

# **Mapping Out Conflicts in Mining Areas: Drawing Lessons and Seeking Spaces for Building Principled Consensus**

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## **Introduction**

The impact of mining is overwhelming, pervasive and wide-ranging. The industry cuts across practically all facets of the nation's life (political, economic, social and environmental). Its importance cannot be overlooked. With the Philippine government's aggressive promotion of mining as a driver for economic growth, however, came a huge divide between stakeholders who hold divergent views with respect to mining. Realizing that an objective assessment of mining, its impacts and potentials is difficult, if not impossible, under this climate, the Ateneo School of Government (ASoG) embarked on a program entitled "Reforming Environment and Natural Resources (ENR) and Mining Governance: Managing Conflicts in Mining Areas." Among others, the program seeks to surface the different types and sources of mining-related conflicts, and to assess how those conflicts can be addressed. Ultimately our goal is to build a consensus based on the principles of sustainable development, environmental protection and social justice. We realize that a principled consensus in all issues related to mining is probably impossible to achieve. However, we believe that progress in some areas, e.g. in addressing gaps related to the economic of mining or improved implementation of free and prior informed consent (FPIC), is possible with a wide range of stakeholders.

This paper is the culmination of the initial phase of the Program. This was intended to serve as a starting point for discussions among stakeholders gathered in a national, multi-sectoral meeting convened by the School. It synthesizes the findings of researches and case studies conducted by the School in partnership with various research institutions and academicians. These researches and case studies consist of the following:

- Report on National Status of Mining Conflicts by the Environmental Science for Social Change (ESSC);
- Report on the Economics of Mining in the Philippines by Dr. Germelino Bautista;
- Assessment of Environment and Natural Resource Use Conflicts in Palawan by Dr. Benjamin Bagadion;

- Case Study on Mining in Tampakan, South Cotabato by Dr. Rosalinda Tomas of the MindanaWon Initiatives for Cultural Dialogue (MindanaWon);
- Case Study on Mining in Claver, Surigao del Norte by Dr. Maria Cecilia Macabuac-Ferolin of MindanaWon;
- Case Study on Mining in Siocon, Zamboanga del Norte by Ms. Perpevina Tio of MindanaWon;
- Case Study on Mining in Samar Island by Atty. Jose Florante M. Pamfilo and Ms. Mary Grace P. Santos of ASoG, and Mr. Marx Anthony Dargantes of the Environmental Legal Assistance Center, Inc. (ELAC)-Eastern Visayas; and
- Case Study on Mining in Brooke’s Point, Palawan by Datu Abdelwin Sangkula of ELAC-Palawan.

Likewise, the paper draws substantially from the views and insights exchanged during the Mining Case Conference hosted by the School in December 2007, where the researches and case studies were presented before a select group of academicians, civil society members and government officials, who were given the opportunity to react to the results and recommendations presented.

All of the foregoing initiatives were made possible through the support of the U.S. Agency for International Development (USAID), The Asia Foundation (TAF) and the United Nations Development Programme (UNDP).

The paper has three main components—first, an overview of the researches and cases studies conducted; second, an identification of the different areas where conflicts usually arise, a discussion of the specific conflicts arising therein, and an analysis of the source from which these conflicts arise; and third, an identification of the various measures that may be undertaken, either collectively or individually, by the different stakeholders to address these conflicts.

In writing this paper, the authors take full responsibility for any inadvertent errors, omissions or misinterpretation in their treatment of the materials from the researches and case studies, and the proceedings of the Mining Case Conference.

## **Overview of the Reports and Case Studies**

### *Tampakan Case Study*

The Tampakan case study focuses on one of the two existing Financial and Technical Assistance Agreements (FTAAs)<sup>1</sup> in the country. The FTAA area spans three provinces in Southern Mindanao—namely, South Cotabato, Sultan Kudarat and Davao del Sur. However, due to practical constraints, the study limits itself to the Province of South Cotabato, specifically the Municipality of Tampakan. The FTAA (held at present by Sagittarius Mines, Inc.) covers what is touted to be one of Southeast Asia’s largest undeveloped copper and gold deposits.

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<sup>1</sup> An FTAA is defined by law as “a contract involving financial or technical assistance for large-scale exploration, development and utilization of natural resources.” (Mining Act, section 3(r)) In an FTAA, contract areas of up to 1,000 meridional blocks may be awarded, in the case of onshore mining.

Apart from its magnitude, the Tampakan project received considerable attention in the past because the FTAA was the subject of a suit in the Supreme Court which sought the nullification of provisions of the Philippine Mining Act of 1995 (Republic Act No. 7942; subsequently, the Mining Act) pertaining to FTAA's, and the FTAA itself.<sup>2</sup> The suit alleged that the foregoing violated nationality requirements contained in the 1987 Constitution.<sup>3</sup> Initially, the Supreme Court found the assailed provisions and the FTAA unconstitutional. However, upon reconsideration, the Court reversed its earlier ruling, and upheld the validity of the law and the FTAA.

The case study revisits the site in the aftermath of the legal battle. It concludes that stakeholders in the area may generally be classified into three categories based on their stand on the mining issue: those who are supportive of mining; those who are against mining; and those who have, so far, maintained an open position with regard to the issue. Significantly, the case study observes that, even among those supportive of mining, there remain serious, continuing concerns that need to be addressed. These include, among others, the adequacy of benefits being extended by the mining company and relocation.

#### *Surigao Case Study*

The case study takes a look at the Municipality of Claver, Surigao del Norte, and the nickel mining operations of Taganito Mining Corporation. The case study site falls within the Surigao Mineral Reservation. Surigao del Norte forms part of the Caraga Region, which is said to be the mining capital of Mindanao. The region hosts approximately 60% of the areas covered by Mineral Production Sharing Agreements (MPSAs) in the island.

The case study observes that there appears to be very minimal conflict among the different stakeholders in the site, with most of them being generally receptive to mining. Nonetheless, the study notes that the usual issues associated with mining—such as the elusiveness of development, and the accompanying environmental and social impacts—are present in this case.

