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# THE MINING LAW REVIEW

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EDITOR  
ERIK RICHER LA FLÈCHE

LAW BUSINESS RESEARCH

# THE MINING LAW REVIEW

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This article was first published in The Mining Law Review, 1st edition  
(published in November 2012 – editor Erik Richer La Flèche).

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# THE MINING LAW REVIEW

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Editor  
ERIK RICHER LA FLÈCHE

LAW BUSINESS RESEARCH LTD

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Published in the United Kingdom  
by Law Business Research Ltd, London  
87 Lancaster Road, London, W11 1QQ, UK  
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ISBN 978-1-907606-46-5

Printed in Great Britain by  
Encompass Print Solutions, Derbyshire  
Tel: +44 870 897 3239

# ACKNOWLEDGEMENTS

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The publisher acknowledges and thanks the following law firms for their learned assistance throughout the preparation of this book:

ADVOCAAT LAW PRACTICE

ANAND & BATZAYA ADVOCATES

ANDERSON & ANDERSON LLP

AVENT ADVOKAT

CARCELÉN & CIA – ABOGADOS

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## EDITOR'S PREFACE

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I am pleased to have participated in the preparation of the first edition of *The Mining Law Review*. The Review is designed to be a practical, business-focused 'year in review' analysis of recent changes and developments, their effects and a look forward at expected trends.

This book gathers the views of leading mining practitioners from around the world and I warmly thank all the authors for their work and insights.

The first part of the book is divided into 22 country chapters, each dealing with mining in a particular jurisdiction. Countries were selected because of the importance of mining to their economies and to ensure broad geographical representation. Mining is global but the business of financing mining exploration, development and – to a lesser extent – production is concentrated in a few countries, Canada and the United Kingdom being dominant. As a result, the second part of this book includes eight country chapters focused on financing.

The advantage of a comparative work is that knowledge of the law and developments and trends in one jurisdiction may assist those in other jurisdictions. Although the chapters are laid out uniformly for ease of comparison, each author had complete discretion as to content and emphasis.

After the lost decades of the 1980s and 1990s came the mining boom of the past decade and the beginning of the 'Commodities Super-Cycle'. During this time, the price of industrial minerals and other commodities rose sharply. Needless to say, the mining boom has resulted in the resurgence of mining and has been a boon to many emerging economies, particularly in Africa and South America.

Will the super-cycle continue? If one accepts that the root cause of the super-cycle is China, then the answer is yes and mining has a bright future: China needs minerals to continue its industrialisation and the rollout of modern cities and infrastructure. While its stated objective is to build a modern service-oriented economy, China is at best 10 to 15 years away from transiting out of its current intensive mineral consumption phase. As a result, continued strong demand should sustain prices for the next decade – this

is particularly true for metals little found in China. Thereafter, demand should remain strong as the world adds an estimated 2 billion to its population by 2050, most of whom will reside in emerging markets and – if the past is indicative of the future – will want greatly improved living standards.

The Commodities Super-Cycle has fuelled increased mining activity across the globe. It has also given rise to the most important trend facing mining: economic nationalism. Governments, under pressure from their exchequers and populations, want increased and – perhaps more problematically – immediate economic benefits from mining. This phenomenon can be observed in post-industrial economies as well as in emerging ones and across all political lines. No country is immune from this trend.

The long period of sustained high prices for minerals and metals has greatly increased expectations and mining companies and governments are struggling to achieve the right balance between competing interests. The question of the day is how predictably and fairly to share income among various stakeholders: governments, mining communities, mining companies, their shareholders and employees. This is a very difficult question and there is no 'one-size-fits-all solution'.

Mining projects are endeavours of long gestation, which can take 10 years or more between discovery and commissioning. Mining projects are also very capital-intensive with a front-ended investment profile. In other words, mining companies invest large amount of money early but have multi-decade payback horizons and require stable legal and tax environments in order to attract project capital.

