



Governance of Extractive Industries

Assessing National Experiences
to Inform Regional Cooperation in Southeast Asia

Editor:

Evi Fitriani
Francisia Seda
Yesi Maryam



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Preface and Acknowledgements

The original idea for this book emerged from a concern regarding the governance of the energy and mineral sectors in Indonesia and other Southeast Asian countries. The natural resources that should be beneficial to the citizenry of these countries often bring catastrophe to them. Despite the negative impact of the problems created by the extractive industries, the idea of governing them has not been popular at the national level in Indonesia, let alone as a field of cooperation among Southeast Asian countries. The ASEAN Study Center of the Faculty of Social and Political Science of the University of Indonesia (ASC FISIP UI) and the Institute for Essential Services Reform (IESR) contended that the academic community, along with non-government organizations, could collaborate to help mainstream the issues. The collaboration between these two entities required two steps. First, academic research on the governance of the extractive industries in Southeast Asia was performed and second, the academic work was compiled into a book that identifies and highlights experiences of individual countries in the region that might provide a foundation for regional cooperation in Southeast Asia.

The contributions of many people and organizations have made this book possible. The academic researchers who contributed their work were, of course, instrumental and are much appreciated by the editors. Many thanks go to Fabby Tumiwa, Morentalisa Hutapea and Nikka Sasongko for participating in review and editorial meetings. Financial support for the book was generously supplied by USAID through a grant for the IKAT-US Project. Marsue and her team provided language usage advice while Darang Sahdana Candra and Yeremia

Lalisang undertook the delicate task of sorting out technical issues in the manuscripts and communicating with authors. We thank the UI press for their timely work on printing and publishing this book. As editors, we would like to express our gratitude to all contributors.

We hope this book can help spread the ideas of good governance of the extractive industries in Southeast Asia.

Jakarta, August 2014

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List of Abbreviations

ADB	Asian Development Bank
ADSDPP	Ancestral Domain Sustainable Development Protection Plan
AEC	ASEAN Economic Community
AIA	ASEAN Investment Area
AICHR	ASEAN Intergovernmental Commission on Human Rights
AMAN	<i>Aliansi Masyarakat Adat Nasional</i> (Indigenous People National Alliance)
AMCAP	ASEAN Mineral Cooperation Action Plan
AMDAL	<i>Analisis Dampak Lingkungan</i> (Environment Impact Assesment)
APBD	<i>Anggaran Pembangunan dan Belanja Daerah</i> (Indonesian for "Local Government's Budget")
ASEAN	Association of Southeast Asian Nations
AUD	Australian Dollar
BAPPENAS	<i>Badan Perencanaan Pembangunan Nasional</i> (State Development Planning Agency)
BP	British Petroleum
BUMN	<i>Badan Usaha Milik Negara</i> (State Own Enterprise)
CADT	Certificate of Ancestral Domain Title
CLMV	Cambodia, Lao, Myanmar Vietnam
CNPA	Cambodian National Petroleum Authority
CNOOC	China National Offshore Oil Corporation
CPI	Corruption Perception Index
CSO	Civil Society Organization
CSR	Corporate Social Responsibility
DAU	<i>Dana Alokasi Umum</i> (Public Allocation Fund)
DBH	<i>Dana Bagi Hasil</i> (<i>Profit Sharing Fund</i>)
DMCs	Developing Member Countries
DMO	Domestic Market Obligation

ESDM	<i>Energi dan Sumber Daya Mineral</i> (Energy and Mineral Resources)
EITI	Extractive Industries Transparency Initiative
FDI	Foreign Direct Investment
FPIC	Free, prior, and informed consent
FTP	First Tranche Petroleum
GRI	Global Reporting Initiative
GDP	Gross Domestic Product
HAM	Hak Asasi Manusia (<i>Human Rights</i>)
HDI	Human development index
ICMM	International Committee on Metal and Mining
ICP	Indonesian Crude Price
IDLO	International Development Law Organization
ISEAS	Institute for Southeast Asia Studies
IFC	International Finance Corporation
IMF	International Monetary Fund
IPO	Indigenous People Organization
IPRA	Indigenous Peoples Rights Act
JOA/JOB	Joint Operating Agreement/Body
KPC	Kaltim Prima Coal
KPSC	Kimberly Process Certification Scheme
Kukar	Kutai Kartanegara
LGU	Local Government Unit
LNG	Liquid Natural Gas
LPPNRI	<i>Lembaga Pemantau Penyelenggara Negara Republik Indonesia</i> (State Apparatus Watch)
LSM	Large-Scale Mining
MCA	Malaysian Chinese Association
MIC	Malaysian Indian Congress
MGB	Mines and Geosciences Bureau
MoA	Memorandum of Agreement

MRG	Minority Rights Group International
MSH	Multi-stakeholder
MTOE	million tons of oil equivalent
NCIP	National Commission on Indigenous Peoples
NGO	Non-Governmental Organization
NOC	National Oil Company
OP	Operational Policy
PC	People's Committees
PDRB	<i>Produk Domestik Regional Bruto</i> (Regional Domestic Product Bruto)
PNOC	Philippines National Oil Company
PS	Policy Standards
PSC	Production Sharing Contract
PTTEP	Petroleum AuThority of Thailand Exploration and Production Public Company
RAP	Resettlement Action Plan
Repelita	<i>Rencana Pembangunan Lima Tahun</i> (Five Years Development Plan)
RGI	Resource Governance Index
SKK Migas	<i>Satuan Kerja Khusus Pelaksana Kegiatan Usaha Hulu Minyak dan Gas Bumi</i> (Upstream Oil and Gas Special Unit)
SSM	Small-Scale Mining
TAC	Technical Assistance Contract
TCF	Trillion Cubic Feet
TEPI	TOTAL E&P INDONESIA
TKIOM	<i>Thach Khe</i> Iron Ore Mine
UMKM	<i>Usaha Mikro Kecil dan Menengah</i> (Small and Medium Enterprise)
UMNO	United Malays National Organization
UNCTAD	United Nations Conference on Trade and Development
UNDRIP	UN Declaration on the Rights of Indigenous Peoples
UNDEF	United Nations Democracy Fund

UNESCAP	United Nations Economic and Social Commission for Asia and the Pacific (ESCAP)
USGS	United States Geological Survey
VAP	Vientiane Action Program
VND	Vietnamese Dong
WALHI	<i>Wahana Lingkungan Hidup</i> (Indonesian Environmental Forum)
WB	World Bank

INTRODUCTION

Dare to Transform: Governance of Extractive Industries in Southeast Asia

Evi Fitriani, Morentalisa Hutapea, and Fabby Tumiwa

Most Southeast Asian countries are rich in natural resources¹. The region's geographical location between two 'old' continents and two vast oceans has created land and continental shelf areas that have abundant resource endowments, including many mineral and energy resources. The regional countries are also endowed with a relatively large share of the world's reserve of certain minerals such as nickel, copper, and tin. For many years countries in this region have extracted their natural resources from land or continental shelf areas through either small-scale production or large industries. Indeed, the extractive industries have contributed significantly not only to many national economies in the region but also to their energy security. According to the IEA (2013: 2), Southeast Asia Energy Outlook, the region's demand for energy sources has increased about two and a half times since 1990. Because this is an excessive increase, the fossil fuel beneath the region will play an important role in ensuring that the region will have adequate energy supplies. Consequently, some of the Southeast Asian members have instigated trade agreement on oil and energy (IEA, 2013).

Given the importance of the natural resources to the countries

1 For the purposes of this book, natural resources is defined as 'stock of materials that exist in the natural environment that are both scarce and economically useful in production or consumption, either in their raw state or after a minimal amount of processing', (World Bank 2010).

in the region, prudent consideration in the context of the regional integration undertaken by the Association of the Southeast Asian Nations (ASEAN) toward the ASEAN Community needs to be exercised. The creation of the ASEAN Economic Community (EAC), which allows the free flow of goods, people and capital², will inevitably affect the extractive industries. The consequences of a single market will vary across the ASEAN member states³ but countries that depend on natural resources and extractive industries will experience an impact not only on their economies but also on their peoples and environment.

Despite the rich endowment of natural resources, many countries in Southeast Asia seem to fail to extend the distribution of the economic benefits of their extractive industries to the welfare of their citizens. The problems are varied and include uneven developmental levels across provinces, unequal distribution of welfare, bureaucratic rivalry, corruption, environmental problems and human rights violations. The underlying issue across these problems is the absence of good governance in managing non-renewable resources. In the regional context, these same problems pose important to the purpose of the ASEAN Community's ability to create people-centered institutions and also to its goals promoting the welfare of people in the region. Thus, natural resource management plays a critical role in the creation of the AEC.

This book provides research-based analyses of the problems of governance of the extractive industries in Southeast Asia and suggests strategies for improvement. The studies address the importance of the extractive industries in Southeast Asian countries and how countries in the region might establish a cooperative framework for pursuing good governance in such industries.

THE IMPORTANCE OF EXTRACTIVE INDUSTRIES IN SOUTHEAST ASIA

As trade commodities, raw materials such as oil, gas, and minerals contribute significantly to the region's exports. Some countries in

2 See ASEAN Vision 2020 and AEC Blue Print, www.asean.org.

3 See ASEAN Secretariat and World Bank, ASEAN Integration Monitoring Report, 2014.

the region are endowed with vast hydrocarbon resources in terms of crude oil and natural gas. For example, Myanmar's natural gas reserves are enormous (Thuzar, 2013) and Indonesia was the fourth largest net exporter of natural gas in 2013 (IEA, 2014). In terms of oil and gas proved reserves, Southeast Asia's oil proved reserves total 13.95 billion barrels (bbl.) while the gas proved reserves have reached 7.4 trillion cubic meters (cu m.).⁴ According to the Statistical Review of World Energy 2010, Brunei, Indonesia, Malaysia, Thailand and Vietnam combined had oil-proved reserves of 16 billion bbl, or 1.2% of the world's total oil-proved reserves at the end of 2009. These same countries plus Burma had combined gas-proved reserves of 7.53 trillion cu m, or 4.0% of the world's total gas-proved reserves at the end of 2009. In terms of coal-proved reserves, Indonesia, Thailand and Vietnam together accounted for 5.8 billion tonnes, or 0.7% of the world's coal-proved reserves at the end of 2009. Obviously, Southeast Asia has a considerable role in the world's oil and gas market

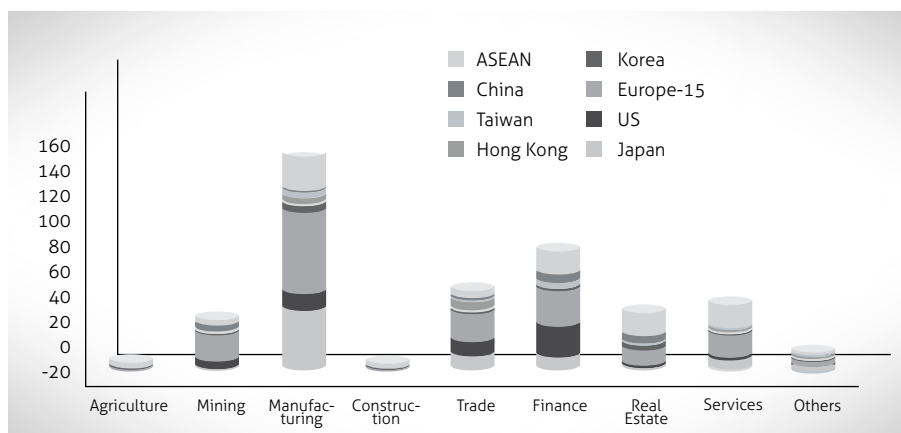
Beside being rich in natural gas and oil, Southeast Asian countries are also world producers of many raw minerals. Countries like Indonesia and the Philippines have been cited as two of the top gold producers in the world (Kuo, 2013). For tin, Indonesia is the second largest tin producing country after China (Kuo, 2011). Indonesia, the Philippines and Laos are listed as top copper producers in the world. Additionally, Indonesia is the second largest coal exporter in the world with the coal coming mainly from South and East Kalimantan. Further, Indonesia is also well known as an exporter of nickel, manganese, iron, and other valuable minerals. In 2010, Vietnam recorded production of 2% of the world's mineral output (Fong-Sam, 2010) and is one of the largest bauxite exporters in the world. Minerals accounts for 15% of Vietnamese exports while gems and precious metals account for about 5%. Other countries such as Laos, Myanmar, and the Philippines also produce minerals that are an important commodity in the international market.

The abundance of these resources has prompted foreign direct

4 Calculating data from the CIA's Factbook.

investment from international oil, gas and mineral companies. The ASEAN member states thus undertake any necessary means to draw more investment to the region. In 1998, the ASEAN leaders signed the Framework Agreement on the ASEAN Investment Area (AIA) that focuses on the liberalization, facilitation and promotion of investment in the ASEAN countries. The mining sector, as well as manufacturing, agriculture, fisheries, forestry, and service, is included in the AIA. From 2000 to 2011, the mining sector has ranked as sixth in terms of total foreign investment (FDI) entering Southeast Asia.

Figure 1: Total FDI Inflows to ASEAN by Country Source 2000-2011



Note: (1) Agriculture includes agriculture, fisheries and forestry; Mining includes mining and quarrying; Finance includes financial intermediation and services (including insurance); (2) EU-15 covers Austria, Belgium, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Luxembourg, Netherlands, Portugal, Spain, Sweden, United Kingdom.

Source: ASEAN FDI Database, 2012 and World Bank staff calculations, taken from ASEAN-World Bank 2014

At the national level, investment flow to the mining sector dominates in the countries endowed with rich natural resources. In Laos, almost 93% of the total FDI comes from the mining sector (IISD, 2009). In Myanmar, the mining sector only attracts 7.8% of total FDI but when combined with the oil and gas sectors, total FDI increases

to 46.3%. In Malaysia 20% of the total FDI come from the oil and gas sector (MIDA, 2012) and in Indonesia the mining sector accounts for around 17% of total FDI (Sathirathai, 2013). It is clear that the extractive industries have become an important economic sector in Southeast Asian countries.

Apparently the AIA aims to create a policy frameworks to formulate a sound investment climate in the form of incentives for FDI. At the same time, rising demand for oil, gas and mineral commodities, especially from the ASEAN's closest neighbors such as China, Japan and South Korea, has attracted investment in those sectors. Today, Southeast Asia enjoys investment from multi-national companies like Exxon, Chevron, Total, Shell, BP, Newmont, Freeport, Daewoo, CNOOC, and thousands of small and medium scale mining and oil companies.

Table 1. Figures of Some Oil Companies in Southeast Asia

Name of Companies	Home Countries	Host Countries	Area of Operation
Daewoo	South Korea	Myanmar	Blocks A-1 and A-3 at the Shwe field
Chevron ¹	United State	Cambodia	Cambodia's offshore Block A, an area covering 1.2 million acres (4,709 sq km) in the Gulf of Thailand.
		Indonesia	Duri, Sumatera Kalimantan
		Malaysia	Chevron operates in Malaysia through its subsidiary Chevron Malaysia Limited
		Philippines	Chevron operates mostly in the service sector and its lubricant provider in the Philippines, however, their gas field in Malampaya is noted as one of the largest gas fields in the Philippines.
		Thailand	Chevron is one of the largest oil companies operating in Thailand. The Platong II project in the Gulf of Thailand is the largest gas block in the Gulf of Thailand
		Vietnam	Chevron is the operator in two Production sharing contracts (PSCs) in Vietnam. They are in the northern part of the Malay Basin off the coast of southwest Vietnam

BP	UK	Indonesia	Tangguh LNG Plant, Papua
		Malaysia	BP is one of the biggest investors in Malaysia. It operates mostly as a Petroleum marketing operation
		Philippines	BP works mainly in the processing chain
Total	France	Myanmar	The Yadana gas field is located in the Andaman Sea, approximately 60 kilometers offshore the nearest landfall is Myanmar
		Indonesia	In Indonesia, TOTAL E&P INDONESIA (TEPI) has been the operator of the Mahakam Block in East Kalimantan since 1968. TEPI has been the largest gas producer in Indonesia since 2000 and currently contributes 82% of the Bontang LNG Plant supply.
Shell	Netherland	Myanmar	Based on OGJ report (2014) in 2014, Shell in collaboration with Mitsui Exploration was granted three deep-water blocks in the Bay of Bengal, Myanmar.
Statoil	Norway	Indonesia	The Norway Embassy in Indonesia report (2012) that Statoil entered Indonesia in the deep water Makassar Strait area, as a partner on the Kuma Production Sharing Contract (PSC) and in 2007 becomes the operator for Karama PSC.
			Additionally, Statoil has developed areas in North Ganal, North Makassar, Obi, Halmahera Aru, and West Papua

While attracting foreign companies to invest in energy sector, various Southeast Asian based oil companies such as Medco, PetroVietnam, PTTEP, Petronas have also started to expand their operations within the region. The Thai base PTTEP, has their oil block operation in Cambodia and also Myanmar, while the Indonesian based Medco, has been expanding their operations in Cambodia and Myanmar.

THE CHALLENGES IN MANAGING THE NATURAL RESOURCES IN SOUTHEAST ASIA

During the last decades, the terminology of *good governance* has been adopted as a new formula in the decision making process. With the end of the cold war and the emergence of international cooperation, the concept of good governance was adopted as part of the world's development agenda (Demmers, et.al., 2005: 1) The presence of a global media, which enables citizens to gain access to news and information, provides a means by which to spread the concept of good governance across the globe. There has been a consensus amongst various institutions, civil society organizations, donor agencies, private companies, and research institutions that *good governance* is important in achieving sustained economic development (Kaufmann and Kraay, 2008: 1).

The terminology of governance itself can be traced back to early history where it is marked Greek literature. The original word, [kubernáo], was translated as "to steer". To steer the power of the decision making process is at the heart of governance study. During its development, the terminology of governance has come to include ideas such as transparency, accountability, and the rule of law. The United Nations Development Program UNDP defines governance as

"the system of values, policies and institutions by which a society manages its economic, political and social affairs through interactions within and among the state, civil society and private sector. It is the way a society organizes itself to make and implement decisions—achieving mutual understanding, agreement and action. It comprises the mechanisms and processes for citizens and groups to articulate their interest, mediate their differences and exercise their legal rights and obligations. It is the rules, institutions and practices that set limits and provide incentives for individuals, organizations and firms. Governance, including its social, political and economic dimensions, operates at every level of human enterprise, be it the household, village, municipality, nation, region or globally." (UNDP Strategy Note on Governance for Human development, 2000)

According to the UNESCAP, good governance has 8 major characteristics. It is participatory, consensus oriented, accountable, transparent, responsive, effective and efficient, equitable and inclusive and follows the rule of law. It assures that corruption is minimized, the views of minorities are taken into account and that the voices of the most vulnerable in society are heard in decision-making. It is also responsive to the present and future needs of society. On the contrary, the symptoms of weak governance are weak checks and balances, excessive regulations, archaic civil service rules, policies that handicap competition, rent-seeking, and poor enforcement of prudential discipline (Gonzalez and Mendoza, 2003).

The level of governance across Southeast Asian countries is varied. The World Bank developed indicators that can be used to compare each country's level of governance to others in the region. The graph below describes the estimate of governance [ranges from approximately -2.5 (weak) to 2.5 (strong) governance performance] using various indicators such as the following: 1) voice and accountability, 2) government effectiveness, 3) regulatory quality, 4) rule of law, 5) control of corruption and, 6) political stability and absence of violence. According to Daniel Kaufmann, no single indicator or combination of indicators can provide a completely reliable measure of any of these dimensions of governance (Kaufmann and Kraay, 2008).

Table 2. Southeast Asia Governance Indicator (2011)

Country	Voice and Accountability	Government Effectiveness	Regulatory Quality	Rule of Law	Control of Corruption	Political Stability and Absence of Violence
Brunei Darussalam	-0,63	0,88	1,17	0,88	0,84	1,12
Cambodia	-0,91	-0,75	-0,45	-1,03	-1,10	- 0,44
Indonesia	-0,08	-0,24	-0,33	-0,65	-0,68	- 0,82
Lao Pdr	-1,60	-0,91	-0,96	-0,92	-1,06	0,01

Malaysia	-0,44	1,00	0,66	0,52	0,00	0,16
Myanmar	-1,86	-1,64	-2,13	-1,42	-1,69	-1,16
Philippines	-0,01	0,00	-0,26	-0,51	-0,78	-1,39
Singapore	-0,19	2,16	1,83	1,69	2,12	1,21
Thailand	-0,45	0,10	0,24	-0,24	-0,37	-1,02
Vietnam	-1,48	-0,28	-0,61	-0,48	-0,63	0,17

Note: Voice on accountability reflects perceptions of the extent to which the country's citizens are able to participate in selecting their government, as well as the freedom of expression, freedom of association, and a free media. The political stability and absence of violence reflects perceptions of the likelihood that the government will be destabilized or overthrown by unconstitutional or violent means, including politically motivated violence and terrorism. Government effectiveness *reflects perceptions of the quality of public services, the quality of the civil service and the degree of its independence from political pressures, the quality of policy formulation and implementation, and the credibility of the government's commitment to such policies.*

Source: *The Worldwide Governance Indicators, 2012 Update* www.govindicators.org

The challenges in improving good governance are evident amongst Southeast Asian countries as most of them, except Singapore and the Brunei Darussalam, are scored quite low. The government effectiveness is unsatisfactory in Cambodia, Indonesia, Lao, Myanmar, Philippines, Thailand and Vietnam as indicated by their low index score.

Just as bad governance will always be associated with corruption, another key indicator that can be used in analyzing the status of the governance situation is the *Corruption Perception Index*, which was developed by Transparency International. The fight against corruption and poor governance have become the main agenda in development and anti poverty campaigns for obvious reasons., First, poor governance leads to resource waste and lack of services, and prevents citizens from gaining social, economic and political protection (Grin, 2002). Second, poor governance and corruption prevents a country from increasing its revenue and from delivering good quality public service to its people (Collier, 2007).

The table below depict the annual report of Transparency International from 2008-2012. According to the TI based index, most

of the Southeast Asian countries are scored low according to the Corruption Perception Index, with the exceptions of Singapore and Malaysia.

Table 3. Corruption Perception Index 2008-2012– Southeast Asian Countries

Country	CPI 2008	CPI 2009	CPI 2010	CPI 2011	CPI 2012
Brunei Darussalam	NA	5.5	5.5	5.2	5.5
Cambodia	1.8	2	2.1	2.1	2.2
Lao PDR	2	2	2.1	2.2	2.1
Indonesia	2.6	2.8	2.8	3	3.2
Malaysia	5.1	4.5	4.4	4.3	4.9
Myanmar	1.3	1.4	1.4	1.5	1.5
Philippines	2.3	2.4	2.4	2.6	3.4
Singapore	9.2	9.2	9.2	9.2	8.7
Thailand	3.5	3.4	3.5	3.4	3.7
Vietnam	2.7	2.7	2.7	2.9	3.1

Source: Compiled from Transparency International CPI Report from 2008-2012

Both of the tables above illustrate the urgency in improving the governance situation in the region. For years, donor agencies and NGO have attributed this situation as one of the causes of slow development, inequality, and poverty in the region. People's ability to observe, monitor and dialog with the government are limited in many of the ASEAN member states. Freedom of information is provided in Indonesia and Philippines, although only Indonesia has passed a freedom of information bill.⁵ It is important for the ASEAN leaders to understand that transparency will provide incentives for public officers to deliver their best efforts in developing public policy. At another level, transparent and accountable government bodies enable

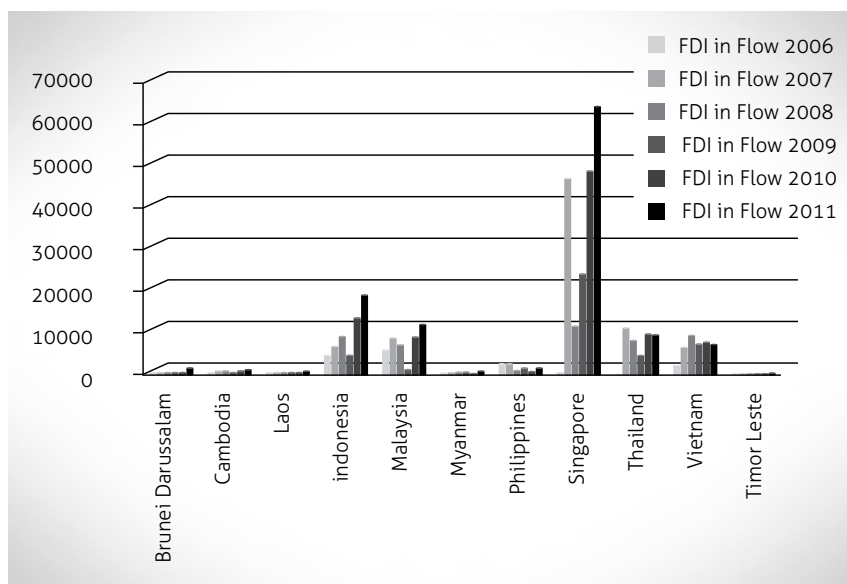
⁵ It is Indonesia the only country in the region that has already adopted the freedom of information law.

citizens to give sufficient information and advice regarding the most suitable development plants for their communities

Despite struggling with problems in transparency, countries in Southeast Asia have adopted some anti-corruption practices. Anti corruption laws and the presence of anti-corruption bodies or institutions have emerged indicating that attempts are being made to address the problem. Nevertheless, the enforcement of the laws and the independence and effectiveness of the anti-corruption authorities varies in each country. Indonesia, Thailand and the Philippines are the only ASEAN member states that have formed independent bodies to eradicate the corruption. Countries like Singapore, Malaysia and Brunei Darussalam, even though they are rated as the least corruption countries based on several studies like the CPI, still do not have independent authorities for dealing with corruption cases. The lack of an independent body in dealing with corruption will make it easier for political interests to influence government agencies.

According to the research on Investment Trends and Prospects in ASEAN by the AUSAID, high transaction costs arising from bureaucratic impediments and administrative burden are cited as one of the barriers to attracting FDI inflow to Southeast Asia. The research has further stated that either a lack of transparency in regulations/laws or corruption is also a challenge that the region should resolve (Davis and Fisher, 2011).

Figure 2. FDI Inflow in Southeast Asia Region 2006-2011 (Million US Dollars)



Source: World Investment Report, UNCTAD 2012

Various elements, such as infrastructure, political stability and regulations, influence investment flow to a country. There is a positive correlation between good governance and FDI inflow. A cross-country regression test using four different corruption datasets, conducted by Rock and Bonnet, revealed that corruption slows growth and/or reduces investment in most developing countries, particularly in small developing countries (Rock and Bonnet, 2004a). According to Rock and Bonnet, more advanced economies will better endure the negative impact of corruption as they already have a larger market to enable them to keep attracting investment. The small-scale economies and markets of some countries make it difficult for them to attract and retain investment (Rock and Bonnet, 2004b).

An important measure that links the governance indicator with business favorability is the Doing Business Index developed by the

IFC. This index measures the efficiency and effectiveness of doing business in Southeast Asia

Table 4. Doing Business Index 2012 - Southeast Asian Countries

Country	World Rank	Asia Pacific Rank
Singapore	1	1
Malaysia	12	3
Thailand	18	5
Brunei Darussalam	79	10
Vietnam	99	14
Indonesia	128	19
Cambodia	133	20
Philippines	138	21
Laos	163	23
Timor Leste	169	24

Source: www.doing-business.org

Singapore, Malaysia, and Thailand are the three main countries in the region that have favorable conditions for business. As the CPI and the Governance Index have shown, those countries are among the least corrupt countries in the region. It is logical that these three countries are noted as top investment recipients.

WEAK GOVERNANCE AND EXTRACTIVE INDUSTRIES IN SOUTHEAST ASIA

In general, the lack of good governance can hamper the region's economic growth at the macro level. The financial crisis in several Southeast Asian countries at the end of the 1990s was caused by, among other factors, corruption and crony nepotism (Gan, 2003).⁶

⁶ The linkage between corruption, cronyism and the Asian Financial crisis has become one of the major analysis one of it be read in Christopher Gan, "Poor Corporate Governance, Market Discipline and Cronyism in the 1997 Asian Crisis" in John B. Kidd and Frank-Jürgen Richter, *Corruption and Governance in Asia*, Palgrave MacMillan, 2003, p. 43-45

Since that time, corruption and bad governance practices have been published a lot in media. In addition, at onset of the ASEAN Economic Community, the practice of good governance is a must to ensure that economic integration can deliver benefits to people in ASEAN countries.

The absence of good governance will also pose challenges as the ASEAN Community generates more active and dynamic economic activities in ASEAN countries. At the same time, it will raise the energy and mineral consumption. Data from EIA statistic shows an increase of 500 times of coal export from Vietnam from 1981 to 2011. While coal exports of the Indonesia in the 1980s was only about 100 million tons and increased to 300,000 per cent to around 340 thousand million tons in 2011. Philippine coal exports in the 1990s was only about 19 million tons and increased by 6400 million tons in 2011.⁷ Indonesia has also witnessed the large scale increase of mineral export, such as nickel ore exports which increased by 800%, iron ore which increased by 700% , and bauxite ore which increased 500% since 2009 (ESDM, 2012).

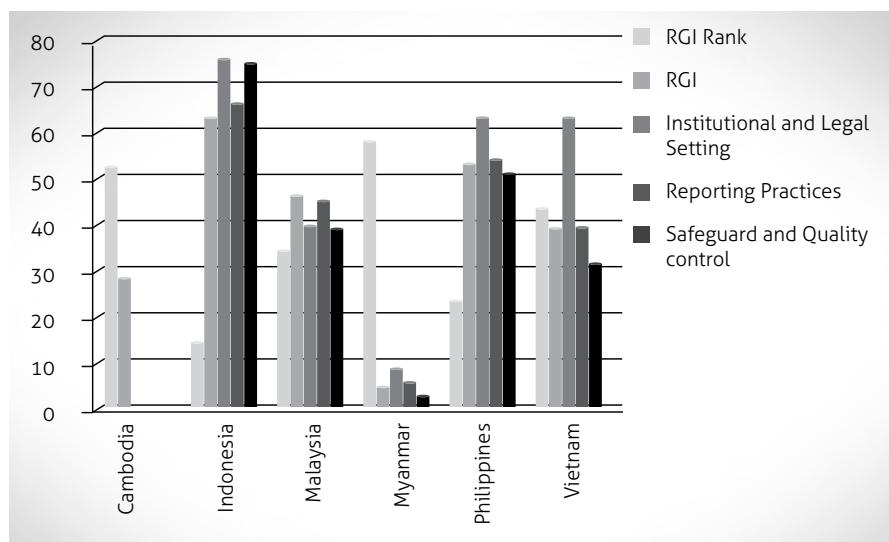
As the producing countries as well as consumers of energy and minerals, Southeast Asia countries need to manage their natural resources and extractive industries. This circumstance requires ASEAN countries to carefully manage the extraction of their natural resources endowment, balancing between for future deposit and for current need. The absence of good governance in the past has led some countries to exploit their natural endowment for high exports.

While facing the fast increase of resource extraction, the management of extractive industries in the region shows a poor record. The recent Resource Governance Index (RGI) developed by the Revenue Watch Institute showed that most of resource rich countries in the region have a low position in terms of resource governance. The index aimed in measuring transparency and accountability specifically in the oil, gas and mining sector in 58 countries, five ASEAN member

7 The data compiled from EIA report from time to time. www.eia.org

states, namely Cambodia, Indonesia, Myanmar, Philippines, and also Vietnam. Two countries are seated in the lowest position with Cambodia in the 52nd and the Myanmar with 58th from 58 countries. According to the Revenue Watch Publication, the low governance index has a strong correlation with the absence of freedom of information law (RWI, 2013b). In Myanmar, the environmental and social impact assessments are not required. This research thus highlighted the situation where policymakers working directly with the oil, gas and mining sector know very little about the inner working of the system. It is unclear which authority receives payments from extractive companies.

Table 5. Resource Governance Index 2013- Some ASEAN Countries



Source: Compiled from Revenue Watch Institute

Because natural resources are not renewable, after a period of production and revenues peaking, production and the money flows that accompanies it inevitably will drop, until at last the resource is no longer economical to exploit and the revenue flows abruptly end. If a country and its government and society do not prepare carefully

to face this inevitability, the depletion of the resource often plunges the communities around the extraction activity and the country as a whole into poverty. The resulting poverty can be worse than the poverty experienced before the exploitation of the natural resource. The whole of these negative situations related to the extractive industries are known by the term “resource curse”.

Over-exploitation and the poor resource governance are challenges for the Southeast Asian countries. In conjunction with the AEC, mitigating the pressure of natural resources consumption needs a collective measure. Regional cooperation to build and practice good governance in extractive industries is imperative.

The Impact of Weak Governance of the Extractive Industries in Southeast Asia

In theory, with the abundance of natural resources such as oil, gas, gold, coal and other valuable minerals, Southeast Asian countries just need to transform their natural wealth and they could rapidly develop into advanced nations. A country like Norway is a great example of how dependency on natural resources can be turned into the people’s prosperity. However, the reality in Southeast Asia is not so simple. The wealth in natural resources does not immediately translate into welfare for the countries’ citizens, especially for the local communities located near the extractive projects. In fact, in many rich resource areas, many Southeast Asian countries find that their natural resources bring more problems than they solve.

The absence of good governance has critically impacted the livelihood of a large number of local communities near the extractive projects across Southeast Asia. The livelihood of these communities is increasingly threatened by the development and implementation of large-scale infrastructure projects which are designed to maximize the extraction and utilization of natural resources (Lim and Valencia, 1990). As most mining and extractive projects take place in remote areas, the presence of extraction projects challenges the sustainability of indigenous people’s livelihoods. Poor management and inefficient law enforcement in the natural resources sector have resulted in the

abuse of power and led to corruption and human rights violations in many Southeast Asian countries. The lack of information and transparency regarding ongoing projects have caused tremendous suffering among the indigenous peoples and their communities. Without information and transparency, it is challenging for indigenous peoples to protect their livelihoods and rights and to prevent displacement. In many cases natural resource projects have lead not only to displacement and rights violations, but they have created an environment in which armed conflicts have occurred, increasing the possibility of insurgency.⁸

In Indonesia for instance, the nickle mining company PT. Inco's operation, based on a Contract of Work with the Indonesian Government issued in 1968, was on going for 30 years. This multinational company negatively impacted on the indigenous population near its operations. Some studies reveal that the project caused more than 3,000 people, including indigenous people, to lose their land and livelihoods (Fuys, 2002: 1). They reported forcible evictions with inadequate or non-existent compensation as well as unsettled land rights in South and Central Sulawesi. There were also increased violence, including conflict and militarization around Inco's Sorowako operations in South Sulawesi and in the exploration area in Central Sulawesi. This case is an example of human rights problems deriving from poor governance of the mining sector.

Another example is the Freeport case. Freeport is one of the oldest mining companies in Indonesia. It was awarded the first mining Contract of Work in 1967 to operate in Papua Island and currently holds a 1991 extension to its Contract of Work that is valid for the next 50 years. Once having received the initial contract, Freeport began to establish camp sites on the coast and up at the Ertsberg. The immediate response of the indigenous people - the Amungme community- was to set up a

8 Research studies on the linkage between natural resources and the presence of war or conflict, such as "The Bottom Billion" by Paul Collier, have been performed and published. Pertinent studies can also be found in Philippe Le Billon's, "The Political Ecology of War and Resource Exploitation" (Studies in Political Economy, 2003), and "The political ecology of war: natural resources and armed conflicts," *Political Geography* 20 (2001) p. 561–584.

wooden cross, their traditional indication the owner of the land did not permit trespassing beyond a certain point (Ballard, 2001). Despite this movement, Freeport, following the terms of the 1967 Contract of Work, paid no rent or royalties to the Amungme other than the stipulated 'reasonable compensation for dwellings to local inhabitants and the cost of their resettlement.' When the mine infrastructure expanded and the township of Tembagapura was constructed, the Amungme of the Wa Valley area continued to protest against what they saw as a constant process of encroachment on their land without either consultation or adequate compensation. A negotiation in January 1974 in Tembagapura between Freeport, civilian, military, and government officials and the Amungme community leaders created the 'January Agreement'. However, the Amungme people did not trust the agreement and in November 1976 rioted near Tembagapura. In June 1977 the Amungme settlements abutting the mining town of Tembagapura were repeatedly destroyed and the residents relocated by the company in order to discourage immigration to the town area. In the aftermath of 1977, the government pursued a more ambitious program of relocation and those Amungme who resided outside approved settlements were regarded as OPM (*Operasi Papua Merdeka*) – a separatist movement in Papua (*Ibid.*).

The huge profit windfall reaped by the mining companies are not always enjoyed by the local communities. In many cases the surrounding communities are left in poverty, which has led to tremendous protests, demonstrations, disruption of projects, and armed conflict involving local/indigenous people, the military and even worse, separatist groups. Across the region, people have raised their concerns and voiced their rejection of extractive companies. In the Philippines for instance, anti-mining groups, which are strongly supported by the Catholic Church, have developed a strong network to advocate for the banning of mining permits. At the global level, this situation leads to the creation of various international standards on business and human rights. Cases on local community versus the extractive companies/government can be found not only in Indonesia and the Philippines, but also in countries such as Cambodia, Myanmar,

Thailand, and Vietnam.

-Other than human rights' issues, the inability of states in regulating the industries has also caused severe environmental problems across the region. As the mining projects are mostly located in forested areas, the presence of these projects may harm the sustainability of the biodiversity by triggering deforestation and hampering the health of the water supply. Meanwhile, in many Southeast Asian countries the mechanism to make companies more accountable for their commitment to environmental protection is weak. Mitigation measures for environmental degradation are underdeveloped, compensation for environmental accidents are often undelivered, and implementing cleaner technology to avoid or reduce the risk of environmental degradation is rarely applied at extraction sites. Improper tailing management caused by illegal as well as legal mining, harms the livelihood of many local communities near the projects.

Other critical challenges to the extractive industry are the presence of corruption and lack of good governance. These challenges pose a latent threat of a resource curse. In a broad term, a resource curse is a phenomenon whereby a resource rich country is ironically trapped into poverty. The revenue cannot be used for the public good because of the mismanagement in the extractive industries governance. In short, the resource curse refers to a condition where a state has abundant oil, gas and mineral resources but lacks economic growth and human development. Publish What You Pay Australia reported that this issue remains important as two-thirds of the world's poorest people live in resource rich developing countries. Tackling the resource curse is becoming an important agenda because the revenues from these industries, if managed in a responsible way, would provide the basis for broad-based economic growth and poverty reduction in these resource-rich developing countries.

In the Philippines for example, despite its status as the largest gold producer in the world and as an exporter of a number of minerals, the extractive sector only accounts for 1-2% of the national GDP of the Philippines. In Myanmar, natural resource sectors such as mining and oil account for 55% and 85%, respectively, of the total investment

coming from the extractive sector (IES, 2012) but the contribution of the sources to the recent economic growth are less than 2 percent (PWC, 2014).

In short, extractive industries in Southeast Asia have created problems such as poverty, unequal distribution, human rights violations, environmental degradation, conflict, and corruption. Literature such as "The Paradox of Plenty" (Karl, 1997), "The Bottom Billion" (Collier, 2007), and "Escaping the Resource Curse" (Sachs and Stiglitz, 2007) shows that the problems created are rooted in the absence of good governance in managing non-renewable resources. The deficiency of good governance principles and practices in countries with abundant natural resources will continue unabated if the issue of good governance is not addressed.

OPPORTUNITIES IN ASEAN

Exercising good governance principles may vary from one country to the next. In Indonesia, universal standard of democracy, separation powers, and check and balances are commonly accepted. Since the last decade, most of the ASEAN member states have formed anti-corruption policies, as well as anti-corruption bodies. The region has responded to the call for promoting transparency, to implement anti-corruption measures and to improve governance improvement. The notion of good governance is also mentioned in the ASEAN Charter. For example, the preamble of the charter states that the purpose of the charter is

"...to strengthen democracy, enhance good governance and the rule of law, and to promote and protect human rights and fundamental freedoms, with due regard to the rights and responsibilities of the Member States of ASEAN." (ASEAN Charter, 2003)

As described earlier, the absence of good governance in non-renewable sectors has created numerous problems for people and states in Southeast Asia. ASEAN need to address this problem in the context of the ASEAN Community because for two main reasons: to

realize the ASEAN Community's objective to enhance social welfare and prosperity for peoples in Southeast Asia, and to ensure the sustainable management of energy and natural resources supplies for the future of Southeast Asian countries. ASEAN should address these concerns problem by creating a common standards, guideline in managing the resources.

A Regional framework to address good governance issues in extractive industries can help achieve ASEAN's purpose. In the 1967 Bangkok Declaration which says thatt '*... the aims and purposes of the Association shall be: 1. To accelerate the economic growth, social progress and cultural development in the region through joint endeavours in the spirit of equality and partnership in order to strengthen the foundation for a prosperous and peaceful community of South-East Asian Nations;...*'. In addition, the preamble of the 2007 ASEAN Charter states that the ASEAN countries '*...are united by a common desire and collective will to live in a region of lasting peace, security and stability, sustained economic growth, shared prosperity and social progress, and to promote our vital interests, ideals and aspirations.* As a single market will unavoidably affect extractive industries in the region, the failure to address the existing problems in extractive industries can lead to a situation that undersmines the purpose of ASEAN and the ASEAN Community, i.e. to enhance the welfare of people in Southeast Asian countries.

Despite various issues and challenges, ASEAN has recognized and taken advantage of some important opportunities. In the 1995 Bangkok Summit, ASEAN leaders agreed to enhance trade and investment in mineral industries to support the industrialization in ASEAN member states within the framework of the ASEAN Free Trade Area (AFTA). Subsequently, the ASEAN Vision 2020, launched in Malaysia in 1997, envisioned measures to enhance intra-ASEAN trade and investment in the minerals sector and to contribute towards a technologically competent ASEAN. This would be achieved through closer networking and sharing of information on minerals and geosciences as well as enhancing cooperation and partnership with dialogue partners to facilitate the development and transfer of technology in the minerals

sector, particularly in downstream research and the geosciences. Further, appropriate mechanism for these activities would be developed. The first Forum for ASEAN Private Sector Cooperation in Minerals was convened during the 6th ASOMM in Vientiane, Lao PDR in July 2004. The Forum serves as a platform for dialogue among the relevant private sector organizations and corporate bodies in minerals sector.

In conjunction with the AEC, the ASEAN Minerals Cooperation Action Plan (AMCAP) was established during the 1st ASEAN Ministerial Meeting on Mineral (AMMin). The meeting issued the ASEAN Minerals Cooperation Action Plan 2005-2010 in order '*... to create a vibrant ASEAN minerals sector by enhancing trade and investment and strengthening cooperation and capacity for sustainable mineral development in the region* (AMCAP, 2005-2010). The Action Plan includes the following statement:

The ASEAN leaders in their 1995 Bangkok Summit Declaration called for the implementation of a program of action that will further enhance trade and investment in industrial minerals to support the industrialization of Member countries and complement ASEAN's thrust in realizing the ASEAN Free Trade Area (AFTA), and continue to create a conducive environment for private sector participation by making rules and procedures transparent.

In the AEC Blueprint, cooperation in the energy sector is written in Articles 53 and 54, whereas cooperation in mining is stated in Article 55. The former aims to enhance energy security and the latter purposes to enhance trade and investment in the extractive industries. Thus, the spirit of integration and the removal of barriers has underlined the theme of ASEAN cooperation in the extractive sector, including both mineral or energy sectors. In the ASEAN Charter, article 1.5, 1.7 and 1.9 cover the issue of good governance as well as energy and minerals cooperation in ASEAN.

The ASEAN mineral cooperation plan 2011-2015 aims to promote information sharing, to promote environmentally sound and

sustainable mineral development, to facilitate and to enhance Trade and Investments in Minerals, and to strengthen institutional and human capacities in the ASEAN mineral sector. To obtain these aims, working groups on mineral information and database, sustainable mineral development, trade and investment in minerals, and on capacity building in minerals were established. In recent years, the ASEAN minerals cooperation has undertaken various training projects in capacity building, trade and investment; mineral database and environmental-friendly mining and mineral processing. Besides creating the ASEAN Minerals Database, the cooperation action plan promoted information exchange on mineral trade, investment and environmental management, and conducted a training project on groundwater management.

Despite the national endeavor to manage the natural endowment and the regional cooperative efforts to undertake collective measures in handling the negative impact of over-exploitation, pressures to extract and exploit natural resources remain high. In order to sustain their own economies, ASEAN member states need to balance the need of investment with the responsibility in preserving the environment, protecting the local and indigenous people, and ensuring the fair sharing of benefits gained through the extraction with the local people and local government. In his keynote messages during the 3rd ASEAN Ministerial Meeting on Minerals in Ha Noi, Viet Nam, December 2011, Deputy Prime Minister of Viet Nam H.E. Mr. Hoang Trung Hai stated that ASEAN needs to underscore the importance of minimizing the negative impacts of mining activities to the environment and community. This call is in line with the principle of the promotion of environmentally and socially responsible mineral resources management and development, which can be found at the main text of partnership under the ASEAN Vientiane Action Program (VAP), 2004-2010.

In strengthening the role of ASEAN to achieve its objective stated under the AMCAP and VAP 2004-2010, ASEAN could promote and adopt rigorous international standards available at the international level. The gap of information due to the secretive nature of this industry

has negative impact on the process involved with natural resource extraction. These information gaps intensify the suspicion between parties, limiting the ability to address sensitive Working together with various stakeholders, including civil society groups, in an open and transparent manner, to gain wider input and consideration of the ongoing and future extractive project is important for strengthening the trust between each stakeholder.

