

Philippine Environmental Mediation in Mining Conflicts

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I. INTRODUCTION

Conflict is inevitable in any community. So long as people co-exist and act on their own needs, the differences among them will inevitably lead to disagreements and misunderstandings. Common goals are difficult to achieve. Thus, there is a need for dispute resolution mechanisms.

The Philippines is prone to floods, drought, and other natural disasters.¹ These are further exacerbated by widespread poverty and scarcity of resources.² When vulnerable sectors of society rely on the environment for

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1. See Pia Lee-Bargo, *Philippines ranks 4th in countries hardest hit by disasters*, PHIL. STAR, Feb. 16, 2016, available at <http://www.philstar.com/headlines/2016/02/16/1553535/philippines-ranks-4th-countries-hardest-hit-disasters> (last accessed Oct. 31, 2016).
2. See ASIAN DEVELOPMENT BANK, *POVERTY IN THE PHILIPPINES: CAUSES, CONSTRAINTS AND OPPORTUNITIES* 49 (2009).

survival, disputes involving the environment can become violent, especially when not addressed authoritatively and without a proper legal remedy. One of the recent environment-related tragedies happened on 1 April 2016 when the members of the Philippine National Police shot some of the farmers affected by the El Niño drought in Kidapawan, Cotabato.³ The said farmers were merely demanding for sacks of rice that they were supposedly entitled to.⁴ Such an event demonstrates that environmental problems have to be managed with sensitivity and regard for the different concerns of the affected stakeholders.

The Philippines is not lacking in environmental laws⁵ which aim to protect people and their environment.⁶ However, in actual operation, when there is a violation of rights or laws, litigation is slow and unwieldy, and ultimately results in the dissatisfaction of all the parties. For this reason, mediation in environmental cases was introduced by the Supreme Court in the form of the Rules of Procedure for Environmental Cases⁷ as an alternative to a protracted and expensive legal battle wherein a decision is imposed by a court in favor of a winning party over the losing party. In environmental mediation, environmental civil cases are mandated to undergo court-annexed mediation (CAM).⁸ This means that during pre-trial, a neutral third party called the mediator, who is selected by the parties, is tasked to facilitate a discussion between the opposing parties with an end view of reaching a settlement in resolving the conflict that is acceptable to all parties.⁹

3. See generally Jeff Caparas, 3 dead, 87 missing, 116 hurt as police fire on Cotabato human barricade, available at <http://interaksyon.com/article/125901/breaking--security-forces-open-fire-on-cotabato-human-barricade> (last accessed Oct. 31, 2016).

4. *Id.*

5. See Justice Reynato S. Puno, *Philippine Environmental Law Practice and the Role of the Courts*, PHILJA JUDICIAL J., Apr.-June 2004, at 14-15.

6. *Id.*

7. RULES OF PROCEDURE FOR ENVIRONMENTAL CASES, A.M. No. 09-6-8-SC, Apr. 13, 2010.

8. *Id.* rule 3, § 3.

9. See Marthe Lois V. Cordia, *Alternative Dispute Resolution in the Philippines: Wave of the Future or the Road Less Traveled?*, 51 U. STO. TOMAS L. REV. 185, 187 (2006-2007).

Mining disputes are particularly difficult because of the perceived destruction caused by mining to the environment.¹⁰ Since mining remains to be allowed by the law,¹¹ conflict that affects the stability of both those who engage in mining activities and the community of the place where they are conducted, is expected.

In this regard, this Article aims to look at the application of environmental mediation in mining disputes. After a limited survey of the mining regime in the Philippines and some of the conflicts it has generated, this Article makes a brief study of the benefits and limitations of mediation in mining-related disputes.

II. PHILIPPINE MINING, CONFLICTS, AND COURT-ANNEXED MEDIATION

[M]inerals play a very important role in our lives. In fact, it would be difficult to imagine a world without minerals and without mining. If we look at history, we can see that mining has been with us a very long time. The history of the human race was divided into ages, named after the minerals that were mastered. The mastery of certain minerals made it possible for the human race to advance culturally. Life as we know it today would be impossible without mining. Almost everything we need and use whether it is on the farm or in the city, in the street or in the home, our means of transport, our communications system, our homes and offices, appliances[,] and fixtures — all in part require minerals. About 99% of the people in the world depend on minerals. Minerals provide us with what are now some of the necessities of life. The people in favor of mining will contend that mining is here to stay.¹²

— *Environmental Science for Social Change*¹³

A. State of Mining in the Philippines

The Philippines is rich with mineral resources which have been estimated to be worth trillions of pesos.¹⁴ However, these resources are nonrenewable,

10. See Ruelie Rapsing, How mining continually rapes nature, *available at* <http://www.rappler.com/move-ph/ispeak/102284-mining-continuously-rapes-nature-surigao-del-norte-philippines> (last accessed Oct. 31, 2016).

11. See, e.g., An Act Instituting a New System of Mineral Resources Exploration, Development, Utilization, and Conservation Mining Act [Philippine Mining Act of 1995], Republic Act No. 7942 (1995) & An Act Creating a People's Small-scale Mining Program and for Other Purposes [People's Small-Scale Mining Act of 1991], Republic Act No. 7076 (1991).

12. ENVIRONMENTAL SCIENCE FOR SOCIAL CHANGE, MINING REVISITED: CAN AN UNDERSTANDING OF PERSPECTIVES HELP? 54 (Jose Dalisay Jr. ed., 1999).

13. *Id.*

limited, or exhaustible.¹⁵ Furthermore, they are often located in forested areas rich in biodiversity or within the ancestral domains of indigenous peoples.¹⁶

In the 1930s, there was a mining “boom” in the Philippines, while the period from 1960 to 1980 was considered a golden age in mining.¹⁷ However, from the 1980s until the present, there has been a slump in the revenues generated by the industry, mainly due to the drop in the price of minerals globally.¹⁸ Thus, in the 1990s, the Philippine government exerted efforts to revitalize mining in the country by enacting the Philippine Mining Act of 1995 (Mining Act),¹⁹ which provided incentives to mining companies, with the end view of attracting foreign investment.²⁰

With the Mining Act, the existing government policy is to encourage mining, albeit with reservations that have been expressed by the new administration of President Rodrigo R. Duterte.²¹ In terms of the revenue it generates, mining operations contribute to the government through taxes paid by mining companies to local governments, and export earnings paid to

14. Ateneo School of Government, *Is There a Future for Mining in the Philippines? (A Policy Brief on Natural Resource Governance and Conflict Management)* 1, available at http://www.ateneo.edu/sites/default/files/ASoG%20Mining%20Policy%20Brief%20FINAL_0.pdf (last accessed Oct. 31, 2016).

15. *Id.* at 16.

16. ROBERT GOODLAND & CLIVE WICKS, *PHILIPPINES: MINING OR FOOD?* 143 (2008).

17. Romeo L. Bayle, *Large-Scale Mining: Its Environmental, Social, Economic and Cultural Impacts in the Philippines (A Paper Published by the Philippine Rural Reconstruction Movement Conrado Benitez Insitute for Sustainability)* 10-11, available at <http://www.prrm.org/publications/gmo2/mining.pdf> (last accessed Oct. 31, 2016).

18. *Id.* at 11.

19. An Act Instituting a New System of Mineral Resources Exploration, Development, Utilization, and Conservation Mining Act [Philippine Mining Act of 1995], Republic Act No. 7942 (1995).

20. *Id.* ch. XVI.

21. Rosette Adel, *Duterte backs Lopez in fight vs illegal mining companies*, PHIL. STAR, July 25, 2016, available at <http://www.philstar.com/headlines/2016/07/25/1606581/duterte-backs-lopez-fight-vs-illegal-mining-companies> (last accessed Oct. 31, 2016). See also Madelaine B. Mirafior, *DENR to review all mining deals, seeks more revenues for gov't*, MANILA BULL., July 1, 2016, available at <http://www.mb.com.ph/denr-to-review-all-mining-deals-seeks-more-revenues-for-govt> (last accessed Oct. 31, 2016).

the national government.²² A significant number of jobs are also created, which boost the local economy through increased economic activities and the formation of downstream industries.²³ These may lead to improved infrastructure, such as roads and bridges; and funding for the health, education, livelihood, reforestation, watershed management, energy supply, and social development of communities.

Because mineral resources are finite, mining operations have a limited lifespan.²⁴ However, its impact on the environment and on the people is irreversible and often last longer than its operations.²⁵ Communities and existing land uses are displaced to give way to mining activities.²⁶ People's health is affected because of pollution,²⁷ whether of land (e.g., contaminants in the soil), of air (e.g., dust or particulate matter), or of water (e.g., dumping of waste materials in rivers). One study has opined that mining endangers food security.²⁸ Disposal of mine wastes and tailings, and even the unintended collapse of tailings ponds, results in siltation of irrigation canals, paddy fields, rivers, and lakes; this, in turn, results in land damage and reduced crop yields.²⁹

Furthermore, mining affects the land and seabed where the resources are found.³⁰ Extraction of ores means that "thousands of [tons] of earth and rocks have to be removed, forests cleared, and water and drainage systems diverted."³¹ It destroys plant life and animal habitats, and may possibly cause

22. See Joan Michelle M. Legaspi, et al., *Access to Environmental Justice: A Sourcebook on Environmental Rights and Legal Remedies* (A Project of the United Nations Development Programme, Supreme Court of the Philippines, and the Philippine Judicial Academy) 9, available at http://www.ombudsman.gov.ph/UNDP4/wp-content/uploads/2013/02/4_A-Sourcebook.-on-Env-Rights-and-Legal-Remedies-FINAL-B.pdf (last accessed Oct. 31, 2016).

