

# Operationalizing the Right to a Balanced and Healthful Ecology: Proposing a Code of Environmental Corporate Governance for Extractive Industries

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I. INTRODUCTION

*... I grieve, when on the darker side  
 Of this great change I look; and there behold  
 Such outrage done to nature as compels  
 The indignant power to justify herself;  
 Yea, to avenge her violated rights ...*

- William Wordsworth<sup>1</sup>

Environment is life. Human survival is inextricably linked to the environment’s continued existence.<sup>2</sup> Yet, environmental degradation, especially of the type triggered by industries, continues to escalate.

In the Philippine context, extractive industries — mining, oil, and gas — are an important component of the national economy; the country is, however, also characterized as one of exceptionally high ecological value.<sup>3</sup> These characteristics have a natural and unavoidable tendency to conflict. The reality is that these industries, by their nature and at every stage of operations, cause imbalance in ecological sustainability.<sup>4</sup> The response to the

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1. *Outrage Done to Nature*, in WILLIAM WORDSWORTH, VIII THE EXCURSION 151 (1814).  
 2. See MICHAEL JACOBS, THE GREEN ECONOMY 3 (1991) (“It is[, after all,] from the earth and the atmosphere that we get the resources with which we produce food and other goods, and it is to the soil, the rivers and oceans, the air and winds that we discard our waste. Without them we could [not] survive.”).  
 3. MARTA MIRANDA, ET AL., MINING AND CRITICAL ECOSYSTEMS: MAPPING THE RISKS 3 (Karen Holmes ed., 2003), available at [http://pdf.wri.org/mining\\_critical\\_ecosystems\\_full.pdf](http://pdf.wri.org/mining_critical_ecosystems_full.pdf) (last accessed Feb. 21, 2009).  
 4. See ANTONIO A. OPOSA, JR., THE LAWS OF NATURE AND OTHER STORIES 209 (2003); IBON DATABASE AND RESEARCH CENTER, THE STATE OF THE PHILIPPINE ENVIRONMENT 53, 154 & 160 (3d ed. 2006) [hereinafter IDRIC]; CARL F. JORDAN, CONSERVATION: REPLACING QUANTITY WITH QUALITY AS A GOAL FOR GLOBAL MANAGEMENT 167 (1995); I WORLD BANK, STRIKING A BETTER BALANCE: THE FINAL REPORT OF THE EXTRACTIVE

dilemma has been the proliferation of progressive environmental protection and conservation laws — ranging from traditional command and control legislation to modern market-based mechanisms. Nevertheless, there has been, and there continues to be, a disproportionately high incidence of environmental disasters attributable to, if not caused by, these industries. The disasters are numerous and of far-reaching consequences, having resulted, and continuing to result, in incalculable and possibly irreversible adverse effects on the environment and the local community.<sup>5</sup> This is symptomatic of the failure of current legislation and the regulatory system to meaningfully operationalize the right to a balanced and healthful ecology.

Through this Note, the author proposes that, considering that extractive industries are predominantly run by corporations,<sup>6</sup> the true solution lies in integrating environmental concerns into the very heart of the going concern, providing impetus to further an environmentally-responsible and stakeholder-sensitive corporate governance no longer rooted in the maximization of profits “without regard to considerations that represent hidden social and environmental costs.”<sup>7</sup> The author, thus, proposes the adoption of a Code of Environmental Corporate Governance for Extractive Industries.

## II. THE FUNDAMENTAL RIGHT TO A BALANCED AND HEALTHFUL ECOLOGY AS OPERATIONALIZED

### A. *The Primordial Right to a Balanced and Healthful Ecology*

No less than the Constitution enjoins the state to “protect and advance the right of the people to a balanced and healthful ecology in accord with the rhythm and harmony of nature.”<sup>8</sup> Drafted during an age of growing environmental concern, it indicated “a clear desire to make environmental protection and ecological balance conscious objects of police power.”<sup>9</sup>

Nevertheless, even prior to this constitutional mandate, the right to a healthy environment, including the state’s and individual’s obligations in relation to it, was already recognized under the Philippine Environment

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INDUSTRIES REVIEW 1 (2003), available at [http://bankwatch.ecn.cz/eir/reports/vol1\\_eng.pdf](http://bankwatch.ecn.cz/eir/reports/vol1_eng.pdf) (last accessed Feb. 22, 2009) [hereinafter EIR].

5. See, e.g. MIRANDA, *supra* note 3.
6. MICHAEL ROSS, EXTRACTIVE INDUSTRIES AND THE POOR: AN OXFAM AMERICA REPORT 5 (2001).
7. Herman E. Daly, *The Perils of Free Trade*, SCI. AM. MAG., Nov. 1993, at 24.
8. PHIL. CONST. art. II, § 16.
9. JOAQUIN G. BERNAS, S.J. THE 1987 CONSTITUTION OF THE REPUBLIC OF THE PHILIPPINES: A COMMENTARY 91 (2003 ed.) (citing IV RECORD OF THE 1986 CONSTITUTIONAL COMMISSION 912-16).

Policy, or Presidential Decree No. 1151.<sup>10</sup> It went so far as to augur the revolutionary doctrine of “intergenerational responsibility,” later laid down by *Oposa v. Factoran, Jr.*<sup>11</sup> This was also echoed by *Felipe Ysmal, Jr. & Co., Inc. v. Deputy Executive Secretary*.<sup>12</sup>

It was, however, the landmark case of *Oposa* that recognized this right as enforceable.<sup>13</sup> The Court made a groundbreaking pronouncement that despite the right’s non-inclusion in the Bill of Rights,<sup>14</sup> it possessed no less significance than the rights enshrined in the latter. It was implied that the right may be even more significant, “belong[ing] to a different category of rights ... concern[ing] nothing less than self-preservation and self-perpetuation ... the advancement of which ... predate all governments and constitutions.”<sup>15</sup> It boldly stated that “these basic rights need not even be written in the Constitution for they are assumed to exist from the inception of humankind.”<sup>16</sup> It further pointed out the right’s inseparability from the right to health<sup>17</sup> and the presence of an intergenerational responsibility to prevent future generations from “*inherit[ing] nothing but parched earth incapable of sustaining life.*”<sup>18</sup> It also made explicit the “correlative duty to refrain from impairing the environment.”<sup>19</sup> These pronouncements were reiterated in later jurisprudence.<sup>20</sup>

The right to a balanced and healthful ecology is not, however, intertwined solely with the right to health; both rights being essentially

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10. Philippine Environment Policy, Presidential Decree No. 1151, §§ 2 (b) & 3 (1977).

11. *Oposa v. Factoran, Jr.*, 224 SCRA 792 (1993); see P.D. No. 1151, §§ 1 (b) & 2 (a).

12. *Felipe Ysmal, Jr. & Co., Inc. v. Deputy Executive Secretary*, 190 SCRA 673, 683 (1990).

13. JOAQUIN G. BERNAS, S.J. THE 1987 PHILIPPINE CONSTITUTION: A REVIEWER-PRIMER 22 (4th ed. 2002) (citing *Oposa*, 224 SCRA at 792).

14. PHIL. CONST. art. III.

15. *Oposa*, 224 SCRA at 805.

16. *Id.*

17. PHIL. CONST. art. II, § 15.

18. *Oposa v. Factoran, Jr.*, 224 SCRA 792, 805 (1993) (emphasis supplied).

19. *Id.*

20. See *Laguna Lake Development Authority (LLDA) v. Court of Appeals and Serapio*, 231 SCRA 292, 307-08 (1994); *Laguna Lake Development Authority (LLDA) v. Court of Appeals and Tech*, 251 SCRA 42 (1995); *Henares, Jr. v. Land Transportation Franchising and Regulatory Board*, 505 SCRA 104, 114 & 117 (2006).

linked to the right to life.<sup>21</sup> They are so closely linked that the right to life has been used to justify environmental protection where a right to a healthy environment is not provided for by law.<sup>22</sup> Further, not only has local law implied that the right to a healthy environment is tied with the concept of human rights,<sup>23</sup> even the International Court of Justice has explicitly stated,

the protection of the environment is ... a vital part of contemporary human rights doctrine, for it is a *sine qua non* for numerous human rights such as the right to health and the right to life itself. ... [D]amage to the environment can impair and undermine all the human rights spoken of in the Universal Declaration and other human rights instruments.<sup>24</sup>

As the attainment of human rights is impossible in a polluted environment, pollution not only destroys nature, but also violates human rights.<sup>25</sup> Given the sweeping importance and far-reaching consequences of the right to a healthful and balanced ecology, of concern is the economically-important yet highly pollutive sector of extractive industries.

### *B. Stained Footprints: Tracking Extractive Industries*

Life today is unimaginable without mineral or energy resources, as societies and economies are heavily dependent on extractive industries.<sup>26</sup> Extractive industries are those “involved in finding and removing wasting natural resources located in or near the earth’s crust.”<sup>27</sup> These industries include oil, gas, and mining. Being typically capital-intensive and requiring skilled labor, “they are generally run by the state, or by *large corporations*.”<sup>28</sup>

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21. OPOSA, *supra* note 4, at 65.

22. *Id.* at 66 (citing M.C Mehta v. Union of India, A.I.R. 1988 S.C. 1037).

23. *See Serapio*, 231 SCRA at 308 (citing III RECORD 119); P.D. No. 1151, § 1 (c).

24. Case Concerning the Gabčíkovo-Nagymaros Project (Hung. v. Slov.), 1997 I.C.J. 7, 91-92 (Sep. 25, 1997).

25. Asia Pacific Forum, Human Rights and the Environment: Background paper, at ii, *available at* [http://www.mcmillan.ca/Upload/Publication/SOCarroll\\_HumanRightsandtheEnvironment.pdf](http://www.mcmillan.ca/Upload/Publication/SOCarroll_HumanRightsandtheEnvironment.pdf) (last accessed Feb. 20, 2009) (citing Klaus Töpfer, Executive Director of the United Nations Environment Programme (UNEP), Statement to the 57th Session of the Commission on Human Rights (2001)).

26. EIR, *supra* note 4, at 1.

27. Department for International Development, Revised Draft Reporting Guidelines: Extractive Industries Transparency Initiative, May 23, 2003 (U.K.), *available at* <http://www.dfid.gov.uk/pubs/files/eitdraftreportguidelines.pdf> (last accessed Feb. 20, 2009) (“Wasting natural resources refer to those that cannot be replaced in their original state by human beings.”).

28. ROSS, *supra* note 6, at 5 (emphasis supplied); *see also* ANTONIO A. TUJAN, JR. & ROS-B GUZMAN, GLOBALIZING PHILIPPINE MINING 53 (1998); IBON

Despite their economic importance, they are the subject of severe censure because of attendant adverse social and environmental impacts.<sup>29</sup> This general sentiment requires a closer examination of the environmental problems posed by extractive industries.

#### 1. Background on Extractive Industries: Mining, Oil, and Gas

Mining is “the process of removing mineral rock and extracting mineral contents from it.”<sup>30</sup> Its products are crucial to modern societies and economies as many basic needs are dependent on these resources.<sup>31</sup> The Philippines, whose long-standing mining industry has been largely extractive, is a country known for diverse and abundant mineral wealth, which contributes significantly to the national economy.<sup>32</sup> Nevertheless, mining is an extractive and non-replenishing activity — non-sustainable by definition and highly destructive and pollutive.<sup>33</sup>

On the other hand, fossil fuels — coal, oil, and gas — are the primary energy sources today and are likewise non-renewable.<sup>34</sup> The Philippines’ likewise long-standing oil industry is critical to economic development — 50% of energy consumption being from oil.<sup>35</sup> The country’s oil industry may

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WORKERS DESK, THE PHILIPPINE OIL INDUSTRY 4 (2002) [hereinafter IBON WORKERS DESK].

29. EIR, *supra* note 4, at 1; ROSS, *supra* note 6, at 5.

30. OPOSA, *supra* note 4, at 203.

31. MINING, MINERALS AND SUSTAINABLE DEVELOPMENT (MMSD), BREAKING NEW GROUND xiv & xxiii (2002), available at <http://www.iied.org/mmsd/finalreport/> (last accessed Feb. 20, 2009); see also OPOSA, *supra* note 4, at 202.

32. See TUJAN & GUZMAN, *supra* note 28, at 15 & 25-26; OPOSA, *supra* note 4, at 203-204; ENVIRONMENTAL SCIENCE FOR SOCIAL CHANGE (ESSC), MINING REVISITED: CAN AN UNDERSTANDING OF PERSPECTIVES HELP? 9, 11 & 41 (1999); MIRANDA, *supra* note 3, at 4 (citing Chin S. Kuo, et al., *The Mineral Industries of Asia and the Pacific*, in *Minerals Yearbook: 2000* (2000)); IDRC, *supra* note 4, at 53, 154 & 160.

33. IDRC, *supra* note 4, at 146; OPOSA, *supra* note 4, at 204 & 209.

34. OPOSA, *supra* note 4, at 216-217 (Coal is the solid form of fossil fuels, oil the liquid form, and natural gas the gaseous form.); see also STEPHEN E. KESLER, MINERAL RESOURCES, ECONOMICS AND THE ENVIRONMENT 57, 129 & 135 (1994); IBON WORKERS DESK, *supra* note 28, at 1.

35. IBON WORKERS DESK, *supra* note 28, at 35-37 & 40; IDRC, *supra* note 4, at 139.

A slight increase in oil and gasoline prices invariably results in some measure of civil unrest and a corresponding spike in commodity prices.

OPOSA, *supra* note 4, at 217.

remain underdeveloped and dependent on importation,<sup>36</sup> but oil exploration or extraction companies are, nevertheless, among the Philippines' biggest corporations and the number of industry players has dramatically increased in recent years.<sup>37</sup> Similarly, however, the development and utilization of such energy sources is closely associated with adverse environmental impacts.<sup>38</sup>

## 2. The Processes and Environmental Footprints of Extraction

Extractive industries cause environmental degradation at every level of their operations: various environmental impacts are inextricably linked to their respective processes.<sup>39</sup> There are four major phases in extractive operations: exploration and feasibility, development and construction, extraction or utilization, and initial processing and decommissioning.<sup>40</sup>

### *Exploration and Feasibility Assessment*

Exploration commences with the "searching or prospecting for [extractive] resources by various geological, geochemical or geophysical surveys," or seismic or well-logging methods.<sup>41</sup> Resource volume is then assessed by

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36. IBON WORKERS DESK, *supra* note 28, at 1 & 40; *see also* IDRC, *supra* note 4, at 139; OPOSA, *supra* note 4, at 223 (citing Department of Energy (DOE), Philippine Energy Plan 1999-2000, at 6 (1999)).

37. IBON WORKERS DESK, *supra* note 28, at 39 & 49 (The combined registered sales of the four biggest oil corporations exceeded Php1.16 billion, their profits Php139.14 million, and their assets Php1.22 billion.).

38. IDRC, *supra* note 4, at 140.

39. EIR, *supra* note 4, at 5.

40. TUJAN & GUZMAN, *supra* note 28, at 45; LEGAL RIGHTS AND NATURAL RESOURCES CENTER, INC.-KASAMA SA KALIKASAN, MINING: LEGAL NOTES AND MATERIALS 3 (Marivic M.V.F. Leonen & Francelyn G. Begonia eds., (undated)) [hereinafter LRC-KSK]; *see also* UNITED NATIONS CONVENTION TO COMBAT DESERTIFICATION (UNCCD) & THE WORLD CONSERVATION UNION (IUCN), EXTRACTIVE INDUSTRIES IN ARID AND SEMI-ARID ZONES: ENVIRONMENTAL PLANNING AND MANAGEMENT 17 (Joachim Gratzfeld ed., 2003), available at <http://data.iucn.org/dbtw-wpd/edocs/CEM-001.pdf> (last accessed Feb. 20, 2009); An Act Instituting a New System of Mineral Resources Exploration, Development, Utilization, and Conservation [Philippine Mining Act of 1995], Republic Act No. 7942, § 3 (af) (1995).

41. Philippine Mining Act of 1995, § 3 (q); *see also* UNCCD & IUCN, *supra* note 40, at 18-19 & 26-28; KESLER, *supra* note 34, at 58-67; DOUGLAS G. BROOKINS, MINERALS AND ENERGY RESOURCES: OCCURRENCE, EXPLOITATION, AND ENVIRONMENTAL IMPACT 212-13 (1999).

drilling exploratory boreholes.<sup>42</sup> Preliminary feasibility studies are thereafter conducted to determine profitability.<sup>43</sup>

There are environmental impacts even at the very onset of operations.<sup>44</sup> Exploration may cause habitat loss or fragmentation, runoff sediments, disturbance to wildlife and local communities, strained water resources, fuel or contaminant spills, increased colonization, and species loss.<sup>45</sup> Minimal extraction activities for sampling and appraisal during the exploration stage<sup>46</sup> may also cause environmental impacts related to extraction. In addition, oil exploration causes coral reef destruction.<sup>47</sup> Drilling is even more environmentally-problematic, requiring access on a larger scale and “ha[ving] the potential to introduce drilling fluids into the ground and release such natural fluids... to the surface.”<sup>48</sup> The risk of oil spill and fire due to blow-outs is also greatest during exploration.<sup>49</sup>

#### *Development and Construction*

Upon completion of the exploration, the project proceeds to development,<sup>50</sup> or “the work undertaken to explore and prepare ... a ... deposit for ... [extraction], including the construction of necessary infrastructure and related facilities”<sup>51</sup> — such as access roads, electricity and water supply facilities, moving rigs and support equipment, housing, more extensive communication networks and power generation facilities, and delivery of fuel and water supplies. In most cases, means for resource transportation must also be provided for.<sup>52</sup>

Transportation has proven particularly problematic, considering the danger of potential spills.<sup>53</sup> For long distances, tankers are more cost effective in moving oil and gas; however, they are more environmentally hazardous

42. UNCCD & IUCN, *supra* note 40, at 19 & 28-30; *see also* KESLER, *supra* note 34, at 63-64.

43. UNCCD & IUCN, *supra* note 40, at 20 & 30; KESLER, *supra* note 34, at 66-67.

44. *See* UNCCD & IUCN, *supra* note 40, at 18-19, 26, 29 & 31.

45. MIRANDA, *supra* note 3, at 7.

46. LRC-KSK, *supra* note 40, at 5.

47. IDRC, *supra* note 4, at 144.

48. KESLER, *supra* note 34, at 67.

49. *Id.* at 67 & 135.

50. TUJAN & GUZMAN, *supra* note 28, at 45.

51. Philippine Mining Act of 1995, § 3 (j).

52. UNCCD & IUCN, *supra* note 40, at 18, 27 & 31.

53. *See* MMSD, *supra* note 31, at 256.

due to constant risk of spillage during transit, loading, and unloading. Oil spills kill or severely affect marine life, birds, and mammals — exterminating animal populations directly or indirectly by killing their food sources — and directly harm local marine communities, at times, wiping out such communities completely.<sup>54</sup>

*Extraction or Utilization*

Mineral utilization or extraction, which adheres to “a cycle of operations of rock breakage and materials-handling,”<sup>55</sup> or onshore or offshore oil and gas extraction follows development.<sup>56</sup>

Extraction is inherently damaging to the environment — causing habitat loss or fragmentation, chemical contamination of surface and ground waters, decline of species populations, toxic effects to organisms, altered landscapes and patterns of drainage as well as runoff, increased demand for water and electricity, increased erosion and siltation, dust or fumes, increased colonization, and species loss — and thus raises the key issue of restoration or reclamation.<sup>57</sup> Impacts on biodiversity — for instance, through habitat destruction, fishkills, and coastal pollution — are critical as they are irreversible.<sup>58</sup> Land degradation alters the landscape through the acceleration of soil instability and erosion, the breaching of water tables, the triggering of acid mine drainage, and the production of sediments and the loading of rivers.<sup>59</sup>

Mine and mill tailings are the most environmentally-problematic, having a glaringly disproportionate waste to resource ratio<sup>60</sup> and raising several

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54. KESLER, *supra* note 34, at 140; BROOKINS, *supra* note 41, at 306.

An example of a community which was wiped out was the community in Prince William Sound, Alaska “after the *Exxon Valdez* spilled 10 million gallons of crude oil in April 1989.”

MARQUITA K. HILL, UNDERSTANDING ENVIRONMENTAL POLLUTION 144-45 (1997).

55. LRC-KSK, *supra* note 40, at 2.

56. KESLER, *supra* note 34, at 71.

57. MIRANDA, *supra* note 3, at 7; KESLER, *supra* note 34, at 68 & 73.

58. MMSD, *supra* note 31, at xxi & 260; MIRANDA, *supra* note 3, at 16 & 21 (citing ESSC, MINING AND CRITICAL ECOSYSTEMS: PHILIPPINES CASE STUDY (2003)).

59. André Gerard Garcia Ballesteros, *All That Glitters: Understanding the Myth of “Sustainable Mining” in the Philippines*, ISSUE PAPER 97-01, at 11-13 (1997); OPOSA, *supra* note 4, at 204; MIRANDA, *supra* note 3, at 8; UNCCD & IUCN, *supra* note 40, at 24.

60. Ballesteros, *supra* note 59, at 12; *see also* OPOSA, *supra* note 4, at 204; MMSD, *supra* note 31, at 234.

environmental issues — such as the “[d]isplacement of existing land uses,”<sup>61</sup> altering of natural habitats, entry of sediments into the drainage system and/or the sea, and contamination of groundwaters.<sup>62</sup> Cost estimates of clean-up are astronomical, and water treatment may need to continue long after cessation of mining operations.<sup>63</sup> As for oil and gas extraction, the most serious problems lie in land subsidence, or the collapse of rock due to fluid withdrawal, and the escape of underground fluids, especially brine (which may possess radioactive properties), from wells and local distribution systems.<sup>64</sup>

Mining also presents serious health hazards: lung and systematic ailments due to dust exposure, intestinal parasites and other enteric infections from contaminated water, and blood poisoning and miscarriages attributable to air pollution.<sup>65</sup> Blindness, deafness, kidney damage, poisoning, neurological damage, high blood pressure, cancer, birth defects, and severe bone damage may be caused by extensive exposure to toxic substances, such as mercury, lead, and cadmium, especially in young children.<sup>66</sup> Soil and water contamination also render crops and fish unfit for human consumption, in turn affecting community livelihood.<sup>67</sup>

#### *Processing and Decommissioning*

Processing is the means of converting mineral ores or extracted oil and gas into marketable products.”<sup>68</sup> Once processing is complete, measures are undertaken to wind-up operations.<sup>69</sup>

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61. Ballesteros, *supra* note 59, at 25.

