



Smartening and Streamlining EIA Regulation in LATAM – Overview of Trends

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Abstract

Years of experience in performing and training on ESHIA in Latin America reveals some promising, and not-so-promising, trends in how nations in the region are streamlining and improving decision-making in ESHIA regulation. Over the decades, ESHIA regulation in LATAM has yielded highly formulaic and voluminous ESHIAs, in some cases driven by environmental penal laws that make regulators liable for decisions that may be alleged to cause environmental damages. Recent attempts to promote smarter and more streamlined ESHIA in Argentina, Brazil, Peru, Colombia, Guyana and Mexico show varying degrees of success and lessons learned. In collaboration with our in-country experts, the authors will highlight the status and trends of ESHIA regulation in the region, focusing on these six countries.

Introduction


Developers and investors worldwide seek predictability, and the changing regulatory landscapes of Latin America (LATAM) are no exception. In Acorn International's decades of work on environmental and social risk management solutions for the extractive industry, investors and governments throughout the region, we have observed many positive development programs hampered or stopped because of unpredictable outcomes in meeting environmental review and approval requirements.

This challenge has not been lost on governments of Latin America seeking foreign investment. Brazil flexibilized its famously rigorous EIA approval requirements and added early government reviews to highlight potential regulatory "red flags." Mexico issued separate guidance for baseline studies and social impact assessments on top of EIA requirements to separate and, in theory, simplify each stage. And in an effort to be more attractive to foreign investors, Peru has been evaluating changes to its approvals and consultation requirements which have been blamed for excessive project delays and abandonments.

One common thread that developers can expect throughout these regulatory regimes is the importance of key issues that virtually all regulators will focus on during their approval reviews: biodiversity, indigenous and human rights, and climate change/resiliency. This paper seeks to highlight examples of how regulators in key countries in the region are addressing expectations for each area, and what efforts are underway to make the approval processes more predictable and streamlined.

Biodiversity

Biodiversity has been increasingly recognized by both governments and the business community worldwide as a critical element of environmental impact assessment due to its



support of ecosystem's services and function.^{1 2} Despite this, and despite the fact that Brazil is widely recognized for its rich biodiversity resources, there has been relatively little focus placed on this specific topic in Brazilian environmental legislation regarding environmental impact assessments (EIAs). What regulations do exist are interwoven with wider environmental conservation and management tools including requirements for offsets and forest reserves in rural properties³ and use of national and sub-national red books of threatened and endangered species.⁴

The need for increased protection for biodiversity will only increase with increased threats to environmental resources. However, additional biodiversity protection requirements would have to be implemented in a regulatory environment that is currently trending towards weakened environmental legislation and enforcement, often with the stated goal of streamlining a notoriously complex environmental approval process. It is more likely that in the foreseeable future, project-specific biodiversity assessment, protection, and/or enhancement measures will be driven more by corporate policy, lender requirements, project commitments to ESG initiatives, or company risk-reduction measures than by Brazilian environmental legislation.

Indeed, we have seen this dynamic play out in a recent assignment for a mining operation in the Amazon River Basin. The project proponent is conducting assessments of impacts to biodiversity and ecosystem services (in addition to legally required EIA and Critical Habitat Assessment). This is motivated not by regulatory requirements, but first by the company's desire to avoid reputational impacts and objections to permit applications by traditional communities who have been impacted by past mining operations, and second by the company's and its owners' interests in complying with international lender standards.

Ongoing efforts by legislators to streamline Brazilian environmental legislation have been critiqued for allowing insufficiently rigorous EIAs, for potentially impacting vulnerable communities through insufficient public consultation, and for not lacking specificity in consideration of sensitive biomes.⁵ Nevertheless, the benefits and need for streamlining of Brazil's notoriously complex environmental legislation is widely recognized by both industry and environmentalists alike, and both project proponents and EIA practitioners should continue to monitor the status of proposed regulations.

