

Asia Indigenous Peoples Pact's Handbook

# Extractive Industries and Free, Prior and Informed Consent of Indigenous Peoples



# Asia Indigenous Peoples Pact (AIPP)'s Handbook Extractive Industries and Free, Prior and Informed Consent of Indigenous

**Copyright: Asia Indigenous Peoples Pact (AIPP), 2019**

Published by:

Asia Indigenous Peoples Pact (AIPP)

112 Moo 1, Tambon Sanpranate, Amphur Sansai, Chiang Mai 50210, Thailand

Contact : +66(0)53343539, Fax: +66(0)53343540

e-mail: aippmail@aippnet.org



[www.aippnet.org](http://www.aippnet.org)

[www.ccm.in.aippnet.org](http://www.ccm.in.aippnet.org)

[www.iva.aippnet.org](http://www.iva.aippnet.org)

[www.iphrdefenders.net](http://www.iphrdefenders.net)

Writer: Jill Cariño

Proofreading by Nalori Dhammei Chakma/AIPP

Layout and cover design by Mona Sihombing/AIPP

Supported by:



ISBN:

**Disclaimer:**

This publication has been produced with the support of the Oxfam America and the Swedish International Development Cooperation Agency (SIDA). The contents of this publication are the sole responsibility of Asia Indigenous Peoples Pact (AIPP). The sharing of this paper with the external audience is aimed at sharing general information and recommendations and does not constitute an endorsement by Oxfam America and SIDA.

Printed by: AIPP Printing Press Co., Ltd.

[www.aippprinting.com](http://www.aippprinting.com)

## Acknowledgment

---

The Asia Indigenous Peoples Pact (AIPP) would like to thank Oxfam America for supporting this research and the Swedish International Development Cooperation Agency (SIDA) for their generous support to the work of AIPP, including the printing of this important handbook.

AIPP would also like to express our gratitude to Jill Cariño for her dedicated effort to produce this concise handbook on the free, prior and informed consent. We also acknowledge the support rendered by the Asia Indigenous Peoples Network on Extractive Industries and Energy (AIPNEE) for this research.

We dedicate this publication to the millions of indigenous communities in Asia. We hope this handbook would contribute in enabling them to assert their rights in defending their homes and lands.

***Gam A. Shimray***  
***Secretary General***

---

## Table of contents

Introduction	5
I. Extractive Industries and Indigenous Peoples in Southeast Asia	6
A. Overview of Extractive Industries	7
B. Extractive industries in Southeast Asia	7
II. The Mining Cycle and its Impact	13
A. What are the different stages of the mining process?	13
B. What are the legal requirements for companies to conduct mining?	15
C. Who are the major stakeholders in the mining industry?	16
D. What are the environmental and social impacts of mining?	17
III. Free Prior and Informed Consent (FPIC)	21
A. Indigenous Concepts and Principles of FPIC	21
B. State Recognition of Indigenous Peoples and FPIC	23
C. International Instruments Recognizing FPIC	24
D. Practical Guide for Communities on FPIC in relation to Extractive Industries	28

## Acronym

ADB	Asian Development Bank
AEC	ASEAN Economic Community
AIPP	Asia Indigenous Peoples Pact
ASEAN	Association of Southeast Asian Nations
ASM	Artisanal and small-scale mining
CCCMC	China Chamber of Commerce of Metals Minerals and Chemicals Importers and Exporters
CERD	Committee on the Elimination of Racial Discrimination
CESCR	Committee on Economic Social and Cultural Rights
CSO	Civil society organization
CSR	Corporate social responsibility
EIA	Environmental impact assessment
EP	Exploration Permits
FDI	Foreign direct investment
FPIC	Free, prior and informed consent
FTAA	Financial or Technical Assistance Agreements
GDP	Gross Domestic Product
ICC	Indigenous cultural communities
ICMM	International Council on Mining and Metals
IP	Indigenous peoples
IPRA	Indigenous Peoples' Rights Act, Philippines
MPP	Mineral Processing Permits
MPSA	Mineral Production Sharing Agreements
UN	United Nations
UNDRIP	United Nations Declaration on the Rights of Indigenous Peoples

# Introduction

Indigenous peoples face many questions and challenges when confronted with mining activities in their communities. What are extractive industries and mining? What laws govern mining in their country? What are the requirements and obligations of companies engaged in mining? What happens in the process of mining and what are its social, environmental and economic impacts? What are the rights of indigenous peoples in relation to extractive industries? What legal instruments can be used to assert these rights? What is free prior and informed consent (FPIC)? What steps should be taken in obtaining FPIC? How can indigenous communities engage and participate in decision-making regarding extractive industries in their land and territories?

All these questions and many more need answers. Thus, Asia Indigenous Peoples Pact (AIPP), in cooperation with the Asia Indigenous Peoples Network on Extractive Industries and Energy (AIPNEE) and Oxfam-America, produced this Handbook for Indigenous Peoples on Extractive Industries and FPIC. The handbook contains basic information needed by indigenous peoples to be able to exercise their right to FPIC in the face of mining activities affecting their communities. It is to be used as a reference by indigenous communities and civil society organizations in understanding and raising awareness on extractive industries and FPIC.

The first part of the Handbook gives an overview of extractive industries and mining in Southeast Asia. It reviews national legal frameworks in relation to mining and indigenous peoples, particularly in Cambodia, Philippines and Indonesia. The three countries were selected as the focus of this handbook because of the significant contribution of mining to the national economy in Indonesia, the immense impacts of mining on indigenous communities in the Philippines, and the potential growth of mining as a major economic sector in Cambodia.

The second part presents the mining cycle and the actual and potential impacts of mining — social, environmental and economic — at each stage. It identifies the legal requirements for companies to conduct mining and the various stakeholders — government agencies, companies, civil society and mining industry bodies — involved at each stage.

The third part discusses what is FPIC from the perspective of indigenous peoples, and as provided in national and international legal instruments on FPIC. It goes through the different steps to be taken to ensure a culturally appropriate FPIC process. It gives practical guidelines for communities in exercising FPIC in relation to extractive industries. Challenges faced by indigenous peoples and possible avenues and international mechanisms for engagement by affected indigenous peoples are also identified.



# I. Extractive Industries and Indigenous Peoples in Southeast Asia

## A. Overview of Extractive Industries

Extractive industries are processes that extract non-renewable metals, minerals and aggregates from the earth. Metals include gold, silver, platinum, iron and copper. Industrial minerals include lime, gypsum, construction materials such as sand and stone, and fuels, such as coal and uranium. Extractive industry operations include oil and gas extraction, mining, dredging and quarrying.<sup>1</sup>

The two main techniques used for mining are underground mining and surface mining. The bulk of the world's minerals are extracted via surface mining, which is cheaper, requiring less labour and construction costs, but with far greater environmental costs than underground mining.<sup>2</sup>

The value of global mining production grew enormously over the last decade. In 2012, it was six times higher than in 2000, reflecting a combination of increased prices and increased production volume. This boom was largely driven by the unprecedented growth in demand for minerals and metals in China, India and other emerging countries.<sup>3</sup>

Extractive industries are mostly large-scale projects by big corporations. However, small-scale artisanal mining to extract gemstones, gold, copper and other industrial minerals is also a significant traditional economic activity in some indigenous territories. A World Bank report on artisanal mining found that at least 20 million people in about 50 countries are engaged in artisanal and small-scale mining and a further 100 million people depend on it for their livelihood.<sup>4</sup>

## B. Extractive industries in Southeast Asia

Countries in Southeast Asia are endowed with abundant reserves of fossil fuel, energy and mineral resources. Extractive industries contribute significantly to the economies of the Association of Southeast Asian Nations (ASEAN) member states. The ASEAN thus supports a prominent role for extractive industries in its current drive for regional economic integration. Extractive industries development through exploration, extraction and processing of minerals is seen a key component of building the ASEAN Economic Community (AEC).<sup>5</sup>

Foreign direct investment (FDI) in the extractive sector in Southeast Asia registered historic highs in 2014. In Indonesia, the mining sector accounted for 20.7 percent of total FDI in the third quarter of 2013. In Malaysia, the mining and quarrying sector accounted for 22.2 percent of total investments in 2011. And in Laos, 27 percent of FDI was directed towards the mining sector from 1989 to 2012. Revenues from natural resources also contribute significantly to the national budget in several countries in the region, particularly in Brunei, Timor-Leste, Indonesia and Malaysia.<sup>6</sup>

However, extractive industries have also caused conflict, human rights violations and environmental degradation across the region. Often, the lands where these companies operate are within the territories of indigenous peoples who face risks of losing their lands, livelihoods and identity when development plans are implemented without their meaningful participation.<sup>7</sup>

1. Accessed from <http://www.businessdictionary.com/definition/extractive-industry.html> on January 26, 2017

2. Andy Whitmore, editor. Pitfalls and Pipelines: Indigenous Peoples and Extractive Industries. Tebtebba Foundation and IWGIA. Baguio City, Philippines. 2012

3. International Council of Mining and Minerals (ICMM). Report: The Role of Mining in National Economies. 2nd Edition. October 2014

4. Whitmore, 2012

5. Institute For Essential Services Reform (IESR) The Framework for Extractive Industries Governance in ASEAN. First Edition. Jakarta, Indonesia

6. Developing a Regional Framework for Extractive Industries in Southeast Asia. January 2014 <http://www.resourcegovernance.org/blog/developing-regional-framework-extractive-industries-southeast-asia>

7. Asia Indigenous Peoples Pact (AIPP) RIGHTS ! Volume 2 Updated Training Manual on Indigenous Peoples Rights. 2015

## 1. Mining in Indonesia

Indonesia continues to be a significant player in the global mining industry. The country has significant mineral reserves and production of coal, copper, gold, tin and nickel. Indonesia ranks 15<sup>th</sup> in the world in coal reserves, 7<sup>th</sup> in gold reserves, 7<sup>th</sup> in copper reserves, 5<sup>th</sup> in tin reserves and 8<sup>th</sup> in nickel reserves. Indonesia is also one of the world's largest exporters of thermal coal.<sup>8</sup>

Extractive industries are among the most important industries in Indonesia, generating employment, taxes and foreign exchange earnings. The mining industry contributed significantly to the overall Indonesian economy, accounting for an estimated 12% of its GDP in 2014 and approximately 4% of GDP in 2015. The substantial decrease between 2014 and 2015 was largely due to the implementation of a ban on exports of unprocessed minerals in January 2014 and the introduction of a significant export duty on mineral concentrates.<sup>9</sup>

Indonesia's mineral reserves are distributed throughout the country, with mining production most significant in the provinces of Papua, Bangka-Belitung, West Nusa Tenggara and East Kalimantan. Many mines in Indonesia are located in remote areas, which are often of significant biological and environmental value, such as small islands and tropical rainforests. Indonesia's mining sector is operated by a wide-range of international and domestic (state-owned or private) companies.<sup>10</sup>

Artisanal and small-scale mining (ASM) has existed in Indonesia for more than 700 years. ASM activities are viewed as important as large-scale mining activities, due to the large number of people employed. There are approximately 109,000 people directly involved in ASM in Indonesia. In areas that have limited or degraded natural resources, ASM becomes the only alternative livelihood available.<sup>11</sup>

Mineral and coal mining activities in Indonesia are governed under the Mining Law of 2009, which replaced the previous Mining Law No. 11/1967. The introduction of the Mining Law in 2009 represented a significant change from the previous Indonesian mining regulatory regime. Contractual-based concessions are no longer available for new mining projects and were replaced by a single area-based licensing system based on specified mining areas.

The Mining Law provides for three categories of mining license depending upon the location and nature of the mineral resource: Mining Business License, Special Mining Business License, and People's Mining License. Mining can only be conducted in areas designated by the Central Government as open for mining. As such, the Central Government is required to designate the mining areas by carrying out a detailed mapping exercise and preparing a map of areas open to mining.

The Mining Law removes some of the distinctions between Indonesian and foreign investors in the mining sector, and allow 100% foreign investment in the mining sector. The law also provides that foreign shareholders must divest part of their interest in a mining concession company by the fifth year of production.<sup>12</sup>

8. Djoko Widajatno, Irwandy Arif. Association of Indonesian Mining Profesional. The Indonesian Mineral Mining Sector: Prospects And Challenges. German – Indonesia Mining Technology Symposium 2011. Jakarta, Indonesia. April 13, 2011

9. PwC Indonesia. Mining in Indonesia Investment and Taxation Guide May 2016 - 8th edition

10. Bernadetta Devi and Dr. Dody Prayogo. Mining and Development in Indonesia: An Overview of the Regulatory Framework and Policies (Final Report) International Mining for Development Centre. March 2013

11. Bernadetta Devi and Dr. Dody Prayogo, 2013

12. PwC Indonesia, 2016



Source: PwC Indonesia



## 2. Mining in the Philippines

The Philippines is well endowed with a range of mineral resources. The country is said to have \$840 billion worth of untapped mineral wealth including copper, gold, nickel, chromite, limestone, clays, feldspar and semi-precious stones. In terms of the density of deposits per square kilometre of land area, the Philippines ranks third in the world in gold deposits, fourth in copper reserves, fifth in nickel and sixth in chromite.<sup>13</sup> Large-scale mining and traditional small-scale mining have been going on in the country for more than a century. Despite a strong push by the government to liberalize the mining industry since 1995, the growth of mining investments in the country has been slow over the past several years. The amount of foreign direct investments going to mining in the Philippines is substantially lower than those of other ASEAN countries.<sup>14</sup> But the effects of mining is just as destructive.