At the global level, concerns over the negative impact of natural resource extraction is the driving force behind the birth of various global standards such as the Global Reporting Initiative (GRI)⁹, Kimberly Process Certification Scheme (KPCS)¹⁰, UN Global Compact, The Extractive Industries Transparency Initiative (EITI) and many other international initiatives. These standards are supported by various international institutions such World Bank, UN agencies, UNDP and IFCs. They are also supported by various developed and developing countries and by giant companies. The EITI for example,

9 Kimberley Process Certification Scheme (KPCS) is the process designed to certify the origin of rough diamonds from sources which are free of conflict funded by diamond production. The purpose of the mechanism is to prevent diamond from conflict areas entering the world market diamond by requiring governments to certify that shipments of rough diamonds are conflict-free. It originated through a bloody civil war took place in Sierra Leone, Angola. In collaboration with some NGOs, the United Nation conducted an investigation on the conflict. It was discovered that local leader used diamond from Sierra Leon to fund their war. Aiming to stop the war, in December 2000, the United Nations General Assembly adopted Resolution A/RES/55/56, supporting the creation of an international certification scheme for rough diamonds. The certification will prevent the diamond from conflict area to enter international market. (<http://www.kimberleyprocess.com/>)

10 The Global Reporting Initiative (GRI) is a network-based organization that produces a reporting framework. One of its purposes is to mainstreaming disclosure on environmental, social and governance performance of companies. To support its goal, GRI develops Reporting Framework which sets out the principles and Performance Indicators that organizations can use to measure and report their economic, environmental, and social performance. Those reporting frameworks vover: (1) ecological footprint reporting, Environmental Social Governance (ESG) reporting, Triple Bottom Line (TBL) reporting, Corporate Social Responsibility (CSR) reporting. These reporting framework apply to corporate business, public agencies, smaller enterprises, NGOs, industry groups and other. (<http://www.globalreporting.org/ReportingFramework/SectorSupplements/MiningAndMetals/>)

the initiative which supports the transparency in the revenue stream of the extractive sector, has already been implemented in more than 40 developing countries and has gained support from developed countries such as the UK, the US, Norway and many more. This initiative has helped creating a shift in the trend of natural resource governance.

The widespread of implementation of EITI a clear indication that there is a strong demand for improving governance in managing non-renewable natural resources, and especially in creating a clear and transparent environment related to the public related to the revenue derived from the extractive industries.

It is an independent, voluntary, and international standard that promotes revenue transparency in oil, gas and mining. Its methodology is applied for monitoring and reconciling company payments and government revenues. All key features in EITI implementation is decided by a multi-stakeholder group that comprises of representatives from the government, companies and national civil societies. This multi-stakeholder group or MSG is the one who determine the outcome of key decisions such as the form of reporting, the structure and content of reporting, level of materiality, auditor selection process and its terms of reference, etc. After completing all steps of the sign-up phase, the national MSG should invite a validator (the international EITI Secretariat's list of validators should be consulted first) to certify that the country is suitable for the 'EITI Candidate' status, and move on to the next phase until finally, the country is an EITI Compliant. The EITI implementation process comprises of 18 steps which are classified by four phases: Sign Up, Preparation, Disclosure, and Dissemination. First a country need to go through the first four steps in the Sign Up phase to become an 'EITI Candidate': Issue government announcement; issue an unequivocal public statement that the government will commit to work with its stakeholders; appoint the implementation leader; compose, agree, and publish a fully costed country work plan (Goldwyn, 2008). A country is affixed as 'EITI Compliant' when it has completed all four phases. International Organisations supporting the EITI worldwide include

the World Bank, IMF, African Development Bank, Asian Development Bank, the European Bank for Reconstruction and Development, and the European Investment Bank. These organisations provide technical and financial support to implementing countries, and support EITI outreach.

For years, the extractive industries have grown as the most secretive sector. Public access to important data and information regarding the extraction process is limited. As EITI required an implementing country to create a multi-stakeholder group representing civil society, government body and private sector in overseeing the implement of EITI, it will provide a chance for civil society to take an equal position in addressing concerns over their natural resource extraction.

The Southeast Asian countries have also responded to this global trend. Under the mineral and energy cooperation, the ASEAN member states have acknowledged the importance of good governance in their natural resource management. Indonesia has played a very important role in taking the initiative further in the regional level. In 2011, during its chairmanship in ASEAN, Indonesia has taken the opportunity to bring the initiative in the regional cooperation. The ASEAN Ministers of Minerals has agreed to adopt EITI in 2011-2015. Under the document, the Ministers of Mineral Cooperation in ASEAN agreed to include capacity building on EITI in the AMCAP 2011-2015, which showed the support of ASEAN in promoting transparency within the sector.¹¹

In the national level, at least five ASEAN member states namely Indonesia, Myanmar, Philippine, Vietnam and Cambodia already developed extensive discussion on EITI in their natural resource governance. Indonesia, the largest natural resource producer in the region, has adopted EITI through Presidential Decree number 26 on Transparency of National and Local revenues from Extractive Industry.

11 The AMCAP document said that: To Enhance capacity on mineral resource revenue management, the ASEAN Holding trainings on Extractive Industries Transparency Initiative (EITI) for ASEAN Senior Officials on Minerals," The AMCAP Document was archived in the ASEAN and can be downloaded from <http://www.asean.org/archive/documents/111209%20-%20AMMin3%20-%20AM.pdf>

The largest country in the region is in the stage to fully implement EITI to push bigger transformation in the revenue management from the extractive industries. In a collaboration with various stakeholders such as academic society, business entities and civil society, government related bodies in Indonesia such as the Ministry of Mineral and Mining and the Ministry of Economic Affairs have produced a report covering the revenue report gained from extractive industries. Philippines which attempted to revive its mining industries followed Indonesia by the issuance of an Executive Order which also stated the country's interest in promoting EITI. Myanmar has recently announced their intention to implement EITI. By implementing EITI, Myanmar has stated their commitment to improve transparency in extractive sector.

This could be a turning point in the ASEAN way in managing natural resources. This opportunity should be utilized in a progressive manner to push better governance in the regional level. ASEAN should take a bigger role in promoting the changes and shifting in natural resource management. Such values will help Southeast Asian countries in utilizing their resource wisely.

ORGANIZATION OF THE BOOK

As mentioned earlier, this book consists of research on problems related to extractive industries in Southeast Asian countries. The underlying message in the book is that because current trends challenges the regional countries in dealing with their natural resources. ASEAN can strengthen the regional cooperative framework to establish good governance for managing the natural resources of its member states. The cooperative regional framework may be drawn from various lessons-learned, particularly from countries in the region whose economies and/or people have been adversely effected by extractive industry practices.

The book is presented in four parts. The introduction explains the setting of good governance issues in extractive industries in Southeast Asia and suggests strengthening EITI as a possible strategy for resolving the issues. After the introduction are five studies on the problems of the extractive industries in Vietnam, the Philippines, and

Indonesia, followed by two studies on a possible regional framework for managing the extractive industries. Finally, the conclusion highlights lessons learned from the problems of the extractive industries as experienced by countries in the region and underscores the need to strengthen the regional framework on good governance in this sector.

The problems with the extractive industries in natural resource rich countries in Southeast Asia are varied. Triyono Basuki and Ermy Sari Ardhyanti studied the effects of the mining industry on indigenous people in the Philippines and reflected on them in light of Indonesian cases. Basuki and Ardhyanti examined the position of the Phillipino indigenous people vis-à-vis mining companies and found that the law protects the rights of local people on their land. Therefore, the Phillipino indigenous people have not only rights to approve or reject mining activities but also to choose the mining company that will operate on their land. The second study by Mai Vo and David Brereton focuses on the involuntary resettlement caused by the extractive industries in Vietnam. Involuntary resettlement created economic as well as socio-cultural problems not only for the resettled people but also for the host community. Vo and Brereton compare the governance of mine-induced resettlement with global standards by exploring the experience of a large-scale mining project in Vietnam. They reveal significant process and knowledge gaps between the various private and public sector actors involved in the mine-induced resettlements in Vietnam. The various stakeholders involved in the resettlements lacked the capacity to meet global standards on implementing mine-induced resettlement projects.

The last three studies in this section focus on Indonesia, a country with the largest natural resources endowment in the region. Laila Kholid Alfridaus examined the capability of communities to advocate for themselves against mining companies and their supporters. Alfridaus observed three different areas with active extractive industries: two in Kalimantan and one in Java. She found that in Kebumen (Java), local communities are better informed than those in the mineral-rich areas of Kalimantan. She argues that information

awareness is vital for the affected communities to defend their rights vis-à-vis extractive sectors in their lands. Sa'dan Mubarak reported on his observation of energy policies in two countries: Indonesia and Malaysia. Through a comparative case study, Mubarak examined government institutions in the oil and gas sector, the National Oil Company, and the relation between central and local government in terms of oil and gas profit sharing. The author reveals that both Indonesia and Malaysia have implemented good governance in their energy policies by implementing a model of shared responsibilities between the National Oil Company and the government.

The third section of the book deals with recommendations and proposals for a regional framework to establish good governance of the extractive industries. The recommendations are drawn from the experiences and examples of countries in the region, such as the law-protected rights enjoyed by indigenous people in the Philippines, the energy policies of Malaysia and Indonesia, and the empowerment of local communities in Kebumen (Indonesia). A proposal for a regional standard is based on the research findings of Andy Whitmore and Fernanda Borges.

The study by Borges analyzes the opportunities and challenges for developing a common framework for managing natural resources in ASEAN countries. Borges identifies reforms and new initiatives and the legislation required to implement them. The author proposes a set of recommendations for developing a common framework for governance of extractive industries and proposes the establishment of a multi-donor ASEAN Extractive Industries Trust Fund to finance and technically support its implementation.

Andy Whitmore studied the rights of indigenous people in the context of extractive industries. He focused on the feasibility of Southeast Asian countries to adopt and implement the emerging global standard for free, prior, informed consent (FPIC) in order to protect the human rights of indigenous peoples and to reduce the risks of conflict around extractive projects. Whitmore discusses his ideas for ASEAN and for the United States and other actors regarding the issues of legislative agendas, consensus creating, capacity building

and redress and grievance mechanisms.

In the final section, Francisia Seda underlines the urgency to transform the governance of the extractive industries in Southeast Asia.

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Part I

National Perspectives



CHAPTER 1

Involuntary Resettlement in the Extractive Industries: Lessons from a Vietnamese Mining Project

Mai Vo and David Brereton

INTRODUCTION

Involuntary resettlement is often a corollary of large-scale development projects, particularly in the developing world. As various studies have demonstrated, poorly implemented resettlements can have severe, lasting, and adverse consequences for resettled people and host communities; even comparatively well-managed processes can be problematic. International organizations such as the World Bank, International Finance Corporation (IFC), and the Asian Development Bank (ADB) have sought to redress this situation by promulgating resettlement performance standards and promoting good practices, but these initiatives have had only limited penetration to date.

Traditionally, the major triggers for involuntary resettlement in Southeast Asia have been the construction of dams and other large-scale infrastructure projects, such as roads, ports, and urban renewal schemes. However, mining projects also displace significant numbers of people because of the need to access ore reserves and establish the mining infrastructure, which includes mineral processing plants, tailings, dams, and roads, all of which require considerable amounts of land (Terminski, 2013). For example, Indonesia's Freeport mining activities forced approximately 15,000 people to relocate (Hyndman, 1994). Another example is the proposed Tampakan copper-gold mine in the Philippines, which could lead to the displacement of

approximately 5,000 households (Swissinfo.ch, 2013). With the continuing growth in global demand for minerals and increased levels of mining activity in regions such as Asia and Africa, mine-induced resettlement is likely to become an even more salient issue in the future.

Poorly managed resettlements can exacerbate social problems and conflicts in areas where mining projects are located because of project delays resulting from the opposition of displaced people. These conflicts expose companies and governments to legal action, add to the financial burden of the State (especially when resettlement results in a loss of livelihood), and attract adverse international attention from multilateral organizations, other governments, and NGOs. Unfortunately, governments in the developing world are often not equipped to anticipate and deal with the complexities associated with mining-induced resettlement. Furthermore, governments are not always disinterested parties; to the contrary, some of the more problematic resettlements have been undertaken by state-owned mining companies (e.g., Mathur, 2008, on Coal India).

In this chapter, we use the example of a large mining project currently underway in Vietnam to demonstrate some of the governance challenges associated with mine-induced resettlement in emerging economies. We argue that the centralized nature of the Vietnamese state, combined with deficient legislation and a lack of expertise and resources at the local level, has created a situation in which project-affected communities have been placed in a particularly vulnerable position. We conclude by identifying specific actions that could be taken in Vietnam and other ASEAN countries to provide better protection for people at risk of being displaced by mining projects and other large-scale developments.

The Global Context: International Standards For Involuntary Resettlement

The World Bank was one of the first international development agencies to formulate an involuntary resettlement policy. The original policy—Operational Manual Statement 2.33—was drafted in 1980;

since then, it has been revised a number of times (in 1986, 1988, 1990, and most recently in 2001). Operational Policy (OP) 4.12, as it is now called, requires borrowers (typically governments) to prepare and implement a resettlement plan that complies with a broad range of conditions (World Bank, 2001).

In 2006, the IFC, a member of the World Bank group, adopted the Performance Standards (PS) on Social and Environmental Sustainability for private sector companies receiving IFC funds (IFC, 2006). In the beginning, the standards were viewed more as aspirational guidelines; collectively, they were treated as an international benchmark for private sector projects (Nazari, 2010). However, when the IFC becomes a lender, they become compliance standards that operate as risk management tools for IFC-funded projects. Increasingly, the IFC standards provide a global benchmark.

For the present purposes, the key IFC standard is PS5 (i.e., "Land acquisition and involuntary resettlement"), which replaced the World Bank's safeguard policies for the private sector. PS5 addresses the risk of involuntary resettlement caused by IFC-financed projects. It covers both physical displacement (i.e., relocation or loss of shelter or land) and economic displacement (i.e., loss of assets or access to assets leading to loss of income sources or other livelihood means) resulting from project-related land acquisition and/or restrictions on land use (IFC, 2012). The standard requires clients to avoid or at least minimize involuntary resettlement wherever feasible by considering alternative project designs. In instances where resettlement is unavoidable, clients are required to provide opportunities for resettled people and communities to receive proper development benefits from the project. In addition, adverse social and economic impacts from displacement must be mitigated to improve (or at least restore) the living standards of people affected by projects (IFC, 2012).

Where there is likely to be physical displacement, PS5 requires a Resettlement Action Plan addressing compensation, the establishment of resettlement sites, adequate replacement housing, and relocation assistance. In the case of a project involving economic displacement only, a Livelihood Restoration Plan is required to compensate affected

persons and/or communities. This plan includes provisions for compensation of economically displaced persons and replacement property, and economic assistance through credit facilities, training, job opportunities, etc. (IFC, 2012).

Numerous commentaries and criticisms have addressed the adequacy and relevance of the 2006 IFC standards (Halifax Initiative Coalition, 2006; IFC, 2009, 2010; JACSES, 2009; Nazari, 2010). In response, the standards—including PS5—were updated in 2011 to incorporate lessons from IFC’s implementation experience and feedback from internal and external sources. The revised standards became effective in early 2012.

The revised PS5 (2012) includes a set of requirements outlining the responsibilities of developers where governments have formal authority to carry out the resettlement process. According to the standard, under government-managed resettlement, the private sector is expected to collaborate with the responsible government agency to “the extent permitted” to ensure that planning and implementation of the resettlement is consistent with the PS. In addition, developers are required to play a more proactive and engaged role in the land acquisition and resettlement process, particularly when government capacity is limited. The revised PS5, while recognizing that investors will be restricted in their ability to influence government planning outcomes, emphasizes the responsibility of the developer in accounting for resource needs, planning requirements, and the potential risks of the project for displaced peoples.

In the Asian regional context, ADB has played a lead role in setting standards for managing project-induced resettlement, commencing with the adoption of the Involuntary Resettlement Policy in 1995. This policy was replaced by the Safeguard Policy Statement in 2009, which in many respects reflects the World Bank/IFC approach. The primary focus of the ADB has been on ensuring compliance with its policies for projects that it funds. However, it also undertakes some capacity building with governments of member companies; further, it has provided technical assistance in the development of laws and regulations (e.g., in Mongolia).

Both the ADB and World Bank have been active in Vietnam and in a number of projects requiring large-scale involuntary resettlement (e.g., *Hoa Lac* High-tech Park, *Song Bung* hydropower project, the *Hanoi* urban transport development project, and the *Nui Phao* mining project). Most of these projects relate to urban infrastructure or dams (e.g., *Kunming-Haiphong* transport corridor project, *Ho Chi Minh City-Long Thanh-Dau Giay* expressway project, and *Song Bung* and *Son La* hydropower projects). There is only one recorded case of a multilateral agency being involved in the funding of a mining project—the *Nui Phao* mining project, which sought funding from World Bank’s Multilateral Investment Guarantee Agency. However, this project did not proceed. The ADB has provided some technical assistance to the Vietnamese government in a review of current laws and policies relating to resettlement (ADB, 2013).

GOVERNMENT-MANAGED RESETTLEMENT: AN OVERVIEW

Much of the available literature on involuntary resettlement in the extractive resources sector has focused on the behavior of mining companies, but the State also has a very important role to play. Because governments define the regulatory context for resettlement (e.g., through laws relating to compulsory acquisition and compensation), they may cause or contribute to displacement by their own actions (e.g., when they require people to move so that a dam or road can be built). Vietnam and some other countries such as Laos, Cambodia, the Philippines, China, and India, may act as their own resettlement agencies.

A consistent finding from the research is that the implementation of resettlement projects in which the responsibility is vested in the State is often cumbersome, particularly for large-scale projects (De Wet, 2004; McMillan, Sanders, Koenig, Akwabi-Ameyaw, & Painter, 1998; Robinson, 2002; Scudder, 2011; Sonnenberg & Münster, 2001; Zaman, 2002). The following problems appear to be commonplace:

- Lack of clear policy mandates
- Overlapping responsibilities of government agencies
- Lack of organizational capacity

- Poor communication at all levels
- Lack of local participation
- Land tenure problems
- Underfinanced resettlement components

In many cases, resettlement projects led by the State have been conducted in the absence of explicit policies, frameworks, and guidelines (Karimi & Taifur, 2013; Maitra, 2009; Das, 2008; Rew, Fisher, & Pandey, 2000). For example, a review of resettlement projects in India (Maitra, 2009) revealed that because of national resettlement policies and guidelines, both compensation rates and resettlement assistance were unsatisfactory by any standards. Maitra (2009) also stressed that numerous national resettlement projects have failed largely because of weak implementation by institutions, lack of a clear policy mandates, and inadequate organizational capacity.

In the case of Indonesia, Zaman (2002) and Karimi and Taifur (2013) argued that the absence of national policies and guidelines is one of the most important causes for the failure of resettlement projects. They observed that many government agencies associated with large-scale resettlement projects do not have adequate resources or training. Moreover, government officials carrying out the majority of resettlement work do not have a clear understanding of policy requirements. It is common for these officials to hold the misinformed belief that compensation for affected people is one-dimensional, involving only financial payment without any need to assist with livelihood restoration.

In reviewing the implementation of resettlement projects led by the State, Cernea (1996, p. 24) observed that effective legal mechanisms are likely to be either absent or subverted under authoritarian institutions. Under government-managed resettlement in an authoritarian setting, central governments typically make regulatory decisions without consulting with other actors (Cernea, 1996; Sonnenberg & Münster, 2001; Tan, 2008). According to Tan (2008), the Chinese government is entirely responsible for managing resettlement processes, and it has decisive roles in many aspects of the resettlement including

overall planning, as well as making, implementing, and monitoring all resettlement policies and regulations. Furthermore, in authoritarian regimes, individuals and groups who are affected adversely by government action or inaction have limited recourse to remedies such as legal action, media campaigns, or political lobbying.

A further concern, identified by De Wet (2002, p. 10), is that the State is both player and referee in government-led resettlement projects, being both the initiator of resettlement and the source of laws and regulations. This situation creates an inherent conflict of interest and increases the risk that the rights and interests of project-affected people will be overlooked or overridden in the pursuit of broader national development objectives. As detailed below, all of these shortcomings and problems have been manifested to varying degrees in Vietnam.

THE STUDY AND ITS CONTEXT

Research Methodology

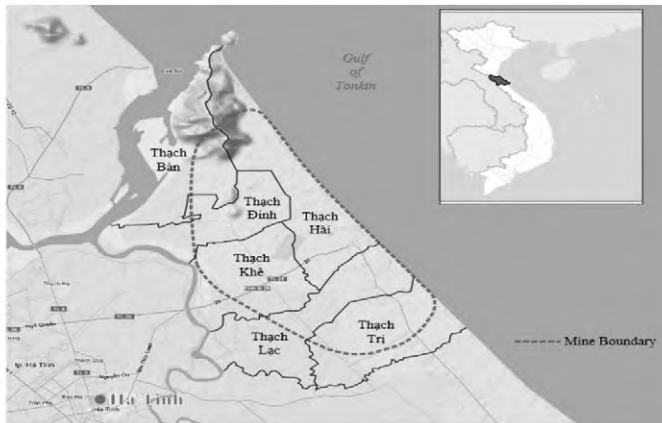
This paper draws on research conducted at and around the *ThachKhe* iron ore mining project (TKIOM) in Vietnam from January 2011 to December 2011. The study was designed to document the impoverishment risks facing people affected by the project and to assess the capacity of the government, mining company, and affected people to mitigate and manage these risks.

The main research methods utilized were semi-structured interviews and observations, both of which are qualitative methods. Secondary data collection was also undertaken (using "official data" such as government reports) along with participatory methods such as informal conversations, participatory mapping, and a transect walk. Data collection was undertaken in two phases: an initial scoping study followed by a more extended fieldwork visit. The main source of qualitative data was semi-structured interviews with 28 key informants, drawn from three actor groups associated with the mine. In addition, 45 others were asked a range of questions pertaining to resettlement processes, their own experiences, and impacts of resettlement.

***Thach Khe* Iron Ore Mine (TKIOM) Project**

The TKIOM is an open pit iron ore mine in central Vietnam. It is located northeast of *Thach Ha* District, *Ha Tinh* province. The mine is approximately 8.5 km to the east of *Ha Tinh* City and about 1.6 km from the coast (MOIT, 2008). Figure 1 shows the location of the mine in the region.

Figure 1.1. Location of *Thach Khe* iron ore mine



The TKIOM deposit was discovered by chance in 1961 when the geology group from the Vietnamese Geography Department was carrying out routine mapping in the northern part of the country (MOIT, 2008). The subsequent definition of the size and shape of the deposit took place over several decades. A relatively recent estimate reserve for the *Thach Khe* deposit is 544 million tons, which equates to 60% of Vietnam's total iron ore reserves. This deposit is considered to be not only the largest in Vietnam but also in Southeast Asia (MOIT, 2008). It is expected that the deposit will support a mining rate of 10 million tons per year for the next three decades.

A range of domestic and foreign investors expressed an interest in investing in the TKIOM; however, only domestic bidders were

successful, despite interest expressed by foreign investors from China, India, Korea, and Russia regarding possible construction of a steel refinery close to the mine (MAC, 2007; MOIT, 2008; VCII, 2007). Although foreign investors are able to establish joint ventures with local partners legally, the Vietnamese government requires that domestic investors hold the controlling stake in this venture, based on the size of the deposit. The details of the bidding process for the ownership of TKIOM have not been made public; however, during the tender process, some foreign investors withdrew their bids because of the uncertain regulatory framework and complex geographical position of the mine. As a result, the final joint venture arrangement only included domestic investors (VCII, 2007).

Thach Khe Iron Ore Joint Stock Company (TIC) was established in 2006 as a joint venture between multiple domestic investors, with a view toward developing the TKIOM deposit to provide iron ore for meeting the domestic demand and for ensuring sales to the export market. The TIC has nine main domestic shareholders, most of which are state-owned enterprises. The company has been granted a 30-year lease to mine iron ore over 527 hectares and to a depth of 550 meters (Vietnam Development Gateway, 2007).¹²

Resettlement at TKIOM: The State of Play

According to TKIOM's 2008 Environmental Impact Assessment report (EIA), the mine was expected to impact approximately 3,898 hectares of natural land covering six communes.¹³ This area includes 2,364 hectares of agricultural land, 793 hectares of non-agricultural land, and 741 hectares of non-used land. Approximately 3,928 households comprising around 16,800 people in six communes would be affected directly by the mine operation and required to relocate. According to MOIT (2008), most affected households—about 2,500—were involved in agricultural production; the remaining households

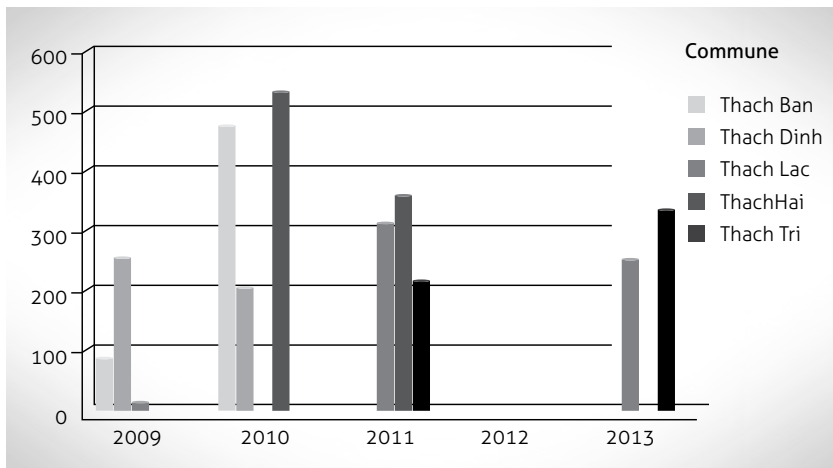
12 One hectare = 10,000 m²

13 Approximately 3,898 hectares of affected land include 527 hectares of the area to be mined and areas to be used for waste rock dumps, roads, plants, buffer zones, etc.

made their living through fisheries (587 households), salt making (404 households), and trading (437 households).

Under the resettlement roadmap, all of these households should have been resettled between 2009 and 2013 (MOIT, 2008). According to the plan, the main years of resettlement were to be 2010 and 2011; during those years, 60% of the households were expected to relocate. Notably, all households from two of the communes, *Thach Ban* and *Thach Dinh*, should have completed relocation by 2010 (see Figure 2). However, at the time of the field trip in December 2011, only 12 households from the *Thach Dinh* commune had relocated; these households were situated on the mining company's planned transportation route.

Figure 1.2. Planned resettlement timeframe for households affected by TKIOM



Source: (MOIT, 2008)

The main reason for the significant delay in resettlement has been the mining company's failure to contribute the capital that it promised. In 2009, the company committed to contribute 1.3 trillion VND (65 million AUD) by 2010; however, by 2012, it had only provided 221.5 billion VND (11.05 million AUD). According to the company, the failure

to meet the original commitment can be attributed partly to certain shareholders with a controlling stake in the company who have been affected by a financial crisis and have incurred large debts. In addition, the company has been undergoing a restructuring process with major changes to shareholder structure (Unibros News, 2011; VCII, 2007).

The delay in resettlement has seriously impacted the lives of many people. At the time of the field trip, the mining company was still undertaking excavation operations even though provisions for relocation had not been finalized. Environmental mining issues such as dust, noise, air pollution, water shortage, and contamination have impacted local people; further, related problems have been amplified by the delay in the resettlement process.

Our data show that affected people did not know when relocation would take place, where they would go, and when compensation would be provided. The only certainty is that they cannot stay because of the adverse environmental effects of the company's mining operations. Affected people, therefore, face a dilemma of "not being able to move but finding it hard to stay." These uncertainties have increased stress levels and economic costs for people who are unable to plan their relocations. Further hardship has been experienced by groups who were already vulnerable. Findings indicate that affected people in the case study potentially confront a number of risks including landlessness, joblessness, homelessness, marginalization, loss of access to common property and services, social disarticulation, loss of access to education, and financial insecurity.

INSTITUTIONAL CHALLENGES UNDER GOVERNMENT-MANAGED RESETTLEMENT IN VIETNAM

In the international sphere, mining companies confront the complexity of resettlement with an internationally recognized PS set as their guide. However, even with the benefit of experienced consultants and practitioners operating within the parameters of carefully constructed standards, executing a successful resettlement eludes most companies. In Vietnam, where bureaucracies have only government legislation to guide them through this process, these

problems are compounded.

Our analysis points to several overlapping factors that contribute to the current unsatisfactory state of affairs at TKIOM; these can be summarized under the following headings:

1. Unclear and confusing responsibilities
2. Inadequate representation structure
3. Lack of collaboration between government agencies
4. A lack of capacity and resources in government, particularly at the local level, where responsibility for implementation resides
5. Marginalization of the company and a general lack of capacity
6. Failure to ensure prior to project approval that funds are available to cover the costs of resettlement
7. Poor communication processes
8. An absence of external monitoring and oversight

Prior to considering these aspects, it is helpful to review a short summary of governance arrangements in Vietnam as they relate to resettlement.

Governance Arrangements in Vietnam

The Vietnamese government structure comprises the National Assembly, the government, the People's Courts, and the People's Prosecutors. At the central level, the National Assembly is the highest legislative body in the State, and the government is its executive organ. At the local level, there are three tiers of government: province, district, and commune. At the provincial level, the Provincial People's Committee is elected by constituents; it is responsible for formulating and implementing the province's socioeconomic development plans, budgets, and defense and security measures. The People's Council elects the Provincial People's Committee as its executive arm to implement the provisions of the constitution, laws, and formal orders of the central government. In addition, the committee is responsible for issuing resolutions for districts and communes regarding implementation of socioeconomic development measures. At district and commune levels, structures are similar to those at the provincial

level (i.e., People’s Councils and People’s Committees have similar functions); furthermore, these levels demonstrate a progressively more practical approach to work in their respective communities. As a matter of principle, the governments at lower levels are expected to be subordinate to those at the higher level (IDLO, 2011).


The executive institutions including the central government and local People’s Committees are responsible for implementing the nation’s resettlement projects. The central government has issued several regulations and guidelines for the implementation of land acquisition and resettlement.¹⁴ Figure 3 shows the governance relationships between key agencies involved in the TKIOM resettlement project.¹⁵

Figure 1.3. Governance arrangements for TKIOM resettlement



Level	Government Organization	Interaction	Organization Responsible for Resettlement Projects
Central	<ul style="list-style-type: none"> Ministry of Finance Ministry of Natural Resources and Environment Ministry of Construction 		Project Management Unit (PMU)
Province	Ha Tinh Provincial People’s Committee (PPC)		Thach Khe Iron Ore Mine Management Board (MB)

14 The main implementation regulation on land acquisition and resettlement is Decree 197/2004/ND-CP (i.e., “Compensation, rehabilitation and resettlement in the event of land recovery by the State”). Decree No. 181/2004/ND-CP guides implementation of the land law.

15 Responsibilities of government agencies in relation to the implementation of resettlement projects are stipulated under Land Law 2003 and Decree 197/2004/ND-CP.

District	<i>Thach Ha</i> District People's Committee (DPC)		<i>Thach Ha</i> Compensation, Assistance and Resettlement Committee
Commune	Six People's Committees for six affected communes: <i>Thach Ha, Thach Dinh, Thach Khe, Thach Ban, Thach Lac, Thach Tri</i>		

Legend:

-  Direct Supervision
-  Subordination

It is evident that the primary responsibility for governing the resettlement process in Vietnam falls to the State. The central government makes all decisions and passes down regulations for implementation. In the case of TKIOM, the major institutions involved in the project are local governments; thus, this structure has unique complexities.

Key Issues

Unclear and Confusing Responsibilities

Although there are laws and regulations to empower the Vietnamese state to dispossess land “needed for the public good,” no explicit policies or legal frameworks have been established to compel relevant government agencies to address the complexity of resettlement. According to Dao (2010) and Bladh and Nilsson (2005), in the absence of an official resettlement policy and framework, responsibilities for government agencies in land acquisition and resettlement have not been defined clearly. Development projects address resettlement matters as they arise on a purely ad hoc basis through the promulgation of instructions that are specific to the project in question. As a result, accountability assigned to government agencies is indefinite and vague.

In the case of TKIOM, the major responsibility for resettlement implementation and management rests with local authorities, mainly the *Thach Ha* district and six communes affected by mining activities.

The resettlement project began in 2008 when there were no specific guidelines addressing the responsibilities of relevant government agencies. It was not until 2010 that the *Ha Tinh* province issued Decision No.7/2010/QĐ-UBND entitled “Compensation, assistance and resettlement when the state acquires land in the provincial region.” In July 2012, the Provincial People’s Committee issued Decision No. 37/2012/ QĐ-UBND (i.e., “Cooperation among the TKIOM Management Board, corresponding government agencies, and the People’s Committees at the district and commune level”), which relates specifically to the TKIOM resettlement project.

A comparison of relevant documents reveals that even with local implementation regulations, responsibilities for district and commune levels were not defined clearly. Unclear and overlapping responsibilities have made it difficult to interpret the legal framework. The situation has been further exacerbated because not all actors have the same level of understanding; in the interviews, several key actors expressed confusion regarding the different levels and types of responsibilities. While the company and government agencies had some understanding regarding their general tasks in the resettlement process, affected people often mistook the responsibilities of the company as belonging to the government and vice versa.

Inadequate Representation Structure

On the surface, the structure of the Resettlement Committee appears to be democratic; further, it appears to involve all key actors—the government, company, and affected people. However, data from interviews and written reports in circulation indicate that the existing membership of the *Thach Ha* district Resettlement Committee is not in alignment with legal requirements. In particular, two key actors are not represented on the committee: the company and affected people. Consequently, people who are affected directly by the mining project have been left “in the dark.” This situation raises questions about whether decisions that have been made relating to resettlement activities are relevant to the needs of affected people.

Lack of Collaboration between Government Agencies

According to Rath and Jena (2003), for the implementation of a resettlement process to be successful, government agencies must collaborate vertically and horizontally from the highest level associated with policy decisions to the district and grassroots administrative levels. Existing legal regulations in Vietnam relating to resettlement appear to require such collaboration, but in practice, there is a lack of effective coordination and communication between government agencies in the TKIOM. There were positive indications from the data that People's Committees (PCs) at local levels were coordinating with each other (to some extent) vertically, and with PCs at higher levels that provided directions and guidance to lower PCs in implementing resettlement activities. However, there was no effective collaboration horizontally between government departments, although such coordination is required by law.

Limited Capacity of Government Agencies

Only four key personnel from the Resettlement Committee were involved in making plans, providing resettlement guidelines, and giving directions to commune governments. These officials held other positions that placed additional demands on their time and prevented them from fulfilling their resettlement tasks effectively.

Another issue is associated with knowledge and competency. Members of the Resettlement Committee have limited formal tertiary educations, and most staff in the communes have not studied beyond high school. This situation has been compounded by the lack of training opportunities pertaining to planning and supervising resettlement. For most of the officials, the TKIOM is the first resettlement project with which they have been involved.

Poor knowledge at the local government level has manifested itself in a lack of capacity to conceptualize Resettlement Action Plans (RAPs), which all government officials who were interviewed considered as roadmaps indicating site clearance, tentative relocation timelines, and the establishment of new resettlement sites. They did not have a comprehensive picture of the components that

should be addressed in a conventional RAP such as project impact, a compensation framework, resettlement assistance, livelihood reconstruction, budget and implementation schedules, organizational responsibilities, consultation and participation, grievance redress, and monitoring and evaluation (IFC, 2012). This narrow focus contributed to resettlement activities being carried out on an ad hoc basis with little consideration for long-term consequences.

Role of the Company

The entire responsibility for resettlement implementation, under current Vietnamese legislation, rests with local governments rather than project developers. Investors are responsible only for providing resettlement funds. Thus, in the case of TKIOM, the responsibility for resettlement has rested solely with local governments, particularly with district PCs; moreover, the role of the company has been restricted to providing compensation. Documentation provided in meetings and correspondence between local governments and the company relate purely to requests for site clearance. There are no other reports from the company on matters such as the distribution of compensation payments or the provision of technical designs.

According to current IFC guidelines, investors are encouraged to collaborate with government agencies in several key areas including: (i) the establishment of methods for determining and providing adequate compensation to affected people; (ii) distribution of compensation payments; and (iii) design and implementation of a monitoring program (IFC, 2012). These practices have not been applied in the case of TKIOM. For example, there are no forums such as the Joint Resettlement Committee or Joint Funding Program that would provide opportunities for formal or informal collaboration between the company and government.

Regarding TKIOM, at the time interviews were conducted, responsibility for resettlement was shared by three part-time staff members. These personnel also had other unrelated responsibilities. Obviously, deployment of such a limited number of staff is not commensurate with the scale and complexity of the project. In addition,

the three staff members did not have relevant experience, knowledge, or understanding of resettlement; like government officials, they were involved in this type of project for the first time.

Inadequate Financial Provision

The company lacks human resources and has limited finances. It does not have sufficient funds to compensate affected people with the calculated amounts because key shareholders, most of whom are state-owned enterprises, have weak balance sheets and have not been able to provide required funds in a timely manner. As of October 2012, the company was going through a capital restructuring process. As discussed earlier, the resulting shortage of funds has contributed to a significant delay in the relocation process.

During interviews, company representatives also stated that they were well aware of the company's responsibility to provide sufficient resettlement funds, and they understood that any delay in the compensation process would cause more hardships for affected people. They also highlighted that the shortage of funds is one of the factors negatively affecting the resettlement process.

Inadequate Communication Processes

Participation of affected people in the TKIOM resettlement process has been minimal. Their main communication channels have been meetings at the grassroots level (commune and village level); generally, they are unable to attend higher levels meetings at province and district levels. In addition, the support provided at these meetings has been limited to infrequent written publications and public broadcasting by the local governments. Moreover, information provided to local people has been delivered in a top-down manner. The information thus far has been of poor quality, and it has been delivered irregularly. Research data also show that the consultation process for TKIOM has taken place in only one direction—from affected people to local government authorities. A few affected people raised their concerns and expectations through available feedback mechanisms; however, they did not receive any response from the government.

Lack of External Oversight

Civil society has the potential to play a constructive role in facilitating public discussions and dialogues during resettlement planning and implementation. According to Gonzalez and Mendoza (2003), civil societies play an important role in articulating the issues and preferences of the people. Such organizations also play a valuable role in ensuring the accountability of the government and private sector. Likewise, the ADB (2013) recognizes the significant role of civil societies by partnering with them in its funded resettlement projects.

Participants interviewed during field trips confirmed that there were no local and international civil organizations representing the interests of affected communities in the TKIOM. Therefore, it must be questioned whether local funding of the TKIOM precluded the involvement of civil society, thus resulting in no independent organizations being available to provide guidance and to track and ensure compliance with planning and implementation guidelines.

CONCLUSIONS AND RECOMMENDATIONS

As noted at the outset of this chapter, the main triggers for involuntary resettlement in ASEAN countries have traditionally been the construction of dams and other large-scale infrastructure projects, such as roads, ports, and urban renewal schemes. However, with the increase in mining activities in several member countries (e.g., Vietnam, Laos, Philippines, and Indonesia), mining-induced displacement has emerged as a significant issue requiring attention in the region. Risks that member countries face in this regard include potential criticism for not protecting the rights of displaced people and increased difficulty attracting funding from the financial sector and multilateral agencies.

This chapter has provided a case study demonstrating how the governance of mine-induced resettlement in one ASEAN member country, Vietnam, has fallen well short of accepted international standards. Under current Vietnamese national legislation, full responsibility for resettlement implementation rests with the government, with no responsibilities assigned to project investors

other than to financially support the physical relocation of people. The structure and governance of resettlement planning and implementation in Vietnam ostensibly draws a large number of representative bodies into the process, but there is no overarching governance framework for coordinating or differentiating roles and responsibilities between different agencies and actors.

A compounding factor is that both the government and the mining company have had limited capacity for resourcing, knowledge, and relevant skills. Furthermore, there has been a lack of external monitoring and oversight during the resettlement process. The impact in terms of policy implementation has been a state of near paralysis at different levels of government, and a system of planning that is almost impossible for affected people to access, interpret, or influence. Implementation failures and delays in preparing relocation sites or providing services and infrastructure to affected households have had direct and negative effects on access to education and basic livelihoods.

These findings provide a useful point of reference and/or comparison for other studies regarding mining-related resettlement in the region. A regional research approach that builds on this study will build a stronger knowledge base and enrich the literature regarding resettlement generally and specifically for the mining sector. Comparisons could also encourage member countries to learn from each other and improve the design and implementation of policy frameworks. In this regard, there would be particular value in comparing the advantages and limitations of government-managed resettlement processes with those that devolve more responsibility to private sector actors.

More generally, this chapter has highlighted the need to strengthen institutional arrangements, build the capacities of key actors, better define actor jurisdiction, encourage actors to engage in the resettlement process, and strengthen the involvement of civil society. ASEAN countries must recognize the need for more active participation by stakeholders and a more comprehensive resettlement policy and framework for managing resettlement projects.

Based on this study, there are several recommendations that can be made to ASEAN's developing member countries (DMCs), including Vietnam, regarding the governance of resettlement arising from mining projects and other large development projects:

1. DMCs, with the assistance of international organizations such as ADB or the World Bank, should consider undertaking a "gap analysis" of their current policies and legislative frameworks to identify areas where these frameworks fall short of current international standards relating to resettlement.
2. To support this process, there would be value in the ASEAN's establishment of model legislation and common guidelines for resettlement planning and implementation that could be used as a reference point by all DMCs. This framework would help fill the current policy void and signify the commitment of governments and project developers to international resettlement standards.
3. Additional consideration should be given to creating an advisory facility to provide guidance and expert advice on matters relating to resettlement. It may be possible to secure funding from donor countries for such a facility.
4. Civil societies have potentially important roles to play in advocating for the rights and interests of communities that may be subject to resettlement, as historically displaced communities have often had a very limited capacity for engaging with the State. Therefore, DMCs should explore ways for recognizing organizations with demonstrated expertise in the area of resettlement so that they have some standing in decision-making and implementation processes, subject always to the provision that they are acting with the consent of the communities that they represent.
5. Periodic independent external reviews of resettlement projects should be undertaken, and developers should be required to make financial provisions to fund these reviews (see below). The reviews would track and verify compliance and progress toward implementation outcomes. An example

is the IFC's PS5, which requires investors to commission an external completion audit of the RAP or Livelihood Restoration Plan to review mitigation measures and implementation outcomes against agreed objectives. The ADB has also required that a monitoring and reporting framework for resettlement activities be developed during resettlement planning and implementation. These independent external reviews should be undertaken by competent resettlement professionals.

6. International and local developers should be required to engage proactively in the resettlement process. As a condition of licensing approval for development projects, DMCs should require these investors to comply with global resettlement standards such as IFC PSs and ADB Safeguard Standards. In addition, developers should guarantee to cover compensation and relocation costs before a development project is allowed to proceed.
7. DMCs, with the assistance of multilateral organizations and donors, should invest in the training and capacity building of government officials responsible for conducting or overseeing resettlement processes. Officials from both the regulatory body and implementing agencies should receive this training along with key company personnel. Possible topics to cover include risks associated with involuntary resettlement, design monitoring and implementation of RAPs, livelihood restoration, community engagement, and dialogue skills.

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CHAPTER 2

Indigenous Peoples and Mining Management: a Practical Case from the Philippines

Ermy Sri Ardhyanti and Triyono Basuki

INTRODUCTION

An unprecedented demand for natural resources across Southeast Asia is feeding ethnic conflict and displacement; it is a severe threat to the land, livelihoods, and ways of life for minorities and indigenous peoples, according to Minority Rights Group International (MRG) in its 2012 annual report.¹⁶ In Vietnam, over 90,000 people—mostly ethnic Thai—were relocated to make way for the Son La Hydropower Plant. Vietnamese scientists stated that many were left without access to agricultural land. Meanwhile, in Cambodia's Prey Lang Forest region, home to the Kuy indigenous people, official land grants have designated tens of thousands hectares of forest for mineral extraction and timber and rubber plantations; consequently, many people have been forced to give up their traditional livelihoods.¹⁷

Contestation regarding land ownership rights and resource extraction benefits from mining has been observed between indigenous peoples and the state. In the Southeast Asian region, the state rarely acknowledges communal land ownership (Xantakhi, 2003). In Indonesia, recognition of indigenous peoples' rights pertains only to rights associated with ancestral forests.¹⁸ In general, the state

16 Annual Report MRG, 2012

17 Ibid.

18 Based on result of Judicial review in constitution court on Forestry Law No.41, 2004

claims ownership of mining resources with a series of regulations, including in areas of ancestral domain. On the other hand, indigenous peoples have been in control culturally (de facto) of land where mining resources are found. Thus, they indirectly keep an eye on the area that they perceive as under their control because of their economic dependence on it; furthermore, they want to make sure that the area is preserved historically and culturally. In fact, indigenous peoples in the Philippines have a slogan—"no land, no history."¹⁹

However, mining management practices in many countries in Southeast Asia have often crushed the interests of indigenous peoples. Typically, the approval process for mining extraction has been carried out without their involvement. Their absence from the process to approve licensing is a reflection of the losses experienced by these people groups. They are entitled to a share of the revenue from mining profits. Unfortunately for indigenous peoples, mining extraction activities are only contested by the state and mining companies.