#### *Siocon Case Study*

The case study focuses on what is perhaps one of the most scrutinized mining projects in the Philippines today. The mining project of TVI Resources Development, Inc. in Mt. Canatuan,

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<sup>2</sup> *La Bugal-B'laan Tribal Association, Inc. v. Ramos*, 421 SCRA 148 (2004), 445 SCRA 1 (2004).

<sup>3</sup> Under Article XII, section 2 of the 1987 Constitution, only Filipino citizens, or corporations or associations at least 60% of whose capital is owned by Filipino citizens, may enter into agreements with the government for the exploration, development and utilization of natural resources. These agreements may come in the form of co-production, joint venture and production sharing agreements. However, the President may enter into agreements with foreign-owned corporations involving either technical or financial assistance for the exploration, development and utilization of minerals, petroleum and other mineral oils.

Petitioners alleged that the Mining Act and its implementing rules allowed foreign owned companies to extend more than mere financial or technical assistance, and in fact allowed them to operate and manage mining activities, in violation of Article XII, section 2. The FTAA in this case was originally entered into between the Republic of the Philippines and WMC (Philippines), Inc., a foreign-owned corporation organized in the Philippines.

Siocon, Zamboanga del Norte has been the subject of numerous researches, investigative missions and documentaries, both in the domestic and international scenes. The controversy in Siocon centers primarily on the struggle between the mining company, and members of the indigenous Subanen tribe, who hold a Certificate of Ancestral Domain (CADT) over the area. This, in turn, has spun-off a conflict among the Subanens, which led to the formation of two factions within the tribe.

The present case study, however, looks into a different angle and examines the capacity of the concerned local government unit to address the challenges posed by mining operations in the area.

### *Samar Case Study*

The Samar case study highlights a very interesting situation where a protected area overlaps with a previously-declared mineral reservation. The protected area, known as the Samar Island Natural Park or SINP, hosts the country's largest remaining contiguous lowland forest, and serves as habitat of diverse populations of endemic, rare, endangered, and economically important plant and animal species. Samar Island is recognized by various international environmental non-government organizations as an important biodiversity area.

On the other hand, the mineral reservation, known as the Samar Bauxite Mineral Reservation or SBMR, has the country's only known commercially viable deposit of bauxite. Bauxite is the main raw material for aluminum. According to the figures of the Mines and Geosciences Bureau (MGB), approximately 55% of the SBMR coincides with the SINP.

The establishment of the protected area (by way of a Presidential Proclamation) was largely the product of advocacy efforts by civil society, and rests on the findings of natural resource valuation studies showing that biodiversity resources in the park are worth much more than the estimated bauxite deposits. Notwithstanding this, Congress has yet to enact a law mandating the final establishment of the park [as required by Republic Act No. 7586, otherwise known as the National Integrated Protected Areas System (NIPAS) Act]. Hence, the status of the park remains unstable, and the policy on mining within the same remains uncertain.

The situation is further complicated by the existence of two MPSAs within the SBMR (issued a few months prior to the establishment of the SINP), and the enactment by the Provincial Government of a 50-year moratorium on the conduct of large-scale mining operations in the province. The MPSAs were issued in the name of Bauxite Resources, Inc. (BRI) and Alumina Mining Philippines, Inc. (AMPI), respectively. However, during the period of the case study, exploration works on the MPSA areas were being conducted by Pacific Alumina Mining (Philippines) Corporation (PAMPC).

### *Palawan Case Study*

The Palawan case study focuses on the Municipality of Brooke's Point in Southern Palawan. To a certain extent, it mirrors the Samar situation. Brooke's Point is also a biodiversity rich area, and its mountains form part of the proposed Mantalingahan Protected Landscape. Likewise, it is

richly endowed with mineral resources, particularly, nickel laterite deposits. Nickel is a key raw material for stainless steel. At present, there are two existing MPSAs<sup>4</sup> in Brooke's Point, while there are 33 mining applications covering almost 120,000 hectares pending. Apart from its biodiversity and mineral resources, Brooke's Point also has vast tracts of prime agricultural land.

The situation in Brooke's Point, however, is marked by the following significant details:

- the existence of a comprehensive framework for sustainable development known as the Strategic Environmental Plan for Palawan or SEP, embodied in Republic Act No. 7611 (otherwise known as the Strategic Environmental Plan for Palawan Act; subsequently, the SEP Law); and
- a conflict between the municipal government and a number of its constituents, stemming from the former's perceived failure to include the latter in the process of deciding whether to endorse the conduct of mining activities in the municipality or not. This conflict has led to the initiation of a petition for recall against the local chief executive, and the fielding of candidates by anti-mining groups in the recent local elections.

#### *Report on Environment and Natural Resource Use Conflicts in Palawan*

The report is a product of an action research project by Dr. Bagadion, which seeks to model multi-stakeholder approaches to managing inter-sectoral conflicts arising from environment and natural resources use in Palawan. It consists of two parts: first, a scanning of environmental and natural resource use conflicts; and second, a report on the consensus building efforts currently being undertaken in the province. Both components, however, are works in progress.

The first part essentially highlights the natural resource endowments of the island province of Palawan, which is dubbed as the country's last ecological frontier, and was named by the United Nations Educational, Scientific and Cultural Organization (UNESCO) as a "Man and Biosphere Reserve." The research identifies the brewing tensions between forest biodiversity, irrigation sources and ancestral domains, on one hand, and mining, on the other. The research also notes tensions offshore between energy development and marine biodiversity protection.

The second part, on the other hand, documents the lessons learned from the recent multi-sectoral Mining Forum in Palawan hosted by the Palawan Council for Sustainable Development (PCSD), and the windows for consensus building opened by the aforementioned activity. These lessons are discussed briefly in a subsequent section.

#### *Report on the National Status of Mining Conflicts*

The report recalls the story of ESSC's engagement in the mining issue since the late 1990s, and summarizes the major mining-related issues that ESSC has encountered through the years. In the end, the report poses questions for stakeholders to consider on four thematic areas, namely: free

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<sup>4</sup> Issued in favor of MacroAsia Corporation and Celestial Nickel Mining and Exploration Corporation, respectively.

and prior informed consent, and other consultation processes; natural habitats and other no-go areas; governance mechanisms; and revenues and employment generation.

