

Environmental and Social Impact Assessment in Countries with Limited Regulatory Frameworks: Lessons from the Democratic Republic of the Congo

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Abstract

Approved in July 2011 by the government of the Democratic Republic of Congo (DRC), the Environmental Framework Law obliges developers of industrial projects to perform an Environmental and Social Impact Assessment (ESIA) and undertake public consultation. However, the DRC regulatory instruments currently in effect do not provide practical information on topics such as categories of projects subject to an ESIA, specific environmental standards or limits, consultation guidelines, and technical details on ESIA development and validation. While the DRC's vast natural resources present a number of opportunities for investment in the mining, oil and gas, and power sectors, its limited environmental and social regulatory framework compounds the already complex challenges of working in a developing country environment and creates uncertainties for project developers which result in additional risks to projects' success.

Based on the case of the DRC and experience from other developing countries in sub-Saharan Africa, the paper identifies issues and risks that can arise for companies working in countries with limited environmental and social regulatory frameworks. The paper then shows how the voluntary application of international and corporate standards for environmental and social performance, which are often more stringent than local requirements, can help minimize risk by providing structure to the assessment and management of environmental and social impacts and serving as common guidelines for developers and local regulators. The lessons learned present valuable guidance to companies working, or looking to begin work, in countries with similar gaps in environmental and social regulations.

Keywords

Democratic Republic of the Congo (DRC); Environmental and Social Impact Assessment (ESIA); Regulatory Framework; IFC Performance Standards

Introduction

An Environmental and Social Impact Assessment (ESIA) is an important tool in a project's planning phase. It allows project proponents to determine what impacts their project may incur on the surrounding environment and communities and, with that knowledge, develop Environmental and Social Management Plans (ESMPs) to manage those impacts. A project proponent can also enhance the effectiveness of the ESIA process by engaging stakeholders to utilize the feedback in finalizing project designs and mitigation measures that better address concerns and needs. Through proactive impact management and relationship-building with stakeholders, the project proponent is more likely to be viewed as a responsible corporate citizen, to secure permits and a social license to operate, and be better positioned for the successful construction and operation of its project.

The benefits of undertaking an ESIA and developing and implementing ESMPs are clear. However, the process and standards by which a project proponent achieves these steps, with outcomes acceptable to stakeholders, can be decidedly less clear in some contexts.

This paper draws from our experiences in the Democratic Republic of the Congo (DRC) and other sub-Saharan African countries that feature, to varying degrees, limited regulatory frameworks with regards to ESIA requirements and environmental and social performance standards. We first define a "limited regulatory framework" and then we explore common challenges faced by our international clients. Finally, we describe approaches to navigate these contexts and minimize risks associated with poor environmental and social performance.

Defining a "Limited Regulatory Framework"

A "limited regulatory framework" may arise from an absence of legislation or a situation where legislation exists, even plentifully, but enforcement is weak. In this paper, we concentrate on the former, describing countries that have no clear legislation that requires projects or companies to consider environmental and social issues as part of their obligations, or little to no regulation that provides detailed insights to:

- The process for undertaking an ESIA, including the designation of a lead agency tasked with reviewing and approving the project, type of projects subject to an ESIA, the expected timeframe for review and, if applicable, associated fees;
- Environmental limits or standards to be applied in assessing and managing impacts to receptors such as air, water, soils, flora and fauna;
- Social and health standards to be applied in assessing and managing impacts to receptors such as land users and the workforce;
- Stakeholder engagement requirements (e.g., public consultation meetings); and
- Ongoing monitoring and auditing requirements.

As an example, consider the DRC, a country with vast potential in sectors such as mining, oil and gas, power, and agroforestry, but possessing a limited regulatory framework to guide companies interested in developing projects.

The establishment of the DRC's Mining Code (*Loi n° 007/2002 du 11 juillet 2002 portant Code Minier*) marked an early step in the development of an environmental regulatory framework. The code, followed by the Mining Regulation (*Décret n°038/2003 du 26 mars 2003 portant règlement minier*), obliges mining exploration and development projects to perform an EIA and public consultation. Annex IX of the Mining Regulation (Directive on Environmental Impact Assessment) provides detail for the EIA process for mining projects and guidelines related to noise and vibration, air emissions and water quality.