Governments, on the other hand, are subject to shorter-term pressures. Their budgets are yearly affairs, employees and local communities are impatient, and politicians are at the mercy of electoral cycles. The tax-receipt profile of mining projects, however, is predominantly back-ended; that is to say, governments receive the bulk of taxes and other charges many years after project commissioning and project debt repayment.

The long-term needs of projects for stable legal and tax environments and the short-term pressures placed on governments for more revenues has led to friction. While governments have considerable leverage thanks to supply constraints and high prices, they must nonetheless walk a fine line. They need to be careful not to 'kill the golden goose' while avoiding a 'race to the bottom'. After all, governments compete with each other to attract mining projects and mining companies can jurisdiction shop.

Economic nationalism is not limited to raising taxes: it can take other forms, including governmental or local ownership, benchmark export pricing, minimum in-country transformation, and export restrictions to ensure supply to local industry.

How can mining companies mitigate risks posed by economic nationalism? One of the best mitigation strategies is for mining companies to have a strong 'social licence'. A social licence may be defined as the acceptance or – better still – the approval of the community adjacent to a project. A strong social licence is not only effective against governmental overreach but can also serve as an effective anti-corruption mechanism.

A social licence has to be earned and maintained. This is best achieved through multi-stakeholder dialogues, local economic involvement, good environmental performance and social inclusion. Medical clinics, schools, roads, power plants, irrigation dams and water treatment plants are some of the types of projects carried out by mining companies as part of their social licence.

As you consult this book you will find more on economic nationalism and other topics apposite to jurisdictions of specific interest to you, and I hope that you will find this book useful and responsive.

**Erik Richer La Flèche**

Stikeman Elliott LLP

Montreal

November 2012

## Chapter 16

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# PHILIPPINES

*Roderick R C Salazar III and Geraldine S Meneses-Terrible<sup>1</sup>*

### I OVERVIEW

Being naturally endowed with a substantial number of mineral resources,<sup>2</sup> the Philippines has recognised the benefits to be derived by it from mining activities, economic or otherwise. This fact is supported by a provision of the 1987 Philippine Constitution allowing the exploration, development and utilisation of mineral resources<sup>3</sup> through the grant of an exploration permit ('EP'),<sup>4</sup> mineral processing permit ('MPP') mineral agreements such as mineral production sharing agreements ('MPSAs'),<sup>5</sup> joint venture

---

1 Roderick R C Salazar III is co-managing partner and Geraldine S Meneses-Terrible is a senior associate at Fortun Narvasa & Salazar.

2 Based on Statistics on Philippine Mineral Production as of June 2012 of the Philippine Mines and Geosciences Bureau ('the MGB'), the following quantities of metallic minerals were produced in 2011: (1) gold: 31,120kg; (2) silver: 45,530kg; (3) copper: 63,835 metric tonnes; (4) nickel: 22,794 metric tonnes; (5) metallurgical chromite: 25,483 dry metric tonnes; (6) zinc: 37,354 dry metric tonnes; and (7) iron ore: 126,177 dry metric tonnes ([www.mgb.gov.ph/Files/Statistics/MetallicProduction.pdf](http://www.mgb.gov.ph/Files/Statistics/MetallicProduction.pdf)). MGB also claims that out of the Philippines' 30 million hectares total land area, 9 million hectares have been identified as having high mineral potential.

3 Section 2, Article XII of the 1987 Philippine Constitution.

4 Section 20 of the Mining Act provides that an EP grants the right to conduct exploration for all minerals in specified areas and is recognised under the Mining Act IRR as the initial mode of entry.

