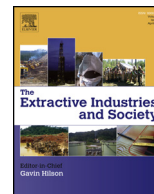




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Original article

Grievance handling at a foreign-owned mine in Southeast Asia[☆]

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ABSTRACT

Across Southeast Asia, there are a range of complex human rights-related issues associated with resource extraction, including, regulatory architecture, institutional capacity, corruption, political freedoms, use of security forces, involuntary land acquisition and resettlement. At this stage, little is known about the degree to which these and other human rights considerations are being integrated into due diligence processes, or whether, in fact human rights due diligence is a being undertaken by businesses operating in the region. This article provides grounded insights about an operational-level grievance mechanism at a foreign owned mine in Southeast Asia. The authors argue that mining companies cannot claim neutrality in contexts where States exercise high levels of authority.

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1. Introduction: mining and human rights in Southeast Asia

The Association of Southeast Asian Nations (ASEAN) has recently sought to bolster its mining sector credentials on the basis that its rich mineral endowment is yet to realize its full economic potential.¹ Development of mineral resources is now considered essential to growing the region's economy. With the explicit aim of increasing the contribution of extractive industries to national and regional economies, ASEAN members have endorsed a series of action plans to enhance mining-related trade and investment, promote responsible practices, and to optimize mineral resource revenues.² While many foreign investors have for the past decade turned their attention towards China and India, a

shift of focus back to Southeast Asia is gaining momentum, which is likely to support growth in the region, despite the recent market downturn and decline in commodity prices (Price Waterhouse Coopers, 2012).

Many mine-affected communities in Southeast Asia have claimed that their human rights have been diminished by mining activities. Claims typically relate to impacts on traditional culture, effects on the natural environment, and/or disruption to livelihoods (Ballard and Banks, 2003). The acquisition, use and management of natural resources remain contentious issues throughout the region. Often brought to the attention of the international community by human rights defenders or non-government organizations (NGOs), claims have been made by some of the poorest people on the planet. Emblematic cases from the ASEAN region include PT Freeport Indonesia's Grasberg mine (Ballard and Banks, 2009; Rifai-Hasan, 2009) and the Marcopper tailings disaster on the island of Marinduque in the Philippines (Macdonald and Southall, 2005). Also included is Newmont's now closed Minahasa Raya mine in the North Sulawesi Province of Indonesia, which in its final year of operation, became embroiled in a multi-party conflict over allegations of impacting the health of local villagers living in the nearby Buyat Bay (Kemp et al., 2008).

Most global mining companies have interests in the region. Rio Tinto, Barrick Gold, BHP Billiton, MMG, Glencore Xstrata, Goldfields, Newmont, Newcrest, Anglo American and Vale are each actively exploring or operating in the region. Foreign, domestic, mid-tier and junior companies are also active. Artisanal and small-scale mining (ASM) is prevalent due in large part to the accessibility of alluvial gold and shallow coal deposits (Lahiri-Dutt, 2004). The interaction between large and small-scale mining

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¹ See remarks in 2005 by Secretary-General of ASEAN at the Sixth Asia Pacific Mining Conference and Exhibition, Makati City, Philippines http://199.19.87.229/wordpress/?static_post=asean-perspective-on-the-region-s-mining-industry-remarks-by-he-ong-keng-yong (accessed 24.07.16.). According to the statement, in 2003, non-energy minerals and base metals productions accounted for less than one per cent of total ASEAN GDP.

² For example, the cooperation action plan for 2011–2015 was entered into in November 2013 at the Fourth ASEAN Ministerial Meeting on Minerals <http://asean.org/joint-press-statement-the-fourth-asean-ministerial-meeting-on-minerals/> (accessed 22.07.16.).

is largely unregulated. Across Southeast Asia, there are a range of complex human rights-related issues associated with resource extraction, including, regulatory architecture, institutional capacity, corruption, political freedoms, use of security forces, resettlement and land acquisition. Additional implications arise as a result of rapid socio-economic transformation, such as in the case of Myanmar (O'Callaghan, 2010; Smith and Naito, 2012). The geopolitics of foreign direct investment, including China's interest in Southeast Asia's mineral wealth also points to an evolving business and human rights landscape. At this stage, little is known about the degree to which these and other human rights considerations are being integrated into due diligence processes, or whether, in fact human rights due diligence is a being undertaken by businesses operating in the region.

There is no doubt that mining is an inherently conflictual practice involving disruption to land, livelihoods and patterns of everyday life. Resource companies form unique relational structures with host communities who, alongside various social and environmental impacts, shape the dynamics of engagement between these actors. This article focuses on company-community conflict and grievance, recognizing that such grievances can serve as a proxy for grievances against the State (Zandvliet and Anderson, 2009). The general character of company-community grievances can be discerned through scholarly research, international campaigns and contemporary media sources. While information may appear readily accessible, few insights are offered about grievance handling practices in the sector. Beyond the standard public responses issued by corporate legal counsel or media representatives about specific claims, case studies in company-produced reports, or abstract corporate social responsibility (CSR) policies, the gap in knowledge about how companies' community grievances are handled is significant (Whiteman and Mamen, 2002). For instance, little is known about the internal patterns of response, organizational routines, and the role of company personnel in bringing human rights to the fore in grievance resolution processes and outcomes (c.f. in the South African context, Farrell et al., 2012). Given the sensitivity of information, the option of legal privilege, and the level of expertise required, organizational aspects of grievance handling are, by and large, a privatized body of knowledge (Kemp and Vanclay, 2013).