The contribution of mining output to the country's Gross Domestic Product (GDP) remains very low from 0.8 percent in 1998 to its highest level of 1 percent for the years 2010 and 2011. The share of mining output to GDP fell to 0.7 percent by the year 2012.<sup>15</sup> Taxes paid by the mining industry to the government are likewise minimal, accounting for only 1.1% of the total revenue collection. On employment, the mining industry employs just over 150,000 workers or 0.5% of the total labor force, most of which come from the quarrying and small-scale mining sectors in the Philippines.<sup>16</sup> On the other hand, mining operations and applications in the Philippines cover vast areas of land in indigenous peoples territories.

The Philippine Mining Act of 1995 or Republic Act 7942 liberalized the mining industry and facilitated the entry of foreign investments in mining. The law provides for the issuance of Exploration Permits, which grant the right to conduct exploration for all minerals in specified areas. Mineral Agreements grant to the contractor the exclusive right to conduct mining operations and to extract all mineral resources found in the contract area. Financial or Technical Assistance Agreements (FTAA) allow any qualified person with technical and financial capability to undertake large-scale exploration, development, and utilization of mineral resources.<sup>17</sup>

The FTAA is exceptional because it gives more benefits and incentives to transnational corporations than those provided to Filipino entrepreneurs. If granted, it allows private and foreign companies to operate a maximum land area of 81,000 hectares for 50 years. It allows up to 100% foreign-owned capital and repatriation profit. It grants the mining company freedom from requisition of investment and expropriation. It gives tax exemption for a grace period of 10 years, easement rights, water rights and timber rights; and tariff and tax exemption for the materials and supplies imported for their mining operation or exploration and free use of port for up to 10 years.<sup>18</sup>

The Philippine Mining Act of 1995 has provisions recognizing the rights of indigenous peoples. Section 16, Opening of Ancestral Lands for Mining Operations, states: *"No ancestral land shall be opened for mining operations without the prior consent of the indigenous cultural community concerned."* Further, Section 17 on Royalty Payments for Indigenous Cultural Communities provides: *"In the event of an agreement with an indigenous cultural community, ... the royalty payment, upon utilization of the minerals shall be agreed upon by the parties... [and]... shall form part of a trust fund for the socio-economic well-being of the indigenous cultural community."*<sup>19</sup>

Since 2003, the Philippine government has prioritized large-scale mining projects among its economic programs. In 2004, the Philippine government implemented Executive Order 270 or National Policy Agenda on Revitalizing Mining Industry in the Philippines, the Mining Revitalization Program, the Mineral Action Plan, and the Priority Mineral Development Projects.<sup>20</sup> These programs encouraged investments in the minerals industry, provided support mechanisms for sustained mineral exploration, and streamlined procedures for the granting of mining tenements. At the same time, EO 270 also declared that ecologically critical areas, including biodiversity hotspots and small-island ecosystems, should be safeguarded. The law also recognized the rights of indigenous peoples, including the requirement of Free and Prior Informed Consent by mining-affected communities.<sup>21</sup>

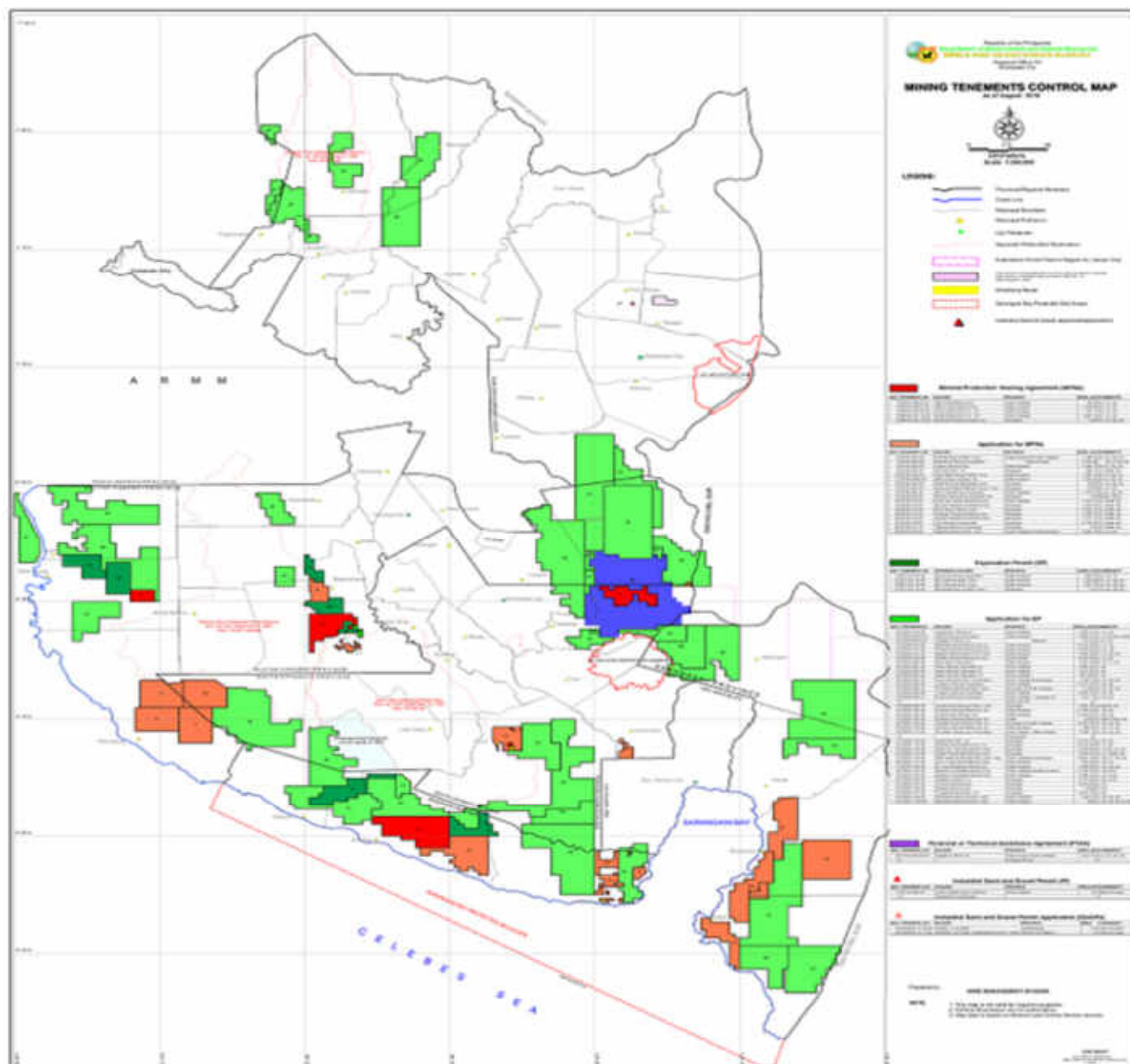
Executive Order 79 was issued in 2013, providing policies and guidelines to ensure environmental protection and responsible mining in the utilization of mineral resources. The Executive Order designated areas closed to mining ...

13. Institute for Essential Services Reform (IESR). 2014. Scoping Study Governance of Extractive Industries in Southeast Asia  
14. Dr. Roberto B. Raymundo. The Philippine Mining Act of 1995: Is the law sufficient in achieving the goals of output growth, attracting foreign investment, environmental protection and preserving sovereignty? Presented at the DLSU Research Congress 2014 De La Salle University, Manila, Philippines March 6-8, 2014  
15. Dr. Roberto B. Raymundo, 2014  
16. Kalikasan People's Network for the Environment (Kalikasan PNE) and the Defend Patrimony! Alliance. Philippine Mining Situation: Liberalization under the Aquino Administration and the People's Struggle. National Council of Churches in the Philippines (NCCP), February 2011  
17. Republic of the Philippines Congress of the Philippines Metro Manila Republic Act No. 7942 Philippine Mining Act of 1995 An Act Instituting A New System Of Mineral Resources Exploration, Development, Utilization And Conservation

18. Scrap The Philippine Mining Act Of 1995 Network, 2014  
19. Republic of the Philippines Congress of the Philippines Metro Manila Republic Act No. 7942 Philippine Mining Act of 1995 An Act Instituting A New System Of Mineral Resources Exploration, Development, Utilization And Conservation  
20. Kalikasan PNE and the Defend Patrimony, 2011  
21. Gloria Macapagal-Arroyo, The President Of The Philippines, Executive Order No. 270-A, Amending Executive Order No. 270, 2004

... applications, including protected areas, prime agricultural lands, plantations and fisheries, tourism areas and island ecosystems. It also called for full enforcement of environmental standards in mining, ordered a review of existing mining operations, established mineral reservations, set up a Mining Industry Coordinating Council and created a One-Stop Shop for all mining applications and procedures.<sup>22</sup> Despite its seemingly positive provisions, the law overrode existing local government moratoriums against mining, displaced traditional small-scale miners, continued on-going mining operations, increased the applications of big mining corporations, and failed to increase revenue shares of government from mining.<sup>23</sup>

Of particular concern for indigenous peoples is the fact that the government has approved hundreds of mining applications for exploration and production that cover thousands of hectares of ancestral lands. In 2014, there were at least 712 approved mining applications covering 967,530.86 hectares. Of this, 251 applications covering 532,368.36 hectares (55% of the total land area approved for mining) were in areas occupied by indigenous communities.<sup>24</sup> Nationwide, 5 out of 6 FTAA's, 148 of the 339 approved Mineral Production Sharing Agreements (MPSA), 23 of the 61 Exploration Permits (EP), 30 of the 84 Mineral Processing Permits (MPP), and 45 of 222 Industrial Sand and Gravel operations are located within the ancestral lands of indigenous peoples.<sup>25</sup>



Source: Department of Environment and natural Resources, Phillipines: Mines and Geoscience Bureau

22. Benigno Simeon Aquino III. President of the Philippines. Executive Order 79 Institutionalizing and Implementing Reforms on the Philippine Mining Sector, providing policies and guidelines to ensure environmental protection and responsible mining in the utilization of mineral resources, 2013

23. Kalikasan-PNE. Powerpoint Presentation, Philippine Mining Updates 2014

24. [Scrap The Philippine Mining Act Of 1995 Network. Petition Urging the Philippine Congress to Repeal Republic Act 7942 or the Philippine Mining Act of 1995 and Enact a Patriotic, Pro-Indigenous Peoples, Pro-Environment and Responsible Mining Bill. June 2014](#)

25. Kalipunan ng Katutubong Mamamayan ng Pilipinas (KAMP/ National Alliance of Indigenous Peoples in the Philippines) and the Stop the Killings of Indigenous Peoples Network (SKIPNet). *The Situation of the Indigenous Peoples' Human Rights in the Philippines*, December 2013

### 3. Mining in Cambodia

Cambodia mineral resources include copper, gold, iron ore, zinc, lead, tin, bauxite, sapphire, ruby, kaolin and limestone. The volume of exploitable mineral resources is yet unclear, due to a lack of comprehensive geological surveys. The mining industry in Cambodia is still undeveloped and there is yet no industrial-scale extraction of minerals. Among the active mining enterprises are small-scale quarries producing materials for construction, such as laterite, marble, granite, limestone, gravel and sand. There are also thousands of artisanal miners recovering gold and gemstones, often on a seasonal or part-time basis.<sup>26</sup>

Over the past decade, the Cambodian government has sought to attract foreign investment to explore minerals in the north-eastern part of the country. Many exploration licenses have been granted to mining companies, mostly to small-scale local and Asian operators, and some have reported promising finds of gold.<sup>27</sup> ANGKOR Gold was granted 6 exploration licenses covering 1,352 square kilometres, which the company has been actively exploring over the past 6 years. In September 2016, the Ministry of Industry Mines and Energy (MIME) approved and issued the first industrial mining license to Mesco Gold (MESCO), an Indian mining company, for its Phum Syarung mine in Ratanakiri. The license sets the stage for further development of the mining sector.<sup>28</sup>

Reports from civil society organizations indicate that the granting of mining concessions across Cambodia is now proceeding at an alarming rate.<sup>29</sup> A map of land and mining concessions in Cambodia prepared by human rights organization LICADHO in 2016 shows that the area covered by mining concessions in the country is 2,318,585 hectares, surpassing the total area given to economic land concessions, which stands at 2,139,552 hectares.<sup>30</sup>

The Law on Mineral Resource Management and Exploitation, enacted on July 13, 2001, governs mining in Cambodia. The mining operation of petroleum and gas is covered under a separate law. The law states, "*ownership of all mineral resources in, on or underneath the land, mountains, plateaus, territorial water and Sea Islands, and in or on seabed within the territorial integrity of the Kingdom of Cambodia, are the property of the State.*"<sup>31</sup>

The law defines the procedure for the MIME to grant mining licenses and sets the obligations of the company and the authorities. Mining without a license is punishable by fine or imprisonment. Violation by a company of any part of the Mining or Environment law or the terms of its license could result in suspension or cancellation of the license. The ministry is required to keep a register of all mining licenses issued. In 2008, the government committed to create a public logbook of all mining licenses, economic land concessions and other concessions in Cambodia. This information needs to be published across the country in Khmer language and kept up to date. However, there is still no comprehensive publicly available information logbook of mining concessions.<sup>32</sup>

The different types of mining licenses are: Artisanal Mining Licenses; Pit and Quarry Licenses and Gem Licenses; Exploration Licenses and Industrial Mining Licenses. Exploration License only gives a company the right to explore for valuable minerals. An Industrial Mining License gives a company the right to conduct commercial mining for precious minerals. Industrial Mining Licenses can only be granted in areas where an Exploration License has already been granted. A license to explore or mine does not mean that the company has ownership over that area. The license holder is not allowed to conduct any other activities in the area aside from mining.

