



25 years Netherlands Commission for  
Environmental Assessment

# IGF Guidance for Governments, Improving Frameworks for Environmental and Social Impact Assessment and Management

Advisory review by the NCEA



20 May 2020  
Ref: 7309



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## Advisory review by the NCEA

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<b>Title</b>	<b>IGF Guidance for Governments, Improving Frameworks for Environmental and Social Impact Assessment and Management</b>
<b>To</b>	Intergovernmental Forum on Mining, Minerals, Metals and Sustainable Development
<b>Attn</b>	Ms S.H. (Suzy) Nikièma
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<b>Date</b>	20 May 2020
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Subject: Final review of the 'IGF Guidance for Governments,  
Improving Frameworks for Environmental and Social Impact  
Assessment and Management'

Dear Suzi Nikièma, member of the IGF Team,

It is with great pleasure that I present to you our final review of the 'IGF Guidance for Governments, Improving Frameworks for Environmental and Social Impact Assessment and Management – Draft version – 9 March 2020'. The NCEA greatly appreciates this initiative by the IGF to develop guidance for governments in improving their legal frameworks on ESIA for mining.

The draft Guidance contains extensive information and valuable instructions on ESIA within the mining sector and beyond and, therefore, is potentially useful for a large audience. Having said this, there is also room for further improvement of the draft, which is stipulated in our advice. This can also assist in further international discussions of the Guidance.

I welcome the mentioning of SESA in the guidance and would recommend IGF to provide more detailed guidance on SESA, either in this guide or a separate guidance. This would contribute to the inclusion of environmental and social issues in an open and transparent strategic planning of the mining sector. Also, ESIA for projects would greatly benefit from an earlier SESA.



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Finally, I would like to emphasise that the NCEA is available for further discussion or new ways of cooperation in the future. Please do not hesitate to contact Ms Paula Dobbelaar directly in the case of any questions or unclarities concerning the advice provided.

Yours sincerely,

[ was signed ]

M.W.J.A. (Tanya) van Gool

Chair Working Group  
Netherlands Commission for Environmental Assessment



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# Executive Summary

The Members of the Intergovernmental Forum on Mining, Minerals, Metals and Sustainable Development (IGF) decided in 2017 during their Annual Meeting in Geneva to develop a guidance on country legal frameworks for Environmental and Social Impact Assessment (ESIA) and related plans in the context of granting permits and negotiating mining contracts. The Guidance is designed in particular for civil servants responsible for drafting and implementing legal frameworks. The IGF requested the NCEA to provide an independent review of the Guidance.

In general, the NCEA concludes that the Guidance contains valuable instructions (section D) that provide guidance on how to improve a legal framework in practice, along with checklists developed for each section in the annex. Although the guidance is intended for civil servants that work on legal frameworks, the guidance is also of great added value for all professionals working in the mining sector. Practical examples, which are foreseen in the final version will illustrate and give direct inspiration on how to improve certain aspects through real case example. This appeals to a large audience and is considered of great value by the NCEA.

The Guidance mentions Strategic Environmental and Social Assessment (SESA). The NCEA underlines the importance of this as the promotion of SESA within the mining sector may significantly contribute to governments taking environmental and social impacts into account in strategic mining planning. This will also greatly facilitate ESIA and decision-making for specific projects. *The NCEA recommends IGF to provide more detailed guidance on SESA, either in this guide or a separate guidance.*

The NCEA has the following recommendations for further improvement of the current draft guidance:

## **Make the Guidance more focused and balanced**

- *Aim the Guidance primarily at civil servants, rather than mining professionals, and avoid mining jargon where possible.*
- *Bring more balance in the description of negative and positive impacts of mining.*

## **Complete the references to legal sources**

- *Make the references to international law in the Guidance more complete by adding information on customary law and case law, in addition to the current focus on international treaties. This will also better clarify the risk of companies to litigation.*

## **Improve the Guidance on the topic of liability derived from ESIA regulation**

- *Instead of discussing the topic of 'exit tickets' for companies, include guidance on the legal obligations derived from the ESIA- and permitting process.*

