

Briefing

Law; Climate change

Keywords:

Climate change mitigation, climate change adaptation, environmental and social standards, land-based investments, legal rights



Columbia Center
on Sustainable Investment
A JOINT CENTER OF COLUMBIA LAW SCHOOL
AND THE EARTH INSTITUTE, COLUMBIA UNIVERSITY



ALIGN

Issue date
October 2023

Policy pointers

Advancing

implementation of the Paris Agreement requires governments to realign investment policies and approval processes with climate goals.

Climate change should

be understood as an impact to be covered by all ESIA, even if ESIA laws do not expressly mandate it — though more explicit legislative requirements can enhance clarity.

Addressing climate

issues in ESIA entails a more holistic approach in law and practice, to consider cumulative, indirect and interconnected impacts at local to global levels.

Making impact

assessments work requires safeguarding them in the face of pressures to fast-track investments and enhancing methodologies, accountability, support and independent review systems.

Climate change in impact assessments: towards an integrated approach

The Paris Agreement sets clear climate goals and calls for making finance flows consistent with a pathway towards low greenhouse gas emissions. Many national policies have responded by encouraging investments in 'green' sectors such as 'transition minerals', often reproducing extractive industry problems while also continuing to support investment in fossil fuels. Yet transitioning towards low-carbon economies requires a more systemic rethink of which investments to promote, aligning investment policies with climate goals. Environmental and social impact assessments (ESIAs) can offer levers to implement this shift. But relative to current practice, fulfilling this potential requires a more integrated approach to assessing climate impacts in investment approval processes, and effective accountability, support and independent review systems.

Around the world, at least 384 coal mines have opened since 2015, when the Paris Agreement was signed.¹ The bulk of these mines are in China, followed by Indonesia, but authorities have also approved coal mines in India, South Africa, Australia and the United States, for example. Apart from a spike in 2021, the number of newly opened coal mines has remained relatively stable year on year.

These developments illustrate disconnections between climate policy and investment approval. Climate policies (Nationally Determined Contributions) in some countries envisage the growth of fossil fuel sectors, including to generate electricity from coal. But while newly approved coal mines typically have lifetimes of more than 20 years,² the Glasgow Climate Pact of 2021 called on states to accelerate efforts towards the 'phase-down' of coal power.³ Despite coal being a

major source of greenhouse gas (GHG) emissions, many of the mines will have undergone an environmental impact assessment and obtained a permit from the relevant environmental agency.

These misalignments are not limited to coal. Oil and gas exploration is underway in many parts of the world — even though energy scenarios consistent with keeping temperature rises below 1.5°C require no investments in new oil and gas fields.⁴ Many governments have also promoted and approved industrial-scale monoculture projects, whereas evidence shows that diversified land use makes people and ecosystems more resilient to climate change.⁵

The Paris Agreement calls for "[m]aking finance flows consistent with a pathway towards low greenhouse gas emissions and climate-resilient development".⁶ This entails a systemic rethink of which types of investment to promote, aligning

Effective impact assessments draw on technical expertise and public consultations

investment with climate policy. Arrangements for vetting proposed investments can offer levers to implement this shift — including environmental and social impact assessments (ESIAs), which are the main mechanism through which the environment can be considered in investment approval processes. But this requires changing how governments assess the impacts of proposed investments and making ESIs a more effective tool through which to address climate.

Impact assessments in outline

ESIAs assess the likely or potential impacts of a proposed project. They also identify alternatives to the option proposed and actions to minimise impacts. Effective impact assessments draw on technical expertise and public consultations that enable affected people and concerned citizens to provide input. ESIA findings inform the formulation of the social and environmental management plans to be applied throughout the project's lifetime and after closure. Where authorities approve an ESIA and management plan, they typically issue environmental permits while also requiring compliance with the management plan.

Under general international law, states must conduct an environmental impact assessment for activities within their jurisdiction that risk causing significant environmental harm to other states.⁷ In addition, several treaties regulate environmental impact assessments within national jurisdictions and in transboundary contexts.⁸ Impact assessments have also been found to be required under human rights law.⁹

Detailed ESIA regulation hinges primarily on national law. Since the 1992 United Nations Conference on Environment and Development, many states have adopted laws requiring an environmental impact assessment for proposed projects that may have significant effects on the environment. National requirements frequently also include identification and mitigation of social impacts. Explicit references to climate change are rare in ESIA laws and regulations, but courts have found that the broad notion of 'environmental impacts' includes climate.¹⁰ In the US state of Montana, a court declared unconstitutional a provision that restricted ESIs from considering global climate impacts.¹¹

Some national laws and regulations reference climate more explicitly, particularly among those enacted after the 2015 Paris Agreement. For example, Uganda's National Environment (Environmental and Social Assessment)

