



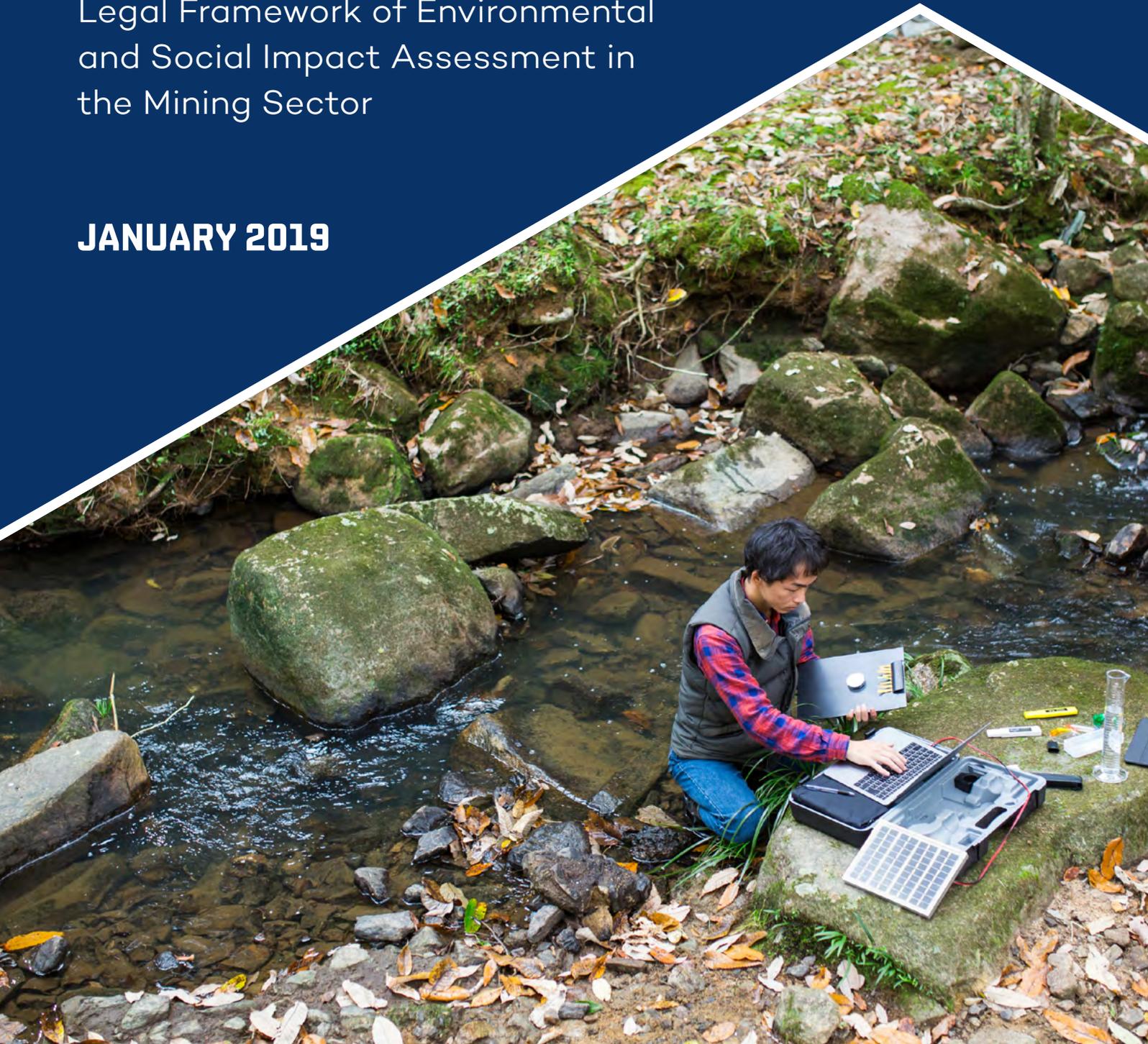
IGF

INTERGOVERNMENTAL FORUM
on Mining, Minerals, Metals and
Sustainable Development

BACKGROUND DOCUMENT

Legal Framework of Environmental
and Social Impact Assessment in
the Mining Sector

JANUARY 2019



Background Document:
Legal Framework of Environmental and Social Impact Assessment in the Mining Sector
January 2019

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DISCLAIMER

This document is based on the data and information as available during the research. As part of the development of the IGF guidance document, the data and analysis presented in this document will be amended and expanded as appropriate.

English or French translations of the legal texts from the countries analyzed are not official translations.

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1.0 BACKGROUND AND RATIONALE

1.1 THE 2017 AGM VOTE ON THE THEME OF THE FOURTH IGF GUIDANCE DOCUMENT

At the last Annual General Meeting (AGM) of the Intergovernmental Forum on Mining, Minerals, Metals and Sustainable Development (IGF), in October 2017, IGF member countries were asked to choose a central theme concerning the governance of the mining sector to be the subject of the next IGF guidance document. It is in this context that the theme “legal framework of environmental and social impact assessment and related plans in the granting of permits and negotiating mining contracts” was chosen by IGF member states.

This guidance document will be the fourth of its kind and is a continuation of the implementation and strengthening of the Mining Policy Framework (MPF) adopted by the IGF member states in 2013. IGF guidance documents are developed on an annual basis by the IGF Secretariat and serve as guidance based on the principles promoted by the MPF as well as international best practices. The themes developed in the guidance documents are devised in consultation with the member states and the IGF Executive Committee.

1.2 PURPOSE AND TARGETED AUDIENCE OF THE FOURTH IGF GUIDANCE DOCUMENT

The fourth IGF guidance document will focus on the legal and procedural aspects of environmental and social impact assessments (ESIAs) in the mining sector and related plans, namely, environmental and social management plans (ESMP), closure and rehabilitation plans, and potential resettlement action plans (RAPs). The guidance document will focus on legal frameworks that govern the development, implementation and monitoring of these tools. Unfortunately, this important issue has so far been the subject of very few in-depth and comparative legal analyses. Indeed, a preliminary review of the specialized literature (see Appendix 2) shows that there are very few comprehensive studies on the legal framework for ESIs and related plans in regard to the process of permitting and negotiating mining contracts. This observation confirms the relevance and urgency of the theme of the next IGF guidance document.

The guidance document will be designed for local, subnational and national governments of IGF member countries. It will be particularly relevant for the ministries or agencies that deal with mines and the environment, as well as for all those directly involved in the governance of ESIs and related plans. In addition, the guidance document will be useful for state entities that have decision-making power in the development and adoption of laws and policies governing permitting process, and other measures related to the mining sector.

The document will also be useful for stakeholders interested in how governments should regulate and manage processes on ESIs and associated plans, including mining companies, local communities, non-governmental organizations (NGOs), experts conducting ESIs and academics.



1.3 PURPOSE OF THIS BACKGROUND DOCUMENT

The purpose of this paper is to identify the issues and problems related to the legal framework of ESIA's and related plans in the legal framework of mineral resource-rich countries, as well as their implications for how the mining sector is governed, while exploring avenues for action and reflecting on appropriate solutions. A previous version of this background document served as a basis for consultation with IGF member countries and other stakeholders at the AGM in October 2018. The comments collected will assist in planning the next steps in the development of the guidance document so that it responds as closely as possible to the expectations and needs of all stakeholders.

This document was also the subject of consultations with two international organizations that are leaders in ESIA: the International Association for Impact Assessment (IAIA) and the Secrétariat internationale de la francophonie pour l'évaluation environnementale (SIFÉE).



2.0 INTRODUCTION

ESIAs, ESMPs, RAPs, and closure and rehabilitation plans are essential tools for any process related to the granting of environmental permits or mining authorizations. When the permitting process adequately addresses the timing, scope, role, development and implementation processes of these tools [see Box 2 on Definitions], this leads to more sustainable outcomes in terms of environmental, social and economic impacts during the life cycle of the mine.

Unfortunately, these issues are often poorly considered in the initial phases of mining projects or are inappropriately monitored during subsequent operational phases. This often results in mines operating with insufficient ESMPs and no closure plan or related financial guarantees. This can lead to conflicts between governments and mining companies at a later stage of the mine operation or near the expected end date of operations. These conflicts sometimes lead to international arbitration resulting from the ambiguities related to the processes and the legal status during the transition phase between exploration and exploitation (See Box 1). In some cases, mines are simply abandoned, leaving local communities and governments with heavy environmental, economic and social impacts.

These various implications show that the establishment of a clear and predictable legal framework can significantly improve the design of mining projects and promote their acceptability within the hosting community.

BOX 1. MINING ARBITRATION CASES RELATED TO ESIAS AND RELATED PLANS

Arbitrations involving ESIA processes and their implications are growing increasingly common in international investment law. In particular, several international arbitration tribunals have now looked at ESIA issues in cases initiated by mining companies.

- The United Nations Conference on Trade and Development (UNCTAD) has recorded 904 known treaty-based investor–state dispute settlement (ISDS) cases as of July 31, 2018.
- The mining sector (excluding investments in crude petroleum and natural gas) accounts for 83 cases.
- ESIAs were relevant in at least nine mining cases, most either initiated or decided as recently as 2014 (See Table 1).
- ESIAs could be involved in at least 14 other cases—including arbitrations concluded by undisclosed settlements or pending cases on which limited information is publicly available.
- At least eight cases involve social and environmental issues outside the context of an ESIA. This is the case for example, when governments, through executive, legislative or judicial measures, limit or cancel mining concessions on the grounds of environmental concerns or social unrest; problems that could have been maybe prevented with a more robust ESIA and its related plans.

The number of ESIA-related ISDS cases in the mining sector may be underestimated, considering the fact that, for several cases that are still pending or that have been settled, there is limited publicly available information on the investors' claims. In addition, arbitrations may have been initiated based on investor–state contracts and domestic laws.



TABLE 1. INVESTOR–STATE DISPUTE SETTLEMENT (ISDS) CASES IN THE MINING SECTOR INVOLVING ESIAS AS OF JULY 31, 2018

YEAR INITIATED	CASE NAME (WITH LINK)	STATUS	COMPENSATION		YEAR OF AWARD
			CLAIMED	AWARDED	
2003	<i>Glamis Gold v. United States</i>	Award in favour of the state (dismissed on the merits)	Not available	None	2009
2008	<i>Clayton/Bilcon v. Canada</i>	Award in favour of the investor	USD 300 million	Deferred to a later decision	2015
2009	<i>Pac Rim v. El Salvador</i>	Award in favour of the state (dismissed on the merits)	USD 314 million	None	2016
2010	<i>Beijing Shougang & others v. Mongolia</i>	Award in favour of the state (dismissed on jurisdictional grounds)	Not available	None	2017
2011	<i>Copper Mesa v. Ecuador</i>	Award in favour of the investor	USD 69.7 million	USD 19.3 million plus interest	2016
2011	<i>Crystallex v. Venezuela</i>	Award in favour of the investor	USD 3.16 billion plus interest	USD 1.202 billion plus interest	2016
2014	<i>Corona Materials v. Dominican Republic</i>	Award in favour of the state (dismissed on jurisdictional grounds)	USD 342 million	None	2016
2014	<i>Infinito Gold v. Costa Rica</i>	Pending	USD 321 million	Not applicable	Not applicable
2015	<i>Gabriel Resources v. Romania</i>	Pending	Not available	Not applicable	Not applicable

Source: Compilation based on data from UNCTAD's Investment Dispute Settlement Navigator at <http://investmentpolicyhub.unctad.org/isds>.

