

SUMMARY NOTE

Strengthening the Legal Framework for Environmental and Social Impact Assessment in the Mining Sector in Madagascar: Selected issues

Summary note on the Evaluation Report of the Legal Framework Governing ESIA in the Mining Sector

Suzy Nikièma, Clémence Naré, and Abas Kinda
April 2023

Introduction

Background

Madagascar is a country rich in mineral resources while also being one of the world's foremost reserves of biodiversity, with more than 80% endemism.¹ Like many developing countries, Madagascar has been seeking to develop its mining sector and attract foreign direct investment, which led to a renewed surge in industrial mining production at the turn of the 2000s.² Despite the COVID-19 pandemic, the mining sector is growing, accounting for 5% of Madagascar's GDP.³ Madagascar is home to 5% of the world's biodiversity—that is, more than 250,000 plant and animal species. To this must be added a difficult socio-political context marked by various crises since 2009. The issue, therefore, arises of reconciling large-scale mining with the imperatives of sustainable development, particularly including the protection of the environment and the social rights of the most vulnerable populations.

As part of the project Governance Processes and Sustainability Impacts of the Extractive Industries: Generating Transformation Knowledge in the Biodiversity Hotspot of Madagascar, the International Institute for Sustainable Development was asked to evaluate the legal and

¹ See UNESCO Country File (UNESCO World Heritage Centre – World Heritage List).

² These are the extraction of ilmenite (titanium ore) and zirsill (a mixture of zircon and ilmenite) in Tolagnaro (Fort-Dauphin), begun in 2009 by QIT Madagascar Minerals, and the extraction of nickel and cobalt (and ammonium sulphate, a by-product of refining), begun in late 2012 by the Ambatovy Project.

³ See page 42 of this Extractive Industries Transparency Initiative report from 2018: https://eiti.org/sites/default/files/attachments/eiti_2018_-_rapport_final_du_13122019.pdf.



political framework governing environmental and social impact assessments (ESIAs) in the extractive industries in Madagascar. The Institute, therefore, prepared the *Evaluation Report on the Legal Framework Governing ESIA in the Mining Sector in Madagascar*. The report reviews the current state of play of the Malagasy framework and makes recommendations for improving the laws, regulations, and procedures governing ESIAs, environmental and social management plans (ESMPs), and closure plans in force in Madagascar. To accomplish this, it builds on international best practices in ESIA governance in the mining sector, as presented in the 2020 Intergovernmental Forum on Mining, Minerals, Metals and Sustainable Development (IGF) document *Guidance for Governments: Improving Legal Frameworks for Environmental and Social Impact Assessment and Management* (referred to in this paper as the IGF ESIA guide).

Target Audience

This note is written for a wide audience so that all stakeholders in the ESIA process in Madagascar can benefit from it (central and decentralized government officials, private-sector actors, members of civil society, and representatives of impacted local communities). To this end, the document uses accessible language, and some technical details or nuances have deliberately been simplified.

Purpose and Scope of the Summary Note

The evaluation report contains key observations on the strengths and weaknesses of the legal framework and current practices in light of the IGF ESIA guide. The purpose of the note is to provide a succinct and accessible presentation of some of these strengths and weaknesses. The objective is for it to be usable as a basis for discussion among leaders and all stakeholders in extractive industry projects in Madagascar in order to improve the legal framework for ESIAs and related processes. Thus, it focuses on certain weaknesses identified, among others in the report, and on related specific recommendations.

Structure of the Summary Note

This note opens by recalling the usefulness of an ESIA and the importance of a robust legal, policy, and institutional framework governing ESIAs in the mining sector. It then presents the main shortcomings of the Malagasy framework in respect of ESIA, among those identified in the report. It concludes by offering specific recommendations related to these shortcomings, to improve the Malagasy legal framework on ESIA. S.

The Purpose of ESIAs in the Mining Sector

ESIAs make it possible to identify and evaluate projects' potential environmental and social impacts (positive or negative).

