
Crafting a Sustainable Mining Policy in the Philippines

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When it comes to natural resources, conflicting interests are a problem that is neither new nor geographically unique. At one time or another, governments all over the world have been faced with a call to develop natural resource policies that balance economic and energy needs with the desire to protect and preserve the environment. These policies can be the extractive industries' biggest headache and the environmentalists' worst nightmare. The struggle to balance competing resource and environmental interests is nowhere more apparent than in the international mining industry. Interestingly, an innovative new model for striking a balance among these interests has presented itself in a small but mineral-rich country on the other side of the world: the Philippines.

Historically, mining laws focused on regulating activities surrounding resource extraction—land rights, permits, processing, and sale of extracted resources—but not the effects of extraction. In recent years, however, increasing dialogue on environmental issues has resulted in a shift in thinking about natural resource law. The importance of protecting the environment has come to the forefront of the debate regarding mining and other extractive industries around the world. Now, even people supportive of mining commonly believe that miners should be required to clean up after themselves and that there are certain places where mining should not take place. In response, governments in mineral-rich countries started considering revision of their mining policies to shape a more sustainable extractive industry. But the passage of such a policy is easier said than done, and the United States provides a good illustration of this. Today, for instance, despite attempts in 2007 by the House of Representatives and in 2009 by the Senate to pass such laws, there continues to be no national reclamation law in the United States governing the extraction of hard rock minerals.

The ongoing debate in mineral rich countries concerning sustainable mining policy development has so far yielded little tangible result. The reasons for this seem to be twofold. First, for many countries, including the United States, developing a sustainable mining policy is simply not a top priority. Mining policy and environmental concerns in general have taken a back seat to major economic concerns, unemployment problems, health care reform, and civil rights issues. Second,

the development of a sustainable mining policy is complicated because it involves balancing land and mineral interests among various stakeholders while also balancing a wide array of conflicting public interests, chief among which are the economic benefits of mining versus environmental protection. Mining industry advocates and environmentalists make no secret of the fact that their views are diametrically opposed and, generally, they are unwilling to admit there is any utility in trying to work together.

The inertia in the development of sustainable mining policy in countries like the United States makes all the more remarkable the policy efforts that are currently underway in the Philippines. Faced with many of the same problems as the United States—balancing national, local, and indigenous land and mineral rights while also balancing the extractive industry and the environment—the Philippines has been forging a path forward for itself. This path began with an almost two-year moratorium on new mining permits pending review of old laws, and it culminated in the development of a July 6, 2012, Executive Order from President Benigno Aquino, III, outlining a new sustainable mining policy for the country.

The differing level of success between the two countries boils down to two things: focus and motivation. President Aquino recognized that arguably the two greatest resources that the Philippines has to offer its people and the global marketplace are its mineral potential and its natural environment. To ensure the continued economic growth of the Philippines, something had to be done to maximize the value of both resources for its people, and quickly. Put simply, the administration made this task its top priority.

The Economics of Philippine Natural Resources

The Philippines is one of the most mineral rich countries in the world. Roughly nine of its thirty million hectares of land mass have been identified as having high mineral potential; of that, only about 3.8 percent is currently covered by mine tenements. The country has some of the largest copper and gold reserves in the world; in fact, some commentators say the country has *the* largest copper reserves. The Philippines is also rich in other precious metal and mineral resources, such as nickel. Some industry estimates have placed the value of the Philippines' mineral interests in the trillion-plus dollar range. With such resources available, a fully developed Philippine mining industry would have few parallels.

Although mining certainly presents tremendous economic opportunity for the Philippines, however, two of its other major resources are also tied to the land: agriculture and tourism. Agriculture accounts for nearly 14 percent of the country's

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gross domestic product and employs nearly one-third of the country's workforce. Agricultural products are among the country's primary exports, particularly rice and coconut oil. Total revenue from agriculture in the Philippines exceeds \$10 billion annually. Despite being a developing market, tourism is also a major contributor to the Philippine economy. Between three and four million foreigners vacation in the Philippines annually, and that number is likely to increase as more foreigners are introduced to the Philippines through its outsourcing industry. With many of Asia's best beaches, pristine forests, natural wonders, and world-class diving, tourism is annually a multibillion dollar revenue generator for the country, and it is set to increase dramatically in coming years.

