



# Impact of the Extractive Industry on the Collective Land and Forest Rights of People and Communities: A Summary

## Rights and Resources Initiative

*Supporting forest tenure, policy, and market reforms*

### RRI PARTNERS



This document summarizes the main conclusions of a more in-depth report\* prepared by Margarita Flórez, Asociación Ambiente y Sociedad. The report was commissioned by the Rights and Resources Initiative to document and analyze the impacts of the extractive industries on the collective land and forest rights of people and communities in Colombia, Peru, Guatemala, and Panama. It focuses on mining activities because of their increased intensity, number, and range in the last two decades, particularly in land owned by indigenous and Afro-descendant communities.

Following are the main findings of the report.

## SIGNIFICANT FINDINGS

- In the last decade, the extractive industry has become financially important to Latin American countries. According to the Economic Commission for Latin America and the Caribbean (ECLAC), from 1990 to 2009, the weight of extractive sector exports increased from 31 percent to 53 percent in Peru; from 38.5 percent to 52.1 percent in Colombia; and from 12.5 percent to 38.2 percent in Brazil. In Peru, mining ranks fourth of the main contributors to the gross domestic product (GDP) (11 percent of the internal revenue and 24.2 percent of income tax), exceeding its share in the GDP structure. Given its competitive and technological nature, mining is capital-intensive and offers few jobs but since they operate in inhospitable areas, their wages are higher than market wages.
- In the four countries (Peru, Colombia, Guatemala, and Panama), Foreign Direct Investment (FDI) has focused mainly on the extractive sector. For example, in Colombia, FDI reached 92 percent (US\$13.234 billion) in 2011, with oil investment increasing and mining investment decreasing. In Peru, compared to 2010, FDI increased five percent, most of which was directed to mining. Guatemala had a 22 percent increase in FDI also in the same period.

\* Rights and Resources Initiative and Asociación Ambiente y Sociedad 2013. Impacto de la industria extractiva en los derechos colectivos sobre territorios y bosques de los pueblos y las comunidades. Washington, DC: Rights and Resources Initiative.

Along with Costa Rica, Panama continues to be one of the main recipients of FDI, allocating a large portion to the electrical sector.

- The states compete to attract FDI. To that end, they implement national standards whose origins are in the investment chapters of the Free Trade and Bilateral Investment Agreements, such as the legal stability agreements in Peru (Legislative Decree No. 662) and Colombia (Law 963 of 2005). Further, restrictions imposed on the extractive industry are being reduced or eliminated, and tax benefits are being granted in Colombia, Guatemala, and Panama. A report by the International Resources Investment Corporation (IRIC 2009) found that Colombia is one of the most appealing countries for mining investment, but this positive trend “is vulnerable and may be reverted if global, private sector stakeholders see or perceive political/tax/legal changes that can undermine the industry’s economic appeal.”
- A distinct policy trait of the four countries is that non-renewable resources are state-owned, and mining companies are granted concessions or temporary ownership of such resources. The extractive industry is particularly privileged in that mining and oil exploitation have been declared of public usefulness. This privilege allows private and state-owned companies to use other resources—such as water, soil, and forests—and establish active servitudes for exploitation purposes. Concession rights can be exercised for an average of 25 to 30 years and require paying surface fees and royalties. These fees and royalties are then distributed among the central state and the regions where hydrocarbon and mining exploration and exploitation activities take place.

States exercise their sovereign right to exploit and use non-renewable natural resources throughout their national territory, including collective land of Indigenous Peoples and Afro-descendants. Colombia is the exception: mining is prohibited in all national natural parks (Decree 622 of 1977) and other areas identified in the current Colombian Mining Code (Article 3, Law 1382 of 2010).