This paper is organized in three parts. First, the main issues common to the legal frameworks of several IGF member countries in the conducting and management of ESIA and related plans will be identified; these problems are often a source of uncertainty and therefore conflict between governments, mining companies and local communities (Section 3). Second, this working paper will explore recommendations for better development, approval, implementation and monitoring processes of ESIA and related plans (Section 4). Finally, the appendices will provide a list summarizing specialized literature on ESIA legal frameworks (Appendix 1) and a list of reference works on the technical aspects of ESIA and related plans (Appendix 2).



BOX 2. KEY DEFINITIONS (AS TRANSLATED)

Environmental and Social Impact Assessment (ESIA) & Environmental and Social Impact Study

This is a formal and comprehensive systematic process for assessing the environmental effects of policies, plans or programs (PPPs), as well as any alternatives, which results in a written report, the conclusions of which are used in decision making by the relevant public authorities, (Glasson & Therivel, 2013). It is a tool to help development planners design investment strategies, programs and projects that are environmentally sustainable for a region as a whole. R-SEAs take into account the opportunities and limitations represented by the environment of a region and assesses ongoing and planned activities from a regional perspective (World Bank, 1996).

Environmental and Social Impact Assessment (ESIA) & Environmental and Social Impact Study

The environmental and social impact study is a step in the environmental and social impact assessment (ESIA) process. The ESIA refers to the process of environmental authorization instituted in national legislation and which usually obliges large-scale projects to carry out an impact assessment and hold consultations. It involves several stages: preliminary sorting, framing or analysis of the scope of the study, carrying out the impact study and monitoring. The proper impact study is a rigorous scientific process that aims to: (i) document the different issues and how the environment functions to better appreciate its vulnerability in regards to the project's; (ii) integrate environmental concerns into project design; (iii) inform and raise public awareness and involve the community in the decision-making process in order to enhance the social acceptability of the project and ensure its sustainability; (iv) inform the administrative authority as related to the approval or rejection of the project taking into account economic, environmental and social issues, as well as mitigation or improvement and monitoring measures; (v) provide the technical, human and financial resources necessary for implementing the monitoring plan, the monitoring itself and its integration into local development actions (Glasson & Therivel 2013; André et al., 2010; Leduc & Raymond, 1999).

Environmental and Social Management Plan (ESMP)

The enforcement of a mining project ESIA must lead to the development of an ESMP, which allows the mining operator to devise actions that will enable it to: respect the regulatory framework applicable to the project; mitigate the negative impacts of the project on the biophysical and human environments; monitor activities and project impacts; make any necessary corrections or improvements as appropriate; and maximize the project's benefits (Benabidès & Delisle, 2011). The ESMP constitutes the project's environmental specifications and serves as a reference document for the holder of the exploitation permit as well as for the state's monitoring body. It has been agreed that the ESMP should include at least: i) the mitigation, compensation and enhancement implementation plan; ii) the environmental and social monitoring program; iii) the Stakeholder Capacity Building Plan; iv) the ESMP's budget; and v) the process by which the ESMP will be integrated into the project.

Resettlement Action Plan (RAP)

This is a document that specifies the procedures and measures that will be followed and taken to relocate and adequately compensate affected individuals and communities (IFC, 2002, 2012). It identifies all the people affected by the project and justifies their displacement, having taken into consideration any alternatives that would minimize or avoid this dislocation. Additionally, it defines the eligibility criteria applicable to the parties concerned, sets the compensation rates for the loss of assets and defines the levels of support for relocation and reconstruction of affected households. It should be remembered that the fundamental principle of resettlement activities is that they must result in tangible improvements in the economic situation and social well-being of the affected individuals and communities.



<p>Closure and Rehabilitation Plan</p>	<p>The process of closing a mine involves the conversion of a mine in operation into a closed mine, in an orderly, safe and environmentally sound manner. The closure and rehabilitation plan, which is always applicable to the particular mine site, explains how the site will be closed and returned to its state prior to exploitation, as far as this is possible (Government of Canada, 2013).</p> <p>This document is concerned with the mining facilities themselves, the conditions of the immediate environment, as well as the socioeconomic parameters. The closure plan and final rehabilitation must include: (i) a summary of the main points and conclusions, including closure targets, timetables and financial guarantees; (ii) a description of the context of the closure which includes the history of the mining company and its operations; (iii) a detailed description of the mining facilities; (iv) a description of the social and environmental characteristics of the area concerned, including the resources most likely to be affected by the closure; (v) a presentation of the closure plan which includes: the Schedule of Operations; the cost; plans (schematics) of an appropriate scale and detail to clearly display the proposals, including the final provisions for the site; and the technical appendixes, which must provide the research details concerning the proposed techniques and methods (Ricks, Steffen, Robertson, & Kirsten, 1999).</p>
<p>Guarantee of Closure and Rehabilitation</p>	<p>The financial guarantee is a written agreement under which a mining company agrees to pay a certain amount of money if it does not perform certain activities properly (e.g., restoration) (Government of Canada, 2013). This is an insurance mechanism, an element of governance, a solution to the bankruptcy or failure of the operator and any resulting abandoned mines, a question central to the post-mine issues, and a question of responsibility for future generations.</p>
<p>Environmental Audit or Environmental Monitoring</p>	<p>The systematic and documented verification process to objectively obtain and evaluate collected evidence (audit evidence) to determine whether activities, events, conditions, environmental management systems, or any related information is in accordance with the pre-established criteria (audit criteria) (André et al., 2006).</p>
<p>Environmental Release or Exit Ticket</p>	<p>When the mining company meets the decommissioning requirements of the government authorities and fulfills all the commitments of its closure plan, it receives from the authorities a written certificate called an "Environmental Release" which releases the company from its responsibilities, and the site is then considered to be closed (Government of Canada, 2013).</p>
<p>Public Engagement</p>	<p>Public participation is defined as the involvement of individuals and groups, positively or negatively affected or interested in a proposed intervention (that is, project, program, plan, policy) subject to a decision-making process (André et al., 2006). Its purpose in the environmental assessment is to enable citizens to participate in making decisions that impact their quality of life. In addition to taking into account the concerns of the communities in the establishment and implementation of policies and development projects, it at the same time allows for citizen participation and the sharing of local and traditional knowledge related to the physical environment and the social fabric (Lanmafankpotin et al., 2013).</p>



3.0 IDENTIFICATION OF LEGAL PROBLEMS IN THE ASSESSMENT AND MANAGEMENT PROCESSES OF ENVIRONMENTAL AND SOCIOECONOMIC IMPACTS IN THE MINING SECTOR

The identification of the main legal problems results from the analysis of several legal instruments from 22 IGF member countries:¹ mining codes and their implementing regulations, environmental codes and their implementing regulations as regards ESIA and related plans, and nine publicly available mining contracts. Some of the texts and contracts examined are very recent (2018), while others are older (1971).² Some of the analyzed texts are under revision. Furthermore, the implementing regulations to provide the specifications for certain rules may not have been adopted or may not have been accessible. It should be noted that the review will be extended to a larger number of IGF member countries as part of the development of the guidance document.

This preliminary review identified several issues and gaps. These mainly relate to:

- The lack of clarity on the role of ESIA and related plans as decision-making tools for public authorities in the mining permitting process (Section 3.1).
- The ambiguity concerning the rights of permit holders during the transition phase between exploration and exploitation (Section 3.2).
- The inadequate sequencing for the submission of ESIA and associated plans during the permitting process (Section 3.3).
- The shortcomings in procedures for preparing and approving these documents, including the effective involvement of affected local communities (Section 3.4).
- The lack of appropriate mechanisms for monitoring and implementing these documents (Section 3.5).

Moreover, a cross-cutting problem has been noted in several of the analyzed jurisdictions: confusion or contradiction between several texts applicable to the mining sector within the same country, or the out-of-date nature of these texts.

3.1 LACK OF CLARITY ON THE ROLE OF ESIA AND RELATED PLANS AS DECISION-MAKING TOOLS IN MINING PERMITTING PROCESSES

3.1.1 TWO DIFFERENT CONCEPTIONS OF THE ROLE OF ESIA

A fundamental issue currently divides environmental assessment experts in the mining sector: identifying the exact role assigned to ESIA as decision-making tools in mining permitting processes. The answers to this question can be analyzed according to several approaches that generally reflect the different perspectives of the stakeholders.

According to one approach, the ESIA could be understood as a tool for identifying the best option for carrying out a mining project at the technical, financial, environmental and social levels. From

¹ The 22 countries or jurisdictions are: Australia (Queensland), Botswana, Burkina Faso, Cameroon, Canada (Québec), Chad, Democratic Republic of Congo, Dominican Republic, Egypt, Equator, France, Ghana, Guinea, Mali, Morocco, Mauritania, Niger, Nigeria, Rwanda, South Africa, Tanzania and, Thailand.

² The dates of the texts listed refer to the date of the last modification made to the text, at the time of our review. They are not necessarily the date on which the fully revised text has been adopted.



this perspective, the issue is not the approval of the mining project itself, but the choice of the best option for deploying it in the interests of all stakeholders. As a result, the public authorities in charge of granting environmental and mining permits can determine the conditions of implementation of the mining project by "choosing" and/or "optimizing" the best variant. From the perspective of the state, this means that there is no option to reject the mining project based on the results of an ESIA.

The difficulty with this approach lies in the fact that sometimes the best environmental or social variant is not always financially or technologically feasible. Should the exploitation proceed under a "variant" that is less satisfactory from an environmental perspective for example? Then, this approach assumes that the mining proponent presents several variants for the deployment of the project. The analysis of several variants is an important step because the selection process inevitably involves comparing different options. However, in the context of mining projects, and especially in the context of developing countries, some mining proponents often present a single variant as the only one available. Some justify this situation by arguing that there are no real alternatives in a mining project because the resource is stationary and specific. Apart from the fact that this statement is open to discussion, it significantly reduces the effectiveness of the ESIA process. The latter would then limit itself to making a single option acceptable, even when it makes it difficult to integrate the necessary and sufficient measures to limit or manage the major environmental and socioeconomic impacts.

According to a second approach, the ESIA appears as a real decision-making tool for public authorities in charge of granting environmental and mining licences. From this perspective, at least two options are open to the state: (1) select or determine the best variant for the project based on the available options, or (2) refuse the development of the project if all available options are unacceptable. In the latter case, the state may consider that the residual impacts exceed the capacity of the receiving environment or do not fit with a previously defined development policy for the area. As a result, when they are well developed, ESIA and associated plans provide the public authorities with all the data needed to decide whether or not the project is acceptable.

This approach also raises difficulties. The first is the extent of the discretion of the public authority that rejects a mining project on the basis of the findings of an ESIA. The assessment of the unacceptability of a project may be controversial and it is important that mechanisms for transparency and control of the reasonableness of the decision be in place. This first difficulty is accentuated by another—the delimitation between the "acceptability" and "desirability" of a mining project. While acceptability here refers to the assessment of impacts and risks, desirability refers to a broader questioning about the desirability of a mining project. Indeed, public concerns often focus on the strategic choices regarding mining in a country, or the pertinence of national development policies. However, only a strategic environmental assessment (SEA) can provide a comprehensive and coherent response to such questioning. An SEA makes it possible to identify areas where mining is desirable and the conditions required for any operation. In this context, it sets the framework within which an ESIA for a specific project can take place and reduces the risk of rejection of projects at the time of the application for an exploitation permit.