This article provides grounded insights about an operational-level grievance mechanism at a foreign owned mine in Southeast Asia. The case study has been anonymized for two reasons: first, that the data collection for this research was undertaken as part of an industry commission study into grievance handling with contractual restrictions on the disclosure of information. Second, as an ethical consideration regarding the vulnerability of some informants, interview participants were assured that no identifying information would be offered to the company or reported in the public domain.

The article describes and analyzes grievance handling processes at the mine and compares this against contemporary international standards.³ The article proceeds by providing a brief overview of the operating context and the methods of data collection. Findings are presented, and implications for mining, CSR and human rights considered. The article concludes by suggesting that mining companies cannot claim neutrality in contexts where single party

³ The standards used as a benchmark including the International Finance Corporation (IFC) Performance Standards 1 – Assessment and Management of Environmental and Social Risks and Impacts and Performance Standard 5 – Land Acquisition and Involuntary Resettlement; the IFC Compliance Adviser Ombudsman Guide to Designing and Implementing Grievance Mechanisms for Development Projects; the International Council on Mining and Metals (ICMM) Guidance Note on Local Level Complaints and Grievance Handling; and the UNGPs on Business and Human Rights.

States exercise high levels of authority. Neither can they assert a 'social licence' (Thomson and Outlier, 2011) by virtue of an absence of community dissent. Companies must take an active role in understanding the socio-political context, the character of the grievance landscape, and their role in influencing that context.⁴ Without this knowledge, companies cannot claim to have discharged their responsibility to respect human rights under the United Nations (UN) Framework and Guiding Principles on Business and Human Rights (UNGPs).

2. Access to remedy in the operating context

'Access to remedy' represents the third pillar of the UN *Protect, Respect and Remedy* Framework, which recognizes that even the most concerted efforts cannot prevent all human rights abuse (United Nations Human Rights Council (OHCHR), 2008). A range of judicial and non-judicial remedies and associated principles are canvassed in the UNGPs on Business and Human Rights (UNGPs), including non State-based, operational-level grievance mechanisms (United Nations Human Rights Council (OHCHR), 2011). Largely as a result of international pressure to address human rights risk and impact, the global mining industry has issued a series of public commitments to the UNGPs through corporate policies, industry organizations and/or stand-alone agreements with Indigenous Peoples and other mine-affected groups.⁵

The country context for our case study represents one of a small number of single party States, with a history of post-colonial conflict and involvement in a protracted high-profile war. Since the early 1990s it has received significant foreign investment from the 'West', and in recent years has witnessed an upsurge in investment from Chinese and other East Asian nations. Rapid development over the past twenty years has brought with it a heightened level of international interest in the country's commitment and handling of governance, corruption and human rights issues. Major natural resource and infrastructure projects have contributed to substan-

⁴ There is a plethora of standards that require mining companies to understand their social context and manage risk. The International Finance Corporation's (IFC) Social and Environmental Performance Standards are mandatory for clients, and have become an industry benchmark for social performance. See 'IFC Sustainability Framework', (2012) http://www.ifc.org/wps/wcm/connect/Topics_Ext_Content/IFC_External_Corporate_Site/IFC+Sustainability/Our+Approach/Risk+Management/IFCSustainabilityFramework_2012 (accessed 25.07.16). International industry-endorsed standards include, for example, the International Council of Mining and Metals (ICMM) (2014). Sustainable Development Framework <http://www.icmm.com/our-work/sustainable-development-framework> (accessed 26.07.16.); and the 2013 Voluntary Principles on Security and Human Rights http://www.voluntaryprinciples.org/files/voluntary_principles_english.pdf (accessed 26.07.16.). National industry bodies such as the Minerals Council of Australia (MCA) and the Mining Association of Canada (MAC) have a similar set of standards that apply to members operating domestically and offshore. Examples of standards that are endorsed by multinational organisations include the Organisation for Economic Co-operation and Development (OECD) (2011) Guidelines for Multinational Enterprises, and the International Organisation for Standardization (ISO) 2010 ISO26000 Guidance on Social Responsibility. For further explanation, see 'OECD Guidelines for Multinational Enterprises', <http://www.oecd.org/daf/inv/mne/48004323.pdf> (accessed 25.07.16.); and 'Discovering ISO 26000' http://www.iso.org/iso/discovering_iso_26000.pdf (accessed 25.07.16.). Some researchers have observed an increasing set of requirements at national and sub-national level, representing a shift beyond 'voluntary' industry standards. See McNab et al. (2012) for an explanation of emerging 'social legislation' in the context of mining. There are also a range of guidance notes produced by a broad range of organisations from NGOs (e.g. Oxfam Australia) to international financial institutions.

⁵ Many companies are also members of a range of other human rights-related frameworks, including the Voluntary Principles on Security and Human Rights, the UN Global Compact, both of which are aligned with the UN Guiding Principles, but do not expound on the concept of grievance mechanisms. See 'Voluntary Principles on Security and Human Rights', *supra* n 9; 'UN Global Compact Brochure 2014' http://www.unglobalcompact.org/docs/news_events/8.1/GC_brochure_FINAL.pdf (accessed 26.07.16.).

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