- The governments of Peru, Panama, Guatemala, and Colombia have decided to use carbon trading as a way to conserve forest areas and access funds from emission reduction mechanisms, such as REDD (Reducing Emissions from Deforestation and Forest Degradation). Nonetheless, REDD Readiness Preparation Proposal (R-PP) documents reveal a need for further analysis on the lack of coherence of existing sectoral policies allowing forestland to be used both for productive activities—such as mining-fuel exploitation—and regional integration infrastructure projects, such as roads and waterways. Such activities might counter all attempts at conserving the forests where they are carried out.
- Forest areas identified by the countries as potential sites for REDD+ projects often overlap with land owned by Indigenous Peoples, Afro-descendants and/or peasants and are also areas subject to concessions for extractive industries. This leads to conflicts of interest and involves the risk of not respecting their human rights and collective tenure rights.
- A review of the literature on the cases of Mandé Norte in Colombia, the Marlín Mine in Guatemala, the Conga Mining Project in Peru, and the opposition to the mining law by the Ngöbe Buglé People in Panama revealed that appropriate processes in terms of prior consultation (PC) and free, prior, and informed consent (FPIC) have not taken place for mining-affected indigenous, Afro-descendant, and peasant communities. Sometimes, mining policies are adopted without prior consultation with the communities, thus creating damaging legal and institutional voids. Hence, adequate regulation of related national and international standards is in order.

- There is a trend toward delegitimizing the claims of ethnic communities. In the traditional discourse, these communities appear to play a negative role in society and are made to look guilty of halting progress, though many studies have proven otherwise.

## DATA

### **The extractive industry is the focus of foreign investment in some Latin American countries.**

In the four countries highlighted in this report, FDI has centered mainly on the natural resources sector. In 2011, in Colombia, it reached 92 percent, with oil investment increasing significantly. In Peru, FDI increased five percent in 2011, most of which was directed to mining. Guatemala had a 22 percent increase in FDI in the same period. Panama and Costa Rica continue to be among the main recipients of FDI, allocating a large portion to the electrical sector.

Investment in the mining sector comes from corporations in the United States, Canada, and South Africa, directly or through their subsidiaries, which also invest in state-run or semiprivate companies. Experts point out that the price increase due to imports from emerging countries, such as China, is one of the factors that may explain the overall increase in foreign direct investment in the extractive industry in Latin America and commodity market speculation.

### **Intergovernmental agencies note that this “exports bonanza” has not resulted in long-term development processes. Their advice is to avoid tax competition and increase state intervention.**

In view of this new reality of a growing extractive industry and its weight in the regional economy—and in the economies of the four countries under study—some trends have remained constant in the region. According to the 2012 ECLAC report, *Revenue from non-renewable natural resources in Latin America and the Caribbean: Evolution during the 1990 -2010 decade and state participation*, these trends include: (i) the exports bonanza has not resulted in long-term development processes; (ii) tax surpluses have not been used as promised; (iii) processes are not socially and environmentally sustainable; and (iv) prices do not reflect the sustainability criteria.

According to ECLAC, tax competition is to be avoided across countries to attract investment. Otherwise it increases state intervention through companies, or in other words, it goes back to the previous scheme and simply adapts it for use by the private sector. ECLAC also draws attention to a downward trend in the reserves-production ratio, which reveals the need for a deeper and more careful analysis of economies that depend almost entirely on revenue from oil, gas, and/or mineral exports. Furthermore, it underlines the causal relationship between resource exploitation, extractive industry impact, and environmental conflicts in the region.

### **Security and legal stability**

Latin America has witnessed a boom of Bilateral Investment Agreements. It has signed almost 18 percent of all such agreements and has filed 90 percent of arbitration claims worldwide. These agreements and the investment chapters of the Free Trade Agreements are signed to ensure a better investment climate, one that protects investors against political risks and promotes enjoyment of the initial financial benefits. In preparation for such agreements in Peru and Colombia, state actors and investors sign legal stability agreements that assure national and foreign investors adhere to and implement all applicable policies when the instrument is signed. However, if the government enacts a

new law that is more beneficial to the investors, they may waive the law originally stated in the stability agreement by invoking the principle of favorability, thus allowing the company to abide by the law offering better benefits. This creates a dangerous precedent in which any guarantee to indigenous groups or communities within existing agreements can be revoked should a new agreement better suit investors.

## CRITICAL ASPECTS

**Because of their social and environmental implications, there is a need for PC and/or FPIC for mining, hydrocarbon, and conservation projects in indigenous territories.**

The extractive industry negatively affects the environment. Open-pit metal mining is most harmful, especially in rain forests, because it entails the removal of native vegetation; however, many mining operations that extract metals using cyanide leaching alter wildlife habitats, contaminate watersheds, and pose multiple risks to health and the environment. The harmful effects of cyanide for fish, wildlife, and humans have been well documented. Harmful changes occur in the physical, chemical, and biological quality of water and in the dynamics between surface and ground water.