23. *Id.*

24. Ateneo School of Government, *supra* note 14, at 2.

25. *Id.*

26. *Id.* at 1.

27. *Id.* at 10.

28. GOODLAND & WICKS, *supra* note 16, at 4-10.

29. See Miningfacts.org, *How are waste materials managed at mine sites?*, available at <http://www.miningfacts.org/Environment/How-are-waste-materials-managed-at-mine-sites> (last accessed Oct. 31, 2016).

30. GOODLAND & WICKS, *supra* note 16, at 1.

31. *Id.* at 1.

their extinction.³² Mining equipment and procedures create noise — the sound of earthworks, machinery, or dump trucks plying small roads. It causes forests to become denuded because mining contractors have the right to cut trees and timber in the mining area.³³ It causes soil erosion³⁴ and reduced slope stability, leading to a higher risk of landslides.³⁵ It has resulted in the sinking of communities, collapse of mountains, and subsidence of mining areas due to open-pit mining.³⁶ It affects biodiversity, damages watersheds,³⁷ and pollutes marine ecosystems. Furthermore, it necessitates huge amounts of water, which in itself is a scarce resource.³⁸

Even if mining operators and corporations strive to be responsible, their efforts may be thwarted by nature herself. Natural disasters can have devastating effects on mining areas and their ecosystems,³⁹ for example — storms that wash mineral residues to the sea destroying coral reefs and killing other marine life,⁴⁰ or earthquakes. The situation is even more precarious considering the finding that the Philippines is one of the countries most likely to be affected by climate change.⁴¹

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32. WILLIAM N. HOLDEN & R. DANIEL JACOBSON, *MINING AND NATURAL HAZARD VULNERABILITY IN THE PHILIPPINES: DIGGING TO DEVELOPMENT OR DIGGING TO DISASTER?* 60 (2013).
 33. Philippine Mining Act of 1995, § 72.
 34. Victor Asio, et al., *A review of soil degradation in the Philippines*, 2 ANNALS TROPICAL RESEARCH 69, 80-81 (2009).
 35. See RODELIO B. CARATING, ET AL., *THE SOILS OF THE PHILIPPINES* 203-05 (2014).
 36. ANTONIO A. TUJAN JR. & ROS-B GUZMAN, *GLOBALIZING PHILIPPINE MINING* 120 (1998). See GERMELINO M. BAUTISTA, *NATURAL RESOURCES, ECONOMIC DEVELOPMENT, AND THE STATE: THE PHILIPPINE EXPERIENCE* 36-37 (1994).
 37. GOODLAND & WICKS, *supra* note 16, at 1.
 38. World Wild Fund for Nature, *Water Scarcity*, available at <http://www.worldwildlife.org/threats/water-scarcity> (last accessed Oct. 31, 2016).
 39. See Ateneo School of Government, *supra* note 14, at 2.
 40. *Id.* at 10.
 41. Kristine L. Alave, *Study: Philippines among countries most affected by climate change*, PHIL. DAILY INQ., Dec. 5, 2011, available at <http://globalnation.inquirer.net/20237/study-philippines-among-countries-most-affected-by-climate-change> (last accessed Oct. 31, 2016).

The effects of mining on the environment similarly affect people. For example, when the soil, water, or air is poisoned, the health of humans, animals, and plants are likewise adversely affected. Water pollution leads to contaminated drinking water for humans and damaged habitats for aquatic resources, on which humans depend on for food and livelihood. Reduced water availability likewise impacts irrigation and farm productivity.⁴²

With that said, there have been studies concluding that the economic benefits of mining are minimal and its costs outweigh all perceived advantages.⁴³ Nevertheless, considering the basic premise that there will always be demand for mining in the foreseeable future because of the need for minerals — in addition to the fact that the Philippine legal system supports the continuation of mining activities⁴⁴ — Filipinos have to live with mining and its issues. Local communities, in particular, have to learn to manage the consequences of mining since the risks and the resulting environmental degradation can neither be prevented nor eliminated and can only be lessened. It is not surprising, then, that whenever and wherever there is a mining application or operation, the different interests of the various stakeholders produce conflicts.

Historically, large-scale mining has been opposed by its host communities and civil society (e.g., non-governmental organizations (NGOs), people's organizations, and church-based groups) because of the social and environmental problems that these practices allegedly cause.⁴⁵ They complain that mining companies have a poor track record in terms of mining accidents that result in massive environmental damage.⁴⁶ They view mining as having a negative impact on livelihood and as a major source of human rights abuses,⁴⁷ including the killings of those who oppose mining operations.⁴⁸ There is a perception that the benefits of mining fail to trickle

42. See Ateneo School of Government, *supra* note 14, at 4.

43. *Id.* at 4-5.

44. See Ronnel W. Domingo, *Mining to stay but under tighter rules*, PHIL. DAILY INQ., Aug. 24, 2016, available at <http://business.inquirer.net/213971/mining-to-stay-but-under-tighter-rules> (last accessed Oct. 31, 2016).

45. See HOLDEN & JACOBSON, *supra* note 32, at 170.

46. *Id.* at 173.

47. See generally CATHAL DOYLE, ET AL., *MINING IN THE PHILIPPINES: CONCERNS AND CONFLICTS* 8 (Mara Stankovitch, et al. eds., 2007).

48. See generally Cielo Magno, *The Mining for Development Framework for the Philippines (A Discussion Paper Circulated Privately in the University of the Philippines Diliman)* 14, available at <http://www.econ.upd.edu.ph/dp/index.php/dp/article/viewFile/1482/964> (last accessed Oct. 31, 2016).

down to the community that is directly affected and bears the costs of the activities.⁴⁹ The effect of past mining conflicts on the community, coupled with the lack of any resolution resulting in on-going tensions and escalating violence, have resulted in suspicion, mistrust, disillusionment, and a more vocal protest of communities against mining.⁵⁰ This has resulted in the reputation of mining companies as outsiders and as threats to the community's future and way of life.⁵¹

It has been observed that —

In many instances when a mining company just explores an area, people in the local communities already feel threatened. Normally people should feel threatened, if at all, only when the mining operation starts. But the start-up of operations is at least six years down the line from the beginning of exploration. In other countries, talks regarding community compensation and social development would take place when it has been decided to go ahead with the mining operation. However, here in the Philippines[,] the communities are already poor, underprivileged[,] and insecure. Even at the very prospect of a mining operation being explored, some are convinced that their land, [] homes, and [] way of life are endangered. They are not sure about what is going to happen to them; they are faced with great uncertainty; the only world they know seems about to be pulled apart. In many cases, they have never felt that they belong to the wider society; they are outsiders. Now they feel helpless and somehow sense that they are about to be further manipulated and exploited not only by business, but even by some [NGOs] who are simply using the community to further their political agenda.⁵²

One mining disaster which has been etched in the memories of Filipinos is the 1996 Marcopper incident, which was illustrated briefly in a study —

When the company finished one of its operations in Marinduque, it plugged the old pit with concrete so that it could act as a disposal pond for mine waste. In August 1995, seepage was discovered in the pit's drainage tunnel. This subsequently ruptured. The accident discharged tailings into the Makulapnit-Boac (Boac) river system.

The incident resulted in the release of some 1.6 million cubic meters of tailings along 27 [kilometers] of the river and the coastal areas near its mouth. The impact on the river and the people who depend on it for their livelihoods was massive. The onrush of tailings displaced river water which

49. *Id.* at 31.

50. ENVIRONMENTAL SCIENCE FOR SOCIAL CHANGE, *supra* note 12, at 78-79.

51. *Id.*

52. *Id.* at 79.

inundated low-lying areas, destroying crops and vegetable gardens[,] and clogging irrigation channels to rice fields. The release left the Boac River virtually dead. The effects of the incident were so devastating that a [United Nations] assessment mission declared the accident to be a major environmental disaster.⁵³

According to another report, '[a]s of 2003, there had been at least 16 serious tailings dam failures in the preceding 20 years and over 800 abandoned mine sites have not been cleaned up. Clean-up costs are estimated in billions of dollars and the damage caused will never be fully reversed.'⁵⁴

Mining companies and their advocates argue that the past mistakes of mining should not be taken against the industry as a whole.⁵⁵ But, considering the extent of the damage caused by mining accidents, such as the latest serious mining spill disaster in August 2012 involving the Padcal Mine operated by Philex Mining Corporation in Benguet,⁵⁶ this has not assuaged the fears of communities. Said spill has been regarded as the biggest mining disaster to ever hit the country — even worse than the aforementioned Marcopper case.⁵⁷

B. Relevant Mining Laws

Under the 1987 Philippine Constitution and the Regalian doctrine,⁵⁸ the State owns all public lands and mineral resources and that the latter's

53. See generally Ma. Eugenia Bennagen, *Philippine Mining Disaster: Counting the Cost of a Ruined River* (Policy Brief Published by the International Development Research Centre) 1, available at <http://idl-bnc.idrc.ca/dspace/bitstream/10625/27051/5/117863.pdf> (last accessed Oct. 31, 2016).