62. *Id.* at 12 & 25; MIRANDA, *supra* note 3, at 8; MMSD, *supra* note 31, at 235; KESLER, *supra* note 34, at 73-74; LRC-KSK, *supra* note 40, at 6.

63. KESLER, *supra* note 34, at 73-74; UNCCD & IUCN, *supra* note 40, at 24.

64. KESLER, *supra* note 34, at 74-75, 133 & 135 (“Some old oil pits, pipes, and other facilities around ... wells are more radioactive than uranium mines and nuclear power plants.” Despite safeguards, water spills can still release brine and contaminate surface and ground water.)

65. KESLER, *supra* note 34, at 74; Ballesteros, *supra* note 59, at 11; Catalino L. Corpuz, Jr., *Report on the Philippine National Conference on Mining*, 17 KASARINLAN 170, 183 (2002); *see also* MMSD, *supra* note 31, at 207-08.

66. HILL, *supra* note 54, at 211-12, 215 & 220; Ballesteros, *supra* note 59, at 11.

67. *See* JORDAN, *supra* note 4, at 47; Corpuz, *supra* note 65, at 183; *see also* LRC-KSK, *supra* note 40, at 6.

68. Philippine Mining Act of 1995, § 3 (y); UNCCD & IUCN, *supra* note 40, at 23; KESLER, *supra* note 34, at 75-78; TUJAN & GUZMAN, *supra* note 28, at 45.

69. LRC-KSK, *supra* note 40, at 4; UNCCD & IUCN, *supra* note 40, at 25.

Some environmental concerns during this stage mirror those during extraction: pollution and contamination are constant risks, especially in a chemical intensive activity like mining, whether resulting from the persistence of acid mine drainage, tailings pond leachates, process effluents containing hazardous chemicals, dust containing toxic contaminants, hydrocarbons, or methane.<sup>70</sup> Furthermore, the volume of petroleum lost to the sea “add[s] roughly twice as much petroleum hydrocarbons as do oil spills.”<sup>71</sup>

Of serious concern is “the quality of water leaving mineral processing facilities and its interaction with local ground and surface water.”<sup>72</sup> Given the presence of possibly toxic contaminants, considerable care is needed in infrastructure design, handling, and disposal.<sup>73</sup> Moreover, even with protective structures in place, the “shifting [of] large volumes of rock ... and ... hazardous reagents ... inevitably ... [makes it] susceptible to accidents,”<sup>74</sup> like infrastructure failure and waste impoundment, during storms, heavy rainfall, earthquakes or other seismic hazards, or even heavy water flows.<sup>75</sup>

Marine life is severely affected, as rain or the flow of streams continually stirs up sediment and exposes new metal to the system, which could go on for hundreds of years and will only cease upon “complete removal of the contaminated sediment.”<sup>76</sup> The death of vegetation and fauna is likewise caused by the air pollution and increased acid rainfall from smelting, and the metal content in tailings discourages the return of natural vegetation.<sup>77</sup>

Notwithstanding the company’s critical obligations of safe decommissioning, site rehabilitation, and ecosystem restoration, the reality is that restoration of the site to its original state is sometimes not possible, the

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70. KESLER, *supra* note 34, at 73 & 81 (citing W. Johnson & J. Paone, *Land Reclamation and Utilization in the Mining Industry, 1930-1980*, in Bureau of Mines, Information Circular 8862 (1982) (U.S.); INNOVATIVE APPROACHES TO MINED LAND RECLAMATION (C.L. Carlson & J.H. Swisher eds., 1987)); UNCCD & IUCN, *supra* note 40, at 25-26; Ballesteros, *supra* note 59, at 13; *see also* MIRANDA, *supra* note 3, at 7.

71. BROOKINS, *supra* note 41, at 306.

72. KESLER, *supra* note 34, at 79.

73. UNCCD & IUCN, *supra* note 40, at 23.

74. MMSD, *supra* note 31, at 240.

75. Ballesteros, *supra* note 59, at 13 (citing MINERAL POLICY CENTER, MINING POLLUTION PROBLEMS, MINES, STORMWATER POLLUTION AND YOU 7 (1995)); MIRANDA, *supra* note 3, at 30, 32 & n.5 (citing C.W. MONTGOMERY, ENVIRONMENTAL GEOLOGY (2d ed. 1989)); *see also* HILL, *supra* note 54, at 208.

76. KESLER, *supra* note 34, at 79.

77. HILL, *supra* note 54, at 208; KESLER, *supra* note 34, at 79-80.

area sometimes being left completely uninhabitable.<sup>78</sup> Rehabilitation is almost never fully realized.<sup>79</sup>

Despite the development of modern, greener technology and the enactment of improved environmental regulations, old plants, installations and wastes from activities predating them continue to be major contributors to environmental deterioration — their effects taking many years to correct and proving that the environmental impacts are long-term.<sup>80</sup> This brings up the core question: who actually bears the cost of these activities?<sup>81</sup>

### C. A Look at Current Legislation

The centrality of extractive industries and natural resources is highlighted by the fact that the chief law governing extractive industries is the Constitution itself.<sup>82</sup> Its jealous guardianship of natural resources and their exploration, development, and utilization, clearly showing that regulation of extraction is inextricably tied with environmental protection.

#### 1. Pertinent Aspects of the Main Extractive Industries Legislation

##### *The Philippine Mining Act of 1995*

There is no dearth of environmental provisions in Republic Act No. 7942, or The Philippine Mining Act of 1995, the main law governing mining.<sup>83</sup> It enjoins the state “to promote ... exploration, development, utilization and conservation ... in a way that *effectively safeguards the environment and protect the rights of affected communities*”<sup>84</sup> and prohibits mining in areas protected by law.<sup>85</sup> In fact, the Department of Environment and Natural Resources (DENR) is the primary government agency implementing this law.<sup>86</sup>

78. UNCCD & IUCN, *supra* note 40, at 18 & 25-27; see JORDAN, *supra* note 4, at 47.

79. LRC-KSK, *supra* note 40, at 6.

80. KESLER, *supra* note 34, at 73, 79, 80 & 81 (citing W. Johnson & J. Paone, *Land Reclamation and Utilization in the Mining Industry, 1930-1980*, in Bureau of Mines, Information Circular 8862 (1982) (U.S.); INNOVATIVE APPROACHES TO MINED LAND RECLAMATION (C.L. Carlson & J.H. Swisher eds., 1987)); MMSD, *supra* note 31, at 246.

81. MMSD, *supra* note 31, at 74.

82. PHIL. CONST. art. XII, § 2.

83. Philippine Mining Act of 1995, § 15.

84. *Id.* § 2 (emphasis supplied).

85. *Id.* § 19 (f); see, e.g. An Act Providing for the Establishment and Management of National Integrated Protected Areas System (NIPAS), Defining Its Scope and

Its environmental requirements include securing the prior consent of indigenous peoples and affected parties during exploration.<sup>87</sup> Except for exploration, an Environmental Compliance Certificate (ECC) is required.<sup>88</sup> Participation by people's organizations and non-governmental organizations is also encouraged.<sup>89</sup>

Eligibility to undertake mineral agreements is also hinged on "a satisfactory environmental track record."<sup>90</sup> Financial or technical assistance agreements also require "effective[ ] use [of] appropriate anti-pollution technology and facilities ... and restor[ation] or rehabilitat[ion of] mined out areas."<sup>91</sup> An environmental protection and enhancement program must also be incorporated into the work program.<sup>92</sup> A mine rehabilitation fund is also established by law.<sup>93</sup>

Permit-holders and contractors are enjoined to comply with mines safety rules and regulations to "achieve waste-free and efficient mine development."<sup>94</sup> Failure to comply with safety and pollution regulations may result in suspension of operations.<sup>95</sup>

A semi-annual mine wastes and tailings fee is likewise included in a fund exclusively used in case of damage to human and animal life or natural and cultural resources, and in the revegetation and rehabilitation of agricultural and fishing areas.<sup>96</sup> While there is no exemption from this fee, as an incentive, pollution control devices are not subject to taxes.<sup>97</sup>

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Coverage, and for Other Purposes [NIPAS of 1992], Republic Act No. 7586 (1992); Department of Environment and Natural Resources (DENR), Implementing Rules and Regulations of the National Integrated Protected Areas System (NIPAS) [NIPAS IRR], DENR Administrative Order No. 1992-25 (1992).

86. Philippine Mining Act of 1995, §§ 8-9.

87. *Id.* §§ 16 & 23.

88. *Id.* § 70. The Local Government Code provisions require prior consultation with the local government units, civil society groups, and other concerned sectors. An Act Providing for a Local Government Code of 1991 [LOCAL GOVERNMENT CODE OF 1991], Republic Act No. 7160, §§ 2 (c), 26 & 27 (1991).

89. Philippine Mining Act of 1995, § 70.

90. *Id.* § 27.

91. *Id.* § 35 (k).

92. *Id.* § 69.

93. *Id.* § 71.

94. *Id.* § 63.

95. Philippine Mining Act of 1995, § 67.

96. *Id.* § 85 (a)-(c).

97. *Id.* § 91.

As for penalties, willful violation of and gross neglect in abiding by the ECC's terms and conditions resulting in environmental damage subjects one to imprisonment of six months to six years or a fine of Php 50,000 to Php 200,000, or both.<sup>98</sup> Penalties for violation of or noncompliance with legal and regulatory requirements include suspension or cancellation of one's permit or agreement or a fine not exceeding Php 5,000.<sup>99</sup>

*The Oil Exploration and Development Act of 1972 and Downstream Oil Industry Deregulation Act of 1998*

The upstream oil and gas industry is governed by the Presidential Decree No. 87, or the Oil Exploration and Development Act of 1972.<sup>100</sup> Its few environmental provisions relate to the obligations of contractors in service contracts. Upon discovery of petroleum in commercial quantities, the contractor must operate the field in a manner “*avoiding hazards to life, health and property ... [and] pollution of air, land and waters.*”<sup>101</sup> Every contract must likewise be subject to general health, safety, and ecological laws.<sup>102</sup>

The downstream oil industry is, in turn, regulated by Republic Act No. 8479, or the Downstream Oil Industry Deregulation Act of 1998.<sup>103</sup> It similarly provides for few ecological provisions. It does, however, declare a state policy of assuring an “adequate and continuous supply of *environmentally-clean* and high-quality petroleum products”<sup>104</sup> and encourages industry practices which enhance environmental protection.<sup>105</sup> It also directs collaboration with the DENR on certain matters, such as specifications for improving fuel composition to increase efficiency and reduce emissions.<sup>106</sup> A penalty of imprisonment for two years and a fine ranging from Php 250,000 to Php 500,000 is even imposed on any person (including the chief operating

98. *Id.* § 96.

99. *Id.* §§ 96-97, 108 & 110.

100. An Act Amending Presidential Decree No. 8 Issued on October 2, 1972, and Promulgating an Amended Act to Promote the Discovery and Production of Indigenous Petroleum and Appropriate Funds Therefor [Oil Exploration and Development Act of 1972], Presidential Decree No. 87, § 3 (d) (1972).

101. *Id.* § 8 (d) (emphasis supplied).

102. *Id.* § 9 (h).

103. An Act Deregulating the Downstream Oil Industry and for Other Purposes [Downstream Oil Industry Deregulation Act of 1998], Republic Act No. 8479, §§ 3 & 4 (h) (1998).

104. *Id.* § 2 (emphasis supplied).

105. *Id.* § 7.

106. *Id.* § 14 (a), (b).

or executive officer of a corporation) who refuses to use “clean and safe (environment and worker-benign) technologies.”<sup>107</sup>

## 2. Relevant Environmental Legislation

### *Environmental Impact Statement System*

Presidential Decree No. 1586, or the Environmental Impact Statement (EIS) System, was enacted to reconcile “the exigencies of socio-economic undertakings ... with the requirements of environmental quality.”<sup>108</sup> It requires an EIS “for every proposed project and undertaking which significantly affect[s] the quality of the environment.”<sup>109</sup>

Under this law, undertaking a Category A or environmentally critical project (ECP),<sup>110</sup> like the heavy industries of oil, gas, and mining,<sup>111</sup> will not be allowed without an ECC.<sup>112</sup> Nonprocurement or violation of the same or of the rules and regulations subjects any person or juridical entity to suspension or cancellation of his or its ECC or a fine not exceeding Php 50,000 for each violation, or both.<sup>113</sup> An immediately effective cease and desist order, not stayed by an appeal, may also be issued upon violation of the law “to prevent grave or irreparable damage to the environment.”<sup>114</sup>

New projects generally require a public hearing to take into account environmental concerns of stakeholders; however, it may also be required in other projects by the Environmental Management Bureau (EMB). Consultations are to be documented and the report validated by the EMB.<sup>115</sup>

Monitoring after ECC issuance is done by a multi-partite monitoring team or a third party audit or by the proponent through its environmental

107. *Id.* § 12 (b).

108. Establishing an Environmental Impact Statement System, Including Other Environmental Management Related Measures and for Other Purposes [EIS System], Presidential Decree No. 1586, Whereas Clause (1978).

109. *Id.* § 3.

110. *See* Department of Environment and Natural Resources, Implementing Rules and Regulations (IRR) for the Philippine Environmental Impact Assessment Statement (EIS) System [EIS System IRR], DENR Administrative Order No. 2003-30, § 4.3 (2003) (one which has significant potential to cause adverse environmental impacts).

111. *See* Proclaiming Certain Areas and Types of Projects as Environmentally Critical and Within the Scope of the Environmental Impact Statement System Established under Presidential Decree No. 1586, Proclamation No. 2146 (1981).

112. EIS System, § 4.

113. *Id.* § 9.

114. EIS System IRR, § 16.

115. *Id.* § 5.3.

unit. An environmental guarantee fund is also established upon DENR determination of significant public risk or the need for rehabilitation or restoration.<sup>116</sup>

*Philippine Clean Water Act of 2004*

The main law governing management of water quality in all water bodies is Republic Act No. 9275,<sup>117</sup> or the Philippine Clean Water Act of 2004.<sup>118</sup> The use of water for extractive industries falls under use of water for industrial purposes.<sup>119</sup>

A list of effluent standards, which limits the amount of wastewater pollutants discharged into waters per specific industry sector and serves as bases for monitoring and self-monitoring reports, is revised every two years and with public consultation. Variance in water quality criteria and standards, however, may be allowed in certain oil and gas explorations.<sup>120</sup>

To induce the modification of polluting processes or investment in pollution control technology and to reflect damages to the environment, a wastewater charge or fee is collected for wastewater discharge into water bodies. Those discharging regulated effluents must secure a discharge permit. An environmental guarantee fund liable for ecosystem conservation, emergency measures, clean-up, and rehabilitation is also required.<sup>121</sup>

Reports and other information may be required after due consultation and notice; these are to be made public, unless violative of intellectual

116. *Id.* §§ 9.1-9.3.

117. An Act Providing for a Comprehensive Water Quality Management and for Other Purposes [Philippine Clean Water Act of 2004], Republic Act No. 9275 (2004).

118. *Id.* § 3.

119. *Id.* § 4 (c) (7).

120. *Id.* §§ 11-12; Department of Environment and Natural Resources, Implementing Rules and Regulations of the Philippine Clean Water Act of 2004 (Republic Act No. 9275) [CWB IRR], DENR Administrative Order No. 2005-10, rules 12.1 & 12.3 (2005).

Quarterly self-monitoring reports are mandated.

*Id.* rule 14.6.

121. Philippine Clean Water Act of 2004, §§ 13-15.

When the fund is used up but clean-up is still ongoing, the polluter is liable for the additional costs.

CWB IRR, rule 15.2.

property rights. Visitorial, inspection, and discharge-testing powers are also accorded the DENR.<sup>122</sup>

Fiscal and non-fiscal incentives are also provided to encourage reduction in water pollution.<sup>123</sup> Fines are imposed upon commission of any prohibited act or violation of the law or its implementing rules.<sup>124</sup> Closure, suspension, or cessation of operations or disconnection of water supply may similarly be ordered. Willful or grossly negligent failure to undertake clean-up subjects one to imprisonment of not less than two years but not more than four years, a Php 50,000 fine, and a Php 100,000 fine for each day of violation.<sup>125</sup>

For gross violations, a fine of not less than Php 500,000 but not exceeding Php 3,000,000 for each day of violation, or imprisonment of not less than six years but not exceeding 10 years, or both.<sup>126</sup> In case of juridical persons, “the president, manager and the pollution control officer or the official in charge ... suffer the penalty.”<sup>127</sup> Administrative action may even be filed in case of violations.<sup>128</sup>

*Toxic Substances and Hazardous and Nuclear Wastes Control Act of 1990*

Republic Act No. 6969,<sup>129</sup> or Toxic Substances and Hazardous and Nuclear Wastes Control Act of 1990, covers “the importation, manufacture, processing, handling, storage, transportation, sale, distribution, use and disposal of all unregulated chemical substances and mixtures in the Philippines.”<sup>130</sup>

The inventory of chemicals required to be kept under the law must include information relevant to environmental and health protection, submission of which must precede the manufacture, processing, or importing of new chemicals. Public access to data concerning chemical substances is ensured, except in cases of trade secrets.<sup>131</sup> Control orders prohibiting,

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122. Philippine Clean Water Act of 2004, § 23.

123. *Id.* §§ 25-26.

124. *See* Philippine Clean Water Act of 2004, §§ 27-28.

125. Philippine Clean Water Act of 2004, § 28.

126. *Id.*

127. *Id.*

128. *Id.* § 30.

129. An Act to Control Toxic Substances and Hazardous and Nuclear Wastes Providing Penalties for Violations Thereof, and for Other Purposes [Toxic Substances and Hazardous and Nuclear Wastes Control Act of 1990], Republic Act No. 6969 (1990).

130. *Id.* § 3.

131. *Id.* §§ 8 & 12; Department of Environment and Natural Resources, Implementing Rules and Regulations of Republic Act 6969 [R.A. No. 6969 IRR], DENR Administrative Order No. 1992-29, § 14 (1)-(2).

limiting, or controlling the use, transport, storage, manufacture, process, import, or export of substances posing unreasonable environmental and health hazards may also be issued. Chemical testing to determine the health and environmental risks posed may also be required.<sup>132</sup> Impoundment or confiscation of chemical substances, its conveyance, and containers occurs if there is a violation of a control order or “an immediate threat or hazard to public health and safety or the environment.”<sup>133</sup>

Commission of any unlawful act is punishable by imprisonment of six months and one day to six years and one day and a fine not less than Php 600 but not more than Php 4,000. Foreign offenders are to be deported and barred from entry. The president, director, or manager of a corporation-offender who consented to or knowingly tolerated the violation is to be held liable.<sup>134</sup> Violations of the law and its implementing rules subjects one to a fine of not less than Php 10,000, but not exceeding Php 50,000.<sup>135</sup>

*Marine Pollution Decree*

Presidential Decree No. 979, or the Marine Pollution Decree, recognizing the vital importance of marine life and its environment and the sea’s limited capacity for carrying pollution, aims to prevent and control pollution of the seas.<sup>136</sup> It prohibits the discharge or dumping of “oil, noxious gaseous and liquid substances and other harmful substances from or out of any ship, vessel, barge, or any other floating craft, or other man-made structures at sea, ... into ... the territorial and inland navigable waters of the Philippines;”<sup>137</sup> the throwing, discharging, or depositing “from ... the shore, wharf, manufacturing establishment, or mill ... any refuse matter ... [which] pass[es] therefrom in a liquid state into [a] tributary ... from which the same shall float or be washed into... navigable water;”<sup>138</sup> and the depositing of any material in the bank “of any navigable water or ... tributary ... where the same shall be liable to be washed into such navigable water, ... whereby navigation shall or may be impeded or obstructed or” the water pollution

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132. R.A. No. 6969 IRR, § 20; Toxic Substances and Hazardous and Nuclear Wastes Control Act of 1990, § 9.

133. R.A. No. 6969 IRR, § 23.

134. Toxic Substances and Hazardous and Nuclear Wastes Control Act of 1990, § 14 (a) (2).

135. *Id.* § 15.

136. Providing for the Revision of Presidential Decree No. 600 Governing Marine Pollution, Presidential Decree No. 979, § 2 & Whereas Clauses (1976).

137. *Id.* § 4 (a).

138. *Id.* § 4 (b).

level is increased.<sup>139</sup> The sufferance, causing, or procurement of these acts is likewise punishable.<sup>140</sup>

Violation of the law or regulations is punishable by a fine of not less than Php 200 but not more than Php 10,000, or by imprisonment of not less than 30 days but not more than one year, or both, for each offense. Vessels are made subject to such fine and clearance from Philippine ports may be denied until payment.<sup>141</sup>

*National Pollution Control Decree of 1976*

Presidential Decree No. 984,<sup>142</sup> or the National Pollution Control Decree of 1976, establishes pollution prevention, abatement, and control to enhance effective resource utilization as a state policy.<sup>143</sup> It prohibits the throwing, running, draining, or disposing, or causing thereof, of any liquid or gaseous matter or substance, causing pollution. A permit is likewise required for some construction, installation, or operation activities which would result in an increase in the direct discharge of waste into the Philippine waters, air, and/or lands; otherwise alter their physical, chemical or biological properties without legal authorization; or when there is an increase in waste volume and strength in excess of what is allowed.<sup>144</sup>

Commission of prohibited acts is made punishable by a fine not exceeding Php 1,000 each day of violation or imprisonment ranging from two to six years, or both. Violation of an order, decision, or regulation also subjects one to a fine not exceeding Php 5,000 each day of violation, nonpayment of which results in the closure or stoppage of operations until payment. Refusing, obstructing, or hampering the entry of an authorized representative during an inspection or investigation renders one liable for a fine not exceeding Php 200 or imprisonment not exceeding one month, or

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139. *Id.* § 4 (c).

