quality management system for hydrogel products following a special inspection of PIP in February 2001.¹⁴¹ However, this does not appear to have had any influence on its auditing and certification practice for silicone implants.

¹³³ Conducted with the support of Annabell Brügemann.

¹³⁴ BBC News, Benjamin Russell, PIP breast implant scandal: Victims visited by bailiffs, 28 May 2019, www.bbc.com/news/uk-england-48132572 (accessed 19 December 2020).

¹³⁵ Ruth Campbell, *Medical Consent: What Do Human Rights Have to Do With It?* (2017), www.echother.org.uk/medical-consent-human-rights/ (accessed 17 December 2020).

¹³⁶ German Federal Court, Judgement of 22 June 2017, VII ZR 36/14.

¹³⁷ German Federal Court, judgement of 27 February 2020, VII ZR 151/18.

¹³⁸ German Federal Court, Judgement of 22 June 2017, VII ZR 36/14, para. 3. TÜV Rheinland is one of about 80 companies in the EU that are accredited as so-called "notified bodies" by the competent national authorities for the certification of medical devices, www.grundundmensenrechtsblog.de/die-haftung-der-zertifizierer-ueberlegungen-zur-uebertragbarkeit-des-eugh-urteils-zu-mangelhaften-brustimplantaten/ (accessed 19 December 2020). In Germany, the ZLG is responsible, www.zlg.de/medizinprodukte/.

¹³⁹ OLG Hamm, Judgement of 19 September 2018, 3 U 125/17, para. 42, 50.

¹⁴⁰ German Federal Court, Judgement of 22 June 2017, VII ZR 36/14, para. 4.

¹⁴¹ See www.handelsblatt.com/unternehmen/dienstleister/skandal-um-brustimplantate-tuev-rheinland-wusste-frueh-von-maengeln-bei-pip/8485172.html (accessed 13 May 2020).

3 What would a proper human rights due diligence process carried out by the auditing or certification entity have looked like?

Stage 1 (identify and assess): As part of a risk assessment to be carried out before entering into a business relationship, TÜV Rheinland could and should have identified some potential risk factors associated with its certification activities for PIP:

- 1 High-risk sector: Medical devices (such as breast implants) are classified under the highest risk category (class III according to the EU Medical Devices Directive) and pose potentially very serious risks to the right to health and life of patients
- 2 Risk of fraud: The possibility of manipulation by the manufacturers should have been included as a potential risk factor, irrespective of concrete suspicious facts¹⁴²
- 3 Absence of independent data, no public registry for certificates and past violations
- 4 Risk for conflicts of interest and associated risks for the quality and objectivity of the audit and certification: TÜV Rheinland was selected, commissioned and paid by the company to be certified, PIP, itself
- 5 Risk of undue influence given PIP's dominant position as one of the largest customers in the field of breast implant certification¹⁴³

This risk assessment should not only have been conducted at the beginning of PIP's work in 1997, but new risk assessments should have been carried out at regular intervals as part of an ongoing process integrated into TÜV Rheinland's general risk management systems.

Stage 2 (act): TÜV Rheinland should have carried out unannounced inspections. This would have considerably increased the chances of detecting PIP's fraudulent manipulations and would have decreased the risk to the human rights of patients. This is why other certification schemes already use unannounced visits. For example, the Commission Regulation (EC) 2008/889 on organic production, labelling and inspection of agricultural products explicitly provides for unannounced inspections to prevent manipulation by the inspected producers as part of the minimum inspection requirements (Article 65 (4)).

Furthermore, at least for class III medical devices, regular product samples should have been taken.

Stage 3 (track): TÜV Rheinland should have checked whether the measures taken (unannounced inspections, product samples, etc.) were effective and whether they actually reduced the identified risks.

Stage 4 (account): Finally, TÜV Rheinland should have reported on its risk analysis and its efforts to minimize the identified risks to interested stakeholders, such as patient protection organizations.¹⁴⁴

¹⁴² The comparison with other certification systems and with the changes made in 2017 also in the area of medical devices—according to which regular unannounced inspections are always necessary (precisely to counter the general risk of fraud)—shows that the possibility of manipulation by the manufacturers is considered a risk factor, irrespective of concrete suspicious facts. See Rott (2017), 1148.

