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Recommendations for incorporating a human rights-based approach in environmental impact assessment of mining projects



This document presents the consensus recommendations for the inclusion of a human rights-based approach in environmental impact assessments of mining projects by the mining companies and human rights thematic group of the Ibero-American Federation of Ombudsmen (FIO by its Spanish acronym). These recommendations were validated by the group in the meeting that took place on September 2nd and 3rd 2019 in the headquarters of the United Nations Economic Commission for Latin America and the Caribbean (ECLAC), within the framework of the activities of the Regional cooperation for the sustainable management of mining resources in the Andean countries Programme, implemented by ECLAC together with the Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ) and financed by the Federal Ministry of Economic Cooperation and Development (BMZ) of Germany.

The opinions expressed within this document, which has not been subject to editorial review, are exclusively the authors' responsibility and may not coincide with that of ECLAC and GIZ.

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FIO Working Group on mining companies and human rights¹

In the United Nations Conference on Sustainable Development (Rio+20), countries highlighted the need to achieve sustainable development within its three dimensions. They added that mining, when effectively and adequately managed, offers the opportunity to drive economic development, reduce poverty and help countries achieve the sustainable objectives agreed upon internationally. Moreover, they recognised the importance of legal and regulatory frameworks, policies and practices to ensure that the mining sector generates economic and social benefits, and includes effective safeguards that reduce adverse social and environmental impacts and conserve biodiversity and ecosystems, including after the end of mining activities and within this context, they urged governments and companies to promote a continuous increase in accountability and transparency.

Coincidingly, in 2015 countries adopted the United Nations 2030 Agenda for Sustainable Development. This Agenda is a call for action to change our world on the bases of an ambitious and transformative future vision.

Within this context, a correct formulation, implementation and monitoring of mining projects will contribute to the decrease in possible human rights impacts and the resulting reduction in social conflicts. For that end, an adequate and strengthened environmental impact assessment is needed, one that incorporates a human rights-based approach.

The environmental impact assessment is a public policy tool whose objective is to provide information and analysis to improve decisions that must be taken in prospective terms, with the aim of helping to anticipate future impacts of present decisions and thus improve public decisions, favouring a correct accountability.

All the countries in the Ibero-american region have legal frameworks to evaluate environmental impacts of certain projects, that include formal information and public participation instances, as well as mechanisms to access justice in case of rights violations. Notwithstanding, projects' environmental assessments traditionally has not explicitly contemplated a human rights approach, which would help paying special attention to specific persons or groups (indigenous populations, women, national, ethnical or linguistic minorities, amongst others), guarantee substantive consultations to those groups potentially affected and effective reparation mechanisms in case of human rights violations ((in line with the [Guiding Principles on Business and Human Rights](#) and the [Escazú Agreement](#)).

This document includes a number of recommendations developed by the Ibero-american Federation of Ombudsman (FIO) working group on mining companies and human rights for the incorporation of the human rights-based approach environmental impact assessments of mining projects, aiming to strengthen this preventive tool in light of the current international and regional developments and addressing the increasing socio-environmental conflicts in the Latin American region, particularly associated with mining.

¹ The National Human Rights Institutions and/or Ombudsperson Offices that are part of this group are those of Argentina, the Plurinational State of Bolivia, Brasil, Chile, Colombia, Ecuador, México, Peru, Paraguay and Portugal. This working group is supported by ECLAC and GIZ in its functioning.

Environmental impact evaluation referential framework in terms of human rights

Achieving sustainable development requires implementing a human rights approach that includes carrying out economic activities that respect the intrinsic dignity of the human person and his or her integral well-being. The human rights-based approach conceptual framework is based upon international norms and Human Rights principles and is focused towards its promotion and protection. Amongst these principles, this study pays special attention to the following: (a) **universality and inalienability**; (b) **indivisibility**; (c) **interdependence and interrelation**; (e) **non-discrimination and equality**; (f) **participation and inclusion**; (g) **accountability and rule of law**.