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The Philippines, as a nation composed of islands, has an especially difficult task in balancing its mining industry with its tourism and agricultural industries. In some places, there simply is not enough land for multiple uses. The country has to take great care to ensure that its promotion and further development of one industry does not cause serious damage to the others.

A Familiar Conflict: The Law and Resource Realities

Although there were several laws before it, the first truly comprehensive mining law in the Philippines was developed part and parcel of the 1987 Constitution enacted following the end of the Marcos era. The 1987 Constitution included the principles of sustainable economic development, environmental protection, and indigenous rights, and it required the enactment of new laws to integrate those concepts. A new mining law incorporating these principles took several years and considerable multilateral debate to develop. But in 1995 Congress passed Republic Act No. 7942, "An Act Instituting a New System of Mineral Resources Exploration, Development, Utilization, And Conservation or the Philippine Mining Act of 1995." The product of international stakeholder collaboration, and referred to by some in the industry as "state-of-the-art," the Mining Act of 1995 included all the trappings of a traditional mining law, but also contained sustainable development and environmental protection provisions, sections incorporating indigenous peoples' rights, and a liberalized international investment policy to attract foreign mining interest.

In recent years, however, the Mining Act of 1995—and by extension the mining industry—has been plagued with legal challenges and criticism. Nongovernmental organizations and citizens' groups complain that the law does not do enough to protect the environment and indigenous peoples. These groups also claim that the legal protections that do exist are not enforced consistently. At the same time, other critics claim that the liberalized investment policy goes too far by allowing foreign entities to extract and export minerals while paying very little to the government to remove the resources. They argue that this failure to retain more revenue negatively impacts the Philippine economy and violates constitutional principles concerning the use of natural resources to benefit the people.

The legal challenges to the Mining Act of 1995 fall largely into two categories. First, indigenous peoples' groups have filed numerous lawsuits claiming that mining projects had been developed on their ancestral lands without consent and without conferring any benefit on the affected indigenous group. Second, more than forty provincial governments (Local Government Units, or LGUs) concerned with the potential environmental effect of mining on their lands passed ordinances or other regulations seeking to ban mining activities in their territories, despite the issuance of federal mining permits on the same land. This conflict of laws has resulted in considerable litigation, has halted major mining projects in the interim, and has discouraged further investment from foreign mining companies concerned with the legal uncertainties.

Enter: A New Regime

Sensitive to the myriad issues with the Mining Act of 1995, in February of 2011 the Aquino Administration imposed a moratorium on all new mining contracts. The moratorium was intended to afford the administration the opportunity to review existing laws and make any necessary revisions without having new contracts signed in the interim that might inject legal ambiguities into the process. The administration's review of existing laws was overseen by two groups, the Climate Change Adaptation and Mitigation Cluster (CCAM) and the Economic Development Cabinet Cluster (EDC). These groups did not merely analyze the law. Instead, they undertook an extensive process of meeting with various stakeholder groups to obtain feedback about particular unmet needs and desired changes in an effort to identify and to fill in many of the perceived holes in the Mining Act of 1995.

This stakeholder analysis, so common in business but often underperformed in policy reform, yielded extremely helpful information for the CCAM and the EDC. More importantly, though, it involved a single dialogue between groups that traditionally oppose one another. The analysis signaled to interested parties—local government units, indigenous peoples, environmental groups, and industry representatives—that they were all being heard. Even before its release, all involved knew that the new policy would be about compromise: No one would be completely happy with the policy, but everyone's concerns about the Mining Act of 1995 would be taken into account.

Reforms to the mining policy were widely anticipated for months. As the moratorium wore on, questions arose concerning whether, and when, any such reforms would be made official. But on July 6, 2012, nearly eighteen months after the

moratorium commenced, Executive Order 79 was signed by President Aquino. Now dubbed “the Mining EO,” Executive Order 79 makes several fundamental and highly innovative alterations to the Mining Act of 1995. And to ensure the Philippine legislature’s continuing incentive to implement the reforms, the Mining EO provides that the moratorium on new mining contracts will remain in place until Congress enacts new laws implementing one of its key provisions: the increased sharing of revenue between the Philippines and its mining partners.