¹⁴³ At that time, PIP was the third largest producer of breast implants in the world and produced about 100,000 implants annually, www.lefigaro.fr/societes/2011/12/24/04015-20111224ARTFIG00307-la-trajectoire-troublante-de-poly-implant-prothese.php (accessed 13 May 2020).

¹⁴⁴ For example, the European Patients Forum (EPF), the umbrella body of 75 patient organizations from all over Europe, www.eu-patient.eu/About-EPF/whoweare/.

4 Would an adequate HRDD process have helped minimize the human rights risks?

It seems very likely that regular unannounced inspections (together with product samples) carried out at regular—but unpredictable—intervals would have detected or prevented the manipulation by PIP, since in this case PIP would not have been able to easily switch the production process to the certified silicone on the occasion of the inspections.

5 What other risk factors existed that an HRDD framework is unlikely to address?

The risks were increased in particular by insufficient binding specifications regarding the auditing methods to be used and by the lack of publicly available data. Had detailed audit and certification reports (including detailed information on the standards and methods applied and justification of the audit result) been required to be published, the competent authorities in France might have become aware of deficiencies and misconduct by PIP much earlier.

6 Are there solutions available in other sectors?

After the scandal was uncovered, the EU Commission issued recommendations on conformity assessments for medical devices.¹⁴⁵ These recommendations include the obligation of auditors to carry out unannounced audits of manufacturers at least every three years. The timing of these audits must not be predictable for manufacturers, and their frequency must be increased under certain circumstances. During these audits, the inspectors are also obliged to examine a recently manufactured sample of the product to ensure that it complies with the technical documentation and legal requirements.

The new Regulation (EU) 745/2017 on medical devices, which came into force in May 2021, introduces a publicly accessible European database for medical devices, which all member states will be required to use and which will include all manufacturers, devices and reports of notified bodies (certification bodies). It also introduces a scrutiny procedure for monitoring conformity assessments, and stricter rules for their surveillance.

Beyond these changes, however, resolving or at least reducing the potential conflict of interest arising from the engagement and payment of the auditing firm by the manufacturer under review seems to be crucial for audit quality assurance. The following measures (some of which are already being implemented in other sectors) could be helpful in this respect:

- 1 A publicly organized system for the independent selection, hiring and payment of auditing and certification bodies
- 2 A mandatory rotation system, as regulated for statutory financial auditing
- 3 Limitation of contractors' rights to terminate the contract after auditing activities have started, as regulated for statutory financial auditing
- 4 Requirement of disclosure of past and present personal and economic relationships with the manufacturer or commissioning party, and a personal declaration (with liability) of no parallel engagements by the specific auditor(s), as is customary in statutory financial auditing
- 5 Mandatory two-person principle, as set out in the accreditation standards ISO 17021 and ISO 17065 for the "certification of certifiers"

¹⁴⁵ EU Commission Recommendation 2013/473/EU.

In addition, liability to third parties in the event of negligence and misconduct during the auditing and certification process would be of considerable importance. Liability rules could provide the necessary incentive for auditing and certification firms to carefully consider the risks of human rights violations and take appropriate measures to mitigate them. However, the court proceedings in Germany and France against TÜV Rheinland have shown that such liability under the current legal situation depends to a large extent on the member state of jurisdiction. The German Federal Court of Justice rejected liability based on third-party contractual protection and, in relation to tort, has neither excluded nor confirmed the possibility of liability in this case. In France, too, the liability of TÜV Rheinland has not yet been conclusively clarified in court.¹⁴⁶ The new EU regulation of 2017 has not changed this situation. This question is therefore still determined by national law.