140. *Id.* § 4 (a)-(c).

141. *Id.* § 7.

A fine of not less than Php 50,000 nor more than one million pesos, or imprisonment of not less than one year nor more than six years, or both, for each violation. Officers, directors, or agents of the juridical entity offender or any person primarily responsible are to be held liable. The owner or operator of the vessel or facility will also be liable for any clean-up costs.

Philippine Clean Water Act of 2004, § 28.

142. Providing for the Revision of Republic Act No. 3931, Commonly Known as the Pollution Control Law, and for Other Purposes, Presidential Decree No. 984 (1976).

143. *Id.* § 1.

144. *Id.* § 8.

both.<sup>145</sup> Moreover, a violation of the law or its implementing rules and regulations which causes the death of aquatic life adds to the penalty liability for damages caused. The managing head is responsible for violations by a juridical person.<sup>146</sup>

At first glance, the massive environmental footprints inherent in extractive industries' processes seem to be sufficiently guarded against. A second look, however, reveals whether these laws and regulations, in practice, adequately respond to the environmental risks in the sector.

### III. THE UNAPPARENT VOID: THE FAILURE OF CURRENT LEGISLATION

*The essence of the disaster lies in the images of once-playful river otters oiled and crawling off to die in rock crevasses along their home streams; bald eagles losing their grip in the treetops, falling dead deep in the forest; orphaned sea otter pups searching for dead parents, shivering through oiled fur in cold water that once seemed warm; seals, sea lions and whales staring up at a black surface through which they must swim in order to take their next breath, eyes and nostrils inflamed, often then inhaling oil instead of air; diving birds, soaked in oil and unable to fly, with simply nowhere to go but back into the thick of the oil. If nothing else, the Exxon Valdez should serve to remind all of us that any true prosperity we seek in this world must also include consideration for the many innocent beings along the way.*

- Rick Steiner<sup>147</sup>

#### A. Symptoms of Failure: The Persistence of Extractive Industries-Caused Environmental Disasters

Even with modern legislation and cleaner technology, case studies indicate that environmental problems resulting from operations of these industries persist — an unavoidable reminder of the impotence of existing laws vis-à-vis grave environmental concerns. Five local environmental disasters, each covering a stage in extraction, are discussed to illustrate this insistent reality.

##### 1. Exploration Stage: Tañon Strait

The Tañon Strait is among the country's top 10 fishing grounds, home to vast coral reefs<sup>148</sup> and "a critical habitat for 14 of 27 cetacean species

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145. *Id.* § 9 (a)-(c).

146. *Id.* § 9 (d)-(e).

147. HILL, *supra* note 54, at 145.

148. *Endangered Strait: Report of the Fact-Finding Mission on Tanon Strait Oil Exploration*, BULATLAT, Nov. 11-17, 2007, available at <http://www.bulatlat.com/2007/11/endangered-strait-report-fact-finding-mission-ta-strait-oil-exploration> (last accessed Feb. 20, 2009) [hereinafter *Endangered Strait*]; Karl G.

recorded in the Philippines.”<sup>149</sup> Due to its rich marine resources, it was declared a protected seascape in May 1998.<sup>150</sup>

Pursuant to a contract for oil and gas exploration among the Department of Energy (DOE), Japan Petroleum Exploration Co. Ltd. (Japex), and Forum Exploration Inc. (FEI), seismic surveys in the area were completed in May 2005. The activities being merely exploratory, no ECC was required.<sup>151</sup>

In November 2007, people’s organizations, however, complained of a drastic decrease in fish catch, mass destruction of fish traps, and increase in skin diseases among residents due to the seismic surveys.<sup>152</sup> A fact-finding mission confirmed a 50-70% reduction in fish catch, destruction of over a hundred artificial reefs, disappearance of a local fish, and fishkills, and noted the lack of community consultation.<sup>153</sup> Scientists also recorded unusual

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Ombion, *Oil Find in Negros: Fisherfolk fear displacement*, BULATLAT, Aug. 21-27, 2005, available at <http://www.bulatlat.com/news/5-28/5-28-negros.htm> (last accessed Feb. 20, 2009).

149. Alex Pal, *Scientists oppose extending oil exploration in Tañon Strait*, INQUIRER.NET, Jan. 27, 2008, available at <http://newsinfo.inquirer.net/breakingnews/regions/view/20080127-115173/Scientists-oppose-extending-oil-exploration-in-Taon-Strait> (last accessed Feb. 22, 2009); see also World Wildlife Fund (WWF) Philippines, Tañon Strait Initiative, available at <http://www.wwf.org.ph/about.php?pg=wwd&sub1=00006> (last accessed Feb. 20, 2009); *Endangered Strait*, *supra* note 148.

150. Declaring the Tañon Strait Situated in the Provinces of Cebu, Negros Occidental and Negros Oriental as a Protected Area Pursuant to R.A. 7586 (NIPAS Act of 1992) and Shall be Known as Tañon Strait Protected Seascape, Proclamation No. 1234 (1998); *Endangered Strait*, *supra* note 148; Jolene Bulambot, *Environmental lawyers: Stop oil drilling in Visayan Sea*, PHIL. DAILY INQUIRER, Nov. 27, 2007, available at [http://newsinfo.inquirer.net/breakingnews/regions/view\\_article.php?article\\_id=103414](http://newsinfo.inquirer.net/breakingnews/regions/view_article.php?article_id=103414) (last accessed Feb. 21, 2009) [hereinafter Bulambot, *Environmental lawyers*].

Exploitation of energy resources within protected areas is only permitted through special law.

Job Tabada, Opinion, *Crimes at Tañon Strait*, CEBU DAILY NEWS, Dec. 7, 2007, available at [http://globalnation.inquirer.net/cebudailynews/opinion/view\\_article.php?article\\_id=105453](http://globalnation.inquirer.net/cebudailynews/opinion/view_article.php?article_id=105453) (last accessed Feb. 21, 2009) [hereinafter Tabada, *Crimes*].

151. DOE expects one billion barrels of oil under Tanon Strait, GOV.PH NEWS, May 26, 2005, available at <http://www.gov.ph/news/default.asp?i=9718> (last accessed Feb. 21, 2009); *Endangered Strait*, *supra* note 148.

152. Jolene Bulambot & Nilda Gallo, *Oil exploration at Tañon Strait to start Thursday*, CEBU DAILY NEWS, Nov. 14, 2007, available at [http://globalnation.inquirer.net/cebudailynews/news/view\\_article.php?article\\_id=100787](http://globalnation.inquirer.net/cebudailynews/news/view_article.php?article_id=100787) (last accessed Feb. 21, 2009).

153. *Endangered Strait*, *supra* note 148.

activity and behavioral changes in the dolphins during the surveys, as well as a decline in their numbers a year after, suggesting both immediate and delayed negative impacts.<sup>154</sup>

As sea drilling would cause greater damage — experts anticipating the loss of 12 to 16 species of dolphin, disappearance of fish from the region and consequent decline in local food supply, and danger to marine resources from drilling equipment<sup>155</sup> — there was much opposition to the project. A large group of marine scientists and lawyers separately passed resolutions opposing the oil exploration.<sup>156</sup> An organization sought recall of the project's ECC on the ground of lack of prior public consultation. The environmental survey was decried as having been conducted within too short a period and lacking essential critical data for the determination of the impacts of exploratory drilling.<sup>157</sup> Later that year, over 26,000 local fishermen filed an injunction case against the government and Japex officers, alleging that their displacement was prompted by the decline in fish population caused by the exploration. A separate petition for injunction and mandamus was filed against the DOE and DENR secretaries and Japex on behalf of resident marine mammals. The cases were consolidated by, and remain pending with, the Supreme Court.<sup>158</sup>

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154. Pal, *supra* note 149 (Negative impacts may have been caused by the loud seismic sounds — especially considering that the operation continued 24 hours a day, with blasting at five- to 20-second intervals — as cetaceans use sound for navigation, feeding, and breeding.); Bulambot, *Environmental lawyers*, *supra* note 150; see Tabada, *Crimes*, *supra* note 150.

155. Job Tabada, Opinion, *Tañon in danger*, CEBU DAILY NEWS, Nov. 12, 2007, available at [http://globalnation.inquirer.net/cebudailynews/opinion/view\\_article.php?article\\_id=100427](http://globalnation.inquirer.net/cebudailynews/opinion/view_article.php?article_id=100427) (last accessed Feb. 20, 2009) [hereinafter Tabada, *Tañon*]; ENERGYCURRENT, *Environmentalist: Tanon Strait drilling threatens marine life*, Oct. 9, 2007, available at <http://www.energycurrent.com/index.php?id=2&storyid=5845> (last accessed Feb. 21, 2009); Ombion, *supra* note 148.

156. Tabada, *Tañon*, *supra* note 155; Bulambot, *Environmental lawyers*, *supra* note 150.

157. Tabada, *Crimes*, *supra* note 150; *Endangered Strait*, *supra* note 148.

158. Nilda Gallo, *High Court to hear Tañon Strait case*, CEBU DAILY NEWS, May 3, 2008, available at <http://globalnation.inquirer.net/cebudailynews/news/view/20080503-134302/High-Court-to-hear-Taon-Strait-case> (last accessed Feb. 21, 2009); Nilda Gallo & Doris C. Bongcac, *Tañon Strait court battle goes on*, CEBU DAILY NEWS, May 17, 2008, available at <http://globalnation.inquirer.net/cebudailynews/news/view/20080517-137118/Taon-Strait-court-battle-goes-on> (last accessed Feb. 21, 2009); SUNSTAR CEBU, *SC consolidates cases v. oil drilling firm*, May 23, 2008, available at <http://www.sunstar.com.ph/static/ceb/2008/05/23/news/sc consolidates.cases.v..oil.drilling.firm.html> (last accessed Feb. 21, 2009); Katrina N. Tabanao, *Lawyer warns oil extraction in Tañon Strait*

## 2. Development Stage: Guimaras Oil Spill and Pandacan Oil Depots

*Guimaras Oil Spill*

On 11 August 2006, a single-hull tanker chartered by Petron Corporation (Petron) sank and leaked 500,000 liters of oil in Guimaras island, wreaking havoc over local marine and coastal ecosystems. Declared a national calamity and the worst oil spill in Philippine history, the spill affected neighboring towns and threatened 220 kilometers of coastline, 1,128 hectares of mangroves, 58 hectares of seaweed farms, and 3,000 families.<sup>159</sup>

The Guimaras Strait is home to several marine sanctuaries, mangrove forests, coral reefs, and many types of dolphins, whales, turtles, and dugongs, some of which are threatened species. At least five marine reserves were with the perimeter of the spill.<sup>160</sup> Finally, “with 450,000 gallons of oil still inside, the tanker [wa]s ... an ecological ‘ticking time bomb.’”<sup>161</sup>

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*worse than drilling, which has stopped*, SUNSTAR, Feb. 7, 1008, available at <http://www.sunstar.com.ph/static/ceb/2008/02/07/news/lawyer.warns.oil.extr.action.in.ta.on.strait.worse.than.drilling.which.has.stopped.html> (last accessed Feb. 21, 2009).

159. Haribon Foundation, *The Guimaras Oil Spill: A Situationer* (as of Aug. 25, 2006), available at <http://www.haribon.org.ph/?q=node/view/364> (last accessed Feb. 21, 2009); Erwin Ambo Delilan, et al., *Guimaras oil spill a national disaster*, SUNSTAR ILOILO, Aug. 26, 2006, available at <http://www.sunstar.com.ph/static/ilo/2006/08/26/news/guimaras.oil.spill.a.national.disaster.html> (last accessed Feb. 22, 2009); GMANews.TV, *Gov't releases P35M for Guimaras oil spill cleanup*, Dec. 8, 2007, available at <http://www.gmanews.tv/story/71965/Govt-releases-P35M-for-Guimaras-oil-spill-cleanup> (last accessed Feb. 21, 2009); World Wildlife Fund (WWF), *Large oil spill in the Philippines threatens marine ecosystem*, WWF NEWS CENTRE, Aug. 17, 2006, available at [http://www.panda.org/news\\_facts/newsroom/index.cfm?uNewsID=78300](http://www.panda.org/news_facts/newsroom/index.cfm?uNewsID=78300) (last accessed Feb. 21, 2009) [hereinafter WWF, *Large oil spill*]; Lea Francisco & Tamarah Tilos, *Activists Confront Oil Companies: Fighting Transnational Environmental Injustices Committed by Chevron*, RESIST, Nov.-Dec. 2006, available at [http://www.resistinc.org/newsletters/issues/2006/activists\\_oilcompanies.html](http://www.resistinc.org/newsletters/issues/2006/activists_oilcompanies.html) (last accessed Feb. 21, 2009); AFP, et al., *Greenpeace steps into Guimaras oil spill quiz*, MANILA STANDARD TODAY, Aug. 21, 2006, available at [http://www.manilastandardtoday.com/?page=news03\\_aug21\\_2006](http://www.manilastandardtoday.com/?page=news03_aug21_2006) (last accessed Feb. 21, 2009).

160. The most severely affected area hosting one which contained numerous species of fish, seagrass, hard corals, and mangroves and serves as a marine life breeding, nursery, and feeding ground.

WWF, *Large oil spill*, *supra* note 159; AFP, *supra* note 159; Haribon Foundation, *supra* note 159 (citing L.V. Aragonés & Bienvenido Gonzales, *Status and Conservation of Marine Mammals in the Philippines* (2001); International Union for Conservation of Nature and Natural Resources (IUCN), 2007 IUCN Red List of Threatened Species, available at <http://www.iucnredlist.org>

Environmental degradation also resulted in loss of a major source of livelihood — fishing, affecting even related trades. The long-term effects of the disaster, such as poverty, diseases, and poor nutrition, prompted serious fears that the community would be completely wiped out, as 99% of Guimarasans were reported to have suffered from the oil slick.<sup>162</sup> Mounting health hazards were a major cause of concern. For instance, 254 cases of respiratory problems, stomachaches, dermatitis, and dizziness were reportedly caused by overexposure to the spill's fumes.<sup>163</sup>

Civil society groups and thousands of affected residents have threatened the filing of a class action suit for widespread adverse environmental, health, and economic effects.<sup>164</sup> No case has been filed, however, despite government findings that overloading and crew incompetence led to the sinking.<sup>165</sup> More than a year after the spill, the government continued to release funds for rehabilitation efforts.<sup>166</sup>

#### *Pandacan Oil Depots*

Petron, Pilipinas Shell Petroleum Corporation (Shell), and Chevron Philippines, Inc. (Chevron) or Caltex Philippines jointly operated oil depots in Pandacan, a densely-populated residential area.<sup>167</sup> Owing to its location — directly across University of the Philippines (UP) Manila and two kilometers away from Malacañang, the official Presidential residence — residents and officials pushed for removal of the depots as “an accident or

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(last accessed Feb. 21, 2009); National Disaster Coordinating Council, *available at* <http://www.ndcc.gov.ph> (last accessed Feb. 21, 2009)).

161. AFP, *supra* note 159.

162. Worse still, even as Petron paid affected residents Php 200 a day to assist in the clean-up operation, they were initially allowed to work *sans* safety gear — it was only later that the Philippine National Red Cross distributed boots to afford some semblance of protection.

Delilan, *supra* note 159; AFP, *supra* note 159.

163. Delilan, *supra* note 159; Haribon Foundation, *supra* note 159.

164. Haribon Foundation, *supra* note 159; Delilan, *supra* note 159.

165. CEBU DAILY NEWS, *No cases filed yet in Guimaras oil spill*, July 25, 2007, *available at* [http://globalnation.inquirer.net/cebudailynews/visayas/view\\_article.php?article\\_id=78663](http://globalnation.inquirer.net/cebudailynews/visayas/view_article.php?article_id=78663) (last accessed Feb. 21, 2009).

166. GMANews.TV, *supra* note 159.

167. IBON WORKER'S DESK, *supra* note 28, at 48; Friends of the Earth, *Behind the Shine: The Other Shell Report 2003*, at 14, *available at* <http://www.globalpolicy.org/soecon/tncs/2004/0623shellpaper.pdf> (last accessed Feb. 22, 2009); Francisco, *supra* note 159; *see also* Social Justice Society (SJS) v. Atienza, Jr., 545 SCRA 92 (2008).

terrorist attack could result in the biggest disaster in the history of petrochemical facilities, affecting the 10.9 million residents.”<sup>168</sup> Despite the passage of an ordinance in 2001 requiring relocation of the depots, however, the three companies were allowed to remain pursuant to a memorandum of understanding (MOU) with the city and the DOE, requiring only the scaling down of operations.<sup>169</sup>

This occurred amid environmental, health, and security concerns.<sup>170</sup> “[O]ver 84,000 ... residents ... [we]re regularly exposed to hazardous chemicals ... detrimental to human health and the environment.”<sup>171</sup> Alarming levels of benzene were found in the air and doctors discovered abnormal levels of lead in urine samples and that majority of the patients suffered from median neuropathy or nerve damage correlative to their distance from the depots. Adjacent trees had withered and sewage drains contained large quantities of exposed oil.<sup>172</sup> There were spills and explosions in the Pasig River and within the depots in recent years. A terrorist threat was also reported by Time Magazine.<sup>173</sup>

In December 2002, the Social Justice Society (SJS) filed an action for mandamus, praying that the ordinance be enforced.<sup>174</sup> The Supreme Court granted the petition, explaining that the ordinance was passed to protect residents from the catastrophic devastation in case of a terrorist attack on the depots.<sup>175</sup> The Court found it to be a legitimate police power measure prohibiting or abating “a noxious use which interferes with paramount rights

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168. Friends of the Earth, *supra* note 167, at 14-15 (citing Shell, Shell in the Philippines: Background on Pandacan Scale-Down Project, available at [http://www.shell.com/home/content/ph-en/about\\_shell/pandacan\\_scale\\_down/psd\\_home\\_1114.html](http://www.shell.com/home/content/ph-en/about_shell/pandacan_scale_down/psd_home_1114.html) (last accessed Feb. 21, 2009)); see also IBON WORKER'S DESK, *supra* note 28, at 48; Francisco, *supra* note 159.

169. *Social Justice Society*, 517 SCRA at 657-62; Friends of the Earth, *supra* note 167, at 15 (citing Shell, *supra* note 168); Job T. Realubit, *Court Order Gives Pandacan Oil Depots a 20-day Reprieve*, THE MANILA TIMES, May 1, 2003, available at [http://www.manilatimes.net/national/2003/may/01/top\\_stories/20030501top4.html](http://www.manilatimes.net/national/2003/may/01/top_stories/20030501top4.html) (last accessed June 26, 2008); Francisco & Tilos, *supra* note 159.

170. Friends of the Earth, *supra* note 167, at 15-16.

171. Francisco & Tilos, *supra* note 159.

172. *Id.*

173. *Id.*; IBON WORKER'S DESK, *supra* note 28, at 48; *LLDA Looks into Pandacan Oil Spill*, THE MANILA TIMES, July 20, 2006, available at [http://www.llda.gov.ph/news/archive/LLDA\\_LOOKS\\_INTO\\_PANDACAN\\_OIL\\_SPILL.htm](http://www.llda.gov.ph/news/archive/LLDA_LOOKS_INTO_PANDACAN_OIL_SPILL.htm) (last accessed Feb. 21, 2009).

174. *Social Justice Society (SJS) v. Atienza, Jr.*, 517 SCRA 657, at 659 (2008).

175. *Id.* at 667; see *Social Justice Society (SJS) v. Atienza, Jr.*, 545 SCRA 92 (2008) (where this motion for reconsideration was also denied.).

of the public”<sup>176</sup> — the oil companies’ right to property giving way to the residents’ right to life.<sup>177</sup> The Court likewise found that 313.5 million liters of highly flammable and volatile petroleum products were within the facilities; the depots are vulnerable to attack; it is situated in a densely-populated neighborhood and in close proximity to Malacañang; and that fire due to explosion or conflagration could spread to neighboring communities.<sup>178</sup> It was also noted that in January 2008, the explosion of a tanker caused “death, extensive damage and a frightening conflagration.”<sup>179</sup>

### 3. Extraction Stage: Rapu Rapu Cyanide Spill

In 2001, the Lafayette Rapu Rapu Polymetallic Project was declared a priority large-scale mining project by the President. Lafayette started mining in April 2005 and had exported 4,000 ounces of gold by October of that year.<sup>180</sup>

Rapu Rapu’s long history of mining had, however, left “three of four rivers contaminated and a wide tract of land barren and useless... [as well as] a strong and noxious odor of water flowing from the area.”<sup>181</sup> Opposition to mining was, thus, grounded on many environmental and community concerns, such as water availability and acid mine drainage.<sup>182</sup> The fragile ecosystem would also be upset: rare or endangered plant and animal species facing possible destruction. Mining would inevitably impact the habitats of various native plant and wildlife — including cetaceans, turtles, mollusks,

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176. *Social Justice Society*, 545 SCRA at 143.

177. *Id.*

178. *Id.* at 138-39.

179. *Id.* at 160.

180. Aubrey SC Makilan, *Destroying Rapu-rapu Through Mining*, BULATLAT, Nov. 20-26, 2005, available at <http://www.bulatlat.com/news/5-41/5-41-rapu.htm> (last accessed Feb. 21, 2009) (The project was operated by Lafayette Philippines, Inc. with Lafayette NL of Australia, LG Collins, and Kores of South Korea); Kevin Brigden & Janet Cotter, *Pollution from the Lafayette mine, Rapu Rapu (Philippines) during 30-day trial run*, Oct. 2006, available at <http://www.greenpeace.to/publications/lafayette-mine-pollution.pdf> (last accessed Feb. 21, 2009).

181. Makilan, *supra* note 180 (The island’s mining legacy of environmental degradation, pollution, health problems, and worsening poverty was affirmed in a 2004 environmental study.).