The human rights-based approach is also focused on identifying and evaluating existing inequalities that underlie development issues and provides answers to overcome them. This is based, on the one hand, on the recognition of rights and what one is entitled to – meaning the object of protection – and, on the other hand, the consequent identification of duty bearers and their corresponding obligations. Such an approach works to strengthen the capacities of right holders to make their claims and of duty bearers to comply with their obligations.

Consequently, a human rights-based approach applied to a mining sector environmental impact assessment:

- ♥ Incorporates congruently and systematically the main Human Rights principles and standards;
- ♥ Focuses on rights and not needs;
- ♥ Pays due attention to evaluation, both of results and of processes guided by human rights standards and principles;
- ♥ Focuses on the most vulnerable groups, by variables such as age, ethnicity, gender, in order to ensure the realization of the rights of the excluded and marginalised;
- ♥ Respects and strengthens participation, as a means and an end in itself, of all actors and promotes local empowerment by considering people as key actors in their own development;
- ♥ Considers the particularities of a community and its territories;
- ♥ Reinforces transparency, information, effective communication amongst stakeholders and accountability, and;
- ♥ Aims to achieve sustainable and non-degressive results building on strengthening capabilities, improving social cohesion and strategic alliances and the institutionalization of democratic processes.

Recommendations on access to information

1. Information during the whole process: must be easily comprehensive for the community, culturally adequate, gender-sensitive, in non-technical language, with summaries that aid its understanding, without prejudice to access all the information.

2. Quality of project information: must be adequate, complete, clear, accurate and timely, that allows for a comprehensive understanding of the project's impacts both for the involved authorities in the evaluation process and the public, allowing, as well, those interested and responsible to take possible protection actions to face such dangers.

3. Information regarding the environmental impact assessment: must be available for those interested, be timely and clear.

4. Administrative act ruling on the evaluation: must be reasoned, precise, clear and available in a timely manner, so as to allow for monitoring, follow-up, compliance and oversight, as well as the exercise of administrative or judicial remedies.

5. Maximum publicity: the publicity of the information should be enhanced so that it is as widespread as possible, considering, amongst others:

a) Forms of communication: The availability of information must be strengthened through its access via physical and electronic media, taking into account territorial circumstances, indigenous and tribal people's presence, as well as accessible formats for disabled persons.

b) Implementation information: The information transparency must also include the implementation of the project under environmental evaluation with the corresponding monitoring and follow-up measures, as well as the possible sanctions.

c) Additional information: Access to information held by private parties should be facilitated through other mechanisms such as Pollutant Release and Transfer Registers (PRTR).

d) Active transparency: Strengthen the State's capabilities to produce, process and disseminate information on the environment's state, including environmental liabilities, that contributes to evaluate projects under consideration from official information.

e) Passive transparency: Requests response systems must be strengthened that allow those interested to have the information, especially when active transparency tools are inefficient.

f) Information in case of imminent threat: Particularly, measures that assure appropriate and accurate information dissemination to the population must be strengthen in case of imminent health or environmental threat that allows the public to take action to prevent or limit possible damages.

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Recommendations on access to public participation

- 1. Opportunity to participate:** must take place from the initial stages of the project ensuring that necessary and sufficient information is taken into account to be able to participate in an effective and appropriate manner regarding the project's impact assessment.
- 2. Participation instances and terms:** Regulatory frameworks must establish sufficient instances and reasonable deadlines that allow the community to prepare and participate effectively in the project.
- 3. Participation conditions:** Must adjust to local contexts, respecting customs and traditions, translating into aspects such as language, dissemination channels, place, date, time schedule and accessibility, with special emphasis in vulnerable people or groups.
- 4. Community capacity:** Power asymmetries must be reduced, strengthening the communities' capacities to be a relevant stakeholder that makes a difference in the decision-making process, ensuring that it has independent technical advice, elected by the people themselves or interested parties.
- 5. Project cycle participation:** involve the community in all project stages in order for its participation to be comprehensive to the process itself, being able to contribute in stages such as: determining the scope, its development, prevention, mitigation and reparation measures definition, as well as monitoring and follow-up measures.
- 6. Participation meaning and scope:** Participation instances must represent real dialogue and deliberating spaces for decision-making, ensuring that the community can express its opinions and receive reply in an appropriate and adequate manner to its consultations and contributions.
- 7. Special attention to vulnerable persons and groups:** Within the framework of the non-discrimination principle, special attention must be granted to the impacts that fall upon vulnerable persons and groups and guarantee their participation.
- 8. Formal requirements to participate:** Special attention must be granted to regulatory requirements so that all those interested in the different project stages can participate, avoiding unnecessary formal requirements that can exclude or hinder their participation.