ESIAs are used to identify and assess the potential environmental and social impacts of a project in the extractive industry sector. In the evaluation process used to inform decision making, the ESIA involves all stakeholders in order to have inclusive and proactive environmental and social management of activities in this sector. Particularly in the mining



sector, the ESIA is a commonly used and well-established legal, technical, and political procedure that serves to ensure that mining projects are not carried out to the detriment of sustainable development and the well-being of communities. It consists, therefore, of identifying, predicting, and evaluating the environmental and social impacts of development projects at the proposal stage, as well as planning for and, ultimately, finding ways to mitigate these impacts before making major decisions and definitive commitments.

The ESIA is a decision-making tool for approving or rejecting a mining project

In the decision-making process for any major project, the ESIA is an essential tool for public authorities. It allows them to make a fully-informed decision on the appropriateness and acceptability of an investment project, regardless of sector. It is then used to plan in advance the proper implementation and conduct of the project, in particular through the ESMP and (conceptual) mine closure plan. Lastly, the ESIA is intended to ensure better monitoring of the implementation of project activities in respect of sustainable development, on the basis of the approved ESMP. It also integrates the broad principles of mine closure into the project-planning stage, for a smooth post-mining transition. In short, the ESIA helps authorities ensure the optimization of the mining project's environmental and social benefits. It thereby informs policy-makers about the project's potential impacts and helps them build good foundations for the project if it is approved.





The ESIA enables effective management of all phases of a mining project

To conduct a high-quality ESIA, the different phases of the mining project must be clearly identified and regulated, with clear, consistent, and precise procedures for taking environmental and socio-economic issues into account at every phase. The ESIA, therefore, ensures that these issues are taken into account from the initial phases of an industrial extraction project and that this continues until its full completion, while also taking into account the level of risk at each phase (prospection, research, extractive operation, and relinquishment).

Why a Robust Legal Framework for ESIA Is Essential

A robust framework provides a clear roadmap for the conduct of a high-quality ESIA