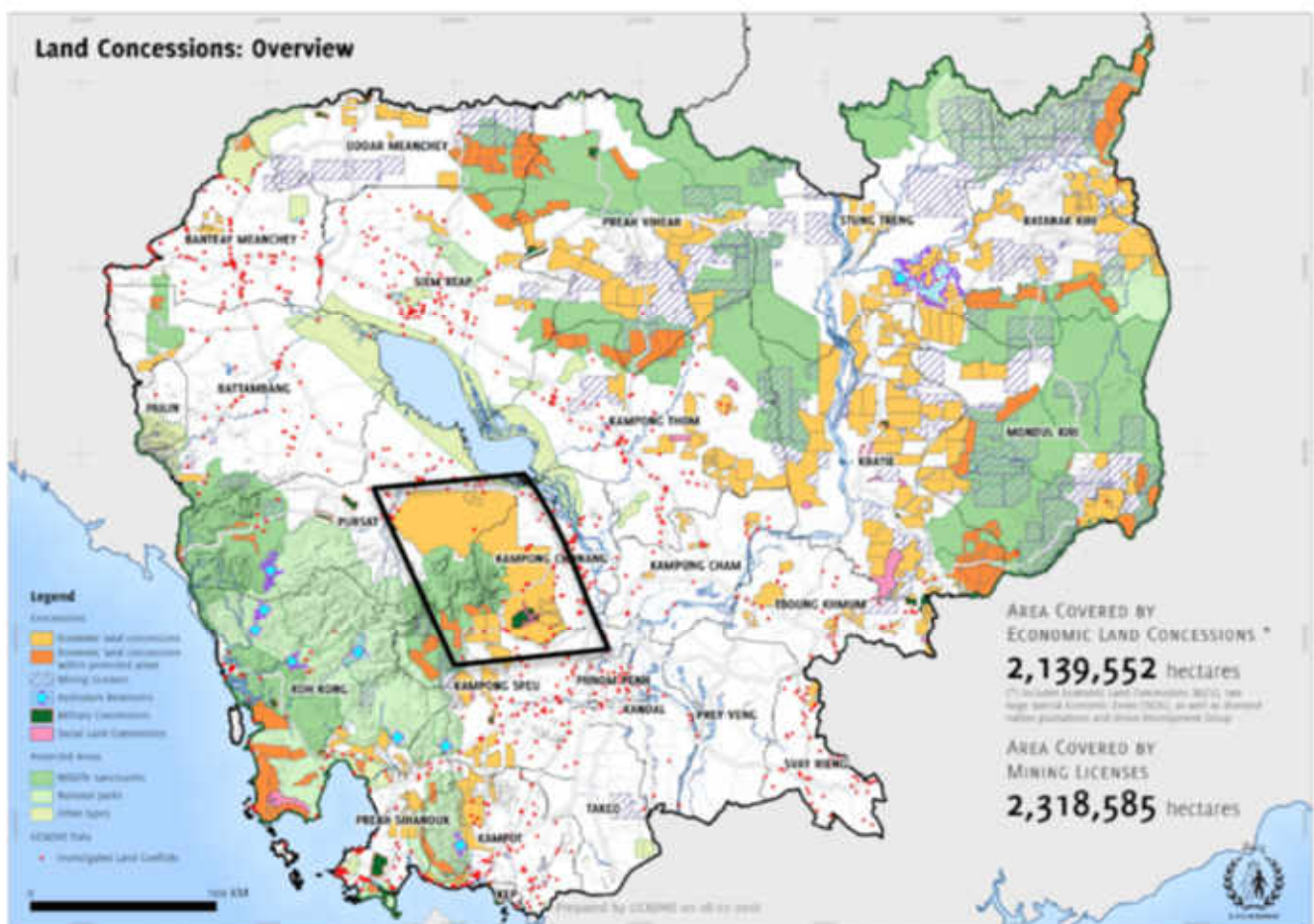
The mining law restricts the areas where mining can happen. Cultural, historical and heritage sites, protected areas and forests have extra restrictions against mining. It is illegal to mine on national cultural, historical and heritage sites. Mining activities are not allowed in temples or archaeological sites. Mining is allowed in the following areas only under certain conditions:

26. Oxfam America. <http://eimap.oxfam.org/?country=KHM> Accessed on January 26, 2017  
27. Open Development Cambodia Accessed at <https://opendevelopmentcambodia.net/topics/mining/> on January 27, 2017  
28. Angkor Gold Corp. "Cambodian Government Issues First Commercial Mining License To Mesco Gold" Accessed at <http://www.angkorgold.ca/cambodian-government-issues-first-commercial-mining-license-to-mesco-gold/> on January 27, 2017  
29. Environmental and Social Impacts of Expansion of the Extractive Industries Sector Position Paper prepared by NGO Forum's Land and Livelihoods Programme.  
30. LICADHO, Map of Land Concessions in Cambodia. Cited in Professor Andreas Neef. Land Rights Matter! Anchors to Reduce Land Grabbing, Dispossession and Displacement, A Comparative Study of Land Rights Systems in Southeast Asia and the Potential of National and International Legal Frameworks and Guidelines. Brot für die Welt. Berlin, September 2016

31. Kingdom of Cambodia. Law On Mineral Resource Management And Exploitation (Preah Reach Kram NS/RKM/0701/09) Enacted on July 13, 2001.  
32. Bridges Across Borders Cambodia (BABC) and Development and Partnership in Action (DPA). Community Guide to Mining: Impacts, Rights and Action, Participants' Manual. 2012



1. *Private property.* If land is privately owned or possessed, a company must first get a written agreement of the landholder before it can mine. The company should compensate the landholder for any inconvenience or damage to their property that is caused by the mining operation.
2. *Indigenous community property.* Indigenous land rights are protected by the Land Law. Anyone who stops an indigenous community from managing their traditional lands may be breaking the Land Law.
3. *State public land.*<sup>33</sup> The Land Law says that State public property cannot be bought and sold, however it can be granted for temporary use or occupation that cannot last longer than 15 years.
4. *State private land.*<sup>34</sup> Mining can happen on State private land as long as no one else already has rights to that land.

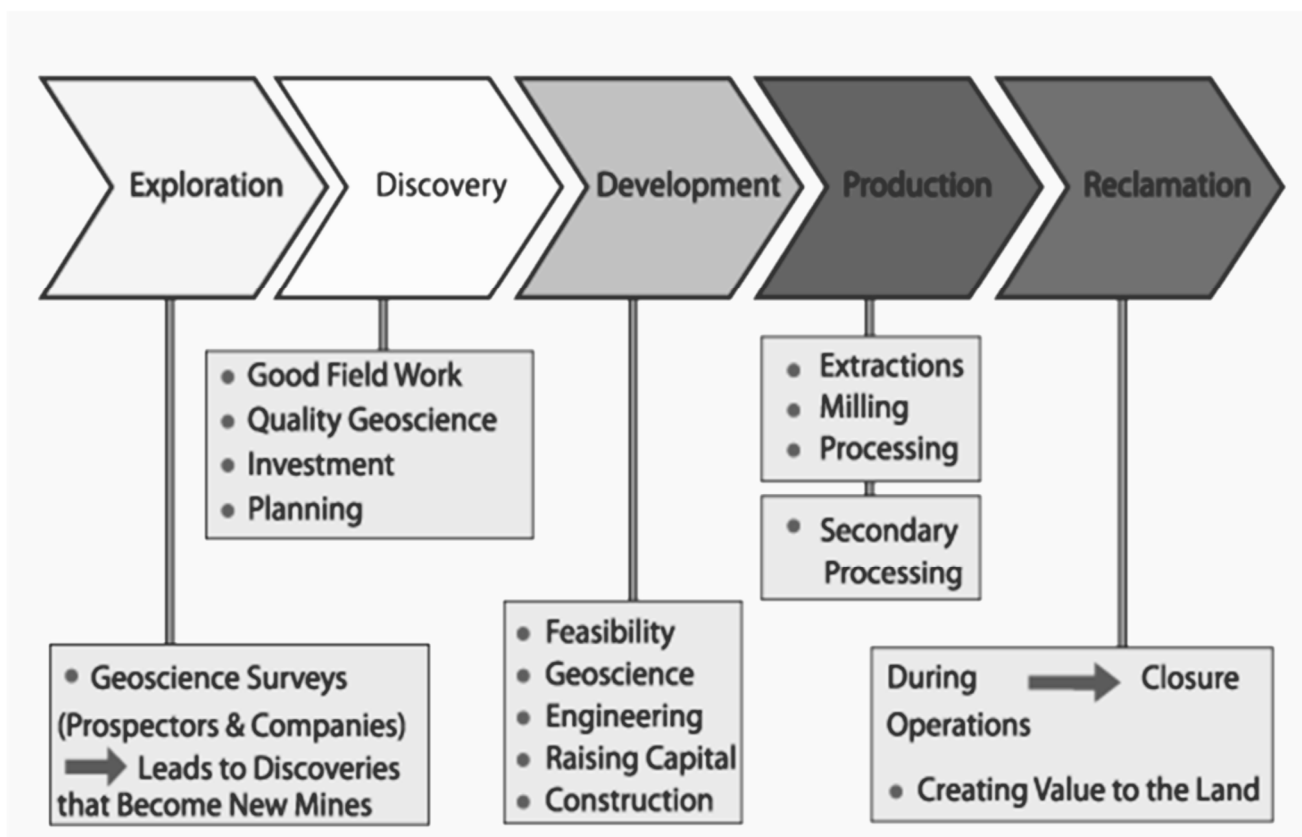


33. State public land is property that belongs to the State that is available for the public to use.

34. State private land is the property of the State that is not made available for public use and does not offer a public service.

## II. The Mining Cycle and Its Impacts

### A. What are the different stages of the mining process?



Source: Department of Lands and Forestry, Canada



## The Mining Cycle<sup>36</sup>

A mining cycle, also referred to as life of a mine, has four phases:

### ***First phase: Mineral exploration.***

This is the search for mineral deposits. The purpose of this phase is to locate a new source of useful minerals. The types of mineral exploration may be "grassroots," "brownfield" or "on-mine-site" exploration. "Grassroots" exploration is when a mining company seeks for ore deposits in areas where mineral or metal has not yet been found before. "Brownfield" exploration involves the search for additional deposits near a known mine. "On-the-site" exploration is when a company intends to expand to a mineral resource that has already been found and developed on the property of an existing mine.

Every new mine begins as an exploration project. However, most exploration projects will not advance to become mines. The success rate for exploration is extremely low for "grassroots" exploration. Fewer than one in 10,000 mineral showings discovered actually become a mine. Exploration is a very slow process. For exploration programs where a promising mineral showing is discovered, it will take at least 7 to 10 years before the start of a new mine.

### ***Second phase: Mine development.***

This proceeds when the potential value of a mineral deposit is determined to be profitable for the mining company and the community. It involves collecting more technical, environmental and socio-economic data. This means collecting more samples, drilling more holes, conducting more field tests and developing the mine plan and infrastructure. If initial exploration leads to positive results, the project moves from exploration to the deposit evaluation and mine planning stage. Once evaluation and planning are completed and a decision to build the mine has been made, construction starts. Mine development can take anywhere from 5 to 10 years, depending on where the mine is located, how large and complex the development is and existing regulations and review processes required.

### ***Third phase: Mine operation.***

This involves the process of producing a mineral product. Mine operation can either be through underground or open pit. It has four main work areas namely excavation, processing plant, waste storage and supporting services. Operation activities include hiring, training, commissioning or testing to see whether a new facility, process or equipment performs as it was designed, production and expansion. The operating life of a mine can be as short as several years or as long as several decades.

At this stage, a mining company could also decide to do further exploration for mine expansion in order to increase production and/or to extend the lifespan of an existing mine.

### ***Last phase: Mine closure.***

All mines, no matter how long they last, will eventually close. Mining is a temporary land use. Mine closure is defined as the orderly, safe and environmentally sound conversion of an operating mine to a closed state. Areas affected by mining activity should become viable and self-sustaining ecosystems that are compatible with a healthy environment and with human activities.