In July 2011, the DRC government enacted the Environmental Framework Law (*Loi n°11/009 du 09 juillet 2011 portant principes fondamentaux relatifs à la protection de l'environnement*), which establishes fundamental principles relative to the management and protection of the environment. The law extends the environmental regulatory framework beyond the mining sector and also emphasizes a social component in the assessment process, obliging proponents of industrial projects to perform an ESIA and public consultation. The law does not, however, provide practical guidance on topics such as the types of projects subject to an ESIA or consultation, specific environmental standards or limits, and details on ESIA development and validation.

Key Challenges

While a limited regulatory environment could appeal to project proponents eager to minimize costs associated with environmental studies and management obligations, in reality the situation creates a large degree of risk.

Project Planning

The most glaring issue associated with a limited regulatory framework relates to planning and financial forecasting. In some cases, for example, it can be difficult to predict a timetable for the issuance of an environmental authorization. The cumulative effect of a number of uncertainties in the process can result in substantial financial implications, as commencing project phases are often contingent on authorization.

Considering the installation of an international submarine fibre optical cable in DRC waters can help illustrate the issue. Such a project involves complex planning and logistics. Given the high costs associated with cable installation (such as the use of a specialized vessel that may be contracted at daily rates), the schedule is very sensitive to modifications. Any delays can significantly increase the project proponent's financial risk.

Unclear mandates within the government can also complicate the planning process. It can be unclear at times which regulatory authority is authorized to issue permits or enforce compliance, which can lead to conflicts. For example, in the case of a cement plant and associated limestone quarry in the DRC, the ESIA might fall under the authority of the Ministry of Mining (due to the quarry aspect) or the Ministry of Environment (for the cement plant).

The involvement of affected communities in the ESIA process – a common and arguably beneficial practice in countries with a robust regulatory framework – can also be a source of delay in the absence of official guidance. In the DRC, the Environmental Framework Law does not articulate whom to consult or the type, timing, number, and objectives of consultations. Without defined expectations, engagements can become subject to interpretation (among regulators, companies, and stakeholders) and extend the process longer than planned.

Reputational Issues

Another issue associated with a limited regulatory framework concerns a company's reputation. All companies wish to work legally, particularly with respect to emotionally fraught subjects such as water pollution, habitat degradation, hazardous waste disposal and community displacement. In situations where related laws do not exist, a defence of legal compliance is *de facto* impossible.

Reputations are further threatened by the potential for misattributed impacts. Even companies that succeed in managing their own environmental impacts may, if located in the same geography as other operators, be “tarred with the same brush” should regulators not have sufficient capacity to distinguish offenders.

The ability to manage impacts throughout the project life also affects reputation. An ESIA remains a largely academic exercise without a robust Environmental and Social Management Plan (ESMP). Monitoring, evaluation, and audits of mitigation measures and other commitments are important steps to improve project implementation and support environmental and social protection outcomes.¹ These actions, however, should ideally be supported by regulations outlining expectations for their implementation.²

Implementation Barriers

Many developing countries derive their basic principles and rules from established systems in developed countries; in Africa, this is often from former colonial powers.³ This practice can include regulatory requirements transcribed verbatim from the other countries' legislation, resulting in countries prescribing or forbidding courses of action that cannot be supported by existing institutional or logistical structures. A common example relates to hazardous waste management. Legislation in many West and Central African countries, such as Decree n° 038/2003 in the DRC, requires the segregation of hazardous waste from non-hazardous waste and disposal of hazardous waste at an appropriately licensed facility. In practice, there are no dedicated hazardous waste disposal sites locally nor is there a licensing process. Often waste streams, regardless of hazard level, may be despatched to informal dumping grounds where they can come into contact with local waste pickers, as has been observed in Senegal, Ghana and Côte d'Ivoire.