In Southeast Asia, the Philippines is the only country to recognize the rights of indigenous peoples in mining extraction (Brett, 2007). Indigenous peoples have power in the mining extraction decision through the free, prior, and informed consent (FPIC) mechanism. A domino effect began with the state's acknowledgement of customary land, including the resources within. Indigenous peoples have a strong bargaining position for profit sharing because of the power they wield in the extraction decision. Mining resource management constellations in the Philippines are not only between the state and mining companies, but also with indigenous peoples who play powerful roles in the country's mining activities.

This paper examines variables associated with the rights of indigenous peoples and mining in the Philippines. First, the country's mining management model that involves indigenous peoples is evaluated. Second, the challenges of mining in the Philippines while engaging these people are explored. Third, the possibility of

19 Blanco Jr., (2014), Interview.

replicating this model in Indonesia is investigated. Finally, conclusions are presented.

In this qualitative research study, relevant references, primary data, and secondary data were used. Geographical focal points are the Philippines and Indonesia, as stated previously. The former is a country with rich mining resources and a high regard for the rights of indigenous peoples. Indonesia is a country that is also classified as rich in minerals; however, the rights of indigenous peoples are not well recognized there.

MINING IN THE PHILIPPINES: INDIGENOUS PEOPLES AND EXTRACTION

In the Philippines, recognition of indigenous rights in mining activities through regulations is aligned with ancestral systems. Section 16 of the Philippine Mining Act of 1995 states, "No ancestral land shall be opened for mining operations without the prior consent of the indigenous cultural community concerned." Further, FPIC must be facilitated preliminarily by the National Commission on Indigenous Peoples (NCIP) to initiate mining activities. Indigenous peoples may approve or reject the proposed activities.

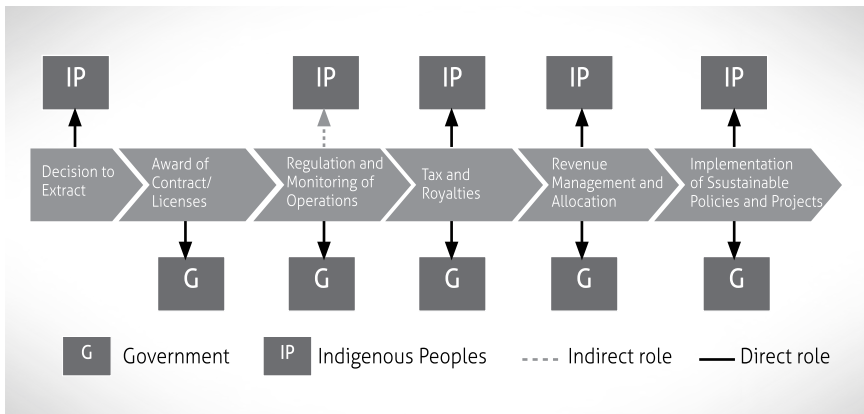
Moreover, indigenous peoples in the Philippines are acknowledged through the Indigenous Peoples Rights Act (IPRA) or Republic Act No. 8371 (Philippines, 1997). The IPRA is the first comprehensive law to recognize the rights of indigenous peoples in the country. In particular, it acknowledges their rights to ancestral lands and domain, and it specifically sets forth the indigenous concept of ownership. The law recognizes that indigenous peoples' ancestral domain is community property for all generations. Furthermore, the law acknowledges the customs of indigenous peoples and their right to self-governance and empowerment (Molintas, 2004). A Certificate of Ancestral Domain Title (CADT) must be issued by the NCIP, a governmental agency under the Office of the President (Chapter VII, Section 40, Republic Act 8371, IPRA).²⁰

With the recognition of their communal rights to land in the

²⁰ <http://www.ncip.gov.ph/about-u.html>

Philippines, indigenous people have the opportunity to become more involved in the management of mining activities. Most mining sites are situated within ancestral lands. For example, 80% of the land in Compostela Valley Province is owned by indigenous peoples; furthermore, more than 90% of mining areas have CADT status (Ansori, 2012). Thus, indigenous peoples have rights within the extractive value chain, as shown in Figure 1.

Figure 2.1. Roles of indigenous peoples in the Philippines' extractive value chain



Source: Modification from Alba, 2009

Licensing Process

In the Philippines, the overall process to obtain a license or mining contract would involve actors from the government, indigenous peoples, and the mining company. Issuance of a mining license for operations within ancestral land is preceded by FPIC discussions between indigenous peoples and the company; these deliberations give people a forum for negotiation as well as for profit and loss calculations. If FPIC discussions result in agreement by both parties, a memorandum of agreement (MoA) between indigenous peoples, the company, and the government will authorize issuance of a mining license.

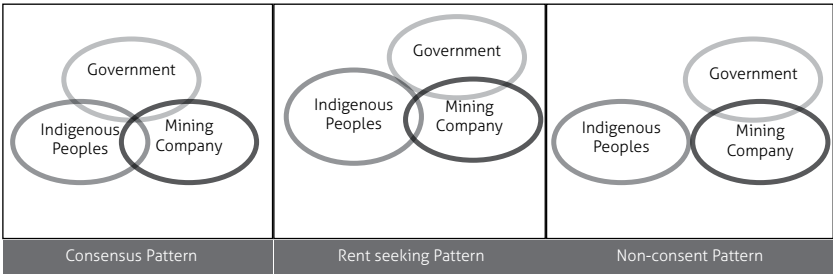
However, if the principle of FPIC is not fully applied during negotiations to obtain approval for mining extraction, indigenous peoples may perceive that the proposed activities would not be favorable. In theory, the NCIP should provide technical assistance to indigenous communities to help them manage potential challenges. However, in practice, the NCIP has often acted on behalf of mining interests. Communities often feel pressured by the organization to give their consent for mining operations; in some cases, forged MoAs have been validated by the NCIP and the government (Bauer, 2011).

There are a variety of reasons for this weakness. First, mining companies and indigenous peoples receive asymmetric information. The latter group does not have access to or the capacity for enough information to make an extraction decision. The information required to make the extraction decision includes information about profits to be gained by indigenous peoples and information about substantial risks (i.e., loss) associated with environmental damage. On the other hand, mining companies are not inclined to disclose full information about the economic potential of mining and the environmental and social risks.

Second, mining companies and the government tend to be allies, and indigenous peoples are not included in this connection. Specific cases have been encountered in which companies have lobbied central and local governments to suppress indigenous peoples and obtain approval for extraction. The pattern of connections between indigenous peoples, companies, and governments is not balanced, as demonstrated by cases in which certain indigenous people and their society's elites have rebuffed mining activities.

Third, there are weaknesses in the indigenous community's decision-making mechanism because the community leader has considerable power in collective decisions. Such power leads to rent-seeking activity, and a company may gain extraction approval by directly lobbying indigenous leaders with offers of personal benefits or benefits for an indigenous elite group (Figure 2).

Figure 2.2. The pattern of connections between indigenous peoples, mining companies, and the government in the extraction decision



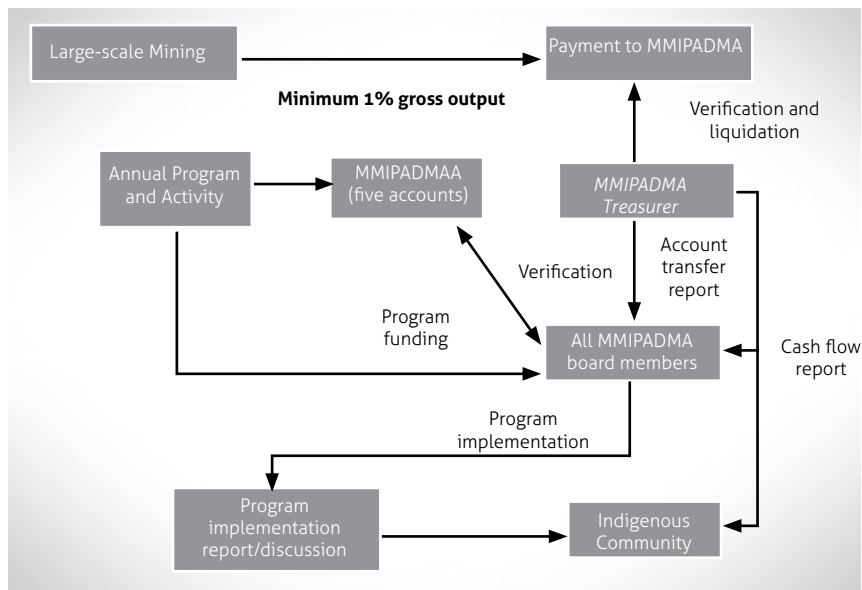
Revenue collection, allocation, and distribution

Indigenous peoples have the right to benefit from mining resource extraction. The Philippine Mining Act of 1995 regulates revenue derived from mining activities for indigenous peoples, stipulating that they receive a minimum of 1% of the gross output from mining sites operating within ancestral lands.

In the implementation, however, indigenous peoples receive direct revenue only from mining companies—about 1% of Large-Scale mining (LSM). Meanwhile, the proportion of revenue for indigenous peoples from Small-Scale Mining (SSM) is not defined. For example, royalties imposed on SSM must be paid to indigenous people; thus, amounts differ by ancestral area because of negotiations between the indigenous community and SSM (Ansori, 2012).

In the context of allocation and distribution, indigenous peoples have the right to manage their revenues for expenditures that are considered important. An example in Maco, Compostela Valley Province, illustrates the process of revenue flow from LSM and revenue management by the indigenous recipients. In Maco, parties receiving royalties are LSM companies, indigenous communities, indigenous leaders (i.e., *Datu*), the indigenous community organization known as MMIPADMA, the Barangay Tribal Council (BTC), and the Municipal Tribal Council (MTC). Of these, the BTC is the indigenous board at the sub-district level. Figure 3 illustrates the flow and management of revenue.

Figure 2.3. Mining revenue flow from LSM to indigenous peoples



Source: Ansori, 2012

This flow of revenue and expenditures seems ideal, but there are weaknesses in collection, allocation, and distribution. In terms of collection, indigenous peoples face problems regarding justified revenue because of their limited access to accurate information about companies' gross production, which is the basis for calculating revenue. This issue highlights information disclosure issues; furthermore, it shows the weak bargaining positions of indigenous peoples with mining companies—especially LSM companies.

The allocation and distribution of mining revenue present many challenges. The indigenous society has experienced a fiscal shock; people who made their living from hunting or farming (with low levels of income) are amassing huge earnings in a short time. Thus, indigenous peoples must learn how to manage and spend their money to support sustainable development. Findings of a recent study by the Ateneo School of Government (2011) show that the poverty incidence

among individuals engaged in mining has continued to, increased based on an economic comparison with workers in other sectors. In 2006 the income poverty index for this sector was 34,64, by 2009 it had increased to 48.71.²¹

The worst effect of revenue generated from mining profits has been the intra-communal conflicts that have developed in the indigenous society—between members of society and their leaders, or among themselves because of a lack of accountability, questionable budget management, and inequalities in revenue distribution. In fact, murders of the indigenous elite or members of other indigenous groups have been reported and attributed to budget issues or corruption.

In addition to inequities in distribution, conflicts are caused by a lack of systems and deficiencies in budget planning. Further, budgets tend to focus on consumptive purposes over improvements in the quality of education, health services, or public infrastructure.

After 17 years since the IPRA was passed, less than 10% of the provinces have implemented its provisions and regulations. Execution of the law has been dependent on the political will of the governor and NCIP in the each province.²²

LESSONS LEARNED FROM MINING GOVERNANCE IN THE PHILIPPINES

Licensing Process

Promoting the capacity of the indigenous society is an important factor in negotiations for the approval of mining extraction, as it reflects recognition of indigenous peoples' rights and regulatory authority. Capacity measures environmental benefits and risks, as well as access to full information about planned mining activities according to government and corporate sources. Capacity ensures that indigenous groups have equal footing in negotiations with mining companies in the extraction decision.

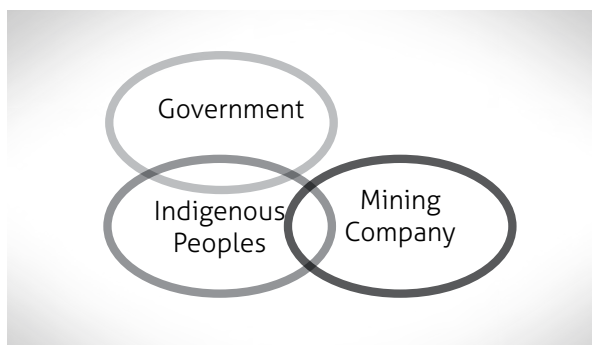
The government's role is also important in this decision process.

21 Income poverty index in this report is a multidimensional poverty index (MPI) to capture various dimensions of poverty

22 Blanco Jr., (2014). Interview.

The government should be in a position to strengthen the position of indigenous peoples toward mining companies, rather than to establish a connection with mining companies and coerce indigenous peoples to agree with the extraction plan (see Figure 4).

Figure 2.4. Ideal connection pattern between indigenous peoples, mining company, and government in the extraction decision



It is important to incorporate structure within the indigenous society to ensure that sound decision making is conducted. The cult-like system that allows decision-making authority to be made by the indigenous leader is very risky. Decision-making systems that require a consensus from all members of indigenous communities should be in place.

Ideally, extraction decisions made by indigenous peoples and companies should promote sustainable mining activities (Brett, 2007). Such decisions indicate that indigenous peoples pay attention to environmental concerns. This conjecture is based on the fact that the livelihoods of indigenous peoples prior to mining operations were hunting and subsistence agriculture, which rely heavily on nature. Thus, leaving the extraction decision to indigenous peoples encourages good mining practices.

Revenue collection, allocation, and distribution

The bargaining position of indigenous peoples should be improved, especially as it relates to their relationships with mining companies

and the collection of revenue from extraction. Effective bargaining includes asking for production and mining activities reports, including financial statements. Further, indigenous peoples are positioned to audit a company's revenues.

Moreover, the indigenous institutional capacity must be promoted for indigenous financial management. Financial statements should be published for dissemination to all members. In addition, an adequate system of internal controls must be established to avoid budget misuse. To improve governance in indigenous peoples' organizations (IPOs), the Provincial Tribal Council/IP-Provincial Consultative Body Resolution No. 4, S. 2013—"Adopting Policy Guidelines Ensuring Transparency and Accountability in Pursuing All Relevant Activities and Process of Decision in Deciding Upon and Implementing Mining Projects and All Other Natural Extractive Industries within The Ancestral Domain of Compostela Valley Province"—was passed.

In promoting the institutional capacity of indigenous peoples in the collection, allocation, and distribution process, the support of the government and other community organizations, such as civil society groups and universities, is desperately needed. Without their backing to enhance capacity, awarded authority and rights associated with mining extraction profits will be a curse instead of a blessing.

Nonetheless, an initiative at the provincial level has been implemented by the NCIP, Compostela Valley Provincial Office; accordingly, the Philippines has applied the Ancestral Domain Sustainable Development Protection Plan (ADSDPP) among the IPOs. Thus, an IPO must align projects, revenue-sharing schemes, issues, best practices, and other initiatives with ADSDPP guidelines. Further, sustainability plans are encouraged under the law to foster self-determination and self-governance of ancestral land by indigenous peoples. An IPO should be able to produce a development plan for appropriate budget allocations and distributions. Subsequently, the organization must prioritize sectors for development. Another important consideration is which instrument will be used to invest revenues from mineral extraction for the next generation.

ACKNOWLEDGEMENT OF INDIGENOUS PEOPLES IN INDONESIA: EXPLORING OPPORTUNITIES TO REPLICATE LESSONS FROM THE PHILIPPINES

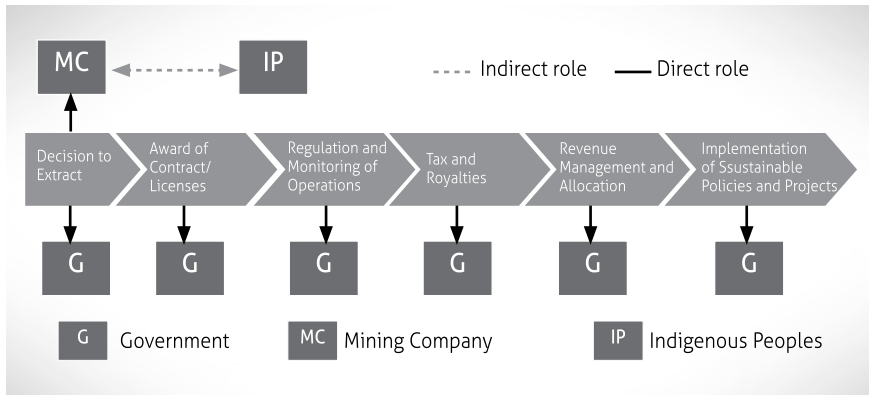
Status of Indigenous Peoples in Mining Governance

Indonesia has a population of approximately 255 million. The government recognizes 365 ethnic and sub-ethnic groups as geographically isolated, customary law communities (*komunitas adat terpencil*). They number approximately 1.1 million. Many more peoples, however, consider themselves or are considered by others as indigenous.

Contestation over Indonesian mining activities has played out formally between the government (central and local) and mining companies. Indigenous peoples are subordinate to a government and corporate connection, especially in mineral extraction agreements, which tend to be more informal. Indigenous peoples receive an inadequate share of mining profits, including corporate social responsibility funding from mining companies. In many cases, they do not get receive any benefits from mining extraction (see Figure 3.5).

Because indigenous rights are not always acknowledged in regulations, indigenous peoples must have favorable bargaining positions to negotiate with companies over mining activities and revenue from extraction. The Dayak people of Central Kalimantan, for example, have enough bargaining power to engage in mining extraction decisions. If bargaining power is low, indigenous peoples will not be involved in mining extraction contestation, such as in the case of Anak Dalam tribes in Riau that were eliminated gradually from their indigenous region because of mining and forestry activities.

Figure 2.5. Indigenous peoples' roles in Indonesia's extractive value chain

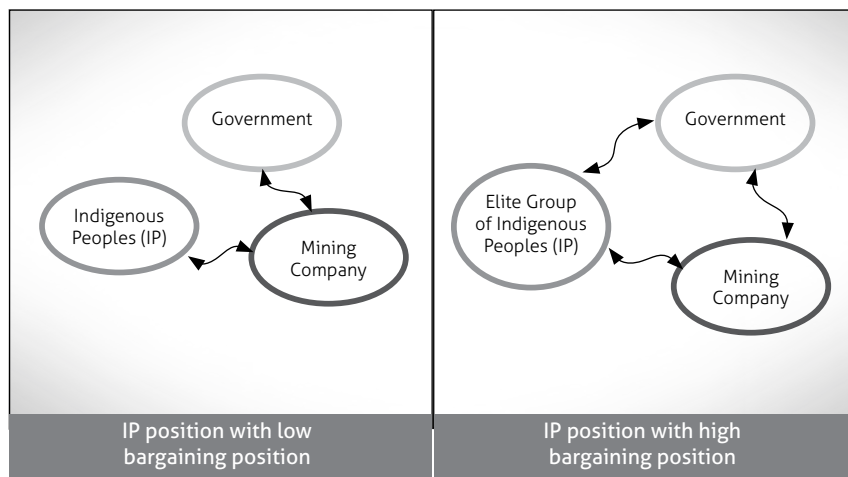


Source: Modification from Alba, 2009

In many cases, the mining extraction decision is no more than a rent-seeking relationship. Indigenous people have a strong bargaining position in Central Kalimantan, and their institutions are used for political legitimacy, especially by local governments and companies, to offer continued mineral extraction in exchange for some benefit.²³ (see Figure 3.6).

23 <http://lussuahanyi.wordpress.com/2012/04/29/antara-perang-jaman-dulu-dan-jaman-sekarang-salah-satu-perubahan-di-dalam-kehidupan-masyarakat-suku-dayak-ngaju-ditulis-tanggal-5-desember-2010/>

Figure 2.6. Connection pattern between IP, mining company and government in extraction decision in Indonesia



The fundamental issue associated with indigenous peoples' informal position in mining activity in Indonesia is the lack of official acknowledgment from the state regarding communal ownership as it has been applied in the Philippines. By de facto, indigenous peoples control territory that is generally rich in natural resources. However, mining resources are claimed explicitly as the state's, and communal ownership is ignored.³ Negation represents the state's denial of the existence of indigenous peoples' communal land ownership in various regions of Indonesia.

MEASURING THE OPPORTUNITY TO REPLICATE THE PHILIPPINES' MODEL IN INDONESIA

National regulations that strengthen the position of indigenous peoples

To understand the Indonesian legal framework regarding recognition of indigenous rights, one needs to explore the various regulations promulgated by the government. For some time, Indonesia had not established a law specifically addressing indigenous peoples. Acknowledgements of indigenous rights are included within different

regulations, reflecting a moderate though insufficient degree of recognition.

Legislation concerning indigenous peoples is reflected in the third amendment to the Indonesian Constitution, which recognizes their rights in Article 18b-2. In more recent legislation, there is an implicit, though conditional, recognition of certain rights (*masyarakat adat*, or *masyarakat hukum adat*); examples include Act No. 5/1960 concerning agrarian regulations, Act No. 39/1999 on human rights, and MPR Decree No. X/2001 on agrarian reform. Furthermore, The UN Declaration on the Rights of Indigenous Peoples (UNDRIP), adopted but not implemented, includes Indonesia a signatory. Government officials argue, however, that the concept of indigenous peoples is not applicable, as almost all Indonesians (with the exception of the ethnic Chinese) are indigenous and, thus, entitled to the same rights. Consequently, the government has rejected calls for special treatment from groups identifying themselves as indigenous.

Forest rights (forestry sector) is a step forward for the recognition of indigenous peoples' rights regarding communal land ownership. The forestry sector, pursuant to Forestry Law No. 41 (1999), recognized the existence of indigenous people by acknowledging their rights to cultivate the forests' produce for their daily needs; additionally, indigenous peoples are permitted to conduct productive activities in the forests according to ancestral methods, as long as the methods are within the corridor of the law.

However, the law appeared to rob indigenous peoples of their ownership of ancestral forests by designating these forests as the state's, although they are situated on ancestral land. The applicable article was later annulled by the Constitutional Court following judicial review, which resulted in the restoration of indigenous peoples' ownership of ancestral lands. Clearly, the government's inclination to share ownership of ancestral forests with the indigenous community is half-hearted.

In addition to these laws, Indonesia has ratified international conventions pertaining to human rights. Among others are covenants pertaining to all forms of racial discrimination, ratified through Law 29

(1999); the international covenant regarding civil and political rights, ratified by Law 12 (2012); and the international covenant regarding economic, social, and cultural rights ratified through Law 11 (2005).

The lack of recognition of land tenure and natural resources rights has resulted in the absence of a fiscal regime for mining revenue. In Indonesia, mining revenue is not being shared directly with indigenous people; instead, it is disbursed to indigenous peoples indirectly through corporate social responsibility (CSR) activities and broad projects such as development of public infrastructures (e.g., roads, schools, prayer facilities, and health facilities), community development initiatives, and local hiring programs. Based on an observation of the University of Indonesia's economic and public research institution LPEM-UI, the percentage of community development funding is small compared to the revenue generated by national mining companies from their net sales. Nickel companies for example, only allocate 0.47% from their net sales, and coal companies allocate only 0.2–0.55% from net sales.²⁴

Regional Decentralization and Autonomy for Strengthening Indigenous Peoples

Since its reformation in 1998, Indonesia has experienced changes in its governmental system, moving from a centralized to decentralized system by promulgation of the Local Government Act (Law No. 32, 2004), which gives considerable authority to heads of regions. From the perspective of indigenous peoples, laws such as Law 32 (2004) provide opportunities to strengthen the institutional capacity of indigenous people, even though they have not been used optimally. The law recognizes indigenous administrative design at the village level to replace uniform institutional design under the New Order regime.

The promulgation of Papua's Autonomy Law (Law 21, 2001) and Aceh's Law 18 (2001) opened further opportunities to recognize

²⁴ <http://www.indonesiainancetoday.com/read/30141/Persentase-Dana-CSR-Perusahaan-Tambang-Masih-Kecil>

indigenous peoples. The Autonomy Law for Papua states that indigenous peoples there are Melanesian. The law recognizes the presence of the Papua People's Assembly—*Majelis Rakyat Papua* (MRP)—as an ancestral institution at the provincial level. It also recognizes ancestral village administration at the lowest level and ensures ancestral rights of indigenous peoples, as well as an ancestral justice system. In terms of fiscal decentralization, the Papua Autonomy Law grants the right to greater revenue shares from mining of natural resources, compared to other regions. However, in terms of natural resource ownership, the mechanism that regulates direct sharing of profits from natural resource extraction with indigenous peoples is absent. The law only stipulates that a consultative process with indigenous peoples take place for investment planning and management of natural resources.

Similarly, Aceh's Autonomy Law provides the opportunity to strengthen recognition of indigenous rights. The law acknowledges ancestral institutions such as the Nanggroe Assembly (Wali Nanggroe) and Tuha Nanggroe as symbols of preserved indigenous traditions. The law also recognizes Sharia court (Mahkamah Syariah) as the judicial institution free from party influence within the territory of Nanggroe Aceh Darussalam Province. In lower level administration, Aceh's Autonomy Law acknowledges Gampong Satuan for village-level administration and Sangoe Cut for sub-district administration. In addition, Aceh is allowed to disseminate special local regulations (qanun). Aceh's provincial government receives a higher proportion of revenue shares than other regions receive. Again, the mechanism that regulates direct sharing for indigenous peoples from natural resource extraction is not in place.

Using National Regulations and Local Autonomy for Replicating the Indigenous Rights Model from the Philippines

At the national level, Indonesia is beginning to acknowledge the rights of indigenous peoples, especially economic rights. The ratification of UN Agreements on Human Rights, including rights of indigenous peoples, is an opportunity for creating legal arrangements,

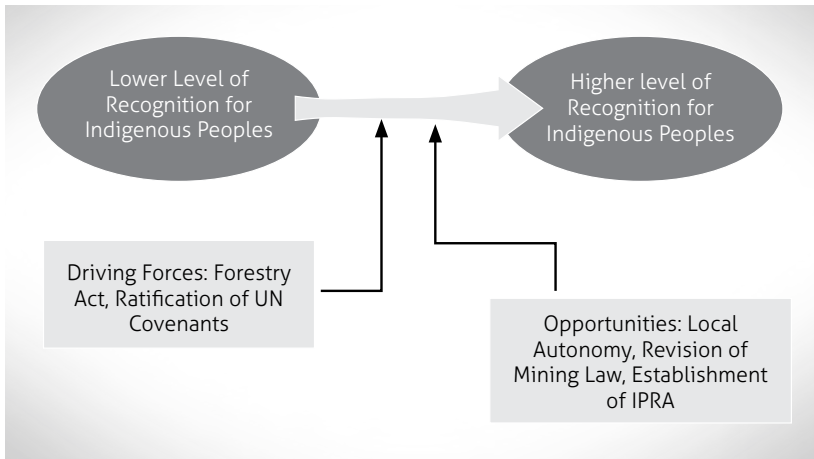
similar to IPRA in the Philippines. Recognition of communal ownership in customary forest rights allows indigenous peoples in the region to take active roles in mining activities in forested areas. Thus, they appear to have a legal basis for demanding involvement in resource extraction in forests. The increased bargaining power allows them to negotiate with companies for favorable deals. Therefore, contestation over mining activities includes mining companies, indigenous peoples, and the government.

Decentralization and regional autonomy are beneficial for indigenous peoples in the Philippines. During the process of decentralization, the local government has the authority to engage people in mining activities and shared revenue from mining extraction. Regions with special autonomy, such as Aceh, Papua, and Yogyakarta, have greater opportunities to legalize indigenous institutions.

This practice, known as asymmetric decentralization, has fostered diversity among local governments' so that local innovation is reflected in governance styles (Santoso et al., 2011). For example, indigenous peoples' rights have been acknowledged locally by the provincial government of Central Kalimantan in its endorsement of the Dayak council.³

The local political constellation offers more opportunities for indigenous peoples. In addition, larger populations of indigenous peoples have more powerful bargaining positions in the political process (e.g., local elections or local legislative issues). See Figure 7.

Figure 2.7. Opportunities to strengthen indigenous peoples' rights in Indonesian mining activities



CONCLUSION

Several important conclusions have been drawn from this study. First, the mining management model involving indigenous peoples in the Philippines supports their roles as actors who determine whether a mining resource will be extracted or not (i.e., decision to extract). Therefore, indigenous peoples in the Philippines own the mining resources. As a consequence of resource ownership, they are entitled to receive fair revenue shares from resource extraction.

Second, the Philippines faces the challenge of optimizing the enforcement of indigenous rights and building the capacity of IPOs. The IPRA essentially gives indigenous peoples the right to refuse exploration or production through FPIC. Through their right to refuse consent to renewing mineral exploration agreements, they can choose the mining company that they want to work with; however, their lack of access to full information and knowledge perpetuates the consistently poor bargaining position.

Third, Indonesia has opportunities to apply indigenous rights models, such as the Philippines' model describe in this paper. At the national level, Indonesia has several regulations that recognize the

rights of indigenous peoples, and they will probably be followed by stronger regulations, similar to the IPRA (Philippines). Additional discourse about the revised Mineral and Coal Law opens a window of opportunity to include a mining clause in indigenous rights legislation. Powerful local governments in the era of regional autonomy can promote policies acknowledging indigenous rights that are more advanced than those promoted by a centralized government. Moreover, indigenous peoples can take advantage of the political process in local elections, to increase their bargaining power as they advocate for certain rights.

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CHAPTER 3

To be Self-Advocates: What Southeast Asian Countries Can Learn from Three Different Indonesian Areas for Extractive Industries (Kebumen, Kutai Timur, and Kutai Kartanegara)

Laila Kholid Alfirdaus

INTRODUCTION

This paper points out differences in community self-advocacy movements in three different Indonesian areas with extractive industries—Kebumen, Kutai Timur (Kutim), and Kutai Kartanegara (Kukar). Kebumen (Central Java Province), Kutai Timur, and Kutai Kartanegara (both in Kalimantan Timur Province) have different typologies of extractive industry governance and diverse social and political environments. Kebumen is relatively new to extractive industries governance. PT. Mitra Niagatama Cemerlang (MNC) is the first national mining company in southern Kebumen to focus on iron sand mining. Mining activities in the other two districts in Kalimantan Timur Province have been underway for a long time. Kaltim Prima Coal (KPC) was established since the New Order in Kutim (1991), and it continues to be active in coal extraction. Chevron and other small- and medium-sized mining companies in Kukar have also operated since the New Order in the extraction of oil, coal, and so forth. In addition, local politics in the three areas appear to be different. While power in Kebumen politics is relatively dispersed, it is relatively elitist in Kutim and centered in the familial circle in Kukar.

This study is based on fieldwork conducted in in Kebumen in 2011

(funded by Diponegoro University) and in Kutim and Kukar in 2012 (funded by the United Nations Democracy Fund, or UNDEF); in-depth interviews were conducted with 30–40 people in these regions. The choices of Kebumen, Kutim, and Kukar for case studies were not based on geographical considerations or on the scale or length of mining operations in the regions. They were selected based on differences in social movements within the respective communities. In addition to providing various portraits of each movement, this paper enables readers to identify the strengths and weaknesses of each movement. Kutim and Kukar, for instance, are both situated in East Kalimantan Province, and both exhibit social and political characteristics that are completely dissimilar. The first tends to have a well-organized community that is less informed about their mining rights and advocacy strategies, while the second is quite vocal about human rights but not effective in community organization. Kebumen has a relatively well-organized community; for example, the farmers' association is linked to the Coastal Farmers Association (*Paguyuban Petani Lahan Pantai*), which has the same concerns as mining industries. It is well informed of its rights and effective strategies for running a social movement, although the mining industry appears as an imposing giant. The three regions have different political climates; Kutim tends to be an oligarchy, with the district head holding the center of power. Kukar has been established as a political dynasty, and Syaukani's family dominates the political stage. Kebumen is a bit fragmented, with the local political stage being less consolidated because of party friction and local elite fragmentation.

Results of this study indicate that apart from the scale of mining projects, people view mining issues similarly: they do not wish for their land to be occupied; they do not approve of environmental degradation triggered by mining activities; and they are concerned about corporate social responsibility (CSR) and accountability. However, similar views on issues related to mining do not always equate to similar abilities to be self-advocates for human rights. Apart from the fact that Kebumen is still new to dealings regarding mining policy, the area's Civil Society Organizations (CSOs) seem to

be more united as advocates for their rights than CSOs in the other two regions. However, the other regions have the potential to be self-advocates, although there are some factors hindering communities in these areas in developing effective strategies. I will discuss this subject more deeply in this work.

Information awareness seems to be a key factor in the Kebumen community's ability to organize effectively in response to the extractive policy. It includes awareness of mining-related regulations, especially regarding rights of participation and inclusion in policymaking, land ownership rights and environmental impact assessments, support and opposition toward the community from legislators and top executives, legislative processes in the local parliament relating to mining issues, support or opposition from village heads, and so forth. Informal forums (i.e., *pengajian* or Qur'anic studies) such as farmers' meetings and daily neighborhood meetings are effective venues for information dissemination and movement consolidation. Awareness of law enforcement also forces a community to comply with applicable regulations, thereby hindering the struggle for rights.

Communities in the other two Kalimantan districts have the potential to demonstrate active citizenship. However, structural constraints seem to hinder their efforts to become empowered. In Kutim, multi-stakeholder forums include CSO activists, company representatives, and local government officials. However, patronizing relationships between elite local politicians and grassroots masses have advanced the independence and self-empowerment of local CSOs. In Kukar, the organization of civil society is a bit sporadic, and the community faces difficulty in consolidating its members, although citizens strongly criticize corporate and local government's lack of accountability.

For revealing differences, this paper is divided into three main parts. The first part discusses local politics in Kebumen, Kutim, and Kukar. This section provides insight into different local contexts, which are clearly influential for the typology of mining policy and the community movement model. The second part includes a discussion about local CSO movements in the three areas. The last part compares

the strengths and weaknesses of the movements as a resource for other communities working toward self-advocacy for human rights in mining sectors.

MINING POLITICS IN KEBUMEN, KUKAR AND KUTIM: ASSESSING THE LOCAL CONTEXTS

Of the three areas studied, Kebumen is the newcomer to mining policy. Since the initial issuance of permits by the government for mining activities, the community has exhibited strong political resistance. Although rumors about mining policy have been spread since 2006, permission letters allowing PT. MNC to operate its iron sand mining industry in six villages in Mirit sub-districts —Mirit, Miritpetikusan, Tlogodepok, Tlogopragoto, Lembupurwo, and Wiromartan—were issued in 2008, 2010, and 2011 (i.e., Mining License Numbers 503/002/KEP/2008, 503/01/KEP/2010 and 503/001/KEP/2011).

In 2009, the local parliament did not endorse issuance of a license because of strong resistance from the community. Denial was strengthened by research conducted by a university delegated by Kebumen's government; findings indicated that the mining projects in southern Kebumen were not appropriate from the environmental impact perspective. Subsequently, another university conducted a study and asserted that mining activities were safe for the local environment. Consequently, the government ruled that PT. MNC could be awarded the mining license. As such, the company could confidently claim that mining activity on 989.74 acres in Kebumen coastal areas was legal. Yet, the community strongly questions how mining licenses could be issued prior to the approval of the district land regulation, since mining and land use are inseparable. The status of land is also debatable. The district regulation regarding land use was issued midyear in 2012 (Perda No. 23); thus, people believe the previous licenses were not valid.²⁵

Despite the issuance of the district regulation on land use and

25 Credit to bumisetrojenar.blogspot.com.

ownership, people do not tend to debate the policy. The government's argument under the administration of Buyar Winarso that the regulation was a compromise to recognize the interests of companies, the military, and farmers has not been accepted readily by the farmers. The remaining articles asserting that southern Kebumen is an area for security defense and mining, in addition to its original agricultural function (i.e., Articles 35 and 39), have angered farmers, who view these as reflective of the government's insensitivity. Retaining the articles on security defense and mining for the community does not represent middle ground; rather, it coerces the community to accept regulations that are not beneficial economically, environmentally, or culturally. In fact, it seems that the government disregarded the voices of farmers during development of the regulation. The farmers recall their difficulties in scheduling public hearings with Winarso as district head and parliament members. They were never invited or involved in three-party dialogues; further, they did not have the opportunity to explain to the government why they were rejecting its plan (Alfirdaus, 2011). Whose interests, then, are represented in the so-called "compromise" approach?

The lenient model of governance seems ingrained in Kebumen's political nature, especially following terms served by Rustriningsih and Nasiruddin (2000–2005 and 2005–2010, respectively). As a newcomer to local politics, Winarso needs to make sure that he is safe through his first term so that he can enjoy a second term from 2015 to 2020. If Rustriningsih and Nasiruddin (Winarso's predecessors) experienced the loss of support despite strong roots in society, Winarso can surely experience the same. Thus, he must be very careful in his handling of sociopolitical issues in Kebumen. His lenient politics toward the mining sector may represent his strategy to save his career in Kebumen.

Local politics in Kutai Timur (Kutim) is similarly complex. However, since Kutim has dealt with mining issues since the New Order, it has different problems than those of Kebumen. While the political situation in Kebumen is regarded as lenient, local strong men and bosses dominate in Kutim. Awang Farouk, the former Kutim district

head (2001–2003 and 2006–2008) and Kalimantan Timur governor (2008–2013); Mahyudin, the former vice district head (2001–2003) and district head (2003–2006); and Isran Noor, former vice district head (2006–2008); and district head of Kutai Timur (2008–2011 and 2011–2016) are among the key political figures in Kutim. They all are known to have close relations with KPC, a national company operating in Kutim owned by the Bakrie Group following an acquisition in 2005. The Bakrie Group is linked with Abu Rizal Bakrie, a national entrepreneur and political figure. Prior to 2005, KPC was a foreign-owned company. It has operated formally since 1992.

KPC is not the only company operating in Kutim's mining sector; for instance, PT. Indominco Mandiri also operates in coal mining. Because KPC is the largest company in this sector, however, it is regarded as the most important company in the area. Although the relationship between local politicians and KPC is viewed as beneficial to Kutim through dividend distributions, employment, and public facilities development in Kutim's city of Sangata (e.g., hospital, nursery school, public offices, and roads), some excesses in local politics have been noted. Thus, the local political situation and governance are complex issues. The government faces difficulty in remaining neutral. In disputes between KPC and the community, for example, the government fails to mediate because of strong pressure from land speculators. Consequently, its inability to remain objective is a disadvantage for KPC and the community (Mahy, 2011, p. 65). Therefore, despite the claims that KPC's operations benefit the local community, resistance toward mining activity continues to be strong.

In addition, KPC is deemed to be the source of money, and friction among the local elites who are competing for access to the money is evident. "Where there is sugar, there are ants" (*ada gula ada semut*) is an idiom that aptly describes this situation (UNDEF, 2013, p. 8). Thus, the multi-stakeholder (MSH) forum has been weakened, although it was designed to support public-private partnerships. The MSH presidium's main tasks are to manage KPC's CSR funds and to synergize the company's related projects with local development policies, but elite fragmentation has diluted such efforts. The government does not

view the MSH presidium as transparent, and the presidium perceives the government's plans as unclear and severe.

Rent seeking in the mining sector is also strong, involving those known as the local strong men. Awang Farouk, the former district head, was allegedly involved in KPC's asset divesture and the markup of infrastructure development for government offices in 2007; yet, he was successful in winning his election in 2008 to become the governor of East Kalimantan Province.²⁶ Noor, who is currently the district head of Kutim, also allegedly misused authority to issue problematic mining licenses while collaborating with the former legislature chief and three government officers.²⁷ Yet, Noor is still very powerful in Kutim. Corruption associated with the company occurs because of KPC's manipulation in tax payments that are not followed up according to clear legal standards.²⁸ Therefore, it appears that mining projects only benefit the few elite, rather than the local community as a whole.

Other complex mining politics can be found in Kutai Kartanegara (Kukar), one of the richest districts in Indonesia. Its government is known as one of the most corrupt in Indonesia. The political dynasty is strongly entwined with Kukar's local politics. Power rests with Syaukani, his family, and his colleagues; furthermore, Golkar (national party) provides additional support. Rita Widyasari, Syaukani's daughter, maintains the family's power as a leader in Kukar, although Syaukani left as district head in the midst of a corruption case in 2006.²⁹

26 *Antara News*, "Attorney General Investigated the Allegation of Corruption of Kutai Timur District Head" (*Kejagung Selidiki Dugaan Korupsi Bupati Kutai Timur*), November 26, 2007: 18.12. *Koran Indonesia*, "The Corruption Case Involving Kutai Timur District Head is Continuously Being Investigated" (*Kasus Korupsi Bupati Kutai Timur Terus Diusut*), November 29, 2007.

27 *Antara News*, "Attorney Intelligent Captured Kutai Timur Former Legislature Chief" (*Intelijen Kejagung Tangkap Mantan Ketua DPRD Kutai Timur*), September 3, 2012: 11.50.

28 *Tribun News*, "Tax Payment Corruption of KPC: Attorney General Investigated Bank Mandiri Bintaro Office Head" (*Korupsi Pajak KPC: Kejagung Periksa Kacab Bank Mandiri Bintaro*), August 31, 2010.

29 Former district head Syaukani had been jailed for corruption in 2006 as a result of the Corruption Eradication Commission (KPK) investigation (see Evaquarta, 2008, p.

The political climate in Kukar is always heated, with strong conflicts between politicians and bureaucrats—that is, local legislators and executives (Riyanto, 2008, p. 183). Politicians (i.e., district head, legislature, and political parties) co-opt the government offices and use their power to eject bureaucrats who do not support their political agendas (Evaquarta, 2008). They also misuse the local government's budget (*Anggaran Pembangunan dan Belanja Daerah* or APBD) for their own benefit. In addition to the rent seeking in infrastructure projects, local politicians also create fake NGOs to benefit personally from the distribution of Bantuan Social Assistance funds, or Bansos (Evaquarta, 2008, p. 9; Riyanto, 2008, p. 185).

Hundreds of mining companies in Kukar extract oil and coal, but they are not managed properly and are characterized by weak accountability. Chevron, PT. Kutai Energi, PT. Adi Mitra, and PT. Indo Mining are among the mining companies in Kukar, some of which have operated since the New Order. Despite the vast amount of money collected by the government, relationships between the local government at the village level and companies are not good. The companies feel as if they are the local elite's ATMs. A poor relationship has also developed between the local government and the central government in Jakarta because the local government often demands higher shares from natural resource revenues (Sumarto, 2005).

Unfortunately, Kukar's wealth has been accumulated by a few elites. In other words, it is not distributed evenly throughout society. Therefore, it is not surprising that the poverty rate in Kukar remains high (12.5%, 2009)³⁰ and that the infrastructures in the city and villages are subpar, in spite of the billions in rupiah collected by government officials from companies (Riyanto, 2008, p. 180). Furthermore, CSR programs are not viewed as empowering the community. Companies prefer that national and international NGOs manage their CSR funds because the local community is viewed as lacking in capability and

13).

30 <http://www.poskotakaltim.com/berita/read/4650-penduduk-miskin-di-kukar-48.160-jiwa.html> retrieved November 10, 2013, 1:29 pm.

accountability. Additionally, CSR activities appear to merely fulfil companies' formal requirements. Thus, the local community is viewed as far left in Kukar's mining governance.

COMMUNITY MOVEMENTS FOR HUMAN RIGHTS ADVOCACY IN THE AREAS

One of the most interesting observations of CSOs in Kebumen is their awareness of the rule of law in Indonesia in spite of the strong intimidation faced by communities in their struggle for self-advocacy. Among the most important civil society organizations in southern Kebumen responding to issues related to mining policies are FMMS (*Forum Masyarakat Mirit selatan*) and FPPKS (*Forum Paguyuban Petani Kebumen Selatan*). The coordinator of FMMS, a farmer in Mirit, implied in an interview in July 2011 that he fully understood the politics of mining. However, he realizes that he should be very careful when addressing the issues and strategic in his choice of methodology (Alfirdaus, 2011). He will never recommend that his neighbors destroy a public facility or damage company property, since these actions would allow a company to bring such cases to the attention of the police. Inevitably, the latter scenario would prove detrimental to the community, as well as to the coordinator's relationships with the police and military heads. Therefore, it should not be a surprise that despite the community's action to block access to the mining areas claimed to be PT. MNC's, they would never vandalize or company property. Although community members maintain a security post outside the mining area to monitor activities of PT. MNC's workers, they have never injured a company employee.

A similar movement can be found in FPPKS for judicial review proposals to the Supreme Court. The demand for Articles 35 and 39 has been made, based on the assertion that areas throughout southern Kebumen designated for defense and mining purposes should be reassigned as areas for farming and village tourism. For villagers affiliated with FPPKS, this movement represents substantial progress because they are not only required to understand the district regulation but also other related regulations (e.g., Law No. 4, 2009, on

coal and minerals mining and Law No. 32, 2009, on the environment). Villagers perceive economic justifications from the local government as nonsense. The reported benefits of mining have no direct impact on farmers; furthermore, arguments that mining will provide employment for farmers are also pointless. The villagers find fault with actions that undermine farming as a source of employment. Claims that iron sand mining does not increase a community's risks for natural disasters, such as earthquakes and tsunamis, are also seen as groundless. Indeed, credit needs to be given to the local lawyers affiliated with the Advocacy Team for Urutsewu Farmers, Kebumen (*Tim Advokasi Petani Urutsewu Kebumen* or TAPUK).³¹ The organization is also active in providing legal training to farmers with the cooperation of national NGO activists, including those affiliated with the Indonesian Forum for Environment (*Wahana Lingkungan Hidup Indonesia* or WALHI) and Mining Advocacy Network (*Jaringan Tambang* or JATAM).

