

Article

Social Impact Assessment and Mediation

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1 Introduction

Conflicts, and hence mediation, exist between individuals, groups, parties and entire institutions. One particular form is business to community mediation (BtCM), used for resolving conflicts in the planning, construction and operational phase of a capital project. Examples are infrastructural and building projects (e.g. residential complexes, highways, railways, harbours), energy projects (e.g. extraction of oil and gas, pipelines, wind parks) and other industrial projects (e.g. chemical plants, steel industry). These capital projects are often significant in scale, complex in nature (controversies over facts and/or values) and extensive in duration. These complex projects can lead to conflicts between the proponent, the government, surrounding communities and non-governmental organisations (NGOs). These conflicts can be very expensive, as illustrated below.

The social impact assessment (SIA) is international best practice to identify, classify and mitigate impacts in a structured way with affected communities. When well executed and implemented, the SIA is a trust-building effort that can contribute to the prevention of business and community conflicts and improve design to serve business and community objectives. This article will explore the background, and the building blocks, of the SIA and will compare this with different tiers of conflict prevention; a neutral, facilitated, dialogue and information sharing, negotiation, joint fact-finding and formal mediation, before entering into conflict resolution, through arbitration and litigation.

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It will then take a closer look at two forms of mediation: facilitated mediation (no steering on the content or focussed on the process) and directive/evaluative mediation (steering on the content and focussed on the outcome) and will consider the ways in which the SIA can connect to these two formats. In particular, it will look at how the SIA can benefit from the essential techniques used in mediation.

The article concludes with some practical recommendations to test how concepts might best be put into practice.

2 Costs of Conflicts

In complex projects such as infrastructure, energy and industry, conflicts with stakeholders (in risk management terms, non-technical or social risks) have an impact on business value since they can seriously affect business continuity and reputation. In 2008, Goldman Sachs investigated the causes of an average delay of 12 months for 190 oil and gas projects on all continents. Social risks were involved in 73% of the investigated projects, compared with 63% for commercial risks and 21% for technical risks. Ernst & Young identified, in 2019,¹ the social licence to operate as the number one risk for the mining industry, an industry with significant impacts on surrounding communities. Costs due to social conflicts in the extractive industry have been researched by Franks et al (2014),² where the biggest cost category was staff time spent on social risk and conflict management. The risk rating research agency Sus-

1. Retrieved at 20 August 2020 from www.ey.com/en_gl/mining-metals/10-business-risks-facing-mining-and-metals.
2. Davis R. & Franks D.M. (2014). Costs of Company-Community Conflict in the Extractive Sector. Harvard Kennedy School CSR Initiative. Retrieved from www.csr.uq.edu.au/media/docs/603/Costs_of_Conflict_Davis-Franks.pdf.

tainalytics supports, since 1993, hundreds of the world's foremost investors by helping them to better understand their environmental, social and governance risks. In their 2018 report, the 'growing importance of stakeholder governance' is one of the four overarching themes.³ Stakeholders who are potentially negatively affected by a project, but who are not sufficiently engaged so as to be able to fully understand the nature of their concerns and fears (health, safety, environmental, social and economic impacts), may oppose a project. Affected communities have, increasingly, access to experts with a different opinion, so certain claimed, or unclaimed, effects can be contested. They have access to informed interest groups and NGOs, who not only hold the proponents accountable, but increasingly also the permitting authorities, investors, consumers and the media. With the power of social media, this discussion-organising-mobilising-protest cascade goes faster than ever; more than 200 forms of protest and virtual protests have been identified (Hanna & Vanclay 2015),⁴ with a high visibility in the media, influencing the public opinion, and consequently political opinion, and thereby permitting decision-making.

Delays in decision-making processes and reputational damage not only affect the private sector, but also affect governments. They can lead to higher transaction costs and may even negatively affect the trust of the general public in administrators. Although social risks are one of the main sources of damage to business continuity and reputation, there is still a lot of variety of opinion as regards how best to manage these risks.

