

CMSI Consultation Response

Respondent Details

NAME

Fernanda Hopenhaym

COUNTRY

Switzerland

PERMISSION

Yes, CMSI can disclose my feedback, name, and organisation.

STAKEHOLDER

Intergovernmental / multi-lateral organisation

ORGANISATION

UN-OHCHR

COMMENTS & QUESTIONS BY DOCUMENT

Document:
Governance

QUESTION 1

The governance principles that guided the development of the governance model are inclusive, effective, credible, impact-driven, pragmatic and efficient. From your perspective, does the proposed governance model meet expectations for consistency with these principles?

Response: 2: Below expectations

QUESTION 2

Does the proposed governance model ensure no single group is able to unduly influence decisions?

Response: no

Document:
Assurance

QUESTION 1

From your perspective, does the Assurance process meet your expectations of a robust, credible, replicable and transparent approach?

Response: 1: Significantly below

Document:
Standard

Introduction

COMMENT:

1. The Working Group on the issue of human rights and transnational corporations and other business enterprises (the Working Group) established pursuant to Human Rights Council resolution 17/4, has the honor to submit its comments to the draft consolidated mining standards for the consideration of ICMM, World Gold Council, Cooper Mark and Mining Association of Canada.

2. *The Working Group is mandated to promote, disseminate and implement the Guiding Principles on Business and Human Rights (the Guiding Principles). The Working Group is also mandated to exchange and promote good practices and lessons learned on the implementation of the Guiding Principles, and to evaluate and make recommendations thereon.*

3. *The purpose of this submission is to convey the Working Group's profound concern regarding the lack of alignment between the draft consolidated mining standards and the Guiding Principles, as well as other international human rights standards. The Guiding Principles constitute the most authoritative normative framework for responsible business conduct, addressing human rights abuses in business operations and global value chains.*

4. *The misalignment between the draft standards and the Guiding Principles risks confusing mining companies about their international human rights responsibilities and expectations. It also exposes businesses to potential infringements of internationally recognized human rights as well as non-compliance with national laws and regulations. Increasingly, the Guiding Principles are being incorporated into supranational and national legislation, as well as into international instruments and technical standards.*

5. *This lack of alignment is illustrated in several key performance areas of the draft standards relevant to the Working Group's mandate. The examples provided herein are non-exhaustive. The omission of comments on certain performance areas or associated documents—such as the governance model, assurance process, reporting, and claims policy—does not imply alignment with the Guiding Principles. These documents should also undergo thorough review in light of international human rights standards, as outlined below.*

6. *The standards categorize requirements into foundational, good, and leading practices. The Working Group emphasizes that the Guiding Principles set minimum requirements for businesses to uphold their responsibility to respect human rights. Therefore, all requirements under the Guiding Principles must be classified as foundational practice, not as good or leading practices.*

II. CONCERNS WITH REGARD TO THE SCOPE, DEFINITIONS AND TERMINOLOGY

7. *The inclusion of a specific performance area on responsible supply chains could imply that other areas apply only to a business's own operations, excluding its value chain. Similarly, the terminology of "area of influence" which includes "areas likely to be affected by the facility current activities" and "associated facilities not controlled by the facility but that would not have otherwise been constructed or explained", may suggest that supply chain impacts fall outside the scope of the standards. The Guiding Principles, however, cover a business's operations and its full value chain, both upstream and downstream.*

8. *The use of the "mitigation hierarchy" framework is inappropriate for addressing adverse human rights impacts. This framework, designed by business associations for biodiversity and ecosystem management, cannot be used to prevent and mitigate human rights impacts, the human rights due diligence process should be used instead.*

9. *The phrase "provide access to a grievance mechanism" does not meet the requirement of the Guiding Principles 22, which requires businesses to provide for remediation for the adverse human rights impacts they have caused or contributed to.*

10. *The formulation "anticipated impacts" suggests that only future impacts are taken into account. However, the Guiding Principles cover actual and potential human rights impacts, which could include past harms that still have ongoing impacts such as the adverse impacts of closed mines, and/or where remedies are yet to be provided to the victims.*

Performance Area 13: Community Impacts and Benefits

COMMENT:

23. *The terminological use of "identify adverse risks and impacts that directly affect stakeholders and rightsholders" is problematic. According to the Guiding Principles, business should identify, prevent, mitigate and where appropriate, remediate, both direct and indirect human rights impacts on the community.*

24. As noted previously, meaningful engagement with stakeholders is a core element of the responsibility of business to respect human rights and should be elevated to foundational practice.