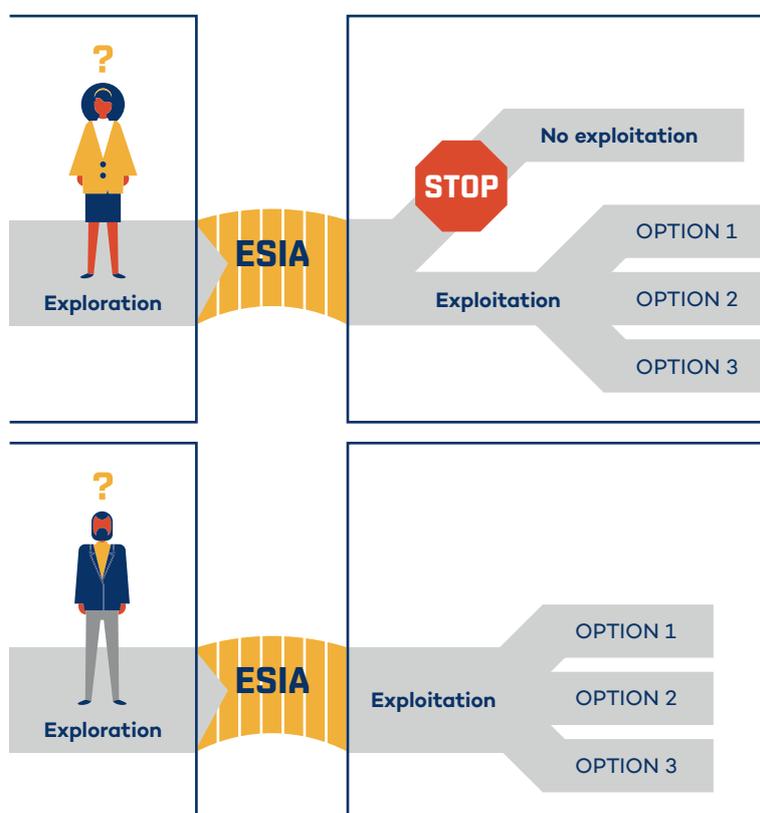
As is often the case with complex issues, there is a gray area between the two conceptions of the roles that an ESIA may play. Indeed, what happens if the least harmful option for the environment and local communities (therefore the most desirable) is financially unsustainable to the mining operator? In such a case, should the project be rejected based on sustainable development issues? These questions demonstrate the importance for states to clearly choose an option to stop a project when the results of the ESIA require it.



The review of environmental and mining legislation has not made it possible to identify a clear choice between the two approaches. This uncertainty or silence usually results in confusing or contradictory rules on the rights and obligations of governments and mining companies during the process of granting exploitation permits, which becomes a potential source of challenges and litigation. Sometimes the approach adopted in the mining code is not in full compliance with the provisions of the environmental code. This brings up the need for proper interaction between environmental and mining laws within the same jurisdiction.

In conclusion, the second approach is preferable because it is important that the ultimate option for rejection of the project by the state is made explicitly available. This is essential to ensuring the credibility of the ESIA process, especially with respect to civil society and to managing the expectations of all stakeholders.

FIGURE 1. WHAT ROLES DO ESIAS PLAY IN THE CONTEXT OF THE MINING PERMITTING PROCESS?



3.1.2 THE USE OF ASSESSMENT AND PLANNING TOOLS AHEAD OF THE ESIA PROCESS

An important issue concerns exploration permits granted in areas that are particularly sensitive in environmental, social, cultural or security terms, for example. Very often, conducting an ESIA in this type of area proves to be complex and expensive, and the cost of completing the satisfactory measures to mitigate the negative impacts can be very high. Accordingly, rejecting a project on the basis of an ESIA may involve very high, unrecoverable losses for the mining investor. In situations where it is reasonable to expect that the project will be undesirable, how to balance the responsibilities of the government in granting exploration permits in such areas and the mining operator's decision to proceed with the exploration in such areas?



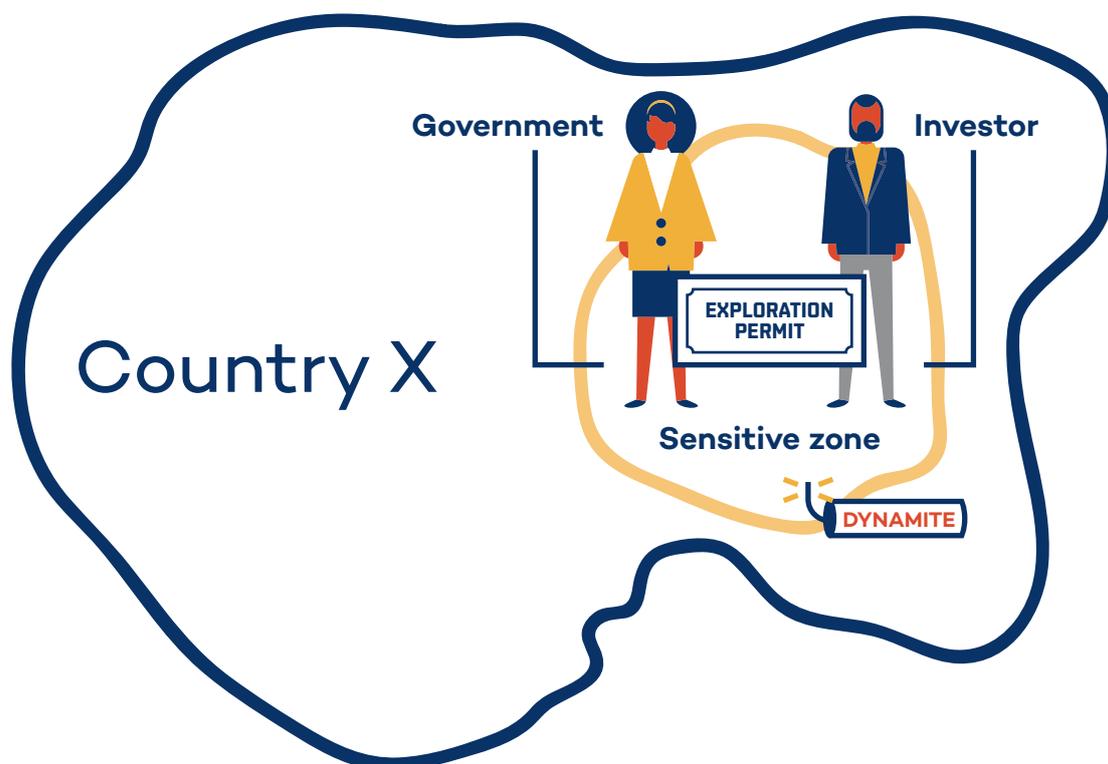
These situations are generally attributable to the absence of a strategic environmental assessment (SEA)—and therefore a strategic vision—before the granting of exploration permits. An ESIA can make it possible for the state to identify any environmental, social or cultural constraints—closely aligned with its land use plans—at the planning stage. For example, a prior superimposing of maps showing the location of potential deposits over those showing areas of major ecological importance may make it possible to define zones that should be excluded in the mining cadastre. This approach makes it possible to anticipate and take into account certain issues (including those related to biodiversity) before the ESIA process, and thus prevent them from revealing tardily unacceptable situations that will lead to the rejection of mining projects in these areas. Unfortunately, the review of several jurisdictions shows that there is very little legislation on SEA. However, it is essential to clarify the legal basis for elaborating SEAs, the binding nature of the zones excluded from any mining exploitation and the responsibilities of the institutions in charge of implementing the determinations of an SEA. Mining operators need clarity on areas where mining is possible, subject to certain conditions such as the conduct of an ESIA, as well as areas or circumstances in which mining is prohibited.

That said, the management of sensitive areas through an SEA process raises a delicate problem. What happens when an SEA recommends excluding an area from the mining cadastre, when exploration permits have already been granted? Should the exploration licences be withdrawn and the holders of these titles compensated? If so, what should be covered by the compensation? The sums already invested in research? The loss of value of the company's shares? In addition, is there any sort of obligation of compensation, if one considers that the exploration permit does not give a right to exploit a mineral? These questions are complex and difficult.

Another solution prior to conducting an ESIA would be to require exploration permit holders to conduct a scoping study or an environmental pre-feasibility review. This could provide the opportunity to check for major environmental and socioeconomic constraints early in the research phase, an initial stage of the project. A requirement of this type does not exist in virtually any of the laws analyzed. However, this option would ideally complement an SEA and should not be used in sensitive areas already excluded from any mining exploration or exploitation. In addition, scoping studies carried out on simple project concepts should never replace the conducting of a proper ESIA at a later stage of the project.



FIGURE 2. THE GRANTING OF RESEARCH PERMITS IN SENSITIVE AREAS, A HIGH-RISK APPROACH



In conclusion, the question of the role of ESIA and associated plans in the mining permitting process affects not only the techniques for developing and presenting the results of the ESIA; it also has significant consequences regarding the rights and obligations of stakeholders during the processes for granting mining permits.

3.2 AMBIGUITY CONCERNING THE RIGHTS OF THE HOLDER OF AN EXPLORATION PERMIT DURING THE TRANSITION PHASE BETWEEN EXPLORATION AND EXPLOITATION

Mineral exploration is a highly speculative and risky activity. For mining companies (junior companies in particular) engaged in exploration, the risk may be partially offset by the fact that, in the event of the discovery of a deposit whose exploitation is economically viable, they could be assured of proceeding to the exploitation phase or selling their exploration permit to a major company with similar guarantee. The granting of such a guarantee may seem obvious from a purely financial point of view as well as from the point of view of the promotion of mining exploration projects: the company that takes the risk of investing in exploration must reap the benefits in the event of success (discovery of a deposit). However, when integrating the assessment and management of environmental, social and economic impacts, the issue becomes more complex.

The question of whether the holder of an exploration permit has a "guarantee" or a "legitimate expectation" to the granting of an exploitation permit is addressed differently in the analyzed national laws than in the mining contracts. Most of the laws provide ambiguous answers that may be subject to conflicting interpretations in the event of a dispute.



At least four approaches can be identified and are presented here in descending order according to the "absolute" nature of the rights granted to the holder of the exploration permit in obtaining an exploitation permit.

3.2.1 A RIGHT TO OBTAIN THE OPERATING PERMIT

Some mining laws explicitly or implicitly give the holder of an exploration permit an absolute right to be granted an exploitation permit without considering if all criteria for exploitations rights are met. This means that the government cannot refuse to grant an exploitation permit, based, among other things, on the ESIA assessment. However, the environmental legislation of the countries adopting this approach specifies that an exploitation permit cannot be granted without the approval of an ESIA. One possible conclusion of this inconsistency between mining and environmental texts would be to consider that the conducting and approval of the ESIA is a mere formality or that it cannot be used as a basis for rejecting a mining project.

This type of legislation thus provides, for example, that "any holder of a research permit who has provided proof of the existence of a deposit within its perimeter" is entitled to the exploitation permit.³ Another example, which can be interpreted in the same way, is to state that the exploitation permit "can only be ceded to the holder of a research permit" and that "the holder is entitled" if he fulfilled his obligations pursuant to the 'research permit.'⁴

Furthermore, the same result shall be achieved if the legislation allows for the conclusion of contracts that cover both the exploration and exploitation phases. These contracts are problematic and are fortunately becoming less frequent. In fact, with this type of contract, the mining operator is granted exploitation rights before the identification of an exploitable deposit and the preparation of an ESIA. Contracts of this type govern mines still in operation or that have been concluded recently.⁵

3.2.2 A RIGHT TO OBTAIN THE OPERATING PERMIT WHEN THE REQUIRED CONDITIONS ARE FULFILLED

This approach is common among the legislative texts analyzed. It means that the holder of the research permit will be "entitled" to obtain the operating permit as soon as it has fulfilled its regulatory obligations; which include, in principle, the development and approval of an ESIA. This approach tries to reassure mining companies while preserving the state's power to make final decisions.

Thus, certain mining codes provide that the operating permits shall be "granted [by right]... to the holder of an exploration permit who has fulfilled its obligations under the Mining Code and filled an application in accordance with the regulations"⁶ or that the holder of the research permit "who has fulfilled all the conditions attached to the provisions of this Act, shall be entitled to the grant of a Mining Lease."⁷

An ambiguous wording that could be interpreted as a right to obtain an exploitation permit would be, for example, that the holder of the exploration permit has "the exclusive option to obtain" the exploitation permit "subject to the requirements set forth in this Act."⁸

³ Cameroon, Mining Code (2016), Article 46.