Extractive projects in land owned by Indigenous Peoples and Afro-descendants affect their economic, social, and religious environment, as well as the biodiversity and ecological balance on which their livelihoods depend. Further, their rights, including those to collective land, self-determination, PC, and FPIC, are often not recognized.

UN Special Rapporteur on the Rights of Indigenous Peoples, James Anaya, submitted a report on *Extractive industries operating within or near indigenous land* to the Human Rights Commission. In it, he notes that the current development model—largely based on the idea that the extraction of natural resources leads to progress—constitutes an important violation of Indigenous Peoples’ cultural, social, environmental, and economic rights.

According to case studies used for the report (Mandé Norte in Colombia; the Marlín Mine in Guatemala; Conga in Peru; and the opposition by the Ngöbe Buglé People to the mining law in Panama), there are conflicts with Indigenous Peoples, Afro-descendants, and peasants involving private companies and/or governments in areas assigned to oil and mining extraction. The implementation of PC and FPIC processes is been notoriously weak in these areas.

The report reveals the need to establish fixed policy frameworks to regulate PC and FPIC processes. In addition, it is essential to develop tools and mechanisms to enforce these rights, as well as formulate, design, and implement public policies that define their content. The vindication of PC and FPIC rights is linked to other rights, including land tenure, a healthy environment, and access to drinking water.

Recognition and implementation of PC and FPIC rights pose both policy and political challenges. Of the four countries under study, only Peru has a prior consultation law, though a bill is under review in Guatemala. Colombia and Panama do not have specific legislation on the matter, which creates governance problems when Indigenous Peoples and Afro-descendants try to expedite their demands at the national level.

**Royalties from the exploitation of non-renewable natural resources have not been equitably distributed in the region and have not translated into greater well-being for local communities.**

In Colombia, royalties have decreased in the last few years due to tax exemptions and reduced surface fees. In the areas where royalties have increased, it has been due to a boost in mineral exports.

Unfortunately, empirical evidence shows that mining and oil municipalities have failed to improve their populations' well-being. Between 1994 and 2001, 70 percent of the royalties were paid to three states only: Casanare (45 percent), Arauca (15 percent), and Meta (10 percent). Casanare, Arauca, Meta, Guajira, and Cesar, however, have the highest rates of unmet basic needs. Since three of the five states are receiving a vast majority of the royalties, one can conclude that royalties are insufficient and often badly managed mainly because of corruption, embezzlement, and rent seeking by legal and illegal actors. With regard to employment in Peru, the balance is not encouraging: around 217,000 people are employed by the mining sector—a mere 1.5 percent of the employed population in the country. When compared to the percent of GDP, this statistic is even more depressing.

Further, mining areas seem to rank the worst on human development indexes. UNDP's 2003 Human Development Report for Peru reveals that it ranked 79<sup>th</sup> of 177 countries. Regionally, however, there are inequalities. Whereas Lima, Arequipa, Ica, Moquegua, and Tacna (the latter two being mining states) rank first in terms of human development and its components, Cajamarca, the site of the most important South American goldfield, ranks last together with Ancash. Although local governments have benefitted from mining royalties, this has not resulted in improved quality of life indicators for the population because of institutional inefficiency. However, the necessary research to conclude whether or not this is associated with mining has not yet been done.

In Guatemala, for example, information about the regional distribution of royalties from extractive activities is scarce and unclear. Local communities have filed complaints about the lack of information on extractive operations, including how resources from these operations have been invested locally. Social and environmental organizations have started legal actions against administrative decisions to renew extractive projects in Guatemala, arguing, among other things, that oil and mining companies have not paid the required dues, fees, and royalties. Nevertheless, none of these legal actions has been successful.

**Forest areas are used both as carbon sinks to implement emission reduction mechanisms like REDD, and for mining and hydrocarbon operations.**

A recent case included in the study is that of the Strategic Mining Areas established in Colombia in 2012. These areas cover a substantial portion of the Amazonia and the Chocó biogeographic region and, although not fully delimited, they are regarded as potential carbon sinks in the R-PP document prepared prior to the mining statement.

If all these activities occur simultaneously, one must ask *how can the integrity of forest areas as carbon sinks can be ensured during climate change-related negotiations?* The study identified the need to adapt the national REDD R-PP documents to the reality of regional development plans, which often imply building hydroelectric plants, roads, and laying power lines that impact forest areas. It is essential to ensure greater intersectoral articulation within governments since development plans are not coordinated with environmental conservation plans for forest areas.