What differentiates FMMS from FPPKS is that FMMS focuses on villages in the southern part of the Mirit sub-district—Mirit, Miritpetikusan, Lembupurwo, Tlogodepok, Tlogopragoto, and Wiromartan—presumed to mining sites; FPPKS covers wider areas in the southern coastal areas of Kebumen. Additionally, FMMS does not develop contacts with outsider NGOs, while FPPKS does. The FMMS wishes to avoid allegations that it is influenced by outside provocateurs, a strategy the political elite has used to weaken the farmer movement. However, the two forums employ similar strategies. Both use a community monthly forum, such as the collective gathering (*arisan*), prayers for those deceased (*tahlilan*), Qur'anic reciting activity (*yasinan*), and Qur'anic studies (*pengajian*) to disseminate information about government policies pertaining to mining. The musholla (small mosque) is an excellent place for members of the movement to gather. They also use daily neighborhood gatherings to coordinate their plans. Members of FMMS can also be members of FPPKS. Different strategies reflect smart politics.

31 Kompas, "Petani Kebumen Ajukan Uji Materi Perda Tata Ruang [Kebumen Farmers Proposed Judicial Review on Land Use Regulation]," October 12, 2012.

The two organizations also monitor the positions of local politicians, local NGO activists, and other Kebumen figures in response to various issues. The organizations assume that an understanding of the problems is not universal for all people; therefore, the groups serve others by operating as middle men for extractive projects. Since the farmers sometime also find people opposing their activities using a name of a CSO to claim political representation, they will be very careful in filtering their networks. Certain media that report on mining issues in Kebumen have been blacklisted for being too indifferent. Additionally, criticism has been aimed at certain academic departments in several universities surrounding Kebumen (e.g., Yogya, Purwokerto, and Semarang) that promote environmental studies in southern Kebumen; their research findings have been questioned. Although farmers are still struggling for recognition of their rights, they clearly demonstrate an awareness of the politics surrounding mining projects and strategic actions that must be implemented in response to mining policies.

In Kutim, the MSH forum includes companies, communities, and local governmental representatives. As touched on earlier, the MSH forum was founded in 2006 with the facilitation of an NGO known as C-FORCE to support public, private, and community partnerships related to CSR fund management under the principles of participation, transparency, and accountability. The district head's regulation No. 10/02.188.3/HK/VII/2006 strengthened the legal status of the MSH in Kutim to include all mining companies there. In practice, however, only KPC participates. For the \$5 million in CSR funds allocated annually by KPC—previously it was \$1.5 million—\$1.5 million is managed by the forum, and the rest is managed by the company. Ideally, with the establishment of the MSH forum, three-party dialogues could be conducted more actively in Kutim rather than in Kebumen. In fact, the forum tends to be elitist and not accessible for the grassroots level.

The presidium's main function is to coordinate decision making for fund management, but it does not perform this function properly (Suryani, 2010, p. 89). Most responsibilities are handled by the MSH secretary, who, ultimately, becomes authoritative. The forum fails

to provide equal relations between local CSOs, the company, and local government. The MSH secretary in chief is very influential in determining which projects will be the beneficiaries of CSR funds. Furthermore, there is no crucial effort from the company to monitor the use of money or ensure that decision making regarding funding is participatory. It acts indifferently. The local government feels that the use of “red tape” by the MSH secretary results in a lack of transparency in CSR management. In response, the secretary has argued that the MSH secretary in chief has tried to involve related parties, including those from the government. Clearly, there has been a failure in capturing the essence of the MSH forum, which was designed to build partnerships and participatory development, as Suryani argues (pp. 75–90).

Amidst the complex problems of MSH administration, local CSOs have become the parties with the least power. Although the MSH secretary claims that best efforts have been extended to involve other parties, the involvement of local CSOs is limited. Those that are willing to access CSR funds are forced to use a persuasive approach with the MSH secretary. Since there is also no clear standard regarding project/proposal analysis and assessment, the criteria of project transparency and accountability are also unclear. Suryani (2010, p. 136) identified the political and personal pressure on the MSH secretary as a hindrance to fair access of local CSOs to CSR funds.

Rather than empowering, CSR is weakening society. Although it has improved the local economy by providing employment and sources of income, the red tape mechanism applied by companies in screening community proposals for CSR funding indicates that the company’s position is “money rules.” Meanwhile, it is clear that citizens have rights regarding CSR. Unfortunately, the community does not seem to recognize these rights. They are not even aware that participation in CSR-related decision making is a right. Further, they have not yet realized that money cannot buy anyone’s rights and that it does not make one party superior to the other in terms of CSR governance. It does not negate the citizens’ rights of participation, transparency, and accountability. Clearly, there is still much work to do in Kutim communities.

Certain local NGOs focus on public service. Among them are the Institute for State Apparatus Watch (*Lembaga Pemantau Penyelenggara Negara Republik Indonesia*, or LPPNRI), the Kutai Timur Forum for Legislature and Executive Performance Watch (*Forum Pemantau Kinerja Legislatif dan Eksekutif Kutai Timur*), and Kutai Timur Youth (*Pemuda Kutai Timur*, or Pekutim). However, they show little concern for CSR monitoring. Things have become more difficult in Kutim, as there are many NGOs that have been formed by politicians or government elites to capture CSR funds. Furthermore, there is an NGO promoted by KPC that was established to support the company's CSR programs. Consequently, a patronizing relationship has developed within the NGO toward the company, and independence is difficult to achieve.

The local community movement in Kutai Kartanegara is different from movements in other areas; despite the locals' criticisms about CSR governance, they still face difficulty in developing an effective community movement for human rights advocacy. People are not well organized, and they often act sporadically. They do not trust the company because they see that businesses line their own pockets with money from CSR funds, ignoring interests of the people for their own benefit. People feel that CSR funds allocated by companies only fulfill formal requirements; these funds are insignificant monetarily and in the chosen areas of development. They do not contribute significantly to the improvement of people's quality of life. The locals need contributions from companies for regional development in the areas of education, health, the economy, and the environment. So far, people do not have any idea of how much money companies allocate for CSR; further, they do not know how CSR funds are managed.

Questions from local people about CSR governance are indicators of a crucial start for building collective awareness and a social movement. The questions reflect their sensitivity toward injustice associated with the large number of rupiahs being circulated within mining companies. Until recently, people have faced some constraints in building a consolidated organization. Local NGOs exist in the areas, but they have not connected people effectively with the local government, politicians, and companies. Their roles are restricted

because of the strong political dynasty in the area, imposed especially by Syaukani's family, which retains power in Kukar, even over civil society's activities. Communities in mining areas that are weak in the area of self-advocacy seem to lack information about building an organization. Further, once organizations are formed, communities do not always know how to advocate for their rights. People are not well informed of applicable laws, governmental offices to contact regarding CSR matters, national NGOs that could help them, and so forth. They only know how to protest. Consequently, any conflict with companies or the government over mining policies, including those related to indigenous (*adat*) rights on tenure, often end up with no resolutions (Nanang and Devung, 2004).

When asked about these issues, company representatives have argued that because of the focus on drilling, CSR funds must be collected according to the national government's mandatory requirements (i.e., Law No. 25, 2007). If a company is willing to conduct a program funded by CSR, it must submit a proposal to the national government (previously BP Migas, currently SKK Migas). When approved, the company finances the program first, and the national government reimburses later. This approach has caused the CSR administration to be very bureaucratic. Unfortunately, the red tape encountered by companies is not known to everyone. Thus, people sometimes think that companies are not willing to participate in regional development. Pressure from the local people can be strong, and companies have had to establish special divisions to manage relations with them—an additional expenditure that does not include money owed to the national government. Furthermore, companies are concerned with financial accountability, showing extreme care in selecting proposals from CSOs for CSR funding. Unfortunately, they generally feel that local people lack the skills needed to manage a program, so they tend to collaborate with national or international NGOs in administration of CSR programs.

In an interview conducted in November 2011, local people admitted that they did not have any idea that CSR was mandatory for oil companies. They also did not know anything about BP Migas.

Locals did not have any connections with national NGOs that could work with them in advocating for their rights. Of course, they were not well informed about CSR regulations or rights guaranteed by the state related to the mining sector. As a result, they could not evaluate whether the mining sector and CSR programs were governed according to principles of accountability and transparency (UNDEF, 2013, p. 3). As the local government also faces difficulty controlling mining companies, it does not include local people in mining and CSR governance; thus, locals become disengaged from decision-making, although they are the first to bear the impact of regulations.

LESSONS LEARNED: THE IMPORTANCE OF A COMMUNITY'S SELF-ADVOCACY IN MINING GOVERNANCE AND WAYS TO STRENGTHEN IT

From the experiences of the three community movements in Kebumen, Kutai Timur, and Kutai Kartanegara, it has become clear that community self-advocacy is important. First, mining sectors are deeply involved with communities, both socially and environmentally, because of land ownership, water supply and sanitation, air cleanliness, employment issues, and so forth. Therefore, self-advocacy is the most legitimate way for making sure that mining activities do not harm individuals.

Second, self-advocacy ensures that a company and the authorities know that the community they are dealing with is well informed of its rights, as well as the risks and benefits of mining. Further, the community will elevate its bargaining position, paving the way to be counted in mining-related decision making. If community members are passive and unable to advocate for themselves, they may be left out of the planning phase for mining operations, in spite of a long set of rules asserting that community participation is an obligation.

In many cases, mining companies have been established without the consent of the surrounding communities; thus, the risks associated with loss of property, environmental degradation, and unemployment (especially in areas where farming is predominant and where loss of land will result in loss of employment) have not been addressed clearly. Companies assure community members that

they will earn money for leasing or selling. Communities surrounding mining areas usually have less access to fresh money, so the offer of millions in rupiahs is hard to resist. Because they are not well informed, community members do not perceive that they have much to lose from mining activity. Consequently, they are not successful in advocating for themselves. Self-advocates, though, have consciences, and they exhibit awareness.

Self-advocacy movements are usually more sustainable. However, assistance from outside parties (e.g., NGOs), does not mean that the movements are less sustainable. Assistance is helpful, but it does not always last long. NGOs' work is highly dependent on project terms. Moreover, NGOs usually play it safe because they often originate from regions outside the communities they aid. They usually avoid local politics, which are too risky, although success of their programs typically requires such involvement. Self-advocacy, therefore, is the best approach to securing a sense of ownership regarding important issues.

Thus, political awareness is the local community's key to self-advocacy, a basis for developing a social movement. Based on observations of the local communities in the three mining areas discussed in this article, information awareness appears to be significant for raising political awareness. Information awareness, followed by political awareness, provides important ammunition for the local community to build an advocacy movement in the mining sector. Further, information awareness must be supported by other factors including social channeling, network building, and movement strategy (i.e., the politics of [dis]obedience). Below are some lessons that may be useful for ASEAN countries that wish to strengthen their communities in mining areas:

Information awareness. Information awareness includes awareness of related regulations, strengths and weaknesses of the regulations with regard to human rights, the positions of other political parties, risks and benefits of particular mining policies, and so forth. Information awareness is the ability to comprehend the information, not merely in terms of content but also regarding its importance, its

political implications, and its strategic usefulness. Thus, it differs from information access, although a correlation between the two exists. We can have access, but we are not always aware of the political inferences of information. Awareness is sensitivity, while access is associated with the provision and acquisition of information. Of course, information awareness requires information access. Yet, access is a necessary but insufficient requirement for awareness. Therefore, information awareness is the ability to question and analyze information that has been accessed.

One of the crucial differences between local community movements in Kebumen, Kutim, and Kukar involves information awareness. Of the three areas, members of the Kebumen community have exhibited an awareness of their rights regarding participation in decision making for issues related to mining; thus, they appear more confident in organizing collectively compared to communities in Kutim and Kukar. Some people may argue that CSR funding has weakened communities and their organizing efforts in Kutim and Kukar. If this premise is accurate, then the ability to become effective self-advocates does not require awareness of information as much as an understanding of the politics of money. People from Kebumen have learned from their neighbors in Purworejo and Cilacap that CSR funds do not compensate for irremediable environmental conditions in a community following mining operations (Alfirdaus, 2011). Most community members are farmers, and the environmental impact of mining activities is the inability to pursue their livelihood. Although companies promise to reclaim land used for mining, they can never restore the soil for its original function. Thus, those distracted by CSR funds are actually not well informed of the politics behind such funding; further, they do not understand that reclamation is not fully possible.

Information awareness is not only applicable to mining policies and community rights; it also helps a community identify the political positions of other parties on mining issues, including those who claim to be NGO activists but who are actually intermediaries affiliated with the mining industry. The Kebumen community's experience with actor mapping has helped address the costs and benefits of interacting with

outside parties; thus, crucial lessons learned in this way are useful for other communities in their strategic development of collective movements. Lessons can be drawn as well from Kutim and Kukar, where local NGOs appear to operate as vehicles for the local elite, the legislature, and government officials who wish to access CSR funds. Therefore, information awareness involves an understanding of important regulations as well as actor identification.

Such awareness also helps a community identify the risks, benefits, and appropriate response to a particular mining policy. The Kebumen community's knowledge about the risks associated with forming an iron sand mining company for operations throughout the southern coastal areas of the region has helped counter the argument regarding increased employment and income used by the company and the government as justification of mining projects there. Informed community members know that mining will not absorb many laborers in its activities. Further, it will not increase their income. Rather, it robs them of their livelihood. Similarly, the local government's assurances about income generation sound hollow, as the people know that government income is hardly distributed to the people; it often fills the pockets of the local elite through budget markups. Therefore, people regard these arguments as nonsensical. Their prior cost/benefit calculations have indicated that allowing a mining company to run its projects will not benefit them; as the main beneficiaries of Kebumen policies, therefore, they remain opposed to the government's plans for mining activities (Alfirdaus, 2011).

Social channeling. Social channeling enables community members to connect for disseminating information and consolidating as a movement. As practiced in Kebumen, social channeling has enabled movement activists to connect with farmers in mining areas. Thus, they do not create a new forum to collect and integrate the community members in the advocacy movement; rather, they use available resources and assets in a community as media for strengthening awareness. Neighborhood relations in the *gameinschaft* community (as in Java) provide community activists with flexibility in developing their movements. Regular Qur'anic studies (*pengajian*), regular prayer

rituals for the deceased (*yasinan* and *tahlilan*), daily interactions with neighbors, and so forth, become the media for movement activists to consolidate members. For example, the movement coordinator disseminates updated information about mining issues (Alfirdaus, 2011). As Kaufmann and Alfonso (1997, p. 18) pointed out, the neighborhood can be an effective organization for breaking with politics of the state that favor a few elites rather than the community as a whole. Further, social channeling helps farmers exchange information with farmers in other regions who are experiencing similar problems associated with mining policies and corruption in the mining sector.

Network building. Network building refers to relationships with outside parties such as independent legal aid institutes and environmental organizations for community training about legal and environmental issues. The Kukar community has not demonstrated an understanding regarding how to make a connection with BP Migas, Komnas HAM (Indonesian Human Rights Commission, Jakarta), WALHI (Indonesian environmental forum), and so forth. Not surprisingly, then, people's actions are sporadic, and their weak networks have hampered the community's efforts to develop an effective advocacy movement. Conversely, the connections of FPPKS with TAPUK and YAPPI (legal aid institutes in Kebumen), Solo (which works with FPPKS for legal and environmental training), and WALHI have helped the community become aware of their rights regarding participation in decision making, land ownership, employment, and environmental issues. Information about their rights in mining governance has helped local community members become more confident in their dealings with the mining companies and the local government (Pennell, 2001, p. 4). Conversely, the Kutim community's experience with the "wrong" network in the efforts to mobilize has perpetuated an impression about the role of politics in CSR policies. Rather than helping the community develop an awareness of its rights in mining governance, training conducted by an NGO in Kutim in organization administration, micro credits, and agribusiness has worsened relations between the community and mining companies; CSR fund allocation

is the point of contention (UNDEF, 2013). Unfortunately, the current situation does not help the community. It is clear, however, that weak administration skills do not negate a community's rights in mining governance. A company has no excuse for not fulfilling its obligations in respect to land status, environmental conservation, and interaction with the community in mining-related decision making (Gaventa and Valderrama, 1999, p. 8).

The politics of (dis)obedience. Fitting the strategy with the community's circumstances is important. It does not need to be frontal or anarchical, although being too lenient could, similarly, not be very effective. Obeying the law in conducting an advocacy movement is sometimes important in community advocacy, not only for the sake of law enforcement but also because of community politics. The Kebumen community's avoidance of destructive actions or injury to mining workers—despite the security post the community builds in front of the mining area—is an interesting example of how people play the political game with regard to mining issues. The movement coordinator I interviewed in 2011 asserted that farmers strive to maintain “good” relations with the police and the military officers (Alfirdaus, 2011). They know that as long as the community does not destroy any public or private facilities, the police will not have reasons to imprison community members. However, the community has asserted that it does not agree with mining plans. The movement coordinator realizes that the company will always look for weaknesses in the farmers' movement, and any fault that can be pinned on the farmers will be used as a weapon to weaken the movement. Therefore, the community must be very careful in this matter.

This article does not imply that the Kebumen community's advocacy movement in responding to iron sand mining politics is the perfect example for other communities. The community continues to struggle for rights. However, the community's ability to view its position as equal to the company's and the government's in mining governance represents important progress. To achieve success in gaining recognition of rights from the company and the government, a community should understand that the lengthy process is normal

in mining governance because the industry is characterized by giant actors who often carelessly apply strong politics in resource competition. This article, however, underscores the fact that a community advocacy movement for human rights in the mining sector must be based on information awareness. It does not have to be enriched with strong material capital, as the community could use available channels, resources, and assets to develop the movement.

CONCLUSION

By examining three different communities' strategies for dealing with mining companies, this study has highlighted the importance of a community's ability to advocate for itself so that the local social movement will be strong in its dealings with the mining industry. The social movement that is run and supported by the community is more legitimate, sustainable, and effective. Further, self-advocacy increases a community's bargaining position before participating actors (mining companies and authorities) in mining sectors. The ability to be a self-advocate lets the participating actors know that the community thoroughly understands the benefits and risks of mining activities; therefore, those actors will be more considerate of mining's impact on the community. Furthermore, the community is more likely to participate in mining-related decision making.

Self-advocacy also requires the community not only to organize, but more importantly, to be critical of the sociopolitical circumstances in local mining sectors. Information awareness of the community's rights and obligations, as well as those of mining companies and other participating actors, is the first key to political awareness; it enables the community to make sure that mining-related policy is based on the principle of justice. Additionally, the community will be knowledgeable of costs and benefits of mining operations—materially, environmentally, and socially. Further, community members must be active in utilizing the channels provided in their environment that link them with each other to share information, concerns, missions, and the sense of belonging to a movement. Finally, community members must have good connections with outside parties with similar concerns

about advocacy in mining areas; such parties include environmental activists, legal advocates for community advocacy, NGOs supporting community empowerment, and media activists that can campaign for pro-community mining. Good relations with outside parties will help the community update and respond to information related to mining policies.

Therefore, communities must be encouraged to pursue self-advocacy. For example, NGOs could assist a community in this endeavor rather than in a face-to-face conflict with a mining company. Should the community already demonstrate the sense of self-advocacy, NGOs can assist with development of effective strategies and information enhancement. If a community exhibits strength in the area of self-advocacy, mining companies and the authorities (who usually support the company's position) are less likely to undermine them. Further, they will be forced to include the community in the decision-making process when developing mining policies.

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Part II

Comparative Studies



CHAPTER 4

Regional Innovations to Avoid the Resource Curse:

Practical Cases from Indonesia and the Philippines to Improve Governance in Extractive Industries

Ermy Sri Ardhyanti and Triyono Basuki

INTRODUCTION

The contribution of the extractive industry sector to regional and national income is often constrained by its non-renewability; thus, the volatility of income (on high and low income curves) and prioritization of spending must be anticipated in regional planning. Natural resources have been regarded more as a curse than as an income generator since 1980. Richard Auty (1993) stated that resource-rich nations have failed to boost their economic performance and capitalize from their natural resources. Furthermore, Auty claimed that economic growth in these nations is significantly slower compared to nations with limited natural resources. Research from Jeffrey Sachs and Andrew Warner (1995) has shown a negative relationship between the affluence from natural resources and the rate of national economic growth. In other words, countries with rich natural resources are often trapped in a resource curse (Sach and Stiglitz, 2007).

Social conflicts are caused commonly by disputes over the distribution of natural resources (Collier, 2007). Another cause of conflict associated with natural resources is rent seeking (Wiriosudarmo, 2012). Anne Krueger (1974) introduced the concept of rent seeking as a manipulation of economic activities that contradicts

public interests such as monopolies and political lobbying. Rent seeking is not contingent on value-added principles; it is driven mainly by financial benefits. It is practiced often in the Philippines and in Indonesia, mostly in resource-rich regions such as Aceh, Papua, and Maluku in Indonesia, and in ComVal in Mindanao Archipelago, Philippines.

Poverty is another indicator of a resource curse. A 2009 statistic from East Java Province shows that Bojonegoro was ranked fifth among the most impoverished populations in the province. Pusdalip Bakorwil II (2009) of Bojonegoro stated that the number of poor households (Rumah Tangga Miskin) in Bojonegoro District in 2009 had reached 128,981.

Another indicator of a resource curse is environmental destruction. Destructive extraction from open pit mining in ComVal has caused severe environmental degradation and an increasing rate of natural disasters such as landslides. Further, irresponsibility in gold refining processes has caused river pollution. Additionally, mining extraction activities affect current land use arrangements, which consequently alter the livelihood of local communities.

In this study, the influence of decentralization on regional governments' efforts in Bojonegoro, Indonesia and ComVal, Philippines toward achieving transparency and improved governance in extractive industries (to avoid resource curse) has been scrutinized. The structure of this paper includes an initial description of current decentralization arrangements in Indonesia and the Philippines. Second, an analysis of the correlation between decentralization and extractive industry toward improving transparency and good governance in the two regions is provided. Third, the paper includes a discussion of ongoing innovation initiatives and issues regarding the efforts. Fourth, it includes comparisons and contrasts of innovation efforts between the two regions. Finally, the paper concludes with discussions and recommendations for ways to improve transparency and good governance in the two regions.

DECENTRALIZATION IN INDONESIA AND THE PHILIPPINES

Centralization was an empirical reality in Southeast Asia between the 1960s and 1970s. However, the region experienced major political transformations by the late 1980s and early 1990s. Similarities of decentralization cases in Indonesia and the Philippines are motivated by politics of their new regimes.

The Philippines context

The Filipino dictator, Ferdinand Marcos, was ousted by the “People’s Power Movement”—a major coalition of civic elites, military personnel, churches, left-wing activists, non-governmental organizations, and university students. The transformation led to the Local Government Act of 1991. A study conducted by Sidel (1999) showed that money, politics, violence, and oppression have played major parts in the dynamic of decentralization in the Philippines. During the transition toward democratization, pressures to implement decentralization appeared from the lower to the upper political levels. The collapse of the Marcos regime in the Philippines was followed by the implementation of the Local Government Act. Nevertheless, the legislation benefited only certain political elites at the regional level, who had ties with the central government. This elitist democratic system in Philippines’ oligarchy resulted in a majority rule by wealthy clans.

Regional autonomy in the Philippines rests with the local government unit (LGU); the provincial government is the main authority, followed by the city, municipality, and barangay. The following discussions are major features of the Local Government Code:

- Devolution of rights to the LGU for delivery of various aspects of basic services that previously were the responsibility of the national government is a key component. Basic services include health (field health, hospital services, and other tertiary services), social services (social welfare services), environment (community-based forestry projects), agriculture (agricultural extension and on-site research), public works (funded by local funds), education

(school building program), tourism (facilities, promotion, and development), telecommunications services, housing projects (for provinces and cities), and other services such as investment support.

- The Code devolves to local governments the responsibility for the enforcement of certain regulatory powers, such as the reclassification of agricultural lands, enforcement of environmental laws, inspection of food products and quarantines, enforcement of the national building code, operation of tricycles, processing and approval of subdivision plans, and establishment of cockpits and holding of cockfights.
- The Code also specifies the legal and institutional infrastructure for expanded participation of civil society in local governance. More specifically, it allocates to non-governmental organizations (NGOs) and people's organizations (POs) specific seats in local special bodies. These special bodies include the local development council, local health board, and local school board. Because of their ability to organize and mobilize people, NGOs and POs have the opportunity to participate in governance and promote local accountability and answerability through recall and people's initiatives.
- The Code increases the financial resources available to LGUs by (1) broadening their taxing powers, (2) providing them with a specific share of the national wealth accrued from exploits in their areas (e.g., mining, fishery, and forestry charges), and (3) increasing their allotments from national taxes (i.e., internal revenue allotments [IRAs] ranging from 11% to 40%). The Code also increases the elbow room for local governments to generate revenues from local fees and charges.
- Further, the Code establishes the foundation for the development and evolution of more entrepreneurial-oriented local governments. For instance, it enables local governments to enter into build-operate-transfer (BOT) arrangements with the private sector. It also provides for float bonds, which facilitate the ability to obtain loans from local private institutions—within the context

of encouraging local governments to be “more business-like” and competitive in their operations.

Indonesian context

In Indonesia, Soeharto was dethroned in 1998 after a three decades; Legislation No. 22 (1999) pertaining to local governments was actually implemented in 2001. Moreover, the wave of decentralization in Indonesia was overwhelmingly massive in reforming governmental arrangements; in fact, Indonesia’s decentralization is known as the Big Bang. Koichi (2004: 2) stated that “decentralization taken by Indonesia is notable for its scale and speed. It was a Big Bang.” Similarly, editors Bardhan and Mookherjee (2006) noted, “Some of these countries witnessed an unprecedented ‘big bang’ shift toward comprehensive political and economic decentralization.” Moreover, IRDA (2002) asserted that Legislation No. 22 (1999) with its focus on regional governments (further refined as Legislation No. 32, 2004) was the most daring decentralization policy in developing countries. Decentralization has been applied administratively and fiscally. Administratively, governmental affairs are managed autonomously by the district municipal government, except for defense and security, foreign affairs, monetary issues, judiciary matters, and religious and other affairs that are the responsibility of the central government.

Fiscal decentralization in Indonesia is regulated by Legislation No. 25 (1999), which was refined in Legislation No. 33 (2004) to ensure financial balance of central and regional governments. Transferable budgets from the central to regional governments is regulated according to the legislation scheme, which includes the (1) Public Allocation Fund (DAU), (2) Special Allocation Fund (DAK), and (3) Profit Sharing Fund (DBH) from natural resources and taxes.

DECENTRALIZATION IN EXTRACTIVE INDUSTRY: THE PHILIPPINES

The Philippines is reported to be the fifth most mineralized country in the world (third in gold, fourth in copper, fifth in nickel, and sixth in chromite deposits). Yet, it has failed to generate significant public revenues from its wealth or to transform wealth into domestic

investments. At present, approximately 1.7% of the country's GDP (\$2.5 billion) is generated by mineral revenues each year, despite significant mining activities in Luzon and Mindanao and the presence of several of the world's larger copper, nickel, chromite, and gold mines.

Mining's contribution to the GDP decreased from 0.09% in 2007 to 0.07% in 2008, and then it increased to 0.08% in 2009. Partial figures for 2010 indicated that the contribution of mining to GDP in that year were in the area of 1%. However, the export share of metallic as well as non-metallic minerals was lower in both 2008 and 2009 than in previous years. Poverty statistics estimated every three years by the National Statistics Coordination Board showed decreases in poverty incidence for all industry sub-sectors except for mining, where the poverty incidence rose from 35% in 2000 to 49% in 2009 (Gomez, 2010).

Revenue received by central government

According to the Philippines' Republic Act No. 7942 (the Philippine Mining Act of 1995), the central government receives revenue from the Mineral Production Sharing Agreement (MPSA) contracts through the following:

1. Levy tax, including
 - a. 10 PhP per metric ton for coal
 - b. 2% from yearly gross output for non-metal minerals and extractive materials
 - c. For copper and other minerals
 - 1% levy from gross output after the first three years of policy implementation
 - 1.5% levy from gross output in the fourth and fifth year
 - 2% levy from gross output in the sixth year and afterwards
2. Revenue tax after holiday tax
3. Mine wastes and tailings fees
4. Occupation fee of 5 PhP/Ha for an exploration license, 50 PhP/

Ha for mineral agreements and financial or technical assistance agreements, 100 PhP/Ha for mineral reservations

Revenue received by local governments

The LGU receives several types of revenue. From small-scale mining (SSM), the local government receives a mining fee (MF) and environmental user fee (EUF). The local government draws a mandatory fee of 5 PhP per gold or copper sac for licensed SSMs and a voluntary 10 PhP per gold or copper sac for unlicensed SSMs. Approximately 40% of SSMs have mining licenses; the rest do not. This revenue is directly received by the LGUs without intermediaries.

Regarding large-scale mining (LSM), the local government receives an excise tax, which is deposited directly by the company into the National Treasury (2% of gross output). Approximately 40% of the total mining tax revenue that belongs to the local government is then divided as follows: 20% for the provincial government, 45% for municipal governments, and 35% for barangays. Besides the excise tax, the provincial government collects an occupation fee amounting to 75 PhP/Ha of the mining field; collection is executed by Provincial Treasury Office (PTO).

DECENTRALIZATION IN EXTRACTIVE INDUSTRY: INDONESIA

Indonesia's abundance of natural resources is divided into the mining sector, which includes oil and gas, coal, and minerals—including gold, copper, nickel, bauxite, and manganese; the forestry sector; agricultural sector; and fisheries sector. According to data from Indonesia's Bureau of Statistic, the extractive sector contributes a significant amount of revenue to the national GDP. The natural resource sectors contributed to 21% of the GDP (mining, 7%; oil and gas, 8.5%) and nearly 50% of exports (mining, 22%; oil and gas, 20%) in 2011.

Revenue flow scheme in Indonesia

The proportion of revenue shared by the central government is 85% of regional revenue. The remaining 15% of the total non-

tax revenue from oil and gas is transferred to the producer regional government (3%), producer region (6%), and district or municipality within the producer province (6%). Revenue flow and taxes were designed to reduce the vertical imbalance between central and regional governments. However, the revenue flow mechanism is prone to sharpen the horizontal imbalance between a producer region and non-producer region caused by Indonesia's diverse regional characteristics.

INNOVATION INITIATIVES IN BOJONEGORO AND COMVAL

Through its "Where is The Wealth Nations" study, World Bank (2006) conducted a counterfactual simulation regarding numbers of resource-rich countries to identify a possible scenario in which these nations would invest their revenue from natural resource exploitation in productive assets to generate perennial revenue and strengthen human capital. The study showed that if countries wisely invest their natural resource revenue in a range of productive assets, they can avoid the resource curse and provide for their future welfare.

Fundamentally, an innovation system is a unity of actors, institutions, networks, partnerships, interactions, and productive processes that influence the direction and growth pace of innovation and its diffusion, *including technology and best practices*, and learning processes (Taufik, 2007).

ComVal

Located on the island of Mindanao, ComVal Province is rich in gold and copper, contributing to 50% of the total Davao region's gold production; here, approximately 20,000–30,000 people rely on SSM. However, tax revenue and revenue flow represent only 3% of the total regional revenue. Environmental damage continues to escalate, and more than 60% of mining operators are not licensed.

In 2011, the provincial government of ComVal earned a revenue of 22 million PhP (approximately \$ 506,097) from mining concessions—18 million PhP from LSM and 4 million PhP from SSM. Additionally, the province earned 150,000 PhP from occupation fees.

Mining has contributed approximately 3% to the total revenue of the provincial government; however, this amount is not enough to fund rehabilitation of the environment, which was damaged by poorly executed SSM practices, such as drilling, tunnel mining, and others.

This phenomenon in the 1980s triggered the discovery of other gold mining areas in Boringot and adjacent areas in the municipality of Pantukan, followed by almost all other municipalities in the province. Statistics from 2012 showed that 10 permits had been issued for LSM, 34 for SSM, and 42 for ore processing. Exploration and production through LSM is underway in 7.2% of ComVal's total area, while SSM activities are conducted in 0.4% of the total area.

Mining has had a negative impact in Mt. Dilwalwal (Monkayo, ComVal) because of the death toll estimated to be in the thousands since mining extraction began there in 1980. Social conflict has ensued over the unreported homicide cases there. Other incidents caused by lack of transparency in royalty sharing were the APEX Mine raid in Maco and the gold smelter assault that led to the killing of a tribal leader in Monkayo in 2008. Further, the incidence of poverty in ComVal's population in 2009 reached 36.7%.³²

ComVal Transparency and Accountability Initiative

Prolonged conflicts related to mining, massacres, and environmental destruction have halted development in ComVal. Thus, a strategy to unite stakeholders for the improvement of governance practices is needed. In 2011, under the administration of Governor Uy, ComVal was one of the top ten performing provinces in the country, recognized for meeting the standards of good governance (i.e., accountability, transparency, and efficiency).

One of the policy reforms instituted by the central government regarding the country's mining industry is Executive Order 79. In May 2013, the Extractive Industry Transparency Initiative (EITI) Board approved the country's application for EITI candidacy.³³ At the

32 Philippines National Statistical Coordination Board (2009)

33 The EITI is an international standard for transparency in extractive industry

local level, Governor Arturo Uy signed Executive Order 020-2012 in October 2012, forming the Provincial Multi-stakeholder Council for Transparency and Accountability in the Mining Industry. The framework of the transparency initiative is as follows:³⁴

1. Publish What You Say: Disclosure of free, prior, and informed consent (FPIC) among indigenous peoples
2. Publish What You Should Do: Disclosure of the terms and conditions of the agreement signed by indigenous peoples, mining companies, and cooperatives, including monitoring of compliance
3. Publish What You Pay: Disclosure of payments by mining companies, cooperatives, and ore processors to LGUs and indigenous peoples
4. Publish What You Receive: Disclosure of payments received by LGUs and indigenous peoples
5. Publish How You Spend: Disclosure by LGUs and indigenous peoples regarding allocation and utilization of their respective revenue

Fundamentally, the initiative ensures disclosure of the following:

1. Decision to extract or not through the FPIC process in the case of indigenous peoples and public consultations pursuant to the Local Government Code in the case of non-members of indigenous communities
2. Significant provisions of a Memorandum of Agreement (MOA) signed by and between a certain indigenous peoples community and a mining company or SSM cooperative or individual holder of a SSM contract, and contracts signed by and between a mining company and the national government

payments and receipts. In countries participating in the EITI, companies are required to publish what they pay to governments, and governments are required to publish what they receive from companies. These figures are then reconciled by an independent administrator. Source: www.revenuewatch.org

34 Bantay Kita Transparency Framework, was developed by civil society coalition in Philippines to ensure critical issues to be performed by the government in managing the natural resources

that may affect the welfare of the constituents of the province, health, and environment

3. Results of monitoring of environmental, health, and cultural impacts of mining operations
4. Amount paid and shared by companies, cooperatives, and individual mine operators to the government through taxes, environmental fees, and social development funds, including royalty shares to indigenous communities
5. Revenues collected from mining operations by provincial, municipal, and barangay LGUs, including allocation and utilization of royalty fees received by indigenous peoples

Bojonegoro

An area around Blora and Bojonegoro known as Cepu has been an oil-contributing region since the Dutch colonial era. In 2006, the central government signed a joint operational agreement (JOA) with ExxonMobil. Moreover, the operational partnership of Cepu Block is conducted by Pertamina EP Cepu, a subsidiary of Pertamina, and Mobile Cepu Ltd, Ampolex (Cepu) Pte. Ltd., subsidiary companies of ExxonMobil.

The amount of oil in Cepu Block is predicted to reach 600 million–1.4 billion barrels. Additionally, natural gas production is predicted to reach 1.7–2 trillion cubic feet. In peak condition, Cepu Block is predicted to produce 170,000 barrels of oil per day (BODP). With the total national oil production of 900,000–1 million BODP, Cepu Block contributes approximately 20% to total national oil production.

In 2012, Bojonegoro received US \$ 20,198,552 from oil and gas DBH, which was three times higher than 2008. Furthermore, Produk Domestik Regional Bruto (PDRB/Regional Domestic Product Bruto) increased significantly from US \$ 750, 971,820 to US \$ 2,157,965,000 in 2011. From 2009 to 2013, the contribution of oil and gas DBH to regional income increased from 3.8% to 18%, thereby opening opportunities for quality improvement in regional monetary governance.

ISSUES IN GOVERNANCE

As mentioned previously, Bojonegoro has been relatively resource-rich region in Indonesia for less than a decade. There are some challenges and obstacles that local governance in Bojonegoro must respond in order to prevent resource curse. These obstacles and challenges are related to fiscal management, social-environmental impact and cost of extraction activities and corporate social responsibility.

1. Unpredictable fluctuation of DBH

The regional revenue from DBH fluctuates each year. Regional governments have difficulties predicting incoming revenue. First, they do not have the capacity to forecast according to DBH's accounting formula. Second, regions find it difficult to verify if the revenue received from DBH is accurate because they are unable to access needed data pertaining to cost recovery, oil lifting, investment credits, First Tranche Petroleum (FTP), domestic market obligation (DMO), benefit-sharing schemes, price of oil (ICP), and other factors that influence the flow of DBH. Tax components that are assigned to regions are not visible, particularly oil and gas taxes, even though they contribute directly to regional revenue based on the number of oil and gas activities in respective regions.

2. Social and environmental problems

Multiple environmental incidents has been related to extraction (e.g., gas kicks that inflict casualties in local communities). The fact that not all mining operators have a disaster risk reduction mechanism (PRB), including an environmental impact assessment (AMDAL) document, environmental management plan (RKL), and environmental monitoring plan (RPL), has contributed to the issues. Furthermore, affected communities usually do not have any knowledge of or access to these documents if environmental or social casualties occur. There have been seven mining-related environmental disasters recorded during the oil and gas operation period. Additionally, social conflicts such as

extraction-related land acquisitions have been occurring.

3. Inadequate planning

Oil and gas extraction activities have not been factored into planning and budgeting processes, either as a major or minor source of revenue in the allocation of regional spending. Additionally, the non-renewable nature of oil and gas is not addressed sufficiently in strategic planning.

4. Corporate Social Responsibility (CSR)

Issues related to CSR accountability revolve around non-transparency and uncoordinated CSR budget distribution. On one hand, the government feels that there is lack of coordination between regional governments in budget distributions; on the other hand, companies experience pressure from all stakeholders for shares of the budget.

Social innovation initiative designed to address the issues

To address these challenges and obstacles, the local government of Bojonegoro, supported by an alliance of national and local civil society organization, developed certain initiatives that have been implemented to increase transparency, ensure participatory budget and policy planning, and grant villages' allocation funds from oil and gas saving funds.

1. Transparency in oil and gas revenue

An accounting mechanism that has been incorporated in Local Regulation No. 28 (2012) is considered highly innovative for Indonesia and the world (see Prijosusilo, 2012). Key aspects of the mechanism are as follows:

- a. Formation of an Oil and Gas Transparency Committee at the district level consisting of multi-stakeholders including representatives from the government, companies, and civil societies
- b. Formation of an annual agenda to coordinate transparency management in the extractive industry (must be approved by multi-stakeholders)

- c. Inclusive access to information related to transparency of oil and gas extraction
- d. Publication of information related to oil and gas extraction, particularly oil and gas revenue (DBH and participating interest), social and environmental information—working opportunity, emergency response plan, AMDAL, and CSR program information.

The scope of information for transparency is described as follows:

- Oil revenue information such as DBH, taxes, participating interest, RKL standards, and emergency state standards at all stages—pre-construction, construction, drilling, production, and post-operation
- Corporate CSR data (i.e., CSR budget)

2. Innovation in participatory and sustainable planning

Local Social and Economic Development Planning (LSED) has been utilized, resulting in the Sustainable Regional Development Planning (RPDB) document, which includes the following.

- a. Prioritization: In Bojonegoro for instance, there are two main priorities in RPBD—improvement of education and health standards for human resource development and economic improvements in agriculture and small and medium enterprise (UMKM). Oil and gas revenue is to be reinvested in these two sectors to provide economic support to communities.
- b. Available list of programs and activities in five-year increments
- c. Information regarding budgetary accounting

3. Innovation in oil and gas savings fund

Innovation has materialized in the Regional Regulation of Bojonegoro District No. 11 (2011) regarding capital equity of the District. The savings fund essentially controls the following:

- 3.1. Capital equity: Regional governments must allocate a portion of DBH for capital in selected shares, particularly corporate shares and regional banks
- 3.2. Funding Allocation: Amounts should be regulated yearly.
- 3.3. Withdrawal and utilization of revenue: Regional governments should reinvest revenue for growth.

As an illustration, a regional government invested US \$ 33 million in equity, which was 24% of the total DBH in 2010. The revenue gained from the equity was US \$ 110,000. In the following year, the total capital invested increased to US \$ 6,3 million, accounting for 35% of the total DBH revenue was US \$ 4,7 million. In 2012, the allocated capital was US \$ 11,6 million or 31 % of the total DBH (revenue was US \$ 875,000). From 2010 to 2012, the total allocated capital was US \$ 21 million and total earned revenue was US \$ 1,45 million.

4. Innovation in oil and gas fund distribution to rural areas

The Indonesian government has designed an instrument known as a rural allocation fund (ADD). It is regulated regionally through Domestic Regulation No. 37 (2007) (i.e., Rural Financial Management Guidelines). A mandatory regulation specifies a minimum allocation for rural levels (ADD) of 10% of the total Local Budget APBD budget. Implementation of the rural allocation fund minimizes risks from mining extraction activities to villages around the sites, including infrastructure damage (roads, etc.), environmental damage, extraction-related disaster, and social conflict. Regional governments regulate DBH for districts and rural areas through Executive Order (Perbup) No. 31 (2009) regarding Rural Proportional Budget Allocation Guidelines based on regional coefficient variables. Objectives of this regulation include increasing ADD allocations (besides the standard ADD allocation from APBD, an additional 12.5% of the annual DBH for oil and gas ADD is received by Bojonegoro's regional government) and prioritizing allocations for villages adjacent to oil extraction

sites. The 12.5% additional allocation is divided among producer villages (12.5%), ring I villages (10%), ring II villages (7.5%), and other villages (70%). As an illustration, Sumber Village in Bojonegoro is a producer village that received US \$ 686,000 (2010), US \$ 894,000 (2011), and US \$ 1,86 million (2012) from ADD budget allocations. The amounts have increased significantly since the oil and gas ADD was implemented.

5. Innovation in local content

Communities, local governmental enterprises, and local companies have limited access, capacity, and financial involvement in the oil and gas industry. Through Regional Regulation No. 23 (2011) regarding optimization of local content, regional governments aim to involve and empower locals in mining operations (e.g., local labor, equipment, and materials). The premise of local content innovation is to generate greater benefits and to create jobs for local communities in Bojonegoro.

DISCUSSION AND COMPARISON OF INNOVATION INITIATIVES

According to Fauzi (2006), many regions have avoided and prevented conflicts in natural resource exploitation, particularly for minerals and the environment. These regions have implemented policy interventions, which include the following:

a. Factor movement policy

Through solid alternative programs, revenue from various sectors is designed to address the impact of extractive industry on other primary industries such as agriculture and fisheries.

b. Spending effect policy

This policy encourages simultaneous development of both extractive and primary industries. A common issue that has been raised since the emergence of the mining extraction industry is that this new industry replaces agriculture, for example, as a primary industry. Thus, the livelihoods of local communities have been affected. Large numbers of farmers have shifted

their livelihood to mining operations, thus abandoning their primary industry of farming. The consequence has been a spike in unemployment in local communities after mining extraction is completed.

c. Spillover loss policy

The policy was designed to develop domestic knowledge and increase investments in research and exploration. Ideally, it would be implemented and aligned with education and research policies. Furthermore, revenue from natural resource extraction should be channeled for education and research and development efforts so that domestic knowledge capacity, particularly in economic and environmental management, can be enriched significantly.

In this study, a comparison and evaluation of the factor movement policy, spending effect policy, and spillover loss policy were conducted for Bojonegoro and ComVal. Findings follow:

- Of the innovative approaches, Bojonegoro's policy for the extractive industry valuation chain is classified as middle level to downstream; it includes revenue sharing, revenue management, and investments for sustainable development. ComVal is classified as upstream to middle level, and it addresses the decision to extract, negotiations for a good deal, revenue collection, and revenue transparency.
- Value chain is a way of describing the stages by which the full value of a product is managed and ultimately realized. When applied to the extractive industries, the framework describes the steps from extraction of natural resources, through processing and sale, all the way to the ultimate use of revenues. In his book *The Bottom Billion*, Paul Collier popularized this approach by stressing the key steps in ensuring that natural resource wealth transforms into citizen wellbeing. This framework has since become a reference for other organizations working on natural resource governance, such as Revenue Watch Institute, the World Bank, and the

Extractive Industries Transparency Initiative (EITI).