5 Section 31 of the Mining Act IRR defines an MPSA as 'an agreement wherein the Government grants to the Contractor the exclusive right to conduct mining operations within, but not title over, the contract area and shares in the production whether in kind or in value as owner of the minerals therein. The Contractor shall provide the necessary financing, technology, management and personnel'.

agreements ('JVAs'),<sup>6</sup> co-production agreements ('CPAs'),<sup>7</sup> and financial or technical assistance agreements ('FTAAs').<sup>8</sup> As of 31 August 2012, the Mines and Geosciences Bureau ('the MGB') reports that there are 340 MPSAs in place covering a total area of 602,630 hectares while there are six FTAAs over a total area of 108,872 hectares. Small-scale mining permits are granted only to Filipino citizens or cooperatives composed of Filipino citizens.

Based on the mining industry statistics<sup>9</sup> released by the MGB on 2 August 2012, total mining investment in 2011 was \$618.5 million and the aggregate mining investment from 2004 to 2011 has been more than \$4 billion.<sup>10</sup> Also, the total taxes, fees, royalties and charges collected from the mining industry as of 2010 amount to around 13 billion pesos.<sup>11</sup> Clearly, the mining industry has made significant contributions to the Philippine economy.

However, with the current policy and pending legislation involving mining, such figures will definitely change, presumably with an increased contribution from raised revenue schemes. The Philippine mining industry will remain unsettled until all uncertainty is resolved by the implementation of new mining policy and legislation.

## **II LEGAL FRAMEWORK**

### **i Mining legislation**

There are three laws governing mining in the Philippines:

- a* Republic Act No. 7042, otherwise known as the Philippine Mining Act of 1995 ('the Mining Act') and its Implementing Rules and Regulations embodied in Department of Environment and Natural Resources ('DENR') Administrative Order ('AO') No. 2010-21 ('the Mining Act IRR');
- b* Republic Act No. 7076 or the People's Small-Scale Mining Act of 1991 ('the Small-Scale Mining Act');<sup>12</sup> and

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6 Section 31 of the Mining Act IRR defines a JVA as 'an agreement where a joint venture company is organised by the Government and the Contractor with both parties having equity shares. Aside from earnings in equity, the Government shall be entitled to a share in the gross output'.

7 Section 31 of the Mining Act IRR defines a CPA as 'an agreement between the Government and the Contractor wherein the Government shall provide inputs to the mining operations other than the mineral resources'.

8 Section 5(ak) of the Mining Act IRR defines an FTAA as 'a contract involving financial or technical assistance for large-scale exploration, development and utilisation of mineral resources'.

9 <http://mgb.gov.ph/Files/Statistics/MineralIndustryStatistics.pdf>.

10 <http://mgb.gov.ph/Files/ItemLinks/ThePhilippineMineralsIndustryAtAGlance.jpg>.

11 \$319 million at the current exchange rate.

12 Presidential Decree ('PD') No. 1899 approved in 1984 establishing a small-scale mining as a new dimension in mineral development also remains in force albeit at a much reduced level of implementation.

- c Executive Order No. 79 entitled Institutionalising 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 (‘the Mining Policy’) and its Implementing Rules and Regulations embodied in DENR Administrative Order No. 2012-07 (‘the Mining Policy IRR’).<sup>13</sup>

The Mining Act is the main mining legislation in the Philippines and governs large-scale exploration, development and utilisation of mineral resources; the Small-Scale Mining Act, as its title suggests, regulates small-scale mining and limits the same to Filipino citizens. The Mining Policy is an executive fiat recently enacted on 6 July 2012. It makes several innovations on the Mining Act, specifically in the following areas: expansion of areas closed to mining applications, establishment of mineral reservations, competitive public bidding for areas open to mining, and compliance with the ‘social acceptability’ requirement of the communities affected. It also calls for the strict implementation of the provisions of the Small-Scale Mining Act and prohibits the use of mercury in small-scale mining activities.

Along with the mining laws, the DENR also strictly enforces various environmental laws through its Environmental Management Bureau (‘the EMB’) to ensure that the mining industry adheres to the protection of the environment. Some of the other environmental laws that would have application to the mining industry relate to the Philippine environmental policy, pollution control, environmental impact statement (‘EIS’) system and environmental compliance certificate (‘ECC’) system, clean air policies, and water environmental policies.