3 History of the SIA

Following several environmental disasters and safety tragedies in the industry, the treatment of technical health, safety and environmental (HSE) risks has been successfully transformed with a view to the prevention of these risks in the last quarter of the 20th century. On a project level, HSE risks were now assessed from the outset and were mitigated by technical experts in environmental impact assessment (EIA), a methodology developed by the American Environmental Protection Agency in the early 1970s.

Environmental impacts, community health and safety, and occupational health and safety have since then increasingly been managed through structured procedures and international best practices. Within a few decades, the EIA has become a legal requirement for large-scale projects in almost all the countries of the world.

Historically, the management of conflicts was often no more than an unstructured and ad hoc reactive exercise

between the CEO, the project manager and the communication department of a company, sometimes in collaboration with the authorities.

In general, risk prevention is often viewed as being more cost-effective and is seen as more ethical than the treatment of actual risks. Social risks, that is the perceived risks and the consequent mitigating actions, are generally perceived as being more volatile, uncertain, complex and ambiguous (VUCA), compared to technical risks. The question to be addressed was whether social risks could be prevented using the same prevention logic as is applicable to technical risks. At the same time, social risks increasingly became the biggest source of expensive delays, of scope changes and of reputational damage.

The SIA had been developed at the same time as the EIA in the early 1970s, but it is less known in Europe. Aspects such as honesty (transparency, accountability) and respect (different values or worldviews) were early stepping stones for the SIA. Since then, it is legally required in most Anglo-Saxon countries like the United States, Canada, Australia and New Zealand (all have a historically significant indigenous population), and various countries in Asia, Latin America and Africa. Overall, it is applicable in about 45 countries worldwide, which roughly equates to 25% of the entire world.

Public participation in capital projects is more problematic in development contexts. Because of the high social and financial risks, project initiators often go to international, financial institutions that offer investment, advisory and asset management services to encourage private sector development in less developed countries and to prevent disbursement risks. The International Finance Corporation (IFC), a member of the World Bank Group, started in the 1990s with a structured approach to managing social risks, just like HSE risks management approach devised earlier that century. The ESIA, an environmental and social impact assessment, became a prerequisite for lending operations by all eight worldwide, multilateral, financial institutions, including the European Investment Bank and the European Bank for Reconstruction and Development.

This new attention to social risks at the multilateral, financial institutions did not go unnoticed by the commercial bilateral banks. A small group of commercial banks, among them the ING and the Rabobank from the Netherlands, established early in this century the equator principles (EPs).⁵ Since the nature, risks and objectives of the bilateral financial institutions did not differ much from those of the multilateral financial institutions, the EPs referred to the IFC Performance Standards (PS) as being the leading social and environmental risk management framework. In 2006 and 2012, when IFC launched its second and third update of the PS, the EP updates were launched shortly after. With the fourth update in November 2019, 105 commercial banks in 38 countries, including 4 from China, have subscribed to the EP.

3. Retrieved at 20 August 2020 from www.sustainalytics.com/esg-investing-news/sustainalytics-publishes-10-for-2018-report/.

4. Hanna P., Vanclay F., Langdon E.J. & Arts J. (2015). Conceptualizing Social Protest and the Significance of Protest Actions to Large Projects. *The Extractive Industries and Society*, 3(1), 217-239. <https://doi.org/10.1016/j.exis.2015.10.006>.

5. Retrieved at 20 August 2020 from <https://equator-principles.com>.

In 2019 alone, the European Investment Bank financed 962 complex projects for over 63 billion euro. The majority of them had to fulfil an ESIA to manage social risks, professionally. The IFC PS are available in nine languages, including Dutch.⁶

Besides financial institutions, also multinational companies like Shell and Boskalis refer to IFC as their standard in social risk management. It is also worth noting that many SIA guidelines and handbooks are available. The most important one is the SIA Guidance from the International Association for Impact Assessments by Frank Vanclay (2015)⁷ that can be seen as complementary tool for the IFC PS.