182. *Id.*; Mineral Policy Institute (MPI), *Rapu Rapu Watching Brief: Philippines Police Confiscate Independent Water Samples at Australian Minesite*, available at [http://www.mpi.org.au/default\\_231.html](http://www.mpi.org.au/default_231.html) (last accessed Feb. 22, 2009) [hereinafter MPI, *Watching Brief*].

herons, egrets, pitcher plants, bats, and seagrass beds, mangroves, and coral reefs. Environmental degradation would, in turn, affect community livelihood, reducing land and coral reef productivity for farming and fishing.<sup>183</sup> Lastly, there is an elevated risk of mining disasters as the island is along both the typhoon belt and a major fault.<sup>184</sup>

As feared, inadequate environmental safeguards soon resulted in two separate cyanide spills. October 2005 saw massive fishkill and the discovery of mercury and a dead dugong in Sorsogon waters. Government water tests ensued and mining operations were suspended.<sup>185</sup> Investigations revealed a violation of the Clean Water Act, company negligence in the installation of proper infrastructure, improper conduct of community consultation, and undue haste in the issuance of the ECC.<sup>186</sup> Major flaws and oversights were confirmed by the company itself. Despite these findings and a class action filed to restrain resumption of operations, the mine was allowed to reopen.<sup>187</sup>

Immediately after the 30-day trial run in July 2006, fishkill and significant impacts from acid mine drainage and highly toxic metal contamination due to a leak were documented. As Lafayette denied responsibility for the fishkill, a Greenpeace volunteer attempting to conduct independent water tests was stopped at gunpoint, searched, and detained by local police, raising serious concerns of transparency and increased

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183. MPI, Watching Brief, *supra* note 182; Makilan, *supra* note 180; Mineral Policy Institute (MPI), Backgrounder on the Rapu Rapu Mining Operation, July 2006, available at <http://www.greenpeace.org/raw/content/international/press/reports/mpi-rapu-rapu.pdf> (last accessed Feb. 21, 2009) [hereinafter MPI, Backgrounder].

184. MPI, Watching Brief, *supra* note 182.

185. Brigden & Cotter, *supra* note 180; *Rapu Rapu waters now free of cyanide, but more tests due*, MANILA STANDARD TODAY, Jan. 27, 2006, available at [http://www.manila-standardtoday.com/?page=politics04\\_jan27\\_2006](http://www.manila-standardtoday.com/?page=politics04_jan27_2006) (last accessed Feb. 21, 2009); Ephraim Aguilar, *BFAR tests: Rapu-Rapu waters safe for marine life: But Lafayette not yet cleared in fishkill*, PHIL. DAILY INQUIRER, Nov. 9, 2007, available at [http://newsinfo.inquirer.net/breakingnews/regions/view\\_article.php?article\\_id=99885](http://newsinfo.inquirer.net/breakingnews/regions/view_article.php?article_id=99885) (last accessed Feb. 21, 2009); MPI, Watching Brief, *supra* note 182; MPI, Backgrounder, *supra* note 183.

186. MPI, Backgrounder, *supra* note 183.

187. MPI, Watching Brief, *supra* note 182; Mineral Policy Institute (MPI), Residents of Rapu Rapu island file injunction to stop Lafayette's toxic mine, available at [http://www.mpi.org.au/default\\_176.html](http://www.mpi.org.au/default_176.html) (last accessed Feb. 21, 2009).

militarization.<sup>188</sup> After an order to pay Php 137 million for environmental rehabilitation, Lafayette gave up the project.<sup>189</sup>

#### 4. Processing Stage: Marcopper Mine Tailings Spill

Marcopper began mining in Marinduque as early as 1968 and started disposing tailings into a nearby bay in 1975. Until 1990, an estimated 200 to 300 million tons of tailings were discharged.<sup>190</sup> Even as the practice destroyed corals and seagrass and severely impacted 12 fishing villages, causing food insecurity for over 25 years, the disposal system was only improved under threat of ECC revocation.<sup>191</sup> In 1991, however, disposal was redirected to the old site by the haphazard plugging of a dewatering tunnel.<sup>192</sup>

In 1996, the plug fractured, releasing approximately “1.5–3 million cubic meters of tailings into the Makulapnit River, Boac River, and eventually the ocean west of the island, 26 kilometers from the open pit.”<sup>193</sup> A river flood inundated croplands and caused two villages to evacuate. The entire island was declared a calamity zone. After a month, the chief water and food source, the Boac River, was declared biologically dead; all aquatic life was destroyed and 20,000 residents in 42 villages (11% of Marinduque’s population) were affected.<sup>194</sup>

188. Brigden & Cotter, *supra* note 180; MPI, *Watching Brief*, *supra* note 182.

189. Marianne V. Go, *Korean group completes acquisition of Rapu-Rapu*, PHIL. STAR, June 2, 2008, available at <http://www.philstar.com/Article.aspx?articleId=65422> (last accessed Feb. 22, 2009); Eric B. Dorente, *Rapu-Rapu proponents told to set aside P137M for environment, social dev’t*, GMANEWS.TV, Feb. 22, 2008, available at <http://www.gmanews.tv/story/81852/Rapu-Rapu-proponents-told-to-set-aside-P137M-for-environment-social-devt> (last accessed Feb. 21, 2009).

190. MMSD, *supra* note 31, at 348; TUJAN & GUZMAN, *supra* note 28, at 141; Ely Manalansan, *No More! 10 years after Marcopper disaster, Marinduque villagers still die*, BULATLAT.COM, Dec. 7–13, 2003, available at <http://www.bulatlat.com/news/3-44/3-44-nomore.html> (last accessed Feb. 21, 2009).

191. Ballesteros, *supra* note 59, at 25; Manalansan, *supra* note 190.

192. MMSD, *supra* note 31, at 348; TUJAN & GUZMAN, *supra* note 28, at 141; Catherine Coumans, *Boac Tragedy Aftermath: Canadian Transnational Dumps Waste, Responsibility in Marinduque*, Mar. 24–26, 1999, available at <http://www.pcij.org/stories/1999/marcopper.html> (last accessed Feb. 21, 2009).

193. MMSD, *supra* note 31, at 348; TUJAN & GUZMAN, *supra* note 28, at 141; Coumans, *supra* note 192; Manalansan, *supra* note 190.

194. Coumans, *supra* note 192; MMSD, *supra* note 31, at 208; Ballesteros, *supra* note 59, at 1; ESSC, *supra* note 32, at 14; TUJAN & GUZMAN, *supra* note 28, at 141.

Even as operations ceased, the ECC was withdrawn, and criminal charges were filed against five company officers, Marcopper and its former major shareholder, Placer Dome, Inc., denied responsibility, blaming instead a minor earthquake. Three years after the spill, they were still lobbying to reopen the mine. Placer Dome, Inc.'s pledge to completely divest the river of its tailings is yet to be wholly fulfilled.<sup>195</sup>

Investigations showcased a consistent corporate culture of environmental negligence.<sup>196</sup> No EIA had been conducted for the unconventional waste disposal. An examination of the drainage tunnel also revealed that fracture zones and groundwater seepage were likely. As early as 1995, seepage had already been reported. A commissioned report revealed that the tunnel was possibly failing; and as the second plug was being installed, the oil spill occurred.<sup>197</sup>

The spill into Boac River was not Marcopper's first.<sup>198</sup> It is, however, the country's worst mining disaster to date, and is one of the most reported in the industry. Despite rehabilitation efforts, the damage was irreversible.<sup>199</sup>

True to mining legacy, problems still endure. Five tailings dams are in danger of collapse and Marcopper's new owner, MR Holdings, has refused to maintain and repair the dams.<sup>200</sup> "Should it burst, 34 million cubic meters of water and silt could cascade down toward the Boac River and may cause untold catastrophe to the low-lying towns of Boac and Mogpog."<sup>201</sup>

*B. Inadequacy of Current Legislation in Meaningfully Operationalizing the Right to a Balanced and Healthful Ecology*

The Philippines has some of the most progressively environmental laws in Southeast Asia. Comprehensive implementation, however, proves to be a major dilemma. Well-drafted laws may become ineffective without the

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195. TUJAN & GUZMAN, *supra* note 28, at 141; Coumans, *supra* note 192 (In 1999, Placer Dome even lobbied for a Submarine Tailings Disposal (STD) system, a system actually banned in its home country, Canada, and the United States.).

196. MMSD, *supra* note 31, at 348.

197. Coumans, *supra* note 192.

198. The 1993 Mogpog disaster swept away houses were swept away, destroyed crops, killed livestock, and submerged 26 barangays in thick, poisoned mud. A decade after, residents were still dying from tailings-related diseases.

Manalansan, *supra* note 190.

199. Coumans, *supra* note 192; TUJAN & GUZMAN, *supra* note 28, at 141.

200. Corpuz, *supra* note 65, at 181; Gerald Gene R. Querubin, *Collapse of abandoned Marinduque mine dams feared*, PHIL. DAILY INQUIRER, Nov. 24, 2007, available at [http://newsinfo.inquirer.net/breakingnews/regions/view\\_article.php?article\\_i=102885](http://newsinfo.inquirer.net/breakingnews/regions/view_article.php?article_i=102885) (last accessed Feb. 21, 2009).

201. Querubin, *supra* note 200.

essential social and institutional context.<sup>202</sup> The rapidly adopted legislation “may have grown faster than the infrastructure necessary to make it work effectively.”<sup>203</sup>

This Note discusses five key difficulties in implementation: a weak regulatory system and corruption; lack of effective free, prior, and informed consent; failure to consider or protect vulnerable areas; an ineffective system of sanctions; and lack of effective means of recourse.

### I. Weak Regulatory System and Corruption

The lack of political will is usually problematic in environmental protection by developing countries.<sup>204</sup> Long-term environmental aims are often traded for short-term economic progress. Local government officials frequently face the choice between implementing environmental protection and demonstrating development and progress in their area to boost the probability of re-election.<sup>205</sup> On the national government level, there is a “race to the bottom,” as social and environmental standards are lowered to attract foreign investment, especially in extractive industries.<sup>206</sup>

Monitoring and enforcement will only be effective if there are sufficient funds, qualified personnel, and other necessary resources.<sup>207</sup> Nevertheless, local government units (LGUs) or even the DENR may not possess the manpower, technical expertise, and capacity to sufficiently attend to their responsibilities under the law. Budgetary constraints and the lack of necessary

202. Alan K.J. Tan, Preliminary Assessment of Philippines’ Environmental Laws, available at <http://sunsite.nus.sg/apcel/dbase/filipino/reportp.html> (last accessed Feb. 22, 2009) [hereinafter Tan, Preliminary Assessment]; Amado S. Tolentino, *Environmental Law Enforcement in the Philippines*, in ENVIRONMENTAL LAW AND POLICY IN ASIA: ISSUES OF ENFORCEMENT 22 (Yoshihiro Nomura & Naoyuki Sakumoto eds., 1997); see also Alan K.J. Tan, Recent Institutional Developments on the Environment in Southeast Asia — A Report Card on the Region, available at <http://unpan1.un.org/intradoc/groups/public/documents/APCITY/UNPAN026595.pdf> (last accessed Feb. 22, 2009).

203. MMSD, *supra* note 31, at 339.

204. Tan, Preliminary Assessment, *supra* note 202; see also Tolentino, *supra* note 202, at 13.

205. Tan, Preliminary Assessment, *supra* note 202.

206. MMSD, *supra* note 31, at 6; ESSC, *supra* note 32, at 41.

States are disinclined to refuse ECC issuance to investment projects and circumvention of legal procedures is frequent.

Tan, Preliminary Assessment, *supra* note 202; Tolentino, *supra* note 202, at 19.

207. Tolentino, *supra* note 202, at 14.

equipment hamper inspections and effective enforcement and monitoring, especially with costly or technical undertakings, such as an EIA, the establishment of local scientific standards, and the measurement of pollutants. Personnel are also strained: the limited staff often juggling multiple charges at the same time and funds often insufficient for proper organizational structure and training.<sup>208</sup>

Corruption is also a major part of the problem, especially in the developing world, particularly in the Philippines.<sup>209</sup> Wide discretionary powers bestowed on many officials allow for minimal or in-existent supervision. As the chance of punishment is miniscule in weak or corrupt financial auditing systems, “weak governance makes corruption more prevalent.”<sup>210</sup> “Transparent and democratic structures are a critical element in ensuring that corporations and governments are held accountable for their actions.”<sup>211</sup>

A study showed extractive industries to be “among the industries most likely to pay bribes, with the oil and gas sector ranking the third most corrupt.”<sup>212</sup> Some companies may employ bribery to obtain licenses and permits to ensure a monopoly over the sector, preferential treatment, or favorable court rulings; but some feel obliged to do so to enhance business

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208. Tan, Preliminary Assessment, *supra* note 202; Tolentino, *supra* note 202, at 14-15, 17 & 19-20; MMSD, *supra* note 31, at 341; *see also* MIRANDA, *supra* note 3, at 35 (citing ENVIRONMENTAL SECTOR MANAGEMENT ASSISTANCE PROGRAMME (ESMAP), ENVIRONMENTAL AND SOCIAL REGULATION OF OIL AND GAS OPERATIONS IN SENSITIVE AREAS OF THE SUB-ANDEAN BASIN, REPORT 217/99 23 (1999)).

209. MIRANDA, *supra* note 3, at 33 & 35 (The Philippines scored in the second lowest quartile in degree of compliance with the law, an indicator of rampant corruption.); MMSD, *supra* note 31, at 184.

210. MMSD, *supra* note 31, at 184.

211. MIRANDA, *supra* note 3, at 35 (citing MMSD, BREAKING NEW GROUND (2002) *available at* <http://www.iied.org/mmsd/finalreport/> (last accessed Feb. 21, 2009); Transparency International (TI), Background Paper to the 2002 Corruption Perceptions Index: Framework Document 2002, *available at* [http://www.transparency.org/policy\\_research/surveys\\_indices/cpi/2002](http://www.transparency.org/policy_research/surveys_indices/cpi/2002) (last accessed Feb. 21, 2009); KAUFMANN, ET AL., GOVERNANCE MATTERS, POLICY RESEARCH WORKING PAPER 2196 (1999); KAUFMANN, ET AL., AGGREGATING GOVERNANCE INDICATORS, POLICY RESEARCH WORKING PAPER 2195 (1999); KAUFMANN, ET AL., GOVERNANCE MATTERS II: UPDATED INDICATORS FOR 2000/01, *available at* <http://www.worldbank.org/wbi/governance/pdf/govmatters2.pdf> (last accessed Feb. 21, 2009); E. PETKOVA, ET AL., CLOSING THE GAP: INFORMATION, PARTICIPATION, AND JUSTICE IN DECISION-MAKING FOR THE ENVIRONMENT (2002)).

212. *Id.* at 34 (citing TI, GLOBAL CORRUPTION REPORT 2003, at 268, *available at* <http://www.globalcorruptionreport.org> (last accessed Feb. 21, 2009)).

efficiency.<sup>213</sup> Extractive industries are highly capital-intensive, extensively regulated, and location-specific (worksites being determined by geological conditions, removal to a less corrupt location may not be an option) acting as a constant temptation to underpaid officials.<sup>214</sup> “[W]hen the stakes are high, officials can be in a strong position to demand bribes.”<sup>215</sup>

## 2. Lack of Effective Free, Prior, and Informed Consent

Public consultation, or even the free, prior, and informed consent (FPIC) of local communities and/or indigenous groups have been incorporated in many environmental laws.<sup>216</sup> Nevertheless, implementation is again problematic. A review of the sector found public consultation and environmental and social impact disclosure as one of the weakest and most inconsistent safeguards.<sup>217</sup>

Even when FPIC is provided for by law, it may be ineffective or unimplemented as governments may lack political will to create “enabling conditions for effective FPIC processes,”<sup>218</sup> which should have due regard for the critical components of information, inclusiveness, dialogue, legal recognition, monitoring and evaluation, and corporate buy-in.<sup>219</sup> The FPIC required may be too limited to be effective — required only at the onset, instead of throughout the entire process, or only for indigenous peoples, excluding local community and organization. Sometimes, only consultation,

213. MMSD, *supra* note 31, at 184.

214. *Id.* at 185; ROSS, *supra* note 6, at 5.

215. MMSD, *supra* note 31, at 185.

216. See STEVEN HERZ, ET AL., DEVELOPMENT WITHOUT CONFLICT: THE BUSINESS CASE FOR COMMUNITY CONSENT 8-9 (Jonathan Sohn ed., 2007).

217. EIR, *supra* note 4, at 18.

Problems include physical and linguistic inaccessibility of documents; lack of information as to rights or opportunity to participate; harassment, threatening, or disregard of those who oppose; inconvenient, unannounced, and exclusive consultation (sometimes, even gender bias); and lack of proper monitoring.

*Id.* at 21-22.

218. HERZ, *supra* note 216, at 15.

219. *Id.* at 3-4 & 12 (Information should be geared towards comprehension and informed decision-making, with sufficient time for discussion and review. Inclusiveness should allow all interested to take part. Dialogue should be formalized, continuing, and inclusive. Legal recognition is achieved through binding negotiated agreements. Monitoring and evaluation are conducted independently and by the community. Lastly, corporate buy-in incorporates “FPIC as an inherent and necessary cost of project development.”).

which is not equivalent to FPIC, is enjoined by law.<sup>220</sup> “Consultation requires only an exchange of information;” decision-making is not transferred or shared to affected parties.<sup>221</sup> “FPIC requires that consent be freely given, obtained prior to final authorization and implementation . . . , and founded upon an understanding of the full range of issues.”<sup>222</sup> At times, the law only provides for notification and compensation.<sup>223</sup>

Sometimes, despite such requirements, no consent is obtained.<sup>224</sup> When this happens, redress is not always sought as affected persons are unaware of their legal rights.<sup>225</sup> There are tragic consequences to an uninformed or non-consenting community: accidents often occur without residents being informed or fully prepared for the eventuality.<sup>226</sup>

### 3. Failure to Consider or Protect Vulnerable Areas

That “[o]f 138 natural World Heritage sites, more than one quarter are threatened by mining or oil and gas development”<sup>227</sup> makes evident the problem of proper consideration of vulnerable areas in extractive

220. HERZ, *supra* note 216, at 7 & 9-10 (citing 37 A. WARHURST, FUTURE ROLES OF BUSINESS IN SOCIETY: THE EXPANDING BOUNDARIES OF CORPORATE RESPONSIBILITY AND A COMPELLING CASE FOR PARTNERSHIP, FUTURES 151-68 (2005); Lyla Mehta & M. Stankovitch, Operationalisation of Free Prior Informed Consent, Contributing Paper to the World Commission on Dams (2001)); *see, e.g.* LOCAL GOVERNMENT CODE, § 26.

221. HERZ, *supra* note 216, at 7 (citing WORLD BANK, THE WORLD BANK AND PARTICIPATION (1994)).

222. *Id.* (citing C.S. SENA, AN OVERVIEW OF A CURRENT UNDERSTANDING OF FPIC AS A METHODOLOGICAL ISSUE, *in* ACTIVITIES RELATING TO INDIGENOUS PEOPLES: SIGNIFICANCE AND CHALLENGES, STATEMENT TO THE INTERNATIONAL EXPERT WORKSHOP ON METHODOLOGIES REGARDING FREE, PRIOR AND INFORMED CONSENT ON INDIGENOUS PEOPLES (2005)).

223. *See, e.g.* Philippine Mining Act of 1995, § 76.

224. *See, e.g.* Save Tañon Strait Citizens’ Movement, The Problem: The Oil Exploration in Tañon Strait, *available at* <http://www.uclaw.org/savetanonstrait/> (last accessed Feb. 21, 2009).

All the projects discussed were met by strong community opposition. There have even been reports of fabricated evidence of consent or that consent to company operations were obtained through deception, coercion, and bribery, or was obtained due to lack of legal assistance to indigenous groups.

Ballesteros, *supra* note 59, at 27; IDRC, *supra* note 4, at 159; Corpuz, *supra* note 65, at 182.

225. Tan, Preliminary Assessment, *supra* note 202.

226. *See* Tolentino, *supra* note 202, at 27.

227. MIRANDA, *supra* note 3, at 35 (citing United Nations Educational, Scientific, and Cultural Organization (UNESCO), World Heritage List (2003), *available at* <http://whc.unesco.org/en/list> (last accessed Feb. 21, 2009)).

industries.<sup>228</sup> In the Philippines, “[t]hree quarters of active mined and exploratory sites overlap with areas of high conservation value and areas of high watershed stress,”<sup>229</sup> and “more than half (56 percent) of exploration areas and mining leases overlap with areas of high ecological vulnerability.”<sup>230</sup>

Boundaries of protected areas, watershed reservations, national parks, and forest reserves often face size reduction or exceptions in cases of development projects.<sup>231</sup> Bans in protected areas are not inadequately carried out: over a quarter of approved mining leases, one third of concession areas, and eight percent of exploration areas overlap with intact forests; “[s]ix percent of mining leases and exploration areas overlap with protected areas;”<sup>232</sup> and “8 percent of approved mining contracts and exploration areas overlap with proclaimed watersheds.”<sup>233</sup> As for the oil and gas industry, only energy exploration and survey are allowed in a protected seascape, extraction being only allowed through legislation.<sup>234</sup> Nevertheless, exploration, for which no ECC is required, and drilling can produce significant adverse effects to the environment.

Posing a bigger threat are those vulnerable areas not yet protected by law.<sup>235</sup> Even as around eight percent of the Philippines’ total land area has been declared protected areas not open to extractive operations, “more than two thirds of existing protected areas have not been ratified by law and forest cover estimates are subject to large uncertainties due to lack of data.”<sup>236</sup> The law also fails to include all areas of high biodiversity into the protected areas system.<sup>237</sup> Other vulnerable areas do not require protection but increase the risk of environmentally-adverse accidents: “two thirds of exploratory concessions and more than half of active concessions are located in areas of

228. See, e.g. MIRANDA, *supra* note 3, at viii & 16.

229. MIRANDA, *supra* note 3, at viii & 16.

230. *Id.* at ix & 16.