The Philippines has not entered into any international treaty involving mining.

## ii Regulatory body

The MGB under the DENR is the agency tasked with implementing the Mining Act and its IRR. It accepts, evaluates, reviews and recommends to the DENR Secretary the approval of applications for exploration permits and mineral agreements.<sup>14</sup>

The environmental laws and standards are implemented by the EMB.

The Mining Policy also created a Mining Industry Coordinating Council (‘the MICC’), which is an interagency body<sup>15</sup> tasked, *inter alia*, with implementing the Mining Policy and conducting an assessment and review of all mining-related laws, rules and regulations, issuances and agreements, so as to be able to make recommendations to improve the allocation of revenues and risk between the government and the mining sector.<sup>16</sup>

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13 The MICC revised Sections 3, 7 and 9 of the Mining Policy IRR and released the revised versions of said provisions on 24 September 2012. Such revisions, as of this writing, are pending approval by the President of the Philippines.

14 Section 9 of the Mining Act.

15 Section 9 of the Mining Policy.

16 Section 10 of the Mining Policy.

**iii Mineral reporting requirements**

The Philippine Mineral Reporting Code ('the PMRC') was recently adopted by the MGB and the Philippine Stock Exchange in setting the minimum standards and requirements for reporting exploration results, mineral resources and ore reserves. The PMRC imposes a mandatory system for classification of tonnage and grade estimates according to geological confidence and technical and economic considerations. The PMRC is based on the JORC Code (2004) of Australasia and is likewise compatible with the international codes of Australia, South Africa, the European Union and Canada, neither is it incompatible with the international reporting template (2006) formulated by the Committee for Mineral Reserves International Reporting Standard ('CRIRSCO').

**III MINING RIGHTS AND REQUIRED LICENCES AND PERMITS**

**i Title**

The Philippines follows the Regalian Doctrine. Under Section 2, Article XII of the 1987 Constitution, all natural resources, including minerals, are owned by the state. The state may however, enter into agreements such as MPSAs, FTAA's, CPAs and JVA's for the exploration, development and utilisation of natural resources.

Title to minerals cannot be transferred to private parties, specifically the permit holders and mineral agreement grantees. The permits and agreements contain a stipulation that the grant thereof does not bestow beneficial ownership of the minerals to the holder or grantee.<sup>17</sup>

Also, pursuant to the Regalian Doctrine, the state owns all mineral lands that are considered inalienable.<sup>18</sup> Thus, a private individual or entity, whether a Filipino citizen or otherwise, cannot own mineral lands. Patented titles to mineral lands perfected under the Philippine Bill of 1902 shall, however, continue to be owned by the grantees thereof.<sup>19</sup>

**ii Surface and mining rights**

*Acquisition of mining and surface rights*

The procedures for acquisition of mining rights depends upon the type of permit or agreement applied for.<sup>20</sup>

*EP*

To apply for an EP, certain documentary requirements should be submitted to the MGB regional office ('RO'). Upon submission of the documentary requirements to the MGB RO concerned, the application must be evaluated and the area applied for will be plotted to determine if it conflicts with other mining areas or is within areas closed

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17 Sections 22(p) and 39(af) of the Mining Act IRR.

18 Section 3, Article XII of the 1987 Constitution.

19 *Atok Big-Wedge Mining Company v. Hon Intermediate Appellate Court and Saingan*, G.R. No. 63528, 9 September 1996.