## **Give more guidance on ESIA in the exploratory phase**

- *Include more guidance on ESIA for the exploratory/prospecting phase and how this could be included in legal frameworks. Guidance on suitable legal thresholds for screening of mining projects would also be of a great added value.*

**Give more guidance on development of alternatives**

- *Include the 'no project' alternative.*

**Pay more attention to the rights of Indigenous Peoples**

- *Change the current approach in the Guidance from Indigenous Peoples to Indigenous Peoples as 'right holders'.*

**Provide more guidance how to guarantee transparency and access to information**

- *Provide more guidance on how to integrate the issues of transparency and access to information in legal ESIA frameworks.*

**Add guidance on ESIA review and approval**

- *Add guidance how to include in the ESIA legal framework provisions on:*
  - *undesirable project segmentation and the need for full cumulative impact assessment;*
  - *the obligation to carry out ESIA of major project modifications;*
  - *appropriate timeframes for ESIA quality review and approval.*

**Give more attention to labour rights and working conditions**

- *Strengthen the Guidance concerning how to deal in legal frameworks for ESIA with labour rights and working conditions, including the rights of migrant workers; gender equality issues; grievance mechanisms; impact on workers and community and requirements for proponents to offer adequate training of local staff.*

**Give more attention to relocation**

- *Give more attention in the Guidance on how to deal in ESIA legal frameworks with the issue of relocation with reference to international treaty and case law.*



# 1. Introduction

## **The IGF Guidance on legal frameworks in ESIA and mining**

The Intergovernmental Forum on Mining, Minerals, Metals and Sustainable Development (IGF) supports more than 70 member states committed to leveraging mining for sustainable development to ensure negative impacts are limited and financial benefits are shared. It is devoted to optimizing the benefits of mining to achieve poverty reduction, inclusive growth, social development and environmental stewardship. The IGF focuses on improving resource governance and decision-making by governments working in the sector (<https://www.igfmining.org/about/>).

The IGF members decided in 2017 during their Annual Meeting in Geneva to develop a guidance on country legal frameworks for Environmental and Social Impact Assessment (ESIA) and related plans in the context of granting permits and negotiating mining contracts. This topic was chosen based on the awareness of the challenges in assessing and managing environmental and social impacts of mining.

The Netherlands Commission for Environmental Assessment (NCEA)<sup>1</sup> was invited by the IGF to attend the Annual meeting in 2018 and discuss the background document ‘Legal Framework of Environmental and Social Impact in the Mining Sector,’ which was elaborated as preparation for the Guidance. As a result of the NCEA attending the annual meeting, the IGF requested the NCEA to provide an independent review of the Guidance.

The objective of the Guidance is to improve legal and regulatory frameworks governing ESIA related to mining. The Guidance is therefore primarily focused on providing IGF members good international practice in legal frameworks for ESIA and related management plans for large-scale mines. While the Guidance is designed in particular for civil servants responsible for drafting and implementing legal frameworks, the good practices and examples provided can also be relevant for companies, civil society organizations, community leaders and others who are interested in optimizing the contribution of mining to sustainable development.

## **Approach taken by the NCEA**

This advisory report was prepared by a working group of experts acting on behalf of the NCEA. The group comprises legal expertise on environmental & social impacts related to mining and the extractive industry as well as expertise on legal frameworks related to ESIA.

The NCEA reviewed the following version of the Guidance:

- *IGF Guidance for Governments, Improving Frameworks for Environmental and Social Impact Assessment and Management* – Draft version – 9 March 2020

For its advisory report on the Guidance, the NCEA has made use of the following reference framework:

- *A Guide for Governments and Partners to Integrate Environment and Human Rights into the Governance of the Mining Sector* – United Nations Development Program (UNDP) 2018

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<sup>1</sup> The NCEA is an independent statutory body of experts based in the Netherlands which is subsidized by the Dutch government to provide independent advice on ESIA and SEA in the Netherlands since 1985 and internationally since 1993.