54. DOYLE, ET AL., *supra* note 47, at 10 (citing Philippine Indigenous Peoples Links, *Chronology of tailings dam failures in the Philippines (1982-2007)*, available at [www.piplinks.org/system/files/Tailings+dam+failures+\(070722\).doc](http://www.piplinks.org/system/files/Tailings+dam+failures+(070722).doc) (last accessed Oct. 31, 2016) & Ronnie E. Calumpita, 857 *Abandoned Mines Pose Health Menace*, *Say Ngos*, *MANILA TIMES REPORTER*, Oct. 11, 2005).

55. See Manuel V. Pangilinan, *How can mining work for the Philippines?*, available at <http://www.rappler.com/thought-leaders/2073-how-can-mining-work-for-philippines> (last accessed Oct. 31, 2016).

56. Rouchelle R. Dinglasan, *Philex spill 'biggest mining disaster' in PHL, surpassing Marcopper — DENR*, available at <http://www.gmanetwork.com/news/story/281988/news/nation/philex-spill-biggest-mining-disaster-in-phl-surpassing-marcopper-denr> (last accessed Oct. 31, 2016).

57. *Id.* & Magno, *supra* note 48, at 15.

58. The Regalian doctrine provides, among other things, that all lands of the public domain belong to the State, and all lands not of private ownership are presumed

exploration, development, and utilization shall be under the State's full control and supervision.⁵⁹ In this regard, the State may enter into agreements with mining corporations or entities for such exploitation.⁶⁰

Mining in the Philippines is regulated by a number of laws, executive issuances, and agencies.

The Mining Act provides for an investment package and incentives for mining operators (e.g., tax holidays and full repatriation of profits).⁶¹ It also requires a comprehensive environmental plan from the mining entities that addresses the negative effects of mining from the beginning of operations until its end.⁶² Its Revised Implementing Rules and Regulations are embodied in Department of Environment and Natural Resources (DENR) Administrative Order (A.O.) No. 96-40⁶³ and the consolidated DENR A.O. No. 2010-21.⁶⁴

The constitutionality of the Mining Act, particularly those provisions allowing the government to enter into financial and technical agreements involving large-scale mining operations with 100% foreign-owned companies, was questioned but ultimately upheld by the Supreme Court in the case of *La Bugal-B'laan Tribal Association, Inc. v. Ramos*.⁶⁵ As of this writing, there are current petitions again questioning the constitutionality of the same law in the Supreme Court.⁶⁶

to be owned by the State. *See* *Aranda v. Republic*, 656 SCRA 140, 146-47 (2011).

59. *See* PHIL. CONST. art. XII, § 2.

60. *Id.* *See* *La Bugal-B'laan Tribal Association, Inc. v. Ramos*, 421 SCRA 148, 205-13 (2004).

61. Philippine Mining Act of 1995, ch. XVI.

62. *Id.* ch. XI.

63. Department of Environment and Natural Resources, Revised Rules and Regulations Implementing the Philippine Mining Act of 1995, Administrative Order No. 96-40 [DENR A.O. No. 96-40] (Dec. 19, 1996).

64. Department of Environment and Natural Resources, Providing for a Consolidated Department of Environment and Natural Resources Administrative Order for the Implementing Rules and Regulations of Republic Act No. 7942, Otherwise Known as the "Philippine Mining Act of 1995," Administrative Order No. 2010-21 [DENR A.O. No. 2010-21] (June 28, 2010).

65. *See generally* *La Bugal-B'laan Tribal Association v. Ramos*, 445 SCRA 1 (2004).

66. *See* *Hontiveros-Baraquel v. DENR Secretary, G.R. Nos. 181702-3* (SC, filed Mar. 3, 2008).

Republic Act (R.A.) No. 7076⁶⁷ or the People's Small-scale Mining Act of 1991 (Small-scale Mining Act) regulates small-scale mining referring "to mining activities which rely heavily on manual labor using simple implement and methods and do not use explosives or heavy mining equipment[.]"⁶⁸ Small-scale mining can only be conducted on what are called people's small-scale mining areas (PSSMAs) or *Minahang Bayan*.⁶⁹ An earlier law, Presidential Decree (P.D.) No. 1899,⁷⁰ issued in 1984, governs small-scale mining areas which are not declared as PSSMAs. It regulates small-scale mining which refers to a "mining operation having an annual production of not more than 50,000 metric tons of ore[.]"⁷¹

Executive Order (E.O.) No. 79⁷² was issued by former President Benigno Simeon C. Aquino III on 12 July 2012 and continues to express the government's mining policy. The DENR issued its Implementing Rules and Regulations embodied in DENR A.O. No. 2012-07⁷³ on 10 September 2012 and the amendments in DENR A.O. No. 2012-07-A,⁷⁴ which took

67. An Act Creating a People's Small-scale Mining Program and for Other Purposes [People's Small-Scale Mining Act of 1991], Republic Act No. 7076 (1991).

68. *Id.* § 3 (b).

69. Department of Environment and Natural Resources, Revised Implementing Rules and Regulations of Republic Act No. 7076, Otherwise Known as the "People's Small-Scale Mining Act of 1991," Administrative Order No. 2015-03 [DENR A.O. 2015-03], § 5 (Mar. 16, 2015).

70. Establishing Small-scale Mining as a New Dimension in Mineral Development, Presidential Decree No. 1899 (1984).

71. *Id.* at § 1. The Supreme Court has ruled that Republic Act No. 7076 and Presidential Decree No. 1899 may co-exist. *SR Metals, Inc. v. Reyes*, 724 SCRA 535, 547 (2014).

72. Office of the President, Institutionalizing and Implementing Reforms in the Philippine Mining Sector Providing Policies and Guidelines to Ensure Environmental Protection and Responsible Mining in the Utilization of Mineral Resources, Executive Order No. 79 [E.O. No. 79, s. 2012] (July 6, 2012).

73. Department of Environment and Natural Resources, Rules and Regulations to Implement Executive Order No. 79 Dated 06 July 2012 Entitled: Institutionalizing and Implementing Reforms in the Philippine Mining Sector Providing Policies and Guidelines to Ensure Environmental Protection and Responsible Mining in the Utilization of Mineral Resources, Administrative Order No. 2012-07 [The Implementing Rules and Regulations of Executive Order No. 79] (Sep. 10, 2012).

74. Department of Environment and Natural Resources, Amendment to DENR A.O. 2012-07 [DENR A.O. 2012-07-A] (Oct. 8, 2012).

effect on 25 October 2012. Under these issuances, there is a moratorium on the award of new mineral agreements “until a legislation rationalizing existing revenue sharing schemes and mechanisms shall have taken effect”⁷⁵ unless “there is an imminent and/or threatened economic disruption, such as shortage of critical commodities and raw materials, that could adversely affect priority government projects.”⁷⁶ In addition, in 2016, aside from its own moratorium on new mining projects, an audit of operating mines was ordered under DENR Memorandum Order (Memo. Order) No. 2016-01.⁷⁷ Small-scale mining under P.D. No. 1899 is also no longer allowed under E.O. No. 79 because it is limited to *Minahang Bayan*.⁷⁸

The State exercises its control and supervision over the country’s mineral resources through the DENR and more directly through its two line bureaus, the Mines and Geosciences Bureau (MGB) and the Environmental Management Bureau (EMB).⁷⁹

The EMB executes environmental laws, rules, and regulations, including mining laws, to ensure that mining activities are compliant with environmental protection laws.⁸⁰ The EMB implements the Environmental Impact Assessment System wherein the mining proponent must obtain an Environmental Compliance Certificate (ECC) before commencing with an environmentally critical project or activity in an environmentally critical area.⁸¹ Under the ECC, the mining proponent certifies that the project will not cause significant negative environmental impact.⁸²

75. E.O. No. 79, s. 2012, § 4.

76. DENR A.O. 2012-07-A, whereas cl. para. 1.

77. Department of Environment and Natural Resources, Audit of All Operating Mines and Moratorium on New Mining Projects, Memorandum Order No. 2016-01 (July 8, 2016).

78. E.O. No. 79, s. 2012, § 11 (b).

79. Mines and Geosciences Bureau, Organizational Structure, *available at* <http://www.mgb.gov.ph/images/homepage-images/OrganizationalStructure.pdf> (last accessed Oct. 31, 2016) & Environmental Management Bureau, About Us, *available at* <http://emb.gov.ph/about-us-2> (last accessed Oct. 31, 2016).

80. *See* Environmental Management Bureau, *supra* note 79.

81. Establishing an Environmental Impact Statement System, Including Other Environmental Management Related Measures and for Other Purposes, Presidential Decree No. 1586, § 4 (1978).

82. *See* Department of Environment and Natural Resources, Rules and Regulations Implementing the Philippine Environmental Impact Statement (EIS) System, Administrative Order 2003-30 [DENR A.O. 2003-30], § 3 (d) (2003).

Under E.O. No. 79, an interagency forum called the Mining Industry Coordinating Council was constituted to coordinate the efforts in implementing the order, among others.⁸³

Another law that has a bearing on mining is the Indigenous Peoples' Rights Act of 1997 (IPRA).⁸⁴ This law gives indigenous peoples the right to develop lands and natural resources within their ancestral domains and priority rights in the harvesting, extraction, development, or exploitation of their natural resources.⁸⁵ Thus, their free and prior informed consent must be secured for projects affecting these rights, including mining operations.