20 MGB primers for EP, MPP, MPSA and FTAA.

to mining applications. Should there be no conflict on the area applied for, the MGB issues an area status clearance, and a notice of application. Upon issuance thereof, the applicant must secure a certification precondition or certificate of non-overlap from the NCIP and publish, post or announce the notice of application on the radio. After this period of publication, the applicant must secure a certification from the DENR Panel of Arbitrators as to whether any opposition has been filed against the application or an adverse claim on the area applied for. Should there have been no claim or opposition, the MGB RO will again evaluate the application and endorse the same to the MGB Central Office ('CO'), which will make a final evaluation of the application and approve or deny the same. Upon approval of the application by the MGB RO after clearance by the MGB CO, the EP will be numbered, registered and released by the MGB RO to the applicant, now holder, thereof. Section 7 of the Mining Policy IRR directs the MGB to issue an approval or disapproval of an EP application within six months from the date of acceptance thereof. Further, it stated that requirements such as area status clearance, certificate of non-overlap or certification precondition, certificate of posting and certificate of (no) adverse claim or protest shall be deemed waived if the government agency concerned are not able to issue them within the prescribed deadlines.<sup>21</sup>

#### *MPP*

Upon filing of an MPP application by the mining company, the MGB RO makes a preliminary evaluation of the requirements supporting the application for MPP. If the project costs less than 200 million pesos, the application will be evaluated and approved by the MGB RO. If it costs more than 200 million pesos, the application shall be forwarded to the MGB CO within five days for review. If the MGB CO finds that the project costs more than 500 million pesos, it will endorse the same to the DENR Secretary for his or her final evaluation, and approval or denial. The MPP application will otherwise be evaluated, and approved or denied by the MGB Director. The approved MPP shall be numbered by the MGB CO and registered with and released by the MGB RO to the grantee thereof.

#### *MPSA*

The MPSA application is carried out in much the same way as that for the EP. Once the MGB RO has endorsed the application to the MGB CO, however, this body will then endorse the application to the DENR Secretary for final evaluation and approval or denial thereof. Upon approval of the application, the MPSA shall be numbered by the MGB CO and registered and released by the MGB RO to the contractor.

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21 Area status clearance should be issued within one month from the date of acceptance; certificate of non-overlap within three months from date of filing of the application or certification precondition within six months from date of filing of the application; certificate of posting within one week of the last day of completion of posting; certificate of (no) adverse claim or protest within one week from the date of filing of the request.

However, the Mining Policy has suspended the grant of new mineral agreements such as the MPSA until legislation rationalising existing revenue-sharing schemes and mechanisms has taken effect.<sup>22</sup>

#### *FTAA*

The initial application process is again identical to that of EPs and MPSAs. After the MGB CO has endorsed the application to the DENR Secretary for final review, the Negotiating Panel<sup>23</sup> and the FTAA applicant will then negotiate the terms of the FTAA. Once the Negotiating Panel is satisfied with the terms and conditions of the proposed FTAA, it shall recommend its execution and approval to the President. The President will then approve the FTAA and notify the Congress of such within 30 calendar days. The approved FTAA will be transmitted to the MGB CO for numbering, and registered and released by the MGB RO to the contractor.

The new Mining Policy does not include the acceptance of applications for FTAA in the moratorium that is presently in place in the Philippines. The new Mining Policy IRR allows national government-owned mining assets to be the subject of FTAA applications, which will be awarded through competitive public bidding.<sup>24</sup>

#### *Validity or term of mining and surface rights*

An EP is valid for a period of two years from the date of issuance, but is renewable for further similar periods, not exceeding a total term of four years for non-metallic mineral exploration or six years for metallic mineral exploration.<sup>25</sup> During the term of the EP, the feasibility study must be conducted and a declaration of mining project feasibility ('DMPPF') filed. If these are not completed in the six-year term, a further extension of two years may be applied for and granted for the specific purpose of completing the DMPPF.