231. Tolentino, *supra* note 202, at 13; Corpuz, *supra* note 65, at 183.

232. MIRANDA, *supra* note 3, at 16 & 21.

233. *Id.* at 23.

234. NIPAS of 1992, § 14.

235. MMSD, *supra* note 31, at viii.

236. MIRANDA, *supra* note 49, at 21.

237. *Id.* (citing J. Mackinnon, *A Preliminary Analysis of the Philippine Protected Areas System: Gaps and Recommendations*, in PHILIPPINE BIODIVERSITY CONSERVATION PRIORITIES: A SECOND ITERATION OF THE NATIONAL BIODIVERSITY STRATEGY AND ACTION PLAN (P.S. Ong, et al. eds., 2002).

high seismic risk.”<sup>238</sup> Lastly, water stress is not adequately guarded against: almost 30% of active mines are within stressed river basins, 20% of which are in highly stressed river basins. Not only are other land uses rendered infeasible, water quality from mines may not be suitable for consumption, further affecting water availability.<sup>239</sup>

#### 4. Ineffective System of Sanctions

Even as prevention is the key goal in sustainable development, environmental protection is traditionally carried out through sanctions.<sup>240</sup> Recent Philippine laws may be progressive, shifting to market-based mechanisms and away from command-and-control legislation; nevertheless, old laws dependent on penalties still exist and neither have new laws dispensed with them. Unfortunately, the usefulness of sanctions is often neutralized by enforcement problems. Despite “nearly one mine-related pollution incident ... reported per year in the past 18 years,” the fine has not been imposed in almost 40% of the cases.<sup>241</sup>

The imposition of penalties is inherently problematic: attaching a price tag to a violation is not a simple task. Companies will easily choose huge profits for the price of small penalties, especially as pollution abatement or control mechanisms are costly and do not generate income.<sup>242</sup> Related is the problem of a fixed penalty in a changing context: penalties become and remain outdated, imposing relatively low fines, no longer deterring violations, nor encouraging the adoption of more costly, cleaner technology. That modifying penalties can only be through legislative amendment, which takes considerable time,<sup>243</sup> shows that penalties often fail to keep up with economic, technological, and environmental changes.

Another drawback is that long-term consequences or the true clean-up costs are not considered: the US\$ 2 million compensation payment in Marcopper “did not cover even 5 percent of the estimated cost of clean-up”<sup>244</sup> and long-term impacts of their mining still haunt the local

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238. *Id.* at 29–30.

239. MIRANDA, *supra* note 3, at 22.

240. Tolentino, *supra* note 202, at 23.

241. MIRANDA, *supra* note 3, at 35.

242. Tolentino, *supra* note 202, at 19; Tan, Preliminary Assessment, *supra* note 202; *see also* IDRC, *supra* note 4, at 155; MIRANDA, *supra* note 3, at 35.

243. Tolentino, *supra* note 202, at 17–18.

244. MIRANDA, *supra* note 3, at 35 (citing Department of Environment and Natural Resources (DENR), Pollution Adjudication Board (PAB), Mining-Related Incidents (2000) (unpublished public records, used with permission from PAB)).

community. Sanctions penalizing the offender or compensating the victim may not even consider rehabilitation costs.<sup>245</sup>

Other prohibitions belatedly catch up with international developments. While other countries have enacted laws to phase out single-hulled tankers pursuant to the 1978 Protocol of the International Convention for the Prevention of Pollution from Ships (MARPOL Convention), it was only after the 2006 Guimaras oil spill, caused by a single-hulled tanker, that Memorandum Circular 2007-001 was issued in the Philippines, strictly enforcing the double-hull requirement for oil vessels.<sup>246</sup>

There is also the dilemma of imposing criminal penalties, especially imprisonment, on corporations, most extractive industries companies being owned by them.<sup>247</sup> As they are incorporeal, they cannot be imprisoned, only fined. Imposing on them mere fines, in turn, “undermine[s] the criminal law system,” as bad guys would commit crimes furthering business with impunity, as mere fines barely affect profitability.<sup>248</sup> As for officers and agents, “all who *participate* in [the violation] are liable”<sup>249</sup> only if the corporation was directly required to act in a certain manner and an express provision of law makes such person so liable.<sup>250</sup> With these stringent requirements, agents can hardly be held liable for such acts.<sup>251</sup>

Also, newer environmental laws now provide for the criminal liability of corporations and its agents, but older laws have not done so. Newer laws may likewise provide that liability be suffered by the director, officer, or

245. MMSD, *supra* note 31, at 347.

246. EIR, *supra* note 4, at 28; *MARINA alerts tanker operators on double hull conversion*, Feb. 15, 2008, PHIL. DAILY INQUIRER, available at <http://www.inquirer.net/specialfeatures/visayasoilspill/view.php?db=1&article=20080215-119128> (last accessed Feb. 21, 2009); see Protocol of 1978 Relating to the International Convention for the Prevention of Pollution from Ships, Feb. 17, 1978, 1340 U.N.T.S. 61; see, e.g. Oil Pollution Control Act of 1990, 33 U.S.C. 2701 (1990).

247. ROSS, *supra* note 6, at 5.

248. CESAR L. VILLANUEVA, PHILIPPINE CORPORATE LAW 40 (2001) [hereinafter VILLANUEVA, CORPORATE LAW].

249. *People v. Tan Boon Kong*, 54 Phil 607, 609 (1930) (emphasis supplied).

250. *Sia v. People*, 121 SCRA 655, 662-63 (1983).

251. VILLANUEVA, CORPORATE LAW, *supra* note 248, at 44.

employee *responsible*, but as the business is usually operated by management and employees, directors can rarely be held responsible.<sup>252</sup>

#### 5. No Effective Means of Recourse

Even when legal responsibility is allocated, “[r]esponsibility without accountability is a hollow prospect, and providing for effective access to justice is fundamental to accountability.”<sup>253</sup> Whereas valid grievances may exist, clear or speedy remedies, legal assistance, or access to the same may be unavailable.<sup>254</sup>

Despite many significant developments in Philippine environmental litigation, litigation is generally not seen as effective in protecting environmental rights due to enforcement issues.<sup>255</sup> “[R]eliance on prosecution and conviction before the courts may be unrealistic, given the amount of time and expenses needed for such recourse.”<sup>256</sup> Environmental prosecution is also limited to after-the-fact complaints, and excludes pre-complaint monitoring.<sup>257</sup>

Environmental violations are also seen as victimless crimes, as a direct or immediate effect on specific persons does not always occur and damage to the environment may not be immediately perceptible, making monitoring

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252. Of the laws surveyed, only one provision provides that the president and each director be held liable for the criminal act of the corporation; this is for the theft of minerals under the Philippine Mining Act of 1995.

See Philippine Mining Act of 1995, § 103.

253. MMSD, *supra* note 31, at 344.

254. *Id.*

To illustrate, only 2,981 of 3,390 compensation claims filed as of 1993, for damage caused by the one billion metric tons of mining wastes produced from 1984 to 1994, were compensated, totaling Php 12,000,000 in payment — an amount which did not even begin to cover the resulting environmental and social damage.

ESSC, *supra* note 32, at 13.

255. Tan, Preliminary Assessment, *supra* note 202; see, e.g. Supreme Court, Re: Designation of Special Courts to Hear, Try and Decide Environmental Cases, SC Administrative Order No. 23-2008 (2008) (Green Courts); Alan K.J. Tan, *Environmental Laws and Institutions in Southeast Asia: A Review of Recent Developments*, VIII SING. Y.B. INT’L L. 177 (2004), available at <http://law.nus.edu.sg/apcel/docs/Article-SYBIL3-SoutheastAsiaEnvironment3.pdf> (last accessed Feb. 21, 2009) [hereinafter Tan, *Environmental Laws*] (Environmental Ombudsman, coordinating with the Integrated Bar of the Philippines (IBP) National Environmental Action Team (NEAT) and an Environmental Team of Investigators and Prosecutors).

256. Tan, *Environmental Laws*, *supra* note 255.

257. *Id.*

much more difficult.<sup>258</sup> Despite a direct or immediate effect on them, “animals do not have any legal personality to sue” and “[w]ithout a private person being directly offended[,] usually no one is interested in vindicating the wrong.”<sup>259</sup> The state may, in theory, be the offended party, but government officials may not always be interested in pursuing the case, or are constrained by politics and funds.<sup>260</sup>

Presidential Decree No. 605<sup>261</sup> is another bar to effective recourse, as it prohibits the issuance of restraining orders or preliminary injunctions against administrative agencies or officials in cases concerning natural resources “concessions, licenses, permits, patents, or public grants.”<sup>262</sup> Affected persons are, thus, deprived of a provisional remedy during the pendency of litigation, at which time, irreparable damage may be caused, rendering a favorable final judgment nugatory. This is highly likely given the track record of courts in delay management or docket decongestion.<sup>263</sup>

*C. A Study in Contrast: A Glance at the Malampaya Deep Water Gas-to-Power Project*

The Malampaya Sound, a protected area, is both ecologically and economically significant — a watershed lined with mangroves and swamps, abundant in species endemic to Palawan and home to different (sometimes endangered) cetaceans, and a major fishing ground.<sup>264</sup> It is also the site of the

258. OPOSA, *supra* note 4, at 43.

259. *Id.*

260. *Id.*

261. Banning the Issuance by Courts of Preliminary Injunctions in Cases Involving Concessions, Licenses, and Other Permits Issued by Public Administrative Officials or Bodies for the Exploitation of Natural Resources, Presidential Decree No. 605 (1974).

262. *Id.* § 1.

The ban, however, is not absolute and may be defeated in the face of a *violation of constitutional rights*.

Dan Gatmaytan, *Challenging Immunity to Injunctions*, 8 PHIL. NAT. RESOURCES L.J. 3, 13 & 19 (1997) (citing *Mantruste Systems, Inc. v. Court of Appeals*, 179 SCRA 136, 145 (1989)).

263. Gatmaytan, *supra* note 262, at 7 (citing *Saulog v. Court of Appeals*, 262 SCRA 51 (1996); Florentino P. Feliciano & Emmanuel L. Caparas, *The Problem of Delay in the Philippine Court System*, 62 PHIL. L.J. 201 (1987); Daniel T. Martinez, *The Problem of Congestion and Delay in Trial Courts*, 7 J. INTEG. B. PHIL. 43-50 (1979)).

264. Palawan Council for Sustainable Development, *The Malampaya Sound Land and Seascape Protected Area*, available at <http://www.pcsd.ph/>

Malampaya Deep Water Gas-to-Power Project, a joint venture of Shell Pilipinas Exploration (SPEX), Chevron Texaco, and Philippine National Oil Company (PNOC).<sup>265</sup>

The Malampaya project was the first to actively and aggressively incorporate community consent into its EIS without being required to do so. Consequently, the project gained support from 72% to 84% of respondents during the perception surveys.<sup>266</sup> Meetings and hearings for each project phase in different affected areas and consequent revisions to project strategy accounted for social and environmental concerns, making provisions for unmet basic community needs, relocation compensation, livelihood and sustainable development programs, and employment. Multiparty monitoring teams were also organized and a venue set for public participation and grievance recourse.<sup>267</sup>

Despite the much higher cost, proponents chose a pipeline route avoiding areas of high biodiversity and certain ancestral waters of indigenous tribes.<sup>268</sup> SPEX, additionally, supports a World Wildlife Fund dolphin monitoring project and numerous environmental and social organizations.<sup>269</sup> The project even garnered an international business award for sustainable development and is now used as a model for other Shell projects worldwide.<sup>270</sup>

This painstaking process of integrating social and environmental concerns into operations has proven to be profitable. The project was

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protected\_areas/malampaya.htm (last accessed Feb. 21, 2009); World Wildlife Fund (WWF), Malampaya Sound Ecological Studies Project, *available at* <http://www.wwf.org.ph/about.php?pg=wwd&sub1=00004> (last accessed Feb. 21, 2009) [hereinafter WWF, Malampaya]; *see* Declaring the Malampaya Sound, Situated in the Municipality of Taytay and San Vicente, Province of Palawan, as a Protected Area Pursuant to Republic Act 7586 (NIPAS Act of 1992) and Shall be Known as Malampaya Sound Protected Landscape and Seascape, Proclamation No. 342 (2000).

265. HERZ, *supra* note 216, at 19 (citing Energy Information Administration, Philippines, Natural Gas, *available at* <http://www.eia.doe.gov/emeu/cabs/Philippines/NaturalGas.html> (last accessed Feb. 21, 2009)).

266. *Id.* at 19 & 21 (citing WOODFIELD CONSULTANTS, INC., ENVIRONMENTAL IMPACT STATEMENT: MALAMPAYA GAS PROJECT FINAL REPORT 7-10 (1997)).

267. *Id.* at 21-25.

268. *Id.* at 24.

269. *See* WWF, Malampaya, *supra* note 264; Malampaya Deep Water Gas to Power, *available at* <http://www.malampaya.com> (last accessed Feb. 21, 2009).

270. HERZ, *supra* note 216, at 26 (citing Malampaya Deep Water Gas to Power, *available at* <http://www.malampaya.com> (last accessed Feb. 21, 2009); Interview with Daday de León, Sustainable Development Manager, Pilipinas Shell Foundation, Inc. (PSFI), in Batangas, Philippines (Oct. 12, 2005).

completed ahead of schedule, saving the company US\$ 50 to US\$ 70 million in potential costs of delay. It also allowed SPEX to procure governmental approval to sponsor a related project.<sup>271</sup>

Despite deficiencies in the regulatory system, the Malampaya Project is instructive and is persuasive proof that adequate environmental protection and conservation within extractive industries operations is realistic and viable. Its success in environmental protection and conservation seems to come from corporate initiative without reliance on the regulatory system.

#### IV. CORPORATE GOVERNANCE AND SOCIAL RESPONSIBILITY

##### A. *The Evolution of Corporate Governance: From Stockholder Theory to Corporate Social Responsibility*

The Corporation Code places all corporate powers, business, and property under the control of the Board of Directors, and, thus, centralizes corporate governance in the Board.<sup>272</sup> Over time, corporate governance has evolved from the traditional maximization of profit model to social responsibility and stakeholderism.

##### 1. Traditional Corporate Law and Profit-Maximization

Traditional corporate law, in line with neoclassical economic theory, established the stockholder theory, which sets down the primary obligation of the corporation as “seek[ing] the maximum amount of profits for the corporation.”<sup>273</sup> In essence, “the ‘business of business is business.’”<sup>274</sup>

271. *Id.* at 25–26.

272. The Corporation Code of the Philippines [CORPORATION CODE], Batas Pambansa Blg. 68, § 23 (1980); VILLANUEVA, CORPORATE LAW, *supra* note 248, at 23; Cesar L. Villanueva, *The Law and Practice on: Philippine Corporate Governance* 37–38 (2008) (unpublished manuscript, on file with author) [hereinafter Villanueva, Corporate Governance] (Corporate governance is the “power to manage corporate affairs and the duties it assumes towards persons and entities to which it owes fiduciary obligations.”). An abridged version of the last source has been recently published in the *Ateneo Law Journal*. See Cesar L. Villanueva, *The Law and Practice on: Philippine Corporate Governance*, 53 ATENEO L.J. 706 (2009).

273. Villanueva, *Corporate Governance*, *supra* note 272, at 2; Niceto S. Poblador, *Stakeholdership, Corporate Responsibility and the Ethics of Managerial Conduct* 3 (unpublished manuscript, on file with author); *Prime White Cement Corporation v. Intermediate Appellate Court*, 220 SCRA 103, 110 (1993).

274. GROVER STARLING, *CHANGING ENVIRONMENT OF BUSINESS* 507 (4th ed. 1996).

The Corporation Code is essentially traditional, referring to or implying the profit-maximization function of corporations in the fiduciary duties of directors of loyalty, obedience, and diligence to stockholders. The duty of diligence, in particular, is closely connected to the Business Judgment Rule, which insulates directors from liability for their exercise of management judgment so long as in good faith and with due diligence.<sup>275</sup>

The argument against social responsibility is three-tiered.<sup>276</sup> First, the corporate executive has a direct responsibility to his employers to generate as much profit as is possible within legal and customary rules. Social responsibility goes against employer interest and expends private resources for a general social interest.<sup>277</sup> Second, a businessman has no competence in public welfare as he is trained to generate profit. Third, social activities are mere window-dressing exercises, the ulterior motive being the furtherance of profits. The theory is supported by Adam Smith's "hidden hand," which declares that giving business full reign over profit-making better serves society in the long-term.<sup>278</sup>

The first argument, however, is based on the flawed premise that initially-invested capital creates corporate wealth, when, in reality, it is the interaction of various forces, including state protection and business environment, which generates such wealth.<sup>279</sup> Additionally, public welfare

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275. Emmanuel Q. Fernando, *Theories of Corporate Governance 6-7* (undated) (unpublished manuscript, on file with author). Even jurisprudence acknowledges the Board's fiduciary duty to and trust relationship with stockholders. *Prime White*, 220 SCRA at 110; *Gokongwei v. Securities and Exchange Commission*, 89 SCRA 337, 367 (1979).

276. Villanueva, *Corporate Governance*, *supra* note 272, at 2; Fernando, *supra* note 275, at 1.

277. Milton Friedman, *The Social Responsibility of Business is to Increase its Profits*, N.Y. TIMES MAG., Sep. 13, 1970, available at <http://www-rohan.sdsu.edu/faculty/dunnweb/rprints.friedman.dunn.html> (last accessed Feb. 21, 2009) (with embedded commentary by Craig P. Dunn); see also GEORGE E. STEINER & JOHN F. STEINER, *BUSINESS, GOVERNMENT, AND SOCIETY: A MANAGERIAL PERSPECTIVE, TEXT AND CASES* 122 (11th ed. 2006); STARLING, *supra* note 274, at 505.

278. Villanueva, *Corporate Governance*, *supra* note 272, at 3; see Friedman, *supra* note 277; Fernando, *supra* note 275, at 1.

279. Villanueva, *Corporate Governance*, *supra* note 272, at 3.

Marjorie Kelly pointed out that capital alone generates nothing. The irony is that even when the "local community might be devastated by plant closings, its groundwater contaminated with pollutants, underpaid employees might be shouldering a crushing workload," we can still claim that the corporation performed well in the sense that shareholders received a good profit.

activities do not require a high level of competence and are readily within the capability of any member of society. The fiduciary duty to earn profits may also be overridden by other business obligations, such as labor relations, consumer protection, and sustainable development.<sup>280</sup> The “hidden hand” argument is belied by the observed reality: business left to their own devices “enrich themselves while impoverishing society, ... pollute the environment, ... discriminate racially and sexually, ... deceive customers, ... eliminate competition and keep prices high through oligopolistic practices.”<sup>281</sup>

The corporation is now seen as directly owing various responsibilities to society. Corporate social responsibility (CSR) is “a debate that continues long after the argument is over,” as, nowadays, “business that for profit’s sake ignores the impacts of its action on society is not likely to see a profit very long.”<sup>282</sup>

## 2. Corporate Governance with a Conscience: Corporate Social Responsibility

CSR is the “the continuing commitment by business to behave ethically and contribute to economic development while improving the quality of life of the workforce and their families as well as of the community and society at large.”<sup>283</sup> Corporations are creatures of a law which finds its basis in the state, a creature of society. The implications are threefold. First, there is a notion of corporate citizenship: similar to an individual citizen, a corporation as an “institutional citizen” has rights and privileges and duties and responsibilities to the community.<sup>284</sup> Second, the corporation’s place in society and the often vast power it wields has shifted its character from private to public.<sup>285</sup> Lastly, corporations benefit from the societal framework,

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Marjorie Kelly, *The Stockholder Myth*, EARTH ISLAND J., Vol. 15, No. 13 (Fall 2000), available at [http://www.thirdworldtraveler.com/Economics/Stockholder\\_Myth.html](http://www.thirdworldtraveler.com/Economics/Stockholder_Myth.html) (last accessed Feb. 21, 2009).

280. Fernando, *supra* note 275, at 2; see also STARLING, *supra* note 274, at 518.

281. Fernando, *supra* note 275, at 2.

282. JOHN L. HYSOM & WILLIAM J. BOLEE, BUSINESS AND ITS ENVIRONMENT 5-6 (1983).

283. Villanueva, Corporate Governance, *supra* note 272, at 5 (citing TOM FOX, ET AL., PUBLIC SECTOR ROLES IN STRENGTHENING CORPORATE SOCIAL RESPONSIBILITY: A BASELINE STUDY (2002), available at [http://www.mpdf.org/ifcext/economics.nsf/AttachmentsByTitle/CSR-CSR\\_interior.pdf/\\$FILE/CSR-CSR\\_interior.pdf](http://www.mpdf.org/ifcext/economics.nsf/AttachmentsByTitle/CSR-CSR_interior.pdf/$FILE/CSR-CSR_interior.pdf) (last accessed Feb. 21, 2009)).

284. STARLING, *supra* note 274, at 507; Fernando, *supra* note 275, at 3.

285. STARLING, *supra* note 274, at 508.

through consumer spending and access to public goods and services; thus, as a matter of reciprocity, corporations owe society.<sup>286</sup>

The reality is that once private corporations “have voluntarily agreed to do business in a community, they thereby become at once members of that community, with duties and obligations ... [not] different from ... [those] ordinarily expected of members in an organized, progressive, and progressing society.”<sup>287</sup> The *ultra vires* doctrine does not, therefore, apply to activities which would benefit the public; the amelioration of society is, after all, the function of all its members, natural or juridical.<sup>288</sup>

Despite the traditionalist Corporation Code, commercial media must evolve alongside commercial practices and “the mandate of the ... state, [as] embodied in social attitudes and in case, statute and constitutional law.”<sup>289</sup> The Philippine corporate setting is founded on a constitution advocating both free market and socialist values, hence, state intervention into private

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[Corporations] have the power to create great wealth, provide jobs for the multitude, advance the frontiers of science and technology by financing and conducting research, *either maintain the ecological balance of or pollute the environment*, create goods and services that increase the safety, health and welfare of its consumers, provide basic needs, affect the stock market and the economy for better or worse, and the like. Clearly, with such awesome power comes the corresponding responsibility.