Regulations of 2020 include extensive references to climate change, while Mali's Decree 0991 of 2018 lists climate among the relevant environmental impacts.¹² Canada's Impact Assessment Act of 2019 requires impact assessments to consider the extent to which proposed projects hinder or contribute to Canada's "ability to meet its environmental obligations and its commitments in respect of climate change".¹³

Impact assessments under pressure

In practice, some governments have approved investments without proper ESIs to minimise costs or fast-track projects. In sectors such as mining, full ESIs are often required only when projects move from exploration to extraction stages; at that point, it may be more difficult for authorities not to approve projects, or to substantially alter their design.¹⁴ Inadequate company systems and perverse incentives affect the quality of ESIs: impact studies are usually financed and contracted by the investor, creating potential conflicts of interest.¹⁵

In addition, consultation processes are often lacking, while project information may be inaccessible for most potentially affected people. The effectiveness of ESIs is also limited by strained institutional capacity and fragmented regulatory responsibilities in the government agencies that review impact studies and monitor compliance with management plans. Environmental authorities are often in a weak negotiating position vis-à-vis other ministries, such as a ministry of mines. Many impact assessments thus fail to adequately identify risks or to establish effective responses. The denial or delayed approval of environmental permits has also resulted in businesses initiating arbitrations against governments, based on international treaties protecting foreign investment.¹⁴

Underlying several of these problems is the strong emphasis many governments place on promoting investment, and the (mis)perception that rigorous ESIs could get in the way of that objective. In some cases, this pro-business policy thrust has translated into regulatory rollbacks that, in the name of creating jobs and promoting economic growth, reverse or water down hard-fought ESIA requirements.¹⁶ Similarly, economic and political pressures to promote investments deemed necessary for the transition to lower-carbon economies have resulted in measures to 'streamline' approval processes.¹⁷ This has raised public concerns about ensuring that administrative simplification does not occur at the expense of properly considering impacts.

A fragmented approach to the environment

Consideration of climate change issues has often been a particularly weak spot in ESIA. This includes assessing how proposed activities would affect climate change mitigation, such as through carbon emissions or sequestration, or climate resilience, such as by impacting a country's or community's ability to adapt to climate change or recover from shocks. The problem partly stems from structural features of ESIA and the lack of explicit climate provisions in many ESIA regulations.

ESIA typically consider the likely impacts of a proposed project, focusing on direct, localised impacts more than the diffuse global effects of emissions and ultimate impacts of climate change on people and the environment. Over time, more careful approaches have broadened the remit, for example to consider cumulative effects of multiple projects in a locality or wider impacts of proposed policies and strategies.¹⁸ But the project entry point remains a key feature of ESIA in investment approval processes.

Land-based investments — for example, in mines or agribusiness plantations — illustrate this issue. Because of their land footprint, these projects are often associated with significant local impacts, such as forest clearing, displacement of people, or water abstraction or pollution; so ESIA often focus on these aspects. Yet these impacts can have climate dimensions, too: for example, deforestation releases GHGs and destroys carbon sinks; and in blocking livestock corridors, projects can undermine pastoralists' resilience to climate shocks such as droughts.

Economic activities are typically interlinked. Investments operate not in isolation but as part of value chains that involve connected activities both upstream and downstream of the proposed project. Overall climate impacts arise therefore not only from the project itself but also from activities that it makes possible. For example, a new coal mine raises climate issues not only because of the GHGs its construction and operation emit but also because the coal extracted will be sold and ultimately burned for power generation, possibly in distant places. (Such indirect emissions are referred to as 'Scope 3')¹⁹

Rigorous consideration of a project's impacts on climate change mitigation and resilience is an emerging practice. And most ESIA do not consider the environmental impacts of activities downstream of the proposed project. Depending on the sector and the country, a downstream activity may require a separate ESIA, primarily focusing on the direct impacts of the downstream

project. There are reasons for this: the downstream activity may be a separate enterprise, run by a different company in a different country. But this approach does not always capture all impacts. For example, an ESIA requirement will probably not apply to coal burning by small businesses and households. The approach reflects a fragmented view of environmental impacts, making it easier for climate-harmful projects to pass an ESIA process and receive an environmental permit.

A shift in approach?

A more integrated approach that considers interconnected impacts at different levels would need to overcome practical challenges. Data constraints, methodological difficulties and uncertain projections are a recurring problem in ESIA. These become even more acute when considering multidimensional climate impacts, including indirect ones. For example, the sources of downstream GHG emissions can be spread across different places. Target markets and final product use may not always be fully defined at the project design stage and can change over time.