Performance Area 14: Indigenous Peoples

COMMENT:

25. *Businesses must respect the rights of Indigenous Peoples, notably by conducting human rights due diligence to address actual and potential adverse impacts. This requirement must be foundational.*

26. *Meaningful engagement with Indigenous Peoples is one of the core elements of the corporate responsibility to respect human rights. As noted in the Working Group’s roadmap for the next decade of business and human rights (A/HRC/50/40/Add.3), engagement must be aligned with international FPIC standards and expectations. Therefore the requirement that the right to FPIC is respected should also be a foundational practice .*

27. *The formulation of “in accordance with the principles of FPIC (...) , obtain agreement with affected Indigenous Peoples demonstrating consent to anticipated impacts to their land or other rights” is profoundly problematic for the following reasons. “Obtaining agreement” is not accurate, as this formulation appears to assure that the process’s end-goal is that Indigenous Peoples agree with the adverse impacts on their rights. However, international human rights standards prescribe that FPIC cover the right to grant consent as well as the right to withhold or withdraw consent at any point in time. FPIC should therefore be sought continually as part of an iterative process. In its report on the extractive sector, just transition and human rights (A/78/155) the Working Group called on businesses operating in the extractive sector to identify and manage risks that Indigenous Peoples and other marginalised and at-risk groups face, including by obtaining free, prior and informed consent prior to any decision-making that may affect Indigenous Peoples’ rights. Therefore, “obtain agreement” should be changed to “obtain free, prior and informed consent”. In addition, this consent should not only cover “anticipated impacts” but also the current ones, which could also stem from past harms. Therefore, the correct terminology would be “actual and potential impacts” .*

28. *Provisions allowing projects to proceed without full FPIC contradict international human rights standards, including the decisions of United Nations treaty bodies and the Inter-American Human Rights system . In addition, the current formulation given in the draft standards does not appear to take into sufficient account how certain operating environments, such as conflict-affected areas, can result in situations where the State is involved in human rights violations. Moreover, as the authorised Commentary to Guiding Principle 23 makes clear: “[w]here the domestic context renders it impossible [for businesses] to meet this responsibility fully, business enterprises are expected to respect the principles of internationally recognized human rights to the greatest extent possible in the circumstances, and to be able to demonstrate their efforts in this regard”. In other words, business should comply with international human rights standards even when State laws do not comply with such standards, or when complying with State law is insufficient for a business to be considered as respecting human rights. For these reasons, the Working Group strongly insists on the removal of “good” practice n°7 and the interpretative guidance for when agreement is not obtained.*

29. *The definition of Indigenous Peoples must include reference to the principle of self-identification, which is a fundamental element of their right to self-determination.*

Performance Area 2: Business Integrity

SECTION: 2.1 Legal Compliance, Foundational Practice, 2

COMMENT:

11. *The Working Group underscores that the corporate responsibility to respect human rights extends beyond compliance with national laws. Businesses must respect all internationally recognized human rights, and this must be explicitly stated.*

Performance Area 3: Responsible Supply Chains

SECTION: 3.1 Responsible Supply Chain, Foundational Practice

COMMENT:

12. *The responsibility to respect human rights applies to the business's own operations and to products or services provided by their business relationships, which means that the requirement of identifying, preventing, mitigating and accounting for human rights impacts should apply not only to a business's operations but also to the entire value chain, and accordingly classified as foundational practice.*

13. *The responsibility to provide for or cooperate in the remediation of adverse impacts does not depend on where the impacts have taken place in the value chain but on the connection of the business to the impacts. If a business has caused or contributed to a human rights impact, it should provide for or cooperate in the remediation. This requirement should be foundational practice.*

