

Briefing Paper

# Regional framework on Extractive Industries Governance



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# 1 Introduction

**E**xtractive industries development, in the form of growth in the exploration, extraction and processing of minerals and hydrocarbons (coal, oil and gas), is a key component of building the AEC. The ASEAN Member States believe that the development of the extractive industries can boost economic growth through the provision of employment, export revenues and investment in infrastructure and human capital.

ASEAN has strong reasons to support a prominent role for the extractive industries in the current drive for regional economic integration. Firstly, ASEAN Member States are endowed with abundant reserves of fossil-fuel, energy and mineral resources. Secondly, the key role of extractive industries in building the AEC is supported by the continuous growth of the sector in various member countries. Despite volatile commodity prices in the world market and the recent global economy slump, extractive industries remain vibrant. The third reason is the significant contribution of the extractive industries to ASEAN Member State economies. However, differing resource endowments, risk profiles, levels of economic development and regulatory and institutional factors currently account for the considerable diversity in the extent and scope of hydrocarbon and minerals extraction and production and their role in economic development across ASEAN countries.

Despite the active development and continuous flow of investment towards the extractive industries in ASEAN, several factors have constrained realisation of the industries' full potential in the region. A key impediment across various ASEAN countries is weak governance at many levels, encompassing the absence of rule of law, a lack of robust mechanisms to ensure transparency and accountability and to facilitate partnership between government and non-government organisations.. Governance is broadly defined as the sound exercise of political, economic and administrative authority to manage a country's resources for development. Good governance requires sound economic management; exercise of the rule of law; public participation, transparency, accountability; and predictability in public administration. The extractive industries, by nature, are particularly sensitive to governance issues at each level.

Good governance must be implemented comprehensively throughout the extractive industries' value chain. The value chain reflects interconnectedness across a sequence of activities in the industry, from the extraction of hydrocarbon and

mineral resources, to their processing and sale, to the ultimate use of the revenues obtained from extractive activities. Governance challenges in ASEAN's extractive industries can be found at each level of the value chain.

The development of extractive industries in ASEAN therefore calls for a strong and effective regional policy framework. Member States and national governments are ultimately responsible for the regulatory and institutional settings within which the industry operates in a given jurisdiction, and their actions are critical to achieving sustainable benefits from the extractive industries for national and regional economies. More specifically, the sustainable development of the extractive industries is contingent on the provision of strategic direction: this includes ensuring the requisite legal, regulatory and institutional frameworks are in place to pursue desired economic, social and environmental objectives; guaranteeing accountability, transparency, and stakeholder consultation; and establishing effective systems to deliver tangible benefits from resource extraction to the country's citizens.

In the ASEAN context, the policy framework must also address the diversity in the extent and scope of the extractive industries across the region, based on the varying resource endowments, risk profiles and levels of economic, regulatory and institutional development of member countries. The policy framework must also serve to address the development divide and accelerate the economic integration of the less developed ASEAN member countries, so that the benefits of ASEAN integration can be shared and enjoyed by all members.



## 2 The Purpose of the Framework

The framework aims to contribute to the development of extractive industries within ASEAN that are accountable, transparent, and well-governed and are effective in stimulating economic growth at regional, national and local levels, environmentally sound, socially responsible and involve the participation of surrounding communities. The framework aspires to create an extractives sector that is a key component of a diversified, vibrant and globally competitive industrialised economy at regional level while harnessing the potential of small-scale mineral extraction to stimulate local/national entrepreneurship, improve livelihoods and advance integrated rural social and economic development.

The framework will provide principles and a platform for the harmonization of extractive industry policies in ASEAN member countries, to ensure high standards of accountability for mining companies and governments, the adoption of human rights, sound fiscal frameworks and revenue management, transparency and social equity, as well as protection of the environment and the rights and interests of local and affected communities. At the same time, the framework will serve as a standard-setting instrument for the management of the extractive industries in ASEAN, enabling a similar level of competitiveness across ASEAN member countries and avoiding a “*race to the bottom*”.

Implementation of the framework will ensure that standardization and harmonization of standards takes into consideration the different stages and contexts in each ASEAN member state in relation to development of the extractive industries and the need to flexibly develop and enact policies and strategies to address the specific needs of each member state. Furthermore, the framework will provide a set of guidelines for developing tools to monitor the progress of extractive industries development in ASEAN member countries.