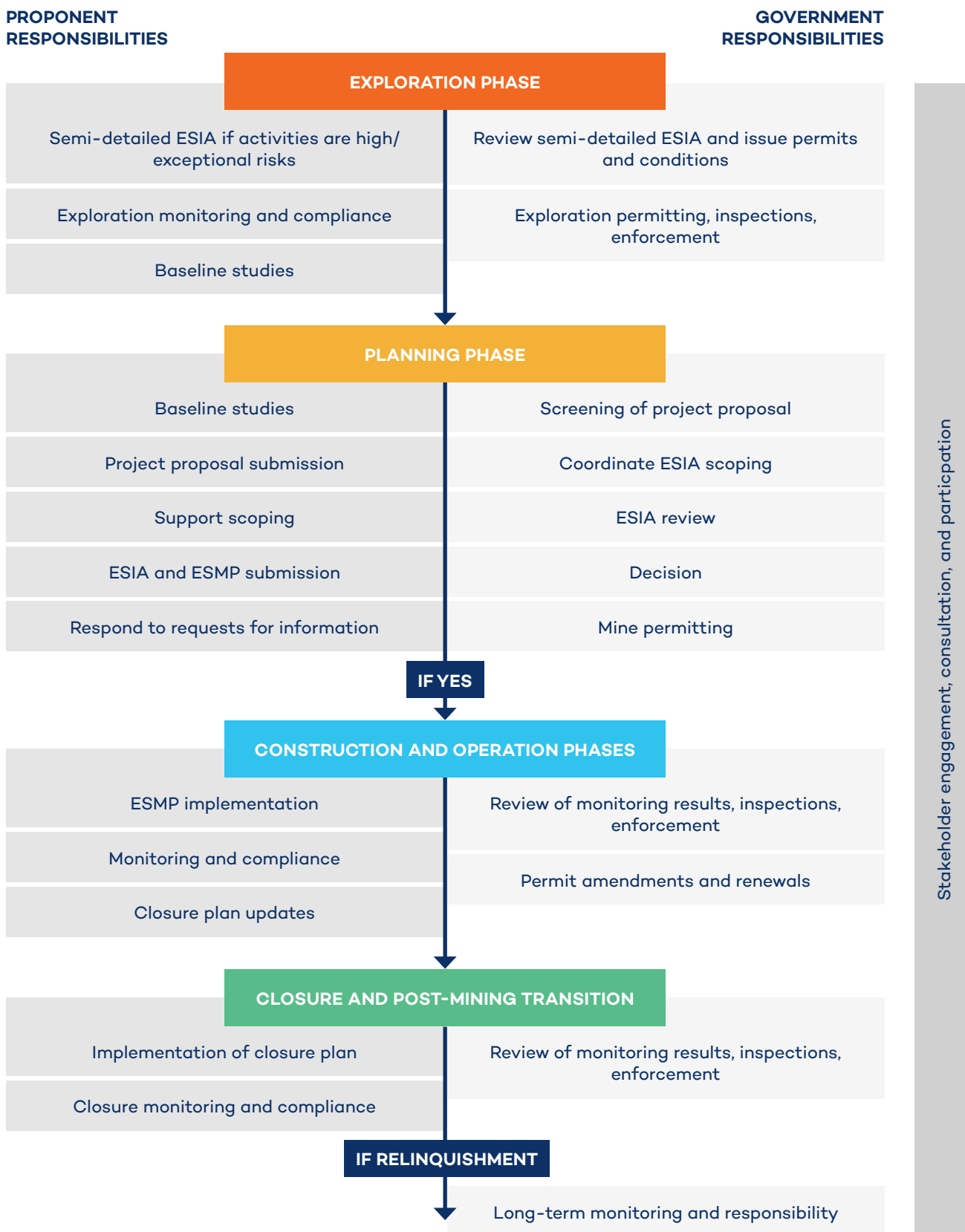
A robust legal framework ensures better protection of the environment and optimizes the chances of ensuring the effective preservation of local communities' social and economic interests. Thus, for a high-quality ESIA, the first requirement is that the different phases of mining activity be well regulated and that all stakeholders be well informed. Then, the rules applying to the different phases of the ESIA must be precisely established. These rules will minimize the negative environmental and social impacts of mining while optimizing the positive impacts. The legal framework, therefore, serves as a clear roadmap for the process of evaluating and managing environmental and social impacts in the project's planning, management, and closure phases. A high-quality ESIA thus makes it possible to optimize the social and economic benefits of the mining sector.

A robust framework helps to effectively distribute stakeholders' roles and responsibilities and facilitate the ways in which they work together

Mining projects involve multiple stakeholders interacting with each other. This being so, the legal framework makes possible the clear definition of the roles, responsibilities, and powers of the various actors (national and sub-national entities, mining companies, local communities, etc.). At each stage of a mining project's life, the authorities must be informed about their roles and responsibilities for achieving sustainable development. For example, the legal framework sets out the guidelines for public consultation and participation in the ESIA process. It also lays out the rules on transparency and access to environmental and social information, as well as on complaints mechanisms related to mining proponents' activities.



Figure 1. Government and proponent responsibilities in environmental and social impact assessment and management by mine phase



Excerpt from the IGF Guide on ESIA, p. 20



A robust framework prevents, to the greatest possible extent, social and legal disputes arising from mining activities

Mining projects often lead to disputes between mining companies and local communities. But when environmental and social requirements are clearly identified, actors' roles and responsibilities are clearly defined, and the public is sufficiently involved in the phases of the project, authorities can effectively monitor activities to minimize the risks of negative environmental and social impacts and to proactively address problems. This can help to reduce the risk of disputes between the proponents and local communities.

The Main Components of a Robust Legal Framework on ESIA

A robust legal framework on extractive industry ESIA must incorporate a number of important components. These components are set out in detail in the IGF ESIA guide.