14. *In the same vein, the human rights due diligence process includes the responsibility to communicate externally for how a business is addressing human rights impacts under the Guiding Principles. Therefore, this expectation should be included in the foundational practice.*

15. *When businesses are linked to human rights impacts, they must use leverage to address them and explore ways to increase leverage where it is lacking. This is a requirement that should be a foundational practice.*

Performance Area 4: New Projects, Expansions and Resettlement

SECTION: NA

COMMENT:

16. *When developing new projects and expansions of its operations, business should conduct a robust process of human rights due diligence, recognizing that human rights risks may emerge and may be inherited through mergers or acquisitions. This should be a foundational practice.*

17. *Meaningful engagement with stakeholders, including (potentially) affected, marginalised and at-risk groups, should be an inherent element of the human rights due diligence process when there is a new project or expansion. Meaningful stakeholder engagement must be a foundational practice.*

18. *Regarding land acquisition and resettlement, businesses must respect the right to housing and explore all alternatives to eviction. In addition, the responsibility of the business to remedy the harms caused by the resettlement is lacking in the draft standards. In the case of displacement, if there is no other possible alternative, businesses should respect the right to resettlement, which includes the right to alternative land of better or equal quality and housing that must satisfy the following criteria for adequacy: accessibility, affordability, habitability, security of tenure, cultural adequacy, suitability of location, and access to essential services such as health and education. All these requirements should be classified as foundational practice.*

19. *For Indigenous Peoples, in case of eviction, their free, prior and informed consent (FPIC) should be obtained, and after agreement on just and fair compensation, and where possible, with the option of return. This should be classified as a foundational practice in view of the internationally recognized human rights of Indigenous Peoples, in accordance with the UN Declaration on the Rights of Indigenous Peoples (UNDRIP) and ILO Convention No. 169. It should be noted that in the case of Indigenous Peoples in voluntary isolation and initial contact, the precautionary, no-contact and intangibility further apply.*

Performance Area 5: Human Rights

SECTION: 5.1 Human Rights

COMMENT:

20. *One of the main elements for businesses to meet their responsibility to respect human rights under the Guiding Principles is to conduct human rights due diligence to identify, prevent, mitigate and account for how they address their impacts on human rights and to enable the remediation of any adverse human rights impact they cause or to which they contribute. Those core elements of the corporate responsibility to respect human rights should be included as foundational practices.*

21. *Respecting and promoting the rights of human rights defenders is crucial and should be maintained and further expanded upon, in line with the Guidance of the Working Group to protect and respect human rights defenders. Likewise, there should be specific mention in the draft standards of the responsibility to respect all internationally recognized human rights*

Performance Area 8: Diversity, Equity, and Inclusion

COMMENT:

22. *The Working Group wishes to bring to the attention of the businesses its report on protecting and respecting the rights of lesbian, gay, bisexual, transgender and intersex persons in the context of business activities (A/79/178), in which it calls on businesses to ensure that actions intended to promoting the inclusion of LGBTI+ persons are in line with the businesses responsibility to respect human rights. This includes that businesses should carry out a process of gender responsive human rights due diligence with a LGBTI+ lens and ensure meaningful engagement with LGBTI+ persons and organization that defend their rights. In addition, DEI policies should be in line with international human rights standards and the Guiding Principles.*

QUESTION 1

Does the scope, content, and narrative style of the consolidated standard meet your individual expectations and the collective industry expectation for responsible production practices?

Response: 1: Significantly below

QUESTION 2

Do the requirements meet your expectations for being sufficiently clear to support consistent and practical implementation and to achieve necessary performance improvement?

Response: 1: Significantly below

QUESTION 3

From your perspective, does the three-level performance structure (Foundational, Good, Leading) of the Consolidated Standard meet your expectations for providing an effective on ramp and clear articulation of good practice and effective path to continuous improvement?

Response: 1: Significantly below

Document:
Claims

QUESTION 1

We would value perspectives on a few additional questions related to threshold of performance associated with achievement claims. Please click here/ see page 11 of Reporting and Claims Policy.

Response: No Response