- *Natural Resource Charter Benchmarking Framework* – Natural Resource Governance Institute (NRGI) 2017
- *Best practices in Environmental Assessment: Case studies and application to Mining* – Canadian International Resources and Development Institute (CIRDI) 2017
- *Principles of Environmental Impact Assessment Best Practice* (IAIA) 1999

**Please note that the order in which observations and recommendations are given in this document, is not related to any kind of priority.**

## 2. General observations

### **Added value of the Guidance**

The NCEA welcomes the initiative of the IGF to draft a Guidance on Legal Frameworks for ESIA in the mining sector. With its publication, the IGF acknowledges the difficulties that many countries face in their legal framework for ESIA in the mining sector and responds to a need of its members.

The Guidance contains valuable instructions (section D) that provide guidance on how to improve a legal framework in practice, along with checklists developed for each section in the annex.

Also, the intention to include in a next draft relevant case examples of good practice country's legal framework for ESIA in the mining sector is considered to be very valuable.

The Guidance mentions Strategic Environmental and Social Assessment (SESA) in chapter 4, section 3. The NCEA underlines the importance of this as it judges that the promotion of SESA within the mining sector may significantly contribute to national or subnational governments taking environmental and social impacts into account in strategic mining planning. This will also greatly facilitate ESIA and decision-making for specific projects. *The NCEA recommends IGF to provide more detailed guidance on SESA, either in this guide or a separate guidance.*

### 3. General recommendations for further improvement

#### Make the Guidance more focused and balanced

*Recommendations are:*

- *Aim the Guidance primarily at civil servants, rather than mining professionals, and avoid mining jargon where possible.*
- *Bring more balance in the description of negative and positive impacts of mining.*
- *Simplify language where possible, making the Guidance more easily translatable for those who are not native English speakers.*

The NCEA observes that the Guidance seems to have been written more from the perspective of mining professionals than from the perspective of civil servants responsible for ESIA legal frameworks. For example, the Guidance provides no detail on how government might fund the extensive costs of ESIA review or project oversight via for example fees, taxes, or fines against mine proponents and operators.

Also, the language and tone in which the current draft is written emphasises predominantly the potential benefits of mining and appear to have been drafted from a pro-mining perspective, responding more to the needs of the global mining sector than to host governments or communities. As a result, the Guidance risks reaching a more limited audience than intended.

#### Complete the references to legal sources

*Recommendation:*

- *Make the references to international law in the Guidance more complete by adding information on customary law and case law, in addition to the current focus on international treaties. This will also better clarify the risk of companies to litigation.*

A more accurate explanation of the sources of international law would help the reader identify and interpret the applicable norms in the context of his or her ESIA regime. Also, the NCEA recommends explaining the higher status of constitutional law over ordinary laws in the Guidance and pay more attention to human rights law, the rights of Indigenous Peoples, and international environmental law, with reference to treaties, other instruments, and case law. Include an explanation how domestic legal frameworks should reflect these international obligations.

Constitutional law usually includes human rights protection, rights of Indigenous Peoples if applicable and – in over 100 countries – principles of environmental protection. Constitutional protection will prevail over ordinary laws on resource management and hence if a regular law regarding a mining investment violates a constitutional provision, the former will be struck down.

Relevant references that the Guidance could address are ILO Convention 169, ICCPR, UNDRIP, the Universal Declaration of Human Rights 1948 and the UNGPs.

A complete list of treaties and other instruments might be included in a footnote or as an Annex.<sup>2</sup> The most significant case law might also be considered in a footnote or Annex.

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<sup>2</sup> In addition to those listed on p34: ILO Convention 169 on the Rights of Indigenous and Tribal Peoples; International Covenant on Civil and Political Rights

## 4. Specific recommendations for further improvement

### **Improve the Guidance on the topic of liability derived from ESIA regulation**

#### *Recommendation:*

- *Instead of discussing the topic of 'exit tickets' for companies, include guidance on the legal obligations derived from the ESIA– and permitting process.*

As the Guidance aims to provide guidance to governments and civil servants as to how their legal frameworks for ESIA in mining could be improved, the issue of whether or how governments should allow companies to be released from liability is an unrelated matter that should not be covered in the legal framework for ESIA.