Fernando, *supra* note 275, at 3 (emphasis supplied).

286. STARLING, *supra* note 274, at 508; *see also* Fernando, *supra* note 275, at 3; Thomas Donaldson, *Defining the value of doing good business*, FTMASTERING CORP. GOVERNANCE, June 2, 2005, at 2.

287. Sulpicio Guevara, *The Social Function of Private Corporations*, 34 PHIL. L.J. 464, 468 (1959) (citing *Seymour v. Spring Forest Cemetery Association*, 144 N.C. 333, 340, 39 N.E. 365 (1895)).

288. *Id.* at 468 & 472 (The creation of private corporations would not be consented to by the state, unless it promotes the public interest.); *see also* HECTOR S. DE LEON, *THE LAW ON PARTNERSHIPS AND PRIVATE CORPORATIONS* 207 (2005 ed.) (intent of Corporation Code “to establish ... business corporations ... [as] effective partners of National Government in ... social and economic development”).

289. HYSOM & BOLEE, *supra* note 282, at 17 (citing Adolph A. Berle, *Property, Production and Revolution*, in *THE MODERN CORPORATIONS AND PRIVATE PROPERTY* xxv (Adolph A. Berle & Gardiner C. Means eds., 1968)); VILLANUEVA, *CORPORATE LAW*, *supra* note 248, at 892-93 & 889 (citing ROBERT CHARLES CLARK, *CORPORATE LAW* 677-79 (1986 ed.)).

properties is allowable for the common good.<sup>290</sup> There has similarly been a degree of affirmation of CSR in Philippine jurisprudence.<sup>291</sup>

While profit-maximization still factors significantly into legal rationale,<sup>292</sup> CSR is not negated, as it does not actually pit profit-making against social responsibility, but recognizes the convergence between corporate responsibility and the maximization of shareholder interests.<sup>293</sup>

### 3. Expanding Corporate Constituencies through the Stakeholder Theory

The theory of the public function of business has developed from CSR to the stakeholder theory.<sup>294</sup> Stakeholder theory, or stakeholderism, “prescribes that managers should be concerned with the interests of all groups that have a legitimate stake in the corporation.”<sup>295</sup> Stakeholders are constituencies having a stake in corporate decisions, interacting with and/or directly affected by the corporate decisions, operations, and organizational performance.<sup>296</sup> Stockholders comprise only one group of stakeholders.<sup>297</sup>

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290. VILLANUEVA, *CORPORATE LAW*, *supra* note 248, at 882-83 & 890; *see* PHIL. CONST. arts. II, § 20, III, § I & XII, § 6.

291. *See* Montelibano v. Bacolod-Murcia Milling Co., Inc., 5 SCRA 36, 42 (1962); Board of Liquidators v. Heirs of Kalaw, 20 SCRA 987, 1007-08 (1967); Pirovano v. De la Rama Steamship Co., Inc., 96 Phil. 335, 356 (1954).

292. Villanueva, *Corporate Governance*, *supra* note 272, at 15 (The act alleged as *ultra vires* must be within reason or “engaged into primarily to engender a greater capacity for the company to better earn profits.”).

293. Donaldson, *supra* note 286, at 2.

*Economic responsibility is by no means incompatible with other corporate responsibilities in society. ... A corporation’s responsibilities include how the whole business is conducted every day. It must be a thoughtful institution which rises above the bottom line to consider the impact of its actions on all, from shareholders to the society at large. Its business activities must make social sense.*

STEINER & STEINER, *supra* note 277, at 122 (citing The Business Roundtable, Statement on Corporate Responsibility 12 & 14, (1981)) (emphasis supplied).

294. Fernando, *supra* note 275, at 2; Poblador, *supra* note 273, at 3.

295. Poblador, *supra* note 273, at 3.

296. HYSOM & BOLEE, *supra* note 282, at 9; STARLING, *supra* note 274, at 518.

297. Fernando, *supra* note 275, at 4 (Other stakeholders include local communities and community organizations, public interest groups, protest groups, and the general public.); *see also* HYSOM, *supra* note 282, at 9; STARLING, *supra* note 274, at 518; Poblador, *supra* note 273, at 1.

There are two intermediate theories. The Moral Minimum Stakeholder Theory prescribes that the corporation can carry on the pursuit of profit so long as its behavior towards other stakeholders does not go below a given moral minimum. Corporate humanitarian activities are encouraged but not mandatory.<sup>298</sup> The Strategic Management Theory treats other stakeholders strategically in line with the fiduciary duty to stockholders to increase profits, allowing humanitarian undertaking beyond the moral minimum if it will further profitability. Overall stakeholder welfare and the maintenance of a good reputation are at the core of long-term competitive advantage, thus, greatly minimizing unethical behavior.<sup>299</sup>

Similar to the latter is Enlightened Value Maximization — where the decision maker retains wealth maximization as her framework, but “*endogenizes* the economic interests of others and factors these into her utility function.”<sup>300</sup> The goal is value enhancement, not maximization. Thus, an activity which increases the enterprise’s total value, or “the long-term value accruing to ALL stakeholders,” is rational.<sup>301</sup> Decisions are, therefore, measured on their ultimate impact on society as a whole. In essence, profit-maximization remains the primary duty of the Board, but is pursued bearing in mind other stakeholder interests.<sup>302</sup>

There have been few and narrow indications of duties to other stakeholders in Philippine corporate law.<sup>303</sup> The stakeholder theory does not, thus, feature prominently in traditional corporate law, deriving its legal recognition in the recently issued codes of corporate governance.

*B. The Law on Corporate Governance: Legal Recognition of Corporate Social Responsibility and the Stakeholder Theory*

Corporate governance reforms were mostly spurred by the collapse of Enron Corporation and the 1997 Asian financial crisis. The large-scale lack of

The coordination of stakeholder interests may be achieved in many ways, which include environmental protection and enhancement.

Fernando, *supra* note 275, at 4.

298. Fernando, *supra* note 275, at 5.

299. *Id.* at 5 & 7; Wilfred Oliver Segovia, *A Broader Conception of Corporate Governance and Its Implications for Asia*, 1 ATENEO STUDENT BUS. REV. 32, 36 (2003-2004).

300. Poblador, *supra* note 273, at 5 (citing Michael C. Jensen, *Value Maximization, Stakeholder Theory, and the Corporate Objective Function*, 14 J. APPLIED CORP. FIN. 8-21 (2001)).

301. *Id.* at 5 & 8.

302. *Id.* at 8-9; Villanueva, *Corporate Governance*, *supra* note 272, at 10.

303. *See, e.g.* CORPORATION CODE, § 31; Villanueva, *Corporate Governance*, *supra* note 272, at 10 & 34; A.C. Ransom Labor Union-CCLU v. NLRG, 142 SCRA 269 (1986).

transparency and fair dealings of business enterprises and the corporate scandals caused by the failure of Boards to exercise their oversight responsibility led to public distrust and call for regulatory reforms.<sup>304</sup> The Philippines was no different, instituting corporate governance codes “to raise investor confidence, develop capital market and help achieve high sustained growth for the corporate sector and the economy.”<sup>305</sup>

The Bangko Sentral ng Pilipinas (BSP) was the first to heed the clarion call for corporate governance reforms, issuing a series of circulars (collectively, BSP CG Circulars) formally recognizing stakeholdership in the banking industry.<sup>306</sup> In 2002, the SEC followed suit by issuing SEC Memorandum Circular No. 2, series of 2002, or the Code of Corporate Governance (SEC CG Code) for listed and public companies.<sup>307</sup> For the insurance industry, the Insurance Commission (IC) issued IC Circular No.

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304. STEINER & STEINER, *supra* note 277, at 588-89, 589 & 591-96 (citing William C. Powers, Jr., et al., Report of Investigation by the Special Investigative Committee of the Board of Directors of Enron Corp., Feb. 1, 2002, at 159); René G. Bañez, *Is Philippine business ready for corporate governance?*, BUSINESSWORLD, Mar. 31, 2004, available at <http://www.pldt.com.ph/cgov/downloads/CGArtAccess2004-12.pdf> (last accessed Feb. 21, 2009); Villanueva, Corporate Governance, *supra* note 272, at 16; Segovia, *supra* note 299, at 32; see, e.g. Public Company Accounting Reform and Investor Protection Act [Sarbanes-Oxley Act], Pub. L. 107-204, July 30, 2002.

305. Securities and Exchange Commission, Code of Corporate Governance [SEC CG Code], SEC Memorandum Circular No. 2, Series of 2002, Opening Paragraph (Apr. 5, 2002); see also Insurance Commission, Corporate Governance Principles and Leading Practices [IC CG Code], IC Circular Letter No. 31-2005, Opening Paragraphs (Sep. 26, 2005).

306. Villanueva, Corporate Governance, *supra* note 272, at 16-17; see Bangko Sentral ng Pilipinas, BSP Circular No. 283, Series of 2001 (May 17, 2001) (amended by Bangko Sentral ng Pilipinas, BSP Circular No. 434, Series of 2004 (May 18, 2004)); Bangko Sentral ng Pilipinas, BSP Circular No. 296, Series of 2001 (Sep. 17, 2001); Bangko Sentral ng Pilipinas, BSP Circular No. 341, Series of 2002 (Aug. 6, 2002) (amended by BSP Circular No. 434); Bangko Sentral ng Pilipinas, BSP Circular No. 391, Series of 2003 (July 15, 2003) (amended by BSP Circular No. 434); Bangko Sentral ng Pilipinas, BSP Circular No. 456, Series of 2004 (Oct. 4, 2004); Bangko Sentral ng Pilipinas, BSP Circular No. 499, Series of 2005 (Nov. 25, 2005); Bangko Sentral ng Pilipinas, BSP Circular No. 584, Series of 2007 (Sep. 28, 2007); Bangko Sentral ng Pilipinas, BSP Circular No. 592, Series of 2007 (Dec. 28, 2007).

307. SEC CG CODE, Opening Paragraph.

31-2005, or the Code of Corporate Governance Principles and Leading Practices (IC CG Code).<sup>308</sup>

Corporate governance, under the SEC CG Code, is “a system whereby shareholders, creditors and other stakeholders of a corporation ensure that management enhances the value of the corporation as it competes in an increasingly global market place.”<sup>309</sup> The IC CG Code also defined stakeholders as “the group of company owners, officers and employees, policyholders, suppliers, creditors and the community.”<sup>310</sup>

All three codes recognize other stakeholders in corporate governance. The SEC CG Code definition even explicitly recognizes stakeholderhood and the pivotal role of stakeholders in enhancing the value of the corporation. One of the IC CG Code’s goals is to promote the interest of stakeholders.<sup>311</sup> The SEC CG Code and the BSP CG Circulars also acknowledged that a “director assumes certain responsibilities to different constituencies or stakeholders,” the latter “hav[ing] the right to expect that the institution is being run in a prudent and sound manner.”<sup>312</sup> Both the BSP CG Circulars and IC CG Code also declare that “[w]hile a director should always strive to promote the interest of all stockholders, he should also give due regard to the rights and interest of other stakeholders.”<sup>313</sup> Therefore, part of the Board’s duties is to identify the stakeholders of the corporation; formulate a policy allowing for accurate, effective, and sufficient communication with them; and render to them an accounting regularly.<sup>314</sup> A sound system of internal control is also required “to safeguard stakeholders’ investment and the company’s assets.”<sup>315</sup> The Board is also tasked to maintain transparency and to make full disclosure by “filing all required information for the interest of the stakeholders.”<sup>316</sup>

A fundamental effect of each of the three agency codes on corporate governance, under a *quasi*-legislative norm, is the adoption of the

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308. Villanueva, Corporate Governance, *supra* note 272, at 18; *see* IC CG Code.

309. SEC CG Code, I.B; *see also* IC CG Code, I.1 (“system by which companies are directed and managed [and] it influences how the objectives of the company are set and achieved, how risk is monitored and assessed, and how performance is optimized.”).

310. IC CG Code, I.18.

311. *Id.* Opening Paragraphs.

312. BSP Circular No. 283, § 2; SEC CG Code, II.6.a.

313. BSP Circular No. 283, § 4 (2); IC CG Code, II.C.1; *see also* BSP Circular No. 341, § 1 (b); BSP Circular No. 283, § 3 (12); BSP Circular No. 341, § 1 (b); SEC CG Code, II.6.b & IV.1.d; IC CG Code, II.A.10, III.C.6 & IV.1.

314. SEC CG Code, II.6.b.iv.

315. *Id.* IV.1.d.

316. *Id.* VII.

*Stakeholder Theory* for all covered companies, in contrast to the existing *stockholder theory or doctrine [of] maximization of shareholder value*. Consequently, within their areas of jurisdiction, the agency codes have effectively expanded the legal constituencies of Boards of Directors and Management of covered companies, beyond merely that of the stockholders.<sup>317</sup>

While these Codes may be mere subsidiary legislation, issued pursuant to administrative rule-making powers, they nonetheless have the force and effect of law.<sup>318</sup>

#### V. ANALYSIS: FILLING THE REGULATORY GAPS THROUGH ENVIRONMENTAL CORPORATE GOVERNANCE

“Good intentions are worth little if not reflected in actions. If a corporation announces aspirations to be socially responsible, it must follow up with the hard work of building those aspirations into its operations.”<sup>319</sup> The author, thus, addresses the principal criticism against corporate governance, environmental corporate governance, at that — that being “mere collections of principles,” they have no real effect on the legal and business practices.

A large part of the problem is simply “newness.” While “a fundamental mechanism of the global drive for corporate social responsibility,” corporate codes of conduct remain “in an early stage of development[,] [t]heir ultimate utility and form... not clear.”<sup>320</sup> There is as yet no common understanding of CSR-driven corporate governance.<sup>321</sup> The author elucidates on the utility of environmental corporate governance by identifying the key features that will enable responsiveness as an environmental protection mechanism.

##### *A. Key Features Necessary in Establishing Environmental Corporate Governance on a Macro Level*

###### 1. Institutionalizing the Environmental Pillar of CSR

One of the three issues that led to the rise of CSR in the U.S. was the *rise of environmentalism*, specifically, the accountability of big business for increasing

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317. Villanueva, *Corporate Governance*, *supra* note 272, at 22.

318. *Id.* at 17.

319. STEINER & STEINER, *supra* note 277, at 167.

320. *Id.* at 135.

321. HYSOM & BOLEE, *supra* note 282, at 38.

pollution and environmental damage.<sup>322</sup> Environment was, thus, a crucial CSR concern from the beginning.

Nevertheless, while it serves as the third and longest standing pillar of CSR, this component is markedly lacking in the Philippine CSR movement. Considering the significance of sustainable development in CSR and the power of corporate activity to drive considerable change in the environment, it is a component which cannot be ignored.<sup>323</sup> “The ultimate purpose of a corporate CSR policy is to develop innovative, economically viable and precautionary solutions within core business processes to improve environmental protection and working conditions.”<sup>324</sup>

That improving environmental performance has its merits is undeniable: lowered operational costs by streamlining processes to lessen use of materials and waste output, discovery of new improvement points because of closer scrutiny over operations, and attraction of new customers through a responsible reputation are examples of win-win improvements, which are “good for both the environment and the profitability of the company.”<sup>325</sup> “Board of directors of enterprises need to make a commitment to excellence in environmental governance and set the tone from the top. Environmental consciousness has now reached a stage where denial of, or inattention to, environmental issues can be detrimental to long-term corporate profitability, competitiveness, and sustainability.”<sup>326</sup>

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322. Fernando, *supra* note 275, at 3.

323. ESCOBALT Project, Corporate Social Responsibility: The Framework, at 1, *available at* <http://www.esprojects.net/midcom-serveattachmentguid2da26caeb11694acd257bb212666e7ee/csr-leaflet1-framework.pdf> (last accessed Feb. 21, 2009) (citing Report of the World Commission on Environment and Development: “Our Common Future,” U.N. GAOR, 42d Sess., annex, U.N. Doc. A/42/427 (Aug. 4, 1987)) [hereinafter ESCOBALT, CSR Framework]; ESCOBALT Project, Corporate Social Responsibility: Environmental Pillar of CSR, at 1, *available at* <http://www.esprojects.net/midcomserveattachmentguid-d5a9a25b3916b78e06d6a6568d0d9c14/environmental-pillar.pdf> (last accessed Feb. 21, 2009) [hereinafter ESCOBALT, Environmental Pillar]; EIR, *supra* note 4, at 3; STEINER & STEINER, *supra* note 277, at 58.

324. Federal Ministry for the Environment, Nature Conservation and Nuclear Safety, Corporate Social Responsibility: An Introduction from the Environmental Perspective, Mar. 2006, at 8 (F.R.G.), *available at* [http://www.bmu.de/files/english/documents/application/pdf/brochuere\\_csr\\_en.pdf](http://www.bmu.de/files/english/documents/application/pdf/brochuere_csr_en.pdf) (last accessed Feb. 21, 2009).

325. ESCOBALT, Environmental Pillar, *supra* note 323, at 2.

326. HERMES PENSIONS MANAGEMENT & ASIAN DEVELOPMENT BANK (ADB), CORPORATE GOVERNANCE PRINCIPLES FOR BUSINESS ENTERPRISES 15 (2003) (Principle 7, ¶ 34), *available at* [http://www.hermes.co.uk/files/pdfs/Corporate\\_Governance\\_Principles\\_for\\_Business\\_Enterprises\\_031003.pdf](http://www.hermes.co.uk/files/pdfs/Corporate_Governance_Principles_for_Business_Enterprises_031003.pdf) (last accessed Feb. 21, 2009) [hereinafter HERMES-ADB].

The institution of environmental corporate governance will not only address the substantive issue of, and the corporation's role in, environmental degradation, it will likewise give legal recognition to and infuse into corporate governance the environmental pillar of CSR.

## 2. Moving Towards Value-Centric Culture

As mentioned, with the evolution of corporate governance from profit-maximization to social responsibility, the corporate function has shifted from profit-centric to value-centric. No longer is environmental responsibility seen as unprofitable for diminishing short-term gains; by focusing on enhancing value, it becomes a necessary, and even desirable, cost in terms of long-term competitive advantage.<sup>327</sup> Environmental responsibility, thus, becomes voluntary and fosters proactiveness in going beyond minimum compliance to enhance value and long-term profitability<sup>328</sup>

Economic activities, which unduly strain nature and disable ecosystem sustainability, threaten as well business operations through increased risks and costs, reduced natural resources and services, heightened regulatory oversight, altered consumer and investor preferences, and decrease in capital and insurance. Costs incurred in the pursuit of environmental responsibility are a sound investment as financial performance is often thereby improved.<sup>329</sup> On the other hand, environmental risks may prove costly for natural resource sectors in terms of corporate finances and reputation.<sup>330</sup>

Value enhancement from environmental responsibility is manifold: shrinkage in waste output and production inefficiencies reduces both environmental impacts and overall costs — thereby increasing competitiveness; corporate responsibility attracts quality workforce and results in higher worker satisfaction and productivity; corporate reputation is augmented; risk exposure at all levels — regulatory, investment, and financial business costs — is reduced; and “increased access to completely new markets [is gained, as] ... environmental opportunities might actually become sources of revenue growth.”<sup>331</sup> Corporate risk factors — such as

327. Segovia, *supra* note 299, at 36.

328. Daniel Franklin, *Just Good Business*, THE ECONOMIST, Jan. 19, 2008, at 4; MIRANDA, *supra* note 3, at vii.

329. Erik Assadourian, *The State of Corporate Responsibility and the Environment*, GEO. INT'L ENVTL. L. REV. 571, 572-73 (2006) (citing Marc Orlitzky, et al., *Corporate Social and Financial Performance: A Meta-Analysis*, 24 ORG. STUD. 403 (2003)).

330. MIRANDA, *supra* note 3, at vii.

331. Assadourian, *supra* note 329, at 573-75 (citing Michael E. Porter & Claas van der Linde, *Green and Competitive: Ending the Stalemate*, 73 HARV. BUS. REV. 120,

revocation of the company's social license to operate, and disruptions in company operations, and targeting by activists and the consequent tarnishing of a brand or decrease in customer loyalty — are, thus, taken into account in business strategy.<sup>332</sup>

By retaining the current recognition of the corporate goal of value enhancement and stakeholders, infusing it with environmentalism, the proposed Code will properly mechanize corporate sustainability.

### 3. Situating the Environment at the Heart of Business:

#### From the DENR to the SEC

The author proposes the issuance of an SEC Code. The DENR may be primarily responsible for natural resources “conservation, management, development, and proper us[age] ... , as well as ... licensing and regulation,”<sup>333</sup> but it is the SEC that has “absolute jurisdiction, supervision and control over all corporations.”<sup>334</sup> The regulatory perspective here shifts from regulating the individual violation to regulating, holistically, the violator. One can then focus on key violators, identifying particular circumstances wherein environmental risks are created and regulating in a manner specific to the same. Extractive industries pose more environmental risks and are, for the most part, run by corporations.<sup>335</sup> Placing environmental concerns at the heart of corporate governance allows industry reorientation and the integration of environmental issues in all aspects of business operations,<sup>336</sup> despite the inadequacies of current environmental legislation.

That environmental regulation is transferred from an agency intimately familiar with environmental issues, the DENR, to an agency with commercial expertise but largely unfamiliar with the ecological concerns, the SEC, may be questioned, especially given that the rationale for subordinate

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125-27 (1995); Natural Res. Can., *Corporate Social Responsibility: Lessons Learned — Final Summary Report* 38 (2004); Stuart L. Hart, *Beyond Greening: Strategies for a Sustainable World*, 75 HARV. BUS. REV. 66, 68 (1997)); Fernando, *supra* note 275, at 6.

332. MIRANDA, *supra* note 3, at ix; Assadourian, *supra* note 329, at 574.

333. Providing for the Reorganization of the Department of Environment, Energy and Natural Resources, Renaming it as the Department of Environment and Natural Resources, and for Other Purposes, Executive Order No. 192, § 4 (1987).

