

Rights-based claims in the extractive sector

How actors engage with rights-based approaches
in South and Southeast Asia



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Key messages

- Although rights are heralded as having the power to redress damages caused by resource extraction, they are often difficult to exercise. Rights holders frequently encounter significant, if not insurmountable, barriers and setbacks in the claim-making process.
- There is limited academic literature in South and Southeast Asia concentrating on explicit rights-based claims associated with the mining sector or extractive industries in general.
- Based on the surveyed literature, three generalized approaches to making rights-based claims against extractive industries emerged: pursuing environmental justice claims; making Indigenous rights and land claims; and claiming the right to conduct artisanal and small-scale mining. These typologies act as guideposts to describe the various methods used by local actors when making rights-based claims. They may overlap in context and content, with jurisdictionally specific considerations.
- Rights-based claims employed multiple strategies that were sometimes undertaken simultaneously. Strategies included litigation and law-based approaches, mass actions such as protests, peaceful demonstrations and blockades, media outreach, and voicing claims through international platforms.
- There are many challenges in making rights-based claims including poor access to information and legal resources, lack of capacity, financial limitations, and strong institutional barriers.

Although mining may lead to great economic gains for corporations and other stakeholders, those living near development sites often bear the environmental and sociocultural burdens that accompany extractive activities. This policy brief discusses the findings from a study surveying peer-reviewed literature to examine how local actors engage with extractive-related rights-based approaches in South and Southeast Asia and how national governments and private mining companies respond to such engagement (Phillips et al. 2020). The study reported the types of rights that were claimed, and by whom; the channels and strategies used by claimants; the circumstances that enabled or impeded rights-based claims; and the effects of varying claims on government and corporate responses. In this context, the study identified three general typologies of rights-based claims: environmental justice claims; Indigenous rights and land claims; and the right to conduct artisanal and small-scale mining.

IMAGE (ABOVE): Abandoned copper mine,
Negros Occidental, Philippines
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Inclusion of rights in the extractive sector

The broad range of rights held by local and Indigenous communities should be reviewed when industrial interests consider natural resource extraction projects. Mineral resource development produces externalities that can harm nearby communities and infringe upon their rights to cultural integrity and environmental sustainability. These rights cover spiritual and cultural connections to the land, clean water, unpolluted air, and – in cases where locals engage in artisanal and small-scale resource extraction – a right to livelihood. In practice, resource extraction projects are often undertaken without engaging local communities in the decision-making process and without observing their right to free, prior and informed consent. These exclusionary practices directly contradict many international commitments made by states and do not represent best practices in the extractive sector. As such, the responses of national governments and private mining companies to rights-based claims – and whether these responses undermine the realization and implementation of rights – are important considerations in the context of resource development.

What are rights-based claims?

Human rights are moral principles protected by international law, describing common standards for all human beings. Despite states' obligations under international law, rights can be difficult to exercise, with rights holders encountering significant, if not insurmountable, barriers and setbacks when making rights-based claims (Phillips et al. 2020). These barriers can arise due to tokenism, weak institutional capacity that leads to lack of enforcement, or a lack of good faith efforts on behalf of governments and private actors, whose interests may conflict with those of local communities, Indigenous groups, or other marginalized people in society (Blowfield 2005; Leifsen et al. 2017).

Under international law, governments are obligated to respect, protect, and fulfil human rights. There are nine core international human rights treaties. Though each United Nations Member State has ratified at least one, not all governments universally subscribe to them. Nevertheless, international law increasingly acknowledges the rights of people in natural resources, which charts a pathway for states to provide mechanisms to prevent dispossession of Indigenous Peoples' lands, establish fair and impartial procedures to adjudicate land claims, and, in the case of state-owned mineral resources, initiate processes for consultation and benefit sharing with affected people (Phillips et al. 2020). Despite an increasingly broad range of international guidelines and frameworks aimed at addressing issues related to mineral resource extraction, little has improved with regard to recognizing and protecting the rights of local populations harmed by these activities. Law-based rights do not always align with the lived experience of those subjected to material deprivation or social exclusion in the context of resource development; thus, rights-based claims can also include assertions that fall outside of formal, legal strictures.

Rights-based claims in the extractive sector: strategies and responses

The ability to engage in human rights discourse is important for mobilizing people in support of a particular goal or agenda, for addressing power imbalances, and for serving as a tool to buttress rights-based claims. Human rights claims are culturally and geographically specific. In South and Southeast Asia, additional research is needed to document how social actors explicitly mobilize rights to address issues related to extractive activities (Phillips et al. 2020). The report examined a number of documented, regional rights-based claims and strategies used by claimants in the context of resource

TYPOLOGIES OF RIGHTS-BASED CLAIMS IN THE CONTEXT OF RESOURCE EXTRACTION

Environmental justice → A political response to social injustices and inequality using rights-based arguments. It is centered around the right to be free from ecological destruction, and it advocates for inclusive and participatory decision-making.