Each component of the Mining EO is intended to resolve issues with, and fill gaps in, the Mining Act of 1995. The components generally fall into three categories: clarification of the legal parameters of mining; improving permitting and mining process transparency; and new business mechanisms related to mining. One interesting synergy of the Mining EO is that it was developed using grassroots-style stakeholder engagement, and much of its language draws from the roots of modern Philippine law: the 1987 Constitution.

The continued moratorium is unique among the components in being both a legal parameter and a business mechanism. To put it mildly, the share of mining revenue to which the government is entitled under Mining Act of 1995 is tiny. The Mining EO, citing the citizenry’s right under Section 1, Article XII of the 1987 Philippine Constitution to “a more equitable distribution of opportunities, income and wealth,” states that the moratorium shall not be lifted until Congress passes a law that encompasses more rational revenue sharing for the mining industry. This measure is intended to balance the desire to develop new long-term mining relationships with the government’s duty to ensure the country’s resources are used to help its people prosper.

The two other clarifications of legal parameters include the definition of “no-go zones” for mining as well as imposing restrictions on small-scale mining. These new (and newly reemphasized) environmental regulations were intended to underscore and acknowledge the Philippine mining policy’s preservation of the people’s right under Section 16, Article II of the 1987 Constitution to a “balanced and healthful ecology.” With respect to the so-called “no-go zones,” the Mining EO’s legal parameters reaffirmed and expanded the list of areas in the Philippines that are off-limits to would-be miners because they are protected for various environmental reasons.

The Mining EO enumerates five categories of areas that are closed to mining activities: (1) lands set forth in the Mining Act of 1995 as no-go zones; (2) lands on which mining is prohibited under the National Integrated Protected Areas System; (3) prime agricultural lands as identified in the Comprehensive Agrarian Reform Law; (4) all of the tourism development areas identified in the National Tourism Development Plan; and (5) all other areas identified by the Department of the Environment and Natural Resources (DENR) as critical ecosystem areas.

Section 1 Article XII of the Constitution, the same provision cited to support more rational revenue sharing, was also cited to support the establishment of these no-go zones, particularly as they relate to tourism and agricultural areas. That section provides that “all sectors of the economy and all regions of the country shall be given optimum opportunity to develop.” Its inclusion in the Mining EO is a clear sign that the Aquino Administration recognizes that the other industries in the Philippines tied to the natural environment are

important to the nation’s economy. As a way of determining the best use of the country’s lands, the Mining EO contemplates that the DENR will adopt the World Bank’s Wealth Accounting and Valuation of Ecosystems (WAVES) process. WAVES will help the DENR to determine more accurately, on a case-by-case basis, the costs and benefits of mining in a particular area of the country versus other available land uses, including tourism and agriculture.

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The Mining EO also provides clear guidelines for small-scale mining as the third of its legal parameters. Republic Act No. 7076, the People’s Small-Scale Mining Act of 1991, provides that small-scale mining must take place in designated areas called the “Minahang Bayan.” However, such limitations have rarely been properly enforced. In fact, small-scale mining across the country is largely unregulated, which causes unresolved environmental issues and results in disputes over small-scale mineral rights. The Mining EO reiterates the limitation of small-scale mining to designated areas, and also limits small-scale mining to gold, silver, and chromite. The small-scale mining provisions in the Mining EO were designed to reemphasize the important role played by the LGUs in regulating small-scale mining and ensuring compliance with environmental standards. It also identified an area in need of improvement: the increased technical capacity of the LGUs to manage small-scale mining.

The Mining EO’s small-scale mining limitations are important because small-scale miners often lack the resources or expertise to undertake the necessary environmental cleanup, and the government is left to perform the remediation for them. Confining small-scale mining to certain areas and certain minerals means the government can perform more easily and efficiently necessary environmental work related to small-scale mining. The preclusion of nickel from this list ends a longstanding practice of miners awaiting medium – and large-scale permits cobbling together “small-scale” interim nickel operations that can become quite large and cause major environmental issues without repercussions. The Mining EO also bans the use of mercury in small-scale mining activities.

The transparency measures included in the Mining EO focus on good governance in the extractive industries through the increased availability of information and the implementation of international best practices for industry regulation.