334. Reorganization of the Securities and Exchange Commission with Additional Powers and Placing the Said Agency under the Administrative Supervision of the Office of the President [SEC Reorganization Act], Presidential Decree No. 902-A, § 3 (1976).

335. ROSS, *supra* note 6, at 5.

336. MMSD, *supra* note 31, at 350.

legislation is the expertise of the administrative agency issuing it.<sup>337</sup> This criticism fails to take into account the nature of corporate governance as it may be applied to environmental concerns. While both agencies suffer from similar deficiencies, the question no longer lies in the capacity of the administrative machinery: the environment becomes an affair of corporate empowerment and enhanced responsibilities, stakeholder empowerment and the social license to operate, stronger deterrence through corporate accountability, and the vesting of public interest and the allocation of fiduciary duties.

*B. Key Features Necessary in Establishing Environmental Corporate Governance on a Micro Level*

1. Corporate Empowerment and Enhanced Responsibility

Environmental corporate governance makes irrelevant the question of administrative capacity, whether at the level of the DENR or the SEC. What is now relevant is the capacity and responsibility of the corporation.

Good corporate governance furthers self-governance — simultaneously improving stakeholder protection while reducing the need for legislation and regulation. It modifies regulation from direct and intrusive government regulation to subtle and indirect, but effective, self-regulation: “regulation can [then] be ‘privatised’ and distributed to create a bottom up, custom-designed outcome-based approach to replace or complement the current top down ineffective, intrusive and costly one size fits all approach.”<sup>338</sup>

Neither reliant on the efficiency of free markets nor on the strength and transparency of the regulatory system, corporate codes of conduct develop corporate activism.<sup>339</sup> “Without effective legal and regulatory systems, corporations must assume heightened responsibilities.”<sup>340</sup> Enforcement can now be undertaken by highly-capitalized corporations, rather than underfunded administrative agencies, permitting them a crucial role in socio-economic development.<sup>341</sup> Enhanced responsibilities also enhance value: by

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337. HECTOR S. DE LEON & HECTOR M. DE LEON, JR., *ADMINISTRATIVE LAW: TEXT AND CASES* 94–95 (5th ed. 2005) [hereinafter DE LEON & DE LEON, *ADMINISTRATIVE LAW*].

338. Shann Turnbull, *Borrowing from the Laws of Nature*, *COMPANY DIRECTOR*, Nov. 2007, at 54 & 56 (Aus.).

339. Lynn Paine, et al., *Up to Code: Does Your Company’s Conduct Meet World-Class Standards?*, 83 *HARV. BUS. REV.* 122, 128 (2005).

340. Donaldson, *supra* note 286, at 2.

341. Fernando, *supra* note 275, at 4.

helping the social and legal framework they exist in, they, consequently, help themselves in their local operations. Value enhancement and corporate survival are furthered.<sup>342</sup>

An illustration of these enhanced responsibilities is the adoption of an environmental management system (EMS).<sup>343</sup> Adoption here is at the corporate level and ensured by the Board under pain of sanctions. Environmental responsibilities are integrated “into everyday management practices through changes to organizational structure, responsibilities, procedures, processes, and resources.”<sup>344</sup> Not only is corporate responsibility enhanced, regulatory enforcement is facilitated by making the determination of compliance easier.<sup>345</sup>

The corporation will also have the freedom and flexibility to set its own standards — to commit to its own brand of corporate environmental responsibility and steer decision-making toward these standards. With a reference point, crisis response may be quick and cohesive and operations will require less supervision.<sup>346</sup> In this way, the proposed Code is non-prescriptive, operating “on a site-by-site or case-by-case basis to be built into the overall management of the operation,” environmental issues rarely fitting any one model.<sup>347</sup> It does not, however, fall into the traps of ill-defined standards and the concealment of critical environmental issues,<sup>348</sup> as existing DENR prescriptive legislation continue to exist.

The SEC CG Code procedure, where corporations promulgate and submit its own manual of corporate governance, under which they can be held accountable,<sup>349</sup> is adopted to combine voluntariness and self-regulation with government regulation. The partial self-regulation allows for a high degree of flexibility for cost-effective solutions tailored to individual situations. In turn, its partially regulatory character makes it binding and facilitates monitoring compliance:<sup>350</sup> minimum features are required;

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342. See STEINER & STEINER, *supra* note 277, at 129; Bañez, *supra* note 304 (“Corporate governance is no longer a choice. Neither is it an alternative. It is a matter of corporate survival.”).

343. See MMSD, *supra* note 31, at 248; ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT (OECD), THE OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES 22 (2000), available at <http://www.oecd.org/dataoecd/56/36/1922428.pdf> (last accessed Feb. 21, 2009) (Principle V.I.).

344. MMSD, *supra* note 31, at xxi & 248.

345. *Id.*

346. Paine, *supra* note 339, at 123.

347. MMSD, *supra* note 31, at 341.

348. *Id.*

349. SEC CG Code, VIII.

350. MMSD, *supra* note 31, at 342.

commitments are binding and actionable; and environmental regulations are in place to complement the corporate governance structure.

## 2. Stakeholder Empowerment and the Social License to Operate

By utilizing a stakeholder-cognizant environmental corporate governance, monitoring and enforcement will not only be through the internal ranks of the corporation, but also be through pressures from stakeholder groups whose standing is now recognized. Stakeholder empowerment shifts from government regulation to stakeholder regulation. “Trust must be earned — it cannot be regulated.”<sup>351</sup> Only the establishment of trust will shield the corporation from litigation, opposition, and operational disruptions, and a general revocation of the corporation’s social license to operate.<sup>352</sup>

The stakeholdership recognized under corporate governance laws remains unoperationalized.<sup>353</sup> Save for the a few provisions mentioning stakeholders, the SEC CG Code is still largely concerned with the Board’s duties to shareholders.<sup>354</sup> Moreover, while it emphasizes the “Board’s responsibility ... to foster ... long-term success,” it limits fiduciary responsibility to “the best interest of the corporation and its shareholders,”<sup>355</sup> and does not extend it to other stakeholders.<sup>356</sup> The proposed Code seeks to en flesh stakeholdership on the level of the local community and environmental groups.

Taking off from the recognition by current corporate governance codes of the stakeholder right to expect that the institution is run in a prudent and sound manner,<sup>357</sup> stakeholders gain legal standing outside of any contract

351. Ian Dunlop, *The quest for ‘the common good,’* COMPANY DIRECTOR, Feb. 2007, at 14 (Aus.).

352. *Id.*

353. World Bank, Report on the Observance of Standards and Codes (ROSC): Corporate Governance, Corporate Governance Country Assessment: Philippines 24 (2006) available at [http://www.worldbank.org/ifa/rosc\\_cg\\_phl\\_07.pdf](http://www.worldbank.org/ifa/rosc_cg_phl_07.pdf) (last accessed Feb. 21, 2009).

The World Bank has even recommended that the SEC issue a code or manual for stakeholder protection to lay down guidelines as to their rights and redress for violations of such.

*Id.* at 8.

354. Poblador, *supra* note 273, at 2; Villanueva, Corporate Governance, *supra* note 272, at 28.

355. SEC CG Code, II.6.

356. Villanueva, Corporate Governance, *supra* note 272, at 28-29.

357. SEC CG Code, II.6.a.

with the corporation and the Board bears the residual goal of meeting stakeholder interests. Stakeholder investment in the corporation may not be proprietary or pecuniary, but it provides for a standing to demand from the Board the consideration of stakeholder interests in its operation of the enterprise.<sup>358</sup> Stakeholder force is not to be underestimated as experience shows that lobbying by stakeholders can prove quite effective in causing change. When corporations do not consider the environment a high priority, bad publicity by activists, which causes loss of profit and stock value, can quickly change this view.<sup>359</sup>

For instance, to ensure FPIC, monitoring, and enforcement, from the outset, the stakeholders' right to know and continuously participate at all project stages must be upheld.<sup>360</sup> Corporations must disclose to stakeholders all reports relating to environmental, social, health, and safety issues.<sup>361</sup> Independent verification of reports by bodies which include stakeholders must also be promoted to build trust.<sup>362</sup> Free and open access to disclosure is meritorious in the long run: "[o]nce a company has established the fundamentals of improved sustainability performance, then increased trust, reduced transaction costs, better feedback, reduced risks, more effective resource use, and increased reputational value all arise through communicating this effectively to others."<sup>363</sup>

### 3. Stronger Deterrence through Director Accountability

"[H]eightedened social involvement by directors stems from the broadened sensitivity of the board to social expectations of constituents[, which]... in turn, has been brought about by the increase in director accountability and liability."<sup>364</sup> The proposed Code reiterates the Board's oversight function under the SEC CG Code — placing primary responsibility for corporate governance in the Board, which must operate as an independent check on management<sup>365</sup> — and goes beyond this by expressly adding to the duties of directors environmental protection and stakeholder consideration, as well as imposing penalties on directors. This enhancement of duties increases the possibility of personal liability for each corporate director and reconfigures

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358. Villanueva, *Corporate Governance*, *supra* note 272, at 24 & 30.

359. Assadourian, *supra* note 329, at 584.

360. ESSC, *supra* note 32, at 101-02 (citing AUSTRALIAN NON-GOVERNMENT ORGANISATIONS, PRINCIPLES FOR THE CONDUCT OF COMPANY OPERATIONS WITHIN THE MINERALS INDUSTRY 20 (1998) (Aus.) (Principles 4.14 & 4.17)).

361. OECD, *supra* note 343, at 23 (Principle V.2).

362. MMSD, *supra* note 31, at 295.

363. *Id.* at 293.

364. HYSOM & BOLEE, *supra* note 282, at 77 (emphasis supplied).

365. SEC CG Code, II.

the Business Judgment Rule.<sup>366</sup> Secure in their virtual freedom from personal liability under the Rule, directors have become divorced from the corporation's daily operations, leaving every aspect of the same to management discretion. Under the proposed Code, however, because a director's duties and responsibilities, for which he can be held accountable for, are specified, directorship evolves from being a largely ceremonial position to one immersed in firm affairs.<sup>367</sup>

With the Board's oversight responsibility, day-to-day operations may remain with management, but the Board is "responsible for monitoring and overseeing management action."<sup>368</sup> Under this system of command responsibility, management is accountable to the Board, and the Board, in turn, is accountable to stakeholders.<sup>369</sup>

It is also the Board who is tasked with the duty to ensure compliance with laws, regulations, and codes of best practices in business.<sup>370</sup> A director must not only inform himself of developments in the industry, but also statutory and regulatory requirements, as well as the contents of the articles of incorporation and by-laws.<sup>371</sup> A director's inactiveness, unawareness of his duties, and lack of legal training cannot be used as shields for personal liability, as he bears a specific duty to devote time and resources to learning operations and attending and actively participating in Board and committee meetings.<sup>372</sup> In contrast, these "become[ ] proof that he or she has not performed his or her obligation to oversee company affairs, and [is] thereby ... personally liable for the consequent los[s] suffered by the company."<sup>373</sup>

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366. Villanueva, Corporate Governance, *supra* note 272, at 45 & 55.

Under the Rule, "[d]irectors and officers acting within such business judgment cannot be held personally liable for the consequences of such acts."

*Id.* at 47.

Holding a director personally liable is a tall order, requiring the establishment of his bad faith or wrong doing, which should be a patently unlawful act. "Bad faith is never presumed" and a law must declare the act unlawful and penalizes it.

*Carag v. National Labor Relations Commission*, 520 SCRA 28, 49-50 (2007).

367. Villanueva, Corporate Governance, *supra* note 272, at 50 & 71.

368. SEC CG Code, II.6 .a.

369. Villanueva, Corporate Governance, *supra* note 272, at 65; SEC CG Code, IV.1.

370. SEC CG Code, II.6.b.iii.

371. SEC CG Code, II.6.b.iii & II.6.c.v.

372. Villanueva, Corporate Governance, *supra* note 272, at 71-73.

373. *Id.* at 72.

The proposed Code, thus, follows the Sarbanes-Oxley model, requiring the President or the director in charge of oversight to certify the accuracy of reports submitted to stakeholders and the government and that “procedures and controls [are] in place that will uncover and report to the top any material liabilities.”<sup>374</sup> He will necessarily have to “understand the requirements for environmental disclosure” to determine compliance and, even where there is disclosure, if processes and controls are not properly in place or followed, the certification will ultimately result in director accountability.<sup>375</sup>

Finally, the varied enterprises, applicable management styles, and prevailing business and industry environments had prevented the SEC CG Code from providing clear penalties for violations of directors’ duties and responsibilities.<sup>376</sup> The proposed Code remedies this by isolating a specific sector, substantive issue, and stakeholder group. Penalties under environmental laws imposed on the director, officer, or employee *responsible* can, thus, be imposed on the director in charge of oversight for failure to perform his duties.

#### 4. The Vesting of Public Interest and the Allocation of Fiduciary Duties

In dealing with an industry vested with public interest, such as extractive industries, over an issue imbued with public interest, the environment, and recognizing the fiduciary duty of directors to stakeholders other than shareholders, the diligence required of directors is raised.

A major difference between the other two codes and the SEC CG Code is that the former have clearly raised the standard of diligence required of their covered companies, as their covered industries are *imbued with public interest*, by imposing *fiduciary* duties which are now extended to stakeholders. In the SEC CG Code, there can be no general vesting of public interest as it is the nature of the industry, especially in its relations with the public, not

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374. Ben Pfefferle, *Sarbanes-Oxley: Environmental management impact*, BUS. FIRST OF COLUMBUS, Dec. 10, 2004, available at <http://www.bizjournals.com/Columbus/stories/2004/12/13/focus10.html> (last accessed Feb. 21, 2009); Chris Locke & Andrew W. Ingersoll, *Environmental Liability Disclosure and the Sarbanes-Oxley Act*, available at <http://library.findlaw.com/2003/Sep/17/133167.html> (last accessed Feb. 21, 2009); ENLAR, *Environmental, Health & Safety Management Systems to Improve Organizational Performance*, available at <http://iso14000expert.com/sarbanes-oxley.html> (last accessed Feb. 21, 2009).

375. Pfefferle, *supra* note 374.

376. Villanueva, *Corporate Governance*, *supra* note 272, at 71.

Also, “[n]o two corporations can or should deal with social responsibility in precisely the same way.”

HYSOM & BOLEE, *supra* note 282, at 38.

the corporate medium, which determines this characterization.<sup>377</sup> As “[s]ocial responsibility varies with company characteristics such as size, industry, strategies, marketing techniques, locations, internal cultures, stakeholder demands, and managers’ values,”<sup>378</sup> a general vesting of public interest on all public companies is both unrealistic and impracticable.

The extractive sector and the environment, however, are readily shown to be imbued with public interest as no less than the fundamental law places natural resources “under the full control and supervision of the State,”<sup>379</sup> and affirms the right to a balanced and healthful ecology.<sup>380</sup> In a sector imbued with public interest, fiduciary obligations to stakeholders are recognized and, consequently, a high degree of diligence is required.<sup>381</sup> Thus, in the performance of corporate functions, there is practically “no room for error[:] ... if loss or damage is caused to a [stakeholder], the [corporations] and their responsible officers and directors shall be made to bear the same.”<sup>382</sup> When damage is proved by a stakeholder, there is a presumption of negligence or breach on the part of the corporation, and the latter bears the burden of showing that a high degree of diligence was discharged.<sup>383</sup>

A high degree of diligence would require the use of precaution in choosing sites and carrying out operations, actively avoiding disposal of tailings in rivers and oceans, and proceeding to development only when tailings containment is available and safe.<sup>384</sup> Judges or quasi-judicial agencies may take into account the adoption of codes of conduct or ethics in considering whether proper processes and controls were in place and in meting penalties.<sup>385</sup> Even the processes and controls in place must meet a high standard — requiring independent periodic evaluations and audits, corporate governance seminars for directors, an environmental subcommittee

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377. See Villanueva, *Corporate Governance*, *supra* note 272, at 53–61.

378. STEINER & STEINER, *supra* note 277, at 125.

379. See PHIL. CONST. art. XII, § 2.

380. See PHIL. CONST. art. II, § 16.

381. Villanueva, *Corporate Governance*, *supra* note 272, at 54 & 60.

382. *Id.* at 54.

383. *Id.* at 55.

384. MMSD, *supra* note 31, at 256; ESSC, *supra* note 32, at 108 (citing AUSTRALIAN NON-GOVERNMENT ORGANISATIONS, PRINCIPLES FOR THE CONDUCT OF COMPANY OPERATIONS WITHIN THE MINERALS INDUSTRY 16 (1998) (Aus.) (Principle 4.2)).

385. Paine, *supra* note 339, at 122.

which manages environmental risks and orients directors on such matters,<sup>386</sup> and knowledge of environmental matters by at least one director.

In filling the gaps in current law, environmental corporate governance is a proposition that presents significant and genuine opportunities for change that is specific to extractive industries — one that goes beyond compliance with and reactivity to legislation.

### *C. Beyond Compliance and Reactivity*

The ineffectiveness and inefficiency of command and control regulations in addressing pressing ecological issues has led to more interest in business initiatives.<sup>387</sup> Modern corporations now recognize that “economic success is inextricably linked to environmental and social performance.”<sup>388</sup> Proactive steps towards responsibility are increasingly being taken to enhance corporate value. Social acceptance of corporations and industries is more readily given and “the credibility of the individual corporation and the overall climate of public trust” are enhanced.<sup>389</sup> Forward-thinking management strategically going into areas still unregulated tends to have a competitive advantage.<sup>390</sup>

While corporate governance is dynamic, having “no defined end-state[,] ... [and] is a continuing process of defining and refining the rights and responsibilities of the various stakeholders to achieve excellence in work,”<sup>391</sup> law or regulation tends to be reactive and often “lags behind emerging norms and duties.”<sup>392</sup> With commerce ever-progressing, utilizing corporate

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386. See ENLAR, *supra* note 374; Villanueva, Corporate Governance, *supra* note 272, at 18 (as in the practice under the BSP CG Circulars, IC CG Code, and SEC CG Code); HERMES-ADB, *supra* note 326, at 15 (Principle 7, ¶ 35).

387. Federal Ministry for the Environment, Nature Conservation and Nuclear Safety, *supra* note 324, at 6-7.

388. UNCCD & IUCN, *supra* note 40, at 7.

389. HYSOM & BOLEE, *supra* note 282, at 83.

390. Jayne W. Barnard, *Corporate Boards and the New Environmentalism*, 31 WM. & MARY ENVTL. L. & POL'Y REV. 291, 308-09 (2007) (citing Ellie Winninghoff, Green Capitalism, Dec. 8, 2004, available at <http://archive.salon.com/tech/feature/2004/12/08/sri/index.html> (last accessed Feb. 21, 2009)) (“[A] company that is really good at managing its environmental footprint or taking proactive steps to keep pollution out... is going to be better positioned almost no matter what for any new environmental legislation that comes down the pike.”).

391. Bañez, *supra* note 304.

392. STEINER & STEINER, *supra* note 277, at 124. “In the field of Corporate Law, as in most other areas of commercial law, it is management practice and innovation that will drive legal developments,” not the other way around. Villanueva, Corporate Governance, *supra* note 272, at 122. For instance, “[a]t the corporate level [of extractive industries], respect for social and environment

governance, thus, allows the corporation the flexibility to change its governance according to the demands of business. By internalizing environmental corporate governance, private entities move away from the traditional reactionary approach to legislation, taking more proactive steps towards self-regulation and going beyond compliance.<sup>393</sup>

Government is also less saddled with enforcement. Corporations, focused on emerging commercial trends and value enhancement, protect “brands, reputations, trade liberalization, and capitalism with voluntary, flexible action instead of regulation.”<sup>394</sup> Stakeholders, on the other hand, are receptive to codes as they “hold the promise of making corporations more responsible in a period when added government regulation is unlikely.”<sup>395</sup> Compliance is also increased: “Codes ... build recognition for global norms of commerce. As these norms jell, dodging them is harder for corporations.”<sup>396</sup>

Even the regulatory medium corporate governance takes is dynamic. Protracted legislative processes tend to struggle in meeting continually changing business demands. The proposed Code is to be issued by the SEC — the agency who encounters these problems on a daily basis and who can best determine the measures for meeting the objectives of the law. Furthermore, regulations are easier to amend: correcting mistakes is easier and meeting changing conditions is faster, without sacrificing the force and effect of such law.<sup>397</sup>

## VI. CONCLUSION AND RECOMMENDATION

*As guardians of doors and gates, Janus presided over the beginning of new ventures ... The law, like Janus, is forever conservatively upholding the past and progressively ushering in the future.*

- Nicholas Robinson<sup>398</sup>

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standards is often now considered an essential element of good business practice.” MMSD, *supra* note 31, at 349.

393. Andrew Hardenbrook, Note, *The Equator Principles: The Private Financial Sector's Attempt at Environmental Responsibility*, VAND. J. TRANSNAT'L L. 197, 203 (2007) (citing Michael P. Vandenberg, *The Private Life of Public Law*, 105 COLUM. L. REV. 2029, 2037 (2005)); Bañez, *supra* note 304.

394. HYSOM & BOLEE, *supra* note 282, at 135.

395. *Id.*

396. *Id.*

397. DE LEON & DE LEON, *supra* note 337, at 95.

398. Hans Christian Bugge & Laurence Watters, *A Perspective on Sustainable Development After Johannesburg on the Fifteenth Anniversary of Our Common Future*:

The right to a balanced and healthful ecology is fundamental to all existence. Yet, that it is threatened by the tremendous, devastating, and, at times, irreversible environmental impacts of extractive industries is not denied. The continuous propagation of progressive environmental laws has proven futile: extractive industries-induced environmental disasters persist as the regulatory system is weak and corrupt; lacks free, prior, and informed consent; fails to consider or protect vulnerable areas; establishes an ineffective system of sanctions; and lacks effective means of recourse.