Participation

Recommendations on prior, free and informed consultation of indigenous and tribal peoples

1. Identifying the population to be consulted: The responsible State entity must identify correctly and promptly interested indigenous and tribal peoples that may be affected by a project, according to internationally accepted criteria such as self-identification and non formality, with the support of non-state actors if pertinent (academia, NGO and indigenous associations, amongst others). In line with the above, special attention should be paid to those who, not having been identified at the outset, request to be part of a consultation process and apply reasonable and flexible criteria, including with regard to time limits, for those who, having established their right, assume the process.

The State must promote the conditions for the indigenous and tribal peoples concerned to exercise their right to self-identify in accordance with ILO Convention 169, through the establishment of public registers and public bodies on a participatory basis, among others, that promote the recognition of their rights.

2. Meaning and scope of the consultation: The State must guarantee that the consulted population promptly knows and understands the consultation's meaning and objective, rights and obligations of all those intervening in the process and its stages, as well as the institutional channels that exist at their disposal.

3. Capacity of the responsible entity: The responsible entity must assure that the consultation takes place with sufficient logistical and technical resources and a working group prepared to carry it out, taking into account intercultural and gender approaches as well as adequate communication abilities to such end.

4. Preparatory stage agreements: the population consulted, and the responsible state entity must agree, among other things, on the responsibilities, methodologies, rules, schedule and logistical aspects, leaving a record of them. During the developing phase of the consultation, agreements reached during the preparatory phase must be respected notwithstanding applying the necessary and justified flexibility in case of contingencies.

5. Impact analysis: the responsible State entity must guarantee that interested indigenous and tribal peoples must be informed in an appropriate, complete and adequate manner on the project's positive and negative impacts, and the possible effects to their rights. Moreover, it must be guaranteed that there is enough time and resources to consider the project, debate over it and make a decision. Due to the usual complexity of environmental issues technical information must be translated into a comprehensible language.

6. Consultation characteristics: the population consulted, and the responsible State entity must hold a timely, intercultural and good faith dialogue on the project, seeking to reach specific agreements that must be recorded. The consent of the population consulted must be obtained in those cases where international standards of prior consultation and national legislation so provide.

7. State decision: The State's decision regarding a project must be adopted within a reasonable timeframe. Also, it must respect the agreements reached during the dialogue and aim to widely protect the consulted population's rights if no consent is reached when this is not mandatory.

8. Publicity: the responsible State entity must guarantee the dissemination and free access to the generated information in all the stages of the prior consultation process and regarding the adopted decisions on behalf of the State.

9. Follow-up and monitoring: Project follow-up and monitoring measures as well as the agreements resulted from the prior consultation process must be available and public, especially considering the role played by the consulted population.

General recommendations on the environmental impact assessment system

Broadly, there is wide receipt of environmental protection principles at a constitutional and legislative level. It must be noted that all countries have environmental references in their Constitutions, stressing that this a right of every person, as well as a ministry or secretariat focused on environmental management. Moreover, most countries that are part of this study have general environmental laws or an environmental framework and consider environmental impact assessment systems as part of their regulations.

In addition, access to justice is contemplated as a guarantee in the Constitutions as well as being developed at the legislative level. In the last years, the particularity and complexity of the environment has been distinguished translating into access to justice through specialized knowledge from sentencing courts and the wide possibility to defend this right when it has been damaged. In this sense, the Plurinational State of Bolivia, Brasil, Chile, Paraguay and Peru have courts that are trained in environmental matters, while other countries such as Argentina has environmental prosecutors in their Public Ministries or specialised agencies within their ordinary courts.