⁴ Mali, Mining Code (2012), Article 64.

⁵ Mirador Contract (Ecuador, 2012).

⁶ Guinea, Mining Code (2013), Article 30.

⁷ Nigeria, Mining Code (2007), Article 60.2

⁸ Dominican Republic, Mining Code (1971), Article 35.



However, it is not certain that all stakeholders always have the same understanding of the implications of this guarantee offered *subject to certain conditions*. For example, consideration should be given to whether the application file for exploitation permit should include an environmental authorization or certification based on an approved ESIA or simply an ESIA (see Section 3.3.1). Indeed, if the holder of the exploration permit must first have the ESIA approved before applying for an exploitation permit, no right to “obtain the permit” exists until the ESIA has been approved. Otherwise, if the approval of the ESIA occurs at the same as or after the application for an exploitation permit, this could result in a legitimate expectation to obtain the exploitation permit before the approval of the ESIA and related plans. The slightest ambiguity in this area can be a source of major conflict.

3.2.3 AN EXCLUSIVE RIGHT TO APPLY FOR THE EXPLOITATION PERMIT AND THE RIGHT TO OBTAIN IT, WHEN THE REQUIRED CONDITIONS ARE FULFILLED

This approach consists of guaranteeing the mining operator the exclusive right to apply for the exploitation permit for its exploration zone. Wording granting the holder of the operating permit an “exclusive right to apply for ... an exploration permit ... if it has fulfilled its obligations under this Code” falls within this approach.⁹

This means that the holder of the research permit has an exclusive right to apply for the permit and is shielded from competition. The logic here seems to be to give the person who took the risks related to the exploration or who holds the exploration permit priority in proceeding with the exploitation.

On the other hand, legislation adopting this approach also cites, in one form or another, the “entitlement” to a permit, subject to compliance with the legal requirements. For example, a recent mining code prescribes to the holder of a research permit the “exclusive right to request and obtain” the operating permit “subject to compliance with legislative and regulatory provisions,” but adds in another article that the permit shall be granted “after the approval of the National Mining Commission,” an inter-ministerial body responsible for examining application files.¹⁰ Along similar lines, it is stated that the holder of the exploration permit has the “exclusive right to apply for and be granted a mining right,” but that this shall be subject to certain conditions such as “comply with the conditions of environmental authorization.”¹¹ In some cases, it is stated that the research permit confers “the exclusive right to the application for the site license” and that the latter “can only be granted to the holder [of the research permit] after the existence of a deposit has been demonstrated.”¹²

A comparative reading of the different provisions from several of the jurisdictions analyzed makes it possible to ascertain that they have adopted this approach, for example when it is stated that the holder of the exploration permit “is entitled to the grant of an operating license,”¹³ or that “Subject to this Act ... the Minister ... shall, within sixty days of receipt and subject to all obligations having been satisfied, grant the applicant a mining lease...”¹⁴

⁹ Burkina Faso, Mining Code (2015), Article 32

¹⁰ Chad, Mining Code (2018), Article 66.iii and Article 110.

¹¹ South Africa, Mining Code (2008), Section 19.1.b - 2.b.

¹² Morocco, Mining Code (2015), Articles 42 and 48.

¹³ Tanzania, Mining Code (2010), Article 39. See also Articles 41, 42, 50, 51.

¹⁴ Ghana, Mining Code (2015), Article 39.2.



3.2.4 A SIMPLE RIGHT TO APPLY FOR AN EXPLOITATION PERMIT

In some of the mining laws analyzed, particularly in developed countries, the holder of the exploration licence does not hold any special rights with respect to the granting of an exploitation permit. In practice, these texts are silent on the question.¹⁵ This can be interpreted as meaning that exploration permit holders may apply for the operating licence just like any investor in the territory. However, it can be noted that exploration permit holders do enjoy a comparative advantage, as they have the best data to initiate the application for an exploitation permit.

3.2.5 CONCLUDING REMARKS

In conclusion, addressing ambiguities about the rights of exploration permit holders in mining laws and policies is important to prevent conflict during the transition phase between exploration and exploitation. Where the legal framework is unclear, arbitral tribunals are given the latitude to resort to and determine the content of the legal concept of "legitimate expectations" of the mining investors in obtaining exploitation permits. This notion has been used by some arbitral tribunals to determine whether a state has violated its international obligation of fair and equitable treatment toward the investor, a controversial notion with nebulous scope.

The idea that investors might have a legitimate expectation of the approval of an ESIA and the granting of a mining permit is highly problematic in that it frustrates the very purpose of an ESIA process. It again demonstrates the importance of clarity in domestic law on the investor's rights during the transition phase between exploration and exploitation, and on whether such rights include a legitimate expectation to the approval of an ESIA. In fact, one issue is to provide a guarantee to the exploration permit holders that what they will find will not be attributed to another proponent while the first has the will and the capacity to proceed with the exploitation. Another issue is providing a guarantee that permit holders will be able to proceed with exploitation as soon as they find an economically viable deposit. If the first guarantee seems legitimate, the second is highly risky and undermines the genuine *raison d'être* of an ESIA.

Furthermore, clarifying the content and limit of the rights of exploration permit holders would allow investors to make an informed decision before starting a mining exploration or exploitation project, as well as allowing the government to make an informed choice regarding the promotion and management of mining on its territory, particularly with respect to the granting of exploration permits.

3.3 INADEQUATE SEQUENCING FOR SUBMITTING ESIAS AND RELATED PLANS DURING THE PERMITTING OR NEGOTIATING PROCESSES

Analyzing the sequencing for the submission of ESIAs and related plans implies verifying, on the one hand, that all these documents are required by law and, on the other hand, that they are developed and submitted at the right time during the permit granting process. This is an important issue because this sequencing ultimately determines the exact role these documents play, as well as the government control over the entire process. At the same time, a good sequencing is essential to ensure that ESIAs and related plans are not only developed, but also well developed before the start of mining operations.

It should be clarified at this point that some of the environmental and mining laws analyzed clearly indicate that ESMPs and closure plans are integral parts of the ESIA, while others seem to consider

¹⁵ Quebec Mining Code (2018); Thailand, Mining Code (2017).



the closure plan as a separate document. This difference will be mentioned whenever it is relevant to the analysis.

The main gaps identified are related to:

- The failure to require an ESIA and related plans prior to the granting of the exploitation permit (Section 3.3.1).
- The failure to require a closure plan prior to the start of mining operations (Section 3.3.2).
- The failure to require a guarantee for closure and rehabilitation before the start of mining operations (Section 3.3.3).

3.3.1 FAILURE TO REQUIRE AN ESIA AND RELATED PLANS BEFORE THE GRANTING OF THE EXPLOITATION PERMIT

Almost all the legislation analyzed requires at least the preparation of an ESIA. However, four situations can be distinguished:

- **ESIA and related plans before applying for a permit:** They must be developed and approved prior to filing the exploitation permit application. In this first case, mining legislation requires that the exploitation permit application file includes a "favourable decision,"¹⁶ or a "certificate of environmental compliance"¹⁷ issued after the ESIA and related plans have been "approved" by the competent authority.¹⁸ This means that the operator cannot apply for the permit until the ESIA has been conducted and approved.
- **ESIA and related plans before the start of exploitation:** The ESIA and related plans must be conducted and approved after the submission of the mining permit application, but before the permit is granted or operations begins.¹⁹ This is the case when mining legislation requires that the ESIA report be submitted with a certificate of validity of the exploitation permit, which is usually granted on a "provisional" basis.²⁰ This is also the case when the mining code prescribes that it is the holder of the exploitation (and not exploration) permit who submits the ESIA.²¹
- **ESMPs and closure plans after the approval of the ESIA and before the start of operations:** In some cases, the ESIA may be approved without taking into account the ESMP or the closure plan. The texts then allow the mining proponent to submit the associated plans for approval at a later stage.
- **Closure plans after the start of exploitation:** In this case, a closure plan is required to be developed during exploitation. It should also be noted that when the mining project has started without an ESIA, an environmental audit will be needed to develop an ESMP.

The second, third and fourth situations raise many concerns. Even when the exploitation permit is granted on a provisional basis, the investor may consider that the granting of this permit has already created "legitimate" expectations on which it based itself to conduct the ESIA, sometime at very high cost. In any case, what happens if after granting of the exploitation permit (provisional or not), the environmental permit is not granted or the ESIA is rejected? This type of approach creates uncertainty and confusion for all stakeholders. Clarifying these points from the outset is as important

¹⁶ Burkina Faso, Mining Code (2015), Article 41.

¹⁷ Niger, Mining Code 2006, Decree 2006-265 Application of the Mining Code, Article 29.

¹⁸ Guinea, Mining Code 2011, Article 30; DRC, Mining Code 2018, Article 69.

¹⁹ South Africa, Mining and Petroleum Code (2009), Section 39.

²⁰ Ecuador, Decree on the Environmental Regulation of Mining Activities, Article 10.

²¹ Morocco, Mining Code (2015), Article 59.



for governments—which have the responsibility to protect the public interest in their territory—as for mining companies that take the risks of investing in a mining project.

Sometimes the combined reading of mining and environmental legislation in the same country does not allow for the clear identification of the process. For example, in some of the jurisdictions analyzed, there was inconsistency between mining and environmental legislation in terms of when the ESIA is to be developed. This occurs in situations when, for example, the mining code states that the ESIA must be prepared by "the holder of the mining exploitation permit,"²² suggesting that the ESIA is conducted by someone who has already obtained the exploitation permit, while the environmental text states that "the decision on environmental acceptability" is to be made on the basis of an ESIA which must be submitted also in the application for the exploitation permit and provides for the annulment of the permit in cases of non-compliance.²³ This contradiction can be a source of conflict between the government and the mining operator.

Another identified problem is the case when the related plans are required to be approved only after the ESIA is approved. Laws usually require that EIAs be subject to public consultations. When ESMP and closure plans are required only after the approval of the ESIA, then these plans will not be subject to public scrutiny—which will have an impact on their implementation throughout the life cycle of the mine.

That said, the majority of the mining and environmental legislation analyzed require the development of an ESIA and its ESMP before the granting of the exploitation permit.

3.3.2 ABSENCE OF A CLOSURE AND REHABILITATION PLAN BEFORE THE START OF OPERATIONS

The requirement of a closure and rehabilitation plan prior to the granting of the exploitation permit is not yet systematic in all the analyzed jurisdictions. While most of the texts reviewed require the submission of a closure and rehabilitation plan, not all texts require this submission at the same phase of the life cycle of the mine. However, mining is one of the few sectors where the end of the project must be planned out before it starts; all mines will close one day and sometimes unexpectedly.

Some mining codes do not expressly require that a closure and rehabilitation plan be submitted by the mining operator prior to the granting of the exploitation permit. This is the case when the plan is to be developed by the "holder of the exploitation permit."²⁴

In some cases, the legislation even requires that the plan be developed or approved six months to one year before the planned closure date. Hence, some legislation requires the holder of the exploitation permit to prepare "six (6) months before [the] closing date, in collaboration with the Administration of the territory and the local community, a plan for the closing of its exploitation operations."²⁵

This type of approach is not in line with international best practices: the closure plan is an ESIA-related component and needs to be developed before operations start. At minimum, a preliminary closure plan should be developed at this stage, and should be periodically updated during the mine life cycle. Furthermore, this approach raises issues during the permitting process and mining contract negotiations. What happens if, after the start of exploitation, the proposed closure plan is not accepted by the government or the local communities and thus results in social conflict? In such a situation, is it still possible or desirable to close a mine in operation, or should it continue operating

²² Morocco, Mining Code (2015), Article 59.