# Legal Building Blocks in 3 Asean Context

**T**he regional framework, as the tool to foster the development of competitive economy region and the Integration into the Global Economy under the AEC, adheres and complies with the existing legal documents and formal decisions at summit, councils, and sector ministerial bodies' level inside ASEAN. Those legalities will serve as building blocks that underpin the implementation of the framework among the member states

- 3.1. The **ASEAN Charter** has set out in Article 1 (5);(6);(7); and(9) that the purpose of ASEAN in creating *"a single market and production base which is stable, prosperous, highly competitive, and economically integrated with facilitation for trade and investment"* must go hand in hand with strengthening of democracy, enhancement of good governance and rule of law, and promotion and protection of human rights and fundamental freedoms; alleviation of poverty and narrowing the development within ASEAN through mutual assistance and cooperation; and promotion of sustainable development as to ensure the protection of the region's environment, the sustainability of its natural resources, the preservation of its cultural heritage, and high quality of life of its people.
- 3.2. The **ASEAN Vision 2020** has emphasized that the creation of Partnership in Dynamic Development which will forge closer economic integration within ASEAN must include *"establishing interconnecting arrangements in the field of energy and utilities and promoting cooperation in energy efficiency and conservation, as well as the development of new and renewable energy resources"*; while at the same time *"enhance intra-ASEAN trade and investment in the mineral sector"*. Nevertheless, along with the Partnership in Dynamic Development, ASEAN Vision 2020 has also outlined the aim to develop A Community of Caring Societies by *"fully established mechanisms for sustainable development to ensure the protection of the region's environment, the sustainability of its natural resources, and the high quality of life of its peoples; and the evolution in Southeast Asia of agreed rules of behaviour and cooperative measures to deal with problems that can be met only on a regional scale, including environmental pollution and degradation"*.



- 3.3. The **ASEAN Human Rights Declaration (AHRD)** and the Phnom Penh Statement on the Adoption of the AHRD has stated that the right to development is an inalienable human rights by virtue of which every human person and the peoples of ASEAN are entitled to participate in, contribute to, enjoy and benefit equitably and sustainably from economic, social, cultural, and political development, and which should be fulfilled so as to meet equitably the developmental and environmental needs of present and future generation.
- 3.4. The **2004 Vientiane Action Programme (VAP 2004-2010)**, which was agreed during the 10<sup>th</sup> ASEAN Summit in Vientiane, Laos on November 2004 has provided, instrument to unify and cross-link the strategies and goals of AEC with other pillars of the ASEAN Community and as an integral part of the action plans which emphasize the trade in goods and trade in service in the area of minerals and energy resources. On the other hand, the Action Programme has outlined the action to increase the role of mining sector in Promoting Environmental Sustainability by strengthening cooperation in the rational utilisation of mineral resources that include the realization of safe, environmentally friendly and socially responsible mineral resources development in ASEAN
- 3.5. The **ASEAN Economic Community Blueprint** that was adopted by ASEAN leaders at the 13<sup>th</sup> ASEAN Summit in Singapore on November 2007 has drawn guidance for member countries to support the development of single market and production base by facilitating free flow of investment through the inclusion of mining and quarrying sector and services incidental to the sector into the The ASEAN Comprehensive Investment Agreement (ACIA) that enhance protection to all investors and their investments; establish more transparent, consistent and predictable investment rules, regulations, policies and procedures; and promote ASEAN as an integrated investment area and production network. The blueprint has also drawn guidance to establish ASEAN as competitive economic region under AEC through infrastructure development in energy and mining sector, especially by enhancing trade and investment and strengthen cooperation and capacity in geological and mineral sector for sustainable mineral development in the ASEAN region that includes the promotion of environmentally and socially sustainable mineral development.
- 3.6. The **Ministerial Understanding on ASEAN Cooperation in Minerals** which was greed in the First ASEAN Ministerial Meeting on Minerals (AMMin) in Kuching, Sarawak, Malaysia on 2005 has reiterated the commitment to the economic, environmental and social dimensions of sustainable development and the importance of the minerals industry as a fundamental platform for better

development in ASEAN, thus requiring intensified initiation of new areas of cooperation in the ASEAN minerals sector. It recognizes that the mineral resources endowment and minerals usage vary considerably between the ASEAN Member Countries which make closer relationship among countries more necessary and that development of the minerals sector has great importance in promoting employment and economic growth in the ASEAN Member Countries.

