

Policy pointers

Governments are looking to mining to kickstart post-COVID-19 economic recovery, boost growth and provide minerals for the global 'green energy' transition.

Too often authorities award licences for mineral exploration — the initial phase of mining — without community consultation, consent or inclusive land-based planning. Conducting these later, in the development/exploitation phase, can be too late to protect local people and the environment.

To avert possible conflict and injustice, governments and companies should ensure meaningful public engagement before exploration begins, protecting and recognising local rights and the environment even at early stages of investment approval.

In investor communications, governments must not create legally enforceable 'legitimate expectations' that may undermine their future enviro-social decision making on mine development.

People and nature first: safeguards needed in mining exploration

Many governments hope to use mining to boost post-COVID-19 growth and engage in the mineral-intensive 'green energy' transition. But they risk repeating the same mistakes at the root of many mining conflicts. That is, not ensuring that environmental and social safeguards are included from the start, when they first grant licences to prospecting companies to search for minerals. Many safeguards only come into play after a company has found the minerals and is applying for a licence to mine (exploit) them. By this stage, it's often too late to take such issues into account because governments and mining interests are committed to a path determined in the exploration phase. This briefing explains why governments, civil society and companies must introduce safeguards in advance of mineral exploration, to promote long-term, sustainable mine development.

Land-based mineral exploration is a high-risk investment in which a government gives a licence holder the exclusive right to explore sub-surface resources. It precedes the development of a mine and is big business.

Newly mined minerals and metals remain foundational to modern-day society, even a green one. Demand for copper, cobalt and lithium is expected to increase four- to 20-fold between 2020 and 2040 as "a clean-energy system will also be a mineral-intensive system."¹ Exploration for these green-economy minerals, used in electric car batteries for example, is expanding rapidly. Meanwhile, demand for precious and other base metals continues unabated: in January 2020, gold exploration reached its highest level in a decade.² Exploration licences worldwide now cover huge swaths of mineral-prospective land across the world — around one quarter of Uganda's total land mass³ and almost 20% of Cote d'Ivoire.⁴

But the environmental and social safeguards governing exploration and pre-exploration are largely insufficient and fail to protect the enviro-social rights of existing land users. These safeguards must be strengthened.

Conflicts rooted in the exploration phase

There are two main phases of mine development:

- **Exploration**, when companies prospect for a certain mineral, usually across a huge area, seeking to prove there's enough to make mining it profitable, and
- **Exploitation or extraction**, when minerals are mined from the earth to be sold.

Legal and regulatory oversight for the approval of mineral exploration can be highly ambiguous and inconsistent. As a result, governments can fail to address the social and environmental dimensions of these investments in meaningful ways.

Without public consultation and safeguards, processes for awarding exploration and mining licences can be highly subjective

Exploration licences rarely require that companies consult with local communities and so permits are awarded without consent, approval or even the

awareness of existing users and inhabitants of the land. Research on over 100 company-community conflicts over mining showed more than 60% began during project inception, bred in the failure to establish trust and ensure benefits and protections for

communities and the environment. These conflicts result in significant, ongoing costs to governments, companies and communities.⁵

Without open, public consultation and safeguards for people and the environment, the processes for awarding exploration and mining licences can be highly subjective, corrupt and fail to meaningfully incorporate complex, diverse perspectives and values. They can also create legally binding 'legitimate expectations' for investors that can later hamstring governments.

All parties must prioritise social and environmental rights early in the mining cycle. Once an exploration licence has been granted and a resource proven, there are fewer options for communities and governments to prevent mining either through community consultation and consent or by enforcing protection in environmental protection areas.

The political economy of exploration is complex

Although laws vary between countries, exploration licences tend to give the holder the exclusive right to explore for minerals in a defined area with the intention of assessing the size, value and exact location of a resource. This right is to the exclusion of all other miners, including artisanal miners. (Artisanal miners may already be mining the land but their informal, unrecognised rights will not protect their livelihoods against incoming investors.)⁶

Investors want an exploration licence to provide them with security that once they've proven a mineral find, they will have the option, or even a right, to mine it ahead of any other investor. To a large extent, mining legislation reflects this political and economic reality.

Exploration licences may carry protections for sacred ground, and land close to residential dwellings and agricultural land; a minimum expenditure requirement as proof of activity; and a duty to restore land and compensate for damages.

But in practice, it can be difficult to enforce these.

Companies. By its very nature, exploration is high risk. It can take years, if not decades, for a prospecting company to discover a viable deposit, if indeed they do so at all. Until a mineral resource is proven, companies are reluctant to invest heavily in an area, including in costly and time-intensive community engagement. Whilst mining company 'majors' may follow their own guidance on community engagement in the exploration phase, most mineral exploration is undertaken by smaller or mid-sized companies. With fewer reputational risks, smaller budgets, few incentives and limited knowledge, their capacity to undertake appropriate social and environmental engagement in this early phase is often limited.