Neither the conflict originated by opposing interests nor the lack of coherence of sectoral policies is analyzed in depth in the existing R-PP documents of the countries under study. The above-mentioned mining statement is an example of one such incoherence. Programs such as the Forest Carbon Partnership Facility and REDD+ project donors should take this point into consideration during grant-making.

**As the extractive industry grows, so do social protests.**

National and regional reports highlight the serious social conflicts, such as the Conga Project and the opposition to mining in glacier areas of Patagonia, arising from extractive projects throughout the

continent. This new and growing reality should be included in government assessments before determining the feasibility of new projects.

A comparison of four cases (Mandé Norte in Colombia; the Merlín Mine / Cerro Blanco in Guatemala; the Conga Project in Peru; and the opposition by the Ngöbe Buglé People in Panama and the Sarayaku in Ecuador) reveals the existence of intense social mobilization and resistance to defend the rights of people and their environment. Social actions are often delegitimized making communities—including Indigenous Peoples, Afro-descendants, and peasants—appear to play a negative role in society and to look guilty of halting the eagerly awaited progress.

## RECOMMENDATIONS

### **Legal security for the environment and the collective rights of Indigenous Peoples, Afro-descendants, peasants, and forest communities**

Human and environmental rights can be the subject of complaints before national and international courts. Sometimes they are recognized and states are required to comply with their obligations. This is not the case with investors. In matters of rights violations by investors there are no such straightforward mechanisms as arbitration courts, whose rulings have grievous consequences to those operating illegally. Therefore, such mechanisms should be developed to ensure that the protection of the environment and rights of Indigenous Peoples, Afro-descendants, and peasants is regarded as important as that granted to investors.

### **Strengthening environmental licensing processes: An essential step.**

All the countries under study issue environmental licenses that comply with international environmental standards. Nonetheless, their legal frameworks undergo continuous changes because of the need to expedite license approval processes to foster the development of the extractive industries.

An extension to issue environmental licenses is essential to pave the way for real citizen participation and prior consultation. Moreover, countries need institutional strengthening, specialized training for authorities issuing environmental licenses, and critical equipment provisions to deal with evaluation processes autonomously.

### **Environmental liabilities.**

Compensation and management of environmental liabilities of the extractive industry is of the utmost importance because of its impact on rural areas and local peoples. A system is needed to close down abandoned mines that were in operation during the peak of the extractive industry boom in the region, as well as ecological plans to compensate and restore areas where exploitation took place. The policy framework regarding the obligations arising from the closing of the mines is still weak and warrants further development.

### **Civil Society working on local and global issues.**

Civil Society groups and technical-scientific organizations are essential to follow up on the global impacts of new trends in the extractive industry and their relationship with social and economic development at the local level. They should discuss and make decisions on issues like conservation; use and/or management of protected areas; use of specific natural resources such as soil, water, and forests; development models based on an extractive economy; territorial regulation and new territorial configurations; and possession, ownership, and use of land of indigenous, Afro-descendant, and peasant communities.

### **Compliance with public information laws.**

The right to information, participation and environmental justice is universal. Therefore, all communities affected by the extractive industry should be consulted. With the exception of confidential and strictly commercial issues, all necessary information should be made available to citizens to avoid limiting their rights. Before mining operations begin, they should be informed about corporate policies regarding human and environmental rights, and compliance indicators should be discussed.

## THE RIGHTS AND RESOURCES INITIATIVE

RRI is a global coalition of 14 Partners and over 120 international, regional, and community organizations advancing forest tenure, policy and market reforms. RRI leverages the strategic collaboration and investment of its Partners and Collaborators around the world by working together on research, advocacy and convening strategic actors to catalyze change on the ground.

RRI is coordinated by the Rights and Resources Group, a non-profit organization based in Washington, D.C. For more information, please visit [www.rightsandresources.org](http://www.rightsandresources.org).

## PARTNERS



## SUPPORTERS



*The views presented here are those of the authors and are not necessarily shared by the agencies that have generously supported this work or all of the Partners of the Coalition.*



1238 Wisconsin Avenue NW  
Suite 300  
Washington, DC 20007  
+1 202 470 3900  
[www.rightsandresources.org](http://www.rightsandresources.org)