Table 1. Components of a comprehensive legal framework on ESIA

Component	Constituent elements	Content and issues
Commitment to sustainable development	1. Commitment to sustainable development, including environmental and social protection, is stated in the legal framework.	This component involves governments committing to sustainable development through national and international legal instruments. In particular, they must guarantee the legal protection of the environment and of populations, the protection of populations' fundamental rights and freedoms, and the full implementation of these protections.
Consistency and coordination	2. Consistency is maintained across all legal instruments. 3. Responsible authorities are clearly identified, along with their respective roles in review, decision-making, and monitoring processes	This component requires that all applicable texts, such as international commitments, policy documents, and national laws and regulations, be harmonized. It ensures the coordination and synergy of action of the various actors and the effectiveness of the implementation of the texts.
Coverage of all phases of mine life	4. Social and environmental requirements are defined for all phases of the mine life, commensurate with risks.	This component focuses on the different phases of a mining project, requiring them to be well identified and regulated, with clear, precise procedures to take environmental and social issues into account at every phase. It ensures that sustainable development issues are considered from the initial phases of an industrial extraction project and that this continues up to the point of its full completion while taking into account the level of risk at each phase.
Public engagement, consultation, and transparency	5. Requirements and guidelines for public engagement and consultation are provided, including ongoing requirements for public engagement throughout the life of the mine. 6. Requirements and guidelines regarding transparency and access to environmental and social information are provided.	This component requires the meaningful and effective participation of the public in all phases of preparation and development of the ESIA, and in monitoring the implementation of environmental and social commitments. It implies that regulation should guarantee transparency and access to important documents related to the ESIA process, including the ESIA report, the ESMP, the closure and rehabilitation plan, and periodic implementation reports. It ensures that the public has the best-possible understanding of the nature of the environmental and social impacts and that it can therefore contribute to the ESIA process in an effective and meaningful manner.



Component	Constituent elements	Content and issues
Grievance mechanisms	7. Requirements and guidelines for grievance mechanisms are provided.	This component specifies that the legal framework must set out the terms under which the mining proponent puts in place mechanisms for gathering and responding to complaints from local communities at an early stage. It ensures that affected communities' and workers' grievances are addressed early on, to prevent them from escalating into significant social conflicts. These requirements facilitate good relationships between the mining proponent and local communities.
ESIA requirements	<p>8. Standard requirements for the initial project proposal are clearly described.</p> <p>9. Screening procedures are required to determine when a mining activity will require an ESIA and review process.</p> <p>10. 10. Requirements and procedures for scoping are provided, including requirements for stakeholder input.</p> <p>11. The ESIA is part of project planning and is conducted before any decisions are made to approve a proposed large-scale mining project.</p> <p>12. A reasonable timeline for the ESIA report review process is defined.</p>	This component stipulates that the legal framework is clear regarding the admissibility of a project. It also necessitates that the legal framework provide for a screening process to analyze the proposal and determine what type of evaluation is appropriate. It lays the right foundations for the preparation of the ESIA report, to cover all important aspects and provide useful analyses for informed decision making on whether or not to proceed with the mining project.
Environmental and social management plans	13. ESMPs are required in the review process, and guidelines are provided.	This component requires that the legal framework provide for the analysis of impacts and adequate solutions for their mitigation, management, and control. This step is important because ESMPs are an indispensable tool for monitoring and implementing the mining proponent's environmental and social commitments. These plans serve to some extent as the dashboard that will allow all the parties involved (mining proponent, government, and affected communities) to ensure effective implementation on the ground.



Component	Constituent elements	Content and issues
<p>Mine closure plans and financial assurance</p>	<p>14. Preliminary mine closure and post-mining transition plans are required in the review process, and guidelines are provided.</p> <p>15. Adequate financial assurance for remediation and mine closure is required and must be maintained by the mining licence holder</p>	<p>This component indicates that the mine's closure must be planned before it is opened and that the measures to ensure that closure must be put in place before start-up and operation. The legal framework must therefore require the submission of a closure and rehabilitation plan, even a preliminary one, as part of the ESIA process. This component insists on a plan to ensure a high-quality closure without future risks and also to decide, in an informed and inclusive manner, on the future use of the site after closure and to prepare accordingly.</p>
<p>Permits and approvals</p>	<p>16. Permits and approvals are subject to standard terms and conditions, including reporting and updating requirements.</p>	<p>This component specifies that the normative framework must clearly define the conditions for the issuing of permits and the monitoring of compliance, including the grounds for the granting of permits, which means that any new permit application, renewal, or change will have to comply with current environmental and social standards. It ensures that permits are not renewed until the mining proponent has fulfilled its environmental and social obligations under the previous permit. In addition to providing an additional opportunity to verify their implementation of management plans, this is a strong incentive for mining proponent to comply, in order to have their permit renewed.</p>