Ideally, the government must first approve of the mine closure plan, which is done through consultations and discussions of all stakeholders, before mine development starts. Mine closure can take from up to 2-10 years but others may take decades before the closure can be considered complete.

36. Mining Information Kit for Aboriginal Communities 2006. Available at PDAC: [www.pdac.ca/MAC](http://www.pdac.ca/MAC); [www.mining.ca/www/Public\\_Policy\\_Issues/Northern\\_Dev.php](http://www.mining.ca/www/Public_Policy_Issues/Northern_Dev.php) CAMA: [www.aboriginalminerals.com/INAC](http://www.aboriginalminerals.com/INAC); [www.ainc-inac.gc.ca/ps/nap/minmin\\_e.html](http://www.ainc-inac.gc.ca/ps/nap/minmin_e.html) NRCan: [www.nrcan.gc.ca/mms/abor-auto/mine-kit\\_e.htm](http://www.nrcan.gc.ca/mms/abor-auto/mine-kit_e.htm)

## B. What are the legal requirements for companies to conduct mining?

The mining laws in each country define the legal requirements for each stage of the mining process. There are certain permits or licences that companies and other stakeholders need to acquire before proceeding with their mining activities. It is useful to know what these requirements are and to monitor whether companies have complied with the law before they proceed with each stage of their mining activity. The table below lists the necessary permits or licenses required by the respective laws governing the mining industry in the Philippines, Indonesia and Cambodia.

Mining Stage	Legal Requirements		
	Philippines	Indonesia	Cambodia
<b>Mineral exploration</b>	<ul style="list-style-type: none"> <li>• Exploration Permit</li> <li>• Declaration of mining project feasibility and work program for development</li> </ul>	<ul style="list-style-type: none"> <li>• Exploration IUP/IUPK: granted for the performance of general surveys, exploration and feasibility studies within a WUP/WPN area.</li> <li>• Include a reclamation plan in its exploration work plan and budget and provide a reclamation guarantee in the form of a time deposit placed at a state-owned bank.</li> <li>• The reclamation plan for the exploration phase is required to be prepared before undertaking any exploration activities.</li> </ul>	<p>Mineral resource license:</p> <ul style="list-style-type: none"> <li>• License for Exploration</li> <li>• Written agreement of the private land owner, and compensation for inconvenience and any damage to the surface of the land as a result of activities of mineral operation.</li> <li>• Written permission of the competent State institution or the inter- ministerial institution responsible for the management of State owned lands</li> </ul>
<b>Mine Development, Operation and Expansion</b>	<ul style="list-style-type: none"> <li>• Mineral production sharing agreement</li> <li>• Co-production agreement</li> <li>• Joint-venture agreement</li> <li>• Financial or technical assistance agreement</li> <li>• Ore Transport Permit</li> <li>• Mineral Trading Registration Minerals Processing Permit</li> <li>• Environmental Clearance Certificate based on an Environmental Impact Assessment</li> </ul>	<ul style="list-style-type: none"> <li>• Operation Production IUP/IUPK: granted for construction, mining, processing, refining, hauling and selling within the WUP/WPN area.</li> <li>• Transport and Sales IUP-OP: for companies engaged in a coal/minerals transportation and trading business</li> <li>• Processing and/or Refining IUP-OP</li> <li>• All IUP/IUPK holders are required to pay production royalties, the rates of which will vary depending on the mining scale, production level, and mining commodity price.</li> </ul> <p>All mining projects that potentially have significant environmental impacts are required to carry out Environmental Impact Assessments (EIA) and to obtain an Environmental License, as a prerequisite to obtaining other relevant business permits.</p>	<p>Mineral resource license:</p> <ul style="list-style-type: none"> <li>• License for Mineral Handicraft</li> <li>• License for Open Mines and Quarrying Sites</li> <li>• License for Exploitation of Precious Stones</li> <li>• License for Industrial Exploitation of Mineral Resources</li> <li>• Environmental impact assessment and study</li> <li>• Environmental management plan</li> <li>• Mine site restoration and rehabilitation and financial guarantees.</li> <li>• Payment of tax, land rental and royalties to the Government</li> <li>• Indemnify land owner both in and out of the license area against damages caused by mining operations</li> </ul>
<b>Mine Closure</b>	Mine rehabilitation fund		<p>Company must put up money (e.g., a deposit or bond) to complete the reclamation, including shut- down, closure and post-closure Permit on shut-down Reclamation permit</p>

## C. Who are the major stakeholders in the mining industry?

Knowing the stakeholders in a mining project is important in order to know whom to approach or engage with when faced with mining activities. It is good to know who are involved during each stage and what their roles and obligations are in the conduct of mining. The table below enumerates the different actors and stakeholders involved during each phase of mining and their respective roles.

Stages of Mining	Major Stakeholders and their Respective Roles <sup>37</sup>
<b>Mineral Exploration</b>	<ul style="list-style-type: none"> <li>◇ National and local government – pass laws and policies to attract investments in areas with mineral potential, conduct community consultations</li> <li>◇ Junior Exploration Companies - smaller companies looking for mineral deposits that could be developed</li> <li>◇ Senior Mining Companies – operate one or more mines, conduct exploration programs on existing mine property in hopes of increasing the mine life</li> <li>◇ Investors and Financiers - private individuals or corporations that provide funding for mining exploration</li> </ul>
<b>Mine development and expansion</b>	<ul style="list-style-type: none"> <li>◆ National and local government - set rules and manage permitting process, issue the required permits, conduct the environmental assessment process, conduct community consultations</li> <li>◆ Senior mining companies - main players as manager and operator in mine development</li> <li>◆ Junior mining companies - secondary players, usually sell all or most of its ownership to a senior mining company</li> <li>◆ Consulting firms – hired by the mining company to conduct feasibility studies, design, project management activities</li> <li>◆ Financial Institutions - Most mining companies raise these funds through a combination of individual and institutional investors and by borrowing money from the banks</li> <li>◆ Construction companies and contractors – hired to build roads, plant sites, buildings, processing plant and other infrastructure</li> </ul>
<b>Mining Operation and Expansion</b>	<ul style="list-style-type: none"> <li>◇ Senior mining companies – play a central role in the mining industry, arrange financing, plan, develop, operate and manage mine operations.</li> <li>◇ Construction companies build the roads, dams, plants, shops, buildings, offices, pipelines and other facilities, including water and power distribution systems that are required before a mine operation can go into production.</li> <li>◇ Government departments - conduct inspections to monitor compliance with applicable environmental permits, licences or authorizations</li> <li>◇ Local government units – conduct community consultations, receive taxes for hosting mining operation</li> <li>◇ Financial Institutions – provide funding to the mining company for their operations</li> <li>◇ Industry Associations – associations of mining companies or employers, which exist to serve its members and promote the interests of the mining industry, e.g. “Chamber of Mines”, International Council on Mining and Metals (ICMM), China Chamber of Commerce of Metals Minerals and Chemicals Importers and Exporters (CCCME)</li> <li>◇ Customers – immediate and final users of the minerals</li> </ul>
<b>Mine Closure</b>	<ul style="list-style-type: none"> <li>◆ Mining company – responsible for full and proper environmental closure and reclamation of the mine operation</li> <li>◆ Government regulators and agencies - enforce mining law and the terms of mining-related permits, conduct community consultations</li> </ul>

37. Extracted from Mining Information Kit for Aboriginal Communities, 2006

## D. What are the environmental and social impacts of mining?

In each stage of mining process - exploration, development, operation, expansion and closure - entails significant environmental, social and economic impacts. Actual and potential impacts of mining activities are presented in the tables and graphics below to help affected communities know what to expect when mining comes into their area:

### Environmental impacts<sup>38</sup>

Mining Phase: Activities	Possible Environmental Impacts
<u>Mineral Exploration</u> <ul style="list-style-type: none"> <li>◆ Basic prospecting</li> <li>◆ Airborne surveys</li> <li>◆ Claim staking</li> <li>◆ Ground exploration and drilling</li> <li>◆ Tree cutting</li> <li>◆ Camp and drilling program</li> <li>◆ Road construction for access, fuel storage or exploration trenching</li> <li>◆ Consultations between government, mining companies and communities</li> </ul>	<ul style="list-style-type: none"> <li>◆ Land use changes, land movement and erosion</li> <li>◆ Loss of archaeological and heritage sites Impacts on traditional and non-traditional land use</li> <li>◆ Impacts on water flows and quality: Water quality affected by waste (mud) from drilling with impacts on fish and fisheries</li> <li>◆ Wildlife migratory patterns affected by presence of humans and noise from helicopters, planes, and drill rigs</li> </ul>
<u>Mine Development</u> <ul style="list-style-type: none"> <li>◇ Collect technical, environmental and socio-economic data</li> <li>◇ Develop the mine plan and infrastructure</li> <li>◇ Consultations between government, mining companies and communities</li> <li>◇ Evaluate financial, socio-economic and environmental impacts</li> <li>◇ Obtain permits and licenses</li> <li>◇ Final evaluation and decision to proceed with production</li> <li>◇ Build mine and facilities to start operations</li> </ul>	<ul style="list-style-type: none"> <li>◇ Land use change, land movement and erosion</li> <li>◇ Loss of archaeological and heritage sites</li> <li>◇ Impacts on traditional and non-traditional land use</li> <li>◇ Air quality affected by dust from roads and mining activities</li> <li>◇ Water quality affected by chemicals in water discharge, mud or dirt getting into water bodies</li> <li>◇ Erosion could cause drying up of natural springs and other water sources</li> <li>◇ Wildlife migratory patterns affected by presence of humans, noise from aircraft, noise from blasting</li> </ul>
<u>Mining Operation and Expansion</u> <ul style="list-style-type: none"> <li>◆ Hire and train permanent employees and contractors</li> <li>◆ Commissioning or testing new facility, process or equipment</li> <li>◆ Mining production: Recovery of ore from waste rock and processing the ore</li> <li>◆ Mine expansion</li> <li>◆ Excavations in the mine, storage of waste rock</li> <li>◆ Tailings waste and tailings dams</li> <li>◆ Consultations between government, mining companies and communities</li> </ul>	<ul style="list-style-type: none"> <li>◆ Land disturbance from mining activities</li> <li>◆ Loss of archaeological and heritage sites</li> <li>◆ Impacts on traditional and non-traditional land use</li> <li>◆ Water quality affected by dirt, rocks, or contaminated or unclean water enter streams or lakes</li> <li>◆ Risks associated with tailings dams overflow or collapse with impacts on agriculture, fish and fisheries.</li> <li>◆ Air quality affected by dust from roads and mining and emissions from trucks and on-site power generation</li> <li>◆ Wildlife and migratory patterns affected by presence of humans, noise from aircraft, noise from blasting</li> </ul>
<u>Mine Closure</u> <ul style="list-style-type: none"> <li>◇ Consultations between government, mining companies and communities</li> <li>◇ Production stopped, employees laid off leading up to the shut-down</li> <li>◇ Decommissioning or taking apart mining and processing facilities and equipment</li> <li>◇ Reclamation or restoring disturbed land as closely as possible to its original condition</li> <li>◇ Post-closure environmental activities, maintenance and monitoring</li> </ul>	<ul style="list-style-type: none"> <li>◇ Long-term stability of waste rock piles and mining slopes need to be monitored.</li> <li>◇ Need annual inspections until permanent stability is demonstrated</li> <li>◇ Tailings containment structures require periodic monitoring and maintenance to guard against spills</li> <li>◇ Water quality is affected by acid mine drainage or metal leaching</li> </ul>

38. Mining Information Kit for Aboriginal Communities, 2006

## Social and economic impacts

Mining operations can have both positive and negative impacts on the local economy, as well as on the social relations within an affected community.