The Philippine Climate Change Act⁸⁶ mandates government agencies and instrumentalities to integrate the concept of climate change in all policy-making.⁸⁷

Under Section 3, Article X of the Constitution, local government units (LGUs) (i.e., provinces, cities, municipalities, and barangays) enjoy local autonomy.⁸⁸ As such, under Section 7, Article X —

Local governments shall be entitled to an equitable share in the *proceeds of the utilization and development of the national wealth within their respective areas*, in the manner provided by law, including sharing the same with the inhabitants by way of direct benefits.⁸⁹

The Local Government Code⁹⁰ implements the constitutionally-enshrined principle of local autonomy.⁹¹ The LGUs' share in the proceeds of

83. E.O. No. 79, s. 2012, §§ 9 & 10.

84. An Act to Recognize, Protect and Promote the Rights of Indigenous Cultural Communities/Indigenous People, Creating a National Commission of Indigenous People, Establishing Implementing Mechanisms, Appropriating Funds Therefor, and for Other Purposes [Indigenous Peoples' Rights Act of 1997], Republic Act No. 8371 (1997).

85. *Id.* §§ 7 (b) & 57.

86. An Act Mainstreaming Climate Change into Government Policy Formulations, Establishing the Framework Strategy and Program on Climate Change, Creating for this Purpose the Climate Change Commission, and for Other Purposes [Climate Change Act of 2009], Republic Act No. 9729, § 2 (2009).

87. *Id.*

88. *See* PHIL. CONST. art. X, § 3.

89. PHIL. CONST. art. X, § 7 (emphasis supplied).

90. An Act Providing for the Local Government Code of 1991 [LOCAL GOV'T CODE], Republic Act No. 7160 (1991).

91. *Id.*

mining is operationalized by Section 82 of the Mining Act⁹² and Section 290 of the Local Government Code —

Section 290. *Amount of Share of Local Government Units.* [—] [LGUs], in addition to the internal revenue allotment, have a share of [40%] of the gross collection derived by the national government from the preceding fiscal year from mining taxes, royalties, forestry[,] and fishery charges, and such other taxes, fees, or charges, including related surcharges, interests, or fines, and from its share in any co-production, joint venture[,] or production sharing agreement in the utilization and development of the national wealth within their territorial jurisdiction.⁹³

Additionally, under the Local Government Code, the national government shall conduct consultations with the LGUs, NGOs and people's organizations, and other concerned sectors of the community before any mining project is implemented in their jurisdiction.⁹⁴ Under Section 27 thereof, the prior approval of the local legislative body or *sanggunian* is necessary for such project.⁹⁵ Additionally, DENR Memo. Order No. 2004-09⁹⁶ requires mining applicants to present proof of consultation or project presentation.⁹⁷

The other environmental laws affecting mining include the Ecological Solid Waste Management Act of 2000,⁹⁸ the Toxic Substances and

92. Section 82 of the Mining Act provides —

Section 82. Allocation of Government Share. — The Government share as referred to in the preceding [S]ections shall be shared and allocated in accordance with Sections 290 and 292 of [R.A.] No. 7160 otherwise known as the Local Government Code of 1991. In case the development and utilization of mineral resources is undertaken by a government-owned or –controlled corporation, the sharing and the allocation shall be in accordance with Sections 291 and 292 of the said Code.

Philippine Mining Act of 1995, § 82.

93. LOCAL GOV'T CODE, § 290.

94. See LOCAL GOV'T CODE, §§ 2 (c), 26, 27, & 408.

95. *Id.* § 27.

96. Department of Environment and Natural Resources, Simplification of Procedures in the Issuance of Mining Contracts and Permits, Memorandum Order No. 2004-09 [DENR Memo. Order No. 2004-09] (Aug. 31, 2004).

97. *Id.* § 5.

98. An Act Providing for an Ecological Solid Waste Management Program, Creating the Necessary Institutional Mechanisms and Incentives, Declaring Certain Acts Prohibited and Providing Penalties, Appropriating Funds Therefor,

Hazardous and Nuclear Wastes Control Act of 1990,⁹⁹ the Philippine Clean Air Act of 1999,¹⁰⁰ the Philippine Clean Water Act of 2004,¹⁰¹ the Pollution Control Law,¹⁰² the Water Code,¹⁰³ the Revised Forestry Code,¹⁰⁴ and the National Integrated Protected Areas System Act of 1992.¹⁰⁵

C. *Kinds of Mining*

As discussed, the Mining Act governs large-scale mining, while the Small-scale Mining Act regulates small-scale mining.

Under the Mining Act, mining applicants can be granted an exploration permit,¹⁰⁶ mineral processing permit,¹⁰⁷ and mineral agreement.¹⁰⁸ The

and for Other Purposes [Ecological Solid Waste Management Act of 2000], Republic Act No. 9003 (2000).

99. 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).
100. An Act Providing for a Comprehensive Air Pollution Control Policy and for Other Purposes [Philippine Clean Air Act of 1999], Republic Act No. 8749 (1999).
101. An Act Providing for a Comprehensive Water Quality Management and for Other Purposes [Philippine Clean Water Act of 2004], Republic Act No. 9275 (2004).
102. An Act Creating the National Water and Air Pollution Control Commission, Republic Act No. 3931 (1964) & Providing for the Revision of R.A. No. 3931, Commonly Known as the Pollution Control Law, and for Other Purposes, Presidential Decree No. 984 (1976).
103. A Decree Instituting a Water Code, Thereby Revising and Consolidating the Laws Governing the Ownership, Appropriation, Utilization, Exploitation, Development, Conservation and Protection of Water Resources [WATER CODE], Presidential Decree No. 1067 (1976).
104. Revising Presidential Decree No. 389, Otherwise Known as the Forestry Reform Code of the Philippines [REV. FORESTRY CODE], Presidential Decree 705 (1975).
105. An Act Providing for the Establishment and Management of National Integrated Protected Areas System, Defining Its Scope and Coverage, and for Other Purposes [National Integrated Protected Areas System Act of 1992], Republic Act No. 7586 (1992).
106. Philippine Mining Act of 1995, ch. IV.
107. *Id.* § 55.
108. *Id.* ch. V.

exploration permit grants the right to conduct exploration of all minerals in specified areas for a period of two years,¹⁰⁹ but is renewable for a similar period and not exceeding a total term of four years for non-metallic mineral exploration or six years for metallic mineral exploration.¹¹⁰

After the exploration stage, the government can enter into the following modes of mineral agreements for enterprises that are 60%-owned by Filipino citizens:

- (a) Mineral production sharing agreement [] is an agreement where the [g]overnment grants to the contractor the exclusive right to conduct mining operations within a contract area and shares in the gross output. The contractor shall provide the financing, technology, management[,] and personnel necessary for the implementation of this agreement.
- (b) Co-production agreement [] is an agreement between the [g]overnment and the contractor wherein the [g]overnment shall provide inputs to the mining operations other than the mineral resource.
- (c) Joint venture agreement [] is an agreement where a joint-venture company is organized by the [g]overnment and the contractor with both parties having equity shares. Aside from earnings in equity the [g]overnment shall be entitled to a share in the gross output.¹¹¹

These mineral agreements have a term of not exceeding 25 years and renewable for another 25 years.¹¹²

For large-scale mining, the government can enter into financial or technical assistance agreements (FTAA) with Filipino and non-Filipino owned enterprises.¹¹³

The area allowed for small-scale mining under the Small-scale Mining Act is a maximum of 20 hectares per cooperative which should be composed of Filipino citizens for a duration of two years.¹¹⁴

109. *Id.* §§ 20 & 21.

110. *See* Department of Environment and Natural Resources, Revised Implementing Rules and of Republic Act No. 7942, Otherwise Known as the “Philippine Mining Act of 1995,” Administrative Order No. 96-40 [DENR A.O. No. 96-40], ch. V, § 18 (Dec. 19, 1996).

111. Philippine Mining Act of 1995, § 26 (a) – (c).

112. *Id.* § 32.

113. *Id.* § 33.

114. People’s Small-scale Mining Act of 1991, §§ 10 & 13.

Filipinos have been engaged in small-scale mining for at least 10 centuries and in large-scale mining by foreign as well as Filipino companies for about a century.¹¹⁵

D. Mining Disputes

Mining has resulted in opposing claims and similar conflicts, if not outright violations of laws and rules, due to the perceived negative impacts on affected stakeholders. Mining conflicts can be emotional and volatile.¹¹⁶ This is because affected stakeholders are usually underprivileged people in rural areas who feel strongly about the land they have settled in. Mining results in a disturbance of the land and environment on which they rely on for their way of life and livelihood.¹¹⁷ Misunderstanding, uncertainty, and confusion breed discontent and conflict.