Indigenous and Human Rights

Among the emerging issues influencing the success of capital projects worldwide, none is more important than indigenous peoples relations and human rights. Developers in the Americas


¹ IPIECA-IOGP. 2016. *Biodiversity and ecosystem services fundamentals: Guidance document for the oil and gas industry*. London, United Kingdom: IPIECA. Available at: <https://www.ipieca.org/resources/good-practice/biodiversity-and-ecosystem-services-fundamentals/>, last accessed 14 May 2021.

² Stephenson, P.J. and Carbone, G. (2021). *Guidelines for planning and monitoring corporate biodiversity performance*. Gland, Switzerland: IUCN. Available at: <https://portals.iucn.org/library/node/49301>, last accessed 14 May 2021.

³ See Brazil's 2012 "Forest Code" (Portuguese): *Lei Nº 12.651, de 25 de Maio de 2012*. Available at: http://www.planalto.gov.br/ccivil_03/_ato2011-2014/2012/lei/12651.htm, last accessed 14 May 2021.

⁴ See, for example: ICMBio/MMA. 2018. *Livro Vermelho da Fauna Brasileira Ameaçada de Extinção: Volume I*. Brasília, Brasil: Instituto Chico Mendes de Conservação da Biodiversidade. Available at: https://www.icmbio.gov.br/portal/images/stories/comunicacao/publicacoes/publicacoes-diversas/livro_vermelho_2018_vol1.pdf, last accessed 14 May 2021.

⁵ See, among other critiques: Bragagnolo, C., Lemos, C.C., Ladle, R.J. and Pellin, A., 2017. Streamlining or sidestepping? Political pressure to revise environmental licensing and EIA in Brazil. *Environmental Impact Assessment Review*, 65, 86-90.



have come to expect, and be prepared to manage, the increasing appreciation and influence of indigenous people on the outcomes of proposed and on-going ventures. ESIA processes in Colombia and Peru, in particular, have prior consultation/FPIC requirements hard-wired into the approval processes, so much so that dozens of proposed economic developments are either being abandoned or delayed into *force majeure* because of inability to gain approvals. Mexico's social impact assessment process for energy industry developments (*Evaluación de Impacto Social* or EVIS) requires an independent approval process from the EIA/MIA – integrating a wider constitutional requirement to achieve FPIC with any affected indigenous groups.

While most countries are strengthening the ties binding indigenous group consent to EIA approval, Brazil has recently taken a turn in the other direction. In late 2019, Brazil's President relaxed regulations protecting the country's roughly 900,000 indigenous people, messaging to business that some of the lands to which these people have held rights should now be considered open to exploration for extractives by private industries. Nonetheless, Brazil's EIA process does recognize indigenous rights through a requirement to gain specific approval from the governmental agency for indigenous affairs⁶ prior to and separately from approval of the EIA.

Consultation with indigenous populations is of great importance in the region as many projects which require EIAs are located in areas with significant indigenous populations. Whereas Mexico, Argentina, Colombia and Peru have detailed guidelines stretching from respecting the language to taking into consideration traditional customs, Guyana does not have established government guidelines, merely recognizing that a best practice is to accommodate tribal leaders. Brazil has established best practices for FPIC, but political changes have affected the way in which this process is conducted. In contrast, Peru and Colombia (along with Bolivia and Ecuador) have adopted Regional Standards for Defense Actions in Prior Consultations,⁷ guidelines which not only emphasize the need for prior consultation and consent, but also provide guidelines for how to conduct the consultation.

Despite the challenges of politics, conflict, and implementation, there is evidence that governments in LATAM are recognizing and increasing their scrutiny of indigenous and human rights issues in the EIA process. This trend – driven primarily from within-country stakeholders – is likely to continue in the region.

Climate Change Resilience

The mechanisms by which climate change is considered in EIAs in LATAM – whether due to regulatory requirements or regulator preference – vary substantially by country. Many countries in the region have instituted national climate change policies, such as Brazil's 2009 National

⁶ Up until recently this was *Fundação Cultural Palmares*, but responsibility is shifting to *Instituto Nacional de Colonização e Reforma Agrária* (INCRA).