Relevant portions of the report are cited in this paper. However, the report is discussed in greater detail in a separate paper prepared by ESSC.

### *Report on the Economics of Mining*

The report revolves around the following research questions:

- Does mineral production growth promote or hinder sustainable development and poverty alleviation?
- How does the upswing and downswing of the mineral price cycle relate to growth and sustainable development? Does rent determine the prospects for growth and development? and
- To what extent are the negative externalities of mining addressed by government programs and company actions? Are there unmitigated resource-environment impacts and uncompensated economic-social costs?

Relevant portions of the report are cited in this paper. However, its entirety is covered by a separate paper prepared by Dr. Bautista.

### **The Conflict Areas and Sources of Conflict**

Based on the data from the reports and case studies, this paper identified four major areas where mining-related conflicts usually arise. They are: (1) economics, (2) local governance, (3) indigenous peoples' rights, and (4) environmental protection. This section discusses the specific issues arising in each of those areas, and tries to break them down by tracing their roots to gaps in information, law and policy, structures and capacity, enforcement, and relationships, or to outright differences in values or interests.

#### **Economics**

The reports and case studies bring to the fore two major economics-related questions:

- Is mining worth its price? That is, can the promised revenues and benefits from mining outweigh its costs in terms of alternative economic activities and natural resource uses foregone due to mining?
- If so, how can these revenues and benefits be harnessed and translated into genuine development for the country as a whole, and for the communities directly affected by mining?

### *Cost vs. benefits*

The first question is best exemplified by the Samar case. As mentioned earlier, Samar Island is richly endowed with both biodiversity and mineral resources. In the course of establishing the SINP, natural resource valuation studies were conducted to aid policy-makers and stakeholders in deciding on the land use priorities for the park. In a study done in 2003,<sup>5</sup> Dr. Marcelino Dalmacio concluded that the biodiversity resources of the park are more valuable than the estimated bauxite deposits. He arrived at this conclusion by taking into consideration the value of water resources, the benefits of environmental protection (such as reduction in soil erosion and sedimentation of rivers and coastal areas), the value of wood and other non-wood forest products (including food and medicine), income from eco-tourism activities, benefits from carbon sequestration and its effect on global warming, and non-use values (*i.e.*, conservation of the island's natural heritage).

The figures, however, are disputed by the Chamber of Mines<sup>6</sup> and the MGB. The Chamber claims that the value attributed to mining is understated, considering the increase in the price of aluminum in the world market, and the direct and indirect benefits that mining activities can generate. The MGB, on the other hand, expressed a need for a detailed exploration in order to arrive at a more accurate estimate of the bauxite deposits, inasmuch as the valuation of the deposits is based on figures gathered in the 1970s under conditions markedly different from the present.

Surigao, on the other hand, is a study in contrast. As stated earlier, there seems to be little disagreement among the different stakeholders on the issue of mining. On the matter of economics, it is interesting to note that members of the indigenous Mamanua tribe observed an inverse relationship between their mountains (“*bukid*”) and their bank accounts (“*katigayonan*”). According to them, before the conduct of mining activities, when their mountains stood, their bank accounts were nil. With the advent of mining, their mountains were eroded, but their bank accounts grew (presumably as a result of mining royalty payments). During the Mining Case Conference last December, Dr. Nereus Acosta, a member of the ASoG faculty and panelist for the Mindanao case study presentations, noted that the foregoing situation illustrates the failure to account for the value of the “*bukid*” that is lost due to mining.

Both the Samar and Surigao cases highlight the ***need for complete and credible information*** on the relative values of natural resources, which can aid both policy-makers and stakeholders in making intelligent choices with respect to mining and other land use options. As illustrated by the Samar case study, natural resource valuation is a useful tool. However, it is also hampered by the following limitations:

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<sup>5</sup> Dalmacio, Marcelino V., Ph.D., *Case Study Valuation of Samar Island Natural Park*, December 2003.

<sup>6</sup> The Chamber of Mines of the Philippines is an association of members coming from exploration, mining, mineral processing and service industries.

(a) the *difficulty of ascribing a value to non-commercially traded resources*, and comparing these to commercially traded ones. Where for instance, as ESSC pointed out in its report, does indigenous peoples' (IPs') valuation of their sacred mountain come in?

(b) the *absence of a government-established standard and procedure for valuation*. Dir. Leo Jasareno, Mining Tenements Management Division Chief of the MGB, pointed out in the absence of this standard, the result of any valuation or cost-benefit analysis study will remain open to debate. In this regard, the Samar experience goes to show the *importance of ensuring stakeholder buy-in* by allowing broad participation from the different sectors concerned in the process of conducting natural resource valuation and similar studies.

Dr. Bautista's report raises another vital question—whether the economic rent<sup>7</sup> from mining is sufficient to cover and compensate its negative environmental impacts and social costs. According to Dr. Bautista, under the existing legal framework, certain impacts remain unmitigated, and certain costs remain uncompensated. These include: (a) household and community displacement; (b) reduced access to or availability of local water supply for in-site and off-site areas; (c) unpaid use and depletion of groundwater; (d) pollution of surface water and aquifer; and (e) leakages, overflowing and collapse of tailings dam.<sup>8</sup>

Accordingly, there is a *need to review and update* the country's *environmental guarantee fund system*.

#### *Translating benefits to genuine development*

The question of how mining benefits can be translated to genuine development is best illustrated by the Tampakan case study. In Tampakan, the provision of community development funds (CDF) is a major commitment of the mining company, and it appears to be a key factor behind the local governments and communities' assent to the mining project. Apart from the CDF, the company is also mandated by law<sup>9</sup> to pay IPs royalty amounting to at least 1% of the gross output.

The following issues have cropped up in relation to the CDF and royalties:

- the proper determination of the company's gross income, which is the basis for the computation of royalties. Local communities rely solely on the information provided by the company and have no means of validating the same;
- the sufficiency of the 1% royalty. Some IP groups find the rate too low and ask that it be increased;
- control over IP foundations and the use of their funds. The mining company exercises huge influence in the decision-making in these foundations (through representation in the board of

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<sup>7</sup> He defines economic rent as the net income (surplus) or receipt over and above the costs.