Indigenous rights and land claims → Indigenous Peoples have the right to take part in decision-making when local, national, and international decisions affect their communities. Free, prior and informed consent (FPIC) is particularly important to affirm Indigenous communities' rights to give or withhold consent for projects affecting their territories.

Artisanal and small-scale mining → Local communities have the right to develop mineral resources and maintain livelihoods through mining.

extraction. The report identified three broad typologies for analysis based on the claiming strategies of local actors, as well as their characterization of rights-based claims. The study also considered how national governments and private mining companies respond to such claims, and whether these responses hamper or delay the realization and implementation of rights.

The study assessed existing peer-reviewed literature to better understand how local actors affected by the extractive industry in South and Southeast Asia make rights-based claims. Literature was identified using a string of keywords and screened by the three study authors. Through this process, 20 published articles were selected. The authors attributed the low number of eligible articles to limited empirical academic research conducted in the region.

The 20 relevant articles described cases based on specific rights being claimed, the channels and strategies used by rights claimants, and the circumstances of the claims and their effects. The articles presented both enabling and impeding factors for making rights-based claims. Examples of enabling factors include the availability of resources to rights claimants, the claimants' living conditions, and their societal circumstances. Impediments include limited access to information and resources, burdensome administrative requirements, weak rule of law, and power imbalances that disadvantage claimants. The study also examined whether gender perspectives and Indigenous Peoples' rights were present in the literature. Of the 20 articles included in the review, 17 included rights-based claims made by Indigenous Peoples.

Support for rights-based claims

There is much to be done to support rights-based claims in the context of resource development, but protection of human rights and the environment must not be the responsibility of claimants alone. In South and Southeast Asia, governments and industries should also protect human rights and environmental integrity. This requires substantively addressing the concerns of communities affected by resource development and can be facilitated by applying inclusive development and participatory decision-making principles to every mineral extraction project. Inclusive development is a foundational element of the Sustainable Development Goals that have been accepted by all United Nations Member States. Participatory decision-making is a key standard for best practices in the extractive industry. In addition to benefiting from greater participation with states and industry, Indigenous Peoples and local communities would benefit through increased support from nongovernmental organizations and donors.

There is a critical need for more effective support of rights-based claims at all levels of governance and from all stakeholders. The study found that even when national legal frameworks were in place, structural or institutional shortfalls often made it difficult to use existing legal remedies. At the national level, governments must ensure that there are clear paths for affected communities to make rights-based claims, including embracing policy measures that enhance local participation in economic development decision-making. Furthermore, unbalanced power dynamics among rights holders and other stakeholders may present obstacles that thwart communities' abilities to pursue rights-based claims, even informally.

Given that the study found only 20 relevant articles, there is some cause for further investigation. Further research on this topic could also produce practical suggestions on how different stakeholders, such as nongovernmental organizations and donors, can more effectively support rights holders; how states might better implement their duties and obligations in various human rights treaties in the context of extractive



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industry development; and how to better map the relationships among stakeholders, with an emphasis on the dynamics and capabilities of empowerment. Examples can be drawn from other geographical regions, including Latin America, where the academic community has given considerably more attention to rights-based approaches in the extractive sector. Finally, noting that in the reviewed literature the concept of environmental justice provided a foundation for many rights-based claims, the relationship between environmental justice and mineral resource development warrants additional attention.

Recommendations:

- Address gaps in research through additional studies that produce practical suggestions on how different stakeholders, including nongovernmental organizations and donors, can more effectively support rights holders; how states might better implement their duties and obligations under various human rights treaties in the context of extractive industry development; and how to better map the relationships among stakeholders, with an emphasis on the dynamics and potential of empowerment.
- Undertake additional research on the relationships among the three identified typologies – environmental justice, Indigenous rights and land claims, and artisanal and small-scale mining – to generate insights into the decision-making process of local actors in their choice of approaches to rights-based claims, and, more specifically, what factors or combinations of factors have the greatest influence on these actions.
- Provide additional support to rights claimants, not only through a focus on their agency, but also by addressing institutional barriers, including overly cumbersome procedural and regulatory processes that make formal channels of claim-making difficult to use.
- Incorporate free, prior and informed consent for Indigenous Peoples and local communities into domestic legal frameworks that have a clear set of obligations and ensure that free, prior and informed consent is easily identifiable as a right on which legal claims may be based.
- Increase efforts to promote the rule of law in jurisdictionally specific contexts, including identification of models where it has proven beneficial to rights claimants in the context of resource extraction. Policy measures should include capacity building and promotion of anti-corruption best practices.
- Work at the local and national level to formalize unlicensed artisanal mining so that artisanal miners can secure legally enforceable property rights to resources and land and that large-scale projects are not granted privilege over artisanal mining and similar livelihoods.

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