On the positive side, the entry of mining could lead to economic benefits by adding more wealth to a community. Mining development and operations bring in more money, new livelihoods and income-earning activities into a community. This could lead to increased local employment, increased income from wages, and new training opportunities for mine workers. More money in the community could also lead local community businesses to prosper by supplying goods and services to the mining community.<sup>39</sup>

On the other hand, mining activities also result in physical and economic displacement of local communities from their land and traditional livelihoods. New employment opportunities attract workers away from traditional economic activities undermining their productivity and role in the local economy. The pursuit of income from wages or through setting up of local businesses could lead to the loss of traditional livelihood activities such as agriculture. Increasing demand for goods and services from an expanding local labor force could also result to local inflation, increasing local prices and reducing the purchasing power of those not directly employed by the mining company.<sup>40</sup>

It is also necessary to distinguish between employment during mine development or construction and operation. Employment levels drop off substantially after construction and this can cause real challenges for community members. Those who have invested in local businesses to cater to mine workers can be left with far fewer clients post-construction, in some cases leaving their businesses unsustainable.<sup>41</sup>

Social impacts of mining include increased population in the community thereby putting a strain on existing social services. Increase of strangers in the community could also worsen existing social problems and widen the gap between the employed and unemployed. More money flowing into a community could also result in increasing alcohol and drug use, crime and prostitution. Family life is also affected when mine workers and their families are separated for several days or weeks. Shift work or rotational work in the mining company often leave the workers less time to spend on traditional activities. At the same time, degradation of the local environment by mining activities — particularly loss of water resources and pollution — has direct impacts on human health and sanitation.<sup>42</sup>

When the relocation of communities is necessary for the mine development to proceed, problems such as social conflicts, and loss of identity and culture can arise. When security forces are brought in to protect the mine, social conflicts between the community and the mining company are even more likely to occur. The local community may not welcome the presence of security personnel, and the private security forces may not be sensitive to the cultural traditions of the local people. In many cases, security forces may commit human rights violations further antagonizing the local population.<sup>43</sup>

Mining also has gender-specific impacts. For example, “the concentration of large numbers of migratory, mostly young, male workers around extractive industry developments can lead to an increase in prostitution and associated health and security risks, including HIV/AIDS and other sexually transmitted diseases, as well as human trafficking. If local economies are disrupted, the traditional roles for both men and women can be undermined, breaking down social relations and resulting in increasing domestic violence and sexual abuse – often as a result of domestic disputes over resources, changed lifestyle, alcoholism, drug use or gambling.”<sup>44</sup>

After the mining operation has ended, mine closure could also bring about economic and social impacts. These include loss of employment, reduced income and loss of social services provided by the company. The end of the employment phase in mining could result in unused skills among the local population and a return to traditional skills and livelihoods.<sup>45</sup>

39. Mining Information Kit for Aboriginal Communities, 2006

40. United Nations Interagency Framework Team for Preventive Action. Toolkit and Guidance for Preventing and Managing Land and Natural resources Conflict. Extractive Industries and Conflict. 2012. Available at [http://www.un.org/en/events/environmentconflictday/pdf/GN\\_Extractive\\_Consultation.pdf](http://www.un.org/en/events/environmentconflictday/pdf/GN_Extractive_Consultation.pdf)

41. Evelyn Greenspan, Oxfam-America

42. United Nations Interagency Framework Team for Preventive Action. 2012

43. United Nations Interagency Framework Team for Preventive Action. 2012

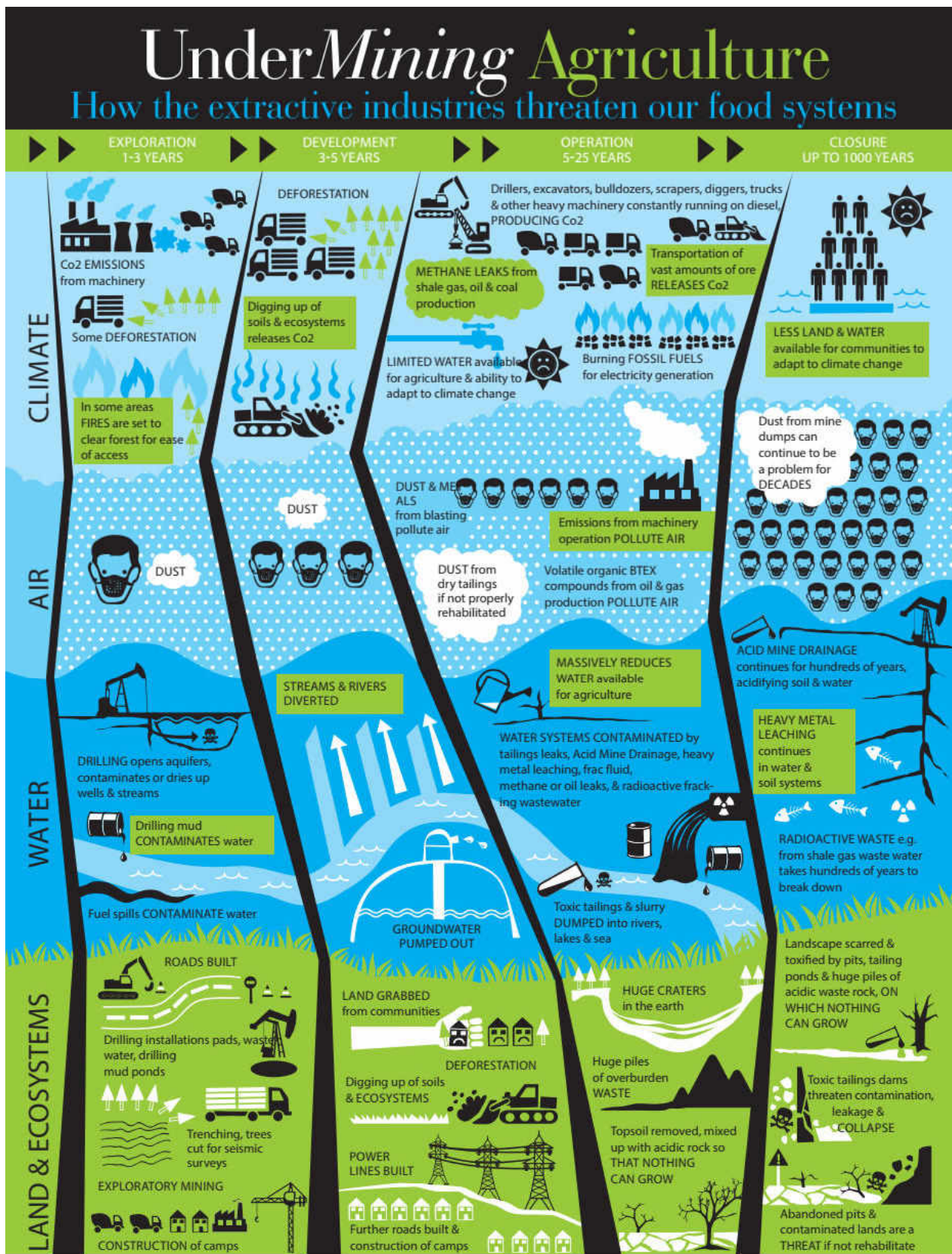
44. United Nations Interagency Framework Team for Preventive Action. 2012

45. Mining Information Kit for Aboriginal Communities, 2006



## Particular impacts on agriculture

Mining threatens agricultural livelihoods and food systems at each stage of the mining cycle as shown in the illustration below.



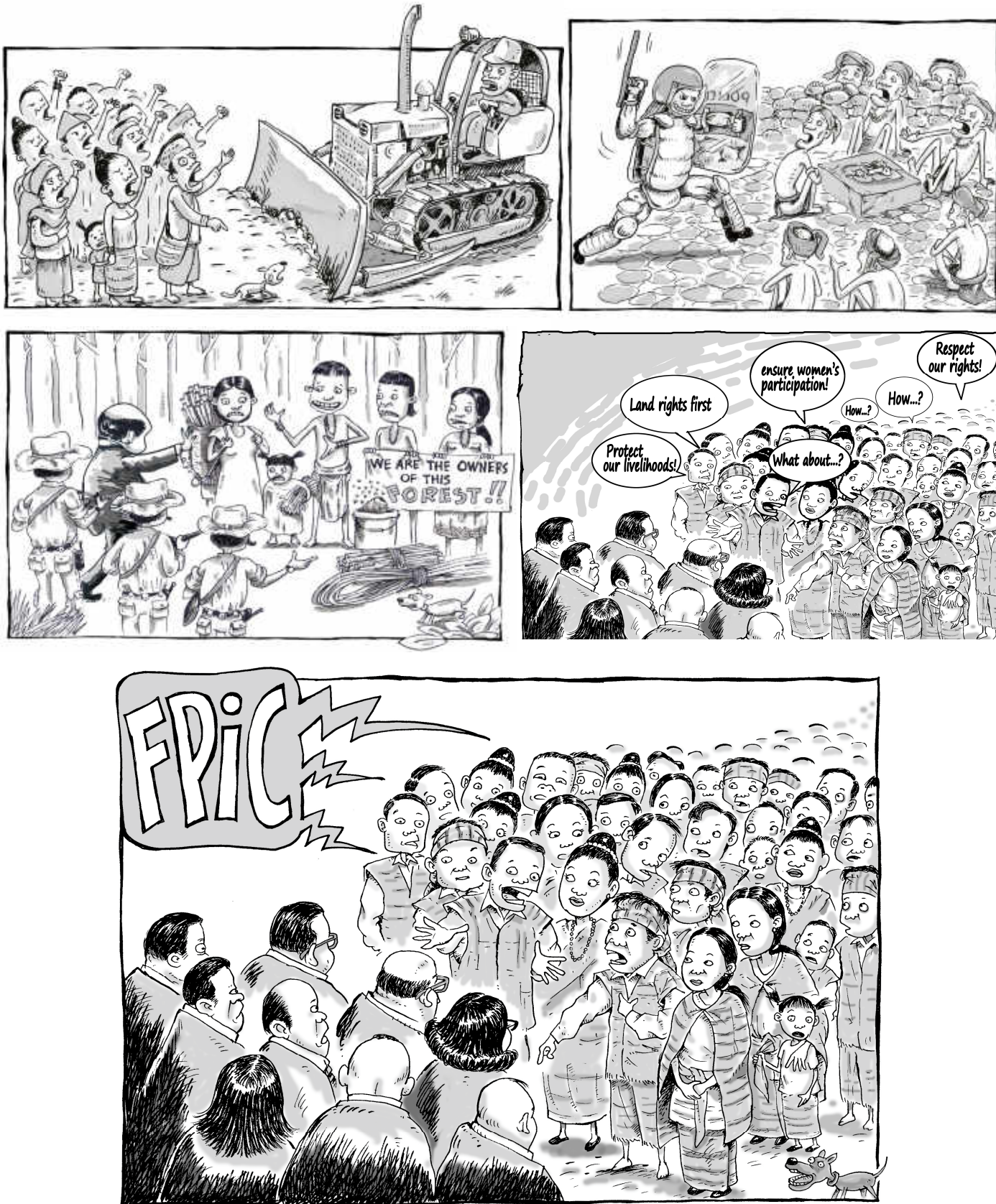
For more information, view the full report  
<http://www.gaiafoundation.org/UnderMiningAgriculture>  
Twitter: @GaiaFoundation #wakeupcall





## Particular impacts on indigenous peoples

For indigenous peoples, the changes brought by mining activities on the land, water, forests, agriculture, traditional livelihoods and food systems pose serious threats to the continued survival of their communities.



## III. Free Prior and Informed Consent (FPIC)



Source: OXFAM

### A. Indigenous Concepts and Principles of FPIC

Indigenous peoples have customarily practiced FPIC since time immemorial when deciding on village events and activities concerning the whole community. On various occasions, indigenous peoples representatives have expressed the concepts and principles that they believe are necessary for FPIC to proceed in a culturally appropriate manner.

First and foremost, indigenous peoples view FPIC as an inherent right that is derived from their right to self-determination. Thus it is not an option to forego the process of FPIC, because to do so would mean from the very start that the rights of indigenous peoples are violated.

Second, for indigenous peoples, the process of obtaining FPIC should be determined by the community itself and implemented in a manner that respects customary laws and traditional modes of decision-making. There is no template or single model for FPIC that applies to all communities. Indigenous peoples feel that it is important to recognize the existing centres of authority in their respective communities. Different governing structures have their own authority and decision-making processes. Companies seeking FPIC should exert due diligence to understand how best to engage with indigenous communities and to ensure that they are engaging with genuine representatives of indigenous peoples.





Further, FPIC is more than just an act of consultation, consent or non-consent. Rather, it entails an internal process of consensus building among the people in order to arrive at a decision. When deciding whether to consent or not to a mining project, indigenous communities need to reach consensus. Consensus means that the decision is not simply a majority vote or a decision made by the leaders in the community. Rather, a decision is reached through a democratic process of discussion with the participation of the community collectively. FPIC processes must include all indigenous communities with impacts in their territories, not just those directly affected by mining activities. All indigenous communities directly and indirectly affected need to be included in the FPIC process. Participation of indigenous women must be ensured because of their intimate knowledge of their environment and their important role in the continuity of society. Interests of indigenous youth as future leaders also need to be considered.

Regarding time frames, obtaining FPIC may be quick or may take a long time, depending on the nature of the community and the extent of the impacts of mining. What is important is that the community fully understands the information and issues, and arrives at a decision by consensus without being restricted by a rigid time frame.

Before starting the FPIC process, all necessary information needed by the community to arrive at a sound and informed decision, must be provided. First, the community must be informed of its right to give or withhold FPIC. Other information needed include: full details about the mining company, information about company ownership, registration, on going operations and track record, information about the proposed project, expected negative and positive impacts. All information should be provided in a language that is simple and fully understood by communities.<sup>46</sup>

46. Mining Information Kit for Aboriginal Communities, 2006 Cathal Doyle & Jill Cariño "Making Free, Prior & Informed Consent a Reality, Indigenous Peoples and the Extractive Sector" (2013) [[www.piplinks.org/makingfpicareality](http://www.piplinks.org/makingfpicareality)].

## B. State Recognition of Indigenous Peoples and FPIC

State legal frameworks in some countries in Asia recognize the existence and rights of indigenous peoples. However, legal recognition by States does not always guarantee the full range and enjoyment by indigenous peoples of their inherent individual and collective rights.