Mining conflicts may arise between or among the following parties: the mining operator or company against the community or its members; the mining company along with the national government representative against the community and local government officials; and the community against the operator and government representatives, both national and local, or among operators. Local governments may not have carried out sufficient consultations with their constituents. Even among government officials, there is tension between national and local policy-makers.¹¹⁸ These two sides may have divergent or opposing views or priorities. Also, with respect to indigenous peoples, they may have sentiments and values that are

115. Cordillera Peoples Alliance, *Case Study on the Impacts of Mining and Dams on the Environment and Indigenous Peoples in Benguet, Cordillera, Philippines* (An Unpublished Paper Submitted to the United Nations Department of Economic and Social Affairs Division for Social Policy and Development) 2, available at http://www.un.org/esa/socdev/unpfii/documents/workshop_IPPE_cpp.doc (last accessed Oct. 31, 2016).

116. See Lala Rimando, MVP to Gina Lopez on mining: You're lying!, available at <http://www.rappler.com/business/2059-mvp-to-gina-lopez-on-mining-you-re-lying> (last accessed Oct. 31, 2016).

117. ANDRE GERARD GARCIA BALLESTEROS, ALL THAT GLITTERS: UNDERSTANDING THE MYTH OF "SUSTAINABLE MINING" IN THE PHILIPPINES 14 (1997). See Bayle, *supra* note 17, at 47 & 51-53.

118. See Carmela Fonbuena, Mining E.O. pits gov't vs local execs, available at <http://www.rappler.com/business/special-report/whymining/whymining-latest-stories/8307-mining-eo-pits-gov-t-vs-local-execs> (last accessed Oct. 31, 2016).

inconsistent with the policies of national and local officials. Mining conflicts may fall under the following areas:

- (1) Who maintains control of a particular area containing a valuable mineral resource, especially when there are competing and incompatible land uses such as mining and agriculture[;]
- (2) Who possesses the right to participate in decision making about the management of the resource and who benefits from the presence of the mineral (often an issue for local communities)[;]
- (3) What means are used to secure capital investment and human resources to run the mining operation[; or]
- (4) The social and environmental impacts of mining activities.¹¹⁹

The specific issues often confronted in Philippine communities are enumerated in detail below.

First, the affected community. The mining application should be acceptable to the affected community. However, it may not always be clear who the affected communities are. In addition, it can take time to see the effects of a mining activity, especially if the same are unintended.

Second, the land use. Mining can be incompatible with current land uses of the area. Aside from that, the community may also prefer the alternatives to mining in terms of economic benefits, such as agriculture, fisheries, or tourism.

Third, the benefits. There is difficulty in computing the fair distribution or allocation of the profits to the parties. Is what is given fair? What is the fair amount? What should be taken into consideration in determining what is fair? Who controls what is given, such as the Community Development Fund¹²⁰ which is required under the Mining Act?¹²¹

119. J.S. Andrew, *Potential application of mediation to land use conflicts in small scale mining*, 11 J. CLEANER PROD. 117, 118-19 (2003) (citing Jason Switzer, Discussion Paper for the July 11 2001 Experts Workshop on Armed Conflict and Natural Resources: The Case of the Minerals Sector (A Discussion Paper Written for the Mining, Minerals, and Sustainable Development Project by the International Institute for Sustainable Development) 5, available at https://www.iisd.org/pdf/2002/envsec_mining_conflict.pdf (last accessed Oct. 31, 2016)).

120. DENR A.O. No. 2010-21, § 136-A.

121. Philippine Mining Act of 1995, § 57.

Fourth, the risks. In managing the risks present in a mining operation, are these explained to the community such that they understood the same before they agree to such?

Fifth, the costs. Are the costs of mining taken into consideration? Does the community understand these costs? If the community agrees, even knowing the negative effects, is there a compensation scheme for the environmental damage and social impacts resulting from mining? The social impact may include “disruption of traditional activities[.]”¹²² “[i]ntroduction of undesirable values and practices[.]”¹²³ and “[d]ivisions within the community[.]”¹²⁴

Sixth, the valuation. In making a cost-benefit analysis of a mining operation, parties need to have an acceptable way of estimating the value of resources that will be adhered to by them as basis for decision-making. Valuation is necessary in order to put an amount to the costs of mining, particularly the non-commercially traded resources like the sacredness of the mountain.¹²⁵ Because there is no government standard to rely on, it is essential to enter into an agreement regarding this. Otherwise, it will remain as a contentious issue. If community members are given the choice to sell their land, there should be a fair process of negotiating a mutually suitable price or fair compensation and an acceptable resettlement area.

Seventh, the implementation of agreements. The dialogue does not stop with an agreement. Community members may, in good faith, have second thoughts on the matters they have agreed to. Accordingly, it is imperative that they be heard with regard to their grievances or apprehensions.

Eight, the militarization. Are human rights being violated by security personnel of the mining company or by the military? Let it be noted that in areas where there is insurgency, mining further increases military presence.

Ninth, the conflict with small-scale miners. Small-scale mining is usually used as subsistence livelihood by the inhabitants of the place or by

122. See Jose Florante M. Pamilo, et al., Mapping Out Conflicts in Mining Areas: Drawing Lessons and Seeking Spaces for Building Principled Consensus Towards Effective Mining Governance (An Unpublished Paper from the Ateneo School of Government Mining Governance Program Team) at 25 (on file with Author).

123. *Id.*

124. *Id.* at 26.

125. *Id.* at 12.

indigenous peoples in their ancestral domain.¹²⁶ An estimated 300,000 Filipinos are engaged in small-scale mining.¹²⁷ Small-scale miners complain about the difficulty in obtaining the written consent of large-scale mining companies which have been granted permits by the government.¹²⁸ When there is no resolution for this problem, increased friction between the large-scale mining corporations and small-scale miners is inevitable —

According to accounts received (from Canatuan and elsewhere) [small-scale miners'] tunnels were bulldozed, they were prohibited from entering their traditional mining areas or maintaining their houses there, and as a result they have been displaced. Some have been evicted by force. Protests by small-scale miners have been met with human rights violations, including blockades to control the entry of goods, food[,] and people, and a series of shooting incidents, violence[,] and threats by security firms working for mining corporations.¹²⁹

Tenth, the nondisclosure of relevant information. Considering that affected communities are in rural areas, community members usually lack knowledge and understanding of the situation. Often, the communities are unaware of the nature, extent, duration, coverage or scope, social and environmental effects — both positive and negative — and current status of the mining company's activities, including its plans for future expansion. They are also uninformed of the safeguards and mechanisms the company intends to put in place. This stems from the fact that mining companies are usually from outside the community; thus, the people are unfamiliar with it and its corporate history (i.e., the ownership of the company or any transfer of ownership). As with other ordinary Filipinos, they may not completely understand what the laws say, especially because the pertinent laws are technical and hard to comprehend.

Eleventh, the broken or false promises. What are the company's limitations with respect to the benefits and concessions it will provide, like employment or sourcing of raw materials from community members? One common complaint of affected communities is that mining companies do

126. DOYLE, ET AL., *supra* note 47, at 19.

127. *Id.*

128. The Alternate Forum for Research in Mindanao (AFRIM), A Background Study on the Small-Scale Gold Mining Operations in Benguet and South Cotabato and their Impact on the Economy, the Environment and the Community (An Study Commissioned by Bantay Kita/Action for Economic Reforms) 9, available at https://issuu.com/bkcommunications5/docs/research_small_scale_mining_4718246abb151f (last accessed Oct. 31, 2016).

129. DOYLE, ET AL., *supra* note 47, at 19.

not utilize local labor. However, the reality is that members of the community do not have the necessary skills or expertise that the company needs. The jobs that they are qualified for usually involve heavy manual labor, with meager wages and poor working conditions.

Twelfth, the consent process. In the process of obtaining local consent, there are community members who feel deceived and manipulated by the mining companies. In the legislative process of passing a resolution endorsing mining activities, some complain about the alleged interference by the mining companies with local politics, particularly by contributing to the campaigns of pro-mining candidates. Communities are unable to take advantage of the process or make it effective for themselves because of several factors, such as the lack of alternatives for development, and historical neglect and marginalization resulting in conditions of deprivation and lack of access to basic services.

The same dilemma is faced by indigenous peoples who, as mentioned earlier, under the IPRA, should give their free and prior informed consent (FPIC)¹³⁰ before the government can issue permits or enter into mining agreements in their ancestral domain.¹³¹ There are complaints that “The Revised Guidelines on Free and Prior Informed Consent and Related Processes of 2012,”¹³² promulgated by the National Commission on Indigenous Peoples, is not properly implemented.¹³³

Finally, the mining moratoriums. All these issues have led communities to oppose mining in their areas and to lobby for their local governments to pass ordinances prohibiting mining, mostly large-scale mining, in their jurisdictions. It has been reported that —

130. Indigenous People’s Rights Act of 1997, § 3 (g). Free and prior consent is defined as —

[T]he consensus of all members of the [indigenous cultural communities/indigenous people] to be determined in accordance with their respective customary laws and practices, free from any external manipulation, interference[,] and coercion, and obtained after fully disclosing the intent and scope of the activity, in a language and process understandable to the community.

Id.

131. *Id.* § 59.

132. National Commission on Indigenous Peoples, The Revised Guidelines on Free and Prior Informed Consent (FPIC) and Related Processes of 2012, Administrative Order No. 03 [NCIP A.O. No. 03, s. 2012] (Apr. 13, 2012).

133. Pamfilo, et al., *supra* note 122, at 20 & 22.

According to the MGB, [seven] out of 16 mining projects in the advanced exploration and feasibility financing stages and 25 out of 28 projects in the development and expansion stages are facing conflicts, i.e., opposition from local populations and/or local officials.