Figure 4.1. Value Chain of Extractive Industry



Regarding innovation in transparency, Fauzi (2006) suggested a level-enabling environment to provide avenues for a clearer policy accessible to all stakeholders. A level-enabling environment is a set of interrelated conditions including from legal, organizational, fiscal, informational, political, and cultural conditions. There are certain differences in the transparency mechanisms in ComVal and Bojonegoro:

a. Coverage

Transparency reporting in ComVal covers all aspects of the value chain, from FPIC to revenue allocation and management. Bojonegoro, on the other hand, covers oil and gas DBH, CSR, and social/environmental impact in transparency reporting. Another important difference between the two areas involves decentralization. ComVal has licensing and management discretion over operations in the region, and it receives direct revenue from mining extraction. Bojonegoro, however, has discretion in revenue flow (allocation).

b. Multi-stakeholders

The multi-stakeholder council in ComVal consists of the provincial government, indigenous communities, SSM, LSM, representatives of the central government in Region XI, Davao; and NGOs. In Bojonegoro, multi-stakeholder arrangements consist of representatives from companies, regional governments, media, and NGOs. Media representatives are not included in ComVal's multi-stakeholder council, whereas local community and vertical government institutions are not incorporated in Bojonegoro's multi-stakeholder arrangement.

c. Implementation

The transparency mechanism in ComVal comprises not only transparency of revenue as ruled in EITI, but also accountability. In addition, the adaptation of EITI requires the involvement of local stakeholders in the accountability process (because ComVal's transparency initiative took place before the national government made a commitment to implement EITI). For instance, accountability reporting covers sociocultural matters, environmental impact of mining operations, and indigenous peoples' revenue and expenditures. ComVal will release its first report in the first quarter of 2014.

In Bojonegoro, the implementation of regional regulations regarding transparency is still under review by the Ministry of Home Affairs and the Provincial Government of East Java after more than a year since their introduction. Ongoing transparency mechanisms are disclosure of APBD data and Friday dialogues with the governor, which have a mediating role for oil and gas operational conflicts. The support of the central government and its role are different for ComVal and Bojonegoro, especially with regard to encouraging transparency.

- The Oil and Gas Savings Fund and Sustainable Development Plan are classified as a **factor movement policy** and a **spending effect policy**, respectively. However, the spending effect policy usually accounts for the Dutch Disease paradox, a condition in which an increase in revenue from the mining sector causes a decline in revenue for other primary sectors, such as agriculture and fisheries. To address the issue, a fiscal and expenditure policy must be implemented (Fauzi, 2006). Additionally, the evaluation of oil and gas ADD implementation for the last three years indicates that measures should be put in place to ensure that ADD funding is utilized appropriately. Channeling oil and gas revenue to villages is one aspect, and ensuring that the budget is well managed is another. Clearly, managing the innovative savings fund has highlighted certain issues related

- to regional budget management.
- Oil and gas ADD innovation and spillover loss policies have improved the potential for local areas to maximize benefits from the oil and gas industry. However, the local content policy has triggered a controversy. Companies have had difficulties fulfilling the clause regarding land acquisition, and regional governments have been accused of impeding achievement of the national production target.

CONCLUSION AND RECOMMENDATIONS

Conclusions from this study include the following:

1. Decentralization creates opportunities for innovation at the regional level. Both ComVal and Bojonegoro have enacted innovative measures in their governance because of increased authority from decentralization. These measures would not have been realized under a centralized government. Certain local content-based policies in Bojonegoro are still being challenged by the central government, indicating that decentralized authority may intersect with central authority. Special autonomy in Indonesia prevails in Papua, Aceh, and DIY and DKI Jakarta, while regular autonomy characterizes other areas.³⁵ Nevertheless, regions with special autonomy still encounter asymmetrical issues in adjusting local content under a decentralized government.
2. The central government plays a critical role in promoting or hindering innovation at the regional level. Contrary to related efforts at the national level, the success of efforts at the regional level to tackle the resource curse is influenced by support from the central government. In some areas, the central government can be an obstacle toward achieving innovation regionally. First, Bojonegoro's regional government faces difficulties collecting the monies because of inadequate regulation

³⁵ See Departement of Politics and Government Gadjah Mada University Yogyakarta (2013), *Assymetric Decentralization Final Report*

associated with regional savings funds. Second, enforcement of local content policy in Bojonegoro appears stagnant; it is viewed as a hindrance to the national interest in increasing oil production in Cepu. Additionally, implementation of the regional regulation regarding transparency is on hold at provincial and central levels because of an extended review process that has lasted for more than a year. Thus, overly rigid regulation by the central government highlights the challenges that regional governments face in encouraging innovation; it presents a disincentive toward demonstrating initiative in regional governance. Taufik (2007) accurately identified a main factor of stagnation in innovation as the lack of integrated systems in development planning.

Innovation policies must be linked with sectoral and regional-national policies and governance. Furthermore, innovation systems will not be effective if technological, scientific, and development policies are designed partially (e.g., fragmented and inconsistent with other policies). On the other hand, transparency innovation in ComVal is acknowledged by the central government by incorporating sub-national transparency reporting into the PH-EITI transparency report. Thus, ComVal is becoming the benchmark for sub-national transparency initiatives.³⁶

3. Formation of the Transparency and Accountability Multi-stakeholder Council in ComVal reflects a positive dimension of conflict resolution; business entities and civil societies (including indigenous peoples) can work side by side to resolve a prolonged conflict.
4. Indications of resource curse—poverty, social conflict, environmental destruction, and inadequate contributions of regional revenue—are apparent in ComVal. In Bojonegoro, however, horizontal conflict and environmental degradation

³⁶ Press briefing by Presidential Assistant on Climate Change Sec. Bebet Gozun, on the Philippine implementation of EITI. PTV Special Coverage (April 4, 2013).

are not as severe. Yet, Bojonegoro faces inexorable issues associated with poverty and governance. Institutional failure in governance, including lack of accountability, representation, and democracy, are crucial elements that accelerate resource curse (Tadjoeddin, 2007).

5. Morris (2006) stated that "there is no innovation without leadership." In the two case studies described in this paper, leadership style is integral for enhancing innovation efforts (Bossink, 2004). Furthermore, vision in leadership contributes to innovation (Noor, 2012). Both Bojonegoro and ComVal feature strong leadership. ComVal's governor, Arturo Uy, and Bojonegoro's governor, Suyoto, were able to formalize effective governance policies following decentralization. Rondinelli and Cheema (1983) observed that decentralization may produce a responsive leadership. Nevertheless, the main challenge for leadership is the ability to transform governance within the limited time allocated for legislative power.
6. The absence of regulations on regional savings funds hinders regional governments (e.g., Bojonegoro); therefore, regional savings are considered as inadequate. The innovation is apparent in the savings stage but not yet visible in the utilization stage. In the popular ear-marking model, the regional government places restrictions on utilization of savings so that funds are used only for certain sectors, such as education, health, and poverty eradication.
7. Bojonegoro has institutionalized its regional savings fund in a regional regulation to ensure sustainability. However, technical measurement regarding implementation is not as systematic as in ComVal, where the multi-stakeholder council, regulated by a Governor's Decree and transparency guidelines, was formed. Further, ComVal elevated its ordinance status as urgent to ensure legal certainty and budgeting integrity.
8. Damages from mining activities in ComVal are regarded as immeasurable. At least 60% of mining operations there have not been authorized via permits, resulting in inestimable

damages that include environmental degradation, pollution, and decreasing state income (Romulo, 2013). In the second quarter of 2012, the amount of gold sold from SSM to the Central Bank of the Philippines decreased by 98% year on year. Leo Jasareno, the Mines and Geosciences Bureau (MGB) director, surmised that gold extracted from the Philippines was being sold illegally on the black market or being smuggled out of the country. Implementing a donation fee on illegal mining operators has been viewed as giving legal permission for these illegal mining operations. Since the donation fee is voluntary, the regional government's ability to collect taxes and retribution as legal income has been diminished.

Regarding replicability of decentralization policies enacted in the Philippines and Indonesia for other Southeast Asian countries, Thailand, Vietnam, and Cambodia have implemented decentralization. Accordingly, in several countries (i.e., the Philippines, Uganda, Brazil, and Indonesia), factors associated with the political environment and national legal framework have influenced the form and content of decentralization policies. Political devolution to local governments is hindered when political systems retain the seeds of authoritarianism. It is important to note that a characteristic of these local power structures is that they have not managed their responsibilities regarding local beneficiaries properly.

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CHAPTER 5

Good Governance in Oil and Gas Energy Policies: Case Study of Indonesia and Malaysia

Sa'dan Mubarak and Darang S. Candra

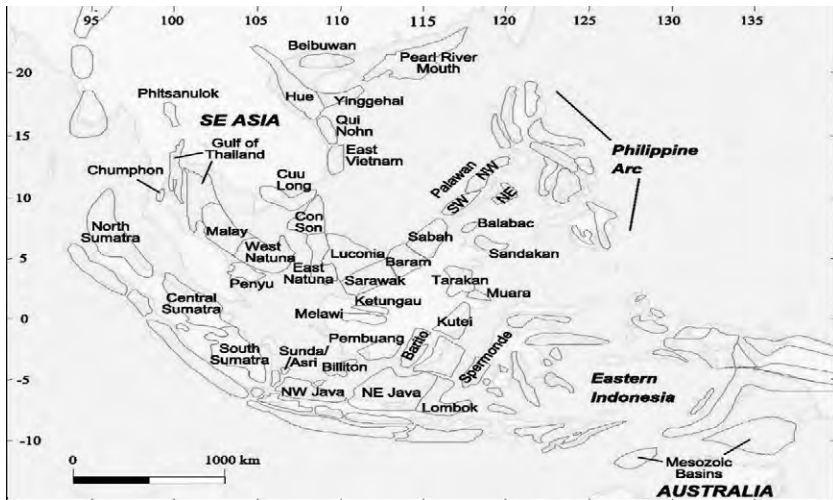
INTRODUCTION

Energy is one of the most crucial concerns in the Association of Southeast Asian Nations (ASEAN), as it is perceived as the engine for economic growth for almost all members of the regional grouping. The primary energy demand in the region is increasing rapidly, with a projected growth from 554.8 million tons of oil equivalent (MTOE) in 2010 to 1,110.2 MTOE in 2035 at an annual rate of 2.8%. The demand for coal has already hit an annual growth rate of 4.8% (ADB, 2013: 288). The statistics clearly demonstrate how dependent the region is on the energy supply.

The increasing demand for primary energy is caused by two main factors: population and economic growth. The ASEAN's population is estimated to grow from 598.53 million in 2010 to 741.21 million in 2035, thereby strengthening the demand for energy needed for household electricity (ASEAN, 2013). On the other hand, ASEAN member countries' average economic growth in 2010 reached 5.7%; although predicted to be halved to 2.7% by 2035, its growth will surely correlate with that of oil and gas industries in the region, especially because some ASEAN member countries have strong clusters of parts and components industries that are integral to "Factory Asia" (ADB, 2012: 35, 57). Transportation (both private and public) and power plants also spur ASEAN countries' high demand for oil and gas.

Another interesting fact regarding the energy issue in ASEAN nations is the disparity of energy resources available for each. By 2013, seven ASEAN member countries had significant oil and gas resources, while the other three did not have any. Indonesia reported 4 billion barrels of crude oil in proved reserves and 121 TCF³⁷ of gas, and Malaysia recorded 4 billion barrels of crude oil proved reserves and 83 TCF of gas. Vietnam had 4.4 billion barrels of crude oil in proved reserves and 24.7 TCF of gas; Brunei recorded 1.1 billion barrels of crude oil in proved reserves and 13.8 TCF of gas; Thailand reported 453 million barrels of crude oil (proved reserves) and 10.06 of TCF gas; and the Philippines stated that it had 139 million barrels of proved reserves of crude oil and 3.48 TCF of gas. Finally, Myanmar recorded 50 million barrels of crude oil in proved reserves and 10 TCF of gas (EIA, 2014). Singapore, Lao PDR, and Cambodia do not have any energy resources; they must import almost all of their energy supplies. As most of the energy resources are located in and near the sea, sea-based territorial boundaries are potential sources of conflict for claimant countries—with fellow ASEAN members, non-members, or the combination of both, as in the case of the South China Sea. The map depicting oil and gas reserve basins in Southeast Asia can be seen in Figure 1, which illustrates the disparity of primary energy resources in the region as well as the energy-rich area in the South China Sea.

37 Trillion Cubic Feet

Figure 5.1. Oil and gas reserve basins in Southeast Asia

Source: from Mubarak (2013: 67)

The energy policies of all ASEAN member countries are designed to fulfill national energy demands and promote economic growth. Regarding governance for oil and gas industries, the respective national oil company (NOC) is the governing body authorized to manage energy policies: Indonesia's Pertamina, Malaysia's Petronas, Thailand's PTT, Brunei's Petroleum Brunei, the Philippine National Oil Company (PNOC), Vietnam's Petro Vietnam, the Cambodia National Petroleum Authority (CNPA), Lao PDR's Lao State Fuel Corporation (LSFC), and the Myanmar Oil and Gas Enterprise (MOGE).

However, governance of ASEAN member countries' oil and gas policies is not always conducted effectively, efficiently, or with transparency. Oil and gas policies in most ASEAN member states are not formulated or implemented according to good governance values. Energy policies must be in line with their roots (i.e., national interests, energy demands, and availability of energy resources); therefore, good governance must become the primary managing mechanism.

RESEARCH METHOD

This article is a comparative study of two ASEAN members, Indonesia and Malaysia. Both demonstrate good governance in oil and gas energy policies. Both countries have the highest reserves for oil and gas in the region, making their positions in energy politics very pivotal. Both countries also share a long history with oil and gas industries dating back to the period of colonialism; additionally, they have been extraction sites for foreign oil and gas companies since the beginning of the 20th century. Moreover, both countries have modified their oil and gas governance policies several times, providing a starting point for this analysis. Nevertheless, the ruling political regimes inside Indonesia and Malaysia also influence the formulation and implementation of oil and gas governance policies.

Thus far, there is no clear definition for good governance in the oil and gas sector, but Chatham House has articulated certain clear principles (Lahn, 2007: 9-14):

- (1) Clarity of goals, roles, and responsibilities for stakeholders in the sector, especially regarding governing entities and NOCs. Lack of clarity can lead to conflicting agendas, duplication of effort, and policy paralysis.
- (2) Sustainable development to benefit future generations. This second principle applies to the careful management of petroleum production and minimization of environmental impact.
- (3) Ability to carry out the role assigned. The respective government and NOC should balance capabilities in terms of authority, financial resources, information, human capacity, and supporting processes.
- (4) Accountability in decision making and performance
- (5) Transparency and accuracy of information to avoid corruption and malpractice.

Chatham House's *Guidelines for Good Governance in Emerging Oil and Gas Producer*³⁸ are used for analyzing good governance associated

38 The order in which the objectives are presented does not necessarily reflect their

with oil and gas policies. The guidelines are structured around the following (Marcel, 2013: 10):

Objective 1: Attract the most qualified investor for the long run.

Objective 2: Maximize economic returns to the state through licensing.

Objective 3: Earn and retain public trust, and manage public expectations.

Objective 4: Increase local content and benefits for the broader economy.

Objective 5: Gradually build capacity and enable actors to perform their role.

Objective 6: Ensure national oil company participation in the development of the resources.

Objective 7: Increase accountability.

Each objective is based on a certain context; as stated in Marcel's edited guidelines (2013: 10), "some of the key objectives identified may not be applicable at all in certain contexts. Some countries may opt not to create national oil companies to ensure national participation in the sector." From the seven objectives presented, only the fifth and sixth were examined in this study because both are more contextual and suitable for analyzing governance of oil and gas/energy policies by government institutions, national oil companies, as well as oil and gas profit sharing between central and local governments.

Besides above guidelines, another focus of this study was centralization versus decentralization. The basic concept of decentralization is understood as part of a vertical separation of power between central and state governments. The objectives of governmental decentralization are equity and justice in politics and the economic sector. The basic concept of centralization is understood as the transfer of power and authority from local government to the central government. The objective of centralization is the delegation of authority and responsibility for policy makers, as well as the transfer

of financial and management functions from the state government to the central government (Prasojo, Maksum, & Kurniawan: 2006: 1).

Regarding Objective 5, Indonesia's National Energy Council (*Dewan Energi Nasional*) and Malaysia's Economic Planning Unit (*Unit Perencanaan Ekonomi*) were analyzed for the use of a "rational plan" in the formulation of oil and gas policies. Regarding Objective 6, the dynamic relations between the NOC and the government were the focus of analysis. Further, the roles of centralization and decentralization in both countries regarding energy policies and profit sharing between central and local governments were examined.

This study employed the qualitative method through interpretation of secondary sources. Secondary source materials including books, reports, websites, and statistics collected by other institutions were analyzed (Ritchie & Lewis, 2003: 2-3). Furthermore, a comparative political study of certain countries was conducted. Todd Landman (2000: 4-12, 27-28) explained that comparative politics usually examines two to nineteen countries based on four objectives. The first objective is to explain the contextual condition of the case or phenomenon. The second objective is to classify the case or phenomenon. The third objective is to test the hypothesis created from the explanations of the contextual condition and classification. The fourth objective is to make predictions after testing the hypothesis. This study is focused on the first objective; the application is the contextual condition associated with good governance in oil and gas energy policies in Indonesia and Malaysia.

RELATIONS BETWEEN THE NOC AND THE GOVERNMENT IN INDONESIA AND MALAYSIA

Regarding Objective 6, NOC participation in the development of resources was analyzed. As one of the stakeholders, the NOC can participate in the governance and development of energy resources as long as the government bestows the company with a functional role to do so. The four functional roles in energy resources governance and development policy making, strategy formation, operational decision making, and monitoring and regulation (Lahn et al., 2007: 15).

The government and the NOC usually divide functions, which can be seen in the model of shared responsibilities. Lahn et al. (2007: 20) proposed three models that could emerge from sharing responsibilities. In the “top-down” mode, the government dominates the NOC. The government or the ministry responsible for the oil and gas energy sector has an absolute role in governing both upstream and downstream activities. In this model, the government does not only focus its activities on policy making, but it also controls the NOC’s strategy and operational decision making, as well as monitoring and regulating of national upstream and downstream oil and gas activities. In the second “bottom-up” model, the NOC is dominant; it maintains an important role in upstream/downstream activities and energy policy and strategy formulation. Alongside its natural operational and monitoring functions, this model positions the NOC as the absolute player in energy resource governance and development. The last model shows “equal” sharing of responsibilities between the NOC and the government; policy and strategy development fall under the domain of the government, while the NOC focuses its activities on operational decision making as well as monitoring and regulating the upstream and downstream sectors. With equal sharing of responsibilities, the government focuses on conceptualization and planning, while the NOC manages the technical parts.

Of these three models, Indonesia and Malaysia have employed different models at different times. One of the most important factors that determines the model chosen by a country (including Indonesia and Malaysia) is its political system (Lahn et al., 2007). Theoretically, a democratic regime tends to choose the model that reflects market liberalization, while an authoritarian regime applies the dominance of government to control and maximize its profits. The following shows how Indonesia and Malaysia have employed different models throughout history.

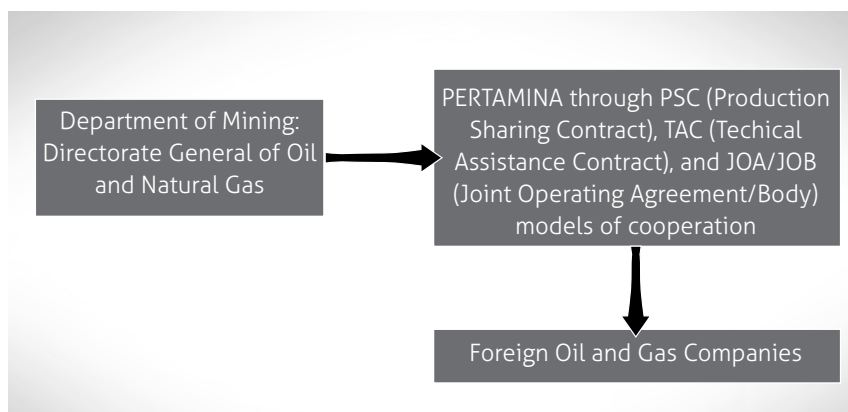
Relations between Pertamina and the Government of Indonesia

Two major Indonesian laws govern the relations between the country’s NOC (i.e., Pertamina) and the government. The first one is

Law No. 8 (1971) concerning the NOC. The other one is Law No. 22 (2001) concerning oil and natural gas. Both laws provide different approaches to good governance of Indonesia's oil and gas energy policies.

During President Soeharto's New Order (Orde Baru),³⁹ Law No. 8 (1971) was passed to replace the president's Old Order (Orde Lama)⁴⁰ managed under Law No. 44 (1960) concerning oil and natural gas mining. Consequently, three state-owned enterprises—Permina (NOC), Pertamina (National Mining Company), and Permigan (National Gas Company)—were merged into one (i.e., Pertamina). The government attempted to exert control over the new company, as seen in Figure 2.

Figure 5.2. Pertamina–Indonesian government relations



Source: Author's rendition from Hertzmark (2007: 30)

The figure shows that during the New Order, Pertamina was placed under the auspices of the Directorate General of Oil and Natural Gas, Department of Mining. Although the Department of Mining made policy decisions, Law No. 8 (1971) designated Pertamina as a “super”

39 *Orde Baru* (New Order) refers to President Soeharto's regime that ruled Indonesia from 1966–1998

40 *Orde Lama* (Old Order) refers to President Soekarno's regime that ruled Indonesia from 1945–1966.

state-owned enterprise with three main authorities to act on behalf of the Department of Mining (Hertzmark, 2007: 30-32). First, the NOC was assigned regulatory responsibilities over Indonesian oil and gas reserves, which means that all foreign oil and gas companies interested in exploring and producing resources in Indonesia would negotiate a cooperation contract with Pertamina according to a "business-to-business" scenario, which included a Production Sharing Contract PSC (PSC), Technical Assistance Contract (TAC), and Joint Operating Agreement/Body (JOA/JOB), managed by Pertamina's Foreign Contractor's Development and Coordination Body (BPKKA). Second, Pertamina maintained sole operational functions for oil and gas industries in Indonesia. The NOC could conduct its activities freely. Third, the company was given the role of strategy formulator for Indonesia's oil and gas energy sector. Pertamina's executive board consisted of commissioners from departments (now ministries) related to the energy sector and state-owned enterprises (*Badan Usaha Milik Negara* or BUMN) such as the Department of Finance, Department of Mining, and Department of BUMN. Therefore, the formulation of oil and gas energy policies and strategies including production quotas and exploration activities was assigned to Pertamina (Hertzmark, 2007: 32). The structure described here illustrates the bottom-up model for relations between the government of Indonesia and the NOC. Pertamina was dominant in managing both upstream and downstream activities.

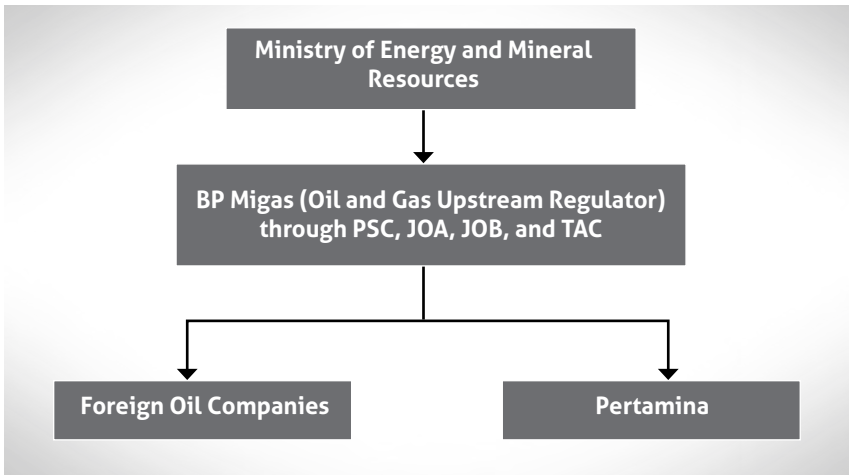
From the perspective of good governance, this bottom-up model enabled Pertamina to develop Indonesia's oil and gas reserves. The company's domination in the oil and gas sector facilitated Indonesia's energy resilience, when more than 1 million barrels of oil per day were produced during its peak (Mubarak, 2013: 102). Combined with Indonesia's low oil and gas consumption, domestic oil and gas needs were fulfilled, and the country managed to export a surplus.

On the other hand, the bottom-up model combined with Indonesia's situation at that time provided fertile ground for corruption, collusion, and nepotism inside Pertamina's organization; later, it almost put the NOC at the brink of destruction. Pertamina's

downfall during the New Order was attributed to the absence of good governance's main indicators in financial management, transparency and accountability. The bottom-up model was not created solely to benefit the country. Rather, President Soeharto's regime used the NOC as a personal power tool to make money for his families and cronies and for funding Indonesia's development. Mursitama and Yudono (2010: 93–94) described Pertamina's attempts during the leadership of Ibnu Sutowo (1968–1976) to become fully independent in directing its business actions by extricating its bank account from the Department of Finance, as well as by discontinuing the financial audit from Indonesia's financial auditing body (BPK). The so-called independence was granted, but the company's downward spiral was propagated through corruption, collusion, and nepotism. Ibnu Sutowo led Pertamina to expand its business beyond the scope of oil and gas to building hospitals and creating insurance sub-companies, which eventually led to a loss of focus for the NOC. Not surprisingly, Pertamina experienced a dreadful financial crisis in 1975 (Permana, 2012: 62).

After the 1997–1998 Asian monetary crisis hit Indonesia, Soeharto's regime fell from grace; it was the target of massive demonstrations and chaos. As Soeharto stepped down from the presidency, Indonesia entered the Reformation (*Reformasi*) era, representing a shift politically from the authoritarian New Order. With this change, Indonesia's economic policies became more liberal. The new regime established new legislation for Indonesia's oil and gas policies. Law No. 22 (2001) pertained to oil and gas mining, and Pertamina's status was changed from a "super" state-owned enterprise to a "normal" state-owned enterprise, impacting the government's relationship with the NOC. Liberalization of the oil and gas sector ended Pertamina's monopoly in the industry. According to Law No. 22 (2001), Pertamina no longer was in a position to supervise or regulate, which left the NOC as the only technical operator in the oil and gas sector. Thus, Pertamina was now of equal status with other international oil companies operating in Indonesia. The new structural relationship between Indonesia's government and Pertamina can be inferred from Figure 3.

Figure 5.3. Relationship between Pertamina and the government of Indonesia since 2001



Source: Author's rendition from Hertzmark (2007: 34)

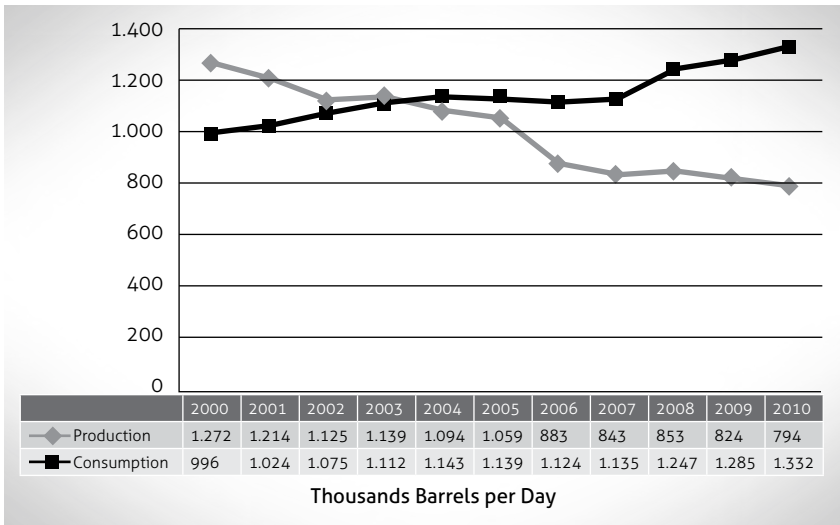
Clearly, oil and gas sector governance in Indonesia since 2001 differs from President Soeharto's New Order model. A new regulatory body, BP Migas (now SKK Migas)⁴¹ stands between the Ministry of Energy and Mineral Resources and oil companies. BP Migas was the government's representative for inspecting and regulating the oil and gas upstream sector, replacing Pertamina's BPKKA as the regulator of upstream activities for all oil companies operating in Indonesia, which now include Pertamina and other foreign companies. As BP Migas is directly under a ministry, Indonesia's collaboration within the oil and gas sector shifted to "government to business" from the former "business to business" paradigm. Moreover, according to Law No. 22 (2001), the President of Indonesia and the Indonesian Parliament (DPR), alongside the Ministry of Energy and Mineral Resources, are included in formulating and guiding the process of developing regulations.

⁴¹ In 2012, BP Migas was disbanded following Indonesia's Constitutional Court ruling that rendered the body unconstitutional. Another body, SKK Migas (Regulatory Task Force for Upstream Oil and Gas Business), now operates as its temporary replacement. For more information, please access www.skkmigas.co.id

The current model reflects a top-down relationship between Pertamina and the government of Indonesia to reform the pattern of governance within the oil and gas sector. This shift to a government-dominated approach was targeted to promote good management practices, especially in upstream oil and gas activities. Shared responsibilities should result in transparency and accountability between Pertamina and the government. Nonetheless, this reform brings liberalization to both upstream and downstream oil and gas activities, which is not in line with Indonesia's Constitution.⁴² Consequently, the government has become more indecisive in administering policies for managing resource exploration and use. Thus, Pertamina no longer operates as regulator in the upstream oil and gas sector; that role was assigned to BP Migas (now SKK Migas), which is inexperienced in managing exploration and exploitation activities. For example, BP Migas did not encourage oil companies in Indonesia to increase production levels for the period 2000–2010. Thus, the industry has experienced a decrease in output over time, as seen in Figure 4 below.

42 The 1945 Constitution of the Republic of Indonesia, Article 33, clauses 1 and 2, stated, "Sectors of production which are important for the country and affect the life of people shall be under the power of the state. The land, the waters, and the natural resources within shall be under the powers of the State and shall be used to the greatest benefit of the people."

Figure 5.4. Indonesia's oil production and consumption from 2000-2010



Source: (OPEC, 2004; 2007; 2012)

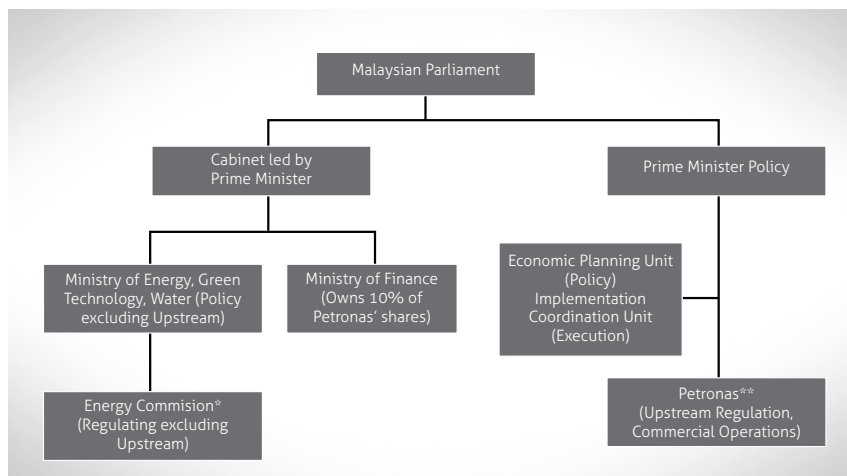
From the graphic, it can be seen that Indonesia's oil production during the period 2000–2010 decreased from 1.272 million oil barrels per day to 0.794 million oil barrels per day. On the other hand, consumption increased from 0.996 million oil barrels per day to 1.332 million oil barrels per day. The new top-down model in Indonesia's oil and gas energy governance could not prevent this scenario. Clearly, Indonesia's oil and gas energy resilience has weakened since President Soeharto's era. Thus, the government is focusing only on reaching its production target rather than pursuing exploration.

The Relationship between Petronas and the Government of Malaysia

Unlike in Indonesia, Malaysia's *Barisan Nasional* regime that dominated the country from its formation until now has maintained a stable relationship with the NOC since the 1970s. In fact, the bond is strong between the government and Petronas, its NOC. Petronas, like Indonesia's Pertamina during the New Order, was conceived through the Petroleum Development Act of 1974 as a "super" state-owned

enterprise. To strengthen the company's downstream activities, the government of Malaysia also enacted the National Petroleum Policy in 1976. As a result, its relationship with the government is neither top-down or bottom-up, as can be seen in Figure 5.

Figure 5.5. Relationship between Petronas and the Government of Malaysia



Source: (Tordo, Tracy, & Arfaa, 2011: 77)

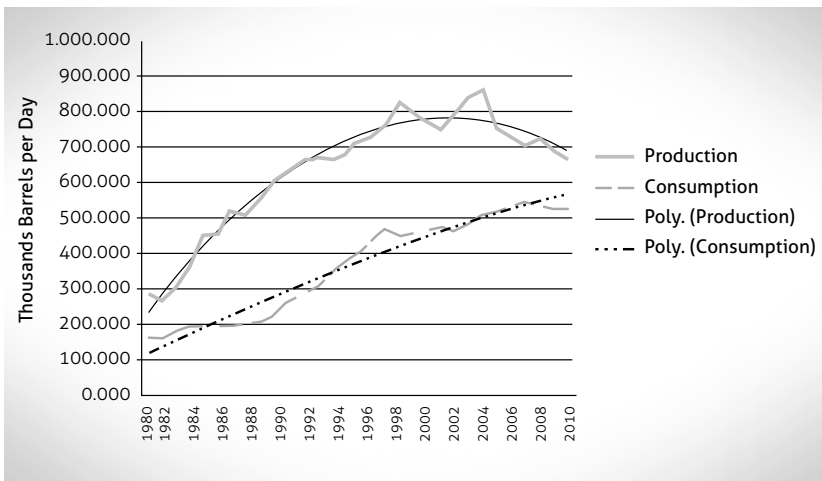
Petronas is influenced by the Malaysian parliament, the Office of Malaysia's Prime Minister, and the Economic Planning Unit (UPE). These three political bodies work as oil and gas/energy policy and guideline formulators. The legislative body of the Malaysian parliament is dominated by *Barisan Nasional* (BN), the coalition of three ethnic-based parties of the Malaysian Chinese Association (MCA), Malaysian Indian Congress (MIC), and United Malays National Organization (UMNO). Thus, BN is usually the main engineer behind policies of Petronas, which is also deeply connected to the Prime Minister's office. In fact, the Prime Minister is the NOC's official adviser for business affairs. Finally, UPE is the governmental body that develops Malaysia's economic policies. Therefore, all Petronas policies must be approved by UPE for conformity to the Malaysia Plan, the guideline for

the country's economic policies.

Petronas focuses its activities on operations as well as monitoring and regulating activities. Through Management Production Sharing (MPS), the government of Malaysia has authorized Petronas to manage the country's oil and gas reserves; thus, the company may engage in international collaborations for exploration and development of natural resources (Patmosukismo, 2011: 228).

Therefore, Petronas and the government of Malaysia share responsibilities equally. The government deals mainly with conceptual issues such as formulation of policies and guidelines, while Petronas oversees technical aspects of oil and gas exploration and production. Clarity regarding the separation of functions encourages Petronas, as regulator and operator in the upstream oil and gas sector, to increase oil and gas production. This equal sharing of responsibilities affects the management of oil and gas production and consumption in Malaysia, which are quite balanced. The graph in Figure 6 shows Malaysia's oil production and consumption for the period 1980–2010:

Figure 5.6. Malaysia's oil production and consumption, 1980–2010⁴³



Source: Rahim & Liwan (n.d.: 265)

⁴³ "Poly." stands for the polynomial expression of the trend

The graph shows that Malaysia's oil production increased, from 280,000 barrels per day in 1980 to approximately 700,000 barrels per day in 2010. Fluctuations were noted in 1998 and 2004, when oil production reached more than 800,000 barrels per day. Oil consumption, although always increasing each year, remains below production. Although Malaysia's oil consumption rose from 170,000 barrels per day in 1980 to more than 500,000 barrels per day in 2010. It was still lower than the amount of oil produced, indicating that the shared responsibilities by Petronas and the government of Malaysia have been effective in protecting the country's energy resilience.

Regarding good governance, the Malaysian model of shared responsibility has enabled Petronas to participate in the development of the country's oil and gas sector. The healthy relationship between Petronas and the government means that the NOC's effort is supported by the latter, especially in oil and gas governance; currently, Petronas dominates Malaysia's upstream sector. Petronas is responsible for 1.528 million barrels of oil (i.e., 72%) out of Malaysia's total production of 2.08 million barrels (Petronas, 2011: 43). Additionally, the company has stated that its production has reached 557,000 barrels of oil per day and 971,000 barrels of gas per day from 76 oil wells and 48 gas wells. It can be inferred that Petronas performs well as Malaysia's oil and gas regulator; moreover, it owns 33% of Malaysia's oil and gas reserves (Tordo, Tracy, & Arfaa: 2011: 76).

FORMULATION OF ENERGY POLICIES IN INDONESIA AND MALAYSIA

Regarding good governance in the oil and gas sector, Objective 5 was analyzed. In this section, the analysis is focused on how the formulation of oil and gas policies in both countries affects capacity building and enables the government and NOC to perform their respective roles.

First, it is important to note that most ASEAN and ASEAN+3 member countries' economic development involve the government, from formulation through development. This scenario also applies to Indonesia and Malaysia, as both governments have exerted considerable control over national economic development. President

Soeharto's New Order regime in Indonesia and Prime Minister Abdul Razak's UMNO-dominated regime in Malaysia illustrated the priority assigned by both leaders to national economic development. Indonesia began its economic development policies in 1969 through Soeharto's first Five-Year Development Plan (Repelita or *Rencana Pembangunan Lima Tahun*), while Malaysia implemented its New Economic Policy in 1970 with Razak's support. Because each country's economic development plan/policy is centrally managed, centralization of oil and gas energy policies in both countries is characteristic.

Centralization of oil and gas energy policies is actually in line with the theory of the developmental state, a rational concept that promotes centralization of all policies, including energy policies (Kusuma, 2002: 8–9). Accordingly, centralized energy policies are incorporated into the government's economic development plan. Further, the country's energy policies are not managed only by energy-related ministries but also by economic ministries. Therefore, policies are influenced by many governmental bodies, as well as by political interests of ruling regimes.

Formulation of Energy Policies in Indonesia

Indonesia's centralized economic development began in 1969 through the first Repelita. However, according to *Badan Perencanaan Pembangunan Nasional* (BAPPENAS)'s⁴⁴ Directorate of Energy Resources, Mineral, and Mining (2012), a national energy policy was enacted in 1980 (i.e., President's Decree No. 46 [1980]); it addressed the creation of the National Energy Coordination Body (i.e., Bakoren). The President's Decree stated that Bakoren⁴⁵ had three

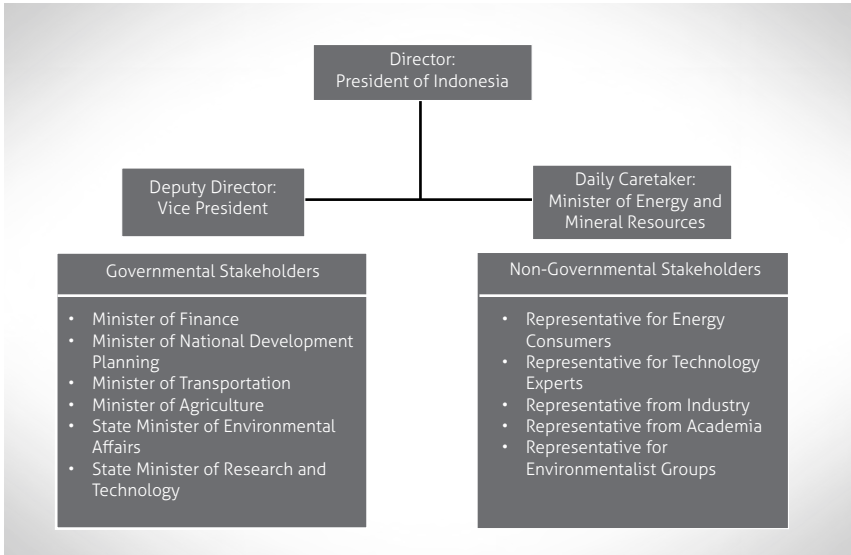
44 BAPPENAS (*Badan Perencanaan Pembangunan Nasional*) or National Development Planning Agency is Indonesia's ministerial-level formulator of developmental policies.

45 In its structure, Bakoren is directly under to the President of Indonesia. The body itself has nine members, all of them official ministers: Minister of Mining and Energy (also acts as the head of Bakoren), Minister of Public Works, Minister of Industry, Minister of Transportation, Minister of Finance, State Minister of Environmental Affairs, State Minister of Research and Technology, Minister of Agriculture, and the Head of the National Development Planning Agency.

main functions: to formulate the government's policies in coordinated energy development and utilization; to create national energy and utilization programs; and to coordinate the program's management as well as to advise the agencies that implement the programs. The Bakoren was assigned the task of producing General Guidelines for Energy (i.e., KUBE or *Kebijaksanaan Umum Bidang Energi*), one of the most important guidelines regarding energy policies in Indonesia. The body produced five versions of KUBE in 1981, 1987, 1991, 1998, and 2003.

After the end of the New Order, the new Reformation regime enacted Law No. 30 (2007), which significantly transformed Indonesia's national energy policies. Bakoren was replaced by the National Energy Council (DEN or *Dewan Energi Nasional*). The UU stated that DEN has four main functions: designing and formulating the government's National Energy Policy (KEN) with the parliament's approval; establishing the General Plan for National Energy (RUEN); establishing guiding principles for energy-related emergencies and crises; and monitoring the effects of cross-sectoral energy policies. As the successor to Bakoren, DEN has a wider membership because non-governmental officials are now included. The membership structure of DEN can be seen in Figure 7.

Figure 5.7. Structure of DEN



Source: DEN's Website (<http://www.den.go.id/index.php/page/readPage/3>)

As shown in the figure, DEN is directed structurally by Indonesia's president, with the vice president as his/her deputy. However, the daily caretaker that manages DEN is the minister over energy and mineral resources, and seven other ministers serve as associates in the council. Non-governmental stakeholders in DEN include those representing energy consumers, technology experts, industry, academia, and environmentalist groups. Compared to Bakoren, DEN's position is stronger because it is directed officially by the president, while Bakoren is directed by a minister. However, it should be noted that DEN's policies are not enacted as UU (law) but only as PP (government decrees or *Peraturan Pemerintah*), similar to Bakoren policies (Aryani, 2012: 176). This legal condition actually hinders the implementation of energy policies because PP is not as binding as UU, resulting in Indonesia's overlapping energy policies.

The weak position of DEN's policies may be rooted in a clash of interests regarding energy policies formulation, especially in the oil and gas sector. This clash of interests undermines the need for good

governance in energy policies, as some Indonesian political elites who have profited from the current national oil and gas industry structure dislike the bureaucrats and scholars in DEN who fight for national energy resilience. DEN's status as the national energy planning body through Law No. 30 (2007) only serves as a formality because real planning is conducted as a compromise between Indonesia's political elites in the executive and legislative bodies.

Current energy policies governance in Indonesia is uncoordinated, as UU may not be in line with PP. For example, KEN produced a strategy for energy diversification, intensification, and conservation. Nevertheless, the strategy was not supported by the government of Indonesia; the government strengthened oil and gas energy subsidies, which in turn devastated KEN's strategy. Because of this overlapping and uncoordinated condition, the governance of energy policies in Indonesia has worsened. Indonesia's oil and gas production has decreased over time, and the country has not been able to cope with rising consumption levels especially since 2000.

According to the perspective of good governance, the formulation of energy policies through government bodies such as Bakoren or DEN is a form of capacity building and should enable actors to perform their roles. However, Bakoren and DEN were not given full authority to create substantial energy policies and build their capacities. They need greater authority as well as advanced legal recognition of its products to demonstrate good governance of energy policies in Indonesia. If DEN is strengthened, Indonesia's energy policies will be governed more positively, as overlapping and uncoordinated policies can be eliminated through single-window policies and monitoring.

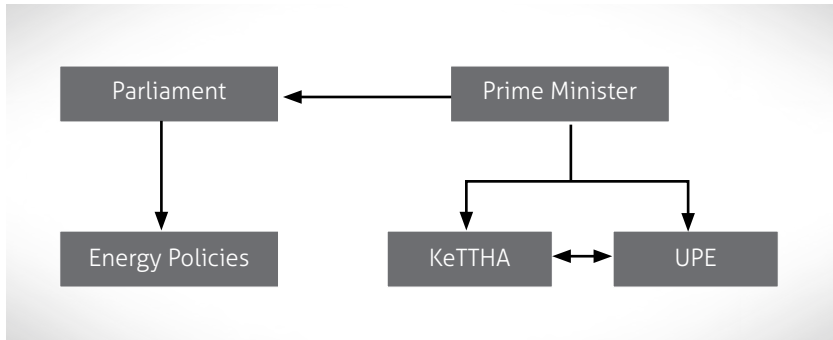
Formulation of Energy Policies in Malaysia

Since 1970, Malaysia's energy policies have been based on national economic planning. The formulation of energy policies in the country is supervised by the Prime Minister and Malaysian parliament. Malaysia's economic planning, manifested in the Malaysia Plan, is conducted by the UPE, which governs Malaysia's main economic planning body. It was created in 1961, and it is structured under the

Prime Minister's office (UPE).