²³ Morocco, Law 12-03 on ESIA's (2003), Articles 7 and 18.

²⁴ Morocco, Mining Code (2015), Article 60.

²⁵ Guinea, Mining Code 2011, Article 131.



with the risk of creating a huge environmental liability at the end of operations? What happens if the closure plan is ultimately so costly in its implementation that it jeopardizes the economic viability of the mining project? In such a case, would the mining operator have begun operations if it had realized what its true costs were? Would it have been possible to convince investors or banks to finance the project with closure costs this high?

In practice, it should be noted that several mining operations in developing countries began at a time when national laws were not yet adequately addressing these issues and, the mining contracts did not integrate these issues. Also, some mines still in operation today are without closure plans and only commit themselves to remedy the problem only when the provisional closure date is soon approaching. This leads to longer, more complex and costly procedures, with strong pressure on all stakeholders to come to an agreement quickly. It is therefore important that governments engage in consultations as soon as possible to address such situations for the benefit of all stakeholders.

3.3.3 THE LACK OF FINANCIAL GUARANTEES REGARDING CLOSURE AND REHABILITATION

When a closure plan is not submitted before operations start, it is highly likely that there will not be an appropriate financial guarantee for the mine closure and rehabilitation. In fact, the amount of the guarantee must reflect the estimated cost of the closure and rehabilitation, and this cannot be calculated without a closure plan. When there is no financial guarantee or when its amount is not sufficient, there is a higher risk that these mines and projects will be abandoned, especially in the case when operation are suddenly terminated due to financial, climate or security reasons, among others.

Most of the mining laws analyzed require the inclusion of a financial guarantee that can take many forms, ranging from an irrevocable letter of credit, a performance bond²⁶ to a fiduciary account with a central bank.²⁷ In some jurisdictions, the competent authority has some discretion in the choice and collection of the guarantee and may for example "require the payment of the entire guarantee when [it] judges that the financial situation [of the licensee] or the reduction in the expected duration of its activities may prevent the payment of part or all of this guarantee."²⁸ In some cases, the financial guarantee required is not specific to the rehabilitation and closure of the mine but covers any damage that might be caused to people as a result of the mining activity.²⁹

Mining legislation in some countries does not provide for a financial guarantee for the mine's closure and rehabilitation.³⁰ However, when provided for, the financial guarantee mechanisms and the management procedures do not always allow the mining operator to bear the responsibility for the closure and rehabilitation. Thus, some legislation requires the creation of a fiduciary account "established by decree and [whose] terms of operation shall be determined by a joint order of the ministers in charge of mines, environment and finance."³¹ This suggests that the account is not maintained by a third party such as a central or commercial bank but by the state which is responsible for the management of the account. According to this line of thinking, this approach would result in state liability for mismanagement of funds or the impossibility for the operator to access them in a timely manner.

²⁶ Dominican Republic, Environmental Code (2000), Article 47 (representing 10 per cent of costs); Ecuador, Decree regarding the regulation of mining activities (2015), Article 34.

²⁷ Burkina Faso, Mining Code 2015, Article 27; Cameroon, Mining Code 2016, Article 235.

²⁸ Quebec Mining Code (2018), Section 232.7.

²⁹ Thailand, Mining Code (2017), Sections 68.9 and 70.

³⁰ Morocco, Mining Code (2015).

³¹ Guinea, Mining Code 2011, Article 144.



Other legislation requires the holder of the research permit to create, on a tax-exemption basis, "a provision for the rehabilitation of the site on which the mining operations are conducted."³² In principle, and without specification to the contrary, a provision shall be maintained in an account held by the mining company itself.³³ This approach presents several risks and challenges, notably the monitoring of the continued existence of the account and the possibility that the government will be unable to access the funds in the event of bankruptcy of the mining company.

Some legislation sets up a single fund, for the contributions of all licence holders,³⁴ and some designates an independent specialized institution to manage the fund.³⁵ It is not always clear if the contributions of all mining companies are aggregated into the fund, in which case their liability may be diluted in the case of insufficient funds for the rehabilitation of a specific mine.

Much of the analyzed legislation fails to provide specifications and procedures as to how to manage and release guarantees or has not yet adopted the implementing regulation, as required by the mining law. As a result, practical difficulties arise when the mining operator seeks to access the funds for progressive or final rehabilitation of the site, depending on the type of guarantee prescribed. Also, the legislation does not always specify the procedures required to release these guarantees, nor how they are transferred from one mining proponent to another one.

Lastly, there is virtually no legislation on the sharing of responsibilities in the event of social harm. The social component of management plans may impose on the government and the mining operator joint obligations such as the provision of services and infrastructure. However, what happens, for example, when the government does not provide the doctors to run a hospital built by the mining company? It is important that the financial guarantee mechanism take into account such specific scenarios.

³² DRC, Revised Mining Code 2018, Sections 258 and 294; Nigeria, Law on Mining and Petroleum (2002), Article 30 (Environmental Protection Reserve).

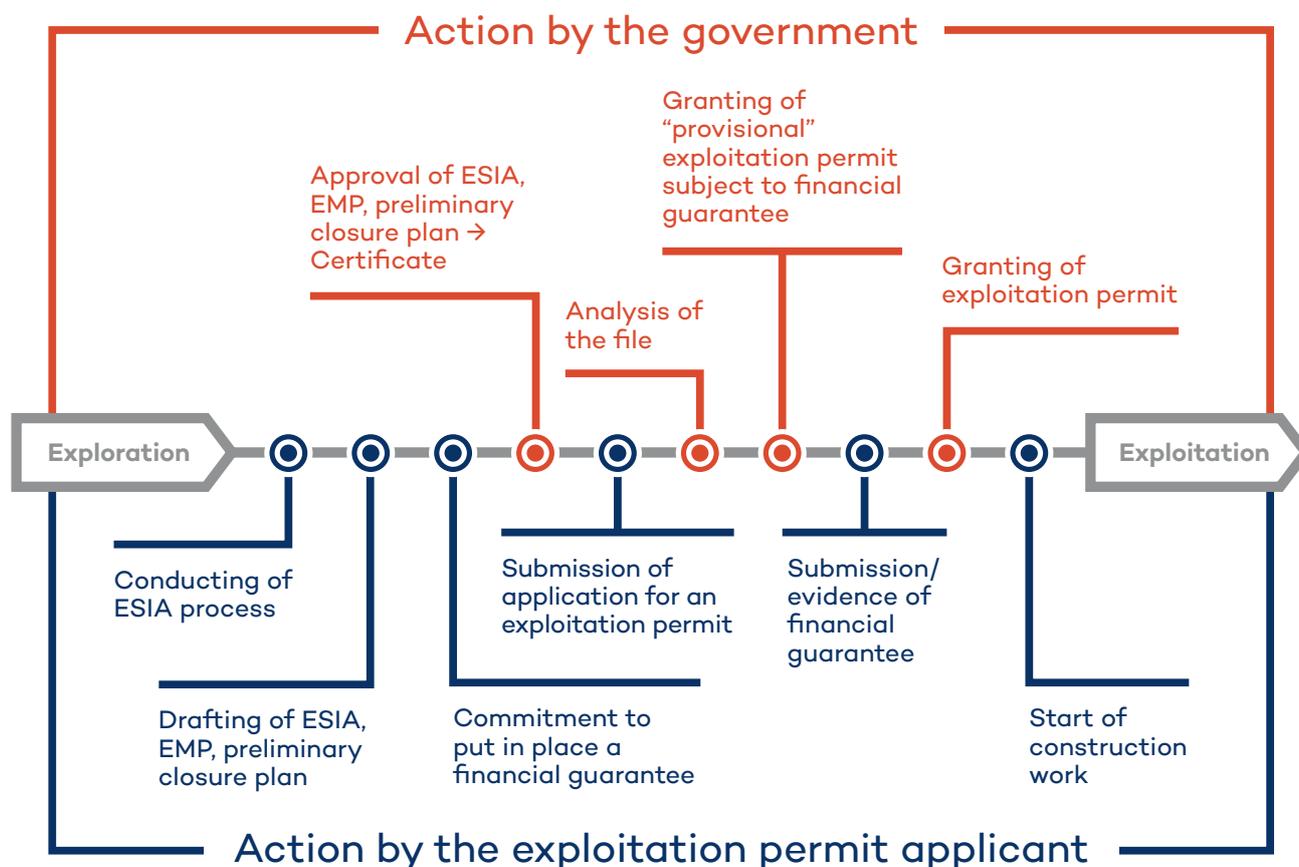
³³ See also South Africa, Environmental Management Act (2017), Section 46.2.

³⁴ Chad, Mining Code 2018, Article 317.

³⁵ Nigeria, Law on Mining and Petroleum (2002), Article 121.



FIGURE 3. ESIA AND RELATED PLANS PERMITTING PROCESS: THE RIGHT TIMELINE



3.4 SHORTCOMINGS IN THE LEGAL FRAMEWORK FOR THE PROCESS OF PREPARATION AND APPROVAL OF ESIA'S AND RELATED PLANS

It should be recalled that the development of the ESIA and related plans is the responsibility of whoever applies for the exploitation permit (whether a private or public entity) with the latter bearing the costs. Almost all of the mining and environmental laws reviewed reflect this rule, as advocated by international good practices.

International standards comprehensively address the steps and rules for the development of a good ESIA, management plan and closure plan (see Appendix 3). When these documents are required at the appropriate time, i.e., before the granting of the exploitation permit, the main issue is then the inclusion of these standards into the mining regulations of the countries, as well as into the practices of the industry.

As part of this study, problems were identified in the following areas:

- Coordination challenges between the ESIA Approval Authority and the Permitting Authority (Section 3.4.1)
- Short delays and automatic approval of ESIA's and related plans (Section 3.4.2)
- Weak integration of some aspects in ESIA's and related plans (Section 3.4.3)
- Challenges for an effective engagement of the local communities (Section 3.4.4)
- The problem of human resources and conflicts of interest (Section 3.4.5)



In some jurisdictions, there were also deficiencies in the detailed and specific guidance regarding the conducting of an ESIA in the mining sector, as well as the existence of clear and publicly available ESIA approval criteria.

3.4.1 COORDINATION CHALLENGES BETWEEN THE ESIA APPROVAL AUTHORITY AND THE PERMITTING AUTHORITY

When the role of the authority in charge of the approval of the ESIA and related plans is not clearly defined in relation to the authority granting the permit, there can be contradictory decisions, or even conflicts, which can be detrimental to all stakeholders.

In most of the analyzed mining and environmental legislation, the ministry in charge of the environment or one of its agencies is responsible for coordinating the conducting of ESIA's and approving them. The granting of the exploitation permit is usually the responsibility of the ministry in charge of mines, sometimes after consultation with an inter-ministerial technical committee.

Generally, the decision of the ministry in charge of the environment is binding on the ministry in charge of mines, which cannot grant the exploitation permit (or the final exploitation permit) if the ESIA has not been approved. Hence, the decision of the ministry in charge of the environment or the authorized authority is therefore binding on the permitting authority, even if it is rarely stated in these terms.

Another important question is whether or not the authority in charge of approving the ESIA has the power to reject it. In the legislation examined, it has been noted that this authority generally has the following options: (1) to approve the ESIA, as it is, (2) to request additional information, (3) to make observations that the applicant will then have to include, or (4) to reject the ESIA, in which case the applicant must resume the ESIA process.

Few of the analyzed texts explicitly consider the option of an ESIA rejection in the sense of a definitive rejection. This may mean that, in most jurisdictions, the ESIA is designed as a tool for choosing the best deployment option for the project, not as a basis on which to determine the desirability of the project. However, the ambiguity and overlap of the provisions does not always allow for a definitive conclusion and it could well be argued that the definitive rejection is implicitly foreseen in the case that the applicant for the exploitation permit submits a new, unsatisfactory version of the ESIA.