...

A number of local legislatures have declared mining moratoriums or banned mining operations. Civil society organizations have protested, filed legal cases against mining companies and/or government agencies that are perceived to have facilitated the operations of mining companies without exercising due diligence.¹³⁴

Some local legislatures have declared mining moratoriums, prompting the national government to state in E.O. No. 79 —

Section 12. *Consistency of Local Ordinances with the Constitution and National Laws/LGU Cooperation.* The Department of the Interior and Local Government [] and the LGUs are hereby directed to ensure that the exercise of the latter's powers and functions is consistent with and conform to the regulations, decisions, and policies already promulgated and taken by the National Government relating to the conservation, management, development, and proper utilization of the State's mineral resources, particularly R.A. No. 7942 and its implementing rules and regulations, while recognizing the need for social acceptance of proposed mining projects and activities.

LGUs shall confine themselves only to the imposition of reasonable limitations on mining activities conducted within their respective territorial jurisdictions that are consistent with national laws and regulations.¹³⁵

To illustrate, South Cotabato's *Sangguniang Panlalawigan* passed an Ordinance¹³⁶ in 9 June 2010 — its Provincial Environment Code — banning open-pit mining in the province.¹³⁷ This delayed the Tampakan copper-gold project by proponent Sagittarius Mines, Inc. (SMI), touted to

134. Maita Gomez, *Transparency Issues in the Philippine Mining Industry (A Policy Paper Submitted to Action for Economic Reforms)* 7, available at <http://www.aer.ph/taxjustice/wp-content/pdf/Mining.pdf> (last accessed Oct. 31, 2016).

135. E.O. No. 79, s. 2012, § 12.

136. Provincial Ordinance No. 04, *Sangguniang Panlalawigan* of the Province of South Cotabato, An Ordinance Providing for the Environment Code of the Province of South Cotabato [The South Cotabato Environment Code] (June 9, 2010).

137. *Id.* § 22 (b).

be the “single biggest foreign investment in the country”¹³⁸ at that the time, worth \$5.9 billion and estimated to contribute an additional one percent to the country’s gross domestic product.¹³⁹ SMI is a holder of an FTAA set to use the open-pit mining method.¹⁴⁰ On 3 January 2012, citing the ban, the DENR denied its application for an ECC.¹⁴¹ However, in February 2013, the ECC was finally granted by the DENR.¹⁴²

The *Sangguniang Panlalawigan* of Bukidnon declared in a Resolution dated 4 May 2011 that it is opposed to large-scale mining.¹⁴³ On 10 January 2011, the Provincial Governor of Romblon issued E.O. No. 001, series of 2011, which declared an “indefinite moratorium on the exploration, excavation, extraction[,] and utilization of metallic minerals in Romblon.”¹⁴⁴ Several other LGUs have also expressed their official opposition to mining.¹⁴⁵

138. Rappler, Palace rebuffs DENR for denying Xstrata unit’s mining permits, *available at* <http://www.rappler.com/business/special-report/whymining/whymining-latest-stories/21322-document-palace-rebuffs-denr-for-denying-xstrata-unit-s-mining-permit> (last accessed Oct. 31, 2016) & Department of Environment and Natural Resources, DENR Issues ECC for Tampakan Project, *available at* <http://www.denr.gov.ph/news-and-features/latest-news/1212-denr-issues-ecc-for-tampakan-project.html> (last accessed Oct. 31, 2016) [hereinafter DENR Issues ECC for Tampakan].

139. *Id.*

140. DENR Issues ECC for Tampakan, *supra* note 138.

141. Bong S. Sarmiento, DENR denies SMI’s ECC application; SMI to appeal for reconsideration, *available at* <http://www.mindanews.com/environment/2012/01/denr-denies-smis-ecc-application-smi-to-appeal-for-reconsideration> (last accessed Oct. 31, 2016).

142. DENR Issues ECC for Tampakan, *supra* note 138.

143. Walter I. Balane, Bukidnon renews opposition to large scale mining, exploration, *available at* <http://www.mindanews.com/environment/2011/05/bukidnon-renews-opposition-to-large-scale-mining-exploration> (last accessed Oct. 31, 2016).

144. Maricar Cinco, *Romblon court rules against mining ban*, PHIL. DAILY INQ., Feb. 3, 2013, *available at* <http://newsinfo.inquirer.net/352079/romblon-court-rules-against-mining-ban> (last accessed Oct. 31, 2016).

145. According to Alyansa Tigil Mina, a coalition of organizations against large-scale mining, among these are the municipalities of Magdiwang, Cajidiocan and San Fernando, Sibuyan Islands; Sagada, Bauko, Tadian and Sabangan, Mt. Province; Leyte; Bulacan; municipality of Cantilan, Surigao del Sur; Quezon; Zambales; municipalities of Loon, Maribojoc, Duero, Guindulman, and Buenavista, Bohol; municipalities of Consolacion and Medellin, Cebu; municipalities of

Some of these mining moratoriums have been challenged in court. In September 2011, the MGB issued a cease and desist order against Altai Philippines Mining Corporation, the principal of Sibuyan Nickel Properties Development Corporation (SNPDC), which was granted a MPSA in 2009.¹⁴⁶ SNPDC filed Special Civil Action Case No. V-1906, a Petition for Declaratory Relief praying that E.O. No. 001 be nullified on the ground of unconstitutionality.¹⁴⁷ On 17 January 2013, Regional Trial Court (RTC), Branch 81 of Romblon Province issued a Resolution declaring E.O. No. 001 to be unconstitutional and allowing SNPDC to proceed with its minerals exploration.¹⁴⁸ Thus, on 11 February 2013, the *Sangguniang Panlalawigan* of Romblon passed its Environment and Natural Resources Code, wherein in Section 64 it is stated —

- Mining shall not be allowed within one (1) kilometer radius from a declared watershed or watershed areas as identified by the municipality concerned;
- Mining shall not be allowed above watershed areas regardless of its distance from the declared watershed areas;
- Mining shall not be allowed in tourism and agricultural areas as designated by the municipality concerned; in areas named by Presidential [E.O.] No. 79, series of 2012; and in Section 19 of [R.A. No.] 7942 as provided shall be applicable within the purview of Section 64 of this Code.¹⁴⁹

Maria, Siuijor, Enrique Villanueva, San Juan, and Larena, Siquijor; Oriental Mindoro; Occidental Mindoro; Marinduque; municipalities of Governor Generoso and San Isidro, Davao Oriental; Samar; Capiz; Iloilo; and Negros Occidental. Alyansa Tigil Mina, About, *available at* <http://alyansatigilmina.net/about> (last accessed Oct. 31, 2016) & Statement by Alyansa Tigil Mina, *List of local measures opposing large-scale mining* 1-2 (on file with Author).

146. Alyansa Tigil Mina, Green groups, Romblon governor question regional court ruling against local issuances, *available at* <http://alyansatigilmina.net/2013/01/29/green-groups-romblon-governor-question-regional-court-ruling-against-local-issuances> (last accessed Oct. 31, 2016).

147. *Id.*

148. Fortun, Narvasa & Salazar, FNS Scores Win for Mining in Romblon, *available at* <http://www.fnslaw.com.ph/PDF%20Files/FNS%20SCORES%20WIN%20FOR%20SIBUYAN-final.pdf> (last accessed Oct. 31, 2016).

149. Alyansa Tigil Mina, Romblonanons pass Environment and Natural Resources Code, *available at* <http://alyansatigilmina.net/2013/02/13/romblonanons-pass-environment-and-natural-resources-code> (last accessed Oct. 31, 2016) (citing Provincial Ordinance No. 2013, *Sangguniang Panlalawigan* of the Province of

Like in South Cotabato, the *Sangguniang Panlalawigan* of Zamboanga del Norte also passed an Ordinance on 15 August 2011 banning open-pit mining.¹⁵⁰ TVI Resource Development (Philippines), Inc. (TVIRD), a MPSA holder, filed a Petition for Relief challenging the constitutionality of the ordinance in the RTC of Dipolog City which granted it, in January 2012, a preliminary injunction against the implementation of the Ordinance.¹⁵¹

The sentiment of local communities is that, despite the fact that they are the most affected, negotiations for the terms of the agreement with mining companies are held at a national level.¹⁵² It has been observed that —

In declaring the supremacy of national laws over local laws, the [E.O.] opens the mining industry to tedious and unproductive court litigation. Section 12 provides that local ordinances should be consistent with the Constitution and national laws, that LGUs should be confined to the imposition of ‘reasonable limitations’ on mining activities in their jurisdiction, and that these should be consistent with national laws and regulations. But who determines ‘reasonable limitations’?¹⁵³

Despite the policy stated in Section 12 of E.O. No. 79, there is no sign that LGUs are backing down with their moratoriums since they consider their legislation to be valid until struck down by the courts.¹⁵⁴ Furthermore, after the issuance of E.O. No. 79, several more LGUs have issued ordinances mandating a total ban or moratorium of mining within their jurisdictions.¹⁵⁵

Romblon, Adopting the Environment and Resources Code of Romblon [The Environment and Resources Code], § 64 (Feb. 11, 2013)).