<sup>8</sup> These are discussed extensively in a separate paper by Dr. Bautista.

<sup>9</sup> DENR Department Administrative Order No. 96-40, section 16.

trustees). This is partly due to the perception that the IPs are not fully capable of managing their funds; and

- the proper utilization of the CDF. These funds are managed by the *barangay* and municipal governments, and there are no clear guidelines on how they are to be spent. At present, these funds are being used for renovation of buildings, purchases or repairs of service vehicles, and sports festivals, among others.

The problems mentioned above manifest not only at the micro-level, but also at the macro-level. ESSC noted in its report the absence of a government framework for the strategic utilization by the government of mining revenues. Meanwhile, Dir. Jasareno of the MGB observed that most of the case studies limited their inquiry to what benefits and how much of these are shared with the communities. According to him, it may also be worth asking if the government itself is getting the appropriate share in revenues.

The foregoing uncovers the following gaps:

- gap in policy—a *need to review revenue flow and to rationalize incentive packages*, and a *need to set parameters for the strategic utilization of mining revenues* (both at the national and local levels), which, as much as possible must be done in a participatory manner;
- gap in law—a *need to institute transparency and accountability mechanisms* in the reporting of revenues (with respect to the company), and the utilization of community development funds (with respect to local governments and community organizations handling them); and
- gap in capacity—a need to imbue indigenous peoples and community organizations with the *necessary financial skills* to be able to judiciously manage their funds.

## Local Governance

Conflicts in the area of local governance boil down to three aspects: (1) local autonomy; (2) consent-giving processes; and (3) monitoring.

### *Local autonomy*

The issue on local autonomy centers on the question as to who between the national government and the local governments concerned should wield the power to decide on mining applications. Under the Mining Act,<sup>10</sup> the national government, through the Department of Environment and Natural Resources (DENR) and the MGB, has direct charge over the administration of mineral lands and resources, and the grant of mineral agreements. However, under the Local Government Code (Republic Act No. 7160), national government agencies and offices may not implement any project or program that may cause pollution, depletion of non-renewable resources, loss of

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<sup>10</sup> At section 9.

forest cover or extinction of plant or animal species, among others, without consulting the local government units, and without prior approval from the *Sanggunian* (Legislative Council) concerned.

The tension is best illustrated by the Samar case, where the Provincial Board enacted an ordinance imposing a 50-year moratorium on large-scale mining in the province. In an Opinion, the Department of Justice (DOJ) implied that ordinances of this nature are invalid. According to the DOJ, local legislative councils are mere delegates of Congress. As such, they cannot undo acts of the former, and negate by ordinance the mandate of statute. Thus, local ordinances cannot prohibit the conduct of mining as this would contravene the Mining Act's mandate on the rational exploration, development and utilization of mineral resources. While the courts have not invalidated the Samar ordinance, there remains a question on its binding effect.

In relation to this, ESSC noted a further complication. Considering that, in any given locality, there are levels of local government involved—namely, the *barangay*, the municipality and the province—situations have arisen where their respective legislative councils have issued contradictory resolutions.

The foregoing demonstrates the *need to clarify* the *parameters of the powers of local governments* relative to the national government and to each other (provincial, municipal, barangay levels).

The issue on local autonomy does not end with this legal problem, however. Certain local governments have experienced and succumbed to *political pressure* exerted by the national government to influence their stand on mining. Personal interests of some national and local government officials who have a stake in mining have also influenced decisions on the issue.

#### *Consent-giving*

In terms of consent-giving, the case studies surfaced the following gaps on the part of the local government:

- a *lack of understanding* of basic mining laws and policies, and basic processes and roles;
- the *lack of capacity* on the part of local government units *to adequately and thoroughly evaluate requests for endorsement* by mining companies.

For instance, in one of the *barangays* in Samar where PAMPC is conducting exploration activities, members of the *Sangguniang Barangay* signed a previously prepared resolution endorsing the mining activity with only a verbal assurance that agreements safeguarding the environment and their welfare would be entered into between the company and the *barangay* before actual operations commence. Such verbal reassurance was taken by the *barangay* officials at face value, without making any independent inquiry, and without putting in place any safeguards for enforceability;

- the *absence of adequate transparency and accountability mechanisms in* connection with the process of *endorsing mining applications*.

This was very apparent in the Palawan case. Brooke's Point residents claim that the resolution endorsing the mining activity of MacroAsia Corporation was passed by the *Sangguniang Bayan* with undue haste and without conducting any public consultations. Feeling aggrieved and betrayed, civil society groups undertook various forms of concerted action, such as the signing of petitions, and the conduct of dialogues, forums and a rally, in an effort to convince the local government to reconsider its action. Failing to do so, the same groups initiated a petition for recall against the local chief executive. While the petition complied with the basic requirements set by the law,<sup>11</sup> the initiative did not prosper because the Commission on Elections (COMELEC) failed to hold a recall election allegedly due to lack of funds.

This predicament may be traced to the following:

(a) the absence in the Local Government Code of an express or unequivocal mandate for local legislative councils to consult their constituents prior to endorsing natural resource extraction and similar high-impact projects. It should be noted that the duty to consult under the Code pertains to the national government, in relation to local government units. There is no parallel mandate with respect to the latter, in relation to their constituents; and

(b) the absence of a speedy and adequate remedy in the case of breach of the mandate to consult, which would have the effect of deterring local government officials from acting otherwise, and which would afford aggrieved parties immediate redress for their grievance.

### *Monitoring*

In line with the Mining Act's provisions on environmental protection, the law's implementing rules and regulations mandate the conduct of environmental monitoring every quarter, or more often, by a multipartite monitoring team (MMT), composed of representatives of the MGB Regional Office, the DENR Regional Office, the Environmental Management Bureau Regional Office, the mining company, the affected communities, the affected IPs (if any), and an environmental non-government organization.<sup>12</sup>

In Siocon, in what seemed to be an effort to further reassure its constituents, the municipal government formed an independent monitoring team known as Task Force Canatuan. However, the team appears to be a mere paper tiger, due to the *lack of capability to monitor*. For example, it does not possess the technical capability to monitor water quality and the integrity of the dam structure. The Municipal Mayor himself also admitted that they are not able to monitor accurately the quantity of minerals being extracted from Siocon.