The mechanisms to achieve this include the establishment of a new council to oversee implementation of the new Mining EO, improvements to the information resources available regarding mining, and the harmonization of existing laws. The new council established by the Mining EO, called the Mining Industry Coordinating Council (MICC), will serve as an inter-agency advisory board to oversee the process of implementing the Mining EO and making all necessary changes to existing law, policies, and procedures. MICC will be cochaired by the CCAM Chair and the EDC Chair, with the support of the Secretary of the Department of Justice, the Chairperson of the National Commission on Indigenous Peoples, and the President of the Union of Local Authorities of the Philippines. The composition of the MICC ensures not only that environmental and mining industry concerns are balanced, but also that a wide array of stakeholders will be directly involved in implementing the new mining policy.

The transparency measures included in the Mining EO are twofold. First, the Mining EO directs the various agencies and government units involved in aspects of mining to create a central interagency information and processing center for all applications, processes, and other information related to mining and minerals. This center is intended to streamline the permitting and application process and to make the process more uniform and easier to monitor by all governmental entities involved. Second, the Mining EO directs the creation of a single central database of all mining, minerals, permits, and other documents related to mining. The EO further requires that mining and minerals-related maps be included in the database, and that information from those maps be included in the planning maps used by other agencies working on development projects.

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The second transparency measure, and arguably the most difficult task mandated by the Mining EO, is harmonization with existing law. This provision requires the review of existing national and provincial law to reconcile all conflicts between the two. Under the Mining EO, LGUs may impose reasonable limitations on mining activities in their territories if those limitations are consistent with national laws. Harmonizing existing laws based on this provision will require review of the many LGU ordinances enacted to ban or limit mining activities. The process is likely to be highly political and highly visible, due to the number and outspokenness of the citizens' groups involved. What constitutes a "reasonable limitation" is

likely to be debated intensely during this process. And the dispute between the national government and LGUs concerning local autonomy and primacy over land within a particular province's territory is also likely to be a continuing issue until it is finally resolved by the Philippine Supreme Court.

The business mechanisms set forth in the Mining EO are the development of mineral reservations, the institution of a public bidding process, and the development of downstream industry related to mining. The Mining EO provides for the establishment of mineral reservations with an eye toward sustainable growth in the mining sector. Under this program, areas rich in mineral potential will be set aside for future development, so that the industry will continue to grow in a sustainable way. This ensures the availability of resources to maintain existing investors and to attract new ones.

The new allocation process established by the Mining EO replaces the country's old first-in-time system for distributing rights to mining tenements with one that subjects such rights to competitive public bidding. This new bidding system is innovative; in fact, some in the industry claim that it is too innovative. The Joint Foreign Chambers, for instance, issued a statement expressing concern that it was an untested process and might be subject to manipulation. However, one major purpose of implementing the new bidding system is to standardize and simplify the process of obtaining mining tenements. In addition, bidders must demonstrate that their proposal is, among other things, environmentally sensitive and socially acceptable in the proposed area. Such a demonstration will require collaboration with stakeholders, which should provide added protections against abuse.

The Mining EO's new downstream development mandate underscores the recognition in the industry that materials traditionally considered mine waste actually have beneficial uses post extraction. It requires that the Philippines invest resources into the development of industries downstream from mining, such as the further extraction of minerals from mine waste rock and tailings, and the development of building materials from the waste itself. The growth of such industries downstream from mining activities will provide an economic benefit to local communities by creating new revenue centers and sources of jobs for them. Even better, however, they will also result in a reduction in the downstream environmental impact of the mining activities through the up-cycling of waste materials into new, usable forms.

The delivery of the Mining EO by the Aquino Administration was a major step in the country's efforts to develop the legal framework for a sustainable mining industry, but it is only the beginning. In the coming months, the DENR will develop implementing regulations, Congress will be faced with the task of creating a new revenue sharing system, and the Supreme Court is likely to be faced with disputes concerning how to harmonize existing law. Given the varying interests to be managed at the local, national, and international level, these are no small tasks. But the Administration's early commitment to multilateral stakeholder engagement is sure to help on that front. What the Mining EO signals is that the Philippines has a clear goal in mind: Find a sustainable way to use the country's natural resources for the economic development and benefit of its people, while also protecting their natural environment. For natural resources practitioners worldwide, this is certainly one to watch—we may well learn a lesson from the developed world about how to maintain such a balance. 🌱