¹⁴⁶ See German Federal Court, Judgement of 22 June 2017—VII ZR 36/14 and Judgment of 27 February 2020—VII ZR 151/18. For France, The Cour de cassation has argued that, under certain circumstances, a breach of duty on the part of TÜV Rheinland could be assumed and has referred the case to the Cour d'appel de Paris, which must now decide on the existence of a "faute" by TÜV Rheinland (Ernst (2019), 134, 137).

Case study 4: Palm oil plantations (RSPO scheme)¹⁴⁷

Palm oil is cheap and versatile and can be found in about every other product in an average supermarket—from margarine and chocolate to ice cream, soaps and cosmetics. Workers on palm oil plantations often struggle to earn enough to feed their families. Among them are children who have to abandon their education to work in unsafe conditions. The establishment and expansion of palm oil plantations also has negative impacts on the environment, access to land, water, and means of livelihood, as well as on indigenous peoples' cultural rights and their right to free, prior and informed consent (FPIC).

The Roundtable on Sustainable Palm Oil (RSPO) is a multi-stakeholder initiative of non-governmental organizations and companies at all stages of the palm oil supply chain with the objective of developing and implementing sustainable palm oil standards. By 2014, RSPO-certified production accounted for 20 percent of the global supply.¹⁴⁸ RSPO offers voluntary certification to its members.

1 What are the human rights violations at stake?

There are reports of a wide range of structural human rights violations by RSPO member companies, ranging from violations of workers' rights, gender discrimination, widespread child labor, forced labor and human trafficking, to restrictions on the freedom of association and threats to workers' health from unprotected work with chemicals or fertilizers. The ongoing expansion of palm oil plantations often takes places without consulting local communities and without respecting the rights of indigenous people. People are forcibly displaced from their land to make way for new plantations, which for communities that live in and from the forests, poses risks to their rights to food, water and health.¹⁴⁹

2 Who are the involved actors and what are their relationships, and what are the applicable laws and standards?

RSPO is the multi-stakeholder initiative that offers two types of voluntary certification schemes for RSPO members: Principles and Criteria (P&C) Certification¹⁵⁰ for palm oil producers and Supply Chain Certification (SCC) for buyers.¹⁵¹

RSPO members do not have to be certified. To become a member, a company commits to make an effort to become sustainable over the coming years. Therefore, not all RSPO members are RSPO-certified, but all RSPO-certified companies are RSPO members.

The *certifiers* are multinational companies like TÜV Rheinland and SGS, but also smaller nationally-based firms that are accredited for RSPO certifications.

Assurance Services International (ASI) is the accreditation body for certifiers under the RSPO scheme. It is a for-profit company whose sole shareholder is the Forest Stewardship Council.¹⁵² Accreditations are supposed to be reviewed annually.

¹⁴⁷ Conducted with the support of Annabell Brüggemann and Teresa Amigo.

¹⁴⁸ Environmental Investigation Agency/Grassroots, Who watches the watchmen, November 2015, www.eia-international.org/report/who-watches-the-watchmen/ (accessed 17 December 2020), 4.

¹⁴⁹ CNV and SOMO (2017) 21f; Amnesty International (2016), 5ff; The Guardian, Laura Villadiego, Palm oil: why do we care more about orangutans than migrant workers?, 9 November 2015, www.theguardian.com/sustainable-business/2015/nov/09/palm-oil-migrant-workers-orangutans-malaysia-labour-rights-exploitation-environmental-impacts (accessed 17 December 2020); Kusumaningtyas (2017), 7ff.

¹⁵⁰ RSPO Principles & Criteria for the Production of Sustainable Palm Oil 2018, www.rspo.org/resources/certification/rspo-principles-criteria-certification (accessed 17 December 2020).

¹⁵¹ RSPO Supply Chain Certification Standard 2020, www.rspo.org/resources/certification/supply-chain-certification (accessed 17 December 2020).

¹⁵² ASI is constituted as a limited liability company (GmbH) under German law. Its sole shareholder, the Forest Stewardship Council A.C.®, is registered as an international not-for-profit membership organization in Mexico, www.asi-assurance.org/s/governance.