The Prospectors and Developers Association of Canada (PDAC), the world's leading industry body for mineral exploration companies, provides guidance for 'responsible' exploration.⁷ Although it is responsive to the more limited resources of these companies, this guidance does not adequately address many complex sustainable development challenges. It is insufficiently detailed on gender sensitivity and historically marginalised groups.

Many companies also look to the International Finance Corporation's Performance Standards (IFC-PS) on Environmental and Social Sustainability.⁸ Although upheld as international best practice, the IFC-PS were written from the investor perspective. They do not support a holistic approach to land, resources and community rights that would balance the enviro-social values and priorities of various stakeholders.⁹

Governments. Governments are keen to receive exploration firms' assessments of a country's mineral wealth and to attract foreign direct investment. In return, they offer mineral investors both ease of access and security.

In most countries, and where geological data is scarce, governments award exploration licences on a first-come, first-served basis. This is largely an administrative affair with the state undertaking minimal due diligence as to the investor's ability to develop a mine successfully **and responsibly**. Often decisions are made simply on the basis that the land is not subject to an existing mineral right.

Without public scrutiny through consultation and other processes, state corruption can flourish. In 23 mining jurisdictions studied, Transparency International identified more than 80 common corruption risks in the awarding of mining licences, permits and contracts.¹⁰

Communities. The priorities and rights of individuals and communities living on the land are

often overlooked when governments and mining firms negotiate out of the public eye. People may be using land and other natural resources under customary, informal or Indigenous systems that are not legally recognised by, or even known to, decision makers. Communities rarely engage in discussions to inform the strategic use and development of a country's natural resources and land.

Yet it is at the exploration stage that first contact is made between the company and community members. Community expectations and fears arise at the presence on their land of unknown operators who may damage cultural sites or the environment.

An investor may argue their impact at the exploration stage is minor, that the resource is unproven and so expectations should be managed. But once a mineral resource is proven, the economic argument for mining development becomes very strong and the legal protections offered to communities and the environment are significantly weakened.

Weak safeguards don't protect communities

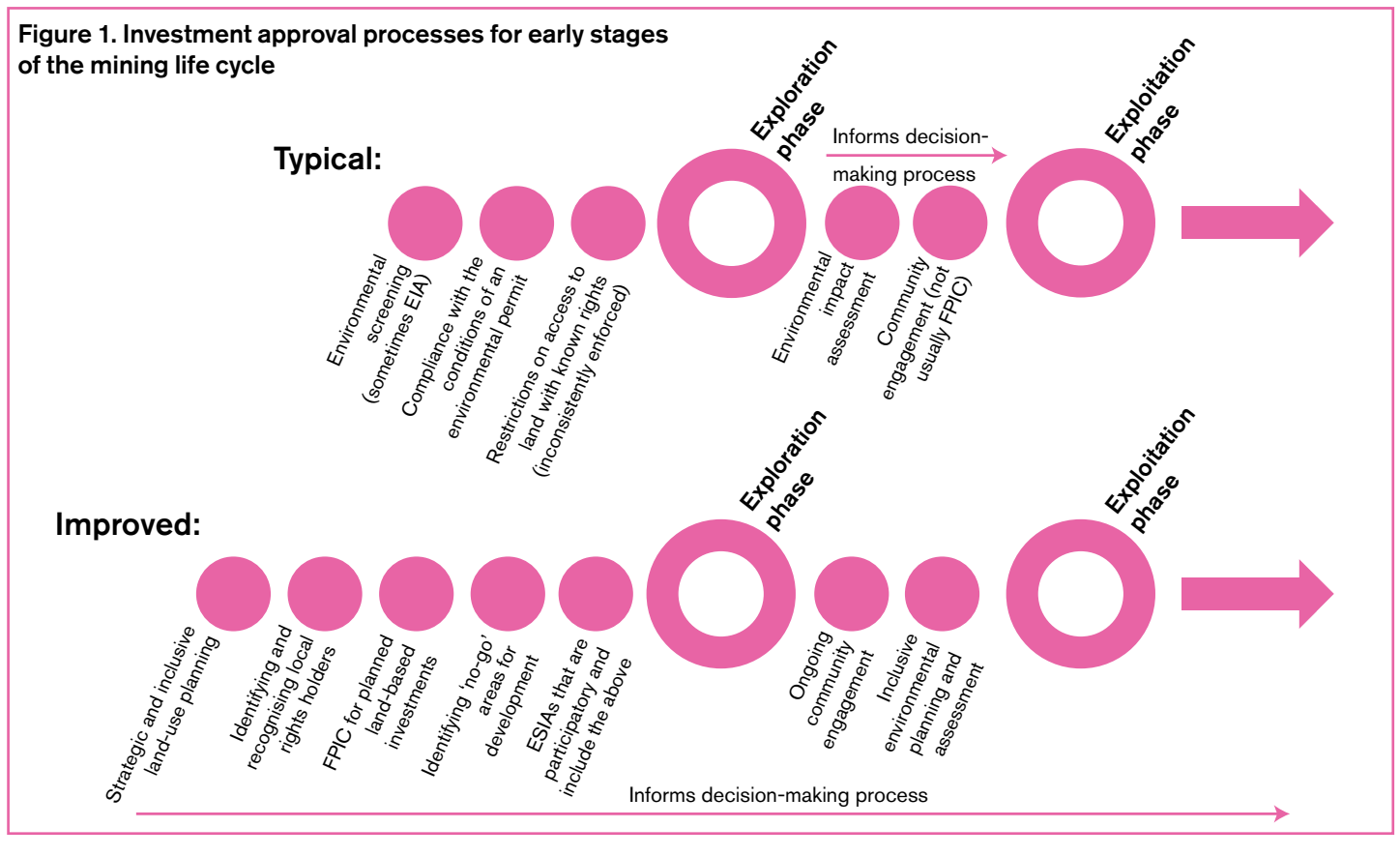
Some governments offer companies an explicit or implicit right to mine following exploration.¹¹ This may be regardless of whether prospectors meet additional criteria, including any required within a full environmental and social impact assessment (ESIA) or a process to garner free, prior and informed consent (FPIC).¹² In these countries, the