Component	Constituent elements	Content and issues
<p>Monitoring, inspections, and enforcement</p>	<p>17. Oversight of environmental and social impacts across the life of the mine is required through monitoring, inspections, and enforcement.</p> <p>18. Sanctions for non-compliance are commensurate with the level of violation.</p> <p>19. Existing permit conditions must be met prior to renewal and prior to approving a permit for large-scale mine development.</p> <p>20. Clear conditions are provided for “exit tickets,” relinquishment, and management of residual risk.</p>	<p>This component requires the monitoring of environmental and social impacts throughout the duration of the mining project and that authorized authorities be identified. Monitoring and inspection procedures must be planned by the texts or management plans and all stakeholders must have the opportunity to participate in them. They require the existence of penalties in case of breach of environmental and social obligations. This component makes it possible to implement and comply with mining companies' environmental and social obligations within the ESIA framework.</p>

Source: Excerpt from the IGF ESIA guide, pp. 24–25 “Components of a Comprehensive Legal Framework for Environmental and Social Impact Assessment and Management”).



The Main Strengths of the Malagasy Legal and Policy Framework on ESIA

Overall, the Malagasy legal and institutional framework on ESIA is coherent and satisfactory on several key points, although some aspects would benefit from improvement in practice. The strengths mentioned below are not the only outstanding features of the Malagasy legal framework, but rather are the most interesting to highlight with regard to the objectives of this note.

All aspects of ESIA are regulated

Madagascar has legal instruments in force on the environment⁴ and mining,⁵ accompanied by implementing legislation. Numerous policy and practice guides have also been adopted.⁶ There are also instruments of commitment to sustainable development,⁷ including numerous texts on protected areas. Similarly, a number of international texts on this subject have been adopted by Madagascar.

The majority of texts relating to ESIA are up to date

Most of the environmental texts have been recently revised. This is the case, in particular, with the environment charter, revised in 2015, the decree on national environmental policy for sustainable development, adopted in 2015, the decree setting out the powers of the Minister of the Environment, Ecology and Forests and the general organization of the ministry, revised in 2016, the decree establishing the control and inspection obligations of environmental technicians and terms of transaction, adopted in 2017, and the decree amending the organization and operation of the Inter-ministerial Committee on the Environment, adopted in 2017. In addition, the Mining Code was partially revised in 2020 and is again under review, although that revision did not cover provisions related to environmental and social aspects.

Institutions exist for the implementation of texts on ESIA

The implementation of texts on ESIA is ensured by a large number of participants who act and interact at different scales, in which the National Office for the Environment (ONE) plays an important role. The Malagasy legal framework defines all the stages of the environmental assessment process and the role of each authority, including the coordinating

⁴ Examples include the Environmental Charter Act, No. 90-033 of December 21, 1990, as amended by Act No. 97-012 of June 6, 1997, and Act No. 2004-015 of August 19, 2004. The charter is complemented by implementing legislation, including Decree No. 2016-298 which lays down the general organization and powers of the Minister of the Environment, Ecology and Forests; Decree No. 2017-566 laying down the control and inspection obligations of environmental technicians and terms of transaction; and Decree No. 2017-1106 amending Decree No. 97-823 of June 12, 1997, on the creation, organization, and operation of the Interministerial Committee on the Environment.

⁵ For example, there is the Mining Code of 2005, which is supplemented by other specific texts, including the Special Law on Large Mining Investments and its implementing decree, No. 784-2003 of July 8, 2003.