So, in short, an SIA is used globally to manage the social risks of a complex project. In OECD countries, SIAs are increasingly used to manage social risks. In the past, the European Investment Bank (EIB) required an EIA for lenders for complex energy and infrastructure projects. Today, the EIB increasingly requires an ESIA to better manage social risks.⁸ Most recently, Malta and Greenland legally required an ESIA as a permitting requirement for complex projects, where France legally requires, since 1995, a similar form of SIA by the Comité Nationale du Débat Publique. In the Netherlands, the first Dutch SIA is currently being executed on a 130 million euro project in Zaanstad, to test the concept and determine the added policy value for future projects in order to better manage social risks and prevent expensive conflicts.

In the following paragraphs, the most important control mechanisms of the SIA with a view to preventing conflicts are described (Section 4), as well as a comparison with the multi-tier dispute resolution mechanisms (Section 5).

4 Conflict Prevention Elements of the SIA

In 1971, John Rawls described in his Theory of Justice⁹ that two important elements are required for public trust, procedural justice – the fairness of the stakeholder engagement process – and distributive justice, how costs and benefits are distributed on the local and national level. The EIA is based on judgement of technical experts, but is not investigating the socio-economic aspects, such as the historical relations of the communi-

ties with the government, the social and economic impacts on the community or concerns about the technology controversies. Where an EIA is about expert judgement, an SIA was needed to assess the public judgement of a project.

Rawls demonstrated that procedural justice, that is early, transparent and inclusive engagement of the affected stakeholders, is more important than distributive justice. When you want to prevent a conflict, the decision-making procedure of a complex project with irreversible impacts is more important than direct or indirect compensation.

The SIA consist of the following four main elements: (i) a Social Baseline Study,¹⁰ (ii) a Stakeholder Participation Plan, (iii) the identified impacts during construction and operation and (iv) Management Action Plans to avoid, mitigate or compensate the negative impacts. These four elements will be discussed hereinafter.

4.1 Social Baseline Study

The social baseline study starts with a preliminary investigation, to see what historical events have happened in the community, what the views towards the government and the project (proponent, objective, used technology, most important temporary and continuing impacts) are and an estimation of how the project might fall.

When this first sensing exercise is positive, it is important to engage the community that is likely to be affected. In a populated country like the Netherlands, it is often not possible to discuss this with all stakeholders, because there are too many people involved. For that, proven social science methods such as surveys, focus groups or citizen panels are designed, based on socio-economic data of the community, that represent the community in age, gender, income and ethnicity. In the Netherlands, the Central Bureau of Statistics provides these data for free.

The use of these methods offers two important advantages. Firstly, they are representative. In the Netherlands, most town hall meetings are dominated by white middle-aged men, often with an engineering or legal background. By using these proven social science methods, one can design a community panel with a representative set of the community, based on gender, age, income/education and ethnicity. In this way, a more diverse set of views are collected, discussed, classified and mitigated. Knowledge to understand specific impacts, such as air quality or noise, can be delivered by a neutral expert. Secondly, these methods are depoliticised, collecting diverse views of the community. The chances of acquiring balanced knowledge representing diverse viewpoints on, for example, historical relationships that have to be repaired, on future coalitions that need to be constructed, on political games (when well facilitated) or hidden agendas are, understandably, smaller. It is, therefore, more efficient, effective, less

6. Retrieved at 20 August 2020 from www.ifc.org/wps/wcm/connect/topics_ext_content/ifc_external_corporate_site/sustainability-at-ifc/policies-standards/performance-standards/ps1.

7. Retrieved at 20 August 2020 from www.iaia.org/uploads/pdf/SIA_Guidance_Document_IAIA.pdf.

8. Retrieved at 20 August 2020 from www.eib.org/en/search.htm?q=social+impact+assessment&sortColumn=relevant&sortDir=desc&pageNumber=0&itemsPerPage=10&pageable=true&language=EN&defaultLanguage=EN&orContentType=true&orPageType=true.