Further, the UPE is responsible for preparing the government's economic plans. As the secretariat of the National Development Planning Committee, it also plans, implements, and monitors evaluations and revisions of Malaysia's development plans. An energy division is part of the UPE. Since 1979, UPE has contributed to Malaysia's energy policies through its National Energy Policy and through the formulation, strategic development, and implementation of related policies; UPE is assisted by KeTTHA, also known as the Ministry of Energy, Green Technology, and Water (KeTTHA). Although both bodies are directly responsible to the Prime Minister of Malaysia, the energy policies that they create require approval of the Malaysian parliament's to be enacted. Figure 8 describes the structure for formulation of energy policies in Malaysia.

Figure 5.8. Structure for Formulation of Energy Policies in Malaysia



This well-organized structure has resulted in the creation of single-window energy policies; all policies must be coordinated between the two bodies, avoiding the overlapping and uncoordinated structure in Indonesia. Malaysia's 1979 National Energy Policy provided general guidelines for other policies such as the 1980 National Depletion Policy, the 1981 Four Fuel Policy, and the 2006 Biofuel Policy. The country's mechanism for formulating energy policies has led to good governance, especially in the oil and gas sector, where consumption demand is met and profits are obtained from exports.

Compared to Indonesia, Malaysia's structure for energy policy

formulation and development is more effective and consistent. Although coordination between the energy sector and Indonesia's national government is supposed to occur, the responsible body (i.e., Bakoren, later DEN) has only limited authority and non-binding legal products. It differs from Malaysia's UPE and KeTTHA, which possess full authority in creation of the country's energy policies and legal products as long as they are approved by the Malaysian parliament. From the perspective of good governance, the authority allocated to UPE and KeTTHA in Malaysia enables capacity building and full participation of the actors involved.

ENERGY POLICIES IN VIEW OF CENTRALIZATION AND DECENTRALIZATION IN INDONESIA AND MALAYSIA

Another important aspect associated with good governance in energy policies analyzed in this study is centralization versus decentralization. This section focuses on relations between central and local governments regarding profit sharing of oil and gas revenues.

The relationships between central and local governments in Indonesia and Malaysia are important as oil and gas reserves are scattered unevenly throughout their vast territories. A province or state may hold numerous oil and gas reserves while another province or state does not have any. Certainly, local governments in areas containing the oil and gas reserves will ask for higher profit shares. On the other hand, the relationships between central and local governments in Indonesia and Malaysia are also influenced by their unique political systems.

For a unitary state like Indonesia, local governments are subordinated under the central government; therefore, local governmental authority is limited. In contrast, a federal state like Malaysia is characterized by coordination between central and local governments; the central government does not impose strong control over the latter. Political regime change also affects relations; in fact, Indonesia experienced the results of such a change after the fall of the authoritarian New Order.

With the advent of Indonesia's democratic Reformation regime,

central-local governmental relations changed from deconcentration to devolution, with local governments assuming greater authority for administrative issues, budget planning, and policy making. This kind of change has not occurred in Malaysia, where the UMNO-dominated central government holds the most important position in energy policies. Therefore, national political dynamics is an important factor in development and implementation of energy policies.

Decentralization and Indonesia's Energy Policies

The political transition in Indonesia after the fall of the New Order has resulted in a significant change in the central government's relationship with local governments. During the previous regime, Indonesia practiced deconcentration, in which the central government held supreme authority over policy making, administration, and budgeting, while local governments only served as proxies. With the Reformation, devolution occurred through the enactment of Law No. 22 (1999) concerning local autonomy and Law No. 25 (1999) concerning general and special budget balancing between central and local governments (Rusli & Duek). Local governments were given greater authority in policy making, administration, and budgeting through these two laws. Rusli and Duek explained that the first clause in Article 10, Law No. 25 (1999)—“Local (governments) are authorized to govern national resources located in [their] territories and are obliged to responsibly protect natural environments in line with the other laws and regulations”—clearly means that local governments legitimately hold mining rights for all natural resources, including oil and gas, located in their territories of jurisdiction.

This decentralization of authority, however, remains limited as Indonesia is a unitary state. Therefore, strategic policies are in the domain of the central government. Such policies include energy policies; according to Law No. 11 (1967) concerning general mining, oil and gas exploration and production is considered strategic and vital (Rusli & Duek: 10). The UU also classified oil and gas as strategic resources that must be cautiously governed. Moreover, Law No. 22 (2001) concerning oil and gas, as well as its predecessor Law No. 8

(1971), clearly stated that the central government holds the mining rights pertaining to oil and gas. In the 1971 legislation, the central government bestowed these rights to Pertamina as its representative while the new UU (later deemed unconstitutional) bestowed them to BP Migas. Thus, local governments do not seem to possess legal authority to govern their oil and gas resources.

The overlapping nature of legislation regarding oil and gas governance in Indonesia is interesting as it shows how a subordinate-based unitary state deals with decentralization. The euphoria of democracy in Indonesia resulted in legal decentralization designed to ensure equality and justice between central and local governments. Unfortunately, conflicts of interest have resulted.

During President Soeharto's economic development, Indonesia's oil and gas industries were used strategically to generate profits. Pertamina continually brought in profits during his regime, especially during the international oil crisis of 1971–1974. Indonesia's economic development during Soeharto's era was funded by millions of dollars from Pertamina's profits. Political elites during the New Order capitalized on this strategically important and profitable position of oil and gas industries, which fueled corruption, collusion, and nepotism within Indonesia (Rusli & Duek, n.d.: 36).

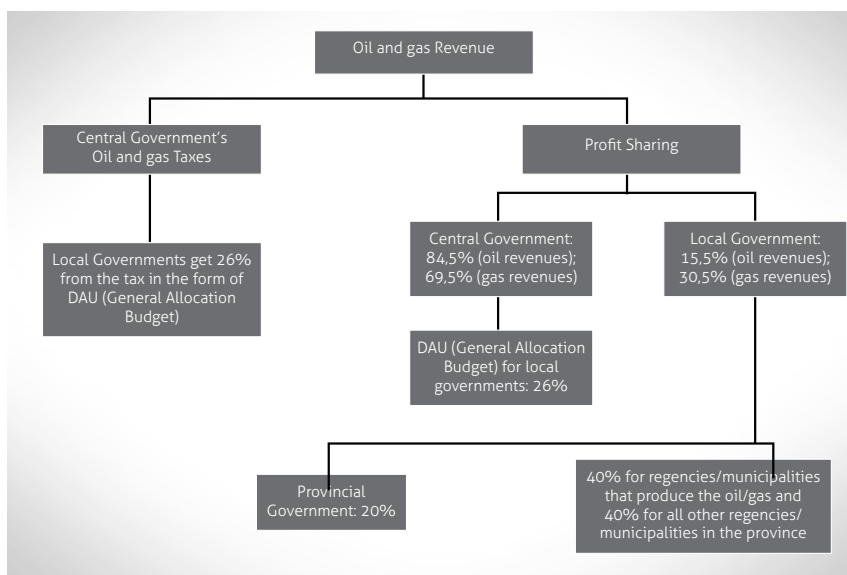
The New Order's development strategy was based on three objectives: political stability, economic growth, and equitable distribution. During Soeharto's regime, the first two objectives were achieved. However, even distribution was not achievable because development policies associated with centralization were tied to the central government's monopoly of oil and gas resources; therefore, only a few political elites benefited. The disparity of development is the main factor behind local governments' craving for decentralization policies after Soeharto's downfall.

Yet, despite local governments' efforts to obtain greater authority in mining governance, the new Reformation regime would not give it to them immediately. Three technical issues were foundational to the central government's decision. First, oil and gas mining is the central government's source of considerable profits, and officials are not

inclined to risk losing this revenue to local governments. Through the Production Sharing Contract, the central government receives 85% of the revenue generated from total national production. Second, as the oil and gas sector plays a pivotal role in the national economy, the central government fears the possibility of a related crisis should local governments mismanage the industry. Third, compared to the central government, most local governments are not experienced in the management of oil and gas exploration and development, and they are viewed as lacking sufficient knowledge regarding mining, risk management, and negotiations with national and foreign oil and gas companies. It should also be noted that these three factors are supported by the central government's reluctance to promote decentralization for oil and gas policies.

Although the conception of decentralization did not result in greater authority for local governments in oil and gas governance, it brought greater local revenue from the oil and gas sector. Through the enactment of Law No. 25 (1999), which was later revised in Law No. 34 (2004), equitable distribution from development has finally reached local governments through profit sharing of oil and gas energy revenues. In the 1999 regulation, the central government was instructed to give 15% of oil revenues and 30% of gas revenues to local governments where the profits were gained; through the 2004 legislation, local governments were to receive 26% of total national oil and gas production. Oil and gas taxes are also shared with local governments, as shown in Figure 9.

Figure 5.9. Indonesia's central–local government profit sharing system for oil and gas revenues



Source: (Agustina, Fengler, & Schulze, 2012: 373)

Based on the new law, local governments receive certain percentages from profit sharing and 26% of oil and gas tax revenues through the General Allocation Budget (DAU). From this income, 20% is given to provincial level governments and 80% to regional/municipal governments. The regions/municipalities that produce oil and/or gas receive 40% of the income, while others in the province divide the remaining 40%.

Centralization and Malaysia's Energy Policies

Generally, federal countries are known for their strong decentralization policies. However, this characterization does not apply to Malaysia, as the federation's oil and gas policies are certainly centralistic (Hui, n.d.: 2). Malaysia's federal government dominates policy making, budgeting, and managing the governance of natural

resources. Centralization is based on the country's authoritative political system, as the ethnically Malay UMNO wants to protect its influence in all 11 federal states. The federal government was given the authority to centralize natural resource (e.g., oil and gas) governance. Just like Indonesia's New Order, the federal government clearly regulates fiscal balance between central and local governments' sharing of oil and gas revenues.

The centralistic character of Malaysia's federal government is seen in its Petroleum Development Act (PDA), which reflects a deconcentration policy based on the country's authority in oil and gas sector governance, represented by Petronas. According to legislation, local state governments do not have any authority in this sector. The federal government's relationships with local state governments in oil and gas sector governance is regulated in the 1974 National Petroleum Policy, in which the federal government must give a 5% royalty to local state governments (The Edge Malaysia, 1990). Table 1 describes the allocation of oil and gas revenue sharing in Malaysia.

Figure 5.10. Allocation of oil and gas revenue sharing in Malaysia

Aspects	Distribution	Companies	Government	
			Federal	State
Oil				
Cost Recovery	20%	20%	-	-
Royalty	10%	-	5%	5%
Tax	-	21%	-	-
Total	100%	20%	54% + 21%	5%
Gas				
Cost Recovery	25%	25%	-	-
Royalty	10%	-	5%	5%
Tax	-	19.5%	-	-
Total	100%	25%	50.5% + 19.5%	5%

Source: Hui (n.d.: 4-5)

As can be seen in Figure 10, Malaysia's federal government receives 70% of the royalties, and taxes in the allocation of oil and gas revenue, while the local state governments receive only 5%. Local state governments' shares are even smaller than those received by energy-related companies reserved by the federal government as contractors; these companies receive a 20-25% in allocation for cost recovery. Several oil and gas producer states—Sabah, Sarawak, Terengganu, and Kelantan—have struggled to receive higher shares of royalty, as high as 20% of oil and gas sector revenues (Free Malaysia Today, 2013). Thus, a clash of interests between federal and local governments has developed.

The UMNO-led Malaysian federal government needs a substantial amount of money to implement its economic development policies, and the oil and gas sector has become the main cash generator. With 70% of oil and gas revenues being poured into the federal government's treasury, the energy-rich states of Terengganu, Sabah, Sarawak, and Kelantan receive uneven shares of royalties. In 2000, when Terengganu was led by the opposing Malaysian Islamic Party (PAS), the federal government froze the state's oil and gas royalty rights.

By reflecting on the implementation of Malaysia's PDA and National Petroleum Policy, the deconcentration model of oil and energy sector governance in the country illustrates the federal government's policy of centralization. However, it brings heavy costs for local state governments, as they receive far less revenue. Thus, some conflict has developed between the federal government and governments of the energy producing states of Terengganu, Sabah, Sarawak, and Kelantan over royalty rights.

LESSONS LEARNED

As the ASEAN Economic Community (AEC) is going to be recognized formally in 2015, ASEAN members must improve their economic conduct, including extractive industries governance. By analyzing the governance of oil and gas energy sectors in Indonesia and Malaysia, it can be inferred that both countries have implemented certain aspects

of good governance in their practices. Through the analysis based on *Guidelines for Good Governance in Emerging Oil and Gas Producers*, three objectives have been presented; additionally, aspects of good governance in Indonesia and Malaysia have been discovered that may be instructional for other ASEAN members.

In the analysis of Objective 5 regarding the NOC's participation in the development of resources, it was discovered that Indonesia has employed two models of government. In one, the NOC shares responsibilities in oil and gas sector governance; Malaysia has stayed with one model throughout its history. In Indonesia, both top-down and bottom-up models have failed to solve the problems associated with the country's oil and gas governance; therefore, Malaysia's model has proven to be ideal. Equal sharing of responsibilities capitalizes on each party's strengths. The government focuses only on long-term strategies, guidelines, and policy formulation; and the NOC focuses on technical matters pertaining to oil and gas development, operational decision making, and monitoring and regulating of domestic oil and gas exploration and production. This model emphasizing shared responsibilities must be based on cooperation between the government and NOC to achieve program targets, especially in securing the country's energy needs and protecting its energy resilience. If the relationship between a government and its NOC is not a positive one, the parties will probably fail to achieve targets, as illustrated by the relationship between Indonesia's government and Pertamina.

Another lesson emerges from the analysis of Objective 6 (capacity building). An analysis of the formulation of national oil and gas policies indicates that the formulation of national policies for this sector must be in line with national economic policies. Therefore, formulation includes other stakeholders besides the responsible ministry, as seen in Indonesia's DEN, which consists of government and non-government stakeholders ranging from energy and/or mining ministers to consumers and environmental groups. Moreover, DEN's institutional structure is conceptually sound for producing comprehensive policies that encompass both governmental and non-governmental interests. However, DEN's legal weakness related to the

binding nature of policies must be avoided.

Through the analysis of relations between central and state governments, it is clear that decentralization and centralization of energy policies influence a central government's relation with local governments concerning oil and gas energy governance. Another important point is that a country's political system has considerable influence over profit sharing of oil and gas revenues. In Indonesia's Reformation regime, the country's transformation from a centralized to decentralized system has improved the local government's share of revenues. Indonesia's local governments receive 26% of the profits from oil and gas activities. Malaysia's local governments only receive 5%. Thus, Indonesia's accountability in oil and gas governance is a good example for other ASEAN member countries.

CONCLUSION

As owners and producers with the largest oil and gas reserves among the ASEAN members, Indonesia and Malaysia have considerable experience in the formulation, management, and implementation of energy policies. Thus, their experiences provide important lessons for other member countries. This study's analyses of good governance in oil and gas energy policies in Indonesia and Malaysia using Chatham House's objectives highlight some of these lessons for ASEAN members and neighboring Southeast Asian countries.

This study also describes how the relationship between the NOC and the government is related to a country's political system. Indonesia's transformation from a dictatorship to a fledgling democracy significantly changed the government's relationship with Pertamina. On the other hand, Malaysia's relatively stable political system has ensured steadiness in the relationship between the government and Petronas. The formulation of energy policies is another vital point in Indonesia and Malaysia; different approaches to formulating policy impact the effectiveness of good governance. Different management styles in the oil and gas sector can be seen in Indonesia's decentralized and Malaysia's centralized applications. Good governance, as it pertains to oil and gas policies, offers lessons

to be promoted by ASEAN institutions such the ASEAN Council on Petroleum (ASCOPE) and ASEAN Center of Energy (ACE). These organizations should endorse accountability and transparency among ASEAN members in oil and gas/energy sectors.

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Part III

Regional Perspectives



CHAPTER 6

Developing a Standard for Managing Natural Resources in Asean Countries: Opportunities and Challenges

Fernanda Borges

INTRODUCTION

The Association of Southeast Asian Nations (ASEAN), established some 45 years ago, is a highly significant multilateral group that has grown increasingly influential since the end of the Cold War. The 10 core ASEAN countries include its founding members—Indonesia, the Philippines, Malaysia, Singapore, and Thailand—and the newer members of Brunei, Laos, Cambodia, Vietnam, and Myanmar. The ASEAN's influence, strength, and capacity to thrive are reflected in its collective population of 600 million people, its purchasing power, and its enormous economic weight—mirrored in the Gross Domestic Product (GDP) of \$1.8 trillion and exports of over \$1.1 trillion for the year 2010. Notwithstanding these impressive figures, the organization has not realized its full potential because it continues to be afflicted by large economic and development gaps between and within member countries, as reflected in the disparate 2010 Human Development Index range of 27–132 and the noticeable difference in the GDP per capita for member countries (ADB Institute, 2012).

This chapter outlines a common framework in which ASEAN member countries could manage the abundant and untapped natural resource sector to boost economic growth through employment, export revenues, and investment in human capital and infrastructure.

The opportunities and challenges facing the ASEAN organization and its member countries are explained, and the proposed framework is supported with regional experiences, successes, lessons learned, and available studies.

Issues that are presented as opportunities and challenges are also recommended as reform measures or new policy/legislative initiatives for inclusion in the standard framework for managing natural resources. These measures are designed to build capacity and transform institutions as well as human resources. Regional and national implementation must provide for built-in monitoring mechanisms to facilitate the achievement of common goals, objectives, measures, initiatives, and outcomes.

Additionally, it is important to support the implementation of a common framework among ASEAN nations with a multilateral donor-funded trust fund linked to international technical assistance programs for meeting the needs of the ASEAN organization and member countries. Adoption of a trust fund modality and arrangement similar to the International Monetary Fund (IMF) Topical Trust Fund for Managing Natural Resource Wealth (MNRW-TTF), but with a broader scope and the participation of stakeholders (given the interdependence of the issues and solutions), is recommended. The proposed ASEAN Extractive Industries Trust Fund is intended to provide the necessary funds to support the development of a holistic common standard/framework for managing extractive industries and the implementation and monitoring mechanisms at national and regional levels. The trust fund structure should deepen and strengthen strategic partnerships, regional cooperation, and coordination with a broad group of participating stakeholders; additionally, the operational mechanism should ensure flexibility to tailor and sequence reforms and new initiatives according to the needs and strategies of individual countries. Interventions would assist ASEAN members in securing natural resource revenues to narrow development gaps and alleviate poverty.

OPPORTUNITIES

The area encompassing ASEAN nations contains considerable oil and natural gas reserves in the Irrawaddy Basin, Malay Basin, North Sumatra Basin, Greater Sarawak Basin, and the South China Sea. Hydropower, coal, and vast forests are also abundant in some countries, as are precious mineral deposits of gold, nickel, and bauxite. Although ASEAN natural resources are still largely untapped, extractive industries projects are evident in all ASEAN member states; in fact, some countries are already heavily dependent on the revenue from oil and natural gas resources. Non-metallic mineral production is important for the economies of Laos, Malaysia, and Myanmar; further, it constitutes a significant share of the total mineral production in Thailand (Tumiwa, 2010; ABARE and Mekong Economics, 2005).

It is possible for ASEAN member states to have a common standard/framework in managing the extractive industries. Existing charters, agreements, action plans, and work programs form the foundation to build on and incorporate many of the best practices, guidelines, tools, and initiatives already available to help manage natural resources. The ASEAN organization has the opportunity to carry out the institutional and governance reforms necessary to expand and grow the economy and human resources capacity. These reforms are necessary to close the gaps in institutional capacity and harmonize regulations and policies for a better regional fit.

There are many opportunities to create a common standard/framework for managing the ASEAN's natural resources and extending their value beyond member countries, thus realizing the full potential of these resources and avoiding the resource curse. Natural resources present countries with the opportunity to accelerate development and make inroads into poverty, which would support the ASEAN's objective of achieving an integrated and prosperous economic community by 2030.

Common standards are necessary not only to protect the significant revenue flow from the extractive industries and safeguard the untapped potential of natural resources, but also to secure funds for national and regional development and intergenerational equity

for the future. Payments by companies operating within the extractive industry to the government in the form of royalties, bonuses, income taxes, production shares, export taxes, and other fees enable the government to increase the supply of public goods and services critical to development and poverty reduction. In addition, there are improved opportunities for local employment and services, pointing to increased economic activity and growth (IMF, 2010).

Over the years, a number of ASEAN member countries have independently begun to implement initiatives and reform measures in managing extractive industries; consequently, their progress is more advanced than in other countries. Although their efforts are encouraging and strong indicators of the need to improve outcomes in this sector, there is some catching up to do by member countries that have not initiated reforms.

Notwithstanding the success stories from individual countries, the selective implementation of measures has not achieved maximum impact and benefit for the region, primarily because the issues are so interrelated and interdependent that a holistic and comprehensive approach is needed to be more effective. The design of institutional reforms, policies, and legislative measures also require targeting the areas needing attention through a programmatic and systematic plan that is sequenced to meet each member country's needs.

A common approach will assist the region in meeting another objective—to harmonize, deepen cooperation, close the development gaps, and integrate into a seamless regional economic unit. Now is the opportune moment for ASEAN member countries to build on their achievements thus far, correct weaknesses, find gaps, and enhance and strengthen institutions and accountability mechanisms. A combination of technical assistance and capacity building programs are required to integrate policies in the administrative and legislative dimensions and to improve governance and outcomes for the natural resource sector. It is recommended that the ASEAN organization and member countries consider adopting a coherent framework of policies, legislation, tools, and initiatives that complement each other to hostially manage the natural resource sector.

The examples provided herein of ASEAN member countries that are already in the process of implementing reform measures or new initiatives serve to highlight the interdependence of such actions; implementing one or just a few is not sufficient to transform the country and alleviate poverty. A combination of initiatives is necessary to create impact and achieve the required results.

GUIDELINES FOR MANAGING NATURAL RESOURCES

Many current and valuable studies and papers about extractive industries are publicly available. However, the two documents that are of special interest to resource-rich countries are the Natural Resource Charter (2010) and *Guidelines for Good Governance in Emerging Oil and Gas Producers* (Marcel, 2013), as they offer practical guidelines that can help maximize the opportunities provided by resource wealth. The Natural Resource Charter provides policy makers, citizens, international companies, industry associations, and civil society groups with targeted advice on managing resources in a way that generates economic growth, promotes the welfare of the population, and is environmentally sustainable.

The Charter contains 12 precepts that offer guidance on core decisions that governments face, beginning with the decision to extract resources and ending with decisions about using the revenues generated. In addition, the *Guidelines for Good Governance in Emerging Oil and Gas Producers* addresses the specific challenges faced by countries new to the petroleum business by offering seven core objectives to help steer strategic planning. This publication, along with the one mentioned formerly above, is invaluable for resource-rich countries to study, incorporate, or adapt to their national contexts. Further, they complement the common standard/framework for managing natural resources.

Institutional Reform

Sound Macroeconomic Framework and Capacity Building

Initial priorities for ASEAN countries with natural resource wealth are to establish a sound macroeconomic framework and build the

capacity for quality governance to administer the revenues derived from extraction of natural resources. These complex issues require experienced technical assistance from multilateral institutions already established in the region to support relevant programs. An opportunity exists for the ASEAN to include the recently established IMF Topical Trust Fund for Managing Natural Resource Wealth as the key initiative in the common standard/framework for managing natural resources.

Specifically, IMF technical assistance is delivered in modules tailored to meet circumstances associated with five areas: (i) extractive industry fiscal regime, (ii) extractive industry revenue administration, (iii) macro-fiscal policies and public financial management, (iv) asset and liability management, and (v) statistics for natural resources (IMF, 2010, Annex 5). It should be noted that the IMF program only accepts candidates with a demonstrated commitment to reform; this requirement aligns with the proposed common standard/framework for management of natural resources by ASEAN member countries.

The program commenced in 2011, and Vietnam, Indonesia, and Timor-Leste are listed in the program document as low- and lower-middle income countries eligible for assistance. Currently, technical assistance projects are underway in Laos and Timor-Leste. The overarching objective is to develop economic policy and administrative capabilities that would enable low-income countries to derive the maximum benefit from their oil, gas, and mineral resources. Additionally, the projects should boost economic development and alleviate poverty. The key outcome is better governance enhanced by accountability through transparency in public services that deal with resource revenues and investments in the resource sector due to an attractive and stable investment climate that induces socially responsible corporate behavior (IMF, 2010).

Good Governance

A transparent government and open state institutions are essential for managing the natural resource sector. Initiatives such as the Open Government Partnership (OGP) should be included in the common

standard/framework, and action plans should be developed by each ASEAN member to address issues related to natural resources. Eight countries founded the OGP, a new international and multilateral initiative. Two ASEAN members, Indonesia and the Philippines, are founding members.

The OGP mission is to encourage governments to be more transparent and accountable for empowering citizens, fighting corruption, and harnessing new technologies to strengthen governance. To become an OGP member, participant countries are required to endorse an Open Government Declaration and to deliver a national action plan developed with public consultation and a commitment to independent reporting regarding progress. Fulfillment of these requirements will facilitate a shift in norms and organizational/behavioral culture to ensure genuine dialogue and collaboration between governments and civil society.

As a founding member, the government of Indonesia is convinced that openness is basic for modern political authority; further, it is a key to unlocking Indonesia's potential in its economy, public services, and innovation. To this end, Indonesia has taken a leading and exemplary role for 2012–14 as a co-chair of OGP; additionally, it has fostered effective collaboration between government and civil society to fulfil several action plans (Open Government Partnership, 2011). For example, the Center for Law and Democracy (2013) supported the implementation of the Indonesian Law on Public Information by training over 40 public bodies in the Indonesian province of Banten as well as representatives from the Jakarta Information Commission. Similarly, the Philippines, according to Poe (2012), consider the OGP a significant tool for implementation of the 1987 Philippines Constitution especially its landmark provisions on accountability and transparency.

Transparency EITI

The World Bank Extractive Industries Transparency Initiative (EITI) profile reports that citizens around the world live in persistent poverty due to a lack of transparency and corruption caused by weak

governance. Despite living in resource-rich countries, many do not receive benefits from the extraction of their natural resources.

The EITI was formed in 2003 to provide a global standard for revenue transparency, better governance, and accountability in the extractive sector. It has a robust yet flexible methodology for monitoring and reconciling corporate payments and government revenues from oil, gas, and mining at the national level (and more recently at the sub-national level). Each participating country implements its own EITI process (adapted to meet national needs).

The EITI standard establishes the methodology countries must follow to become compliant. Companies must disclose payments publicly, and governments must publish receipts of payments in an EITI report. Tax and royalty payments are verified independently and reconciled by a multi-stakeholder group with representatives from government, companies, and civil society who oversee the process and communicate findings from the EITI report (Extractive Industries Transparency Initiative, n.d.).

Aguilar, Caspary, and Seiler (2011) have encouraged countries to comply with the new EITI rules and include sub-national resource revenues as part of their reporting framework to ensure that a complete picture of material payments is available. At the sub-national level, EITI can assist local governments with significant revenue to become more transparent; further, it is useful for anchoring the initiative in a given country to help achieve accountability.

Governments that wish to join EITI must meet the initial “sign-up” requirements, including the establishment of multi-stakeholder groups and a commitment to work with a civil society. Once the EITI board agrees that these requirements have been met, the aspiring country is recognized as an EITI candidate and authorized to begin implementation of the initiative. The country must demonstrate compliance to confirm that it is adhering to EITI’s standards within two and half years of becoming a candidate. Validation is performed by independent external evaluators (Human Rights Watch, 2013).

The World Bank (WB) Donor Trust Fund (MDTF) provides countries with resources to implement the EITI principles of revenue

transparency by supporting programs in countries that (i) help consolidate and deepen EITI implementation, (ii) continue better governance reforms by building on the platform of EITI principles, and (iii) build capacity of civil society actors to hold government accountable for the use of extractive industries revenues. The MDTF is also a good vehicle for sharing experiences and learning from other countries that are implementing EITI principles. To illustrate, the Revenue Watch Institute is working in partnership with the MDTF to facilitate the engagement of diverse and active civil society coalitions in the nascent implementation of EITI processes in the Philippines.

A network of regional NGOs is pursuing both national and ASEAN-level advocacy to urge endorsement of transparency and accountability in managing extractive industry resources, including adopting a joint policy at the ASEAN level and endorsing the commitment to EITI by resource-rich member countries. Indonesia and Timor-Leste have implemented EITI and have a platform for sharing knowledge and best practice examples. The ASEAN member states of Myanmar and the Philippines have recently expressed their intention to join EITI. Currently, the Revenue Watch Institute (RWI) is working in partnership with the WB MDTF to facilitate the engagement of diverse and active civil society coalitions in the nascent EITI processes in the Philippines. Furthermore, Vietnam, Malaysia, the Philippines, and Cambodia are working with RWI and several Indonesian civil society partners to share Indonesia's experience in joining EITI and supporting it at the sub-national level for outreach in the Philippines. In Myanmar, a program to support civil society is contemplated to build capacity and offer technical assistance toward developing linkages between civil societies, the government-appointed EITI coordinating institution, and the parliament.

Since implementing EITI, Indonesia has incorporated its rules by being transparent about revenues accruing to sub-national governments. For this reason, Indonesia was selected by the World Bank for its emerging experience with sub-national EITI implementation on the island of Sumatra, which holds 70% of the country's proven and probable oil reserves (accounting for more than

half of its oil production). Sumatra also holds over two thirds of the country's coal reserves. To highlight the benefits of sub-national EITI for Sumatra, the Director General of Minerals and Coal said recently that of the estimated 10,500 licensed permits in the district, he has adequate information on only about 4,000 of them. This may be one of the reasons that the contribution of the mining sector to Indonesia's revenue is so small vis-a-vis the size of the resource and the number of operations (Aguilar, Caspary, & Seiler, 2011).

While EITI has served as a platform for transparency in the extractive industries, the 2011 independent evaluation has cautioned that EITI alone cannot deliver on governance improvements because the necessary political, legal, and institutional improvements must also be put in place to impact governance, corruption, and poverty reduction. To catalyze better governance, there needs to be a coherent strategic vision in a common/standard framework for managing natural resources (Human Rights Watch, 2013). Nevertheless, EITI is an important instrument for transparency, governance, and accountability in the natural resource sector; accordingly, it should be endorsed by the ASEAN organization and included in the common standard/framework for managing natural resources.

Tax Reform

Taxation provides governments with the funds needed to invest in development, relieve poverty, and deliver public services. Reforms which begin with tax administration may spread to other parts of the public sector and streamline systems and processes for managing natural resources. To strengthen tax administration in some ASEAN member countries, assistance is needed in tax management, policy design, benchmarking, and identification of performance indicators. Reports state that objective, codified, and accessible knowledge on the capability of tax administration systems in Asia and Central Asia is extremely limited. It will be important to engage the Asian Development Bank (ADB) and other regional organizations such as the Study Group on Asian Taxation Administration and Research (SGATAR) in this work now that tax issues have increased in importance to

developing countries.

The common/standard framework for managing natural resources provides an opportunity to encourage ASEAN member countries to participate actively in regional and global knowledge-sharing platforms that include design and improvement as well as communication among tax officials in sharing good practices, particularly in Asia. The African Tax Administration Forum and the *Centro Interamericano de Administraciones Tributarias* (CIAT) are good examples of regional bodies that provide platforms for regional action, peer learning, capacity development, and dialogue on domestic and international tax issues (IMF, OECD, UN and WB, 2011).

As ASEAN member countries diversify, grow, and transform their economies into productive areas, they strengthen their per capita income and broaden the tax base. These advances require a simple but efficient tax administration system to administer tax revenues transparently and account for amounts collected and subsequent expenditures. In addition, natural resource exploration will require companies to pay large amounts in taxes and royalties to the government in a transparent way. Improved tax administration will ensure that companies comply with applicable laws and that taxes collected are appropriate for the revenue received.

Judicial Reform

To successfully implement the common/standard framework for natural resources, the judiciary must be independent, impartial, and effective with an appropriate legal framework that provides enforceable rights and access to justice for all. Many reports, including one from the World Bank (2003), argue for legal and judicial reform as a strategic imperative to strengthen the rule of law in developing countries. The rule of law promotes economic growth and reduces poverty by providing opportunity, empowerment, and security through laws and legal institutions. Effectiveness of the judiciary is dependent on its independence, judicial training, court administration, and case management. Its ability to fight corruption, appoint judges, administer criminal justice, demonstrate government accountability, and operate

as an alternative dispute mechanism are also characteristics of effectiveness. Furthermore, the judicial system plays an important role in the fight against corruption, which undermines political legitimacy and citizens' confidence in government. If corruption is to be addressed, it needs, among other things, independent prosecutors and an independent judiciary. Messick (1999) has contended that economic development depends on a legal system in which contracts are enforced, property rights of foreign and domestic investors are respected, and the executive and legislative branches of government operate within a known framework of rules.

The International Commission of Jurists (ICJ), based in Bangkok, has been working for several years to improve the rule of law and respect for human rights in Southeast Asia. Ten countries of Southeast Asia are working toward greater regional integration under the ASEAN organization and in the area of judicial reform. Further, the ICJ is working directly with ASEAN member countries to strengthen developing institutions, identify the numerous barriers to justice in the region, and remove the barriers through advocacy, legal reform, and litigation (International Commission of Jurists, n.d.).

A regional workshop on judicial integrity in Southeast Asia was held in Jakarta in January 2012 to address issues of judicial integrity and ways in which the Bangalore values could be upheld in countries in the region. Central to these discussions was the implementation of the Bangalore Principles of Judicial Integrity, which have been accepted by the judiciary around the world as the core principles by which a judiciary should perform its functions and fulfil its obligations. The Bangalore Principles establish integrity within the judiciary by focusing on six essential values with explanations and guidance on how they can be put into effect. The values are (i) independence, (ii) impartiality, (iii) integrity, (iv) propriety, (v) equality, and (vi) competence and diligence. These fundamental principles and rights are also reflected in the ASEAN Human Rights Declaration (2012) and in the domestic constitution, laws, and judicial conventions and traditions (UN ECOSOC, 2006: 23).

Several countries in the region including the Philippines,

Indonesia, Malaysia and Singapore have endorsed the Bangalore Principles. A judge from Myanmar who participated at the Jakarta workshop emphasized the special opportunities afforded by ready-made international standards for his country and others during the process of democratic transition (Kirby, 2012). Going forward, implementation of the Bangalore Principles by all ASEAN member countries is critical to managing natural resources in the region and to providing legal certainty and a rules-based approach to doing business in the extractive industry. If the judiciary cannot reform, impunity for corrupt activities and unaccountability will prevail.

PARLIAMENTARY OVERSIGHT

In the past, the involvement of national parliaments in passing laws and providing oversight of governmental and state institutions in the areas of transparency and good governance has been weak and limited in many parts of the world. Typically, national parliaments have not been involved in or considered as important by stakeholders in the process of instilling transparency, good governance, and accountability, nor in implementing programs related to economic development, growth, and the alleviation of poverty. Traditionally, it has been considered the responsibility of the executive branch of government to make policy decisions on these matters and to prepare legislation for implementation. The parliament's role has been limited to approving and passing legislation in its area of competence. Sometimes, the lack of either involvement at the policy level or real connection with the issues has complicated the law-making process, resulting in long delays, gaps, and weak legislation. Some countries have passed an impressive array of new legislation, but the supplementary rules and regulations are missing, thus rendering implementation and effectiveness weak.

This trend is changing rapidly, particularly since the adoption of the United Nations Convention against Corruption and democratic transition in many countries. Further, national parliaments in ASEAN member countries have been challenged by the democratization process and have seized the opportunity to perform their roles and

functions in unprecedented ways to strengthen oversight, good governance, and accountability. Regional parliamentary organizations such as the ASEAN Inter-Parliamentary Assembly (AIPA), South East Asian Parliamentarians against Corruption (SEAPAC), and the Global Organization of Parliamentarians against Corruption (GOPAC) are presently organizing to work together on common interests and goals with the aim of bringing about action and timely responses from members at the national level. There is tremendous opportunity for these organizations to collaborate and cooperate in unique ways to support the democratization and reform process that will improve the well being of ASEAN people.

The AIPA includes delegates from the parliaments of Cambodia, Indonesia, Laos, Malaysia, Philippines, Singapore, Thailand, and Vietnam and was established by ASEAN member countries to facilitate achievement of goals by the ASEAN economic community. The AIPA aims to study, discuss, and suggest solutions to common problems and to express its view on such issues. Article 7 in the AIPA empowers the General Assembly to adopt policy initiatives, provide input regarding policy formulation, and propose legislative initiatives on issues of common concern.

SEAPAC, a regional chapter of GOPAC, is composed of national chapters in Indonesia, Timor-Leste, the Philippines, and Malaysia. Efforts are underway to establish new GOPAC national chapters in Thailand, Laos, and Myanmar; this worldwide alliance of parliamentarians encourages collaboration to combat corruption, strengthen good government, and uphold the rule of law. GOPAC members believe that strong parliamentary oversight is essential for the effective implementation of the United Nations Convention against Corruption (UNCAC) and other complementary improvements in the governance roles of parliamentarians. In addition, parliamentarians provide leadership for ratification, implementation, domestication, and monitoring and review of UNCAC. Thus, they are supplementary instruments of corruption prevention.

The involvement of AIPA, SEAPAC, and GOPAC chapters is critical to implementation of the regional common/standard framework for

managing the natural resource sector. In particular, their participation will ensure that required laws are reviewed efficiently, developed, and passed in the appropriate timeframe with parliamentarians fully active and engaged in the process. Regional and national approaches will be coordinated in tandem with each other, making the impact of the results broader and the oversight more real and sustainable both nationally and regionally.

It is proposed that the regional common standard/framework for managing natural resources be adopted by the AIPA General Assembly as a resolution for domestication and implementation by ASEAN member countries. Where appropriate, AIPA could initiate and approve legislation for region-wide implementation. Examples of such initiatives include a regional anti-corruption convention, regional anti-bribery convention, and regional anti-corruption strategy. The statutes would permit the AIPA to work with national parliaments in ASEAN countries to strengthen institutions and their roles in the affairs of the ASEAN region. Thus, there is ample capacity for peer monitoring and reviews of national efforts toward implementing the common framework.

Common standards for managing the resource sector would be supported by participation in SEAPAC and GOPAC national chapters. First, the governance and anti-corruption challenges in ASEAN member countries require a robust regional and national anti-corruption strategy. Second, the role of parliamentarian as the champion of good governance and anti-corruption initiatives would be extremely valuable at regional and national levels to identify and address legislative and governance gaps that need to be overcome in the implementation of UNCAC. Additionally, a parliamentarian could provide oversight for the standards framework for managing natural resources. Parliamentarians from Indonesia, Timor-Leste, Thailand, Laos, Malaysia, Cambodia, and Brunei demonstrated commitment to the common goal and common action of eliminating corruption in Southeast Asia during the SEAPAC conference in Medan, Indonesia. Their cooperation is extremely encouraging for managing natural resources, given the vulnerability for large flows of funds from the

resource sector to fall prey to corrupt practices. A regional SEAPAC action plan that includes implementation of the common framework for managing natural resources and participation as “Special Observers” in AIPA and in the Trust Fund Steering Committee would ensure that ASEAN member country parliaments stay focused on the framework.

CHALLENGES

The strong global demand for natural resources is expected to continue, and the ASEAN region will be in an excellent position because of its abundance in this area and its potential to boost economic growth, narrow development gaps, and contribute to poverty alleviation through increased investment in the extractive industries sector. However, the organization must overcome certain institutional, governance, and economic impediments as well as political and human rights challenges in the region.

To contextualize and put into perspective these challenges, ASEAN Secretary General Dr. Surin Pitsuwan stated: “In ASEAN, we are committed to the principles of democracy and human rights. But we have found that different states have different ways of interpreting and promoting both ideals. Some are doing better than others while some are still going through a debate about how to translate these ideals in the ASEAN Charter into their laws and institutions” (Clarke, 2012).

These challenges are complex and interdependent in many dimensions. For these reasons, they need to be included in the common standard/framework for managing the extractive industries and related policies and legal solutions to consistently address the issues in each member country. As ASEAN member countries jointly handle these challenges holistically and comprehensively, they will make inroads toward an integrated and prosperous economic community by 2030.

Political Challenges

Relevant reports include similar findings to indicate that the ASEAN

organization has largely achieved its primary purpose of preventing further outbreaks of war in Southeast Asia following the Indochina Wars; additionally, it has reintegrated the region into a united whole (ADB Institute, 2012; Kurlantzick, 2012). Furthermore, it has helped build infrastructure that links mainland Southeast Asia to South Asia and China through new roads, rails, and ports with the aim of a borderless region by 2030. To the ASEAN's credit, these achievements have been made with a demanding consensus and non-interference policy. Cooperation in the region has also evolved; currently, it is more pragmatic and flexible. The ADB Institute (2012) report on a borderless community sums it up as a gradual evolution where barriers that hindered cooperation in fighting common problems have been broken down, demonstrating the move from cooperation by consensus to integration by choice. Going forward, ASEAN nations will continue to develop and deepen their own unique brand of integration over time.

Meanwhile, the ASEAN organization will need to ensure that member states have reached a consensus in the ASEAN Charter (2008) and the ASEAN Human Rights Declaration (2012). On the issue of natural resources, member states have reached a consensus on three key and interdependent ASEAN purposes that are relevant and critical to the establishment of a common framework for resource management: (i) consensus on sustainability of natural resources, according to Article 1(9); (ii) consensus on alleviating poverty and narrowing the development gap within ASEAN nations through mutual assistance and cooperation, according to Article 1(6); (iii) consensus on strengthening democracy, enhancing good governance and the rule of law, and promoting and protecting human rights and fundamental freedoms, according to Article 1(7).

The present issue is how to put the ASEAN's resolve into practice and meet the needs of people living in the region. There are a number of opportunities to consider. First, the ASEAN organization could decide to designate poverty alleviation as the next major regional objective and to harness and unite all forces in the region to work toward this goal. Significant financial resources would be required to meet this objective. Natural resources may provide the avenue for

financing accelerated development and making inroads into poverty. However, this will require the ASEAN organization to comprehensively address the institutional, policy, legal and governance challenges through the development and implementation of a common/standard framework in managing the natural resource sector.

Furthermore, to achieve ASEAN objectives, the region will need to bolster internal cohesion to cooperate effectively in determining strategic direction, common objectives, ideas, and goals to close development gaps and reduce poverty in the region. The challenge for ASEAN leaders is to unite for political reform, modernization, and access to funding sources to implement a common framework for managing the resource sector.

Institutional Challenges

The commitment from ASEAN nations to cooperate in the natural resource sector has been clearly established in the ASEAN Charter, ASEAN Energy Cooperation and Mineral Cooperation Agreements and action plans, and the ASEAN Economic Community (AEC) Blueprint. A common standard/framework for the extractive industries will ensure the sustainability of natural resources (Charter, Article 9), complement and build on the objectives and achievements of the agreements already in place, and strengthen the institutional and human capacity of ASEAN and member countries to undertake reforms.

The ASEAN has made considerable progress in implementing AEC initiatives. At the end of 2011, it had completed 187 out of 277 measures (67.5%). The AEC Scorecard was established to monitor implementation of the various AEC measures and identify implementation gaps related to ratification, adoption, and transportation into domestic laws, regulations, and administrative procedures of the agreed obligations within the specified timeframe. The ASEAN Secretariat (2012) Report on the AEC Scorecard attributes shortfall in implementation to political will, coordination and resource mobilization, implementation arrangements, capacity building, institutional strengthening, and public and private sector consultations; improved outcomes in these areas have been targeted

within the specified timeframe of 2015. Lessons learned will benefit ASEAN and member countries in formulating suitable monitoring, review, and evaluation mechanisms for each initiative or program included in the common standard/framework for managing natural resources. The AEC Scorecard also gives insights into each member state's institutional and human capacity strengths and weaknesses.

In recent reports (ADB Institute, 2012; Owen, 2013; Kurlantzick, 2012), experts have argued for the need to improve the effectiveness and efficiency of the regional bureaucracy and ASEAN institutional governance by enhancing the Secretariat's legal capability to attain trust, confidence, and respect in enforcing ASEAN agreements. Underperformance in implementation of agreements is also due to weak institutional arrangements at the regional level and the lack of an institutionalized enforcement mechanism to ensure compliance at the national level. In addition, the large gap in development stages, as well as enormous political, economic, and governance disparities among member countries, make coordination in implementation difficult.

There is a need to move toward better policy formulation, agreement and adherence to timeframes and mechanisms of cooperation and implementation, pooling of resources, and regulatory harmonization to ensure that regional agreements produce the intended outcomes for the region and individual member countries. Furthermore, Kurlantzick (2012) argued that there are significant obstacles to strengthening the Secretariat because of current limitations in working styles, obtaining a consensus in the decision-making process, staffing, and fulfilling mandates. To remove these obstacles, Kurlantzick has proposed the appointment of a more powerful leader, a larger staff, adequate compensation, recruitment of qualified foreign and civil officers for the ASEAN organization, and the provision of financial resources, tools, and knowledge to analyze and provide impartial policy advice on critical issues.