⁶ One example is Madagascar's 2014 national mining policy framework document.

⁷ An example is the Environmental Programme for Sustainable Development, adopted in 2016.



authority and the decision-making authority. The legal framework has also determined the roles of the ministries involved in the process of reviewing ESIA reports and granting various permits. Similarly, coordination is supported in texts that clarify roles and establish coordination platforms or mechanisms. Overall, the competent authorities and their respective responsibilities are well defined.

The Main Limitations of the Malagasy Legal and Policy Framework on ESIA

Although the Malagasy legal framework on ESIA has many strengths, some gaps remain. Of several, four of them are worth highlighting here.

Certain mining texts contain broad stabilization clauses

The relative coherence of the Malagasy legal framework on ESIA may be called into question by the presence of stabilization clauses in certain texts. A stabilization clause is any provision by which the state moves not to apply new legislation it has adopted, to one or more investors, after the mining investment has been made. On the ground, such clauses can lead, for example, to the "freezing" of an outdated environmental law so that it continues to govern a mining project even after it has been revised for better environmental protection. In some cases, monetary compensation, payable by the state, may be provided to cover all additional costs that proved necessary for the mining proponent to comply with the new law. An approach of this nature can therefore create obstacles to the implementation of more modern legislation promoting better environmental and social protection.





Article 93 of the Law Establishing a Special Regime for Large Investments in the Malagasy Mining Sector is a stabilization clause. Even though it comes with an exception for the protection of public order, health, or safety,⁸ its wording remains broad because it does not specify the areas covered by stabilization. Neither does it place any limit on the duration of the stabilization of rights. Similarly, Article 154 of the Mining Code is a broad stabilization clause that does not provide for any exceptions. The existence of these two stabilization clauses in the legal environment of mining activities may effectively prevent the Malagasy state from applying to mining companies certain measures that are in the public interest.

The ministerial authority in charge of granting environmental permits has the power to override the technical opinion of ONE

The distribution of responsibilities among the bodies responsible for ESIA matters is another challenge for the Malagasy legal framework. For example, in the granting of environmental permits at the end of the ESIA process, the technical role of ONE is weakened by "extraordinary" power granted to the minister with responsibility for the environment. Thus, the minister can overrule the technical opinion of ONE if it proves adverse to mining development, and grant the environmental permit. Under the terms of Article 28 of the decree on the compatibility of investments with the environment, in the event of an opinion adverse to a project from ONE, the minister may commission a second opinion by a panel of experts of the minister's choice, which must make a decision within 30 days. ONE has 10 days in which to decide on these experts' conclusions. If ONE maintains its adverse opinion, the minister responsible for the environment "may, under his own authority, issue the environmental permit." ONE's technical advice is based on the public assessment report and the technical opinions of the ad hoc Technical Assessment Committee established for the project, which includes representatives of several ministries involved. This power granted to the minister can, therefore, erase all the safeguards under the ESIA process, with the risk of an environmental permit being granted for socially and environmentally problematic projects.

The operating permit may be granted before the environmental permit

The ESIA is a key tool in the decision-making process on the approval or rejection of a mining project. The decision to grant an operating permit must be made on the basis of the findings of the ESIA and, therefore, after the granting of the environmental permit. However, the Malagasy legal framework has not clearly established the chronology of the granting of these two permits. Indeed, the Malagasy legal framework allows operation permits to be granted before environmental permits. Under Article 45 of the Mining Code, the mining proponent may apply for an operating permit with a letter in which it commits to not commencing any mining activity before obtaining an environmental permit, while waiting to obtain the operating permit pending the granting of the environmental permit. This approach suggests that obtaining an environmental permit may be a mere formality, leading to a weakening of the ESIA's role and importance in the decision to approve or reject mining projects.

⁸ The exception reads as follows: "However, the Malagasy State may take any non-discriminatory measures that are manifestly necessary to restore or protect public order, health or safety."