150. Provincial Ordinance No. ZN-11-128, *Sangguniang Panlalawigan* of the Province of Zamboanga del Norte, An Ordinance Protecting and Conserving the Integrity of the Land, Water and Vegetative Resources in Zamboanga del Norte (Aug. 15, 2011).

151. Marianne V. Go, *TVIRD obtains injunction vs Zambo mining ban*, PHIL. STAR, Jan. 7, 2012, available at <http://www.abs-cbnnews.com/business/01/06/12/tvird-obtains-injunction-vs-zambo-mining-ban> (last accessed Oct. 31, 2016).

152. Philippine Daily Inquirer, *Editorial: Mining Issues*, PHIL. DAILY INQ., July 23, 2013 available at <http://opinion.inquirer.net/33271/mining-issues> (last accessed Oct. 31, 2016).

153. *Id.*

154. Allan Nawal & Jeffrey Maitem, *Mining ban stays, says S. Cotabato governor*, PHIL. DAILY INQ., Feb. 21 2013, available at <http://newsinfo.inquirer.net/362313/mining-ban-stays-says-s-cotabato-governor> (last accessed Oct. 31, 2016).

155. One of the more recent total mining moratoriums by a LGU was issued by Davao City on 5 May 2015. See Rappler, Karlus Manlupig, *Davao vows to*

In the midst of all these, the national government, through the Department of Interior and Local Government, was empowered to file cases against local government officials who enact ordinances conflicting with national laws.¹⁵⁶ All these mentioned heretofore illustrate the divisiveness caused by mining.

E. Mining Cases Filed in Court

In 2010, the Supreme Court formulated the Rules of Procedure for Environmental Cases (Rules).¹⁵⁷ The Rules categorizes environmental cases into three: (a) ordinary civil actions,¹⁵⁸ (b) special civil actions,¹⁵⁹ and (c) criminal actions.¹⁶⁰ Special civil actions include the Petitions for Writ of *Kalikasan*¹⁶¹ and Writ of Continuing *Mandamus* which are new and innovative remedies pioneered under the Rules.¹⁶² The Petition for Writ of *Kalikasan* is a remedy filed in the Court of Appeals (CA) or Supreme Court

available to a natural or juridical person, entity authorized by law, people's organization, non-governmental organization, or any public interest group accredited by or registered with any government agency, on behalf of persons whose constitutional right to a balanced and healthful ecology is violated, or threatened with violation by an unlawful act or omission of a public official or employee, or private individual or entity, involving environmental damage of such magnitude as to prejudice the life, health[,] or property of inhabitants in two or more cities or provinces.¹⁶³

The Petition for Writ of Continuing *Mandamus*, on the other hand, is filed in the RTC, CA, or Supreme Court by a person personally aggrieved

shield mining ban from Malacañang pressure, *available at* <http://www.rappler.com/nation/93080-davao-mining-ban-malacanang-pressure> (last accessed Oct. 31, 2016).

156. Department of Justice, DOJ Opinion No. 87, Series of 2012 (Sep. 18, 2012).

157. RULES OF PROCEDURE FOR ENVIRONMENTAL CASES, A.M. No. 09-6-8-SC, Apr. 13, 2010.

158. *Id.* part II.

159. *Id.* part III.

160. *Id.* part IV.

161. *Id.* rule 7.

162. *Id.* rule 8.

163. RULES OF PROCEDURE FOR ENVIRONMENTAL CASES, rule 7, § 1.

[w]hen any agency or instrumentality of the government or officer thereof unlawfully neglects the performance of an act which the law specifically enjoins as a duty resulting from an office, trust[, or] station in connection with the enforcement or violation of an environmental law rule or regulation or a right therein, or unlawfully excludes another from the use or enjoyment of such right ... [.]¹⁶⁴

The writ is *continuing* in that —

[i]t permits the court to retain jurisdiction after judgment in order to ensure the successful implementation of the reliefs mandated under the court's decision. For this purpose, the court may compel the submission of compliance reports from the respondent government agencies as well as avail of other means to monitor compliance with its decision.¹⁶⁵

Under these petitions — both of which are exempt from payment of filing fees¹⁶⁶ — the petitioner may also pray for an Environmental Protection Order (EPO) “directing or enjoining any person or government agency to perform or desist from performing an act in order to protect, preserve, or rehabilitate the environment.”¹⁶⁷ When an EPO is prayed for, the petitioner may also ask for a Temporary Environmental Protection Order (TEPO) as a provisional remedy.¹⁶⁸ The TEPO is issued if “the matter is of extreme urgency and the applicant will suffer grave injustice and irreparable injury[.]”¹⁶⁹ No bond is required for its issuance.¹⁷⁰

Another highlight of the Rules is the provision on citizen suits by which “[a]ny Filipino citizen in representation of others, including minors or generations yet unborn, may file an action to enforce rights or obligations under environmental laws.”¹⁷¹

Not all mining disputes necessarily land in the courts. Plaintiffs may choose the particular cause of action they want to pursue although there may be other related conflicts against the same defendant. Some of the mining cases pending in courts will be briefly narrated hereunder to give an overview of the nature of cases being currently litigated.

164. *Id.* rule 8, § 1.

165. *Id.* annot., rule 8, § 8.

166. *Id.* rule 7, § 4 & rule 8, § 3.

167. *Id.* rule 1, § 4 (d).

168. *Id.* rule 2, § 8.

169. RULES OF PROCEDURE FOR ENVIRONMENTAL CASES, rule 2, § 8.

170. *Id.*

171. *Id.* rule 2, § 5.

Before the Rules were issued, on 27 February 2008, Didipio Earthsavers Multi-Purpose Association filed an injunction suit against OceanaGold in the RTC Branch 30 of Bayombong, Nueva Vizcaya.¹⁷² On the same day, a temporary restraining order was issued restraining OceanaGold from demolishing the houses of complainants.¹⁷³ OceanaGold filed a motion to dismiss which was denied by the RTC of Bayombong.¹⁷⁴ This denial was questioned by the company in the CA, which dismissed the petition for *certiorari* on 22 February 2010.¹⁷⁵

On 22 June 2010, the Anislagan Bantay Kalikasan Task Force, Inc. and Lower Anislagan Farmers Irrigators Association, Inc. filed the very first case under the Rules.¹⁷⁶ It was a case for injunction with damages, with urgent *ex parte* application for EPO and/or TEPO against Manila Mining Corp., Kalayaan Copper Gold Resources and Silangan Mindanao Mining, Inc. in the RTC, Branch 30 in Surigao City, Surigao del Norte.¹⁷⁷ The first ever TEPO was issued for 20 days against the exploration activities of the three companies.¹⁷⁸

In the Municipality of Cantilan, Surigao del Sur, Jaime “Datu Dagsaan” Bat-ao, Liquisa Irrigators Association, Nagkahugpong Managatay Para sa Kalambuan Nan Ayote, et al. filed a Petition for Injunction with Urgent *Ex-parte* Application for TEPO and/or EPO under the Rules against Marcventures Mining and Development Corp. (MMDC) in the RTC, Branch 41 of Cantilan.¹⁷⁹ On 10 November 2010, the RTC of Cantilan issued against MMDC a TEPO which was extended on 26 May 2011, enjoining MMDC from continuing its mining activities and operation inside

172. Solidarity Philippines Australia Network, UPDATE: Ifugaos Applaud Court of Appeals Junking of OceanaGold Petition, *available at* <http://cpcabrisbane.org/Kasama/2010/V24n1/Didipio.htm> (last accessed Oct. 31, 2016).

173. *Id.*

174. *Id.*

175. *Id.*

176. Philippine Indigenous People Links, Stay order on mining project issued, *available at* <http://www.piplinks.org/Judge+Evangeline+Yuipco-Bayana+.html> (last accessed Oct. 31, 2016).

177. *Id.*

178. *Id.*

179. Balaod Mindanaw, Chronology of the Cantilan Watershed Mining Cases 10-11 (unpublished) (on file with Author).

the watershed.¹⁸⁰ The LGU earlier refused to grant MMDC, which mines nickel ores, a business permit. On 26 May 2011, the RTC of Cantilan issued an Order affirming the effectivity of the TEPO until there was an order lifting or revoking the same.¹⁸¹ On 29 June 2011, MMDC filed a petition for “*Mandamus/Certiorari*, Damages and Injunction” in the RTC of Cantilan, against Cantilan Mayor Genito B. Guardo for the alleged denial of business permits for the mining operations of MMDC in accordance with its MPSA.¹⁸² On 5 July 2011, MMDC filed a complaint in the RTC of Butuan entitled “Damages and Attorney’s Fees” against Cantilan Mayor Guardo and members of the civil society groups who accompanied the Mayor in the conduct of an ocular inspection of the mining premises.¹⁸³ The TEPO has not been implemented by the MGB-Caraga Region and MMDC continued its operations.¹⁸⁴

In an Amended Decision dated 13 September 2013, the CA Fourth Division issued a Writ of *Kalikasan* with a permanent cease-and-desist order against LNL Archipelago Minerals, Inc. from leveling a mountain in Barangay Bolitoc, Santa Cruz, Zambales.¹⁸⁵ Deciding the Petition filed by Agham Party List, the CA stopped the mining company’s alleged construction of a seaport for the transportation of chromite-rich soil to China.¹⁸⁶

In April 2016, however, the Supreme Court reversed the ruling of the CA in *LNL Archipelago Minerals, Inc. v. Agham Party List*.¹⁸⁷ In an *en banc*

180. Danilo Adorador III, *Protesters want temporary environmental protection order against mine firm*, PHIL. DAILY INQ., Mar. 18, 2013, available at <http://newsinfo.inquirer.net/375793/protesters-want-temporary-environmental-protection-order-against-mine-firm> (last accessed Oct. 31, 2016) & Vanessa L. Almeda, *Resign, anti-mining groups tell MGB-Caraga chief*, available at <http://www.mindanews.com/top-stories/2013/04/23/resign-anti-mining-groups-tell-mgb-caraga-chief> (last accessed Oct. 31, 2016).