investment approval process is set up to make greenlighting projects a foregone conclusion.

Impact assessments (IAs) theoretically offer communities and environmental defenders a route to protect and assert their rights and priorities regarding local development of the land. An IA can be an effective sustainable development tool that delivers both social and environmental benefits and protections if deemed necessary, or desirable, within natural resource management. But this is true only where it is meaningfully and inclusively implemented and given sufficient decision-making weight early in the mining life cycle.

However, in most countries, full ESIA's are not required at the exploration stage, but only in the transition to exploitation. The International Institute for Sustainable Development's extensive analysis of laws governing ESIA's in this transition identified numerous ambiguities and inconsistencies in the laws governing IAs within the mining approval process.¹² These include contradictions between mining codes and environmental codes that impede decision making in line with broader sustainable development concerns. Indeed, mining cadastres (registries) across Africa show that exploration licences have been awarded in multiple environmental protection zones¹³ as the search for new mineral reserves drives exploration into new frontiers.^{14,15}

The lack of legal clarity can also increase the risk of investors claiming they have 'legitimate



expectations' under international investment law. According to international arbitration tribunals, these expectations can be established in a government's negotiations and other communications with an exploration company, including, for example, assurances that land and licences will be made available. If the host government takes action that frustrates those expectations, an investor could be entitled to significant compensation under applicable treaties. A simple 'reminder' of these investor expectations may be enough to pressure a government to act in line with them in granting an exploitation licence.¹⁶ An investor's claims may then have greater weight in decision making than local human and environmental rights.¹⁷

Despite their failings, IA processes can be seen as a proxy for public participation in decision making.¹⁸ Yet in both policy and practice, IAs often fall far short of providing a substantive, mandatory process for taking public views into account. FPIC processes offer local communities a more effective means by which to assert their rights and priorities. But policymakers and practitioners have largely failed to meaningfully implement FPIC.¹⁹

Better safeguards needed at exploration stage

By the time an exploration effort is transitioning into mine development, both a community and a national government may have already lost significant ground on which to protect or negotiate their rights. To recap, this is due to:

- Complex, overlapping legal systems
- Inadequate and opaque decision making in awarding mineral licences, and
- Insufficient knowledge of communities' priorities and rights.

Better safeguards in advance of mining exploration are imperative in tackling the long-term risks these