Instead, the Guidance should clarify the legal obligations derived from the ESIA– and permitting process with regard to the mining companies. This includes the obligation and liability related to preventing, mitigating and compensating environmental and social impacts.

### **Give more guidance on ESIA in the exploratory phase**

#### *Recommendation:*

- *Include more guidance on ESIA for the exploratory/prospecting phase and how this should be included in legal frameworks.*

The current Guidance is too much focused on the mine planning phase and therefore does not do justice to the importance of the exploratory/prospecting phase. This early phase requires more guidance as to how it should be included in the legal framework.

In many cases a limited or even a full-fledged ESIA is appropriately required for the exploration phase. There are almost always environmental and social impacts that occur during the prospecting/exploration phase, which means ESIA in the exploration phase cannot be limited to 'project proposal' and 'screening'. For example, explorative drilling can cause environmental impacts such as forest clearing and might raise expectations among local communities.

Conducting ESIA at the exploratory/prospecting stage enables governments and project proponents to identify conflicting land use interests earlier and therefore make more reasoned decisions about whether to develop a costly ESIA for exploitation. Additionally, requiring ESIA for the exploratory phase is key to implementing the principles of precaution and prevention that are cornerstones of international environmental law (Rio, Principle 15), as well as the principles underlying ESIA.

### **Give more guidance for the screening phase in ESIA**

#### *Recommendation:*

- *Provide more guidance for the screening phase for ESIA in the exploratory respectively mine planning phase, including suitable thresholds and criteria to be used in screening.*

The screening phase is mentioned, but no guidance is provided as to appropriate thresholds to include within the legal frameworks for screening. Nor does the Guidance provide screening criteria to determine the level of sensitivity of environments and communities to the impacts of mining. The Guidance would benefit from good practice examples of legal frameworks for ESIA that provide relevant threshold and screening criteria.

### **Give more guidance on requirements of quality review**

#### *Recommendation:*

- *Include more guidance on how to integrate in ESIA legal frameworks requirements for quality review by authorities of scoping and assessment reports.*

The figure on page 18 suggests that review is only linked to screening and scoping. However, quality review and approval by an authorised authority is also relevant for the assessment report. The figure should be modified, and clear timelines could be added for reviewing and approval in every phase of the mine life cycle.

### **Put more emphasis on alternatives, especially the no project alternative**

#### *Recommendation:*

- *Give more guidance on how to appropriately include the development and comparison of alternatives in legal frameworks, including the importance of always including the 'no project' alternative.*

The no project alternative is particularly important in countries that have no strategic mining planning and/or the need to do strategic environmental assessments at the strategic level. As discussed in some detail in the Background Document, particularly in those states where a prior SESA for the region has determined that a specific mining project is appropriate, ESIA is then carried out to decide "how" a project should be implemented. Where no SESA has taken place, ESIA is often carried out to determine both "whether" and if so, "how or under what conditions" the project could proceed. Given this differentiated approach it is recommended to include in the ESIA legal framework in nations where SESAs are not conducted that prior to project approval in the ESIA the project impacts must be compared to a 'no project' alternative. In this alternative, development models for the region without the mining project are considered.

### **Pay more attention to the rights of Indigenous peoples**

#### *Recommendations:*

- *Change the current approach in the Guidance from Indigenous Peoples to Indigenous Peoples as 'right holders'.*
- *Put more emphasis in the Guidance on how to include the principles of FPIC in legal frameworks for ESIA in the mining sector during all stages of ESIA (screening, scoping and reviewing).*
- *Include this guidance in the checklists of section D.*