⁷ Aedo, N. and Bustamante, M. 2017. *Estándares regionales de actuación defensorial en procesos de consulta previa de Bolivia, Ecuador, Colombia y Perú*. Lima, Peru: Defensoría del Pueblo. Available at: https://www.rindhca.org/images/publicaciones/redes_indh/consulta_previa/Documento_Estandares_actuacion_defensorial_en_consulta_previa.pdf, last accessed 14 May 2021.



Policy on Climate Change⁸ and Argentina's 2019 Climate Change Law⁹, however the implementation of these laws and their applicability to the EIA process varies.

In Brazil, national climate legislation is linked to EIA by a requirement to consider mitigation measures related to greenhouse gas emissions in the EIA process. In contrast, Argentina currently lacks federal requirements for climate consideration in EIA (such as inclusion in EIA Terms of Reference [TORs], or requirements that proponents conduct a climate change risk assessment). In Argentina, regulatory power is more concentrated at the sub-national (municipal and state) level than in other countries, and both project proponents and EIA practitioners are more likely to encounter climate-related EIA policies at that level before encountering national requirements.

Guyana takes a third approach to the consideration of climate change in EIA. The Guyana Environmental Protection Agency (EPA) does not have formal regulations requiring that climate change be addressed in EIAs. However, there has been a trend in recent years of the agency including climate impacts in EIA TORs and/or requiring projects to conduct a climate change risk assessment. The Guyana EPA is currently reviewing EIA regulations across multiple industry sectors to ensure alignment with current projects, and it is possible that following this review, additional climate change consideration requirements will be implemented.

In the coming years, we anticipate that the current patchwork of regulations related to consideration of climate change in LATAM EIAs will be strengthened and more clearly integrated with existing national EIA legislation. However the timeline for this shift, and the strength of the implementation in practice, remain to be seen.

Conclusion

Although the political, legislative, and operating context in which EIAs are conducted and the process for their approval varies substantially across LATAM (as described throughout this paper), there are common trends which we have observed in our recent work throughout the region.

First, as detailed above, EIAs in LATAM are aligning with a global trend of increased consideration of three key issues: biodiversity, indigenous and human rights, and climate change. While increased scrutiny of these issues is a common trend, the drivers for each topic vary. Consideration of biodiversity and indigenous and human rights is driven by interests within the country, including governmental departments, interest groups, and indigenous groups themselves. However, increased scrutiny of climate risk driven primarily by international interests including lenders and finance organizations as well as commitments to international accords. We anticipate that this interest and focus will continue to increase.

Second, EIAs conducted in the region are far more complex and voluminous than in other parts of the world. This is due in part to regulatory requirements, but also due to typical training of EIA and industry practitioners, and to laws that make regulators personally liable for environmental impacts of projects they approve. While there are efforts underway to streamline EIA processes,

⁸ 2009 "National Policy on Climate Change" (Portuguese). *Lei Nº 12.187, de 29 de Dezembro de 2009*. Available at: http://www.planalto.gov.br/ccivil_03/_ato2007-2010/2009/lei/l12187.htm, last accessed 14 May 2021.

⁹ 2019 "Climate Change Law" (Spanish). *Ley de Presupuestos Mínimos de Adaptación y Mitigación al Cambio Climático Global*. Available at: <https://www.argentina.gob.ar/normativa/nacional/ley-27520-333515/texto>, last accessed 14 May 2021.



we anticipate that the complexity of these processes is unlikely to significantly change in the near future.

In the face of these trends, EIA practitioners working in LATAM are uniquely positioned to enhance the practice and outputs of EIA. EIAs are an important component of a project's regulatory approval process – a process that developers have an interest in being as predictable as possible, and that EIA practitioners are often expected to facilitate. But in the face of emerging trends and evolving standards and legislation, EIA practitioners may find that the best way to deliver a predictable EIA process and outcome is to not just execute a predictable EIA, but go above and beyond strict TOR and regulatory requirements to integrate forward-looking consideration of key issues. Implementing existing international best practices for EIA, such as careful engagement with authorities and sensitive communities and alignment with overarching sustainability frameworks, but in an enhanced and forward-looking manner, may help ensure that key emerging issues are addressed to the degree necessary to mitigate environmental and social risk and also contribute to sustainable development.