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<sup>11</sup> Under section 70(c) of the Local Government Code, recall of any elective provincial, city, municipal or *barangay* official may be validly initiated upon petition of at least 25% of the total number of registered voters in the local government unit.

<sup>12</sup> DENR Department Administrative Order No. 96-40, sections 174 and 185, as amended Department Administrative Order No. 2005-07.

## Indigenous Peoples' Rights

Of the five case studies that form basis for this paper, four involve mining within ancestral domains of indigenous peoples. Indeed, many mineral exploration and development activities in the country today fall within ancestral domains, and affect indigenous peoples.

In this area, conflicts can be traced to four major areas: (1) Free and Prior Informed Consent (FPIC)<sup>13</sup>; (2) the adequacy of benefits and the implementation of mining company commitments; (3) IP and non-IP relations; and (4) socio-cultural impacts.

### *FPIC*

Regarding FPIC, ESSC noted in its report that certain *gray areas in the law* are responsible for a number of FPIC-related conflicts. These include:

- the definition of the term “impact areas,” for purposes of determining whose FPIC must be obtained (and, consequently, who are entitled to benefits from the mining activity);
- lack of a provision dealing with situations where some affected communities assent to mining within their territory, while others do not;
- questions as to who is entitled to represent communities where divisions exist. In this regard, the Palawan case study asserts that, under the law FPIC must be based on consensus; and
- the application of the same set of policies to IPs all over the country, when in fact their situations are not homogenous.

The first problem is illustrated by the Surigao case. Taganito, the community that hosts the mining operations is barely affected by the latter, while a downstream community, which bears the brunt of the mining operations, receives very little support from the company.

Below is a summary of current rules on the determination of impact areas:

#### Current rules on the determination of “impact areas”

Under the FPIC Guidelines of 2006 promulgated by the NCIP (Administrative Order No. 01, series of 2006), the IPs whose FPIC is required to be secured depends upon the “area affected.”

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<sup>13</sup> FPIC is defined as by the Indigenous Peoples Rights Act (Republic Act No. 8371, or the IPRA Law) as the consensus of all members of the IPs, 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 an process understandable to the community. The IPRA Law requires FPIC from the IPs concerned before any government agency issues concessions or licenses, or enters into production-sharing agreements.

The latter is determined by following the rules of the Philippine Environmental Impact Statement (EIS) System (DENR Department Administrative Order (DAO) No. 2003-30).

The Procedural Manual for DENR DAO No. 2003-30 states that the impact zone of a project are those areas which are most likely to be directly or indirectly affected by the proposed project or undertaking. It comprises of the direct or primary impact area, and the secondary impact area.

The term “direct or primary impact area” refers to areas where the project facilities or infrastructures will be located, such as buildings or structures, irrigation, drainage and other utility areas, quarry sites, access roads and others. This may include the following, among others:

- areas where there will be displacement of settlements or livelihood;
- areas directly vulnerable to potential flooding or inundation that may be caused by the project;
- areas along the main tributary downstream of the river system that will be the receiver of waste discharges;
- areas where there will be disturbance of habitat of endangered species;
- catchment area of river systems or watersheds; and
- ancestral domain of indigenous communities that may be directly affected by the project.

On the other hand, “secondary impact area” refers to the area that may be indirectly affected by the proposed development. This may include areas in the vicinity of the direct impact area. Examples are:

- communities or settlements outside the direct impact area which can also be benefited by employment opportunities created by the project;
- sub-tributaries of the river system which can be indirectly affected by pollution; and
- areas where water sources will be indirectly affected by drawdown in the direct impact area.

The Procedural Manual further provides for public participation in the identification of impact areas. The FPIC Guidelines, on the other hand, require that the opinion and views of IP elders and leaders be taken into account in the determination of the impact areas.

In the light of the aforementioned rules, it appears that problems arising in Surigao may have more to do with *failure in implementation* rather than with any ambiguity in the law.

*Irregularities in implementation* of the FPIC process were also noted in the Palawan case. According to witnesses, IPs were allegedly offered monetary reward in exchange for their assent to the mining project. It should be noted, though, that some of the witnesses subsequently recanted their statements.

#### *Adequacy of benefits and implementation of commitments*

In two of the case studies, host communities expressed dissatisfaction with the benefits provided to them, and the agreements they entered into with the mining companies.

In both Tampakan and Surigao, the promise of employment is a major bone of contention. In Tampakan, IP communities complain about the company's policy of hiring through service agencies, the rotational nature of the employment, and the non-regularization of employees. While the company has adopted a policy of prioritizing locals for employment, limited opportunities are available to them given their level of skill. As certain positions require technical or professional skills not available in the communities, community members only qualify for positions requiring manual labor.

Concerns about scant employment opportunities were also raised in Surigao, where locals are employed for an average of only 5.5 months a year.

Resettlement is another contentious area. In Tampakan, the IPs acknowledged the possibility of relocation as a result of the mining activity, and have bound themselves to consent thereto in the Principal Agreements entered into with the mining company. However, a number of them appeared to be having second thoughts and have expressed apprehensions as to what future awaits them if they are removed from their land. Concerns include questions on the availability of suitable livelihood, basic services and education for their children in the relocation site. Some community members, on the other hand, have expressed their preference to be relocated still within their ancestral domain. Furthermore, while they have consented to the conduct of mining activities under their Principal Agreements, some have expressed a desire that the operations be confined to a designated area consisting of 229 hectares only.

In Surigao, the Mamanuas complain that while the company promised to build them concrete houses, they have only been given houses made of light materials.

It is interesting to note that, in Tampakan, the IPs have resorted to barricades to exact concessions (mostly employment related) from the mining company. It has proven to be an "effective" way to get the company's attention and have it respond immediately to the IPs' demands, inasmuch as the company stands to lose millions with every day of delay in its operations. In fact, to deter people from mounting barricades, the company has been offering communities an incentive of PhP15,000 for every barricade-free month.