Regarding access to justice it must be noted that it does not only aim to protect environmental rights and related substantive rights, but that it also extends to procedural rights, meaning, access to information and participation and prior consultation.

Regulation against environmental damage also stands out. In Colombia, regardless of the sanctions imposed, the restitution of the affected environment, natural resources or landscape corresponds. In Ecuador, whoever pollutes is obliged to integrally repair and compensate those affected, incorporating compensation measures to the affected populations and the corresponding sanction payment. In the case of Mexico, any natural or legal person who with his action or omission directly or indirectly causes damage to the environmental shall be responsible and liable for the reparation of the damage, or, when the reparation is not possible, for appropriate environmental compensation. In the same way, it will be obliged to carry out the necessary actions to avoid increasing damage caused to the environment. In addition, Portugal provides for the liability of all those who directly or indirectly, by intention or negligence, cause threats or damage to the environmental, with the State being responsible for applying the appropriate sanctions, without excluding the possibility of compensation under the law. Moreover, it contemplates recovering which obliges the person that caused environmental damage to restore the state of the environment as it was before the occurrence of the harmful event.

4.1 Recommendations for States

Considering international and national identified standards, the following recommendations deem to strengthen the role of the State:

1. **Human rights-based approach:** Incorporating a human rights-based approach in environmental impact assessments.
2. **Escazú Agreement:** Encourage all States to sign and/or ratify the Escazú Agreement that establishes standards regarding access to information, public participation and justice in environmental matters.
3. **Incorporating the criteria:** Consider incorporating and implementing the highlighted criteria in this study regarding access to information, public participation, prior, free and informed consent of indigenous and tribal peoples, as well as access to justice.
4. **Institutional coordination and coherence:** Strengthen coordination amongst State institutions able to intervene in environmental impact assessment processes, as well as criteria and regulation uniformity, as applicable, that contribute to a correct understanding, coherence and legal certainty for all actors.
5. **Follow-up, auditing and control:** Strengthen following-up, auditing and controlling capacities of an environmentally assessed project's obligations, including the community's participation, as applicable, and the transparency in processes and results.
6. **Community's support:** Strengthen awareness and the community's capacities to exercise its rights.
7. **Imminent threat:** have adequate and appropriate solutions to emergencies that compromise a healthy environment and human rights.
8. **Environmental defenders:** Generate the conditions for a favourable setting to the defence of human rights and to have the necessary measures in place for the comprehensive protection of environmental defenders and their families, taking special account of differentiated approaches, in coordination with the beneficiaries.

4.2 Recommendations for companies

Considering international and national identified standards, the following recommendations deem to strengthen the role of companies:

- 1. Respect for human rights:** Adopt a company policy that respects human rights in the whole project cycle in relation to the interested communities.
- 2. Due diligence:** Applying due diligence to projects subject to environmental impact assessment aiming to ensure participation of those interested and adopt measures that safeguard the right to a healthy environment and human rights.
- 3. Resources:** Make sufficient technical, financial and logistical resources available and an interdisciplinary team that includes qualified with human rights expertise and knowledge on the local circumstances, during the whole project subject to environmental assessment's life cycle.
- 4. Transparency and accountability:** Develop and publish periodically compliance reports, including those developed by independent consultants.
- 5. Claims process:** Have public and efficient mechanisms that are able to receive, research and address environmental and human rights violations claims.
- 6. Emergency tools:** Have emergency tools that aim to control and mitigate possible grave environmental and human rights damages caused during the operations' development, as well as have warning systems for authorities and the population that allow for rapid and efficient action.
- 7. Damage repair:** Have adequate resources and mechanisms to address in an appropriate manner damage caused to the environment and communities during the project's development.
- 8. Voluntary initiatives:** Adhere to initiatives or tools that promote human rights principles and standards.