But increasingly robust climate-related data and methods increase scope for a more holistic approach. As regards climate change mitigation, this includes methods to consider indirect GHG

Box 1. Developments in national jurisprudence

Disputes over polluting projects have resulted in court litigation, for example when young people, environmental advocates and concerned citizens challenge government decisions approving fossil fuel investments. Courts have also assessed evidence and arguments ahead of government decisions on environmental permits. In several cases, courts have considered downstream GHG emissions and ruled against proposed projects, leveraging ESIA laws that, while not necessarily mentioning climate change, allow consideration of climate aspects.

In the Australian case *Waratah Coal Pty Ltd v. Youth Verdict Ltd & Ors*, the Queensland Land Court recommended that government agencies refuse a mining lease and environmental permit for a proposed coal mine. The court was tasked with making recommendations to government after a group of young people and environmental activists objected to the lease and permit being granted. The court noted that "granting permission to mine the coal cannot be logically separated from the coal being used to generate electricity". It thus considered downstream GHG emissions from coal burning and concluded that the mine would have unacceptable climate impacts.²²

This ruling followed an earlier case in which Australia's New South Wales Land and Environment Court declared void approval of an impact assessment that examined GHG emissions from a proposed coal mine but not from coal burning downstream.²³ Comparable judicial developments have occurred in other countries, such as the United States.²⁴ These cases point to the role of advocates in ensuring ESIA properly address climate change. Although government agencies have primary institutional responsibility for overseeing ESIA, activists often support public participation, scrutinise impact studies and monitor compliance with management plans.

emissions.²⁰ Some national instruments provide openings for this shift, for example calling on authorities to consider indirect climate impacts upstream, such as the emissions generated to produce the electricity necessary to power a project.²¹ But it is national courts that have spearheaded the biggest shifts towards more comprehensively addressing climate in ESIA (Box 1).

Towards a new generation of ESIA

Aligning investment and climate policies entails a rethink of the processes through which public decisions on investment are made. For all their limitations, ESIA offer an institutionalised arrangement to consider the environment, and climate change, before approving investments.

Litigation challenging ESIA on climate grounds has focused on climate change mitigation and carbon-intensive activities such as mining and burning coal. As carbon budget constraints become more apparent, these activities present greater scope for sector-wide 'phase-downs', rather than project-by-project decisions, in line with international commitments. Meanwhile, integrating climate change mitigation and resilience in ESIA can inform decisions on a wider range of investments where climate impacts are less clear-cut.

This entails understanding climate change as an environmental impact all ESIA should cover, even if ESIA laws do not expressly mention it — though more explicit laws can enhance clarity. As passing legislation takes time, governments can also issue guidance on how climate should be considered under existing regulations.

Making ESIA work in practice requires safeguarding them in the face of often intense pressures to fast-track investments. It needs further methodological advances, climate expertise in environmental agencies and effective public participation and scrutiny. It requires deep changes in ESIA approaches, developing 'next-generation' ESIA¹⁸ that consider cumulative, indirect and interconnected impacts more holistically. And it needs accountability, support and independent review systems to address the factors that often undermine ESIA quality — from conflicts of interest to pressures on regulatory agencies.

Lorenzo Cotula

Lorenzo Cotula is head of the Law, Economics and Justice programme at IIED.

With thanks to Esther Akwii, Eric Bisil, Nora Mardrossian, Emily Polack, Kyla Tienhaara and Lara Wallis for their helpful comments, although the views expressed are the author's.

As part of the ALIGN project, CCSI is preparing a related briefing note that comprehensively discusses integrating climate change in investment approval.



Knowledge Products

The International Institute for Environment and Development (IIED) promotes sustainable development, linking local priorities to global challenges.

The Columbia Center on Sustainable Investment (CCSI) is a leading applied research center dedicated to the study, discussion and practice of sustainable international investment.

Namati advances social and environmental justice by building a movement of people who know, use and shape the law.

Implemented by a consortium led by IIED, CCSI and Namati, the Advancing Land-based Investment Governance (ALIGN) project supports governments, civil society and other actors in strengthening the governance of land-based investments.

Contact

Lorenzo Cotula
lorenzo.cotula@iied.org

Third Floor, 235 High Holborn
London, WC1V 7DN
United Kingdom

Tel: +44 (0)20 3463 7399
www.iied.org

IIED welcomes feedback
via: @IIED and
www.facebook.com/theiied

ISBN 978-1-83759-050-6

This material has been produced as part of ALIGN, which is funded with UK aid from the UK Government. However, the views expressed do not necessarily reflect the official views or policies of ALIGN partners or the UK Government.