Transparency and Responsibility

Costs associated with the ESIA process may not be clearly documented in an official law, which leaves room for negotiations with authorities. The risk of corruption is greater in this context and can affect a company's reputation and jeopardize project development. A lack of applicable legislation can also lead to hidden costs and risks as regulators can exploit a lack of legal detail to impose disproportionately substantial fines for minor infringements.

Finally, all challenges stemming from a limited regulatory framework can negatively affect the attitude of in-country employees towards environmental responsibility, as these deficiencies may foster a belief that environmental issues are not important.

Creating a common framework

For many Sub-Saharan African countries, ESIA legislation is a relatively new phenomenon, beginning in the 1990s and continuing today as the benefits of ESIA are more widely understood.¹ While legislation and regulations develop, project proponents require structured approaches to undertaking ESIA's and developing and implementing ESMPs in the interim. In what ways can project proponents overcome the challenges of initiating and operating their projects in countries with limited regulatory frameworks?

First, companies can benefit from collaboration with reputable experts familiar with the local requirements and context, who can more readily identify risks. Often, these experts can also identify local authorities who will be involved in the permitting process. By building relationships with these authorities, project proponents can better distinguish mandates between different regulatory authorities, identify any changes to legislation or regulations, gain further insights into the ESIA process and determine how regulations are applied in practice.

Applying international standards for environmental and social performance, which are often more stringent than local requirements, can also minimize risk. For instance, while the IFC Performance Standards first require adherence to the national laws and standards of the host country,⁴ they also provide a robust framework to fill gaps that may exist in the host country's regulatory framework, at levels meeting international expectations. We have found that regulators can welcome this solution – in the DRC, environmental authorities informally recommend using the IFC Performance Standards or the World Bank's Safeguard Policies to guide the ESIA process and provide further details on processes than described in legislation, such as consultation with affected communities.

Whilst the IFC Performance Standards themselves are relatively high level, often allowing room for interpretation, the World Bank Group's Sector Guidelines are technical documents, usually providing detailed recommendations and quantitative standards. Consequently, scope exists for these to be used as the basis for ongoing environmental management in the absence of regulatory

requirements. Additionally, the international nature and reputation of the Performance Standards and Guidelines means that adherence to their requirements and recommendations can act as proof of best practice and a responsible approach to environmental and social performance, acting to an extent as a buffer against reputational issues.

Companies with global footprints often develop corporate standards for environmental, health and safety, and social management which, if consistently applied and adaptable to varying contexts, can also provide a framework for quality environmental and social performance. Corporate standards, as with the IFC Performance Standards, will usually call for compliance with local legislation in addition to internal requirements, and have an advantage over the Performance Standards in that they usually prescribe a fixed auditing and reporting regime.

Industry leadership in environmental and social performance can also help a company mitigate risks, such as the issue of hazardous waste management in the DRC presented above. In some instances, environmental management procedures implemented by leading companies become the “rule” within a country and a point of comparison for regulators with other industry actors.

Conclusions

A number of challenges, notably scheduling uncertainties and reputational concerns, are associated with investment and operation in countries such as the DRC that have a limited regulatory framework. This paper has outlined several lessons learned from project experience and shared various approaches that can provide guidance to companies working in such countries.

The early adoption and consistent application of international or corporate environmental and social standards and management systems can lower the risks associated with these challenges. A pragmatic approach would also include collaboration with experts familiar with the local context and able to identify regulators involved in the ESIA process to support a project’s success. Although adherence to national legislation and a comprehensive auditing and reporting regime are inherent in most international or corporate standards, it is also advisable that these elements be specifically addressed.

¹ Arts J., Caldwell P. and Morrison-Saunders A. (2001). *Environmental impact assessment follow-up: good practice and future directions — findings from a workshop at the IAIA 2000 conference*. Impact Assessment and Project Appraisal, 19 (3). pp. 175-185.

² Morrison-Saunders A., Baker J. and Arts J. (2003). *Lessons from practice: towards successful follow-up*. Impact Assessment and Project Appraisal, 21 (1). pp. 43-56.

³ Kameri-Mbote, A. P. and Cullet, P. (1997). *Law, Colonialism and Environmental Management in Africa*. Environmental Management in Africa, 6 (1).

⁴ IFC Performance Standard 1.