Natural Resource Challenges

Difficulties stem from the diverse mix of resource endowments,

constrained sources of finance, different economic and governance structures, poor infrastructure, limited access to technology and skilled labor, an uncertain legal regime for land tenure and taxation, an uneven playing field, and varied political settings. Such obstacles place a constructive and certain investment climate out of reach. In addition, the absence of region-wide institutions and systems to regulate, manage, and monitor ecological impact causes environmental standards in the regions to worsen. These factors directly affect the ability of ASEAN member countries to secure necessary foreign direct investments to start and support long-term capital investments in the natural resource sector. Unless there is a common standard/framework to address these issues, it will be difficult for ASEAN members to capitalize on their abundant resources to promote economic growth and equitable distribution of wealth (ABARE and Mekong Economics, 2005).

Governance Challenges

World Bank indicators suggest that there is an urgent need in several ASEAN countries to strengthen governance. In particular, it is important to introduce regulatory institutions that are transparent and rule-bound and that work toward economic welfare for all rather than for particular interests.

The IMF points to the resource curse as the root of underperformance in human development indicators because governments fail to properly address institutional and policy challenges that come with natural resources. National administrations are defective and policies are inadequate; furthermore, there is a tendency to be secretive in natural resource matters. As a result, countries often do not receive fair compensation for their resources; once any revenue is spent, the expenditures do not produce the desired benefits (IMF, 2010).

The Transparency International World Corruption Index (2013) shown in Table 1 presents disturbing results for Asia. For example, CPI scores for countries on a scale of zero to 100, with zero indicating high levels of corruption and 100, low levels, indicate that the majority of ASEAN countries score below 50; therefore, they are considered to be

significantly corrupt. Singapore is the only ASEAN country deemed to be clean; it ranks fifth in the world with a CPI 2013 score of 86, close to a score of 100, which indicates low levels of corruption. Comprehensive action by governments working with civil society to strengthen integrity, governance, transparency, and structural quality throughout the region is needed.

Table 6. 1. Transparency International World Corruption Index 2013

Country Rank 2013	Country	2013 Score	2012 Score
5	Singapore	86	87
38	Brunei	60	55
53	Malaysia	50	49
94	The Philippines	36	34
102	Thailand	35	37
114	Indonesia	32	32
116	Vietnam	31	31
119	East Timor*	30	33
140	Laos	26	21
157	Myanmar	21	15
160	Cambodia	20	22

Source: Transparency International

*Observer Status

Significant corruption in the economies of ASEAN member countries puts the resource sector at great risk. Managing the quality of governance and setting priorities regarding policies and legislation for exploration of natural resources require immediate attention to avoid creating incentives for rent seeking and corruption. The development of a common framework should include objectives on how to manage the complex and large revenue flows from natural resources. Further, due to the different environments in ASEAN member states, objectives must be designed to fit emerging and small producers as well as to provide sound practices for large and sophisticated producers

with decades of experience in the extractive industries sector. For example, experts have developed the new *Guide for Good Governance in Emerging Oil Producers* to assist in the early stages of exploration or production when financial and human resources are limited. Seven objectives identified by Heller (2013) are (i) attract the most qualified investor for the long run, (ii) maximize economic returns to the state through licensing, (iii) earn and retain public trust and manage public expectations, (iv) increase local content and benefits for a broader economy, (v) ensure national oil company participation in the development of resources, (vi) gradually build capacity and enable actors to perform their role, and (vii) increase accountability.

Regional and National Anti-Corruption Framework

The challenge is for ASEAN and member countries to put together a robust anti-corruption framework to address the high levels of corruption in certain countries and improve governance and transparency. Corruption is the abuse of public power for private gain, detrimental for the country and the region. It acts like an irregular tax, increasing costs and uncertainty and distorting incentives to investment. As a result, countries with high levels of corruption show lower levels of economic growth and distorted government expenditures (Cuervo-Cazurra, 2008). The G8 Brief (2013) on anti-corruption estimated that \$20 to \$40 billion is removed illegally from developing countries annually. The large flow of funds generated by the extractive industry makes it a high-risk sector that is prone to corruption.

Establishing a regional and national anti-corruption framework would be crucial and integral to the common framework for managing natural resources. Furthermore, anti-corruption strategies should ensure that revenues are protected, distributed equitably to citizens, invested in human and capital development, and saved in a wealth fund for intergenerational equity.

Currently, there are no regional treaties regarding anti-corruption in the Asia-Pacific region although the ADB has been working with the Organization for Economic Cooperation and Development (OECD)

on a non-binding “Anti-corruption Initiative for Asia-Pacific,” which will also promote good standards for governance in the region. This initiative could form the basis for a binding regional approach to support the implementation of UNCAC (Banisar, 2006).

The UNCAC convention supports state parties in their efforts to implement broad anti-corruption measures affecting their regulations and policies, institutions, and practices. The purpose of UNCAC is to facilitate and support international cooperation and technical assistance in the prevention and fight against corruption, including in asset recovery. The intention of the convention is to promote integrity, accountability, and proper management of public affairs and public property.

However, merely being a signatory to the convention is not sufficient. Implementation of UNCAC requires the establishment of a regional and national anti-corruption strategy as a commitment and action by various stakeholders to the governance process. The strategy should recommend sets of actions to be taken by the government, political entities, the judiciary, media, citizens, the private sector, and civil society organizations.

Findings from some studies have found that relying on anti-corruption agencies to combat corruption has produced mixed results. Pope and Vogl (2000) cautioned that anti-corruption agencies are difficult to establish properly; further, they often fail to achieve their goals once established because they have no prosecuting power, may be poorly staffed or influenced politically, and may not be supported by effective anti-corruption laws. Therefore, it is recommended that the common standard/framework include pertinent anti-corruption laws and measures relating to the implementation of UNCAC to ensure good governance and transparency in the natural resource sector. Laws required for inclusion must address anti-money laundering, whistleblowing, witness protection, anti-bribery, and asset recovery.

Anti-Money Laundering Law

Corruption and money laundering are linked. Money laundering is the process of concealing illicit gains generated from criminal activity.

Combating money laundering is a cornerstone of the broader agenda to fight organized and serious crime by depriving violators of illicit gains and prosecuting them as criminals. The Financial Action Task Force (FATF) is an independent intergovernmental body that sets standards and develops and promotes policies to combat money laundering and terrorist financing with the support of regional bodies (FSRBs). ASEAN member countries are part of the Asia-Pacific Group on Money Laundering (APG) that has 40 member jurisdictions. The IMF and World Bank recognize the FATF's 48 special recommendations as the international standards for combating money laundering and protecting the global financial system.

The recommendations issued by the FATF define criminal justice and regulatory measures that should be implemented to counter money laundering in individual countries. The mutual evaluation program is the primary instrument used by the regional APG body to monitor progress made by member governments in implementing FATF recommendations and to publish the assessments. The FATF also has procedures for identifying and reviewing non-cooperative and high-risk jurisdictions. Once publicly identified, these jurisdictions can face multilateral countermeasures (e.g., blacklisting the country's financial sector) with recommendations for national parliaments and governments to rectify legislation and implementation mechanisms in line with FATF recommendations.

By effectively implementing FATF recommendations, ASEAN countries can (i) better safeguard the integrity of the public sector; (ii) protect designated private sector institutions from abuse; (iii) increase transparency of the financial system; and (iv) facilitate the detection, investigation, and prosecution of corruption and laundering and the recovery of stolen assets (FATF, 2003; FATF, 2012).

The challenge for ASEAN member countries is to pass anti-money laundering laws that fully comply with FATF's 48 special recommendations. Progress in this area is slow; efforts are characterized by reluctance and mixed outcomes. Some ASEAN member countries have passed such laws, but they contain gaps and implementation weaknesses. Others are still considering enacting

legislation to comply with FATF recommendations. Some member countries have approved the law but have failed to put in place supplementary rules and regulations required for implementation; in such cases, law making is generally ineffective. A more concerted effort from member countries is needed to control the international movement of illicit gains derived from corrupt practices and criminal activity. An anti-money laundering law is included in the common framework to protect the wealth derived from natural resources. It is recommended that national parliaments follow the anti-money laundering recommendations and action guide to ensure that the following key provisions are included: (i) support for key anti-corruption agencies (financially and with staff of high integrity); (ii) proper vetting of employees working for designated financial institutions and other similar business professionals such as bankers, foreign exchange dealers, money remitters, casino employees, lawyers, accountants, and real estate agents; (iii) adequate systems to comply with AML/CFT requirements; (iv) reliable paper trails of business relationships, transactions, and disclosures regarding the true ownership and movement of assets; (v) assigned powers to recover stolen assets; (vi) mechanisms for alerting authorities of suspicious activities in the financial system and delegated powers to investigate and prosecute such activities by establishing an FIU; (vii) authorization for freeing, seizing, and confiscating stolen assets; (viii) cooperation with foreign counterparts for coordinated law enforcement action; (ix) mechanisms to provide effective mutual legal assistance; (x) required financial disclosures from public officials through asset and liabilities declarations, proper registers, and reports on politically exposed persons (PEPs); and, (xi) required business interest disclosures from public officials (GOPAC, 2012). The above comprehensive provisions are important to ensure there are no holes in the legislation that can undermine good governance of the natural resource sector.

Whistleblowing Laws and Witness Protection Laws

Corruption will thrive if silence and fear continue to prevail. UNCAC (2004) is the most significant international instrument

on whistleblowing, as it encourages countries to adopt measures that protect disclosures about corruption in public institutions. Whistleblowing can be regarded as an act of free speech; it is an anti-corruption tool and an internal management dispute mechanism. Whistleblowing laws have two major objectives. The first is to change the culture of organizations by making it acceptable to come forward and disclose information on negative activities in the organization, such as corrupt practices and mismanagement. The second objective is to provide a series of protections and incentives for people to come forward without fear of being sanctioned for their disclosures since many countries have passed libel and defamation laws that deter whistleblowers from making disclosures.

Whistleblowing should be distinguished from laws and policies designed to protect witnesses. Witness protection involves the physical protection of an individual who refuses to testify in a criminal case unless promised protection. In whistleblowing, the focus is on the information and not on the person who makes the disclosure. Article 32 in UNCAC provides for the protection of witnesses, experts, and victims, as well their relatives, from retaliation; moreover, the article has established limits on disclosure of their identities (Banisar, 2006).

For whistleblowing laws to be effective, ASEAN member countries will need to decriminalize and repeal defamation clauses in their penal codes to foster trust and confidence regarding disclosures. The involvement of powerful high-level officials and businesses in the extractive industries in awarding contracts and exploration licenses requires that laws are in place for whistleblowers and witness protection to denounce conflicts of interest or/and abuses of power by politically exposed persons. Impunity will prevail if credible witnesses are not able to provide information to the appropriate authorities when the rule of law is being broken and corrupt practices are used to attain lucrative deals.

Anti-bribery Laws

Cuervo-Cazura (2008) argued that countries should have laws that punish bribery, especially because of bribes involving politicians

and government officials. In addition, countries can reduce bribes by foreign investors by introducing laws against bribery abroad, in particular, within ASEAN member countries. Such laws would reduce the incentives for corruption by increasing the costs and risks of detection for multinational enterprises that bribe foreign government officials. To be successful, ASEAN nations will need to coordinate this implementation with other countries. A regional approach would discourage ASEAN and other international multinational enterprises from participating in bribery with another country. Thus, a level playing field for all foreign firms would be in place so that they would face similar costs for bribery. For example, the OECD Convention on Combating Bribery of Foreign Public Officials (2011) established a general framework that criminalizes bribery of foreign officials to gain an improper advantage. The convention encourages mutual legal assistance in investigations and allows for extraditions. The opportunity to establish its own anti-bribery convention is open to the ASEAN organization for member states.

Asset Recovery Laws

Corruption is often driven by greed. Countries can remove the incentive for engaging in corrupt activities by depriving perpetrators and others of benefits from their crimes. The FATF recommends that countries enact effective laws and procedures to freeze, seize, and confiscate stolen assets—proceeds of corruption and laundered property—in response to requests by foreign countries. The authorities should have sufficient powers to trace and freeze assets in cooperation with foreign counterparts. Countries should have effective mechanisms for sharing confiscated assets through coordinated law enforcement actions. Additionally, they should consider establishing funds into which confiscated assets may be deposited for law enforcement, health, education, or other worthwhile purposes (FATF, 2012).

As an example, \$5–10 billion was illegally taken from the Philippines under former President Marcos. After 18 years, the asset recovery efforts of the Philippines achieved a single cash remittance

of \$624 million in 2004 to the Philippines Treasury (G8, 2013). The natural resource sector with its large income flow would require a robust asset recovery law to freeze, seize, and confiscate the stolen assets. Therefore, asset recovery laws should be included in the common framework for managing natural resources; further, an ASEAN Convention on Asset Recovery is proposed to strengthen cooperation between member countries and to stop countries in the region from becoming safe havens for those hiding assets acquired through corrupt practices.

Finally, to ensure that a regional anti-corruption strategy does not remain a mere document, it should be passed by the ASEAN Inter-Parliamentary Assembly (AIPA) as a resolution for implementation by ASEAN member countries. Further, AIPA could also consider passing a binding ASEAN anti-corruption treaty or convention to fight cross-border corruption crimes, recover stolen assets abroad, and strengthen regional cooperation and coordination. This effort would provide a wide range of support in the form of legal assistance, execution of extradition requests, and overtures in international cooperation and coordination for authorities at the policy and operational levels.

DEMOCRACY, RIGHT TO INFORMATION, AND HUMAN RIGHTS CHALLENGES

Constitutional and Electoral Reform

Freedom, democracy, and human rights are essential to protect people's social and economic interests and the perceptions of investors regarding sovereign risk and stable government. Genuinely free, fair, and credible elections are also very important to the promotion of peace, security, economic development, good governance, and the rule of law. These principles are only achievable when there is a democratically elected government that is accountable to the people. The Global Commission on Elections, Democracy, and Security Report (IDEA International, 2012) recommends that barriers to universal and equal participation be removed and that electoral reform be carried out to control and regulate undisclosed and opaque political financing that can lead to flawed elections and corruption. Elections

held with integrity will strengthen democracy, accountability, trust, and cohesion within ASEAN society.

Prospects for democracy in the region (Clarke, 2012) have been strengthened by political reform in Myanmar, which is encouraging for countries such as Laos and Vietnam as they endeavor to institute reforms. Myanmar has taken some important steps toward establishing a democracy and respecting human rights through the release of political prisoners, legalization of peaceful protests, ceasefire agreements with ethnic rebel groups, and elections where the opposition has made inroads. Speaking at the UN in September 2012, President Thein Sein noted that democratic reforms in Myanmar are “irreversible.” The decision to review Myanmar’s constitution represents another stepping stone to a smooth transition toward democracy. The country has authorized technical assistance from the University of Sydney (Myanmar Constitutional Reform Project) and International IDEA to support an inclusive process and provide the tools necessary for all stakeholders in Myanmar’s transition to a constitutional democracy.

There are some aspects in Myanmar’s constitution that require amending, as they are obstacles to managing a common framework for the natural resource sector. Improvements needed include (i) legal conditions of the rule of law and the release of control over the judiciary through conditions for judicial independence, (ii) strengthened separation of powers and freedom of expression and association to enable a stronger oversight and accountability system, and (iii) stronger independent regulatory institutions such as anti-corruption bodies and guarantees of independence for the electoral commission with the view of ensuring free and fair elections (Myanmar Constitutional Reform Project, 2013).

Interdependence between democracy, oversight, and accountability requires that electoral and constitutional reform be carried out in member states where legal provisions limit the exercise of democratic principles associated with transparency and good governance. This recommendation is in line with the aspirations, values, and principles enshrined in the ASEAN Charter (Article 2h) and in the ASEAN Human

Rights Declaration (specifically, the affirmation of all civil and political rights). This challenge is also an opportunity for the ASEAN organization to meet the binding commitments established in the Charter and Human Rights Declaration. An international organization like IDEA International could assist with regional level discussions for democracy building and realization of the governance elements contained in the ASEAN's political and security blueprint. The common standard/framework for managing natural resources should include constitutional and electoral reform to enhance separation of powers, transparency, and good governance in countries where the framework is applied.

Freedom of Expression

A free press plays a key role in sustaining and monitoring a healthy democracy, as well as in contributing to greater accountability, good government, and economic development. Freedom House (2013) publishes annually the Freedom of the Press Index, a survey of media independence; additionally, it monitors freedom of association in 197 countries. The 2013 Freedom of the Press Index ranked Indonesia, Thailand, Malaysia, Singapore, and the Philippines as partly free; further, it identified Myanmar, Laos, Vietnam, Brunei, and Cambodia as not free. Constraints affecting the press are restrictive press legislation, censorship, and access to information; these issues limit transparency and accountability in the natural resource sector. The ASEAN recently adopted the Human Rights Declaration (November 2012), which explicitly affirms the civil, political, economic, social, and cultural rights stated in the Universal Declaration of Human Rights. Further, it reinforces cooperation in the promotion and protection of human rights. Based on this instrument, there is now a consensus and space for press freedom and reform in ASEAN member countries. Accordingly, the common framework for managing the natural resource sector includes removing constraints on the press and promoting transparency and accountability in ASEAN society.

Freedom of Association

Legal barriers affecting civil society participation such as lengthy or cumbersome regulation and reporting processes for NGOs should be removed to enable free speech and accountability, especially for member countries seeking to become EITI compliant. Civil society participation or engagement is a key criterion for EITI. Myanmar, Indonesia, and Timor-Leste have undertaken the process to become EITI compliant, and their experiences are useful information for other member countries. From the perspective of the common standards for managing natural resources, it is very important to have a free media and engaged civil societies to provide oversight and social accountability in the region (Freedom House, 2013; Revenue Watch Institute, 2013). To this end, the common framework should include measures to remove legal barriers and promote freedom of association and free media.

Right to Information

Right to information (RTI) laws and policies to access public information are an integral part of institutional systems in process reform because they mandate that public bodies proactively publish information, put in place systems of implementation, protect personal data, and create effective information management systems to respond to demands for information. These legal obligations embed transparency in public institutions and enhance citizens' abilities to participate in public affairs, protect other human rights, and hold governments accountable. Therefore, RTI should be included in the common framework to promote the discipline of maintaining accurate and transparent natural resource management information and data, exemplifying integrity and serving as a foundation for the ongoing strategic management of extractive industries.

To date, only two ASEAN countries have RTI laws—Thailand (1997) and Indonesia (2008). Other member countries—the Philippines, Cambodia, Malaysia, Myanmar, Singapore, Thailand, and Timor-Leste—have had active RTI campaigns running in some cases as far back as 10 years. Thus, they are now in a position to enact RTI laws.

Laos, Vietnam, and Brunei have had limited exposure to RTI because of the limited capacity for civil societies to operate in these countries.

As a reference, the Inter-American Law on RTI provides guidelines for developing and improving RTI frameworks within individual countries. From the perspective of good governance in natural resources, it is imperative that there are no provisions for hiding corruption in large flows of revenue. Moreover, RTI laws are an integral component of open government and EITI initiatives designed to promote transparency in governance. The analysis by region highlights opportunities for ASEAN nations to improve outcomes of RTI laws; formation and development of the ASEAN organization reflects the regions' respect for human rights, awareness of the collective influence of a regional group, the desire not to be left behind by others, and an interest in open data and economic potential (Global Right to Information Update, 2013).

ECONOMIC GROWTH CHALLENGES

Economists define economic growth of a country as an increase in its total output measured by calculating the GDP, which is calculated by weighing outputs according to their prices and adding them together. Since output and income are closely related concepts, the measure also serves as a statistic for a country's level of income. Increased growth has important benefits to development; additionally, it is an important factor in reducing poverty in poor and developing countries.

The ADB Institute (2012) reported that the ASEAN's GDP in 2010 was \$1.85 trillion and the average annual (real) GDP growth rate was 5.3%. It also reported an average per capita income of about \$3,100. It is the ASEAN's intention to continue a strong growth pattern. To this end, the ASEAN organization has set an ambitious target to increase average annual economic growth to 6.5% in order to accelerate the pace of development and reduce poverty. Economic growth is beneficial to member countries as it creates jobs and investment, raises per capita income, and increases demand for goods and services.

The challenges for the ASEAN region to continue achieving high growth rates are threefold. The first relates to the source, level, and growth rate for member countries given their diversity in economic

structure and size. The second challenge is the impact of the natural resource sector on the economy (i.e., its effect on economic growth and the structural transformation required to sustain and increase such growth). The third challenge relates to how and where the income from growth should be spent to ensure that the gains benefit the people and close development gaps.

To understand these growth issues within the framework of managing natural resources, it is important to unwrap the complex and interrelated challenges that ASEAN member countries have to confront. This analysis is based on growth of the ASEAN organization and its member countries, GDP, and trade performance, highlighted in Tables 2 and 3.

The challenges are significant because regional averages disguise the diversity and differences in each country's developmental stage, which requiring targeted and individualized structural policies and reforms, especially in Cambodia, Laos, Myanmar, and Vietnam (CLMV). These reforms must complement ASEAN economic partnership agreements, economic integration policies, and the robust implementation of the ASEAN Free Trade Area (AFTA).

Looking at ASEAN (2012) economic growth published in the most recent Community in Figures Report (ACIF) and GDP for the period 2010, the share of GDP growth for CLMV countries is only 9.1%, compared to the 90.9% growth contribution from the other six ASEAN members. CLMV countries contributed \$999, which is considerably lower than the \$3,932 an average growth rate of the six ASEAN members. The lower growth rate of CLMV countries had the effect of reducing the overall total ASEAN GDP figure to \$ 3,106.

The disparity is more glaring for economic growth rates and GDP per capita rates for individual member countries. The figures show that income levels in ASEAN societies range from high to low. Singapore and Brunei report high income levels with a GDP per capita of \$43,929 and \$29,915, respectively. Middle-income members are Indonesia (\$3,023), Malaysia, (\$8,262), the Philippines (\$2,014), and Thailand (\$4,735). Vietnam's income status has improved to lower-middle with a GDP per capita of \$1,238. The other three ASEAN members' GDP

Per capita rates—Cambodia (\$731), Laos PDR (\$1,045), and Myanmar (\$715)—are characterized by low income, underdevelopment, and major pockets of poverty despite accelerating economic growth (ASEAN, 2012).

Table 6.2. ASEAN population and GDP per capita, 2010

Member Country	Population	GDP Per Capita US\$
Brunei Darussalam	415	29,915
Cambodia	15,269	731
Indonesia	234,181	3,023
Lao PDR	6,230	1,045
Malaysia	28,909	8,262
Myanmar	60,163	715
Philippines	94,013	2,014
Singapore	5,077	43,929
Thailand	67,312	4,735
Viet Nam	86,930	1,238
ASEAN	598,498	3,106
CLMV (includes Cambodia, Lao, Myanmar, Vietnam)	168,592	999
ASEAN 6 (includes: Brunei, Indonesia, Malaysia, Philippines, Singapore, Thailand)	429,907	3,932

Source: ASEAN (ACIF), 2012

The ASEAN Nominal GDP and rates of growth and shares for CLMV (Table 3) indicate the marked variance in annual growth rates for each member state. ACIF recorded growth rates ranging from as low as 2.6% for Brunei to as high as 14.5% for Singapore in 2010. The greatest challenge is how to raise the average 5.5% economic growth rate of the CLMV countries and Brunei closer to the range achieved by Indonesia, Malaysia, the Philippines, Singapore, and Thailand. If the CLMV and Brunei cannot demonstrate growth, the target annual growth rate of 6.5% will be difficult to achieve because of financial

crises in Europe and the U.S., as well as China, with its slower growth rate.

The ASEAN's total trade figure grew by 33.1% (i.e., to US\$2 trillion). Primary growth in trade was linked to the ASEAN's openness to trade, expansion, and strong demand for a diverse range of export products both inside and outside the region. Intra-ASEAN and extra-ASEAN trade partners accounted for 25.4% and 74.6%, respectively. The former figure indicates potential for an improvement in the growth rate of ASEAN member countries.

A positive aspect of ASEAN trade is the diversity in commodities exported. ACIF figures for 2010 show that 20 top export commodities contributed \$463,240 million in export value (43.3%) of the total \$1,070 billion in export commodities. The balance of \$606,760 million (56.7%) in export value was for other export products. Natural resource products accounted for \$210,298 or 19.7% of export income, but this figure is increasing as some CLMV countries have expanded their exports in natural resource commodities since 2011 (ASEAN, 2012).

However, the performance story is different for individual countries, as some can improve their export trade to strengthen their economic growth rates. Among ASEAN countries in this category are Myanmar, with a current GDP trade rate of 27.4%; Indonesia with 41.4%; the Philippines with 57.9%; and Lao PDR with 69.3%. Singapore, Malaysia, Thailand, and Vietnam have high export-to-GDP ratios (over 100%) while exports from Brunei and Cambodia accounted for over 80% of their GDP levels during 2010 (ASEAN, 2012).

Table 6.3. ASEAN and CLMV: Nominal GDP and rate of growth for periods indicated

COUNTRIES	1998	2003	2008	2009	2010
In US \$ Million					
ASEAN	483,057	721,978	1,515,317	1,504,277	1,858,683
CLMV	38,029	58,051	132,309	144,013	168,351
ASEAN 6	445,027	663,926	1,383,008	1,360,264	1,690,332
Percent (%) share of total					
ASEAN	100.0	100.0	100.0	100.0	100.0
CLMV	7.9	8.0	8.7	9.6	9.1
ASEAN 6	92.1	92.0	91.3	90.4	90.9
Annual growth rates (%)					
Brunei	-0.6	2.9	-1.4	-1.8	2.6
Cambodia	5.0	12.6	6.7	0.1	5.0
Indonesia	-13.1	4.8	6.0	4.5	6.1
Lao PDR	4.0	5.8	7.8	7.6	7.2
Malaysia	-7.4	5.8	4.8	-1.6	7.2
Myanmar	5.8	5.1	3.6	4.8	5.3
Philippines	-0.6	3.7	3.4	1.1	7.3
Singapore	-2.1	4.6	1.8	-0.8	14.5
Thailand	-10.5	7.1	2.5	-2.2	7.8
Viet Nam	5.8	7.4	6.3	5.2	6.8
ASEAN	-5.9	6.6	4.9	1.3	7.1
CLMV	5.2	10.6	6.4	2.0	5.5
ASEAN 6	-8.8	5.3	4.2	1.1	7.7

Source: ASEAN Finance and Macroeconomic Surveillance Database and IMF—World Economic Outlook, April 2011

The overview provided by the economic data raises questions as to why some member countries are not growing as rapidly as others; the data also highlight ASEAN challenges regarding future growth, particularly for countries endowed with natural resources. Brunei is an

interesting and relevant example because of its complete dependence on natural resources, small population size (i.e., 415,000), and its high GDP (i.e., \$29,915) derived from the lowest regional annual growth rate of only 2.6% in 2010.

According to OECD (2013), Brunei has relied completely on the natural resource sector for its income over the last 80 years. Hydrocarbons, oil, and gas account for over 90% of the nation's exports and 60% of its GDP. This scenario presents certain challenges as much of this revenue is from the sale of exhaustible and nonrenewable resources.

Empirical evidence cited by Sachs and Warner (1995) shows that, on average, countries with high levels of resource-based exports (reflected in GDP) tend to have lower growth rates and that resource-poor economies frequently outperform resource-rich economies in terms of growth. Singapore, for example, is a resource-poor country that has delivered a high growth rate of 14.5% and an export-to-GDP ratio of over 100%. Timor-Leste, an observer ASEAN member, is in a similar situation to Brunei's; it is highly dependent on natural resources with coffee as the only other (minor) source of export income. Thus, the nation faces many economic, infrastructure, human capital, and institutional challenges.

Research by Sachs and Warner is supported further by Collier's (2007) reasoning that an economy fails to grow when there is an abundance of natural resources because surplus income from one-off sales of natural resources has a tendency to make an entire society forget about normal economic activity. Linked to the inclination for natural resource countries to have lower growth is the risk of falling prey to the Dutch disease. This term is known also as resource curse. Collier (2007) explained it as "The resource exports cause the country's currency to rise in value against other currencies. This makes the country's other export activities uncompetitive or more expensive. Dutch disease can damage the growth process by crowding export activities that otherwise have the potential to grow rapidly such as labor intensive manufacturing and services that generally are the best vehicles for technological progress."

The challenge for ASEAN countries is to avoid the Dutch disease, especially CLMV member countries that are already dependent on natural resource wealth and are undergoing structural transformation of their economies. These countries need to strengthen other productive sectors by harnessing the resource wealth for growth, avoiding rent seeking, and ensuring the equitable distribution of wealth.

Presently, Brunei is attempting to address its dependence on oil and gas by implementing the Tenth National Development Plan 2012–2017 to transform its economy and improve the average growth rate to 6%. The plan entails carrying out economic reforms to reduce dependence on hydrocarbons, enhance productivity, and improve the business environment (OECD, 2013).

The agricultural economic structure in CLMV countries represents approximately 27% of the GDP; this sector employs 60% of the population. Yet, Myanmar and Laos are becoming more reliant on natural resources for export income and economic growth. During 2011, Myanmar's export value for oil and gas was \$3.5 billion, representing 38% of the total export value. Laos exported minerals and earned \$1,088 billion (55% of total export value). In Cambodia, manufactured textiles were responsible for 90% of the country's export income. Ongoing reforms are necessary to strengthen the export market, create a climate of economic openness, and shift from primary exports to labor-intensive manufacturing and services (Onozawa, 2012).

During the structural transformation phase, the challenge for resource-rich countries is to avoid the temptation to use tariff and subsidies to protect industries that are not competitive. Sachs and Warner (1995) warned that it would be a mistake to conclude that countries should subsidize or protect non-resource sectors as a basic strategy for growth; they argued that government policies that promote non-resource industries over the natural resource sector would be costly. Engaging in open trade policies that are simple and basic can often be effective in raising national growth rates. This argument holds true for ASEAN member countries like Malaysia,

Indonesia, and Thailand. As CLMV countries, Brunei, and Timor-Leste should attempt to diversify while simultaneously intensifying their efforts to explore their natural resources, and they should consider the three previously mentioned ASEAN member countries as models for open trade to avoid the resource curse.

Another instrument that ASEAN countries could use to mitigate the Dutch disease is the wealth fund, which sequesters large flows of export income from the sale of natural resources into a trust fund account that is transparent and managed prudently to mitigate fluctuations in the value of currency and prices. A wealth fund would enable the government to drip feed sufficient budgetary support into the economy to fund sustainable development based on the country's absorptive capacity. Singapore and Malaysia have set up sovereign funds to invest their large savings and account surpluses; furthermore, Brunei and Timor-Leste have established petroleum trust funds for oil and gas revenue (Steigum, 2013: 4).

ECONOMIC DEVELOPMENT

Achieving high growth rates does not necessarily translate into economic development or poverty reduction, as confirmed in a study by Shome and Tondon (2010) regarding Indonesia, Malaysia, the Philippines, Singapore, and Thailand. Findings showed a low correlation between the GDP and Human Development Index (HDI) for most economies except Indonesia. Results of the study indicated that despite high growth rates for the Philippines, Singapore, Malaysia, and Thailand, there was not a corresponding improvement in the HDI rating.

In the Philippines, for example, the HDI ranking was 124th despite record-level economic growth; unfortunately, the country's education index remained stagnant despite the adult literacy rate having reached 93.4%. Furthermore, 7% of the population did not have access to clean drinking water, and 28% of children below age five were underweight. Singapore has high social indicators; however, findings from the study indicate that growth has increased at a faster pace than development. Malaysia has achieved a good standard of living and universal primary

education, but the country is still lagging in the treatment of HIV and other illnesses. Thailand reduced poverty to 11% following a 39% level in 2004; yet, a high degree of inequality, concerns over the quality of higher education, and an inequitable availability of health services are ongoing issues. According to the study, Indonesia is the only country with a high correlation between GDP and HDI. Since the end of its 1997 crisis, Indonesia has made significant progress in reducing poverty. However, 52% of the population continues to live on less than \$2 per day, affecting the nutritional status of children under age five.

Going forward, ASEAN members must ensure that the outputs associated with higher growth are directed into higher expenditures for education, health, infrastructure, and poverty alleviation. Such interventions are needed to improve the productivity of citizens, which will lead to economic growth. Therefore, two instruments are needed. The first is a wealth fund for natural resource profits that can be used for expenditures geared toward economic development. The second is the proposed ASEAN Charter for Budget Honesty, outlining where and how resource wealth can be spent and describing processes to scrutinize for budget transparency from the bottom up. The aim is to ensure that economic gains are diverted to and actually spent on fundamental human development needs (Collier, 2007).

SITUATION ANALYSIS

The data presented reveal significant and interconnected challenges for ASEAN countries in politics, natural resource management, institutions, governance, and economic areas. The challenges indicate the position of this region in its trajectory to achieve the broad strategic objectives and values outlined in the ASEAN Charter and in human rights declarations. Therefore, a situation analysis is appropriate for highlighting relationships between the various problems and explaining how to overcome the challenges in a coherent and sustainable way.

The history of each ASEAN member country has shaped its political system and economic development. There is a correlation between a

country's economic success and its transition to democracy, a scenario that is reflected already in the experiences of certain ASEAN member countries. Economically, the open, diverse, and rapid growth in ASEAN member countries has had liberalizing consequences. The Asian economic miracle brought with it increased literacy, globalization, a more diversified economic base, a rise in per capita income, better communication and access to information, and a business class. Together, these forces have unleashed a greater demand for improved governance and services, property rights, legal certainty in business dealings, access to information, and freedom of speech—characteristics of a robust civil society that is ready to question and propose changes to the status quo.

At the heart of the challenges is the design of state architecture and the varied political systems in ASEAN member countries. Broadly, ASEAN member countries fall into four categories: monarchy, authoritarian regime, in transition to a democracy, or consolidated democracy. Moreover, each member country is in the process of gradually extending economic, social, political, and civil rights to its citizens to achieve a level of constitutional liberalism that has all the checks and balances explained by Sen (1999) and Zakaria (2004).

Emerging democracies around the world, including those in ASEAN countries, demonstrate that it is no longer enough to say that a country is democratic because it holds consecutive and competitive multiparty elections. Asians are looking for a political system to accompany a set of freedoms that the people truly experience. Zakaria (2004) argued that these freedoms include an individual's right to life and property, freedom of religion and speech, equality under the law, impartial courts and tribunals, and the separation of church and state. Therefore, ASEAN member countries will need constitutionalism to place the rule of law at the center of politics and for the state to provide checks and balances to prevent the accumulation of power and abuse of office. Each country must construct political, governance, and legal systems that will prevent the government from violating the rights of citizens. Consequently, ASEAN member governments must deliberately relax their grip on public life to steadily expand the freedoms provided for

in the Human Rights Declaration.

In the examination of ASEAN's democratization process, parallels can be drawn from historian Phillip Nord's (1995) account of Europe's journey to democracy. It is evident that the ASEAN's democratization process is attributed to rapid growth and socioeconomic changes. These dynamics have produced change agents that constantly apply pressure and oppose the ruling elite in order to obtain contemporary "citizen needs" and the yardsticks related to constitutional liberalism. "People power" in the Philippines during the 1990s toppled the Marcos regime; in Indonesia, people power led to Suharto's downfall during the Asia crisis in 1998. Additionally, the first free and fair elections have been held in Myanmar following its citizens' struggle for freedom, political, and civic rights. Dissent and opposition are occurring presently in Thailand, where protesters are calling for sweeping reforms; in Cambodia, where rights groups and labor unions are clamoring for increased wages and the release of people detained for protesting. A similar situation exists in Mindanao, a resource-rich area plagued by separatist conflict in the Philippines.

Studies show that once reforms are introduced to an economy, the internal dynamics and pressures produce changes to the political equilibrium and system that promote governance reforms. To illustrate, Pei's study (1997) of Taiwan reveals that the results of liberalization and the road to democracy are often unintentional. This finding was confirmed by Nord (1995), who described Europe as a place where autocrats did not think they were democratizing but, rather, spurring growth and modernity; consequently, they unleashed forces they could not contain. Sen (1999) argued that "political and civil rights guarantees related to the open discussion, debate, criticism, and dissent are central to the processes of generating informed and reflected choices; and they are processes crucial to the formation of values and priorities."

If history and recent experiences over the last decade are to serve as lessons, the issue is no longer how to limit freedoms but how to respond to and deliver citizens' needs by supporting synergy and embracing societal values. Thus, societal values should be incorporated

nationally beyond written declarations. These values should drive and shape political, governance, economic, and security institutions and processes to mirror the cultural and value system envisioned by member countries when they approved the ASEAN Human Rights Declaration. Thus, political parties must share power and compromise, and the state must limit its power by being accountable to citizens.

Zakaria (2004) suggested that a lasting solution could be achieved by deliberately combining economic and political reform to create a limited and accountable state and a genuine middle class. Sen (1999) also explained that there is strong evidence that economic and political freedoms reinforce one another. Economic reform requires administering genuine contracts, enforcing the rule of law, and ensuring a functioning judiciary, and promoting openness (globally), access to information, and the development of a strong business class. These elements make an economy thrive; additionally, they are integral to political freedom. Many ASEAN member countries are on track to combine economic and political reform, while others are still in the phase of focusing only on economic development based on their levels of growth and per capita income.

Collier (2007) argued that if an economy is weak, the state is likely to be weak; moreover, dependence upon natural resources (e.g., oil and diamonds) helps to finance and even generate conflict. Collier's research into development traps revealed that low income, slow growth, and primary commodity dependence can lead to civil wars. Further, countries with low income face a disproportionately high risk of relapse, which he refers to as the "conflict trap. In addition to 58 other countries, Collier (2007) identified Laos, Cambodia, and Myanmar as countries that are still caught in "development traps," countries that are small, have a low per capita income, are politically unstable and are experiencing civil wars. Consequently economic development in these countries has been delayed. This view is also shared by Chheang and Wong (2012), who argued that prolonged conflicts, regime changes, instability, and political upheaval have placed Cambodia, Laos, and Vietnam far behind other Southeast Asian countries in terms of economic development, industrialization, and

modernization.

Przeworski and Limongi (1997) demonstrated that per capita income is a good predictor of a country's political stability. Their results were later explained and simplified by Zakaria (2004). Every country in existence between 1950 and 1990 was investigated. Calculations indicated that the regime in a democracy with a per capita income of under \$1,500 would only last eight years. The anticipated term for a democratic regime with per capita income of \$1,500–3,000 was about eighteen years. Regimes were highly resilient when the per capita income was above \$6,000. Based on these calculations, ASEAN countries with a per capita GDP of \$3,000–6,000 should be successful in their transitions to democracies.

The relationship between economic growth and political stability cited in the Przeworski and Limongi study (1997) can be interpreted by ASEAN member countries in the following ways. Indonesia, the Philippines, and Thailand have per capita incomes in the \$3,000–6,000 range. Therefore, they are still in the process of forming resilient democracies, but their efforts should prove to be successful because their economies will support reforms to the political system. On the other hand, Cambodia, Laos, Myanmar, and Vietnam have per capita incomes under \$1,500. It is possible, then, that their regimes will struggle with political stability because stronger economic growth and further improvements in per capita income are needed. Per capita income in Singapore and Malaysia already exceeds \$6,000; therefore, both countries have a strong economic foundation, and their governments can safely and purposely relax their grip on society to facilitate political reforms.

In addition, CLMV countries will need to bear in mind that foreign direct investors also tend to consider a country's political stability when assessing investment opportunities. During the transition to democracy, it is important that these countries ensure that dissent and opposition to political processes, as well as to human rights and governance issues, are properly and quickly resolved so that they can attract business confidence and experience growth. Political instability labels the country as high-risk, a detracting feature for

foreign investors.

Another challenge for low- to middle-income member countries rich in natural resources is ensuring that economic development is not focused on wealth that is not earned. It is important that the exploration of vast oil and mineral reserves does not create a state and business class so dependent on it that societies remain uneducated, unskilled, and unhealthy because modernity is linked to new buildings, hospitals, mansions, cars, and televisions. Often, knowledge is imported to run these facilities. In these situations, economic mismanagement, political corruption, and institutional decay become entrenched and systemic (Zakaria, 2004). Collier (2007) observed that poor governance and related policies can destroy an economy at an alarming speed. Presently, the key governance challenge for the ASEAN organization is the high level of corruption in member countries' economies.

The corruption level in ASEAN economies has an impact on the natural resource sector. Empirical data collected from the Revenue Watch Institute (2013) revealed that the Resource Governance Index (RGI) has confirmed that the quality of governance in the oil, gas, and mining sector of 58 countries is very low. The RGI revealed that only 11 of the countries (i.e., less than 20%) have satisfactory standards for transparency and accountability. In order for people in ASEAN nations to benefit from their resource wealth, these weaknesses must be rectified by a comprehensive strategy that includes all interrelated elements. Attention is needed to improve dissemination of project information from regulatory agencies and to ensure that state-owned companies and natural resource funds have transparency and accountability standards to control corruption, improve the rule of law, respect civil and political rights, permit freedom of press, and accelerate the adoption of international reporting standards. Therefore, it is imperative that ASEAN member countries focus more strongly on eradicating corruption and establishing systems and processes for good governance and sound policy development. This approach is needed to effectively manage the natural resource sector.

The rule of law transcends political conduct, governance, and legal

certainty for businesses. In countries where the rule of law is not firmly at the center of decision-making processes, men with power operate above the law to support and allow inequalities, conflicts, and corruption to fester and flourish. Institutional and legal reforms combined with human resource capacity building are needed urgently in the judicial sectors of ASEAN member countries to implement the Bangalore Principles of Judicial Integrity. Equality before the law, fair treatment of all citizens, and certainty in legal rights are fundamental to economic growth, development, peace, security, and political stability.

The HDI reports and studies regarding the ASEAN 5 members (Shome & Tondon, 2010) have shown that ASEAN member countries are still lagging behind in the realization of broader economic development improvements (i.e., literacy rates, health conditions, access to clean water, poverty rates, and general quality of life). Sen (1999) also advocated that literacy and numeracy are related to the development process because they help the masses become participants in economic expansion, growth, and politics. Additionally, they build capacity for citizens to foster their own initiatives in improving their own socioeconomic conditions. Growth without development will not change a country's economic and living standards; the two are related. Further, they must not outpace each other. Additionally, if a country's per capita income is under \$1,500, the political system could also be affected; instability may occur as citizens exert pressure for better economic governance and development outcomes.

The institutional challenge for the ASEAN organization is two-dimensional. The first dimension relates to the political structures, rules, institutions, systems of cooperation between member states, and the institution's technical capacity. To progress and strengthen the ASEAN's effectiveness as a regional body, the reforms discussed under institutional challenges should be addressed promptly and adequately. Unless there is a more robust approach to overcome the issues, it will be very difficult for ASEAN member countries to mutually grow economically and provide solutions for contemporary and future problems. It is imperative to acknowledge the ASEAN's successes to

date; going forward, however, will require a competent and efficient ASEAN machine to drive the institution's vision, plans, and programs.

The second institutional dimension relates to how ASEAN member countries' governance and accountability structures function and perform. The AEC Scorecard results point to inefficiencies in the implementation of its initiatives by member countries. Although each country is different with its own structures and processes, inefficiencies must be eliminated with broad reforms in the public sector and in state institutions. In instances where there are common policy agendas, members can share ideas and learn from each other through peer reviews. Thus, ASEAN political bodies such as the Ministerial Council and AIPA, and the technical Secretariat, must articulate and synchronize with ASEAN member countries' parliaments, governments, and public service providers to support the implementation of regional values and initiatives. This approach could nurture and strengthen opportunities to increase economic growth, political reform, and economic development.

To implement the common standard/framework for managing natural resources, a coordinated, coherent, and customized approach must be demonstrated at regional and national levels. Therefore, financial resources, technical assistance, and expertise from a broad range of disciplines and organizational status (multilateral) are needed. It is proposed that the ASEAN institution establish an ASEAN Extractive Industry Trust Fund to finance and support regional and national implementation of the common framework for managing natural resources. The fund would support regional coordination mechanisms to implement standards, promote learning, and inspire a wide range of broad stakeholders as participants.

There are many benefits associated with the establishment of a multi-donor Extractive Industries Trust Fund for member countries. They include availability of large-scale, continuous, and predictable funding; depth of policy standards; partnerships and program assistance; adequate staffing to maintain policy dialogue and project management oversight; the ability to support and promote regional collaboration across most sectors; transparent rules and regulations

regarding financial assistance, institutional development that is transparent and sustainable, sequenced interventions, and support for implementation of new laws and procedures.

It is proposed that the steering committee include donors and multilateral organizations, appropriate sector representatives, implementation partners, and special observers to ensure that reform programs and initiatives for implementation meet established principles and requirements. Multilateral organizations like the IMF, WB, ADB, and UNDP would be reliable trustees with expertise in trust fund modalities, skills in managing multi-donor trust funds, and the capacity to attract and secure sufficient funds to support the program. Regional parliamentary organizations such as AIPA and SEAPAC should also be involved to provide oversight and to promote and approve the necessary legislative measures.

The above situation analysis encapsulates the benefits that ASEAN member countries can derive from establishing and implementing a common framework for managing the natural resource sector. The impact will be felt through society as the interrelated approach brings improvements to living standards in the region.

CONCLUSION

To conclude, it is possible for ASEAN countries to operate according to a common standard/framework for managing natural resources, although the opportunities need to be harnessed and the challenges overcome to enable the natural resource sector to thrive and benefit the ASEAN economies and society. The data and analysis on politics in ASEAN nations, as well as their natural resource management, institutions, governance, economies, and development explain the challenges and highlight the need for a holistic and comprehensive approach in managing the natural resource sector.