The Guidance is recommended to refer to Indigenous Peoples as rights-holders, as is the approach under international law. When Indigenous Peoples' territory, including marine

areas, is implicated in an extractive project, they are an equal party with governments and companies in negotiation and management.<sup>3</sup> In countries where Indigenous Peoples do not have full property rights over subsoil resources underlying their traditional territory, international law recognizes Free Prior and Informed Consent (FPIC) rights over those resources. These rights extend to any project contemplating subsoil exploration or extraction and regardless of whether the peoples traditionally used or mined those resources. Project proponents must seek Free, Prior and Informed Consent from Indigenous Peoples and, if they are likely to experience a 'substantive negative impact'<sup>4</sup> or a 'major impact'<sup>5</sup> must obtain that consent for the proposed project to go ahead lawfully.<sup>6</sup> Consent must also be obtained if hazardous materials will be stored on Indigenous territory.<sup>7</sup>

Indigenous Peoples have a right to equitable sharing of the benefits of extractive activities on their territories; usually conducted by means of the Community Development Agreements (CDAs)/Impact-Benefit Agreements (IBAs). Indigenous Peoples also possess rights to continue their traditional activities, e.g. herding, hunting, fishing and gathering, as an expression of their culture in areas that they do not permanently occupy or hold historic sovereignty. Mining projects must be compatible with the continuation of these activities.<sup>8</sup>

## **Give more guidance on public engagement and consultation strategies**

### *Recommendation:*

- *Give more detailed guidance on how to integrate good practice public engagement and consultation in ESIA legal frameworks. This should cover:*
  - *the early phases (which is particularly important for the social impacts of mining projects);*
  - *inclusiveness of the ESIA process to all groups (including gender issues);*
  - *the right of communities to consult experts.*

Throughout the different chapters, the Guidance recognizes the necessity for public engagement and consultation in line with ESIA good practice. However, the Guidance does not provide enough detail as to how public engagement and consultation should be incorporated into legal frameworks for ESIA and at which stages.

<sup>3</sup> See, ILO Convention 169, article 13–15; and UNDRIP, article 32

<sup>4</sup> Poma Poma v Peru, Human Rights Committee, Communication No. 1457/2006 (27 March 2009) CCPR/C/95/D/1457/2006

<sup>5</sup> Saramaka People v Suriname, Case of the (Preliminary Objections, Merits, Reparation and Costs) Petition 12338, Inter-American Court of Human Rights Series C No 172 (28 November 2007).

<sup>6</sup> See also, Kichwa Indigenous People of Sarayaku v. Ecuador, Case of the (Merits and Reparations) Petition 12465, Inter-American Court of Human Rights Series C No 245 (27 June 2012); and ; Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya, Communication 276/2003 (25 November 2009) AHRLR 75

<sup>7</sup> UNDRIP, article 29

<sup>8</sup> See, e.g., Human Rights Committee Views (International Covenant on Civil and Political Rights): Kitok v Sweden, Human Rights Committee, Communication No. 197/1985 (27 July 1988) CCPR/C/33/D/197/1985; Länsman, Ilmari et al v Finland, Human Rights Committee, Communication No. 511/1992 (8 November 1994) CCPR/C/52/D/511/1992; Länsman, Jouni E. et al v Finland, Human Rights Committee, Communication No. 671/1995 (30 October 1996) CCPR/C/58/D/671/1995; Länsman, Jouni et al v Finland, Human Rights Committee, Communication No. 1023/2001 (17 March 2005) CCPR/C/83/D/1023/2001; Mahuika et al v New Zealand, Human Rights Committee Communication No. 547/1993 (15 November 2000) CCPR/C/70/D/547/1993



Environmental and social impacts are often seen from the very early stages of mine project development, and social impacts can occur even before there are physical changes to the land or environmental resources. Therefore, effective engagement is necessary during and even prior to exploration, as well as throughout the planning, operations, closure and post closure phases. Social and environmental impacts can be particularly severe if closure occurs early or unexpectedly.