Certification bodies issue a P&C certificate to palm oil producers after an on-site audit. The certifications are valid for five years, but there are annual follow-up audits to monitor continued compliance.

Palm oil producers can commission audits to review individual units of their operations (such as the oil press) against the P&C standard. The units can then become RSPO-certified as “sustainable.”¹⁵³

Corporations along the supply chain that are not oil producers can obtain certificates under the Supply Chain Certification (SCC) scheme to use palm oil products from RSPO-certified production sites. To meet SCC requirements, the members must demonstrate through external audits that they have implemented quality management systems to control RSPO-certified palm oil products.¹⁵⁴

The P&C standard, which is revised every five years, contains seven basic statements, including Principle 4: “Respect community and human rights and deliver benefits.” The P&C standard includes detailed descriptions of the requirements for the audited company, but no methodological guidance or minimum requirements for the audit performance.

The RSPO Complaints Panel considers complaints against RSPO members brought by NGOs, communities and other stakeholders, and issues corrective action plans.¹⁵⁵ However, the system has been heavily criticized as not being effective. When auditors have been found to have performed poorly or irregularly, this has not led to sanctions or consequences.¹⁵⁶

3 What would a proper human rights due diligence process carried out by the auditing or certification entity have looked like?

Stage 1 (identify and assess): Palm oil production auditors and certifiers should identify potential risk factors associated with their auditing and certification activities before and continuously during the activities. Risk factors include, for example, the often unprotected situation of customary land tenure rights and indigenous consultation rights. Auditors and certifiers should conduct risk assessments periodically as part of an ongoing process integrated into their management systems. Auditing and certification firms, including their staff and subcontractors, should undergo human rights capacity building. The RSPO standards have a strong human rights component, but one cannot understand their significance and applicability in specific cases without proper human rights training.

Stage 2 (act): The auditor should take appropriate measures to minimize risks and prevent possible human rights violations. In relation to palm oil, such measures could include regular unannounced site inspections,¹⁵⁷ meaningful engagement with local workers and affected populations, and consideration of topics particularly relevant to women and vulnerable groups.¹⁵⁸ The scope of the audit and applied methods should be made transparent in the reports. Information, e.g. from management or from state authorities, should be critically reviewed and corroborated with further sources.¹⁵⁹ Both auditors and certifiers should issue a disclosure declaration before engaging with a company and verify that there are no parallel engagements ongoing or planned, to ensure independence. They should also ensure appropriate payment schemes to shield their personnel from undue influence.

¹⁵³ Environmental Investigation Agency/Grassroots, *Who watches the watchmen 2: The continuing incompetence of the Roundtable on Sustainable Palm Oil’s (RSPO) assurance systems*, November 2019, www.eia-international.org/wp-content/uploads/WtW2-spreads.pdf (accessed 17 December 2020), 3.

¹⁵⁴ Environmental Investigation Agency/Grassroots, *Who watches the watchmen 2: The continuing incompetence of the Roundtable on Sustainable Palm Oil’s (RSPO) assurance systems*, November 2019, www.eia-international.org/wp-content/uploads/WtW2-spreads.pdf (accessed 17 December 2020), 3.

¹⁵⁵ The Complaints System is heavily criticized as not being effective at all. Of more than three dozen complaints brought in front of the RSPO’s oversight committee, only two led to tangible results (suspension of the member). In one of the cases, after a lawsuit brought by the affected producer, the suspension was lifted. See Environmental Investigation Agency/Grassroots, *Who watches the watchmen*, November 2015, www.eia-international.org/report/who-watches-the-watchmen/ (accessed 17 December 2020), 7.

¹⁵⁶ Environmental Investigation Agency/Grassroots, *Who watches the watchmen 2: The continuing incompetence of the Roundtable on Sustainable Palm Oil’s (RSPO) assurance systems*, November 2019, www.eia-international.org/wp-content/uploads/WtW2-spreads.pdf (accessed 17 December 2020), 12.

¹⁵⁷ Humanity United (2015), 9; Iwundu et al. (2018), 9.