To this end, we include a recommendation for a common/standard framework that includes political reforms, expansion of citizens' social, political and economic rights; policy and legal reform to strengthen economic growth and maximize the revenue from natural resources; good governance; and the development of an anti-corruption

framework to protect revenue and enable the equal distribution of natural resource wealth. New policy initiatives like the EITI and Open Government Partnership are needed to improve transparency and accountability in managing natural resources. Finally, institutional reforms to ASEAN political structures and bureaucracies need to be undertaken to achieve strategic objectives and support the implementation of the common framework.

The reforms and initiatives provide the framework for political/economic development and improved performance in ASEAN countries. The recommendations set forth below are aimed at institutionalizing reforms, governance, and accountability systems and processes for managing natural resources and fostering synergy and cooperation between ASEAN member countries to enable the implementation of the common standards.

RECOMMENDATIONS

In view of the above analysis and conclusions, the following recommendations are proposed for inclusion in the ASEAN common/standard framework for managing natural resources:

Recommendation 1:

ASEAN prepares and submits the common standard/framework for managing natural resources for approval by AIPA General Assembly by way of a resolution or ASEAN convention for implementation by ASEAN member states.

Recommendation 2:

ASEAN establishes the multi-donor ASEAN Trust Fund for Extractive Industries to support the implementation of the common standard/framework for managing natural resources.

Recommendation 3:

AIPA approves the entry of SEAPAC as a Special Observer to assist in the implementation of the common standard/framework for managing natural resources and supporting peer monitoring and review at regional and national levels.

Recommendation 4:

ASEAN and AIPA establish implementation and monitoring mechanisms for ASEAN member countries with the support of SEAPAC to measure their performance in reviewing and approving new laws, reforms, and new initiatives related to the implementation of the common standard/framework for managing natural resources.

Recommendation 5:

AIPA approves a regional anti-corruption convention, regional anti-bribery convention, and regional anti-corruption strategy for each member country to enable adaptation and development of new national legislation.

Recommendation 6:

ASEAN approves a joint policy agreement to endorse EITI by resource-rich member countries.

Recommendation 7:

ASEAN and AIPA adopt a resolution to approve the Bangalore Principles for Judicial Integrity; further, they urge member countries to carry out judicial reforms in line with the Bangalore values.

Recommendation 8:

ASEAN establishes the ASEAN Regional Tax Administration Forum to assist in the tax reform process for ASEAN member countries.

Recommendation 9:

AIPA approves the Convention on Asset Recovery for all member states to strengthen cooperation among ASEAN member countries regarding the return of assets obtained through illicit or corrupt practices.

Recommendation 10:

ASEAN and AIPA approve the ASEAN Charter for Budget Honesty.

Recommendation 11:

ASEAN and AIPA approve principles for managing natural

resource revenue; further, they encourage member countries to establish wealth funds to protect natural resource revenues for intergenerational equity.

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CHAPTER 7

The Benefits of Applying the Framework for Indigenous Rights in Southeast Asia

Andy Whitmore

INTRODUCTION

Southeast Asia is estimated to be home to up to 20% of the world's indigenous peoples (Quizon, 2014). Indigenous peoples in the region are among the poorest in terms of income and access to justice, made worse by insecurity over land tenure, food security, and the gradual erosion of their traditional cultures (Plant, 2002). Although much of this paper will concentrate on the advances in the norms of international indigenous rights, it should be remembered why such a framework is necessary in the first place: to address the past and current situation of discrimination and economic deprivation among indigenous peoples. This is all the more urgent given that indigenous peoples are frequently living in areas of land - in the highlands, forests and remote islands - that are being targeted for large-scale extractive projects. (UNDP and OHCHR, 2014).

As a result of significant advocacy from indigenous groups and their supporters, the passage in 2007 of the UN Declaration on the Rights of Indigenous Peoples (the Declaration) by the UN General Assembly marked a watershed moment in global recognition of indigenous rights. The Declaration was particularly noteworthy for promoting the requirement for free, prior, informed consent (FPIC) on any project that encroaches on, or impacts, indigenous peoples' lands, territories and resources. Although FPIC previously appeared

in a number of human rights instruments - such as ILO Convention No. 169 and the Committee for the Elimination of Racial Discrimination's general recommendation 23, as well as in national and international jurisprudence - it was the passing of the Declaration that truly established it as an international norm (Doyle & Carino, 2013). This has led to the Declaration being increasingly recognized by a range of actors as the key global standard for indigenous peoples implementing their rights to self-determination. It is viewed as a vital tool for ensuring the right to participate in decision-making on projects that will have an impact on their lands, territories or resources.

Alongside guidance on its implementation, the requirement for FPIC is increasingly being reflected in international instruments, international and national jurisprudence, national laws, and financial institution and company policies. A key milestone in this progress occurred when the World Bank's International Finance Corporation (IFC) finally decreed, in May 2011, that its safeguard mechanisms adopt the principle of FPIC. This decision is creating repercussions outside of the IFC's immediate lending market as these safeguards form the basis of other lending guidelines, such as those found in the Equator Principles.⁴⁶

THE CURRENT LEVELS OF UNDERSTANDING BY DIFFERENT ACTORS OF FPIC

Different stakeholders are prone to different understandings of what they believe FPIC means, and how it should be implemented. In the case of the extractive industries, the different sectors can primarily be broken down into States, corporations, financiers and indigenous peoples.

States are the principal bearers of human rights obligations in

⁴⁶ The Equator Principles is a risk management framework, adopted by financial institutions, for determining, assessing and managing environmental and social risk in projects and is primarily intended to provide a minimum standard for due diligence to support responsible risk decision-making. Currently 78 adopting financial institutions in 35 countries have officially adopted the Equator Principles, covering over 70% of international project finance debt in emerging markets. For more information see: www.equator-principles.com/index.php/about-ep/about-ep.

that they have a duty to respect and protect the human rights of indigenous peoples. However, despite the fact that there is no State dissenting to the Declaration, States are often reluctant to implement the internationally recognized rights of indigenous peoples. In Asia in particular, there are a number of governments, such as those of China, Bangladesh, Vietnam and Indonesia which, while expressing their support for the rights of indigenous peoples overseas, deny the application of the term and its associated rights, in their own countries (UNDP and OHCHR, 2014).⁴⁷ This is primarily caused by a fear of ethnic divisions within countries, as well as of granting too much autonomy to citizens over control of natural resources. This perhaps explains why ILO Convention No. 169, has not been ratified by most Asian countries even though the Convention itself explains that its “use of the term peoples ... shall not be construed as (implying rights attached to) the term under international law”.⁴⁸

However, as Doyle & Carino (20013) note, the broad advances being made in indigenous rights - through the work of UN Charter and Treaty bodies, through international and national jurisprudence and the subsequent pressure for national legislation – are creating an irresistible pressure to respect indigenous peoples’ rights, including the requirement for FPIC. Southeast Asian States will eventually have to address this pressure. In the later section, the author will review how five of the major States in the region are doing that.

Extractive industry corporations, according to the UN Guiding Principles on Business and Human Rights, have the responsibility to respect human rights (OHCHR, 2011). The UN Special Rapporteur on the rights of indigenous peoples has clarified that extractive

47 This is not a uniform situation throughout Asia. For instance the Philippines particularly has made great strides toward recognising and accommodating indigenous rights, notably through the 1997 Indigenous Peoples Rights Act, even if indigenous rights groups note there are problems with the implementation.

48 20 countries have so far ratified this Convention. In Asia only Nepal has ratified, and no Southeast Asian country has done so yet. However, ILO 169 was ratified by all Latin American countries with significant indigenous populations. See: http://www.ilo.org/dyn/normlex/en/f?p=1000:11300:0::NO:11300:P11300-INSTRUMENT_ID:312314

companies should “as a matter of company policy, endeavour to conform their behaviour at all times to relevant international norms concerning the rights of indigenous peoples” (Anaya, 2009, para 56). Furthermore, in his most recent report on the extractive industries the Special Rapporteur emphasized “the responsibility of companies to respect human rights, in accordance with the Guiding Principles on Business and Human Rights ... and that this responsibility is independent of whatever requirements the State may or may not impose on companies and their agents” (Anaya, 2013a, para 22).

Despite historic intransigence in the extractive industries, some companies are broadening their understanding of FPIC and accepting it as a rights-based process. Although this trend in corporate policy-making is encouraging, most corporate policies still fall short of adequately complying with international standards of indigenous rights (and that is even before we consider how those policies are implemented). The improvements are at least partly thanks to the accumulated experience of progressive companies, making it possible to see FPIC as an inclusive and iterative process. A recent research project has partly focused on positive case studies of FPIC by companies (Doyle and Carino, 2013,). Nevertheless, those case studies identified by the companies tend to focus on benefit sharing. Few can point towards positive examples of the ‘consent’ part of FPIC despite the acceptance of indigenous consent being key to building the trust necessary to reach agreements (Anaya, 2013a). The most often cited example of a company recognizing the indigenous right to say no is that of Rio Tinto agreeing, in response to objections by the aboriginal owners, not to proceed with the Jabiluka mine in Australia. The company formally and publicly agreed to this despite holding a mining lease from the State authorities and almost regardless of the relevant legislation, but – importantly – only after a vociferous indigenous campaign (Doyle and Carino, 2013).

The financiers of extractive projects have, like many companies, a tendency to “bureaucratize” FPIC, placing a focus on verification and auditing, which in turn leads to restricted ‘practice guidance’. There is a danger that these ‘limiting’ guidelines will be used to

justify limitations on the indigenous role within the FPIC processes. Therefore, financiers have to develop a nuanced understanding to respect the particular governance and decision-making processes of each impacted indigenous people. This action will require guidance from indigenous peoples themselves within the context of the Declaration. Such collaboration would yield groundbreaking results and would be the true insurance the financiers seek against project risk. (Doyle and Carino, 2013).

Last, but by no means least in the terms of actors, are the indigenous peoples. For indigenous peoples FPIC is seen in the context of the right to self-determination. The Implementing Rules and Regulations of the 1997 Indigenous Peoples Rights Act - which is modelled on the draft Declaration - refers to FPIC as "an instrument of empowerment" which "enables IPs [indigenous peoples] to exercise their right to self-determination" (IPRA, 1997, Part III, section 1.). Indeed, in a situation where indigenous peoples are not in full control of their lands, territories and resources (through some form of self-government), FPIC may well be one of the only instruments for indigenous peoples to rely upon in calling for their self-determination.

For proper implementation of FPIC, it is essential to have indigenous ownership of both the concept and the practice of the guidelines. There is a growing movement within indigenous peoples groups to assert their own vision of FPIC. This practice is often referred to as the creation of protocols (also referred to as templates, guidelines or policies), but can manifest itself in a wide range of activities, depending on what is most appropriate to any situation. Case studies examining effective strategies stress the importance of certain factors if communities are to assert their rights. These factors include the following: some external recognition of and respect for the governance of the indigenous community; previous experience of consultation processes and/or dis-empowerment to spur the need for such protocols; clearly defined land boundaries and land rights, customary laws and governance, and a vibrant, extant culture to draw upon; and finally, the time and conceptual space required to properly consider all of the issues free from external pressure

and manipulation (Doyle and Carino, 2013) These activities are an indicator of both FPIC's legitimacy as a process to assert the right to self-determination and also of a response to experiences where the right to FPIC has been undermined by governments or companies seeking to manipulate decisions in their own favour. The industry has been cautiously welcoming of indigenous protocols in the belief they will remove uncertainty from negotiation processes and thereby reduce their operational risks.⁴⁹

WHERE CAN THERE BE CONVERGENCE OF UNDERSTANDING ON FPIC?

So is there a hope for a convergence of understanding from these different actors? There does seem to be in the positive sense that there is a growing understanding of the issues and much mobilization on all sides to better understand how to implement FPIC.

Admittedly, most of the extractive industries' improvements and best practices regarding indigenous peoples still tend to be limited to the area of benefit sharing. Much of this positive experience in benefit sharing is coming either from Canada or Australia (Whitmore, 2012). One key advance in benefit-sharing models is a greater understanding of industry to move beyond money as the basis for compensation or reward and to accept the significance of indigenous culture in calculating the risks and benefits. Furthermore, some indigenous communities are developing alternative business models with indigenous control and ownership of extractive projects, and indigenous equity - or ownership - is increasingly being considered (Anaya, 2012). Despite these advances, equitable benefit sharing

⁴⁹ This opinion is based on feedback to the report published by Doyle & Carino (2013), particularly at a round-table launch event. The issue of uncertainty is often quoted by companies as a problem in moving outside of their own systems and processes, and in dismissing indigenous decision making systems that may seem opaque or difficult for them to understand. It is clear why companies who are investing large amounts should require some surety in an FPIC process, but examples have been cited where companies have achieved more by allowing the FPIC to run its due course in terms of minimising risk (because a fairer negotiation decreases the chance of one side unilaterally defaulting). Also, uncertainty can likewise come from States, and from companies themselves, who can, during an FPIC process, change staff, pull out of projects, sell to other companies, etc.

should not be seen as a substitute for a genuine consent process. Many indigenous communities note that they should be able to say 'no' to extractive projects rather than being continuously pressured by outsiders to negotiate and be coerced into accepted these supposed benefits.

One area of convergence is the general recognition of a need for more capacity building, not only for communities, but also for States, companies and international institutes, in order to better understand what FPIC is and how it can be applied. This idea refers to building capacity within companies, communities and support organizations and mediators. Although there is the risk of poor implementation, with outsiders interfering in community governance mechanisms, there are examples of better practice of FPIC through patient agreement, community-driven planning and transparency. There have also been new innovations such as companies providing payments for completely independent advice, and the concept of so-called 'blind funds'. These are funds which companies jointly pay into that can be deployed for capacity building and - thanks to their communal and anonymous nature - would remove any hint of undue influence.⁵⁰

Another useful potential convergence is in the call within the UN General Principles for Business and Human Rights for companies to complete human rights due diligence (OHCHR, 2012). This creates the potential for such processes to be assimilated into an FPIC process, especially via the tool of Human Rights Impact Assessments. Assuming such Human Rights Impact Assessments are community-led (and recognize the expertise within indigenous communities), there is a real hope that the methodologies employed could be complementary to a genuine FPIC process.

However, leaving such voluntary measures aside there is still a need, through regulation, to create more binding commitments with effective oversight in order to ensure implementation of FPIC. The key argument for regulation is the focus on the systematic imbalance

50 The basis for this assertion is from interviews with companies, and from the May 2013 launch of Doyle and Carino's report (minutes of the meeting available from the author)

of power involved in FPIC negotiations. Indeed, in his most recent report to the Human Rights Council on the subject of the extractive industries, the UN Special Rapporteur on the rights of indigenous peoples stressed that he “remains concerned that many corporations still do not commit to more than complying with national law and fail to independently conduct the relevant human rights due diligence” (Anaya, 2013a, para 13). Although he stresses the encouraging trend in company policies, much of this remains untested in practice and for now, given this slow progress, it seems that regulation is required.

As if to emphasize the need for regulation, the Special Rapporteur advises that States who are the home countries of multinational companies “adopt regulatory measures for companies domiciled in their respective jurisdictions that are aimed at preventing and, in appropriate circumstances, sanctioning and remedying violations of the rights of indigenous peoples abroad for which those companies are responsible or in which they are complicit” (Anaya, 2013a, para 48). Although this is primarily aimed at countries outside the ASEAN region, the increasing focus on inter-regional cooperation (as envisaged in the ASEAN Mineral Cooperation Action Plan, or AMCAP) means this is likely to become more of an issue within the region (ASEAN, 2011).

The very nature of a power imbalance means that the party it favours is unwilling to relinquish such an advantage unless legally obliged to do so. It seems that the only way to ensure that this power balance is recognized, and that deliberate steps are taken to address it, is through binding legislation. Such a legal framework should ideally ensure a level playing field, creating transparent processes (Anaya, 2013a).

To conclude, at present it appears there is a growing desire for genuine dialogue among indigenous peoples, States, companies, and financial institutions on how to implement FPIC. If such a dialogue is fruitful, it should help develop the growing movement for indigenous peoples to identify their own visions of FPIC, based on their priorities and models for development. This collaboration would also assist the development of innovative and culturally appropriate models for

benefit sharing. In addition to such dialogues and capacity building, an effective regulatory framework may also be needed in order to ensure enforcement of the norms regarding FPIC.

THE APPLICATION OF INDIGENOUS RIGHTS IN DIFFERENT COUNTRIES IN THE SOUTHEAST ASIAN REGION

Southeast Asia is said to be home to some 20% of the world's estimated 370 million indigenous peoples. The available data on indigenous populations are frequently based on rough estimates, as there tends to be minimal reliable official statistics or disaggregated data identifying their numbers in any country in the region. Having said that, indigenous peoples are estimated to make up as much as 30% of the populations in Lao PDR and Myanmar, about 20% in Indonesia, 10-15% in the Philippines, and as low as 1.3% in Cambodia. Their estimated numbers range from a high of 50 to 70 million in Indonesia, followed by 12 to 15 million in the Philippines, to a low about 179,000 in Cambodia (Quizon, 2014)

Part of the problem in identifying the numbers of indigenous peoples in Southeast Asia, is that there are ongoing conceptual debates concerning the term 'indigenous peoples'. As noted previously States in the region, despite supporting the Declaration, frequently deny that there are indigenous peoples within their borders and often refer to them as ethnic minorities, or use terms such as "hill tribes", "cultural minorities" or "isolated and alien peoples" (Quizon, 2014). In Laos, for instance, the use of concepts such as "indigenous" and "ethnic minority" is considered problematic in case it encourages ideas of separateness or non-inclusion (IFAD and AIPP).

However, many of these groups self-identify as indigenous, and their right to determine their own membership is crucial to the definition of who indigenous peoples are (Imai and Buttery, 2013). The UN Special Rapporteur on the rights of indigenous peoples, in his 2013 report on the situation in Asia, notes that despite State arguments, there are a number of groups in Asia who fall within the international rubric of "indigenous peoples" and that this term "extends to those groups that are indigenous to the countries in which

they live and have distinct identities and ways of life and that face very particularized human rights issues related to histories of various forms of oppression, such as dispossession of their lands and natural resources and denial of cultural expression" (Anaya, 2013b).

Within the region the application of indigenous rights has been mixed. The Philippines is undeniably the most advanced country in terms of the legal framework governing indigenous peoples, including a law with the provision for FPIC although implementation is frequently lacking. Then there are countries such as Indonesia and Cambodia that have a history of conflict but where recent changes in the law show promise in terms of the protection of indigenous rights. Finally there are countries such as Laos and Myanmar that, despite showing some minor improvements in creating regulatory and institutional mechanisms, have a long way to go in terms of providing a rights-based legislative framework.

The 1987 Philippines Constitution, instituted after the overthrow of President Marcos, contained a provision for the rights of indigenous peoples to their ancestral lands and to ensure their economic, social, and cultural well-being. This was codified and expanded upon in the 1997 Indigenous Peoples Rights Act (IPRA). Under the principle of self-determination, IPRA provides for indigenous communities to document and delineate their own ancestral domain claims. As of December 2012, the National Commission on Indigenous Peoples (NCIP), which is tasked with implementing IPRA, reported that 158 Certificates of Ancestral Domain Titles (CADTs) had been issued, covering approximately 4.2 million hectares and benefiting 918,000 rights claim-holders. (NCIP, 2012).

As noted previously, IPRA contains a provision on FPIC. However, that provision is more abused than respected in practice. Various reports have condemned how frequently many mining, companies manipulate FPIC processes through legal technicalities or corrupt practices to obtain their "consent". (Alternative Law Group *et al*, 2009; Nettleton, Whitmore and Glennie, 2004). The national indigenous organisation KAMP, in its submission to the Office of the United Nations High Commissioner for Human Rights (OHCHR) in June 2012, reported

that “despite the enactment of the IPRA, indigenous peoples all over the country continue to be subjected to various forms of human rights violations, both as individuals and as collective peoples” (KAMP, 2012). These include mining company-related violations, such as the use of paramilitary groups and the militarizing of indigenous peoples, extra-judicial killings and forced evacuations.

In Indonesia *masyarakat hukum adat* (community customary law) is recognized under the 1945 Constitution, but – unlike the Philippines - to date there has been no enabling legislation focused specifically on *adat* or customary land rights. Although the Basic Agrarian Law of 1960 recognizes *adat* land rights, its implementing regulations were issued only in 1999. However, there have been two positive initiatives recently, both of which are primarily thanks to the advocacy work of the Indonesian indigenous peoples organisation AMAN. The first is the historic ruling of the Constitutional Court in May 2013, which declared the 1999 Forestry Law unconstitutional. It asserted that indigenous customary forests (*hutan adat*) should not be classified as forests falling within the State Forest Areas. There is an expectation that this decision will lead to the demarcation of customary territories as separate from State forests, and lead to increased recognition of indigenous rights to land and resources in the country. Second is the Draft Law on *Masyarakat Hukum Adat* initiated by the Indonesian Parliament, which will provide the missing enabling legal provision to recognize and protect indigenous rights. The draft law is currently being reviewed by the relevant government authorities (Lee and Moniaga, 2014).

In Cambodia, following decades of political turmoil, the first progressive provisions for the protection of indigenous peoples’ lands came in the 2001 Land Law, which allows for communal land titles while preventing the sale and transfer of indigenous lands. The subsequent 2006 Land Law includes provisions on the formal titling of communal lands and the establishment of land dispute mechanisms. However, it took several years before the implementing rules for communal titling were instituted, and the process of documentation and mapping has proven difficult for indigenous communities. In

particular, many indigenous communities have started the process but are unable to complete the final stage of land registration due to the high costs involved in land demarcation. Out of the 95 indigenous communities recognized by the Ministry of Rural Development, and the 74 communities recognized by the Ministry of Information, only eight communities have actually received land titles as of September 2013 (Quizon, 2014).

Also, a May 2012 Directive⁵¹ intended to expedite the process of issuing private land titles has had the effect of confusing and undermining indigenous land rights because there is no provision for simultaneously holding land under both private and collective titles. The UN Special Rapporteur on the situation of human rights in Cambodia had already warned that parcelling land traditionally used by indigenous peoples into separate pieces of private land could undermine the creation and maintenance of communal lands. By September 2012, at least 98 private land concessions were granted on indigenous peoples' land (Subedi, 2012). It will be important to ensure that the Directive and future land titling policies are harmonized with the existing legal framework for collective titling.

Although the 1991 Constitution of the Lao People's Democratic Republic (PDR) describes the country as a multi-ethnic state and seeks to promote their ethnic identity and cultural heritage, communal rights to land tenure remain very weak. This is especially the case in forest areas where the Forest Law of 2008 stipulates that all forests are national property. In 2011 the first communal land titles (under the 2003 Land Law) were issued for bamboo areas in Vientiane Province, but the communal titling process has, overall, been slow in the country (Land Issues Working Group, 2012). This is of particular concern given the background of land conflict as the Government of Laos' national development strategy is focused on the land-hungry extractive industries. Although the Government and the National Assembly have been working on developing a new land policy and a

51 Directive 01 Bor.Bor, on the measures to strengthen and foster effectiveness for the management of ELCs

revised land law to address the land rights issues, it is not addressing these as issues within the framework of an indigenous rights agenda. However, one positive note is that the government decided in 2012 to suspend approval for mining projects for three years as it seeks to first bring the current projects under proper management (Insouvanh and Lee, 2014).

In Myanmar, although significant reforms have been instituted following the 2008 Constitution and the 2010 elections, the subsequent lifting of most international sanctions has led to economic development through resource extraction and expansion of agribusiness driven by foreign direct investment, which again threatens serious conflicts over land. A rapid promulgation of new laws, with no real consultation, threatens a new wave of land grabbing and the displacement of local communities, which will likely lead to longer term instability in the country. Recent human rights violations following unrest around the now Chinese owned Letpadaung Copper Mine sets a worrying precedent for how the concerns and aspirations of local, especially indigenous, communities will be dealt with. (Kar, Lee, Aung and Thi, 2014).

THE DIFFICULTIES AND OPPORTUNITIES FOR IMPLEMENTING INDIGENOUS RIGHTS AT THE COUNTRY LEVEL

Overall, it should be noted that while there is a growing legal recognition of indigenous peoples' rights in Southeast Asia, the existing regulatory and institutional mechanisms to protect indigenous peoples remain weak (certainly when compared to the situation in the Americas). This is especially true in the face of the growing privatization of lands, the granting of large-scale state land concessions to outsiders, and accelerating land conflicts.

At the same time, there are some significant positive developments that do exist in the region: the Indigenous Peoples Rights Act (IPRA) and the official government policy on FPIC in the Philippines; the parliament-initiated draft law on *masyarakat hukum adat* and the recent Constitutional Court decision on customary forest recognition in Indonesia, and the Cambodian land law which provides collective

land titling of indigenous peoples.

With regard to national laws, it is clear that few Southeast Asian countries have anything approaching comprehensive legislation recognising and protecting the rights of indigenous peoples. This represents an opportunity, but given the intransigence of many States on this issue, it also represents a great difficulty as well. The same is true in terms of legal frameworks to protect the land rights of indigenous peoples and to provide fair compensation from extractive projects. As the UN Special Rapporteur on the rights of indigenous peoples notes in his report on Asia: "In many countries throughout the region, there is no specific legislation that recognizes indigenous peoples' customary land tenure. Even in those States where the regulatory frameworks afford such recognition, significant challenges remain to secure those rights in practice" (Anaya, 2013b).

It is clear that those States with the least developed regulatory frameworks can learn from the experiences of others. This seems to be the case in the Indonesian draft law on *masyarakat hukum adat*, which can draw on the positive and negative experiences of IPRA.

In many countries in the region, the issues of land and the extractive industries remain highly politically sensitive. This means that protective legislation and policies are often de-prioritised when they conflict with laws promoting the extractive industries. Any protective policies get buried in the overlapping institutional mechanisms, blocking effective and coherent implementation. This provides for opportunities for improvement but is also a serious difficulty, particularly where limited State resources are an issue. However, if the private sector is truly to operate effectively on indigenous lands with a reduced risk of conflict to benefit both business and States, then this issue will need to be dealt with.

Finally, with regard to States, a particular challenge is the growth of the impact of the extractive industries on indigenous women. In many communities, indigenous women have become increasingly marginalized, discriminated against and threatened with different forms of violence, as large-scale extractive industries aggressively push into local communities (UNDP and OHCHR, 2014). It is clear

that any legislative agenda aimed at the extractive industries and/or indigenous peoples needs to take account of this marginalization and work to correct it.

The difficulties and opportunities for implementing indigenous rights at the regional level

Given the above-mentioned lacunae in legislation at the national level, there is a real opportunity for ASEAN as a regional body to provide guidance, a role which it has so far failed to fulfill. ASEAN can provide resources for the necessary research and evaluation, which could lead to a common action program to protect indigenous peoples' rights, both in terms of national legislation and at the regional level. There should be specific focus on the role of FPIC as a tool to implement the right to participate in relevant decision-making and, in order to be effective, the implementation should be done in concert with indigenous peoples' organisations. As noted, there is also a need for inter-State learning, for which ASEAN is well placed to play a major part.

Although it has not worked specifically on indigenous rights, ASEAN has an Intergovernmental Commission on Human Rights (AICHR) that was set up in 2009 as a consultative body to promote regional cooperation on human rights. However, its current terms of reference lack the mandate to investigate human rights abuses. There are great opportunities here, not least of which is to go beyond the ASEAN Human Rights Declaration in 2012 - which only provides commitment to common values - and to sign on to a legally binding regional document (as other regions have done). This commitment should result in an ASEAN human rights court, which could deal with regional issues of justice and redress. However, the unwillingness of ASEAN to give human rights the full consideration they deserve remains a serious impediment to such significant advances.

Also at the regional level, ASEAN is currently considering the passage of an ASEAN Mineral Cooperation Action Plan (AMCAP) by 2015 with the intent of liberalizing mineral investment and mineral trading in the ASEAN region. This international agreement will bind

member-countries and assume the force of law. While the stated aim of AMCAP is to promote greater transparency and accountability in extractive industries, it will also result in the expansion of mining and may well legitimize the operations of companies that infringe on indigenous rights and their ancestral lands (Quizon, 2014). There is, therefore, an opportunity for advocacy, but given the dominance of the relevant mining ministries in future negotiations, it will be a limited opportunity.

With regard to extractive industry company policies there have been significant movements forward, which provide unique opportunities. In the mining sector various companies, particularly Rio Tinto, have espoused advanced policies on indigenous peoples (Doyle & Carino, 2013). The ICMM's new 2013 position statement adopted for the first time a "commitment to work to obtain the consent of Indigenous Peoples for new projects (and changes to existing projects) that are located on lands traditionally owned by or under customary use of Indigenous Peoples and are likely to have significant adverse impacts on Indigenous Peoples" (ICMM, 2013). Although far from perfect, it constructively describes FPIC as a "process based on good faith negotiation, through which Indigenous Peoples can give or withhold their consent to a project" (ICMM, 2013).

The ICMM is currently working toward a May 2015 deadline on formulating guidance for implementing this policy. The main difficulty will be in getting corporations and their financiers to understand they have legal and moral obligations to adhere to authoritative international standards; these standards command respect for indigenous peoples' rights, irrespective of State compliance with their human rights obligations. Also, the fact that current company commitments are frequently made as part of voluntary and nonenforceable standards, which are often framed towards maximizing the ambiguity of the circumstances in which they apply, is a concern. Nevertheless, it is clear that ASEAN can engage with companies to better understand and promote standards that will assist in fulfilling the human rights obligations, especially in terms of routes of redress.

Finally, at a civil society level indigenous peoples and their civil

society partners across the region are increasingly organizing their advocacy on these issues. These advocacy activities are happening at a national level and, increasingly, through regional bodies such as the Asia Indigenous Peoples Pact and the Asia Indigenous Peoples Network on Extractive Industries and Energy (AIPNEE). To be effective such regional organisations need to be well resourced, both to support indigenous communities on the ground in implementing FPIC and to liaise with ASEAN to advocate for indigenous rights.

CONCLUSION

In conclusion indigenous peoples in the region generally lack clear and accessible mechanisms for obtaining fair legal recognition on lands that they customarily own, manage, or occupy. Although some countries in the region have progressive laws and policies, even where they exist there is lack of institutional capacity and political will to effectively implement them. There is a lack of a rights-based understanding in the extractive industries as well as a lack of robust accountability mechanisms to implement the evolving international norms.

The key lesson to draw from the above is that the correct application of FPIC will both protect the human rights of indigenous peoples and reduce the risks of conflict around extractive projects. That correct application will come from indigenous peoples themselves but only if there is a legislative framework enabling it to happen. Despite the significant advances in international rights norms for indigenous peoples, the situation for many indigenous peoples in the ASEAN region remains grave; much capacity building needs to be done with business enterprises at the regional and State levels but first and foremost with indigenous peoples themselves.

RECOMMENDATIONS

Many of the following recommendations are to some extent a synthesis of various previous publications & pronouncements.

1) Recommendations for ASEAN

- Review ASEAN's extractive development plans, notably AMCAP, within a human rights-based paradigm of development.
- Undertake a common action program that protects indigenous people's rights and promotes and fulfils the UN Declaration on the Rights of Indigenous Peoples at the regional level.
- Better facilitate learning and exchange on policy development between ASEAN States, including examining the Philippines' experience with IPRA and encouraging more progressive indigenous legislation.
- Building on the work of the AICHR, establish a regional system of redress for serious human rights violations.
- Create a mechanism for establishing communication channels between governments, indigenous peoples and companies to resolve potential conflict.

2) Recommendations for States

- Recognize the existence and substantive rights of indigenous peoples in line with international human rights norms and State obligations (including establishing mechanisms to ensure the implementation of FPIC before the entry of development activities in the lands and territories of indigenous peoples). This includes ratifying ILO Convention 169.
- Provide legal recognition for the land and territorial rights of indigenous peoples by consulting with them, and include the provision of technical and financial support to indigenous communities in establishing and protecting their tenure rights.
- Uphold the rights of indigenous women with particular attention on the impact of extractive industries.
- Ensure that adequate and culturally appropriate grievance mechanisms are available to indigenous peoples through which they can address allegations of State and corporate violations of their rights, including their decision-making rights over developmental activities in their territories.
- When creating a regulatory environment for business, ensure

that the regulations allow for human rights impact assessments which are community-led (and recognize the expertise within indigenous communities) and, where appropriate, to be complementary to genuine FPIC processes.

- Guarantee that where indigenous peoples wish to do so they are accorded the necessary time and space to formulate their own FPIC protocols or policies. Where these protocols or policies exist, commit to respecting, and requiring corporations to respect, their contents.

3) Recommendations for other actors

- Business enterprises should commit to respecting international standards on indigenous peoples, especially the UN Declaration, within corporate policy and practice, integrating it into the conduct of their human rights due diligence and operating 'as if' these international standards were recognized regardless of the situation as regards the relevant national law.
- Business enterprises should acknowledge and respect the fact that FPIC is viewed by indigenous peoples as a principle which provides for their control over the future development of their territories and as a manifestation of that control.
- Business enterprises should explore, in direct consultation with indigenous peoples, the mechanisms for new innovations such as 'blind funds', which can be deployed for capacity building.
- Investors in extractive industry projects should ensure that their clients have policies in place which adhere to the principles of the UN Declaration, including the requirement for FPIC, and require rigorous due diligence regarding the potential impact of projects on the rights of indigenous peoples.
- Civil society should build the capacity of indigenous organizations and institutions within ASEAN to defend their rights. This should include developing their governance systems to create indigenous-defined protocols, policies or guidelines on conducting FPIC for extractive industries.
- Meaningful indigenous participation is essential where civil

society bodies initiate processes to dialogue with the industry in relation to FPIC.

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CONCLUSION

The Urgency to Transform: The Governance of Extractive Industries in Southeast Asia

Francisia SSE Seda

The ASEAN has already acknowledged the vital role of good governance in their extractive industries natural resource management under the ASEAN Mineral Cooperation Action Plan (AMCAP) and the ASEAN Plan of Action for Energy Cooperation (APAEC), which give direction for mineral and energy cooperation in ASEAN. This important acknowledgement has been due to the realization of the urgency to transform the governance of extractive industries based on the lessons learned through research analysis on various Southeast Asian countries.

Of the many and varied lessons learned, there are seven that stand out. First, it is vital for ASEAN member states to protect the rights of indigenous peoples in managing their land, especially in relation to mining industries. The local people have to be protected legally and given the right to approve or reject mining activities operating on their land.

Second, within the context of State, Market, and Society, there is an urgency to encourage the transformation of the state and market relationship vis a vis Civil Society into a more balanced and equal relationship among these three pillars. Civil Society, specifically the local people surrounding various mining sites, has to be protected legally on the issue of indigenous rights over their land. These rights should include the power to negotiate with extractive industry companies.

Third, on the issue of involuntary resettlement, various stakeholders involved in the resettlement process must strengthen their own personal and institutional capacities in order to achieve global standards on implementing mine-induced resettlement programs. This is of vital importance due to the fact that improper involuntary resettlement causes social, economic, and cultural problems to both resettled people and host communities. Again, there is a great urgency to transform and thus strengthen Civil Society in its relations with the government. This transformation can occur only if there is legal protection, balanced economic policies, and political and socio cultural empowerment of the local people.

Fourth, on the issue of the capability of local communities to empower themselves *vis a vis* mining companies operating on their lands, it is extremely important that the people have the information they need to defend their indigenous rights over their lands. Information based self-empowerment within the contexts of politics, economics, social issues, and culture is vitally important if Civil Society is to have a voice equal of that of the state and the market.

Fifth (and more on the macro level), energy policies enacted and implemented by the State, especially in oil producing countries in ASEAN, have resulted in good governance implementation of energy policies within the context of the relations of the state owned National Petroleum Company and the National Government. It is relevant to realize, however, that on the issue of the role of the State, there are various actors and institutions within the same state that can play both cooperative and conflicting roles in enacting and implementing various governance mechanisms related to the extractive industries in Southeast Asia. The ASEAN member states thus should develop a flat-form in promoting the advancement of governance practices in the oil and gas sectors.

Sixth, the urgency to transform the governance of the extractive industries in Southeast Asia is not limited to single member states of the ASEAN, but more significantly, is essential to transform governance includes the necessity to develop a common framework for managing the extractive industries in the ASEAN region. The framework would

provide the guidelines needed by ASEAN member states to set a higher standard in managing the extractive industries. The ASEAN for instance, could initiate the establishment of a multi donor ASEAN Extractive Industries Trust Fund to finance and give technical support in the implementation of the common framework.

Seventh, on the regional issue of local indigeneous people and extractive industries, it is feasible for the ASEAN to adopt and implement the global standards contained in the requirement for FPIC (Free, Prior, Informed Consent) for the protection of the human rights of the local indigenous people and for decreasing the potential of conflicts surrounding extractive projects.

These lessons learned on the micro and macro levels, as experienced by ASEAN single member states as well as other regional states, strongly indicate that there is a corresponding and vitally important relationship between the enactment of mutual cooperation regionally and the resulting policy implementation in local indigenous communities surrounding the various extractive projects throughout ASEAN and the region as a whole. Thus, the urgency to transform the governance of the extractive industries is not confined to single member states but is dependent on region-wide mutual cooperation. Various region-wide mutual cooperation agreements have been enacted to try to achieve global standards on good governance, specifically on extractive industries. Nevertheless, the challenge lies in its implementation at the local level.

In order to meet the various global standards on good governance of extractive industries, such as the Global Reporting Initiative (GRI), the Kimberly Process Certification Scheme (KPCS), the UN Global Compact, and the Extractive Industries Transparency Initiative (EITI), this book suggests that strengthening EITI as a possible strategy to develop a common framework for transforming the governance of extractive industries in Southeast Asia. EITI is an initiative to establish and increase the transparency in the revenue system of the extractive industries on the global level and has already been implemented in various countries in the world. With the good and effective implementation of EITI, there is an opportunity to strengthen the trust

between relate stakeholders and encourage the creation of more equal balance relationship between the state, business entities or extractive companies, and Civil Society with more self-empowered local indigenous communities affected by and in the surroundings of extractive industries projects. In 2011, the ASEAN Minister of Minerals agreed to promote capacity building on EITI in the AMCAP 2011-201, ASEAN member states are encouraged to look into the collaboration of EITI implementing countries in ASEAN and to embrace the the basic principles of EITI as part of their cooperation.

On the national level, four ASEAN member states have already developed and adopted EITI through various government policies. Through the adoption of EITI region-wide, it is hoped that good governance in the extractive industries, specifically as it relates to natural resource management, can be more transparent, accountable, democratic, participatory and self-empowering, especially for the people directly affected by the extractive activities in the region. Hopefully it will also propel the resource rich ASEAN countries in particular toward a more equal and balanced relationship between the State, the Market and the Civil society.

As previous stated, recommendations resulting from the research analysis in this book are aimed at emphasizing the urgency to transform the governance of extractive industries in Southeast Asia through a regional framework. Strategies that can be developed to achieve this objective should be two-fold: implement global standards to govern the extractive industries while ensuring that the needs of the local communities are met. Any policy implementation at either the national or regional (ASEAN) levels should be for the common good and include the interests of the people (The Civil Society) and not just of the State and the Market. These policies, attitudes and values can only be realized and achieved if and when the citizens of the ASEAN can democratically elect their own leaders, from the local communities to serve at national level of leadership. Good governance in any industry, including the extractive industries, can only be fulfilled if there exists good governance overall at the national and region-wide ASEAN levels.

Contributor Profiles

Evi Fitriani

Evi Fitriani, PhD, is the Head of the International Relations Department at the University of Indonesia. She teaches International Relations in both the undergraduate and master programs. In addition, she is one of the founders and a member of the teaching staff of the master's degree program in European Studies. She is co-founder of the ASEAN Study Center at the Faculty of Social and Political Sciences (FISIP) at the University of Indonesia. She is also the Indonesian Country Coordinator for the Network of East Asian Think Tanks (NEAT). Evi graduated from the University of Indonesia (undergraduate), Leeds University, UK, and Ohio University, USA, (master's programs) and from the Australian National University (PhD). She received more than ten scholarships and awards, including the British Chevening awards, the Fulbright scholarship, and the Australian Development Scholarship (ADS). Evi's research interests include Indonesian foreign policy, ASEAN, Asia Pacific regionalism, and Asia-Europe relations. Her ongoing research include Indonesia-Australia relations and border issues in Southeast Asia.

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Francisia SSE Seda is a senior lecturer in the Sociology Department at the University of Indonesia. She holds a bachelor's degree in Sociology from the University of Indonesia (1987), a Master of Arts Degree in Asian Studies from Cornell University (1989), and a PhD in Development Studies from the University of Wisconsin at Madison (2001). Her field of expertise includes Development Sociology, Environmental Sociology, Gender Sociology, Sociology

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Fernanda Borges holds a Bachelor of Commerce degree in Economics and an MBA in Business Law and Public Sector Management from Australian Universities. She served as the Minister of Finance during the United Nations Administration in 2001 and as a Member of Parliament for Timor Leste from 2007 to 2012. For five years she advised the President of the Republic on Defense and Security issues. She has held various professional positions in the United Nations and worked as a Banker in Sydney, Australia for over 10 years. Fernanda is currently the Audit Committee Chair for the Canada based Global Organisation of Parliamentarians Against Corruption (GOPAC) and was the Executive President and Board Member of GOPAC, Timor Leste Chapter from 2010-12. Born in Timor Leste, she is fluent in three languages: Tetum, English and Portuguese.

Andy Whitmore

Andy Whitmore is the coordinator of a project on Free Prior Informed Consent (FPIC) under PIPLinks, Middlesex University, and ECCR, which produced a report in 2013 entitled "Making Free Prior and Informed Consent a Reality: Indigenous Peoples and the Extractive Sector". He is also the author/editor of "Pitfalls and Pipelines: Indigenous Peoples and the Extractive Industries", published by Tebtebba, IWGIA, and PIPLinks. Currently, he is engaged in a PhD program at Middlesex

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Fabby Tumiwa’s expertise is in the areas of energy and climate policies. He has carried out extensive studies on the energy and climate policies of Indonesia and countries around the world, developing renewable energy projects and participating in international climate change negotiations as an adviser to the Indonesian delegation. Since 2009, Fabby has been working with civil society organizations in Cambodia, Indonesia, Vietnam, the Philippines, and Timor Leste on advocating for improving governance on extractive industries in Southeast Asia. He has led a campaign on the promotion of EITI (Extractive Industry Transparency Initiative) to ASEAN member countries. In 2013, Fabby was elected to the EITI International Board. He also serves on the Board of Trustees for the Indonesia Climate Change Trust Fund (ICCTF). Fabby is the executive director of the Institute for Essential Services Reform (IESR), and is an Eisenhower Fellow.

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Professor David Brereton is the Deputy Director for Research Integration at the Sustainable Minerals Institute (SMI). Before taking this role in June 2012, David was the foundation Director of the Centre for Social Responsibility in Mining, SMI. David has over 25 years' experience in applied research and teaching. Over the course of his career, he has worked in senior research roles in both the university and government sectors, focusing on the use of applied social science to improve organisational practice and policy. He has authored 30 refereed articles and book chapters, as well as numerous research reports. In his current role, he is frequently invited to present at industry and practitioner conferences and workshops, including as a keynote speaker at conferences in Chile, Mongolia, India, Papua New Guinea and Peru.

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Mai Vo is a research scholar at the Centre for Social Responsibility in Mining at The University of Queensland. Mai has over 10 years' experience in applied research and teaching. Before undertaking her PhD, Mai worked as a lawyer in the field of environment and land law and lectured in Law at Hue University, Vietnam. She has also worked as a consultant on development projects in the areas of stakeholder engagement, land acquisition and resettlement, and environmental and social impact assessment. Mai holds a Bachelor of Law from National University of Vietnam, a Master of Science in Environmental Management from National University of Singapore, a Master of Environmental Law from Golden Gate School of Law, and a PhD from The University of Queensland.

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Ermy Ardhyanti currently serves as Article 33's coordinator of the extractive governance division and is Project Leader of IKAT-US Subnational, which is a project to promote good governance in the mining industry in Indonesia, the Philippines and Vietnam. Ermy is experienced in policy research, including policies related to mining in forests, local policies related to the extractive industry, policies concerning Indigenous Peoples in the mining industry, and to mining decentralization issues in Southeast Asia. She is also an experienced advocate for non-tax revenue of mining. Since 2004, Ermy had been a researcher at PATTIRO Solo, served on the Emergency Response Team Oxfam GB, GLG-GTZ, and has served as Director at PATTIRO Magelang. She has been an independent consultant and researcher on gender issues, public policy and disaster management. She holds a bachelor's degree in Public Administration from UNS Surakarta.

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Triyono Basuki holds a Bachelor's Degree in management of water resources and environment. He has been a member of the Fisheries and Marine Science faculty, Bogor Agricultural University (IPB) since 2005. Triyono's experience includes the following: lecture assistance of Fisheries and Marine Science Faculty, IPB; research assistant for an environmental consulting company; analyst for an environmental

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Sa'dan Mubarak is a researcher at the Center for Election and Political Party (CEPP), Faculty of Social and Political Science, University of Indonesia. He holds a bachelor's degree in Political Sciences from the University of Indonesia. His scope of research includes election and political party issues as well as natural and energy resources policies. Sa'dan wrote a book titled Politik Energi dan Ketahanan Migas Nasional: Studi Perbandingan Indonesia dan Malaysia (Energy in Politics and National Oil and Gas Security: comparative Study between Indonesia and Malaysia), published in 2013. He also works as a political consultant in the Indonesian House of Representative (Dewan Perwakilan Rakyat Republik Indonesia).

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