In the Philippines, the rights of indigenous cultural communities/indigenous peoples (ICC/IP) are constitutionally guaranteed under Article 2, section 22 of the 1987 Constitution. The rights of indigenous peoples are further elaborated and enabled through Republic Act 8371 or the Indigenous Peoples' Rights Act [IPRA], passed in 1997. The IPRA recognizes both collective and individual rights of indigenous peoples to own and develop their ancestral domains and lands. In addition, the law protects and promotes indigenous peoples' cultural integrity, the right to self-governance and the right to FPIC.

The Implementing Rules and Regulations of the IPRA further define FPIC, the scope of who are required to give consent, and the procedure and requirements in securing FPIC. In addition, the National Commission on Indigenous Peoples (NCIP) Administrative Order No. 3, Series of 2012 defines detailed and revised Guidelines on Free and Prior Informed Consent and Related Processes.<sup>47</sup>

According to Oxfam America's Briefing Paper on FPIC in the Philippines:

"The IPRA adopted the concept of FPIC as a means to protect indigenous rights and interests and give them a voice in matters that affect them. In this context, FPIC requires that indigenous communities be provided with adequate and accessible information, and that consensus is determined in accordance with indigenous peoples' customary laws and practices and free from any external manipulation or coercion. The IPRA requires FPIC prior to the extraction of resources from indigenous ancestral domains and lands. When implemented effectively, FPIC represents a critical tool in the realization of indigenous self-determination, promoting community participation in decision-making and mitigating the risk of social conflict around natural resource projects."<sup>48</sup>

Unfortunately, however, even with strong legislation in place, indigenous peoples in the Philippines have faced considerable challenges in realizing their right to give or withhold FPIC. Various researches and evaluations have found significant gaps between policy and practice in the implementation of FPIC.<sup>49</sup>

In Indonesia, the third amendment to the Constitution in Article 18b-2, recognizes indigenous peoples' rights and respects traditional communities and their customary rights where these exist and as long as these are in accordance with the societal development and principles of the state. Some laws on agrarian reform, agrarian regulations and human rights also give implicit recognition of some rights of peoples referred to as *masyarakat adat* or *masyarakat hukum adat* or custom law-based communities.<sup>50</sup>

While Indonesia is a signatory to the UN Declaration on the Rights of Indigenous Peoples (UNDRIP), government officials argue that the concept of indigenous peoples is not applicable as almost all Indonesians (with the exception of the ethnic Chinese) are indigenous and are thus entitled to the same rights. In May 2013, the Constitutional Court affirmed the constitutional rights of indigenous peoples to their land and territories, including their collective rights over customary forest.<sup>51</sup> However, the government has yet to draft the operational guideline for the implementation of this court decision.<sup>52</sup>

In Cambodia, the 2009 National Policy on Development of Indigenous Peoples uses the term "*chuncheat daoem pheak tech*" which literally means "minority original ethnicity" in its documents to refer to peoples who are not Khmers, Chams, Chinese, Laos, Thais, or Kinh (Vietnamese). This term is also used in the 2001 Land Law and in the 2002 Forestry Law. The 2001 Land Law recognizes the collective rights of indigenous communities to their traditional lands.<sup>53</sup> Also, indigenous communities are entitled to register their communal land and receive a collective land title for the protection and management of their traditional lands. Until they get the opportunity to actually do this, the Land Law protects their right to continue to manage their land according to traditional custom. This includes residential land and agricultural land. The Forestry Law also protects the rights of indigenous people to continue to use the forests in line with their traditional customs, beliefs and religion.<sup>54</sup>

Of the three countries, only the Philippines have explicit provisions in the law recognizing the right to FPIC. No such legal provisions on FPIC are found in Cambodia and Indonesia.

47. For more information on the NCIP 2012 Guidelines see Cielo Magno and Dante B. Gatmaytan, Free Prior and Informed Consent in the Philippines. Regulations and Realities. Oxfam America Briefing Paper. September 2013. Available at <https://www.oxfamamerica.org/static/media/files/fpic-in-the-philippines-september-2013.pdf>

48. Cielo Magno and Dante B. Gatmaytan, Free Prior and Informed Consent in the Philippines. Regulations and Realities. Oxfam America Briefing Paper. September 2013. Available at <https://www.oxfamamerica.org/static/media/files/fpic-in-the-philippines-september-2013.pdf>

49. Asia Indigenous Peoples Pact (AIPP). Recognition of Indigenous Peoples' Customary Land Rights in Asia. March 2015

50. AIPP, 2015

51. IWGIA. The Indigenous World 2015. April 2015

52. AIPP, 2015

53. AIPP, 2015

54. Bridges Across Borders Cambodia & Development and Partnership in Action. A Community Guide To Mining Impacts, Rights And Action, Participants Manual. January 2012



---

## C. International Instruments Recognizing FPIC

FPIC is derived from the right of indigenous peoples to self-determination. This is the right freely determine their social, economic and cultural development, which is an inherent right of indigenous peoples recognized under international human rights treaties and declarations. A number of international conventions and legal instruments explicitly recognize FPIC as a collective right of indigenous peoples. These international instruments clarify that it is a duty of States to obtain indigenous peoples' FPIC to the issuance of concessions, and before the commencement of related activities in or near their territories or impacting on the enjoyment of their rights.<sup>55</sup>

---

### 1. International Labour Organization Convention on Indigenous & Tribal Peoples No. 169 (ILO Convention 169)

ILO Convention 169 requires that indigenous peoples should not be removed from their land or relocated without consent.

Article 6 provides:

Governments shall consult the peoples concerned, through appropriate procedures and in particular through their representative institutions, whenever consideration is being given to legislative or administrative measures which may affect them directly; ... The consultations carried out ... shall be undertaken, in good faith and in a form appropriate to the circumstances, with the objective of achieving agreement or consent to the proposed measures.

Article 7 states:

The peoples concerned shall have the right to decide their own priorities for the process of development as it affects their lives, beliefs, institutions and spiritual well-being and the lands they occupy or otherwise use, and to exercise control, to the extent possible, over their own economic, social and cultural development. In addition, they shall participate in the formulation, implementation and evaluation of plans and programmes for national and regional development which may affect them directly.

Further, Article 15 of the convention states:

The rights of the peoples concerned to the natural resources pertaining to their lands shall be specially safeguarded. These rights include the right of these peoples to participate in the use, management and conservation of these resources.

---

### 2. Treaty bodies of the International Covenant on Civil and Political Rights (ICCPR), and the International Covenant on Economic Social and Cultural Rights (ICECSR)

In its 2009 General Comment No 21 on the right of everyone to take part in cultural life, the Committee on Economic Social and Cultural Rights (CESCR) affirmed the duty of States to: ...respect the principle of free, prior and informed consent of indigenous peoples in all matters covered by their specific rights. Likewise, the Committee on the Elimination of Racial Discrimination (CERD), in its 1997 General Recommendation No XXIII on indigenous peoples, clarified that: ...no decisions directly relating to [indigenous peoples] rights and interests are taken without their informed consent.<sup>56</sup>

---

<sup>55</sup>. Cathal Doyle & Jill Cariño, 2013

<sup>56</sup>. Cathal Doyle & Jill Cariño, 2013

### 3. UN Declaration on the Rights of Indigenous Peoples (UNDRIP)

The requirement for consent is affirmed in eight out of the 46 articles of the UN Declaration on the Rights of Indigenous Peoples (UNDRIP).

Article 10 states:

Indigenous peoples shall not be forcibly removed from their lands or territories. No relocation shall take place without the FPIC of indigenous peoples concerned.

Article 32:

States shall consult and cooperate in good faith with the indigenous peoples concerned through their representative institutions in order to obtain their FPIC to any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.<sup>57</sup>

### 4. International Financial Institutions policies on FPIC

FPIC is gaining wider acceptance as an international standard that should be respected by external entities wishing to engage with indigenous peoples and enter into their ancestral domains. A growing number of international financial institutions have incorporated language on indigenous peoples and FPIC into their policies in an effort to abide by international human rights standards.

#### Asian Development Bank (ADB) Safeguard Policy Statement (2009) and Accountability Mechanism (2012)

ADB's Safeguard Policy Statement of 2009 specifically states:

Consultation and participation are central to the achievement of safeguard policy objectives. ... They all imply the need for prior and informed consultation with affected persons and communities in the context of safeguard planning and for continued consultation during project implementation to identify and help address safeguard issues that may arise. ... In addition, ADB needs to clarify what "meaningful consultation" means. For policy application, it would refer to a process that (i) begins early in the project preparation stage and is carried out on an ongoing basis throughout the project cycle; (ii) provides timely disclosure of relevant and adequate information that is understandable and readily accessible to affected people; (iii) is undertaken in an atmosphere free of intimidation or coercion; (iv) is gender inclusive and responsive, and tailored to the needs of disadvantaged and vulnerable groups; and (v) enables the incorporation of all relevant views of affected people and other stakeholders into decision making, such as project design, mitigation measures, the sharing of development benefits and opportunities, and implementation issues.

Further, ADB's Indigenous Peoples Safeguards states:

ADB's indigenous peoples safeguards aim to ensure that the design and implementation of projects foster full respect for indigenous peoples' identity, dignity, human rights, livelihood systems, and cultural uniqueness as defined by the indigenous peoples themselves so that they receive culturally appropriate social and economic benefits, are not harmed by the projects, and can participate actively in projects that affect them. For a project with impacts on indigenous peoples, the Safeguard Policy Statement (SPS) requires borrowers to carry out meaningful consultation and to prepare and implement an indigenous peoples plan. The plan includes measures to ensure that indigenous peoples benefit, and that adverse impacts are prevented, or where this is not possible, mitigated. The SPS requires that broad community support of affected indigenous peoples' communities be ascertained for project activities to which indigenous peoples are deemed particularly vulnerable.<sup>58</sup>

57. United Nations Declaration on the Rights of Indigenous Peoples. 2007

58. Asian Development Bank (ADB). Indigenous peoples Safeguards. Accessed from <https://www.adb.org/site/safeguards/indigenous-peoples> on February 9, 2017.

## **World Bank Environmental and Social Framework (ESF) and Standard 7 on Indigenous Peoples/Sub-Saharan African Historically Underserved Traditional Local Communities (ESS7)**

On August 4th, 2016, the World Bank's Board of Directors approved a new Environmental and Social Framework (ESF), aimed at preventing Bank-funded development projects from harming the environment and people. Standard 7 on Indigenous Peoples/Sub-Saharan African Historically Underserved Traditional Local Communities ("ESS7") is the principle safeguard standard that borrowing countries are expected to follow to protect the rights of indigenous groups.

The Bank's ESS7 moves from Free, Prior, and Informed Consultation, to Free, Prior, and Informed Consent, requiring FPIC in the following circumstances:

- when the project will have adverse impacts on land and natural resources subject to traditional ownership/customary use occupation;
- when the project will cause relocation on land; or
- when the project will have significant impacts on an indigenous group's cultural heritage that is material to the identity, cultural and/or spiritual aspects of the affected indigenous group's lives.

Where FPIC is identified as a requirement for a project, and is not obtained, the entire project may not be jeopardized however those aspects of the project requiring FPIC will not be processed further.<sup>59</sup>

**International Finance Corporation (IFC) Environmental and Social Performance Standards (2012)**, defines IFC clients' responsibilities for managing their environmental and social risks. Performance Standard 7 on Indigenous Peoples aims, among others,

*to ensure that the development process fosters full respect for the human rights, dignity, aspirations, culture, and natural resource-based livelihoods of Indigenous Peoples. [Also]*

*to ensure the Free, Prior, and Informed Consent (FPIC) of the affected communities of Indigenous Peoples when the circumstances described in this Performance Standard are present.*

It should also be noted that IFC requires documentation evidence of the agreement reached with indigenous peoples.<sup>60</sup>

---

59. Oliver W. MacLaren and Julie-Anne Pariseau. The New World Bank Safeguard Standard For Indigenous Peoples: Where Do We Start? Paper prepared for presentation at the 2017 World Bank Conference On Land And Poverty. The World Bank – Washington DC, March 20 – 24, 2017

60. International Finance Corporation (IFC). Performance standard 7 Indigenous Peoples. Accessed from [http://www.ifc.org/wps/wcm/connect/1ee7038049a79139b845faa8c6a8312a/PS7\\_English\\_2012.pdf?MOD=AJPERES](http://www.ifc.org/wps/wcm/connect/1ee7038049a79139b845faa8c6a8312a/PS7_English_2012.pdf?MOD=AJPERES) on February 9, 2017

## 5. Extractive Industry Bodies

Extractive industry bodies are growing to accept the requirement of FPIC as the standard that corporate actors must comply with in order to respect indigenous peoples' human rights. This has come about in recognition that failing to achieve genuine community consent has put companies at risk of short, medium, and long-term financial losses, including stalled project commencement or disruption of production due to local community opposition.<sup>61</sup>