- 3.7. The **Manila Declaration on Intensifying ASEAN Minerals Cooperation** which was adopted in the 2<sup>nd</sup> ASEAN Ministerial Meeting on Minerals (AMMin) on October 2008 in Manila, Philippines, has affirmed strong support to the ASEAN Minerals Sector as a vibrant force in the establishment of the ASEAN Economic Community by 2015; and adopted key policies direction that includes:
- cooperation to work towards the facilitation and enhancement of trade and investments in minerals through harmonisation of mineral policies, incentives and taxation, standardisation of mineral resource information, and systematised flow and exchange of resource and trade information
  - cooperation to develop policy guidelines and standards for ASEAN Best Mining Practices to promote environmentally and socially sustainable mineral development in the ASEAN region;
- 3.8. To further enhance the minerals sector's contribution to the establishment of the ASEAN Economic Community (AEC) and to follow up the Ha Noi Declaration on Sustainable ASEAN Connectivity in Minerals, the Third ASEAN Ministerial Meeting on Minerals (AMMin) which was held on December 2011 in Ha Noi, Viet Nam has endorsed the **ASEAN Minerals Cooperation Action Plan (AMCAP) 2011-2015** with "*Dynamic Mineral Sector Initiatives for a Prosperous ASEAN*" as its theme. The AMCAP 2011-2015 would focus on strategies that include promoting environmentally and socially sustainable mineral development, and capacity building on Extractive Industries Transparency Initiative (EITI) in the AMCAP 2011-2015.
- 3.9. The **Agreement on ASEAN Energy Cooperation 1986** was agreed by the ASEAN Energy Ministers in Manila, Philippines in June 1986. The Agreement laid the foundation for cooperation in the energy sector within ASEAN, including in the efficient development and use of all forms of energy, whether commercial, non-commercial, renewable or non-renewable. Agreed cooperation spans planning, development, manpower training, information exchange, efficiency and conservation, supply and disposal and other areas.
- 3.10. To further enhance the energy sector's contribution to the establishment of the ASEAN Economic Community (AEC) and to build on previous agreements and initiatives, the **ASEAN Plan of Action on Energy Cooperation (APAEC) 2010-2015** was adopted on 29 July 2009 in Mandalay, Myanmar by the ASEAN Ministers for Energy Meeting (AMEM). The APAEC serves as the blueprint for ASEAN cooperation in the field of energy for the period 2010-2015 under the theme "*Bringing Policies to Actions: Towards a Cleaner, more Efficient and Sustainable ASEAN Energy Community*". The plan sets out strategies for achieving the objective of enhancing energy security and sustainability for the ASEAN region.



## 4 The Framework

The framework acknowledges various past efforts to address the social and environmental impacts of economic activities have highlighted common principles and a rights-based approach to development. Many of these principles are enshrined in international agreements and constituted key underpinnings for the work conducted in prior stakeholder engagement processes, and should be recognized by the framework. Those norms are as follow:

- ✓ *Sustainable development*, which is commonly accepted to mean a development which meets the needs of the present without compromising the ability of future generations to meet their own needs.
- ✓ *Precautionary approach*, which implies that governments have the right to decide against promoting development and to establish regulations to prevent serious environmental degradation when development proceeds.
- ✓ *Equity*, which defines that development must occur in an equitable manner between men and women, among different groups in the society, respects the rights of future generations while considering the current needs of society, and implies fairness in the distribution of costs and benefits of development, as well as in the treatment of women and other traditionally marginalized groups
- ✓ *Basic rights*, which outlines the obligation for the State to protect and to fulfil sets of basic rights and the role of business enterprises, as specialized organs of society performing specialized functions, to comply with all applicable laws and to respect those rights in the extractive industry development that includes: human rights, right to development, right to a healthy environment, and indigenous peoples' rights.
- ✓ *Participatory decision making*, which ensures that all citizens have the right to participate in natural resource development decisions, which must be accompanied by effective access to information and opportunities to seek appropriate forms of redress and accountability if agreements are not respected
- ✓ *Accountability and transparency*, which government and business enterprises must be held accountable for their activities, and the use of authority and resources in the extractive industry development to a broad range of

stakeholders, including the affected communities. This implies that they should support independent monitoring and oversight and disclose the impacts of their operations, as well as wider scrutiny from the public.