This Note proposes a paradigm shift — a look into that critical area that regulation cannot cover: corporate governance. The corporate governance movement towards CSR and stakeholdership makes possible the establishment of an *environmental* corporate governance. The author, thus, proposes that the SEC issue a Code of Environmental Corporate Governance for Extractive Industries — one that institutionalizes the environmental pillar of CSR; moves towards a value-centric, rather than profit-centric, culture; and situates environmental concerns at the heart of business operations through regulation by the SEC, not the DENR. Due to the nature of corporate governance, the question will no longer lie in the capacity of the administrative machinery, but the capacity of the corporation and the stakeholders: utility and effectiveness comes from corporate empowerment and enhanced responsibility, stakeholder empowerment and the social license to operate, stronger deterrence through director accountability, and the vesting of public interest and the allocation of fiduciary duties.

The overall effect is dramatic: a movement beyond regulatory compliance and reactivity to and of laws. In tying corporate action to the dynamic ebb and flow of commercial practices, behind which regulation often lags, environmental corporate governance shifts from reactive, even evasive, to proactive.

#### VII. PROPOSED CODE OF ENVIRONMENTAL CORPORATE GOVERNANCE FOR EXTRACTIVE INDUSTRIES

In line with the Note's discussion, conclusion, and recommendation, the author herein proposes the adoption by the SEC of the following draft Code of Environmental Corporate Governance for Extractive Industries.<sup>399</sup>

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*An Interview with Gro Harlem Brundtland*, 15 GEO. INT'L ENVTL. L. REV. 359, n.15 (2003) (citing *A Legal Perspective on Sustainable Development*, in THE LEGAL CHALLENGE OF SUSTAINABLE DEVELOPMENT 15 (J. Owen Saunders ed., 1990)).

399. In drafting the proposed Code, the author adopted different elements from various sources. See, e.g. SEC CG Code; BSP Circular No. 283; BSP Circular No. 296; BSP Circular No. 341; BSP Circular No. 391; BSP Circular No. 456; BSP Circular No. 499; BSP Circular No. 584; BSP Circular No. 592; IC CG

## SEC MEMORANDUM CIRCULAR NO. \_\_\_\_\_

Series of 2009

**CODE OF ENVIRONMENTAL CORPORATE GOVERNANCE  
FOR EXTRACTIVE INDUSTRIES**

*The Commission*, in its Resolution No. \_\_\_\_, Series of 2009, dated \_\_\_\_\_ 2009,

*In accordance with* the State's policy to actively promote corporate governance reforms aimed to raise investor confidence, develop capital market and help achieve high sustained growth for the corporate sector and the economy,

*In view of* the fundamental right of the people to a balanced and healthful ecology in accord with the rhythm and harmony of nature — including the principles of intergenerational responsibility and sustainable development, the correlative duty not to impair the environment, and the centrality of a healthy environment to secure human rights, especially the rights to life and health — and the State duty to advance and protect such right,

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Code; PHIL. CONST. arts. II, §§ 15-16 & III, § 1; *Oposa v. Factoran, Jr.*, 224 SCRA 792, at 805 (1993); Case Concerning the Gabcikovo-Nagymaros Project (Hung. v. Slov.), 1997 I.C.J. 7, 91-92 (Sep. 25, 1997); Asia Pacific Forum, *supra* note 25; Philippine Mining Act of 1995, § 2; Downstream Oil Industry Deregulation Act of 1998, § 2; Oil Exploration and Development Act of 1972; SEC Reorganization Act, § 3; ESCOBALT, CSR Framework, *supra* note 323; MMSD, *supra* note 31, at xvi, xviii, xxv, xxix-xxxii, 250, 295 & 300-01 (Sustainable Development Principles); HERMES-ADB, *supra* note 326, at 14-15 (Principle 7, ¶¶ 32 & 35-36); HYSOM & BOLEE, *supra* note 282, at 9; STARLING, *supra* note 274, at 518; Barnard, *supra* note 390, at 302 (citing Cynthia A. Williams, *Engage, Embed, and Embellish: Theory Versus Practice in the Corporate Social Responsibility Movement*, 31 IOWA J. CORP. L. 1, 24 (2005)); Einer Elhauge, *Sacrificing Profits in the Public Interest*, 80 N.Y.U. L. REV. 733 (2005); INTERNATIONAL COUNCIL ON MINING & METALS (ICMM), ANNUAL REVIEW 2007: ESSENTIAL MATERIALS, PRODUCED RESPONSIBLY 22, available at <http://www.icmm.com/document/21> (last accessed Feb. 21, 2009) (The 10 Principles of the ICMM Sustainable Development Framework, principles 2-3, 7 & 10); OECD, *supra* note 343, at 19 & 22-23 (principles II.2, V.1-V.2, V.4 & V.6); STEINER & STEINER, *supra* note 277, at 132 (The Global Compact Principles, principles 7-8); HERZ, *supra* note 216, at 3-4 & 12; EIR, *supra* note 4, at 50; Multilateral Investment Guarantee Agency (MIGA), Policy on Disclosure of Information, available at [http://www.miga.org/documents/ environ\\_social\\_disclosure\\_policy\\_021507.pdf](http://www.miga.org/documents/environ_social_disclosure_policy_021507.pdf) (last accessed Feb. 21, 2009); ESSC, *supra* note 32, at 102; Pfefferle, *supra* note 374; Locke & Ingersoll, *supra* note 374; ENLAR, *supra* note 374; EIS System IRR, *supra* note 110; Villanueva, Corporate Governance, *supra* note 272, at 18.

*Taking likewise into consideration* the State responsibility to promote the rational exploration, development, utilization, and conservation of natural resources through the combined efforts of government and the private sector to enhance national growth in a way that effectively safeguards the environment and protect the rights of affected communities,

*Acknowledging* the Commission's absolute jurisdiction, supervision and control over all corporations who are the grantees of primary franchise and/or a license or permit issued by the government to operate in the Philippines; the legal recognition given to other stakeholders in the corporation; the corporate goal of enhancing the value of the corporation as it competes in an increasingly global market place; and the environmental pillar of corporate social responsibility,

*Responding to* the massive potential for environmental degradation at each stage of extractive industries operations and the escalation of extractive industries-caused environmental disasters resulting in incalculable, and possibly irreversible, adverse effects on the environment,

*Approved* the promulgation and implementation of this Code, which shall be applicable to corporations in extractive industries which are grantees of permits/licenses from the Commission. This Code also applies to foreign corporations in extractive industries operating or doing business in the Philippines and/or their branches or subsidiaries.

## I. DEFINITIONS

- A. *Board of Directors* – refers to the collegial body that exercises the corporate powers of all corporations formed under the Corporation Code. It conducts all business and controls or holds all property of such corporations.
- B. *Corporate Governance* – refers to a system whereby shareholders, creditors, and other stakeholders of a corporation ensure that management enhances the value of the corporation as it competes in an increasingly global market place.
- C. *Extractive Industries* – industries which find and remove wasting natural resources, or resources which cannot be replaced by human beings in their original state, from or near the earth's crust, encompassing the large-scale mining and oil and gas industries.
- D. *Environmental Corporate Governance* – refers to corporate governance which enhances the value of the corporation through improved performance and sustainable development at all stages of operations to ensure that critical natural capital is maintained, that ecosystems are enhanced where possible, and that resources wealth contributes to net environmental continuity for the welfare of future generations.
- E. *Free, Prior, and Informed Consent* – process by which the corporation gains its social license to operate: stakeholders, government, and companies come to mutual agreements in a forum that gives affected stakeholders enough leverage to negotiate conditions under which companies may proceed and an outcome leaving stakeholders better off.

- F. *Large-Scale Mining* – mining which utilizes substantial capitalization, heavy equipment, high technology and a much bigger workforce and produces commercial quantities sufficient for export and large industries.
- G. *Management* – refers to the body given the authority to implement the policies determined by the Board in directing the operations of the corporation.
- H. *Stakeholders* – are constituencies having an environmental stake in corporate decisions, who interact with and/or are directly or indirectly affected by the corporation’s decisions, operations, and organizational performance (its products, policies, and work processes). These include the local community and indigenous groups in extractive industry sites as well as non-governmental environmental and social organizations.
- I. *Sustainable Development* – the development that meets the needs of the present without compromising the ability of future generations to meet their own needs.
- J. *Triple Bottom Line* – the objective of balancing shareholder and stakeholder values by simultaneously meeting the needs of the people and the environment, while at the same time generating wealth for investors.

## II. APPLICABILITY OF THE CODE OF CORPORATE GOVERNANCE

The Code of Corporate Governance issued under SEC Memorandum Circular No. 2, Series of 2002 (CG Code), shall be applicable to the corporations covered by this Code insofar as not manifestly inconsistent with the provisions of this Code. Terms not defined herein shall have the corresponding meaning set forth in the CG Code. The requirements of this Code apply in addition to those laid down by the CG Code.

## III. THE BOARD GOVERNANCE

The Board of Directors (Board) is primarily responsible for the environmental governance of the corporation. It shall serve as an independent check on the management’s ecological and sustainable performance and shall ensure transparency, disclosure, and engagement; accountability and oversight; and extraordinary diligence and proactiveness in corporate operations.

### A. Chief Ecological Officer

At least one member of the Board shall be sufficiently experienced in environmental matters. Such member or from such group of members shall be designated the Chief Ecological Officer (CEcO) and shall be responsible for ensuring management’s compliance with environmental laws, regulations, and best practices and the sustainable performance of the corporation.

In the event that no CEcO is designated, such responsibility shall be deemed assigned to the President, without prejudice to the imposition of civil, criminal, and/or administrative penalties for violation of this Code.

## **B. Disqualification of Directors**

The following shall be disqualified from serving as a director of the corporations covered:

1. Any person who has been finally adjudged by a competent judicial or administrative body or this Commission of violating laws governing the extractive industries sector, environmental laws relevant to extractive industries, or this Code;
2. Any person who served as a CEcO in the same or another corporation whose license or permit, environmental compliance certificate, or other permit issued by this Commission or other regulatory agencies was revoked for non-compliance with environmental laws or regulations or this Code;
3. Any person finally found guilty by a foreign court or regulatory authority of acts or violations similar to any of the acts or violations enumerated in paragraphs (1) and (2) hereof.

These disqualifications are in addition to those enumerated in the CG Code.

## **C. Duties, Functions, and Responsibilities**

It is the Board's responsibility to foster the long-term success and sustainability of the corporation and secure its sustained and sustainable competitiveness in a manner consistent with its fiduciary responsibilities to its stakeholders. It must ensure that the corporation exercised extraordinary diligence and meets the triple bottom line in its operations.

### **1. General Responsibility**

A director's office is one of trust and confidence. He shall act in the best interest of the corporation in a manner characterized by transparency, disclosure, and engagement; accountability and oversight; extraordinary diligence and proactiveness and shall direct the corporation towards sustained and sustainable progress over the long term. A director assumes a fiduciary responsibility to its different constituencies or stakeholders, who have the right to expect that the institution is being run in a prudent and sound manner.

To ensure good environmental governance of the corporation, the Board should integrate environmental protection and conservation and sustainable development principles in the corporation's vision and mission, strategic objectives, the policies and procedures that guide and direct the activities of the company, and the means to attain the same as well as the mechanism for monitoring management's performance. While

the management of the day-to-day affairs of the institution is the responsibility of the management team, the Board is, however, responsible for monitoring and overseeing management action, including its ecological and sustainable performance

## **2. Expanded Duties and Functions**

The Board, and consequently, each director of covered corporations, shall have the following expanded duties and functions in addition to those enumerated under the CG Code:

- a. Maximizing the contribution to the well-being of the current generation in a way that ensures an equitable distribution of its costs and benefits, without reducing the potential for future generations to meet their own needs, through the integration environmental integrity into the corporate operations and decision-making;
- b. Supporting a precautionary approach to the environment, by exercising prudence where impacts are unknown or are uncertain and making decisions based on comprehensive and reliable analysis,
- c. Promoting responsible stewardship of natural resources and the environment, including the operation within ecological limits and the protection of critical natural capital, the minimization of waste and environmental damage along each stage of operations, the remediation of past damage, and planning at project commencement for rehabilitation measures post-operations;
- d. Identifying and internalizing environmental costs and ensuring accountability for decisions and actions, as well as undertaking initiatives to promote greater environmental responsibility, such as the active development and diffusion of environmentally friendly technologies;
- e. Encouraging cooperation with stakeholders and the government in order to build trust and shared goals and values and implementing effective and transparent engagement of and communication with stakeholders and their access to independently verified reports and other relevant and accurate information; and
- f. Respecting and reinforcing fundamental human rights — including civil and political liberties, cultural autonomy, social and economic freedoms, and personal security — the values of those affected by extractive activities, and the conservation of biodiversity, natural life, and habitats.

## **3. Specific Environmental Duties and Responsibilities**

The Board, and consequently, each director of covered corporations, shall have additional duties and responsibilities geared specifically at environmental protection and sustainability over and above its duties and responsibilities under the CG Code. These are divided into three broad categories: transparency, disclosure, and engagement; accountability and oversight; and extraordinary diligence and proactiveness.

**a. Transparency, Disclosure, and Engagement**

- i. **Free, Prior, and Informed Consent.** The Board shall ensure the procurement of the Free, Prior, and Informed Consent of its stakeholders at the commencement of operations and throughout a project's life cycle. Effective access to information, inclusiveness, continuing dialogue, and the formulation of binding negotiated agreements shall be ensured in the pursuit of such.
- ii. **Stakeholder Engagement and Participation.** The Board shall guarantee the continuous engagement of stakeholders during the operation's life cycle — from exploration to closure. Even the formulation of its plans of engagement shall be discussed with the community to ensure that proper and adequate mechanisms are in place. Participation shall be actively sought in the development and updating of an environmental management system for construction, operation, and decommissioning.
- iii. **Stakeholder-Based Monitoring and Enforcement.** The Board shall ensure that monitoring shall be stakeholder-based and that the monitoring group has access to and participates in environmental sampling, review of results, and recommendations to improve measurement and management systems. The results of such monitoring shall be incorporated in the management of operations.
- iv. **Access to Information.** Access of stakeholders to material information shall be ensured by the Board through mechanisms, such as contact points for regular exchange of information with civil society and clear and agreed procedures for requesting, receiving, and disseminating information.
- v. **Transparency and Disclosure.** Subject to exceptions under existing laws, the corporation shall foster a policy of full, timely, regular, and reliable disclosure of relevant and accurate information. There is a presumption in favor of disclosure, absent a compelling reason not to disclose such information.

Restricted disclosure of confidential information shall be made where it shall avert imminent and serious harm to public health or safety, and/or imminent and significant adverse impacts on the environment.

- vi. **Dispute Resolution and Grievance Machinery.** As access to information and public participation cannot be established and maintained unless there is a right to access to the legal means to enforce them, machinery and procedures for redress of grievances and resolution of disputes shall be provided for by the Board. The Board shall also ensure that regular meetings with stakeholders be conducted as fora for discussions and questioning on key matters of public interest.

- vii. **Regular and Independently Verified Reporting.** The Board shall guarantee multi-parameter triple bottom line reporting, describing the company's economic, environmental, and social performance to internal and external stakeholders. It shall promote the use of independent verification by bodies which include stakeholders.

Open book reporting on health, safety, and environmental issues; closure and reclamation; and positive and negative developments of a project shall also be encouraged.

#### **b. Accountability and Oversight**

- i. **Environmental Management System.** The Board shall require the establishment of an effective and continuously improved environmental management system (EMS), which includes:
  - a. Clear definition of environmental responsibilities with the expectation of a proactive approach from all links in the chain of command;
  - b. Collection and evaluation of adequate and timely information regarding the environmental, health, and safety impacts of their activities;
  - c. Establishment of measurable objectives and, where appropriate, targets for improved environmental performance, including periodically reviewing the continuing relevance of these objectives;

- d. Regular monitoring and verification of progress toward environmental, health, and safety objectives or targets;
  - e. Provision of adequate and timely information on potential environment, health, and safety impacts of operations, including reporting on progress in improving environmental performance, to the public and employees; and
  - f. Adequate and timely communication and consultation with communities directly affected by the environmental, health, and safety policies of the enterprise and by their implementation.
- ii. **Environment Audit Program and Independent Review.** The Board shall ensure the institution of an environment audit program including an independent review for reporting to management and the Board of Directors. This includes financial and non-financial audits, such as audits of tailings storage facilities, which shall be communicated to stakeholders and integrated into decision-making.
- iii. **Risk Assessment and Emergency Response.** The Board shall ensure the establishment of a system of risk management where potential risks are initially identified and analyzed, tolerability and reduction options are evaluated, and selection, implementation, and monitoring of appropriate control and reduction measures are recommended. The results of risk-analysis must be incorporated in development or operational decision-making.
- The Board shall guarantee the maintenance of contingency plans for preventing, mitigating, and controlling serious environmental and health damage from their operations — including accidents and emergencies — and mechanisms for immediate reporting to the competent authorities.
- iv. **Director Certification.** The CEcO, or the President, in the absence of a designated CEcO, shall certify the accuracy of reports submitted by the corporation to stakeholders and the government. He shall also certify that the company has procedures and controls in place that will uncover and report to the top any material environmental liabilities.
- v. **Director Accountability.** As the Board is primarily responsible for the environmental governance of the corporation, each director is responsible for the duties, functions, and responsibilities of the Board under this Code, a violation of the Board's duties, functions, and

responsibilities under this Code shall subject each director to penalties that the Commission imposes herein. This is without prejudice to civil, criminal, and/or administrative penalties that such director may incur for violation of other laws or regulations or for damages caused by failure to exercise extraordinary diligence in accordance with his fiduciary duties.

In violations of environmental laws or regulations where the penalty is imposed on the responsible officer, employee, or director, the CECO shall be deemed the responsible director or officer jointly with such responsible officer or employee.

Performance evaluation systems of Board environmental performance may also be established by management and submitted to the Commission as provided for by the Code.

**c. Extraordinary Diligence and Proactiveness**

- i. **Precaution and Protection of Vulnerable Areas.** The Board shall ensure that the foreseeable environmental, health, and safety-related impacts are assessed and addressed in decision-making. Where these proposed activities may have significant environmental, health, or safety impacts, an environmental impact assessment must be made, regardless of whether it is required by law, with requisite stakeholder engagement.

The Board shall ensure the use of precaution in decision-making. Where there are threats of serious damage to the environment, the lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent or minimize such damage.

- ii. **Environmental Management Training and Research.** The Board shall endeavor to incorporate sustainable development in the education and training of employees and officers. Directors shall themselves undergo orientation seminars on corporate governance with accredited groups and on environmental matters. An Environmental Committee shall be established which will deal with environmental issues, manage environmental risks, and orient directors on recognizing and mitigating such risks.

Research shall be undertaken on ways of improving the environmental performance of the enterprise over the longer term.

A multidimensional performance measurement system for employees may be established, under which rewards or gains are given for value-added environmental ideas and performance.

- iii. **Technological Development.** The Board shall continually seek to improve corporate environmental performance, by encouraging, where appropriate, the adoption of technologies and operating procedures in all parts of the enterprise that reflect standards concerning environmental performance in the best performing part of the enterprise.

A management information system that enables the appropriate monitoring of performance versus plan and compliance requirements and identification of early warning signals to ensure a proactive timely response shall be established.

#### IV. EVALUATION SYSTEMS

The management may establish a performance evaluation system to measure the environmental corporate governance performance of the Board and top-level management of the corporation.

The establishment of such evaluation system, including the features thereof, may be disclosed in the company's annual report (SEC Form 17-A).

#### V. PENALTIES

Unless a specific officer responsible is indicated under this Code, each director shall be liable for violation of the Board's duties, functions, and responsibilities specified herein and under the CG Code. Violations shall be punishable by imprisonment of not less than six months, but not more than six years, or a fine of not less than Php 100,000.00, but not more than Php 5,000,000.00, or both. This is without prejudice to civil, criminal, and/or administrative penalties that such director or the corporation may incur for violation of other laws or regulations or for damages caused by failure to exercise extraordinary diligence in accordance with the director's fiduciary duties.

In violations of environmental laws or regulations where the penalty imposed is on the responsible officer, employee, or director, the CEcO shall be deemed the responsible director or officer jointly with such responsible officer or employee.

#### VI. COMMITMENT TO ENVIRONMENTAL CORPORATE GOVERNANCE

Extractive industries corporations shall promulgate and adopt its environmental corporate governance rules and principles in accordance

with this Code. Said rules shall be in a separate manual or incorporated in the manual of corporate governance submitted in accordance with the CG Code and made available as reference by the directors. It shall be submitted to the Commission, which shall evaluate the same and their compliance with this Code taking into account the circumstances of the company. The said manual shall be made available to the public for inspection at reasonable hours on business days. The CEO, or in the absence of one, the President, of the Board shall be specifically tasked with the responsibility of ensuring the adoption and submission of such manual or the incorporation of the necessary provisions into the manual submitted pursuant to the CG Code.

Unless mandated by law, other corporations are likewise encouraged to observe applicable portions of this Circular in the absence of any mandated environmental corporate governance rules adopted by other agencies.

#### **VII. ADMINISTRATIVE SANCTION**

Failure to adopt a manual of environmental corporate governance or to incorporate environmental corporate governance rules and principles as specified herein shall subject an extractive industries corporation, after due notice and hearing, to a penalty of Php 100,000.00, in addition to the penalty under the CG Code. This is without prejudice to any civil or criminal liability that may be incurred by the extractive industries corporation, responsible officers, employees, or directors for failure to meet their environmental corporate governance responsibilities under this Code and the CG Code, regardless of whether a manual is adopted.

#### **VIII. TRANSITORY PROVISION**

All corporations affected by this Code shall submit their environmental corporate governance manual or revised corporate governance manual by \_\_\_\_\_, 2009 to be effective \_\_\_\_\_, 2009. A model manual will be drafted by the Commission and will be available by \_\_\_\_\_, 2009 in the Commission's web page.

#### **IX. EFFECTIVITY**

This Memorandum Circular shall take effect after fifteen (15) days from publication in a newspaper of general circulation.

\_\_\_\_\_, 2009.

Mandaluyong City, Philippines.

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Chairperson