181. See Balaod Mindanaw, *supra* note 179, at 12.

182. *Id.* at 14.

183. *Id.*

184. Vanessa L. Almeda, *MGB-13 refuses again to enforce order vs mining firm*, available at <http://www.mindanews.com/top-stories/2013/02/06/mgb-13-refuses-again-to-enforce-order-vs-mining-firm> (last accessed Oct. 31, 2016).

185. *LNL Archipelago Minerals, Inc. v. Agham Party List*, G.R. No. 209165, Apr. 12, 2016, at 9, available at <http://sc.judiciary.gov.ph/pdf/web/viewer.html?file=/jurisprudence/2016/april2016/209165.pdf> (last accessed Oct. 31, 2016).

186. *Id.*

187. *Id.* at 1.

decision, the Supreme Court ruled that contrary to the CA's findings, LNL Archipelago Minerals, Inc. (LAMI) "did not cause any environmental damage" that may harm the residents of Santa Cruz, Zambales, and nearby towns in neighboring Pangasinan.¹⁸⁸ Stating that there was no expert testimony or evidence of any environmental damage caused by LAMI, the Supreme Court also noted that, under the Rules on the Writ of *Kalikasan*, the petitioner has the burden to prove that environmental rules have been violated and that ensuing damage harms the inhabitants in two or more cities or provinces.¹⁸⁹

Finally, last 21 June 2016, the Supreme Court issued a Writ of *Kalikasan* in favor of Concerned Citizens of Santa Cruz in Zambales against five mining firms, including LAMI.¹⁹⁰

F. Mediation of Mining Conflicts: Benefits and Limitations

Considering the community's opposition vis-à-vis the incentives provided in the Mining Act primarily aimed at luring mining companies, it is imperative that there are avenues for dialogue and negotiation to address inevitable disputes resulting from misunderstandings and/or clash of interests. This is desirable in order to prevent the escalation of conflicts, which have resulted in violence and bloodshed in the past, and especially considering that heightened tensions may likewise lead to human rights violations.

Mandatory CAM in environmental cases is required for environmental cases, including those involving mining laws.¹⁹¹ Under the Rules, conflicts arising from mining-related laws can be mediated in civil cases or crimes with a civil aspect filed in court.¹⁹² However, those violations of the law which are crimes, and with no private offended party, cannot be mediated, and should be prosecuted.¹⁹³

188. *Id.* at 24.

189. *Id.*

190. See Rappler, SC to Zambales mining firms: Prove you're not harming environment, available at <http://www.rappler.com/nation/137168-supreme-court-writ-kalikasan-zambales-mining-companies> (last accessed Oct. 31, 2016).

191. RULES OF PROCEDURE FOR ENVIRONMENTAL CASES, rule 3, § 3.

192. *Id.* rule 1, § 2 & rule 3, § 3.

193. For example, corruption and illegal mining. An Act to Institutionalize the Use of an Alternative Dispute Resolution System in the Philippines and to Establish the Office for Alternative Dispute Resolution, and for Other Purposes

In order to take advantage of the benefits of and to expand the use of environmental mediation, environmental interest groups can assist the community in filing civil cases that lead to mediation. The cost of filing a case is generally minimal and the CAM fee is relatively affordable.¹⁹⁴

The role of a CAM mediator in mining conflicts is highly important. As stated, it is the expressed policy of the State to allow mining.¹⁹⁵ Thus, agents of LGUs¹⁹⁶ and DENR are perceived, whether correctly or incorrectly, as harboring a pro-mining or pro-mining companies stance. For this reason, they cannot stand as impartial mediators in conflicts of the community against mining companies. Although local government officials are representatives of their constituents, and the DENR are regulators of the industry on behalf of country, they are implicated by the national policy allowing mining. The fairness of the process will be put in doubt if the mediator is not accepted as impartial. Apart from facilitating the dialogue between the disputing parties, independent mediators ensure the credibility of the process. Although the court cannot encroach on policy-making, the function of mediation between parties is also not proper for the political branches considering that they set the policy, have their own views or concerns to advance, and cannot be perceived as impartial.

It is inevitable that community members and officials will have different views about mining. However, the national and local government officials who favor the entry of mining companies, and the mining companies, themselves can initiate dialogue with community members and groups. Their differences can be voiced out and dialogue can assist in preventing strained relationships. Moreover, during these dialogues, those opposing the mining company should do more than harp on the violations and disasters of the past and pointing out the poor track record of mining companies. This is not adequate, particularly since mining companies can simply counter that they will implement new processes and technology that will prevent mistakes made in the past from happening again. On one hand, this kind of discussion can lead to an understanding by the community of what the mining company intends to do and the safeguards it plans to implement. On the other hand, the company is given an opportunity in a neutral proceeding

[Alternative Dispute Resolution Act of 2004], Republic Act No. 9285, § 6 (g) (2004).

194. ₱500.00. See Philippine Judicial Academy, Frequently Asked Questions, *available at* <http://philja.judiciary.gov.ph/pfaq.html> (last accessed Oct. 31, 2016).

195. See Philippine Mining Act of 1995.

196. See DENR A.O. No. 96-40, § 8.

and venue to listen and understand the community's concerns and apprehensions.

The benefit of mediation is that, instead of an adversarial and lengthy court litigation, a mutually satisfactory solution is reached — one that may include a discussion on the “reasonable limitations” and the terms and conditions for the “social acceptance” of the project under E.O. No. 79.¹⁹⁷ Particularly when there are gaps in the law and policy, the parties have to agree on what is acceptable. Resolution of these conflicts in a voluntary and peaceful way is desirable so that the mining industry is also not burdened by uncertainty and delay.

The importance of capacitating the stakeholders is clear. For example, training on financial management and the technical aspects of mining on the part of local officials and the community is necessary so that they can meaningfully engage in the mediation process. However, at present, this is beyond the services that CAM can offer.

Likewise, the community will have access to complete, accurate, and reliable information¹⁹⁸ on mining laws and on operations and effects of mining — all of which are necessary for decision-making.¹⁹⁹ For example, the mediator can arrange that they should be furnished copies of official documents, e.g., the company's mining permit. In this process, the parties can clarify facts and dispel misconceptions. The mediator's role is non-coercive as he or she cannot compel such disclosure. But on the part of the mining company, it can explain, among others, the costs, investment, and length of time necessary for exploration and actual mining, and how it intends to dispose of mine tailings. During mediation, both parties should expect good faith and sincerity from each other. Good faith means that the parties should be honest and transparent when negotiating so as to cultivate trust and respect between them. Negatively stated, there should be no fraud, corruption, bribery, deception, coercion, manipulation, interference, and underhanded methods of convincing groups, or “divide-and-conquer” strategies.

Mediation is especially useful when the valuation of land or other resources is necessary in the solution to the conflict. In this context, the parties can have a fair negotiation leading to a mutually acceptable amount or relocation.

197. See E.O. No. 79, s. 2012, §§ 6, 12, & 13.

198. Pamfilo, et al., *supra* note 122, at 30.

199. Ateneo School of Government, *supra* note 14, at 2-4.

In mediation, the weaker party — usually the underprivileged community — is assisted in representing its views. The mediator can explain the legal and technical aspects of the conflict to the community, or if he or she is not competent to do so, facilitate the discussion such that a mutually acceptable impartial expert (e.g., from NGOs or academe) can be invited to enlighten the parties.

The objective is for the parties to sit down and craft a workable and implementable agreement to resolve contentious issues between or among them. Agreements should be understandable to both parties, wherein the technical terms are defined and explained, and in the vernacular whenever necessary. In the resulting agreement, the different parties should delineate and clarify their respective roles moving forward, such as monitoring compliance with the agreement.

The resulting agreement should not be contrary to law. For example, the consent of the community cannot make mining in a prohibited area legal.

Finally, in line with the people's rights to development, self-determination, and participation in the decision making process, the community has the right to be heard if it opposes or rejects the mining activities for various reasons, such as the need for vindication and reparation for wrongs done in the past, or the decision to stick to their mining moratoriums. Thus, after undergoing CAM, the court cannot force them to enter into a mediated agreement if they are not persuaded to do so.

III. CONCLUSION

The present policy of the national government to audit mining operations and place a moratorium on new mining projects shows that mining remains to be a contentious issue. Moving forward, CAM in environmental cases is an effective mechanism of conflict resolution that may enable affected parties to reach mutual understanding — something that is preferable over the festering of hostilities. The hope is that with the Rules in place, the process of environmental mediation can be utilized as a way for legitimate mining to be a stable economic activity that benefits the country.