¹⁵⁸ Humanity United (2015), 9.

¹⁵⁹ OECD, FAO (2016), 67.

Stage 3 (track): Auditing and certification firms must check whether the measures taken are effective and actually reduce the identified risks and prevent or at least mitigate their contribution to human rights violations by the audited companies. Auditors and certifiers cannot rely on checklists, but must thoroughly assess the situation, based on qualitative process and impact-related criteria and indicators. Unannounced site visits should also be conducted at this stage.

Stage 4 (account): The auditing and certification companies should document and communicate their risk analysis and efforts to minimize the identified risks, as required by the UN Guiding Principles.

Auditing and certification companies should establish complaint and grievance mechanisms that are transparent and easily accessible to stakeholders and therefore allow feedback from those directly affected.¹⁶⁰ Grievances must be addressed and remediation offered.

4 Would an adequate HRDD process have helped minimize the human rights risks?

Auditing and certification companies must ensure that they do not issue substandard or false audits and certificates. By failing to detect or by concealing human rights risks, they can significantly contribute to human rights violations.

Auditing and certification companies can minimize risks by training their personnel in human rights methodologies, and by being transparent about the applied methods and results of their activities so that civil society organizations and affected people can critically examine the information and give relevant input. Engagement with stakeholders and trade unions is essential for quality control, especially in relation to identified risk factors. If RSPO certification only relies on documentation by management and official sources, there is a high risk of overlooking relevant information. However, without an adequate payment scheme, all expectations of thoroughness and reliability are put into question.

5 What other risk factors existed that an HRDD framework is unlikely to address?

The risks here are increased by the fact that the RSPO scheme is purely voluntary, which means that violations by participating companies have few significant consequences. This does not sufficiently dissuade violations of RSPO rules and procedures, and the Complaints Panel has also not been able to stop them.¹⁶¹ This weakness is typical for voluntary systems without any public regulation or oversight.

When auditors and certification companies are directly commissioned and paid by the audited RSPO member company, this compromises their independence and increases human rights risks through courtesy certificates, particularly in countries and sectors with widespread corruption.

Another factor that puts the reliability of RSPO audits and certificates into question is the disparity between overly ambitious standards and methodological weaknesses, such as check-list approaches or verification based only on documents, without conducting interviews in a safe space or unannounced site visits. For example, one RSPO indicator requires documentation “showing identification and assessment of demonstrable legal, customary and user rights.” If an auditor relies on written documents produced by the state and the audited company, this is not enough. Land use rights and consultation rights, in particular, are often undocumented, unregulated and contested. Without meaningful stakeholder engagement, including with land users and local or national civil society organizations, an evaluation of these rights cannot be reliable. Such a procedure is more resource-intensive and therefore requires appropriate conditions, namely the adequate payment, guidance, training and monitoring of auditors.

¹⁶⁰ Humanity United (2015), 6.

¹⁶¹ Environmental Investigation Agency/Grassroots, Who watches the watchmen 2: The continuing incompetence of the Roundtable on Sustainable Palm Oil’s (RSPO) assurance systems, November 2019, www.eia-international.org/wp-content/uploads/WwtW2-spreads.pdf (accessed 17 December 2020), 13.

The RSPO SCC provides interpretation guidance in principle, but basic methodological guidelines are not included, leaving the methodological approach largely up to the auditor's discretion.

RSPO's complaint procedures are lengthy and ineffective; the high incidence of substandard audits (up to 60%) indicates a lack of quality control in the system.¹⁶² Even if complaints are brought to the complaints mechanism, the RSPO member can decide to leave the RPSO scheme without negative consequences. This could disincentivize the RSPO scheme from sanctioning members over complaints in order to minimize its risk of losing members.¹⁶³ In some cases, the same auditors investigated complaints against companies that they had previously audited themselves. This represents a clear conflict of interest and therefore compromises the complaints mechanism.

There is also a lack of transparency in the awarding of contracts, certification processes, audit reports or the withdrawal of a contract or certification or accreditation. This lack of transparency largely shields the actors from scrutiny by civil society.