- ✓ *Polluter pays*, which recognizes that parties responsible for generating pollution/environmental damage are responsible for paying for cleanup and environmental remediation.

Based on those considerations, the framework consists of four corner stones which include (1) protection of the environment; (2) adoption of human rights; (3) transparent and accountable practices; and (4) sound fiscal framework and revenue management. Those corner stones encompass main agenda that need to be addressed to ensure good governance throughout the value chain of extractive industry, both in the fossil-fuel energy (hydrocarbon) and mineral/mining sector.

**Table 1. Key elements of the framework**

Protection of the environment	Respect and Protect of the Human Rights
<ul style="list-style-type: none"> <li>✓ Designation of “no go” zone</li> <li>✓ Environmental and social impact assessment</li> <li>✓ Prevention of hazardous spillage</li> <li>✓ No shallow-water submarine waste disposal</li> <li>✓ Rehabilitation fund</li> <li>✓ Artisanal and small scale mining rights</li> <li>✓ Complaint mechanism and audit</li> <li>✓ Contingency plan for environmental accidents</li> <li>✓ Measures and international and regional cooperation to prevent and combat potential trans-boundary environmental impact</li> </ul>	<ul style="list-style-type: none"> <li>✓ Respect and protect recognized human rights in extractive industry activity</li> <li>✓ Respect and protect rights of local impacted community and indigenous people</li> <li>✓ Grievance mechanism</li> <li>✓ Peaceful cohabitation between small and large scale resource extraction rights holders</li> <li>✓ Guidelines for voluntary relocation and fair compensation</li> <li>✓ Abide to international human rights agreement in conflict zone</li> </ul>
Transparent and accountable practices	Sound fiscal framework and revenue management
<ul style="list-style-type: none"> <li>✓ Accessible database on resources</li> <li>✓ Transparent decision making process</li> <li>✓ Openness of data related to revenue flow</li> <li>✓ Penalty for false, incomplete, misleading information to public</li> <li>✓ Implementation of EITI</li> <li>✓ Certification on mineral commodities trade</li> <li>✓ Commitment to combat illicit trading</li> <li>✓ Oversight on artisanal and small-scale mining</li> </ul>	<ul style="list-style-type: none"> <li>✓ Legislation to optimize and protect revenue from extractive industry</li> <li>✓ Mechanism to channel all revenue from extractive industry to budget system</li> <li>✓ Spending for basic and social infrastructure</li> <li>✓ Investment in resource knowledge infrastructure</li> <li>✓ Auction and competitive bidding</li> <li>✓ Develop down-stream and up-stream value addition</li> <li>✓ Revenue sharing to local impacted community</li> <li>✓ Establishment of natural resource fund</li> </ul>

Artisanal and small-scale mining become the cross-cutting issues in the framework. In many ASEAN member countries, artisanal and small-scale mining (ASM) is largely a poverty-driven activity which plays an important economic role, particularly in terms of the numbers of people employed. Nonetheless, small-scale mining can be extremely environmentally damaging and often has serious health and safety

consequences for workers and surrounding communities. Absence of formalization also makes improvements in environmental performance much more problematic. Many of the potential economic benefits of the small-scale mining sector are lost through poor practice in mining, processing and marketing the target minerals while artisanal and small-scale miners are often involved in serious disputes with communities, government agencies and large-scale mining interests.

The framework targets four audiences: (1) government and government agencies as representation of the State; (2) the business and private sector corporation (3) citizen, community and citizen groups, including the impacted community and civil society organizations; and (4) financial institutions, including public and private banks as well as insurers. This framework will require government involvement and buy-in. The establishment of voluntary standards is not sufficient to ensure that mining maximizes benefits and minimizes costs to the environment and local communities. Many of the issues outlined in the framework require a functioning government, including strong regulations and the will and capacity to enforce laws. Within the framework, the government in the Member State holds a primary role to fulfil the guiding principles and its implementation through appropriate policies, regulation, and adjudication that prevent infringement while addressing substantial legal and policy incoherence and gaps as well as adequate budget to oversee its compliance.