Notes

¹ Paragraph based on 2015–2022 data from: Global Energy Monitor (2023) Global Coal Mine Tracker. <https://globalenergymonitor.org/projects/global-coal-mine-tracker> / ² Hauenstein, C (2023) Stranded Assets and Early Closures in Global Coal Mining under 1.5°C. *Environmental Research Letters* 18(2). / ³ Report of the Conference of the Parties serving as the meeting of the Parties to the Paris Agreement (Glasgow, 31 October–13 November 2021). Addendum: Decision 1/CMA.3, para. 36. https://unfccc.int/sites/default/files/resource/cma2021_10_add1_adv.pdf / ⁴ International Energy Agency (2021) Net Zero by 2050: A Roadmap for the Global Energy Sector, 23. https://iea.blob.core.windows.net/assets/beceb956-0dcf-4d73-89fe-1310e3046d68/NetZeroBy2050-ARoadmapfortheGlobalEnergySector_CORR.pdf / ⁵ Intergovernmental Panel on Climate Change (2019) Special Report: Climate Change and Land. Section 5.3.2.3. www.ipcc.ch/srccl/chapter/chapter-5 / ⁶ Paris Agreement, Article 2(1)(c). / ⁷ *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, International Court of Justice (ICJ), 20 April 2010, para. 204; *Certain Activities Carried out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)* / *Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica)*, ICJ, 16 December 2015, para. 104. / ⁸ For example, Convention on Biological Diversity, Article 14; Espoo Convention on Environmental Impact Assessment in a Transboundary Context. / ⁹ For example, *Saramaka People v. Suriname*, Inter-American Court of Human Rights, 28 November 2007, para. 134. / ¹⁰ See for example, the South African case *Earthlife Africa Johannesburg v. The Minister of Environmental Affairs and Others*, 8 March 2017, [2017] 2 All SA 519, paras. 78–91. / ¹¹ *Rikki Held and Others v. State of Montana*, 14 August 2023, Mont. Dist. Ct CDV-2020-307. / ¹² Sections 15(1)(a) and 21(1)(i) of Uganda's regulations and 2 and 34–36 of Mali's decree. / ¹³ Section 22(1). / ¹⁴ Nikiéma, S (2019) Legal Framework of Environmental and Social Impact Assessment in the Mining Sector. International Institute for Sustainable Development. www.iisd.org/system/files/publications/igf-esia-background-en.pdf / ¹⁵ Kazemi, L, Toledano, P and Mebratu-Tsegaye, T (2022) Tackling the EIA Impact Gap: Addressing Political Economy Realities to Bring Actual Practice Closer to Best Practice. Columbia Center on Sustainable Investment. <https://ccsi.columbia.edu/sites/default/files/content/docs/Tackling-the-EIA-Impact-Gap-Addressing-Political-Economy-Realities-to-Bring-Actual-Practice-Closer-to-Best-Practice.pdf> / ¹⁶ See for example, Febry, P, Malik Akdom, A and Seigneret, A (2023) Bringing coherence and a rights-based approach to Indonesia's climate and investment governance. IIED, London. www.iied.org/21561iied/ / ¹⁷ For example, the US Infrastructure Investment and Jobs Act 2021 directs the Secretary of the Interior to "complete the Federal permitting and review processes with maximum efficiency and effectiveness" with respect to critical minerals projects on federal land (Section 40206(c)). / ¹⁸ Sinclair, AJ, Doelle, M and Gibson, RB (2022) Next Generation Impact Assessment: Exploring the Key Components. *Impact Assessment and Project Appraisal* 40(1) 3–19. / ¹⁹ World Business Council for Sustainable Development and World Resources Institute (2004) The Greenhouse Gas Protocol: A Corporate Accounting and Reporting Standard. <https://ghgprotocol.org/sites/default/files/standards/ghg-protocol-revised.pdf> / ²⁰ For example, IPCC (2019) 2019 Refinement to the 2006 IPCC Guidelines for National Greenhouse Gas Inventories. www.ipcc.ch/report/2019-refinement-to-the-2006-ipcc-guidelines-for-national-greenhouse-gas-inventories; International Council on Mining and Metals (2023) Scope 3 Emissions Accounting and Reporting Guidance. www.icmm.com/en-gb/guidance/environmental-stewardship/2023/scope-3-emissions-accounting-and-reporting / ²¹ For example, Canada's Strategic Assessment of Climate Change (2020). www.canada.ca/en/services/environment/conservation/assessments/strategic-assessments/climate-change.html / ²² *Waratah Coal Pty Ltd v. Youth Verdict Ltd & Ors* (No 6), [2022] QLC 21; citation from para. 25. / ²³ *Gray v Minister for Planning and Ors*, [2006] NSWLEC 720. / ²⁴ *Mid States Coalition for Progress and Others v. Surface Transportation Board*, 345 F.3d 520 (8th Cir. 10/2/2003); *High Country Conservation Advocates and Others v. United States Forest Service and Others*, 52 F. Supp. 3d 1174 (D. Colo. 2014).