Even when the respective roles are clearly defined in the texts, collaboration between the two entities is sometimes difficult. This occurs when each of the two entities feels that the other is pursuing goals that are contrary to their own (for example, opening mines versus protecting the environment). These difficulties highlight the importance of having the same understanding of the role and importance of ESIA's and related plans in the permitting process and the need for the fluid channels of collaboration and communications.

The lack of adequate coordination between the ESIA approval authority and the permitting authority can lead to ESIA-related arbitration cases. For example, the permitting authority may issue commitments to the mining operator even though the authority responsible for the approval of the ESIA makes a different decision. Sometimes litigation can result from conflicting decisions made within the same department.

Lastly, it should be recalled that the scope of the ESIA goes beyond purely environmental issues. As a result, the management of ESIA and associated plans should not be limited to the ministry in charge of the environment and the ministry in charge of mines. Thus, all the competent authorities, including



the different levels of government, must play a role in both the review of the ESIA report and also in the monitoring and implementation of the ESMP and the closure plan. Depending on the project, this may concern the Ministry of Health, the Ministry of Infrastructure or the Ministry of Agriculture for example.

3.4.2 SHORT DELAYS AND AUTOMATIC APPROVAL OF ESIAS AND RELATED PLANS

The issue of timelines for review and approval of ESIA's and related plans is a difficult one. It is a question of striking a balance between the need for serious and thorough examination and not unduly delaying the process of granting the exploitation permit. That said, some approaches are clearly risky and counterproductive for all stakeholders.

The time allowed for the licensee to prepare and submit the ESIA is sometimes specified in the reviewed legislation, in some cases one year from the receipt of the terms of reference (ToR). This type of delay is highly problematic as it sometimes takes time to collect seasonal data, establish baseline conditions and conduct socioeconomic surveys. This is especially true when there are no national or up-to-date databases.

Another recurring problem is the time given to the mining proponent to provide additional information. This time may be too short when the first version of the ESIA report is particularly deficient.

As for the time allowed for the governmental authority to render its decision on the ESIA, based on the date of the filing of the document, this has not been established in all jurisdictions.³⁶ However, when this has been established, the timeline is sometimes very short when considering the complexity of certain ESIA's and the human resources available to the administrative bodies of developing countries. This period varies from seven days to six months, depending on the analyzed jurisdictions.

However, the main problem lies in the fact that delays in the approval may be followed by automatic approvals in the legislation, and an ESIA might then be approved even without proper review. This is the case, for example,³⁷ when the texts provide that "at the expiry of the period of seven (7) days (...), the applicant may consider his project as approved,"³⁸ or "after this period of twenty (20) days, if the administration has remained silent, the study shall be deemed approved"³⁹ or "if the applicant receives no response from the Agency within the time limit [3 months], the study shall be considered approved and the certificate granted."⁴⁰

In other cases, the legislation prescribes a time limit for the administration, without indicating consequences in the case of non-compliance.⁴¹

One can understand the desire of administrations to provide a prompt review of ESIA reports and reduce overly long waiting times. But the ESIA is such a vital document for the success of a mining project that it cannot be approved automatically, especially when the deadlines are short. In some cases, automatic approvals appear to be counterproductive, as they prevent the creation of an enabling environment for dialogue and negotiation to resolve conflicts between stakeholders.

³⁶ Rwanda, Mining Code 2014; Burkina Faso, Mining Code 2015.

³⁷ See also Mali, Decree 03-594 ESIA's, Article 21 (60-day period); Ecuador, Environmental Regulation of Mining Activities (2015) Article 24 (6-month period subject to certain conditions); Egypt, Environmental Law (2014), Article 20; Thailand, National Environment Improvement and Conservation Act, (1992), Section 49 (45-day period).

³⁸ Niger, Decree 2000-397 Administrative Procedure Evaluation and EIA Examinations, Article 4(6).

³⁹ Cameroon, Environmental Code 1996, Article 20.

⁴⁰ DRC, Decree 14-019 on Procedural Mechanisms for the Protection of the Environment, Article 29.

⁴¹ Morocco, Decree 2-04-563 on ESIA Committees, Article 11 (deadline is 20 days); South Africa Environmental Management Act (2017), Article 24.1 (deadline of 107 days).



3.4.3 WEAK INTEGRATION OF ECONOMIC, SOCIAL AND CLIMATE CHANGE ASPECTS IN ESIA'S AND RELATED PLANS

Fifty years ago, the question of the environmental impact of mining was not even on the agenda of mining policies in most mineral-rich countries, nor was it a concern for the mining companies. Subsequently, thanks to scientific discoveries and a global awareness of the environmental stakes of human activities, the evaluation and management of environmental impacts has become, first and foremost, the cornerstone of impact studies in the mining sector. Today, many environmental codes still use the terminology of “environmental impact assessments” (EIAs) instead of “ESIA’s.” The social component is therefore relatively recent. That said, it does not seem necessary to systematically review the acronyms in the law as soon as the definition and scope of the ESIA is sufficiently specified for all stakeholders.

The environmental component is understood to include both the natural and human environments and is being expanded to integrate (or is interpreted as integrating) climate change and human health impacts.

The social component is increasingly understood as integrating human rights, culture and gender considerations. However, the social aspects of ESMPs are often less developed in the law, and as a result the monitoring of mitigation measures also receives less attention. ESMPs should also include social indicators based on the results to be achieved.

In addition, new cross-cutting issues are still inadequately covered in national legislation applicable to the mining sector. This is especially true for climate change or gender.

A third largely ignored component lies with economic impacts. While recently revised environmental legislation generally indicates that ESIA’s should include an economic component⁴² (in line with best international practices), implementation on the ground is different. Indeed, the parts related to economic aspects in ESIA reports are often minimal; the fact is that teams conducting ESIA’s usually do not include economists. This gap is particularly significant in the development of closure plans.

This is an important gap. Mining activities do not only have environmental and social impacts, but also economic ones. However, these different impacts are often related to each other, and the way in which one aspect is dealt with automatically influences the others. Thus, the choices made for environmental rehabilitation should also take into account the economic and social repercussions.

ESIA’s and related plans alone are unlikely to address the economic benefits of opening a mine. Broader policies for local content and economic diversification are essential, and the role of government is fundamental. But the economic component of an ESIA can inform local content plans by providing useful information in terms of supply, demand and realistic projections over the lifetime of the mine. Also, plans for local goods and services furniture may be required in ESMPs.

In conclusion, ESIA’s and related plans can be formidable tools for all stakeholders to apply these international standards and national development policies into a particular project. They can then easily address the environmental, social and economic aspects in a holistic, integrated and sustainable way.

⁴² Ecuador, Decree regarding Environmental Regulations for Mining Activities (2015), Article 23.



3.4.4 CHALLENGES RELATED TO THE EFFECTIVE ENGAGEMENT OF AFFECTED LOCAL COMMUNITIES IN THE PROCESS OF PREPARING ESIAS

The processes for developing ESIA's and related plans must be inclusive and give an important role to local communities impacted by mining activities. There are numerous international guides and standards for effectively taking into account the concerns and interests of affected local communities (see Appendix 3). Clarifying and strengthening the role of communities in this process could reduce the risk of conflicts and arbitration cases related to ESIA's.

Most of the analyzed legislation requires consultation with local communities that will be affected by the mining project and that takes their concerns into account. However, in some cases, public consultation is not mandatory and shall be decided on a case-by-case basis.⁴³ This local community engagement requirement, which complies with international standards, is essential for building local acceptance or obtain the "social license to operate." However, the reality on the ground is more complex, and the stakes more varied.

The first issue concerns consultation methods, which do not always allow for effective consideration of the local communities' opinions. For example, in some of the reviewed legislation, public consultation takes place after the submission and provisional approval of the ESIA by the competent authority.⁴⁴ This does not comply with international standards that require public consultation during the ESIA report process.

A second issue concerns the scope of the consultation. Indeed, it is not always clear whether local communities can oppose the project and if so, to what extent this refusal is binding on the government. The analysis of the texts seems to indicate that the final decision belongs to the government. However, the decision-maker is generally not required to explain how it has taken into account the comments and concerns of the public, nor to justify the compromises that result from its decision. It is therefore important to ensure that public consultations have a real impact in the sense that they can influence the outcomes of the ESIA and the decision-making process.

There is, however, usually a lack of a requirement for decision-makers to reflect on how they have considered and responded to public comments/concerns, and justify any trade-offs that will result from the decision. In practice, the decision-maker is sometimes led to take into account a local community's strong opposition; otherwise, the project, even if it is legally approved, cannot be achieved peacefully. Additionally, consultation mechanisms are not always clearly specified in environmental and mining legislation. And when specifications exist, they are not necessarily effective. For example, the time required for consultations, or the number of meetings required, may be insufficient to ensure real community involvement. Several jurisdictions set a range of "one to many" meetings.

Also, while the participation of local communities in the preparation of ESIA's is generally required by the reviewed national legislation, this is not always the case for the drafting of the closure and rehabilitation plan. At this time, very few of the legislative texts examined explicitly require consultation with local communities.⁴⁵ However, it is important that they can decide on a proposed scenario such as, for example, choosing the final disposition of the site after its closure. Indeed, the success of the rehabilitation project will largely depend on their engagement.

⁴³ Tanzania, Environmental Management Act (2004), Article 90 (1-2); Decree on Environmental Audits and Impact Studies (2005), Articles 26 and 27; Botswana, EIA Act (2011), Section 11.

⁴⁴ Thailand, Mining Code (2017), Articles 82, 83 and 86.

⁴⁵ Quebec, Act Respecting the Environmental Quality (2018), Article 31.55.



Finally, other gaps or limitations can also be problematic. We note the reference to communities as simply "neighbouring" or "local" and not as "impacted," which is a broader and more flexible concept. International best practices are increasingly using the notion of "interested parties" which includes all persons with an interest or expertise in the affected resources. One can also note a secondary role that is sometimes given to local (municipal) or subnational (provincial, regional) authorities in the process of developing ESIA's.

BOX 3. THE SPECIFIC CASE OF INDIGENOUS PEOPLES

The protection of Indigenous Peoples is becoming a pressing issue in the extractive industries sector, particularly in regard to the principle of free, informed and prior consent. Indigenous peoples have special and specific rights but are not acknowledged by all states.

In certain countries (Australia), the state has granted Indigenous Peoples the right to approve or reject a project. This is especially the case when the holder of the research permit must first obtain the agreement of the community in the form of a legal document before being granted the exploitation permit.⁴⁶ It is important here to distinguish between the legal power granted to Indigenous Peoples to approve a mining project or not, from the diffuse concept of the "social licence to operate." In the first case, it is a true right of veto, and in the second case, a way to ensure the feasibility and success of the project in the long term.

Issues related to Indigenous Peoples are also crucial in Latin America, the location of several responding states in mining arbitration cases related to the ESIA's (see Table 1). The mining and environmental laws from this area that we examined show that local communities have been given a role to play in the process of developing ESIA's and related plans, but do not have a right of veto. Another significant problem is that the law has not provided effective mechanisms for the communities to actually participate or have their issues addressed.

In Africa and Asia, where issues related to Indigenous Peoples are generally less prominent, local communities do not have a legal veto right. As a result, the final decision rests with the central or provincial government, whichever the case may be.

For countries where the protection of Indigenous Peoples is a sensitive issue, it is important that legislation clarify and strengthen their role in the process of developing ESIA's and related plans, while putting in place tools and mechanisms to ensure their effective participation. The United Nations Declaration on the Rights of Indigenous Peoples offer best practice on means of meaningfully consulting the public and upholding indigenous rights that all legislation should consider. This would reduce the risk of conflicts and arbitration cases related to ESIA's.