Notes

¹ Michaels, K. 'Critical minerals: opportunities and challenges in the race to zero.' Intergovernmental Forum on Mining, Minerals and Sustainable Development annual general meeting, virtual, 19 October 2021. / ² S&P Global Market Intelligence, World Exploration Trends 2020. <https://tinyurl.com/2p84ncau> / ³ Uganda Mining Cadastre Portal. <https://portals.landfolio.com/uganda> / ⁴ Hilson, G, Sauerwein, T and Owen, J (2020) Large and artisanal scale mine development: The case for autonomous co-existence. *World Development* 130: 104919. / ⁵ Alforte, A, Angan, J, Dentith, J, Domondon, K, Munden, L, Murday, S and Pradela, L (2014) Communities as counterparties: preliminary review of concessions and conflict in emerging and frontier market concessions. Rights and Resources Initiative. <https://tinyurl.com/bdz8h5uz> / ⁶ See further, for example, note 4. / ⁷ PDAC. First engagement: a field guide for explorers. <https://tinyurl.com/bddfbp7k> / ⁸ IFC. IFC Performance Standards on Environmental and Social Sustainability. <https://tinyurl.com/mx3pz46r> / ⁹ Cotula, L (2019) Land rights and investments: why the IFC performance standards are not enough. Land Portal Foundation. <https://tinyurl.com/58bv4zat> / ¹⁰ Nest, M (2020) Mining awards corruption risk assessment tool. Third edition. Transparency International Australia. <https://transparency.org.au/publications/macra-tool> (this paper covers corruption risks at all stages of the mine cycle, beyond just exploration). / ¹¹ See further: Oshionebo, E (2020) Mineral mining in Africa: legal and fiscal regimes. First edition. Routledge, London. / ¹² Suzy Nikiema, H (2019) Background document: Legal Framework of Environmental and Social Impact Assessment in the Mining Sector. International Institute for Sustainable Development. www.iisd.org/system/files/publications/igf-esia-background-en.pdf / ¹³ Buxton, A (10 February 2022) Mineral exploration goes unchecked as mineral demand escalates. www.iied.org/mineral-exploration-goes-unchecked-mineral-demand-escalates / ¹⁴ Sonter, L, J, Dade, MC, Watson, JEM and Valenta, RK (2020) Renewable energy production will exacerbate mining threats to biodiversity. *Nature Communications* 11, 4174. / ¹⁵ Maennling, N and Toledano, P (20 March 2019) Seven Trends shaping the future of the mining and metals industry. www.weforum.org/agenda/2019/03/seven-trends-shaping-the-future-of-the-mining-and-metals-sector / ¹⁶ See further: Cotula, L (2016) Foreign investment, law and sustainable development: a handbook on agriculture and extractive industries. IIED, London. pubs.iied.org/12587iied; <https://tinyurl.com/jbedu8ch> / ¹⁷ Cotula, L (23 March 2021) Rethinking investment law from the ground up: extractivism, human rights, and investment treaties. <https://tinyurl.com/2p8bmdjs> / ¹⁸ Sishekanu, M and Katati, M (2021) Subjectivity in the logic of Zambia's environmental impact assessments (EIA) process: the bedrock of controversial EIA approvals. *Law, Environment and Development Journal* 17(1) 40. / ¹⁹ Buxton, A and Wilson, E (2013) FPIC and the extractive industries: a guide to applying the spirit of free, prior and informed consent in industrial projects. IIED, London. pubs.iied.org/16530iied / ²⁰ Buxton, A, Schwartz, B and Cotula, L (2021) Tenure rights in large-scale and artisanal mining: implications of the tenure guidelines. FAO, Rome. <https://pubs.iied.org/20506fx>

challenges pose to communities, land, national resources and sustainable development (Figure 1).

There are several actions that governments in mineral-rich countries can take, particularly by reviewing legal frameworks and decision-making structures to ensure they are robust, fit for purpose, and provide clarity to both investors and communities:

- By embracing best practice in strategic land-use planning and in ESIA and FPIC processes, authorities can ensure communities communicate their views, are better informed and freely consent to investments **prior to exploration** taking place.
- Governments will find broader, more holistic, guidance on land-based investments by looking beyond 'accepted' guidance, such as the IFC standards, to the Food and Agriculture Organization's Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests (VGGT), for example. The VGGT apply to public authorities and the private sector. They use local people's legitimate tenure rights as the starting point for discussions on investments impacting land, even if those rights are not formally recognised in law.²⁰
- Authorities must uphold protections given to unique and threatened ecosystems and other areas of natural resource importance, denying mineral exploration there in the first place.

Mining policy and implementation, which currently prioritises investor interests, must give greater weight to the rights and protections of communities and the environment. Governments looking to achieve the Sustainable Development Goals should make it a policy priority to strengthen these protections in advance of mineral exploration.

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Knowledge Products

The International Institute for Environment and Development (IIED) promotes sustainable development, linking local priorities to global challenges.

The Columbia Center on Sustainable Investment (CCSI) is a leading applied research center and forum dedicated to the study, discussion and practice of sustainable international investment.

Advancing Land-based Investment Governance (ALIGN) supports governments, civil society, local communities and other relevant actors in strengthening the governance of land-based investments. The project is implemented by a consortium led by IIED, CCSI and Namati.

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ISBN 978-1-78431-948-9

This material has been produced as part of ALIGN by IIED and CCSI and is funded with UK aid from the UK government, however the views expressed do not necessarily reflect the official views or policies of ALIGN partners or the UK Government.