9. Rawls J. (1971). *A Theory of Justice*. Harvard University Press. Retrieved at 20 August 2020 from https://en.wikipedia.org/wiki/A_Theory_of_Justice.

10. A Social Baseline Study can consist of multiple studies; Cultural Heritage, Gender, Conflict, Human Rights, Socio-Economic.

biased and constitutes international best practice. Careful, professional and informed chairmanship of the SIA remain an important requirement.

4.2 Stakeholder Participation Plan

In the EIA used in the European Union, the areas affected by the project during construction and operation are calculated based on legal requirements and industry best practices, for instance noise or air quality. These norms have been developed, researched and tested over decades. These affected areas are captured in so-called risk contours. To determine who from the community is affected, the SIA uses the same risk contours. Sometimes, the risk contours are enlarged in order to stay on the safe side or to avoid discussions.

Everybody in the risk contour receives information in a letter in understandable language (B1 level) on:

- i. the purpose, nature, and scale of the project;
- ii. the duration of proposed project activities;
- iii. any risks to and potential impacts on such communities and relevant mitigation measures;
- iv. the envisaged stakeholder engagement process; and
- v. the grievance mechanism.

A decision is taken to discuss with all stakeholders, or to discuss with representative groups, open for all stakeholders.

4.3 Impact Identification Process

The SIA requires the proponent to: (i) begin, early in the project, a process of identification of environmental and social risks and impacts and to continue this process on an ongoing basis as risks and impacts arise; (ii) be based on the prior disclosure and dissemination of relevant, transparent, objective, meaningful and easily accessible information, which is in a culturally appropriate local language(s) and format and is understandable to affected communities; (iii) focus inclusive engagement on those directly affected, as opposed to those not directly affected; (iv) be free of external manipulation, interference, coercion or intimidation; (v) enable meaningful participation, where applicable; and (vi) be documented.

A neutral facilitator identifies, with the affected community or a representative panel, the impacts, classifies these and proposes corrective actions to avoid, mitigate or compensate these impacts, which are then documented in an action plan. The community assessment of the impacts looks at both facts (what is the probability that a certain effect will occur, what is the nature, scale and duration) as well as the values of the community. Concerns about impacts without a scientific base are equally assessed. It is important to notice that the discussions with the citizen panel or focus groups are public, or will be made public. To ensure that all views are collected, discussed and considered, concerns and views from stakeholders who are not participating in the panel can always be plugged in at the project desk, in order to be considered and publicly answered in the next discussion round. It will often lead to a combined ESIA report. A non-technical summary in easy to access language

(B1 level) is required, so the affected community understands how their concerns have been, or have not been, addressed.

4.4 Management Action Plan

Negative impacts and the mitigation measures discussed in order to avoid, mitigate or compensate these are documented in an action plan. These plans are discussed with the affected community, in a stakeholder engagement process, that follows the impact assessment. When the SIA and management action plans are ready, they are made public to the community for final comments. When these are processed, the SIA and its management plans have to be approved by the government. There can be broader concerns, impacts or insights that are out of scope for the stakeholder engagement process. It is possible for the authorities to classify the impacts identified differently, or to make changes to the action plans. In any case, changes have to be motivated and made public, to be fully transparent and accountable and hence to remain trusted.

During the construction and operational phases, the initiator has to be compliant with the action plans. The monitoring body is often the government, but in cases with high controversy it is also possible to involve community members in the monitoring and evaluation, such as a multi-stakeholder dispute resolution board. When appropriate, an annual report will be drafted with the progress obtained being made public and, if necessary, discussed with the community with a view to drafting corrective actions.