The business, that usually acts as license/concession/resource extraction rights holders in the extractive industry, has the responsibility to respect and comply to the state's deed as well as to act with due diligence to avoid any contravention on the framework. The business's responsibility to respect applies across its business activities and through its relationships with third parties connected with those activities—such as business partners, entities in its value chain, and other non-state actors and state agents. Some corporations acknowledge the need for compliance with international codes, protocols, covenants, declarations, instruments, and customs that protect basic human rights, self-determination, cultural integrity, labor and social rights, and the natural environment. On the other hand, financial institutions shall avoid supporting the financing of projects with potential significant adverse environmental and social risks and/or impacts that are diverse, irreversible or unprecedented. Therefore, the framework aims to keep the business accountable by subjecting corporate operations to independent scrutiny and enable a verifiable chain of custody for their products

Even where institutions operate optimally, adverse impacts of extractive industries may still result from a state and business's activities and impacted community must be able to seek redress. Effective grievance mechanisms play an important role in both the state duty to protect and the corporate responsibility to respect. States must take appropriate steps within their territory and/or jurisdiction to ensure that when such impacts occur, those affected have access to effective remedy through judicial, administrative, legislative or other appropriate means. Nevertheless, civil society organizations has proved themselves as effective watchdog for those processes, as well as in assisting citizens and community group to exercise their rights and voicing their grievance.



## The Proposed Means 5 of Implementation

**A**ll ASEAN Member States should adopt the framework to govern their extractive industries at national level in order to ensure the framework's effectiveness as a regional harmonization and standard-setting tool. Implementation of the framework by national governments must take into consideration the differences in extractive industry development of each ASEAN Member state, based on variations in national resource endowments, risk profiles, levels of economic development and existing regulatory and institutional frameworks. Therefore, adoption in a particular national setting will be based on the current stage of extractive industry development of each ASEAN Member State and the need for enactment of varying policies and strategies to address the specific needs in each Member State.

Member State governments have the role of leading the process of implementation. Each Member State will be responsible for the development and enactment of the requisite policies and strategies to implement the framework in the domestic context. Member States should develop appropriate policies, regulation, and adjudication in order to prevent and penalize infringements of the framework and ensure adequate budget and resources to oversee implementation and enforcement. A strategic schedule or action plan, including key milestones for the timely integration of the framework into national policy, should be developed by each government. This should include a baseline assessment of legal, regulatory and policy frameworks to identify coherence with the framework principles and to address existing weaknesses and gaps.

Furthermore, Member States should play a key role in communicating the framework within government agencies and departments at national and sub-national levels and with relevant stakeholders, including the business and financial communities engaged in the extractives sector, civil society groups, affected communities and the public. They should work to build knowledge and capacity within the sector, including among businesses and financial institutions to encourage and facilitate compliance. This may include conducting technical studies or training programmes on issues and challenges for implementation at national level.

Member State governments should also identify and appoint key agency/institution that serves as focal point to oversee and coordinate the implementation of the action plan at country level. The focal point shall develop a multi-stakeholder platform at national level for open discussion and sharing information on issues regarding the

implementation of the framework. This platform should engage representatives of the business sector in the extractives industries, including business enterprises, industry associations and financial institutions, as well as representatives of civil society, affected and local communities and community and citizen groups. Such groups should include adequate representation of women, indigenous peoples, small-scale miners and other traditionally marginalized groups. The multi-stakeholder platform should serve as a forum for reporting on issues and challenges regarding the implementation of the framework and should support mechanisms to record and regularly report on the outcomes of the implementation process.

As example, in the initial stage, the government can use this Framework to conduct a Rapid Assessment or Gap Analysis to figure out the situation of extractive industries governance, and determine the readiness level and gaps to implement the framework. The result of the Gap Analysis can help the government to develop the action plan in country level to address those gaps. The process for conducting RA/GA and setting up the action plan can be done with involvement and support from business/private sector, and civil society organization.