A research on the costs of community-company conflicts in the extractive sector conducted by the Corporate Social Responsibility Initiative in 2014 has found that social conflicts often result in significant costs to companies engaged in mineral and energy development. Among the most frequent and greatest costs of social conflicts were those arising from lost productivity due to temporary shutdowns or delay caused by community opposition. Opportunity costs due to lost value from future projects, expansion plans, or sales that did not push through were also identified. Indirect costs often overlooked by companies include costs resulting from staff time being diverted to managing conflict. The argument was made for extractive companies to better understand the costs that can arise from failing to build sustainable relationships with local communities. The research suggested "analyzing the costs of conflict can help community relations staff to make the business case for increased attention to community engagement before severe impacts occur." It is thus worthwhile for extractive companies to invest in building good relationships with local communities in order to avoid greater costs later on arising from social conflict.<sup>62</sup>

### International Council on Mining and Metals (ICMM)

The International Council on Mining and Metals (ICMM) is a mining industry association comprised of 23 of the world's leading mining and mineral companies, as well as 35 national and regional mining associations. In 2013, the ICMM published its official position on FPIC in a document called the Indigenous Peoples and Mining Position Statement ("FPIC Statement"). The FPIC Statement encourages ICMM members to seek to obtain the consent of Indigenous Peoples for new projects (and changes to existing projects) that are located on lands traditionally owned by, or are under customary use by, Indigenous Peoples, where such projects are likely to have significant adverse impacts on Indigenous Peoples. On October 29, 2015, the ICMM released an updated version of its Indigenous Peoples and Mining Good Practice Guide, which now provides practical guidance on the implementation of its 2013 official statement on FPIC. The Guide is intended to reflect ICMM's commitment to ensuring that mining projects create lasting benefits for companies and local indigenous communities in a manner consistent with the principle of FPIC.<sup>63</sup>

## 6. ASEAN Regional Framework on Extractive Industries

To address the perceived weak governance of extractive industries across ASEAN members, a Regional Framework on Extractive Industries is currently undergoing discussion at the ASEAN. The regional framework, as formulated by Institute for Essential Services Reform (IESR)<sup>64</sup>, a civil society think tank, calls for the adherence to and compliance with the existing legal documents and formal decisions of the ASEAN, while promoting international best practices and standards related to the extractive industries. Among the key norms and principles of the ASEAN Regional Framework on Extractive Industries are fundamental human rights principles. The specific rights of indigenous peoples are mentioned in the framework, including:

"the right to existence as distinct peoples, self-determination, control over territories, cultural integrity, the right to a healthy and productive environment, political organization and expression, the right to fair compensation for damage to indigenous lands, and the right of indigenous peoples to 'free, prior, and informed consent' for any development activities that affect their territories and livelihoods."<sup>65</sup>

61. Cathal Doyle & Jill Cariño, 2013

62. Davis, Rachel and Daniel M. Franks. 2014. "Costs of Company-Community Conflict in the Extractive Sector." Corporate Social Responsibility Initiative Report No. 66. Cambridge, MA: Harvard Kennedy School.

63. Lexology. International mining industry releases new guidance for FPIC. Accessed from <http://www.lexology.com/library/detail.aspx?g=1ae45b6d-a119-476b-8459-ace39b27ee21> on February 9, 2017

64. Institute for Essential Services Reform (IESR) is a Think Tank composed of civil society organizations in Indonesia, which was established in 2007 to support those who actively inspire, push, and support changes towards a just utilization of natural resources to support human development. IESR activities cover policy advocacy, public campaigns, action research and development, and capacity building for the civil society.

65. IESR

## **D. Practical Guide for Communities on FPIC in relation to Extractive Industries**

### **1. At what stage of the mining process should FPIC come in?<sup>66</sup>**

Indigenous peoples representatives have expressed the view that FPIC should be obtained even before the issuance of a mining concession in indigenous peoples' areas. Indigenous peoples would have to give consent for their territories to be designated as mining areas, before the government enters into investment agreements with, or issues mining concessions, exploration permits or licenses to mining companies.

It is suggested that the government and private companies seek FPIC of the concerned indigenous communities at the earliest time possible. Consultations need to be done at the very early inception and planning stages of a mining project. Even before entering indigenous territory for exploration, the government and the company would have to talk to the people to explain what it is they plan to do. The earlier they do it, the easier it is for them to develop good faith in any subsequent negotiations.

Indigenous peoples representatives also expressed the view that FPIC should be an on-going and iterative process, and should be obtained at every major step of the mining development process - from exploration, to development, operation, expansion and post- operation. The community and the company would have to negotiate for different conditions and requirements at each stage.

While national laws do not stipulate this, indigenous representatives believe that FPIC should be non-transferrable and should not be for sale at any point in the mining process. If a company pulls out of a project, this would signify abandonment. If another company takes over or buys the project or company, this should require another FPIC process to be negotiated between the community and the new entity. If national instruments do not provide spaces for the conduct of FPIC, international instruments could be used to assert these demands.

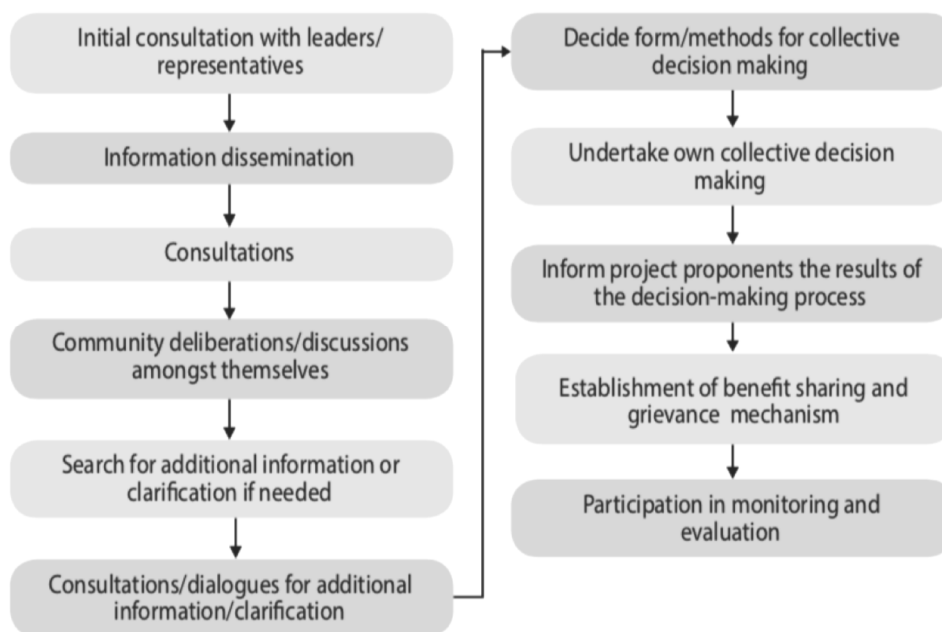
### **2. What are the key steps and processes in obtaining FPIC?<sup>67</sup>**

The process of obtaining the FPIC of an indigenous community needs to undergo a series of steps leading to consensus or a collective decision by the community on whether to give or withhold consent for a particular project affecting them. The key steps that are considered essential in conducting a genuine FPIC process are described in the next page.

66. Cathal Doyle & Jill Cariño, 2013

67. Asia Indigenous Peoples Pact (AIPP). 2013. Training Manual for Indigenous Peoples on Free, Prior and Informed Consent. Chiang Mai. AIPP Printing Press Co., Ltd.





Source: Asia Indigenous Peoples Pact

**a. Initial consultation with community leaders and representatives**

Initial consultations are necessary to inform the community of the plan to consult them and request their FPIC. It is the responsibility of government to conduct or facilitate community consultations, but companies also have an obligation to ensure that consultations are effectively implemented. At this point, the proponent should provide all available and basic information about their proposal to the community and request for a process of FPIC. They should ensure that they are talking to the real leaders and representatives of the indigenous community.

**b. Information dissemination**

The community leaders disseminate the information about the request for FPIC to all members of the community and call for community consultations, to be scheduled at a convenient time for the whole community. At this point, they may also seek advice and support from local authorities, NGOs, support groups, indigenous federations or technical advisers, as needed.

**c. Consultations**

Consultations involving all those concerned are conducted, including community members, the mining company proposing the project, and other groups that the community would want to involve. Consultations should be done in accordance with the customary practices of the people, several times or in different locations. During the consultations, all available information about the proposed project should be presented to the community, i.e., basic information about the project, the company, the purpose, the timeframe for implementation, all potential positive and negative impacts, among others.

**d. Information disclosure**

The project proponent should provide full and accurate data about the proposed project. This should include studies on environment and social impacts, project design, implementation plan, budget and sources of funds, terms of contracts or agreements, among others. Information should be provided in language and form understood by the indigenous peoples concerned, while considering the literacy level in the community. Government and companies should also consult communities about the ways or means in which they would like to receive the information.

**e. Search for additional information or clarification if needed**

If the information provided is seen as inadequate, indigenous communities have the right to request additional information or clarification from the proponent, to seek additional information from other sources, or to verify the accuracy of information provided to them. This includes not only positive aspects of the projects but especially potential adverse and indirect impacts as well.

**f. Community deliberations and discussions among themselves**

Independent and thorough deliberation by members of indigenous communities should be held after disclosure of the information. Community members should be given the time and space to deliberate among themselves and discuss or raise questions on particular concerns. Adequate time for community deliberations must be provided for members to arrive at their collective decision. The active participation of all members and groups in the community should be ensured, including women and youth. This process of deliberation should be free from external influences that undermine their free expression and collective discussions.

**g. Consultations and dialogues for additional information and clarification**

Additional consultations and dialogues with the company or the government may be called to ensure that accurate information is provided about the project. Indigenous communities may review or change their decision after additional information is acquired. Communities may decide to take sanctions against project proponents for providing false or inadequate information.

**h. Agree on the method for collective decision-making**

Indigenous communities can choose their own mechanisms and processes of consensus building and collective decision-making in accordance with their customary practices or through other processes agreed by them. If necessary, the capacity of the indigenous peoples should be enhanced for them to effectively participate in the decision-making process, before finally taking a decision.

**i. Collective decision-making**

Community members should be given the time and space to collectively decide whether or not to give their consent for the project. All members of the community should be allowed to express their views and positions. The active participation of women and youth should be ensured. As part of their decision-making, the community should set the terms and conditions for consent. If these conditions are not met, consent can be withdrawn.

For indigenous communities or groups with strong or functioning traditional systems of self-governance, traditional systems of decision-making may be used, such as the traditional elders councils in Nagaland, North-East India and Philippines.

In the absence of strong or functional traditional decision-making structures, indigenous peoples may form their own organizations to facilitate and represent the community in the FPIC process. For example in Nepal, affected communities have formed concern or struggle committees at village and district levels (with village level representatives). These committees draw their mandate from the affected community members based on minutes of meetings with them.

Other forms of collective decision-making could include casting of individual votes in a referendum, either through secret ballot or through open vote by raising of hands during a community gathering. An example of collective decision-making through voting was undertaken recently for a proposed pipeline in Canada where two-thirds of concerned First Nations rejected the project.

**j. Giving or withholding consent**

The final decision of the community is made on whether to give or withhold consent. Strong opposing views within the community signifies the absence of consent. On the other hand, consent does not mean unanimity of opinion. Based on the traditional systems of indigenous peoples' decision-making, consensus is reached via a collective decision-making process upholding the collective interest and welfare of the community. Even if there are views or positions that run counter to those of the majority, as long as those with opposing views agree to abide by or respect the position of the majority, then this is considered as a consensus and a collective decision.

**k. Inform project proponents of the result of the decision-making process**

The designated community representatives should communicate the final decision of the community, irrespective of a consent or a no consent decision, including the accompanying terms and conditions, to the proponent. The decision should be recorded either in a written form or in an appropriate means of communication whereby it can be relayed to the proponent. A copy of the recorded decision should be kept with the concerned community representatives and one copy to the project proponents. The proponent must respect the decision of the community, including a no consent decision.

**l. Agreement and establishment of grievance mechanism**

A decision giving consent will result in the signing of an agreement between the indigenous community and the proponent regarding the proposed project or activity. Any agreement reached should be written in language and form fully understood by the community members. Part of this agreement should be the terms and conditions for consent defined by the community. At this point, a grievance mechanism, independent of the proponent to hear and address complaints regarding violations of the agreed terms should be set up.

**m. Participation in monitoring and evaluation**

Indigenous peoples should be able to participate in the monitoring and evaluation of the project within their territories. If terms of the agreement are violated, complaints must be made, entertained and addressed through a grievance mechanism.