Public engagement and consultation need to be inclusive to ensure that all groups can participate in the process. This requires the process to be gender sensitive and to ensure the identification and participation of hard-to-reach groups.<sup>9</sup> When integrating these requirements for public consultation into legal frameworks for ESIA, the Guidance might refer to other useful documents in this regard.<sup>10</sup>

### **Provide more guidance how to guarantee transparency and access to information**

#### *Recommendation:*

- *Provide more guidance on how to integrate the issues of transparency and access to information in legal ESIA frameworks.*

The Guidance does not link participation in ESIA to accessibility of documents and transparency of decision-making, nor does it sufficiently emphasise the obligation for project proponents to accept, respond to, and integrate information from the public in decision-making. Adequate public engagement processes provide all affected individuals and groups full access to information and enable them to understand and to influence the decision-making process, project design, monitoring, and risk management. Such processes also include access to effective remedies.<sup>11</sup>

### **Add guidance on ESIA review and approval**

#### *Recommendations:*

- *Add guidance how to include in the ESIA legal framework provisions on:*
  - *undesirable project segmentation and the need for full cumulative impact assessment;*
  - *the obligation to carry out ESIA of major project modifications;*
  - *appropriate timeframes for ESIA quality review and approval.*

#### *Undesirable project segmentation*

Some countries allow mine project components to undergo separate assessment in ways that reduce apparent overall impacts.<sup>12</sup> No ESIA should be approved for review unless it covers all

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<sup>9</sup> e.g. the elderly, youth, women, socio-economically disadvantaged, those with limited literacy in the dominant language, those with limited internet connectivity or IT skills, and those with limited transport or availability to attend public meetings

<sup>10</sup> e.g. [https://www.humanrights.dk/sites/humanrights.dk/files/media/dokumenter/udgivelser/hrb\\_2019/gender\\_and\\_extractives\\_report\\_sept2019.pdf](https://www.humanrights.dk/sites/humanrights.dk/files/media/dokumenter/udgivelser/hrb_2019/gender_and_extractives_report_sept2019.pdf) – Danish Institute for Human Rights

<sup>11</sup> See, e.g., Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters 1998 (Aarhus Convention)

<sup>12</sup> For example, separate ESIA for a pit mine and for the tailings deposit. Courts have clearly stated that projects should not be divided in this manner. The text on p. 60 of the Guidance is not in line with this statement

project elements,<sup>13</sup> unless full documentation and backup studies have been completed and presented, and unless cumulative impacts of different projects are adequately assessed.

#### *The obligation to carry out ESIA of major project modifications*

Furthermore, proposed project modifications should trigger new ESIA processes when the cumulative impact of modifications made after an initial assessment meet the criterion that would mandate ESIA for a new project. The Guidance refers to these ideas but could be more explicit. Also, Table 14 provides an inappropriate example suggesting that a modification yielding a 50% capacity increase could be considered a modification not requiring ESIA. For example, a 50% increase can however overwhelm existing treatment and waste management infrastructure. The Guidance could recommend frameworks that specify how permitting modifications will work, including more examples of trigger points and observed effects thresholds on page 79.

#### *Adequate quality review*

To comply with international legal requirements for precaution and assessment,<sup>14</sup> governments should ensure that authorities have sufficient time to review adequately all proposed projects. The Guidance should make clear that under international law mine projects cannot be subject to lesser review for being of “national security” or otherwise fast-tracked to circumvent ESIA requirements. The Guidance suggests establishing “reasonable timelines” for project review with “provisions for addressing delays” to be created within the legal framework (p. 28). What is reasonable, depends on project complexity, staff availability, and the number of projects pending reviews. It is therefore difficult to give an advance definition. Rather than advocating fixed timeframes, the Guidance could recommend ticketing systems where ESIA and permit applications are handled in the order received, during timeframes appropriate for the project size/complexity, and as human resources become available. Applications should be queued for review and if needed, authorities should contract additional staff to reduce wait times. There should be full transparency with respect to the order in which projects are handled and the status of all projects under review. Administrative appeals processes established should be open for use by not only project proponents but also by affected parties.

### **Include qualitative measuring of social impacts**

#### *Recommendation:*

- *Give more guidance on requirements in ESIA legal frameworks for qualitative analysis of social impacts, in addition to quantitative measurement.*

The Guidance includes many important considerations of the social impacts of mining activity. However, the approach presented in the Guidance seems to be limited to measuring social impacts via quantitative means. Some social impacts can be measured using numerical indicators (e.g. poverty level, unemployment, GINI coefficient, house prices, etc.) but many social impacts are not suitable for quantitative analysis (e.g. anxiety, social division).