The term of an MPP is five years from the date of issuance, renewable for further similar periods but not exceeding a total term of 25 years.<sup>26</sup>

Both the MPSA and the FTAA have terms not exceeding 25 years from the date of execution, and are renewable for another term not exceeding 25 years.<sup>27</sup>

Should the parties fail to agree on the terms of renewal in accordance with the provisions of the Mining Act, the MPSA or the FTAA will be considered an expired mining tenement and the grant thereof will be subject to competitive public bidding. Mining contractors with tenements expiring from 1 September 2012 to 30 April 2013 are

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22 Section 4 of the Mining Policy.

23 The Negotiating Panel is composed of representatives of the DENR, MGB, Board of Investments or Department of Trade and Industry; National Economic Development Authority; Department of Finance; DENR's Field Operations Office; DENR's Legal and Legislative Affairs Office; and MGB RO concerned (Section 58 of the Mining Act IRR).

24 Section 7 of the Mining Policy IRR (as revised).

25 Section 21 of the Mining Act and Section 18 of the Mining Act IRR.

26 Section 109 of the Mining Act IRR.

27 Sections 32 and 38 of the Mining Act and Sections 34 and 52 of the Mining Act IRR.

required to file their renewal applications within 30 calendar days from the effectiveness of the Mining Policy IRR, whereas mining contractors with tenements expiring after 30 April 2013 are required to file their renewal applications at least six months prior to the expiry of their mining contracts or agreements.<sup>28</sup>

*How mining rights are protected*

During the term of the permits and mineral agreements, the holder or grantee has the right to conduct the activities allowed therein without interference as long as it complies with the terms and conditions of the permit or mineral agreement. EP holders are given the right of first refusal to develop and utilise minerals in their exploration area upon approval of their declaration of mining project feasibility and effectiveness of new legislation on mining. Failure to put the area into operation within the period provided in the EP shall result in automatic loss of the priority right, and the government can open the areas for bids.<sup>29</sup>

*Restrictions on the surface or mining rights that may be acquired by foreign parties*

Only qualified persons are allowed to hold and be granted permits and mineral agreements. The Mining Act and its IRR defines ‘qualified person’ as:<sup>30</sup>

*[...] any Filipino citizen of legal age and with capacity to contract; or a corporation, partnership, association or cooperative organised or authorised for the purpose of engaging in mining, with technical and financial capability to undertake mineral resources development and duly registered in accordance with law, at least sixty percent (60 per cent) of the capital of which is owned by Filipino citizens: Provided, that a legally organized foreign-owned corporation shall be deemed a Qualified Person for purposes of granting an Exploration Permit, FTAA or Mineral Processing Permit only.*

Thus, only Filipino citizens or corporations, partnerships, associations or cooperatives 60 per cent of the capital of which is owned by Filipino citizens are qualified to be granted an MPSA; however, legally organised foreign-owned corporations are qualified to hold and be granted EPs, MPPs and FTAAAs (see Section V.i and iii, *infra*).

*Maximum allowable areas*

For an EP, the maximum area that mining companies may apply for or hold is as follows:

- a* onshore, in any one province – 200 blocks or approximately 16,200 hectares;
- b* onshore, in the entire Philippines – 400 blocks or approximately 32,400 hectares;
- or
- c* offshore, in the entire Philippines, beyond 500 metres from the mean low tide level – for corporations, 1,000 blocks or approximately 81,000 hectares.<sup>31</sup>

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28 Section 3 in relation to Section 9 of the Mining Policy IRR (as revised).

29 Section 7 of the Mining Policy IRR.

30 Section 3(aq) of the Mining Act and Section 5(cg) of the Mining Act IRR.

31 Section 22 of the Mining Act and Section 18 of the Mining Act IRR.

The maximum area for an MPSA, however, is:

- a* onshore, in any one province – 5,000 hectares for metallic minerals and 2,000 hectares for non-metallic minerals per final mining area;
- b* onshore, in the entire Philippines – 5,000 hectares per final mining area; or
- c* offshore, in the entire Philippines, beyond 500m from mean low tide level – 500 blocks or approximately 40,500 hectares, and for the Exclusive Economic Zone, a larger area to be determined by the DENR Secretary upon the recommendation of the MGB Director.<sup>32</sup>

The maximum FTAA contract area that may be applied for by or granted to a qualified person in the whole of the Philippines is:

- a* 1,000 meridional blocks or approximately 81,000 hectares onshore;
- b* 4,000 meridional blocks or approximately 324,000 hectares offshore; or
- c* a combination of 1,000 meridional blocks onshore and 4,000 meridional blocks offshore.