3.4.5 THE PROBLEM OF HUMAN RESOURCES AND CONFLICTS OF INTEREST

The problem of human resources and conflicts of interest in the review and validation of ESIA's and related plans is a recurring issue.

Several testimonials collected by the IGF Secretariat indicate that the administrations of certain IGF member countries do not always have all the internal expertise to assess the content of mining sector ESIA's and related plans, particularly for large-scale projects. As a result, the ESIA and related plans, as well as the project, may be approved even though they are not technically satisfactory. In addition to the lack of human and technical resources to provide an informed opinion on the real

⁴⁶ See, for example, South Africa, Environmental Management Act (2017), Article 40.1.a.



consequences of a mining project, one can sometimes add the lack of political will or support to fully exercise the authority to approve or reject a mining project.

Another problem that results from the low number of mining sector ESIA experts in developing countries is the risk of conflicts of interest. Indeed, some evidence shows that national private firms in charge of conducting ESIA on behalf of mining companies are not always exempt from conflicts of interest. For example, some government officials have created private firms in charge of conducting ESIA, or subcontract their expertise, which can lead to situations where the government officer responsible for reviewing the case turns out to be the one who wrote the ESIA. In such a case, it is difficult to guarantee the quality of the ESIA and related plans that the government has approved.

Lastly, governments might not have the financial resources to pay for an independent review of the ESIA process and report. However, this can be addressed by requiring the proponent to bear the costs of the independent review or by requesting the support of an independent and credible international institution.

In conclusion, it should be noted that the gaps or weaknesses in the mechanisms for developing and approving ESIA and related plans make the quality of the ESIA process dependent on the good will and ethical rules specific to the mining operator itself. However, even when the legal requirements and regulations adequately address these issues, a lack of monitoring and evaluation may make these requirements obsolete in the field during the life cycle of the mine.

3.5 LACK OF APPROPRIATE AND SUITABLE MECHANISMS FOR MONITORING AND IMPLEMENTING ESIA AND RELATED PLANS

While mining and environmental legislation may clearly and appropriately govern the development process for ESIA and related plans, and require their submission and approval prior to permitting, its implementation often remains a problem.

The issues identified relate to:

- Ineffective monitoring and inspection mechanisms (Section 3.5.1).
- Lack of periodic reports on the implementation of the ESMP and closure plan requirements (Section 3.5.2).
- Lack of Periodic reviews of these documents requirements (Section 3.5.3).
- Unsuitable or insufficient sanctions for breach of the requirements set forth by ESIA and related plans (Section 3.5.4).
- Uncertainty regarding the scope of Environmental and Social Release (Relinquishment) and its legal consequences (Section 3.5.5).

3.5.1 INEFFECTIVENESS OF APPROACH BASED ON REVIEWS, INSPECTION AND THREAT OF SANCTIONS

Mechanisms for implementation and monitoring based on reviews, inspection and the threat of sanctions are common to all mineral-rich countries, including the jurisdictions that were analyzed. They consist, for the competent governmental structures, of organizing monitoring and field inspection activities in order to monitor compliance by the mining permit holder.



Unfortunately, to be effective this approach requires significant public resources, both human and financial. As a result, many developing countries are unable to provide regular reviews and inspections, particularly unannounced inspections, which are highly unlikely. Therefore, the incurring of sanctions remains mostly hypothetical. Evidence gathered during events organized by the IGF shows that certain mining companies must themselves contribute financially, or take the lead, in seeking the legally required monitoring. Some countries may draw lots to determine the mining companies that will be subject to a review each year.

In such a context, efforts should be undertaken or strengthened to find stable and autonomous sources of funding for the monitoring and inspection of ESMP and closure plan, including the use of part of mining revenues collected by the state. Simple and effective monitoring mechanisms should also be put in place for financial guarantees for closure and rehabilitation of mines.

The lack of coordination among government agencies in monitoring and controlling ESMP mitigation measures is an additional problem. This is especially true for the management and mitigation of social impacts. For example, environmental authorities likely do not have the expertise to monitor whether health mitigation or gender measures are being implemented and are being effective. The Ministry of Health, for example, should be actively involved in this exercise, but experience has shown that this is rarely done, especially in developing countries. As a result, these aspects of ESMPs and closures plans are unmonitored.

Moreover, most of the analyzed texts do not explicitly involve local communities in the monitoring mechanisms. This is an important issue because local communities are best suited to follow up regularly and spontaneously in some matters, as long as they are organized and trained to do so. For example, only a few legislative texts have established monitoring committees which include at least one representative from the local community.⁴⁷ Sometimes mining legislation explicitly provides for the possibility of local communities playing a role in monitoring activities.⁴⁸ One text provides that the Minister of the Environment may require the mining operator to train local communities in monitoring and inspection of environmental obligations.⁴⁹ Such prescriptions are generally not made, and it is not certain whether they are actually enforced.

That said, alternatives to complement and reinforce the monitoring and sanctions approach are also possible (see Section 4.2.3).

3.5.2 LACK OF REQUIREMENT OF PERIODIC REPORTS ON ESMP AND CLOSURE PLANS

Some of the analyzed mining and environmental laws require periodic reporting on the implementation of ESIA requirements, sometimes with deadlines specified in the law (e.g., semi-annually⁵⁰ or annually⁵¹). Sometimes an environmental audit is required (for example once every two years).⁵² In some cases, the frequency of the periodic reports is fixed on a case-by-case basis in the environmental authorization, with a maximum interval of five years.⁵³

However, many of the compliance requirements set forth in ESIA and related plans in the analyzed mining and environmental laws do not require periodic reports at all.

⁴⁷ Quebec Mining Code (2018), Section 101.0.3.

⁴⁸ Niger, Decree 200-397, Article 4 (7).

⁴⁹ Ecuador, Decree Regarding Environmental Regulations of Mining Activities (2015), Article 68.

⁵⁰ Dominican Republic, Environmental Law (2000), Article 163; Cameroon, Decree No. 2013/0171 EIA Modalities, Article 27.

⁵¹ Ecuador, Decree on Environmental Regulation of Mining Activities, (2015) Article 45.

⁵² Burkina Faso, Mining Code (2015), Article 139.

⁵³ South Africa, Environmental Management Act (2017), Article 26.e.



When periodic reports are required, they are not always published online or in a language and format accessible to the public (including local communities). Moreover, legislation providing for periodic reports on implementation does not systematically provide for follow-up actions to be taken based on the submitted reports, apart from the right of the administration to request adjustments or sanctions. It should be considered that this stage could be an opportunity for consultation between all the stakeholders. The government, the mining company and the local communities could build on past successes, learn from failures and agree on adjustments that will address issues.

Periodic reports and inclusive consultation frameworks can complement and help reduce the number of required field controls and inspections.

3.5.3 LACK OF REQUIREMENT OF PERIODIC REVIEWS OF ESMP AND CLOSURE PLANS

Some of the reviewed legislation has no requirements for exploitation permit holders to periodically update the ESMP and closure plan or make adjustments whenever circumstances fundamentally change.

In general, the reviewed legislation places responsibility on the administration to request amendments of the plans to the mining operator, after reports—if any—have been reviewed (when such reports are required).⁵⁴ This approach requires technical and financial capacities that are not always available in developing countries. In addition, the mining operator is better placed to systematically update the different plans, because it has a better knowledge of the site. Requiring periodic modifications also has the advantage of simplifying the review process and increasing its efficiency.

However, some mining codes do prescribe a periodic review of the ESMP⁵⁵ or closure plan.⁵⁶ The time periods range from one to five years and sometimes also when new circumstances justify it. In the event of revisions of the closure plan, certain mining codes explicitly require a corresponding revision of the amount of the guarantee for closure and rehabilitation.⁵⁷ Sometimes an annual update of the ESIA itself is required.⁵⁸

Finally, few of the analyzed mining and environmental laws provide for a periodic update of the ESMP and the closure plan,⁵⁹ as well as the submission of a definitive closure plan as the planned completion of operations approaches (e.g., two years in advance⁶⁰).

3.5.4 UNSUITABLE OR INSUFFICIENT SANCTIONS FOR VIOLATIONS

One of the deficiencies of the legal framework applicable to ESIA and related plans is the adoption of insufficiently dissuasive sanctions in the case of non-compliance. This could be linked to the fact that the sanctions are usually provided for in environmental legislation and are not always adapted to the realities of the mining sector, given the magnitude of the potential negative impacts and the amounts at stake. Thus, some of the analyzed environmental legislation provides for a maximum fine equivalent to approximately USD 2,000 in the event of a project undertaken without an ESIA.⁶¹

⁵⁴ Cameroon, Decree Establishing Detailed Rules for Carrying Out EIAs, Article 28.

⁵⁵ Dominican Republic, General law on environment and mineral resources (2008), Articles 45–46; Ecuador, Mining Code (2013), Article 85; Mozambique, Decree on the Regulation of the Environment for Mining Operations (2004), Article 14.

⁵⁶ Quebec Mining Code (2018), Section 232.6; Tanzania, Mining Code 2010, Article 47.

⁵⁷ Quebec Mining Code (2018), Section 232.7; Ecuador, Regulation Regulating Mining Activities (2015), Article 34.

⁵⁸ Mali, Mining Code (2012), Article 145.

⁵⁹ South Africa, Environmental Management Act (2017), Article 26.g.

⁶⁰ Ecuador, Mining Code (2013), Article 85.

⁶¹ See also South Africa, Mining Code (2008), Section 99.1.a (approximately USD 6,500).



The highest amount found in the review was USD 3,000,000, usually found in developed countries.⁶² The amounts remain much lower in the majority of the examined legal frameworks, which are mostly from developing countries, but some disparities have been also noted. In some cases, the maximum sanction in the environmental code is, on the contrary, much higher than the one provided for in the mining code for the same type of offence.⁶³ In this case, it is likely that the lowest amount will be applicable as provided for in a special law.

Sanctions usually include fines, confiscation, seizure, suspension, prohibition or limitation of activities that are harmful to the environment, the total or partial closure of the exploitation site, and imprisonment.

When low penalties relative to the breaches are coupled with poor monitoring of the implementation of obligations, there exists a risk of spontaneous non-implementation. In addition to the question of the rigour of the sanctions, the categorization of violations can also sometimes pose problems. In fact, should non-respect for environmental obligations that leads to groundwater pollution and the construction of a medical centre with a capacity of 50 instead of 100 beds, as originally planned, be placed on an equal footing? Should a systematic violation and a first violation be sanctioned in the same way? How does one determine "a substantial or serious breach," and what should the appropriate sanction be: onerous fines and imprisonment, suspension of activities, revocation of the exploitation permit? These issues are not always addressed in a detailed and clear manner by mining legislation that does not take into account the specificities of the sector. However, some of the analyzed texts do distinguish and define, for example: "Environmental damage, environmental nuisances, material environmental damage and serious environmental damage."⁶⁴

3.5.5 UNCERTAINTY REGARDING THE SCOPE OF RELINQUISHMENT

A complex issue is the scope of relinquishment (following the so-called "exit ticket") and its civil liability implications for both the state and the permit holder. The relinquishment process is of great importance to the government and the mining companies. Indeed, after relinquishment the mining operator needs to clearly know whether or not it will still be held responsible (and if so, to what extent) for any problems not envisaged at the time of the closure and rehabilitation. The government or entity to whom the land is handed over also needs to know its responsibilities if future problems arise and how far that responsibility will go. Finally, this question is inextricably linked to the duration of post-closure monitoring, which can sometimes last for many years.