5 SIA Compared with Multi-tier Conflict Resolution Methods

Although different definitions are used, most multi-tier conflict resolution concepts use a neutral, facilitated dialogue and information sharing, negotiation and joint fact-finding, before formal mediation, arbitration and/or litigation.

- Facilitated dialogue: there are requirements to prevent power imbalances, by having requirements as regards the representation in the stakeholder engagement process, the focus on meaningful and easily accessible information, the focus on inclusive engagement and the requirement that the process must be free of external manipulation, interference, coercion or intimidation.
- Negotiation: the negative impacts that have to be avoided, mitigated or compensated require a more dynamic negotiation process.
- Joint fact-finding: When facts or measuring methods are contested, a joint fact-finding can be executed for the SIA.
- Mediation: although the SIA does not formally mention mediation as a conflict resolution mecha-

nism, clearly mediation is an instrument that can be used effectively to resolve community concerns.

Contested values are addressed through the impact assessment process. They can also be addressed in a grievance mechanism that has to start together with the impact assessment process. The SIA requires the client to establish a grievance mechanism to receive and facilitate resolution of affected communities' concerns and grievances about the client's environmental and social performance. It should seek to resolve concerns promptly, using an understandable and transparent consultative process that is culturally appropriate and readily accessible, at no cost and without retribution to the party that originated the issue or concern. The mechanism should not impede access to judicial or administrative remedies.

6 SIA and Business to Community Mediation

SIA does not require, nor exclude, a formal mediation step. According to Brenninkmeijer,¹¹ mediation is a structured intervention (intake, exploration, negotiate, document). During the SIA process, these elements have been incorporated. The community has signed off on the SIA and its action plans, a grievance mechanism has been installed and reporting takes place at least annually, sometimes with community members in the monitoring body.

However, when the SIA process has not been facilitated professionally and/or conducted completely, or when the monitoring process and/or grievance mechanism has not been conducted professionally, a formal mediation process is a good resolution. It is important that a new and impartial mediator is assigned. It is also important to pay attention to the profile of the mediator; should it be a transformative, a facilitative or a directive/evaluative mediator? That is an important question.

Another important question is to understand why so few business to community disputes are handled by a mediator. For example, in the Netherlands, the majority of the mediation, according to the standards of the Dutch Mediation Federation (MfN), take place in divorce cases (60%), labour law (25%), business mediation (5% board and shareholder issues, contractors) and criminal justice (1%).¹² Just a very small amount of cases concerns BtCM.

Most companies know that the cost of legal disputes with communities is high due to legal aid, senior staff time and reputational costs, amplified by media and political attention. The reason that BtCM has not yet lifted off may be explained on multiple grounds.

For most impacts, there is legislation with which a company simply has to comply. Just like the EIA, the SIA is designed to get government approval rather than community approval. This means that companies are not really interested in mediation or even conflict resolution if they believe they will get their permit. Hence, the key to the story is not so much what communities think about a project, but what the company is able to get away with and still obtain their permit.

When a permit has been granted, legal requirements have not changed and business processes, products and volumes have not changed either, there is not much room for discussion. A mediation process does not, arguably, bring much added value, and may even create false expectations.

Because of the confidential nature of mediation, it is not known whether a company or a community did, in fact, reject a proposed mediator to reconcile a case.

Furthermore, it may not be so easy to find the right mediator. A directive/evaluative mediator steers the process using active problem resolving, and researches solutions before and during the mediation process.¹³ Some argue whether such an approach can be called mediation; when the mediator already has a solution in mind or comes up with his or her own solution, what does that mean for the autonomy of the parties? Also, the parties' own creativity might be at stake, as well as their feeling of ownership and acceptance of the outcome.