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<sup>13</sup> This includes but is not limited to all mine workings and pits, waste rock and spent ore deposits, roads, energy transmission lines, power plants, dams, desalination plants, and water treatment plants

<sup>14</sup> United Nations Rio Declaration on Environment and Development, 1992, Articles 15 and 17

From a community perspective, quantitatively measured social impacts might not include all the social impacts of importance to a community. Developers need to consult with the community about what to measure as well as to develop strategies for how to assess what the community considers important. Some social impacts are hard to measure if only external experts are involved. Social impacts also occur long before any physical impacts – from the first prospectors, members of the community will have questions, expectations and fears.

### **Give more attention to labour rights and working conditions**

#### *Recommendation:*

- *Strengthen the Guidance concerning how to deal in legal frameworks for ESIA with labour rights and working conditions, including:*
  - *the rights of migrant workers*
  - *gender equality issues*
  - *grievance mechanisms*
  - *impact on workers and community*
  - *requirements for proponents to offer adequate training of local staff.*

Labour and working conditions' issues, including occupational health and safety and labour rights' issues, are hardly addressed in the Guidance. Labour and working conditions' issues are crucial when it comes to mining activities. These activities create a vast influx of external or foreign labour force, predominantly male, causing complex, interrelated, gender-nuanced social impacts that carefully need to be addressed and managed. One can think of the risk of sexual harassment and discrimination, sex-stereotyping in hiring, unequal pay etc.

About the implication of local labour, the Guidance seems to highlight only the positive impacts on community level, whereas negative impacts should be addressed and considered by the legal framework as well. Examples of negative impacts of including local labour are:

- competition for (limited) pool of labour with other employers (education, healthcare);
- increased inequality and social division between mining employees and others;
- loss of traditional skills, including transmission between generations.

Relevant exemplary guidance is addressed in Human Rights Impact Assessment practice as well as the IFC Performance Standard 2 on Labour and Working conditions.<sup>15</sup> The Guidance could consider including gender pay audits, which are required by law in some jurisdictions.<sup>16</sup> The inclusion of a gender-mainstreaming expert as part of the drafting team would strengthen the content related to gender-specific issues to be considered by the legal framework.

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<sup>15</sup> See for example "HRIA Toolbox– Guidance and practical tools for conducting, commissioning, reviewing or monitoring human rights impact assessments of business projects and activities"; IFC Performance Standards

<sup>16</sup> E.g., Canada, France, Germany, Iceland, Norway, UK

## Give more attention to relocation

### *Recommendation:*

- *Give more attention in the Guidance on how to deal in ESIA legal frameworks with the issue of relocation with reference to international treaty and case law.*

The Guidance does not include any consideration of how to deal in ESIA with relocation of individuals or communities. While relocation should be a last resort, relocations do sometimes take place to facilitate mining projects and in emergency situations. According to international law, Indigenous Peoples must only ever be relocated with their Free, Prior and Informed Consent and in such cases, must be given territory of equal value to them while retaining a right to return should it become safe to do so.<sup>17</sup> Majority consent to relocation and the possibility to relocate as a community is also a relevant consideration for non-Indigenous communities.<sup>18</sup> Individual relocations must follow proper legal process, respecting internationally recognised rights to property, home, housing and family, and including full compensation.<sup>19</sup>

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<sup>17</sup> UNDRIP, article 10; ILO Convention, article 16

<sup>18</sup> Noack and Others v Germany, App No. 46346/99 (ECtHR, Fourth Section, 25 May 2000)

<sup>19</sup> See, e.g., International Covenant on Economic, Social and Cultural Rights, article 11; International Covenant on Civil and Political rights, article 17; European Convention on Human Rights, article 8 and 1st Optional Protocol; American Convention on Human Rights, articles 11 and 21; African Charter on Human and Peoples' Rights, article 14