Some of the reviewed legislation does not provide for a relinquishment process.⁶⁵ However, many of the analyzed legislative texts do so, but did not provide clear answers on the legal consequences of relinquishment.

In some mining codes, the relinquishment "releases" the holder of the mining permit "from its environmental obligations"⁶⁶ or "its obligations [with respect to the rehabilitation and restoration plan and the financial guarantee]."⁶⁷ However, one mining code adds that the former operator to whom an exit ticket has been issued "remains responsible for any loss later discovered in connection with the previous activities conducted at the site."⁶⁸ In some cases, the mining code provides that

⁶² Quebec Mining Code (2018), Article 316.

⁶³ Burkina Faso, Mining Code 2015, Article 195, and Environmental Code, 2013, Article 126.

⁶⁴ Australia (Queensland), Environmental Protection Act (1994), Articles 14 to 17.

⁶⁵ Dominican Republic, Mining Code (1971) and Environment Code (2000); Burkina Faso, Mining Code (2015) and Environment Code (2013); Tanzania, Mining Code (2010) and Environmental Management Act (2004).

⁶⁶ Mali, Decree 03-594 EIE, Article 32.

⁶⁷ Quebec Mining Code (2018), Article 232.10.

⁶⁸ Cameroon, Mining Code, 2013, Article 136 (5).



the competent authority may withhold any portion of the financial provision for latent or residual environmental impact that may become known in the future.

Additionally, a number of mining and environmental laws require, before the relinquishment is effective, that the competent governmental authority conduct an inspection or an environmental audit, usually led by the holder of the exploitation permit itself.⁶⁹ This approach raises the issue of audit independence, especially in the absence of specific criteria for selecting the auditor.

3.6 CONCLUSION

This list of problems is not exhaustive and offers only a brief glimpse into the situation.

That said, the major problems seem to be the ambiguity of certain provisions, the lack of specifications for the implementation of certain rules and the inconsistency between different applicable texts.

The analysis should also be extended to include certain ancillary issues such as broad stability clauses that freeze all applicable law and prohibit the state from enforcing new environmental or social regulations on a mining operator, as well as the economic equilibrium clauses that require financial compensation for the costs incurred due to the implementation of new regulations. Although they are disappearing, broad stability clauses exist in mining codes⁷⁰ and in mining contracts still in force.⁷¹

⁶⁹ Mali, Decree 03-594 EIA, Article 32; Ecuador, Regulation Regulating Mining Activities (2015), Article 128.

⁷⁰ Mauritania, Mining Law (2008), Article 141.

⁷¹ Niger–Areva contract, Inouarem Exploitation, 2009, Article 16.1: "16.1." The State shall guarantee the company the stability of the general, legal, administrative, customs and tax conditions provided for in the agreement."



4. IDENTIFICATION OF POTENTIAL SOLUTIONS

The purpose of this section is to set forth some principles and guidelines that could be further analyzed in future phases of the guidance document development. We are not yet at the stage where we may propose detailed and specific solutions, but rather we can provide a list of possible points to be considered.

4.1 CREATING THE RIGHT FOUNDATION: CLARIFYING THE LEGAL STATUS OF ESIAS DURING THE TRANSITION PHASE BETWEEN EXPLORATION AND EXPLOITATION

4.1.1 CLEARLY IDENTIFY THE ROLE OF ESIAS AND RELATED PLANS AS DECISION-MAKING TOOLS IN MINING PERMITTING PROCESSES

- States could design the ESIA as a decision-making tool regarding the environmental, social and economic acceptability of a project.
- In order to reduce mine operators' uncertainty associated with this option and maintain the country's attractiveness in terms of mineral exploration and prospection, states could:
 - Develop national SEAs to identify areas where exploitation is prohibited and identify options for potential exploitation in sensitive areas, upstream of the ESIA for mining exploration and exploitation projects.
 - Identify (and periodically update) areas where research permits shall be authorized based on strategic ESIA findings and geological information data.
 - Clarify the status of exploration permits that have already been granted in areas that have subsequently been excluded from mining by an SEA.
- Until SEAs are conducted, states could systematically require a scoping study for mining exploration projects in order to identify the environmental and socioeconomic issues and impacts that could constitute constraints on the exploitation of potential deposits located at the site.
- States could increase the transparency of the ESIA process: (i) during the study process, (ii) by requiring the publication of the justification of the environmental authorization by the competent authority, and (iii) by requiring the publication of ESIA's, associated plans and periodic implementation reports, while promoting access for civil society actors and local communities
- The government and the mining operator could use the approved ESIA and ESMP as a key tool in ongoing community engagement.
- All stakeholders could use an approved ESMP as a dashboard for implementation and monitoring.
- A table of commitments could be developed as a means to monitor the implementation of the commitments in the ESMP and related plans.
- The closure plan shall be the key element in preparation for post-mining for all stakeholders.
- Legislation could require the integration of environmental, social and economic aspects into these documents and promote better consideration of emerging issues by ESIA's such as climate change, biodiversity, human rights and gender. As part of the integration, engagement with local communities should be undertaken throughout the development of the ESIA's and related plans.



4.1.2 ALIGN AND CLARIFY THE ROLE ASSIGNED TO ESIA'S AND RELATED PLANS DURING THE TRANSITION BETWEEN EXPLORATION AND EXPLOITATION

- States may consider granting an exclusive right to the holder of a research permit to apply for the exploitation permit and clarify what this means in the legislation:
 - The holder of a research permit would be the only one who can apply for a permit to operate in the area, but there is no guarantee to exploitation permit unless all the necessary conditions, including approval of the ESIA, are met.
 - The decision-maker would have the right to reject any project on the basis of the ESIA, and the justifications for its rejection will be made public and open to the review of national courts.
 - The assessment criteria for ESIA's and related plans shall be developed and available to the public.
 - When a project is rejected, the state would no longer have the right to award the project to another mining operator as long as the environmental, economic, social and technological conditions that justified the rejection of the initial ESIA—and therefore the refusal of the exploitation permit—remain largely unchanged.
 - Legal remedies for reimbursement for sunk costs in the case of a project being denied based on specific ESIA-related issues, should be clarified, if provided.

4.2 BASIC PRINCIPLES FOR AN APPROPRIATE LEGAL FRAMEWORK ON ESIA'S AND RELATED PLANS

4.2.1 LIFE CYCLE OF A MINE AND FRAMEWORK OF ESIA'S AND RELATED PLANS: THE RIGHT APPROACH

- Environmental and mining legislation should consistently affirm or clarify the following:
 - ESIA's and related plans should be submitted and approved by the competent authorities prior to the granting of an exploitation permit and the conclusion of the contract. This includes:
 - ESIA and ESMP (and RAP, if applicable)
 - The initial closure and rehabilitation plan
 - A financial guarantee for the closure and rehabilitation of mining sites should be required and put in place before the start of operations.
- States could seek to harmonize:
 - The mining code and other applicable laws, including the environmental code
 - National legislation and mining contracts
- States could ensure transparency in all stages of the process of preparing and approving ESIA's and related plans.



4.2.2 ENSURE THE QUALITY OF THE PROCESSES FOR ELABORATION AND APPROVAL OR REJECTION OF THE ESIA AND RELATED PLANS

States could incorporate best practices in the development of ESIA and associated plans into mining legislation as developed by international institutions and the mining industry. This includes, but is not limited to:

- Identifying and involving all stakeholders from the start.
- Clarifying the roles and responsibilities of all stakeholders and managing expectations Better regulating the participation of the public, especially local communities, in the ESIA process.
- Developing appropriate mechanisms for real engagement with local communities.
- Creating and/or reinforcing initiatives that strengthen the technical capacity of government officials regarding the content and analysis of mining sector ESIA.
- Requiring an independent second review when skills are not yet available within the administration or for any particularly complex project.
- Establishing independent certification processes for private firms conducting ESIA, and address issues regarding conflict of interest.
- Strengthening socioeconomic components of ESIA and related plans.
- Clarifying the role of the institution that grants permits and negotiates contracts.
- Clarifying the role of the institution responsible for the review and approval of ESIA and related plans, as well as involving other relevant ministries in the review process of the ESIA report.
- Establish a validity period (two or three years) for the environmental permit or authorization granted following the approval of the ESIA and associated plans, as well as requesting an update and resubmission of the ESIA report when this period has passed without the mine becoming operational.

4.2.3 ESTABLISH ADEQUATE AND REALISTIC MECHANISMS FOR IMPLEMENTATION, MONITORING AND ENFORCEMENT

States could consider the following in the legal and institutional framework governing ESIA and related plans:

- Clarifying the role of each stakeholder in monitoring and implementation.
- Establishing periodic reporting requirements and other opportunities for constructive collaboration among all stakeholders.
- Requiring periodic review and adjustment of ESIA and related plans.
- Ensure transparency through the publication of the results of periodic reports and audits in a publicly accessible language.
- Creating innovative and multistakeholder monitoring and inspection mechanisms that:
 - Move from centralized monitoring and enforcement mechanisms to diffuse mechanisms for spontaneous implementation (including a “watchdog” role for local communities).
 - Capitalize on building social acceptance or on “social licence to operate,” ensuring that all stakeholders have an interest in actively and unreservedly complying with the rules, or even going beyond required actions and make it public.
- Establishing local community grievances mechanisms and management before conflicts occur.



- Defining and organizing sanctions for violations of ESIA or associated plan requirements, as well as other sanctions. These could include:
 - A clear definition of "material breach"
 - Sanctions in the case of a substantial violation
 - Remedies or rectification mechanisms for non-substantive violations

4.3 ADDRESS PAST GAPS AND ERRORS IN THE GOVERNANCE OF ESIA_s AND RELATED PLANS REGARDING THE MINES IN OPERATION

States may consider engaging with mining operators so that they begin to comply with the requirements of the new ESIA regulations and associated plans. This may include the development of (or update to) a closure plan, establishing a financial guarantee or adjusting the guarantee amount, if already established, updating and reinforcing an insufficient ESMP, etc.

The purpose of this approach should be to agree on the terms and timing of compliance with these requirements. When legislation does not yet incorporate international best practices, stakeholders could refer to international standards and incorporate these requirements into a mining contract, pending regulatory changes.

To achieve this, the states may consider the following:

- Favouring agreed solutions.
- Engaging in consultations with all stakeholders for each mine.
- Seizing the opportunity of the end of the exploitation permit or mining contract to initiate a renegotiation or, failing that, proposing a renegotiation.
- Renegotiating broad stability clauses covering environmental and social issues in order to delete them or limit their scope to fiscal issues.
- Taking into account the remaining operating life of the mine and prioritize appropriate actions.



APPENDIX 1. REVIEW OF THE LITERATURE AVAILABLE TO DATE ON THE LEGAL FRAMEWORK OF ESIA'S AND RELATED PLANS

The review of the available literature on the legal framework for ESIA's and associated plans shows the approach of several authors to this aspect, but in a very superficial way. Thus, we can distinguish:

- Documents focusing on the legal aspects of the ESIA and associated plans, which are few in number.
- Documents addressing institutional and regulatory frameworks and stages of ESIA procedures for information purposes. This second category, which is more abundant, includes documents dealing with technical considerations related to ESIA's.

The listed documents, which are not exhaustive, are scientific books and articles (university productions), methodological reports and references developed by international and regional organizations (organizations and associations), and regulatory and reference frameworks of government agencies.

DOCUMENTS FOCUSED ON LEGAL ASPECTS RELATED TO ESIA'S

INTERNATIONAL OR REGIONAL ORGANIZATIONS

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Coleman J., Guven, B., Johnson L., & Sachs, L. (2018). *What do we mean by investment facilitation?* Columbia Center on Sustainable Investment. Retrieved from <http://ccsi.columbia.edu/2018/02/22/what-do-we-mean-by-investment-facilitation/>

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