6 Are there solutions available in other sectors?

After strong criticism, there have been some improvements (e.g. revised P&C standards and new FPIC guidelines) within the RSPO system in recent years. However, most of the basic problems do not seem to have been solved.¹⁶⁴

The P&C 2018 set high standards for certified companies, yet they can only reach their full potential if they are audited and enforced thoroughly, comprehensively and competently.¹⁶⁵ Without clear guidelines and minimum methodological standards for auditors, even the most sophisticated standards will not provide a truthful picture of the situation on the ground, but will result in a superficial checklist procedure.

What is needed is therefore the development of consistent and binding minimum methodological standards, including unannounced inspections and clear instructions for stakeholder interviews, methods for identifying all relevant stakeholders, representative selection of interview partners, etc., and the principle of independent corroboration of information. Audit reports¹⁶⁶ and corrective action plans should be made available for cross-checking by stakeholders, such as rights-holders, trade unions and CSOs. The certifiers (and auditors, where applicable) should be selected, hired and adequately paid by an independent body.¹⁶⁷

The RSPO complaints system must be improved to bring it in line with the criteria established in the UN Guiding Principle No. 31.¹⁶⁸ Conflicts of interest between complainants, respondents and those sitting on the complaints panel must be avoided. Should the mechanism confirm human rights violations, there should be robust consequences, such as the suspension of accreditations or inclusion in a public register.

Finally, liability of auditing and certification companies towards affected rights-holders could provide the necessary incentive for these companies to improve their HRDD processes as well as their quality and integrity management. General principles of negligence, intent and attribution would apply.

¹⁶² Profundo (2018), 59; Iwundu et al. (2018), 7ff. See also Environmental Investigation Agency/Grassroots, Who watches the watchmen, November 2015, www.eia-international.org/report/who-watches-the-watchmen/ (accessed 17 December 2020), 3, 6.

¹⁶³ Environmental Investigation Agency/Grassroots, Who watches the watchmen 2: The continuing incompetence of the Roundtable on Sustainable Palm Oil's (RSPO) assurance systems, November 2019, www.eia-international.org/wp-content/uploads/WWtW2-spreads.pdf (accessed 17 December 2020), 13.

¹⁶⁴ The Palm Oil Innovation Group founded in 2013 has developed a more comprehensive certification scheme, which is based on the RSPO system. However, it relies on existing mechanisms utilized by RSPO and therefore suffers from similar problems regarding the grievance mechanism.

¹⁶⁵ Environmental Investigation Agency/Grassroots, Who watches the watchmen 2: The continuing incompetence of the Roundtable on Sustainable Palm Oil's (RSPO) assurance systems, November 2019, www.eia-international.org/wp-content/uploads/WWtW2-spreads.pdf (accessed 17 December 2020), 23.

¹⁶⁶ See Environmental Investigation Agency/Grassroots, Who watches the watchmen, November 2015, www.eia-international.org/report/who-watches-the-watchmen/ (accessed 17 December 2020), 23.

¹⁶⁷ As foreseen, for example, in the Bangladesh Accord on Fire and Building Safety in Bangladesh. See above, Chapter III.

¹⁶⁸ UN Guiding Principle No. 31 establishes the criteria for non-judicial grievance mechanisms, including the necessity for a legitimate, accessible and transparent grievance mechanism.

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Verantwortlichkeit von Wirtschaftsprüfern gegenüber dem Anlegerpublikum.
In: Callies GP (ed.) *Transnationales Recht—Stand und Perspektiven*, p. 307–328

Imprint

Publishers

European Center for Constitutional and Human Rights e.V. (ECCHR)
Wolfgang Kaleck (V.i.S.d.P.)
Zossener Str. 55–58, Aufgang D
10961 Berlin
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Brot für die Welt
Evangelisches Werk für Diakonie und Entwicklung e.V.
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Bischöfliches Hilfswerk MISEREOR e.V.
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Print

Umweltdruckerei

June 2021