The situations described above reveal a *defect in the agreements* entered into between the IPs and the mining companies. Many of the issues raised go into the heart of the consent given by the IPs. The fact that they have arisen is an indication that the IPs did not enter into the agreements on equal footing with the mining companies. Otherwise, the specific terms as well as the limitations of the benefits and concessions to be provided by the mining company to the IPs should have been fully disclosed and thoroughly discussed, in order for the IPs to make a decision with these information on hand. Furthermore, these should have been included in the terms of the agreement, and the latter should have provided for specific remedies in the event of the company's default. Had this been done, there would have been no need for the IPs to resort to barricades to exact concessions from the mining company.

### *IP and non-IP relations*

The Tampakan case study exposed conflicts in relations between IPs and non-IPs that came as an indirect result of the entry of mining activities in their area. For one, Christian landowners feel that, compared to the IPs, they are second class citizens. The IPs have their own set of agreements with the mining company (apart from those entered into by the municipal and *barangay* local government units), while the non-IPs do not. Hence, the latter feel less secure about their rights.

Second, conflicts have arisen in connection with landownership. Since the commencement of mining activities, many IPs who have previously sold their land to Christian settlers began to again lay claim again over these lands. The Christian settlers feel that the IPs' renewed interest in the land is due to the promise of compensation from the mining companies.

With regard to the first problem, the execution by the company of a separate set of agreements with the IPs is a necessary offshoot of the latter's ancestral domain rights, while the respective agreements entered into by the municipal and *barangay* local governments may be reasonably presumed to represent the interests of their constituents at large. However, the situation at Tampakan demonstrates a *need* for both the local governments and the company ***to provide non-IPs with wider spaces within which they can participate*** in the decision-making process on project related concerns, and where they can timely and adequately raise their concerns and protect their rights.

### *Socio-cultural impacts*

In terms of socio-cultural impacts, the case studies raised the following concerns:

- dislocation, and disruption of traditional activities

In Tampakan, particularly, the IPs fear that, once mining goes into full operation, they will no longer be given space to practice their culture and traditions. Hence, some of them insist that mining activities be confined to a given area. The same concern was raised by the IPs in Palawan, who fear that they will no longer be able to devote their ancestral domain to traditional activities, such as *kaingin* (slash-and-burn farming), hunting, and gathering of almaciga resin, wild fruits and honey, in the future. They also fear that their *diwata* or spirit may be driven away by the disturbance caused by mining;

- introduction of undesirable values and practices

With the impending development, the IPs in Tampakan fear that there will be a corresponding increase in the occurrence of vices such as drinking and gambling, and an upswing in the crime rate. They also fear that, with an increase in internal migration, different and conflicting value systems will be introduced in their territory. Meanwhile, the local Roman Catholic Church is concerned about materialistic values that are being imbibed by the IPs due to the dole-outs given by the company;

- divisions within the community

Perhaps the best and most well-known example of this is Siocon, where a deep schism exists among the Subanens, with one group supportive of mining, and another strongly against. The situation is perceived to have been aggravated by the NCIP's appointment of non-traditional leaders, who have been pitted against the traditional IP leaders. A similar, though less volatile, situation was observed in the Palawan case study, among members of the Pala'wan tribe.

Furthermore, the NCIP—the agency supposedly promoting and upholding IP rights—is perceived to have contributed to these divisions because, as IPs in Surigao pointed out, some NCIP personnel have discreetly advocated for mining; and

- potential militarization and human rights violations

Certain IP communities in Tampakán experienced harassment from the military in the past, when the exploration activities were still under auspices of another company. They fear a repeat of this should there be an increase in military presence. They insist that they should be informed and consulted before security forces are detailed in their area.

The foregoing concerns reveal the following needs:

- a need for complete and accurate disclosure of information to the IPs regarding the potential extent and impacts of the proposed mining activity, in order that they may take these into account in their decision-making, and in short, there is a *need for strict adherence to the spirit behind FPIC*;
- a *need for effective social preparation measures*, should the IPs consent to the entry of mining, in order for them to be adequately prepared for the onslaught of the changes that it will bring;
- a *need to revisit the policy* on appointment of non-traditional leaders;
- a *need to restore the credibility of the NCIP*, and for it *to assume a stronger role* in the promotion of IP rights;
- a *need for increased sensitivity to IP rights and good faith* on the part of the mining companies; and
- a *need for strict implementation of* the IPs' *human rights*, and to sensitize the military and other security forces on these rights.

## Environmental Protection

### *Protected areas, old growth forests, watersheds*

Conflicts in the environmental area are best illustrated by the cases of Samar and Palawan. As mentioned earlier, in Samar, a large portion of the protected area coincides with the bauxite mineral reservation. Mining advocates, however, claim that the conflict between environmental protection and biodiversity conservation, on one hand, and mineral development, on the other, is more apparent than real. According to them the availability of environment-friendly technologies and best practices (especially with regard to rehabilitation and restoration processes) will ensure that impacts will be managed and biodiversity will be protected.

Civil society groups in Samar, however, remain unconvinced. To them, general claims citing advances in technology are not sufficient reassurance. These environment-friendly technologies and practices must first be demonstrated as the standard practice in the country before mining is allowed in the SINP. Moreover, these groups claim that the idea of responsible mining can only be realized if both mining companies and the concerned government regulatory agencies are responsible—that is, if the mining companies can be counted upon to strictly adhere to the rules set by the government, and the latter can be relied upon to conscientiously monitor the mining operators and enforce the rules. In their view, both conditions have not yet been fulfilled. In their case, they cite the issuance of the two MPSAs within the SINP, which partly cover old growth forests. This is notwithstanding the express mandate of the Mining Act<sup>14</sup> that MPSA applications shall not be allowed in old growth or virgin forests.