The public is not sufficiently involved in the preparation of the ESIA report

Despite the relative clarity on the ways in which the public can participate in the ESIA process, the requirements and guidelines for public participation and consultation should be strengthened. Local communities should be sufficiently involved and engaged as early as possible in the ESIA process in order to significantly contribute to it. However, analysis of the Malagasy legal and institutional framework for ESIA shows that the public is only involved after the mining proponent's ESIA report has been submitted to the government. The public is not, therefore, involved in certain key steps, such as screening or preparation of the report. And it means that public participation is marginal and less effective than it could be.

How to Remedy These Limitations in the Malagasy Legal and Policy Framework on ESIA

The shortcomings of the Malagasy legal and policy framework identified above could be corrected in line with the recommendations provided in the IGF ESIA guide.

Eliminate or reduce the scope of stabilization clauses

There is currently a consensus that broad stabilization clauses that completely or almost completely "freeze" national law, including environmental or social laws affecting fundamental human rights, are unacceptable. This position is reflected in the 2011 [United Nations' Guiding Principles on Business and Human Rights](#), which warns of the negative impacts of these clauses. In addition, and as indicated in the Organisation for Economic Co-operation and Development's 2019 document [Policy Dialogue on Natural Resource-Based Development](#), the need for stabilization clauses, even when limited to the tax regime, is now being challenged, and recommendations are, at minimum, to limit and rationalize their use. As a result, and in view of their negative impacts, both stabilization clauses in Malagasy legislation could simply be deleted. Otherwise, their scope will have to be strictly limited to certain specific tax aspects, with exceptions, and their duration will have to be reduced and specified.

Restore a central place to the technical opinion of ONE, developed on the basis of the ESIA, for environmental permit.

The technical advice of ONE, which is supposed to be built on an inclusive process, must play a central role in environmental permit. Indeed, the ministerial authority granting the environmental permit must be able to base its final decision making on the conclusions of this technical body. The environment minister's power to override the technical opinion of ONE when it doesn't support a new mining project could be replaced by an enhanced coordination mechanism between members of the ad hoc Technical Evaluation Committee and the minister, for evidence-led, concerted, and coherent decision making.



Make the environmental permit a condition for the granting of the operating permit

The provisions on applications for operating permits must be reviewed to ensure that the environmental permit is a prerequisite to obtain an operating permit. To do this, regulations should prevent the consideration of an application for an operating permit before the environmental permit has been granted. The environmental permit should then mandatorily form part of the application package for the operating permit.

Involve the public in the preparation of the ESIA report

For better public input into the ESIA process, the public must be involved from the outset. To this end, the government should start by helping communities understand the process and their rights to take part. In this regard, local communities would benefit from continuous capacity building. Then, regulations should require mining companies to engage with communities from the scoping stage of the ESIA onward, stating what form this engagement should take. Lastly, guidelines could be developed or strengthened on how stakeholder input will be integrated into the project from the scoping stage onward and into the preparation of the report.

Acknowledgements

This note was prepared by the International Institute for Sustainable Development. It is based on the *Evaluation Report of the Legal Framework Governing Environmental and Social Impact Assessment in the Mining Sector in Madagascar*. The report was prepared with input from project partners with the Swiss Network for International Studies, including the Centre for Development and the Environment, the University of Bern, the Centre on Conflict, Development & Peacebuilding, Geneva Graduate Institute (formerly, the Graduate Institute of International and Development Studies), and the University of Antananarivo.

The report on which this note is based also benefited from specific contributions by Julie G. Zähringer (Project Coordinator at the Swiss Network for International Studies) and Onintsoa Ravaka Andriamihaja (Principal Scientific Researcher at the Centre for Development and the Environment), who firstly helped with the collection of data through field consultations and then offered observations and comments on the various drafts of the report.

We also wish to thank Nogaye Mbengue for providing support through collecting data on Malagasy legal texts on environmental and social impact assessment, as part of the preparation of the report.

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Head Office

111 Lombard Avenue, Suite 325
Winnipeg, Manitoba
Canada R3B 0T4

Tel: +1 (204) 958-7700

Website: iisd.org

Twitter: [@IISD_news](https://twitter.com/IISD_news)