### 3. What are the ways in which affected communities and CSOs can do to ensure that genuine FPIC is implemented?

The situation and circumstances of a mining project may be different for each community. However, in each stage and in each circumstance, indigenous communities would have to identify what needs to be done in order to ensure that their right to FPIC is recognized and respected. Depending on their particular situation, indigenous peoples could take some of the following suggested actions:

- Work for policy reform in the national legal framework for the recognition of indigenous peoples' rights and FPIC when national laws do not provide for or stipulate these rights.
- Assert their right to FPIC even before exploration starts. Initiate a FPIC process when companies try to come in and start exploration or operation.
- Engage government and mining companies to provide more information on the project.
- Find out if companies have obtained necessary mining permits and licenses and have submitted the required environmental impact assessments.
- Monitor, document and report mining exploration, development, operation and expansion activities to concerned agencies and authorities.
- Participate in environmental assessment processes and consultations to input ideas and concerns and to determine if the project can develop into a mine.
- Monitor the mining company's compliance with FPIC, mining and environmental laws and standards.
- Engage companies, government, industry associations, financial institutions and other stakeholders on violations of FPIC standards, mining and environmental laws.
- Expose FPIC violations and misconduct of mining companies and government actors to the public.
- Use guidelines and complaint mechanisms of financial institutions and industry bodies requiring FPIC to hold mining companies accountable.
- Study mining closure plans to ensure that all community concerns are addressed.
- Monitor and ensure compliance by mining company of rehabilitation plans.

### 4. What are the challenges that indigenous peoples face and possible remedies and recommendations in implementing FPIC in Extractive Industries?

Indigenous peoples face many challenges in asserting their right to FPIC. It is necessary to explore all possible remedies for indigenous communities to overcome these challenges and realize genuine self-determined development. Some of the challenges and possible remedies or recommendations on how to overcome these are presented in the table in the next page.

Challenges faced by Indigenous Peoples <sup>68</sup>	Possible remedies/recommendations
<b>1</b> Lack of access to adequate and correct information on mining projects and its impacts. Only biased, misleading information or positive impacts of mining are provided.	<ul style="list-style-type: none"> <li>◆ Seek objective and accurate information from support groups, media, research and academic institutions, and internet sources.</li> <li>◆ Build alliances with other organizations at local, national and international levels.</li> </ul>
<b>2</b> Lack of financial and logistical requirements necessary for the community to gather and hold their consultations, especially if the communities are far apart or the affected area involves different indigenous peoples and communities.	<ul style="list-style-type: none"> <li>◇ Ask government to facilitate FPIC process and to include the expense of conducting FPIC in their budget.</li> <li>◇ Seek support groups for financial and logistical support to conduct consultations.</li> </ul>
<b>3</b> Communication problems when dealing with companies or government because of cultural barriers such as language and different ways of thinking and perspectives	<ul style="list-style-type: none"> <li>◆ Seek support groups, such as CSOs, NGOs and academicians/researchers on extractive industries who can translate and facilitate communication.</li> <li>◆ Indigenous communities can also proactively develop communications strategies for FPIC which they can propose to government and companies outlining how and when they would like to receive information.</li> </ul>
<b>4</b> Indigenous authorities and institutions are sometimes weak and traditional leaders are unable to assert their right to FPIC.	<ul style="list-style-type: none"> <li>◇ Conduct capacity-building for indigenous communities and NGOs through community organizing, leadership training, skills training, alliance work, community exposure and exchange, and movement building.</li> <li>◇ Build strength through solidarity links and joint campaigns with other IPs who experience similar problems or with people's organizations in countries where mining companies are based.</li> </ul>
<b>5</b> Formal laws of the government do not recognize indigenous peoples and FPIC. Laws favouring developers prevail over customary laws. Rights of mining companies are given precedence over the rights of indigenous peoples.	<ul style="list-style-type: none"> <li>◆ Empowerment of indigenous peoples to assert their rights, customary laws and practices.</li> <li>◆ Form federations, Coalitions and alliances with other indigenous peoples to assert rights.</li> <li>◆ Invoke international instruments that recognize customary law and indigenous peoples rights.</li> <li>◆ Use the media to highlight the issues to a wider audience</li> <li>◆ Work with international networks, UN agencies and global campaigns.</li> </ul>
<b>6</b> Undue influence, repression or harassment exerted on indigenous leaders, or the establishment of unrepresentative structures. Use of corporate social responsibility (CSR) projects to promote the company and influence communities to consent.	<ul style="list-style-type: none"> <li>◇ Seek information on CSR projects and their links with investors on extractive industries. Guard against bribery and use of CSR projects as incentives for consent.</li> <li>◇ Seek legal support for defence of human rights victims and indigenous peoples' human rights defenders.</li> </ul>
<b>7</b> Lack of recognition by the State of indigenous peoples' sovereign rights over their lands and resources leading to dispossession of territories.	<ul style="list-style-type: none"> <li>◆ Hold multi-stakeholder dialogues at national level to influence decision-makers. Lobby States to formulate and adopt laws recognizing indigenous peoples rights.</li> <li>◆ Lobby ASEAN Member States to adopt the Regional Framework on Extractive Industries Governance.</li> </ul>
<b>8</b> Inequality in negotiations, wherein the company has the advantage and enjoys the support of the State, while indigenous peoples come from a position of disempowerment.	<ul style="list-style-type: none"> <li>◇ Capacity-building for indigenous peoples on FPIC and negotiation skills</li> <li>◇ Encourage or request the government and/or companies to provide finances for indigenous peoples to be able to independent technical support.</li> </ul>
<b>9</b> Difficulty in identifying strategies to use in pressuring the State to implement FPIC.	<ul style="list-style-type: none"> <li>◆ Call for transparency in State and corporate engagement in relation to proposed projects through national and international lobby and campaigns.</li> <li>◆ Monitor and hold concerned government agencies to account, to ensure that they act in accordance with their human rights obligations.</li> </ul>
<b>10</b> Practical challenges in operationalizing FPIC, i.e. different ways of defining consent, determining who is indigenous, who are genuine representatives, local vs. national interests, uncertainty of mining potential before entering FPIC process	<ul style="list-style-type: none"> <li>◇ Demand due diligence on the part of the company to understand customary laws in relation to land, resources and decision-making, independent of government determinations as to who is indigenous.</li> <li>◇ Conduct capacity-building for company and government personnel on culturally appropriate FPIC, and international standards on FPIC, Business and Human Rights.</li> <li>◇ Develop clear FPIC guidelines for mining companies that are consistent with IP rights recognized in the UNDRIP.</li> </ul>

68. Cathal Doyle & Jill Cariño, 2013

## 5. What are the other challenges in implementing FPIC, particularly within the context of gender inclusion and women's participation?

Indigenous peoples way of decision-making, which is related to the process of FPIC, often entails a long process of discussion with members of the community to allow reaching an inclusive and collective decisions. However, it is recognised that many indigenous communities are not saved from a patriarchal system and ensuring women's inclusion and involvement remains a challenge.<sup>69</sup> Though there are indigenous communities where women are included in the decisions of the community; these are exceptions rather than the norm.

Furthermore, the general status of laws, policies and regulations on land rights remains to be gender-blind.<sup>70</sup> "Laws around marriage, divorce, widowhood, inheritance, and family relations undermine rural women's enjoyment of human rights, especially their right to access, own, acquire, control, administer or otherwise use land." Land rights are, of course, closely interlinked with the FPIC process and the institutional structures of its implementation have consequences to the participation of women.

But there are studies<sup>71</sup> that explore the roles of women in FPIC despite the challenge of the formidable patriarchal system that is not exclusive to indigenous communities. The study posits that women are involved more in the process of awareness-raising that is crucial in FPIC than in the deliberations involved in the decision-making process.

In the recent study of the Expert Mechanism on the Rights of Indigenous Peoples on FPIC<sup>72</sup>, there were no particular discussion on operationalising the involvement of women in FPIC. It puts emphasis, however, in the importance of ensuring women's participation and involvement all throughout the FPIC process.

Within the context of extractive industries, reports and studies show that women are often in the frontline with regards to engaging with companies and State representatives. But the decision-making process, especially to a patriarchal community, remains a challenge for women to make a strong voice. And there is still a need for better understanding of the complexity of inclusion of women in the FPIC process to draw out concrete outline for its plausibility and implementation whether in the context of extractive industries or beyond.

69. <http://www.forestpeoples.org/sites/fpp/files/publication/2010/08/fpicsynthesisjun07eng.pdf>

70. <https://www.ohchr.org/Documents/HRBodies/CEDAW/RuralWomen/InternationalLandCoalition.pdf>

71. See a study on women participation in FPIC on UN-REDD programme in Vietnam: [file:///Users/joycegodio/Downloads/Fulltext%231\\_189077.pdf](file:///Users/joycegodio/Downloads/Fulltext%231_189077.pdf)

72. [http://ap.ohchr.org/documents/dpage\\_e.aspx?si=A/HRC/39/62](http://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/39/62)



## 6. Aside from FPIC, what are other possible opportunities for community participation in decision-making in relation to mining and extractive industries?

There are various avenues for indigenous peoples to participate in defining the path of development that they would like to pursue for their communities. Aside from asserting the right to FPIC, other legal instruments and mechanisms can be used at local, national and international levels to put pressure on mining companies, investors and States to recognize and respect indigenous peoples rights. Below are some suggested tracks for engagement, advocacy and campaigns of indigenous peoples in relation to extractive industries.

Other opportunities for community participation	Available legal instruments or mechanisms
<b>EIA system</b>	National laws in many countries require that an environmental impact assessment (EIA) be done for every private or public project and activity. Public participation in environmental impact assessment process is encouraged. Environmental laws and processes can thus be used to hold companies accountable for environmental degradation due to mining and extractive industries and to ensure that they comply with EIA and environmental protection measures.
<b>Monitor compliance with legal requirements and licenses</b>	Mining companies are required to comply with the conditions of their licenses and other requirements defined by existing laws on mining and extractive industries. Legal action may be taken in court in combination with collective protests to hold companies accountable for any violations of mining laws or terms of their licenses.
<b>Complaints mechanisms of IFIs</b>	International financial institutions (IFIs) have safeguards policies on indigenous peoples that their borrowers or recipients need to comply with to be able to access funds. Complaints mechanisms of IFIs are possible avenues for filing cases against mining companies that fail to abide by these safeguard policies. One such mechanism is the Compliance Advisor/Ombudsman (CAO) of the World Bank Group. Its mission is to address complaints by people affected by IFC/MIGA projects and to enhance the social and environmental accountability of both institutions.
<b>Extractive Industry Associations</b>	Extractive industry associations such as the ICMM and CCCMC may present possible opportunities for engagement with industry players as well as specific mining companies. Also, most mining companies have grievance mechanisms that communities can employ when they have concerns. General Assemblies of shareholders of mining companies and industry associations are also possible venues to ventilate concerns.
<b>International Lobby</b>	Lobby efforts to bring international attention to indigenous peoples issues in relation to extractive industries can be taken at various UN and intergovernmental venues or extractive industry forums. These include UN HR Treaty Bodies, Universal Periodic Review, UN Permanent Forum on Indigenous Issues, UN Forum on Business and Human Rights, ASEAN Peoples Forum, among others, where indigenous peoples can participate.
<b>Peoples' movements for the defence of IP rights</b>	Local communities and indigenous peoples organizations may also launch advocacy and solidarity campaigns to draw attention to rights violations by extractive industries through civil society formations and campaign initiatives. Solidarity support for local struggles could be generated through such initiatives as the Asia Indigenous Peoples Network on Extractive Industries and Energy (AIPNEE), the Asia Indigenous Peoples Pact (AIPP) and the Global Call to Action for Land Rights Campaign.

# About AIPP

---

The Asia Indigenous Peoples Pact (AIPP) is a regional organization founded in 1988 by indigenous peoples' movements as a platform for solidarity and cooperation. AIPP is actively promoting and defending indigenous peoples' rights and human rights; sustainable development and management of resources and environment protection. Through the years, AIPP has developed its expertise on grassroots capacity building, advocacy and networking from local to global levels and strengthening partnerships with indigenous organizations, support NGOs, UN agencies and other institutions. At present, AIPP has 48 members from 14 countries in Asia with 7 indigenous peoples' national alliances/networks and 35 local and sub-national organizations including 16 are ethnic-based organizations, five (5) indigenous women and four (4) are indigenous youth organizations.

## Our Vision

Indigenous peoples in Asia are living with dignity and fully exercising their rights, distinct cultures and identity, and enhancing their sustainable management systems on lands, territories and resources for their own future and development in an environment of peace, justice and equality.

## Our Mission

AIPP strengthen the solidarity, cooperation and capacities of indigenous peoples in Asia to promote and protect their rights, cultures and identities, and their sustainable resource management system for their development and self-determination.

## Our Programmes

Our main areas of work among the different programmes are information dissemination, awareness raising, capacity building, advocacy and networking from local to global. Our programmes are:

- Communication Development
- Environment
- Human Rights Campaign and Policy Advocacy
- Indigenous Women
- Organizational Strengthening and Movement Building
- Regional Capacity Building

AIPP is accredited as an NGO in special consultative status with the UN Economic and Social Council (ECOSOC) and as observer organization with the United Nations Framework Convention on Climate Change (UNFCCC), Convention on Biological Diversity (CBD), Green Climate Fund (GCF), Global Environment Facility (GEF) and the World Intellectual Property Organization (WIPO). AIPP is a member of the International Land Coalition (ILC).

---



**Asia Indigenous Peoples Pact (AIPP)'s Handbook  
Extractive Industries and Free, Prior and Informed Consent of Indigenous Peoples**