### *Illegal entity*

Another issue against the MGB's seriousness in regulating mining contractors raised in the Samar case study was the fact that the company conducting exploration works in the two MPSA areas (PAMPC) was openly dealing with the MGB Regional Office, and yet appeared to have no registration papers with the Securities and Exchange Commission, and no deed of assignment from the original MPSA holders on file with the MGB Central Office. Dir. Leo Jasareno confirmed that PAMPC is indeed an illegal entity (a foreign corporation, thus prohibited from holding an MPSA under the Mining Act). During the Mining Case Conference, he promised that the MGB would deal with this matter and take appropriate action.

On the other hand, in Palawan, existing MPSA areas cover or are adjacent to the Mt. Gantong and Maasin watersheds. While these are not yet officially declared as watershed areas, they supply water to two communal irrigation projects which, together with three other irrigation projects in the municipality, irrigate approximately 3,000 hectares of rice fields. Farmers and

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<sup>14</sup> At section 19.

irrigators have undertaken initiatives to have these areas officially declared as watersheds, but the local government unit<sup>15</sup> and the DENR have not acted on the proposals.

Moreover, parts of the MPSA areas are situated within the core and restricted use zones of the Mantalingahan Mountain Range, under the Environmentally Critical Areas Network (ECAN) Map of the Municipality of Brooke's Point. ECAN refers to the graded system of protection and development control over the whole Province of Palawan established by the SEP Law. Areas considered as core zones include, among others, all types of natural forest, areas above 1,000 meters in elevation, and endangered habitats and habitats of endangered and rare species. The SEP Law mandates that they be fully and strictly protected, and maintained free from human disruption. On the other hand, restricted use zones refer to areas generally surrounding the core zone, providing it with a protective barrier. According to the law, only limited and non-consumptive activities may be allowed in this area.<sup>16</sup> Notwithstanding this, the PCSD, the body tasked with the implementation of the SEP Law, gave clearances to the mining companies.

Apart from the abovementioned concerns, there are other pending MPSA applications in the proposed Mantalingahan Protected Landscape.

The foregoing environmental conflicts can be traced to one or more of the following gaps:

- a ***gap in the implementation of the law***, such as those provisions pertaining to old growth forests and core or restricted use zones;
- ***lack of trust and confidence*** in government regulatory agencies and mining companies, on the part of the other stakeholders;
- ***inadequacy in the technical capability*** of the DENR and the MGB. As Dir. Jasareno of the MGB himself admitted, the MGB is unable to excise old growth forests from MPSAs because they do not have maps showing the true forest cover or the actual situation on the ground;
- the ***need for better coordinative mechanisms*** among different bureaus under the DENR (*e.g.*, the MGB and the Protected Areas and Wildlife Bureau or PAWB);
- ***lack of complete, accessible and reliable information*** on mining technologies and practices, which can assist stakeholders in decision-making. In this connection, the Tampakan case study observed that education and awareness campaigns by mining companies focus heavily on the economic benefits aspect, without giving equal emphasis to other vital aspects, such as mining processes and environmental impacts; and
- ***differences in values and development priorities***. For instance, there are groups in Brooke's Point who believe that mining should not be considered as a development option for

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<sup>15</sup> Under Section 447(a)(5)(i) of the Local Government Code, municipal legislative councils are authorized to enact legislation providing for the establishment, maintenance, protection and conservation of watersheds.

<sup>16</sup> SEP Law, section 9.

municipality at all, given the existence of adequate alternatives such as agriculture, fisheries and tourism.

At this juncture, it may be appropriate to call the attention of the local government of Palawan and the civil society organizations supporting the establishment of the proposed Mantalingahan Protected Landscape to the experience of Samar. They should draw lessons from that experience and ensure that, in the process of establishing the protected area, adequate mechanisms for coordination and consultation with other stakeholders are in place, so as to avoid overlapping and conflicting measures.

### **Current Efforts Towards Conflict Management**

The reports and case studies also documented certain efforts on conflict management that are currently being undertaken. In the Tampakan, the mining company, Sagittarius Mines, Inc. (SMI), has initiated the formation of a grievance mechanism to help settle issues between individual or group complainants, and the company, on matters relating to the environment, land use and the like. The mechanism is intended to facilitate a more participatory process for resolving conflicts, as opposed to legal action. It involves three stages, namely: (1) initial negotiations; (2) third party negotiations; and (3) arbitration.

The grievance mechanism was only initiated in the middle of 2007, and had not yet gone into full operation at the time of the preparation of the case study. Hence, its effectiveness has yet to be seen.

Also in Tampakan, the different stakeholders (namely, the local government, the DENR and NCIP regional offices, the IPs, associations of non-IP landowners, and the mining company) agreed to form a Joint Committee for Land Disputes or JoCom to thresh out issues pertaining to land ownership and occupancy rights. At present, the JoCom's main strategies consist of the conduct of census (to identify the rightful claimants) and parcellary survey (to determine the actual parcels or boundaries). The results of the census and survey will be used as basis for negotiations to resolve conflicting claims. The Committee was formed in October 2006. However, the case study observed that its performance has been hampered by the lack of resources and conflicting schedules on the part of its members (mainly, the DENR and the NCIP).

On the other hand, Dr. Bagadion's report on Palawan documented the recently concluded Mining Forum organized by the PCSD. The report noted that the stakeholders in Palawan were highly polarized, and a climate of distrust pervaded. The Mining Forum, however, provided an opportunity for third party mediation and shuttle diplomacy. In the end, talking points for the different stakeholders were identified. One of the points identified was the operationalization of the concept of "responsible mining."

Reacting to Dr. Bagadion's report, a member of the School's faculty, Dr. Edna Co, observed a big disconnect between the government (both national and local) and the local communities (including the Church, non-government organizations, and IP communities). In view of this, she

noted the need for a middle ground or a third force that would rise above sectoral advocacy, and facilitate discussions among the contending parties.