Many mediators are facilitative mediators, who will guide people through a communication process in which the parties' voices, thoughts, feelings and ideas are the important factors. The mediator structures a process to assist the parties in reaching a mutually agreeable solution. The facilitative mediator does not make recommendations to the parties, give his or her own advice or opinion as to the outcome of the case, or predict what a court would do in the case. The mediator is in charge of the process, while the parties are in charge of the outcome.¹⁴

Research conducted by Thomas¹⁵ showed that most companies prefer a directive mediator. On the hypothesis 'I prefer that the mediator is in charge of the process' on a 7-point scale, 27% agreed completely, 39% agreed, 30% agreed a little, 3% was neutral and 1% disagreed.

Most companies seem to prefer a directive mediator, who is primarily focussed on the objective to come to an agreement that works, where communities and interest groups may prefer a facilitative mediator. The company has based its business case on the legislation and leaving those principles out of the process may be difficult to accept. When the company is sure it is in compliance, a legal procedure may be the preferred choice.

13. Prein in Brenninkmeijer (2013), p. 212.

14. Prein in Brenninkmeijer (2013), p. 218.

15. Thomas et al. (2018). ZAM/ACB Onderzoek naar kansen en belemmeringen voor zakelijke mediation. Retrieved at 20 August 2020 from <http://www.vereniging-zam.nl/wp-content/uploads/2018/12/ZAM-ACB-Onderzoeksrapport-met-bijlagen.pdf>

11. Brenninkmeijer et al, 'Handboek Mediation', SdU, 2013, p. 29.

12. De Nederlandse Mediationmarkt, Panteia, Zoetermeer, 28 November 2019, p. 13.

Finally, and more of a psychological nature, some companies may see mediation as a weak solution. According to Thomas,¹⁶ this argument ranked 6 out of 9 main arguments to not use mediation.

Communities on the other hand are, in general, more diverse in nature than a company is. For communities, a more facilitative style or even a directive style may be preferred. Classic mediation techniques, used in order to really understand and transform conflicts by careful listening, negotiation and resolution of conflicts, have to be incorporated in the mediator's toolbox. The SIA addresses this by focusing on inclusive engagement, to assure the process is free of external manipulation, interference, coercion or intimidation and to enable meaningful participation.¹⁷

When the most important impacts have a 'non-scientific' nature, such as the loss of identity or resettlement, the impact assessment process can be upsetting in deep and profound ways. This may require less of a clinical 'neutral facilitator' approach and more of a facilitator that understands the local context, culture and history and has time and resources available to build trusted relationships.

7 Main Conclusions

The SIA is international best practice to prevent conflicts by the spatial integration of complex projects. It uses different elements of the multi-tier dispute resolution mechanisms, neutral, meaningful and complete information, a facilitated dialogue and a facilitated negotiation process to avoid, minimise or compensate negative adverse impacts. Since many people in the mediation community are interested in preventing conflicts, paying more attention to the SIA may be of help, since it addresses all tiered conflict prevention mechanisms, facilitated dialogue, negotiation and joint fact-finding according to a globally accepted standard. The essence of mediation, having an open mind and trying to understand, rather than arguing to come to a consensus, is the very spirit of the SIA.

BtCM is not yet a formal option in the SIA process. Although it is likely SIA practitioners use mediation skills, formal mediation could be adopted as a strategy in a forthcoming update of the IFC PS. Given the technical nature and limited interpretation of the regulation of most impacts, a mediator has to be aware that most companies may favour a more directive/evaluative style. Communities are, in essence, more diverse than companies, and may favour a more facilitative style. Mediation has much to offer (repair of relationships, creative solutions, less time and cost consuming). A business to community mediator, in order to be successful in this

field, ought to avail of the agility to switch between these different styles. This is especially important when the underlying legal framework and policies which the project is based on is not endorsed by the local community at the outset.

16. Thomas (2018), p. 33.

17. Requirement #30 IFC Performance Standard 1. Retrieved at 20 August 2020 from www.ifc.org/wps/wcm/connect/8804e6fb-bd51-4822-92cf-3dfd8221be28/PS1_English_2012.pdf?MOD=AJPERES&CVID=jiVQlfe.