ASEAN organs shall strengthen the commitment of the Member State to adopt the framework by giving directives as well as guidelines in the process. Ideally, in order to achieve effective implementation at regional level, the Framework for Extractive Industries Governance in ASEAN must be integrated within ASEAN institutional and policy structures and adopted in existing and future plans and strategies for ASEAN integration. With respect to the current framework, the ASEAN Minerals Cooperation Action Plan (AMCAP) and ASEAN Plan of Action for Energy Cooperation (APAEC) will each be renewed in 2016 and can provide ASEAN Member States with a point of reference at regional level for implementation of the framework. Promotion of the framework by relevant ASEAN organs, as an important tool to support ASEAN integration and community building, will strengthen and support the commitment of ASEAN Member States to adopt and implement the framework at national level. Relevant ASEAN Sectoral Ministerial Bodies will therefore have a key role in developing and issuing directives and guidelines for implementation of the framework at regional level and within Member States. In particular, the ASEAN Ministers on Energy Meeting (AMEM) and the ASEAN Ministerial Meeting on Minerals (AMMin) should develop and incorporate the requisite directives and guidelines for adoption of the framework into the new AMCAP and APAEC documents. These bodies will be responsible for leading the detailed implementation of the framework under the umbrella of the APAEC and AMCAP and monitoring the commitments under their respective purviews.

Other relevant Sectoral Ministerial Bodies will also have a role in implementing the framework into plans and strategies for integration and community building. For example, the ASEAN Investment Area (AIA) Council, responsible for overseeing the implementation of the ASEAN Comprehensive Investment Agreement (ACIA), should implement framework standards into plans and policies for enhancing intra and inter-regional investment. Under the Political Security Pillar, the ASEAN Law Ministers Meeting (ALAWMM) has a role with respect to plans and strategies for the development and harmonization of legal and regulatory frameworks necessary for the effective implementation of the framework. Similarly, under the Socio-Cultural Community Pillar, the ASEAN Ministerial Meeting on the Environment (AMME) and the ASEAN Ministers on Rural Development and Poverty should integrate framework



standards into policies and plans on environmental protection and poverty eradication as they pertain to the extractive industries.

Implementation of the framework within the standard-setting and programmatic agendas of the Sectoral Ministerial Bodies should be reinforced by endorsement of the framework at Summit and Council levels. Endorsement of agreements and policy documents by the ASEAN Leaders at the Summit signifies the highest level of commitment of ASEAN member states. The ASEAN Summit is the supreme policy-making body within ASEAN, setting the direction for ASEAN policies and objectives. The Summit deliberates, provides policy guidance and makes decisions on key issues relating to the realization of the objectives of ASEAN, important matters of interest to Member States and all issues referred to it by the ASEAN Coordinating Council, the ASEAN Community Councils, and the ASEAN Sectoral Ministerial Bodies. The four Council bodies support the role of the Summit: the ASEAN Coordinating Council (ACC) which oversees the overall implementation and coordination in the ASEAN Community, the ASEAN Political-Security Community Council, ASEAN Economic Community Council, and ASEAN Socio-Cultural Community Council to ensure coordination of the activities under each of the three areas.

While the framework is most directly linked to the standard-setting and programmatic work of the AMEM and AMMin Sectoral Ministerial Bodies, effective implementation is dependent on the achievement of other objectives of ASEAN community building, including those of the ASEAN Community's Political-Security and Socio-Cultural Pillars. The standards set out in the framework should therefore be implemented in relevant plans and programmes across the three pillars of the ASEAN Community. It will be important for the relevant Sectoral Ministerial Bodies to work closely with the ASEAN Coordinating Council to ensure the inclusion of the framework in the ASEAN Summit agenda as well as the agendas of the AEC, APSC and ASCC Councils, enhancing policy coherence, efficiency and cooperation among the ASEAN pillars.

The success of the framework requires the involvement of all stakeholders in the process. Developing an effective communications programme is required to create greater public awareness of the framework within all ASEAN Member States as well as to keep all stakeholders, including the business community and peoples of ASEAN, informed of the progress of the adoption process. The AMEM and AMMin Sectoral Ministerial Bodies should launch a comprehensive communications plan to explain to the government officials, key stakeholders in the business community, civil society, and the general public the objectives, benefits and challenges of the framework. This plan should serve as a regional platform for open discussion and information sharing for all Member States. At the same time, the Member States should each establish a mechanism at national level to regularly report on the outcomes and issues raised during the adoption process.



Jl. Mampang Prapatan VIII  
Komplek Bappenas No. R-13  
Jakarta 12790, Indonesia  
Telephone: +62+21+7992945  
Fax: +62+21+7996160  
Website : [www.iesr.or.id](http://www.iesr.or.id)