### **Recommended Interventions**

In line with the purpose stated at the beginning, this section lays down for the different stakeholders a menu of options that may be adopted by the different stakeholders to address the conflicts discussed above. Essentially, this section proposes measures that are designed to fill in the gaps that were identified as the source of conflicts. They are as follows:

#### **On conflicts in the area of economics:**

- On the matter of *cost vs. benefits*:
  - Policy Reform—adoption of a standard natural resource valuation tool;
  - Education and Capacity Building—conduct of trainings for communities on the use of community-based natural resource valuation techniques;
  - Research/Policy Reform—review of existing guidelines on environmental guarantee funds;
  - Research—review of the government’s data on projected mining revenues and investments;
  - Education and Capacity Building—conduct of lecture series on the economics of mining to improve public awareness and stimulate discussions on the issue;

- On the matter of *translating benefits to genuine development*:

At the macro level:

- Convening Process/Policy Reform—development of a national framework for strategic utilization of mining revenues;
- Convening Process/Research—development of concrete indicators on the correlation between mineral development and poverty alleviation;
- Research/Policy Reform—review of mining revenue flow, and rationalization of investment incentive packages and benefit sharing packages;

At the micro level:

- Convening Process—development of a framework for the strategic utilization of community development funds and/or mining royalties;
- Education and Capacity Building—conduct of trainings on financial management skills for IPs;
- Others—institution of community-based monitoring systems to monitor the revenues reported by mining companies and the utilization of community development funds by local government and community organizations;

#### **On conflicts in the area of local governance:**

- On the matter of *local autonomy*:

- Policy Reform—clarification of the parameters of the powers of local governments vis-à-vis the national government and other local governments;
- Education and Capacity Building—conduct of lecture series on ethical leadership;
- On the matter of *consent-giving*:
  - Research/Education and Capacity Building—preparation of toolkits and conduct of lecture series for local government officials on basic mining laws and policies, and basic processes and roles;
  - Research/Education and Capacity Building—preparation of toolkits and conduct of trainings for local government officials on environmental impact assessment;
  - Research/Education and Capacity Building—preparation of toolkits and conduct of trainings for local government officials on evaluation of the technical and financial aspects of mining applications;
  - Policy Reform—institution of adequate transparency and accountability mechanisms in relation to the endorsement of mining applications, including mechanisms for greater community participation in the decision-making;
- On the matter of *monitoring*:
  - Research/Education and Capacity Building—preparation of toolkits and conduct of trainings on monitoring the environmental, technical, financial and other aspects of mining operations;

#### **On conflicts in the area of indigenous peoples' rights:**

- On the matter of *FPIC*:
  - Policy Reform—review of the FPIC guidelines to clarify gray areas;
  - Education and Capacity Building—conduct of lecture series on ethics for NCIP personnel;
- On the matter of *adequacy of benefits and implementation of mining company commitments*:
  - Education and Capacity Building/Policy Reform—creating a legal and technical support structure for IPs in connection with the negotiation of agreements with mining companies, to ensure that agreements entered into by them are as professional as any other agreement entered into by mining companies (such financing agreements and supply or consultancy contracts);
- On the matter of *IP and non-IP relations*:
  - Policy Reform—institution of a policy (on the part of both the government and mining companies) that would promote a more enabling environment for non-IPs, and provide them with wider spaces for participation in decision-making;
  - Convening Process—creation of an alternative forum for dispute resolution, as in the case of the Joint Committee for Land Disputes in Tampakan;
  - Education and Capacity-Building—conduct of trainings for national government agencies and local governments on how to interface indigenous and non-indigenous systems of governance;

- On the matter of *socio-cultural impacts*:
  - Policy Reform—review of the existing FPIC Guidelines;
  - Education and Capacity Building—conduct of lecture series on ethics for the NCIP and mining companies;
  - Research—conduct of research on how development projects can be made more sensitive to IP culture;
  - Policy Reform—review of NCIP policy on the appointment of non-traditional leaders;
  - Education and Capacity Building—conduct of lecture series on IP and human rights for officials and employees of mining companies (including security personnel);

**On conflicts in the area of environmental protection:**

- Convening Process—initiation of a dialogue process to explore the possibility of establishing “no-go areas,” and securing commitments for strict compliance with legal provisions such as the ECAN and Section 19 of the Mining Act (on old growth forests);
- Policy Reform—adoption of precautionary approach until the necessary monitoring technology and capacity are in place in the DENR and the MGB;
- Policy Reform—improving mechanisms for coordination among the different DENR bureaus (*e.g.*, the MGB and the PAWB); and
- Others—establishing a neutral, credible and reliable database and information dissemination system on mining.

**Conclusion**

In summary, it may be observed that the conflicts and issues surfaced by the reports and case studies that form the basis of this paper may generally be classified under two categories: those that pertain to the mining projects’ implementation details (*e.g.*, the adequacy of benefits given to the IP communities and lapses in the implementation of mining company commitments), and those which go into the core of the mining discourse, that is, whether mining should be undertaken in the first place (*e.g.*, the issue of cost vs. benefits). There are some which, at the surface, appear to be merely implementation-related, but actually lead us back to the basic question, such as those issues pertaining to the capacity of the DENR to regulate and monitor mining operators, and the socio-cultural impacts relative to the IPs.

While this discourse recognizes the need to address implementation-related issues— considering that numerous mining projects are currently in various stages of implementation in different parts of the country, and that due regard for the welfare of the concerned local communities demand that they be addressed promptly—it emphasizes, with equal force, the need to objectively re-examine the fundamental premises underlying the government’s mining policy. This would entail openness and utmost good faith on the part of all the stakeholders involved. Without a doubt, the conflicts and issues identified in this paper call for massive reform. However, as many members of the academe and civil society present at the School’s Mining Case Conference indicated, genuine reform would not be possible unless the assumptions underlying the country’s national minerals policy are laid open and scrutinized.

In designing interventions intended to manage conflicts in mining or to build principled consensus on specific issues, it is important to bear in mind the distinction between these two categories. Where implementation is the focus, it would be helpful to take a technical approach, making sure that there is an accurate understanding of the facts and issues at hand and that the necessary expertises are at hand to address the problems. But where the mining dispute is more fundamental and goes to the heart of the mining debate, it is important to recognize the diversity of views, the need for a frank and candid exchange, and disciplined identification of what are the common stakeholder interests that can make principled consensus possible. There are spaces that exist for such a consensus; limited and narrow, yes, but they exist. This paper has identified some of them; the next step is to implement the necessary interventions that would achieve principled consensus towards reforming mining governance.