### *Capitalisation*

The minimum capitalisation requirement for an EP or an MPSA applicant or holder is 2.5 million pesos.<sup>33</sup> The applicant or holder of an FTAA is required to have authorised capital in the amount of \$4 million or its Philippine peso equivalent.<sup>34</sup> Note also that an FTAA contractor is required to invest at least \$50 million for the infrastructure and development of the mining area.

### **iii Additional permits and licences**

Under Section 7 of the Department of Finance Local Finance Circular No. 02-09, in relation to Sections 147 and 151 of the Local Government Code, an individual or entity must secure a business permit from the relevant local government unit prior to the commencement of mining operation.

Further, MPSA and FTAA contractors or grantees are required to obtain an ECC,<sup>35</sup> a permit to operate air pollution control equipment,<sup>36</sup> a wastewater discharge permit,<sup>37</sup> a permit to operate electrical and mechanical installation,<sup>38</sup> a licence to use and purchase cyanide,<sup>39</sup> a permit to purchase and use explosives,<sup>40</sup> a tree-cutting permit and

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32 Section 28 of the Mining Act and Section 33 of the Mining Act IRR.

33 Sections 19(d) and 35 of the Mining Act IRR.

34 Section 53(c) of the Mining Act IRR.

35 Sections 35 and 56 of the Mining Act IRR.

36 DENR AO No. 2000-81.

37 DENR AO No. 2005-10, 16 May 2005.

38 Section 150 of the Mining Act IRR.

39 DENR AO No. 1997-39, 23 December 1997.

40 Executive Order No. 58, 1 January 1987 entitled 'Rationalising Fees and Other Charges on Firearms, Explosives and Explosive Ingredients, Security Agencies and Security Guards'

water permit and such other relevant permits as may be required by specific laws relevant to the nature of the mining project.<sup>41</sup>

#### **iv Closure and remediation of mining projects**

The contractor or permit holder is required to formulate a final mine rehabilitation ('FMR') or decommissioning plan ('DP') or a mine closure plan, which will be integrated to its environmental protection and enhancement programme. The FMR/DP will consider all possible mine closure scenarios and contain cost estimates for the implementation of each, taking into consideration expected inflation, technological advances and the unique circumstances faced by the mining operation. The estimates shall cover the full extent of work necessary to achieve the objectives of mine closure, such as decommissioning, rehabilitation, maintenance and monitoring, and employee and other social costs, including residual care, if necessary, over a 10-year period.<sup>42</sup>

A Final Mine Rehabilitation and Decommissioning Fund is required to be established by each operating contractor or permit holder and must be deposited as a trust fund in a government depository bank and be used solely for the implementation of the approved FMR or DP.<sup>43</sup>

### **IV ENVIRONMENTAL AND SOCIAL CONSIDERATIONS**

#### **i Environmental, health and safety regulations**

Holders of permits and grantees of mineral agreements are required to strictly comply with all the rules and regulations relating to mine safety and health standards embodied under DENR Administrative Order No. 2000-98.<sup>44</sup>

The MGB regional director concerned must conduct a safety inspection of all installations in mining operations and monitor the safety and health programme of a contractor or permit holder.

#### **ii Environmental compliance**

Mining contractors, prior to the development stage of the MPSA or FTAA are required to obtain an ECC and go through an environmental impact assessment ('EIA').<sup>45</sup>

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41 Presidential Decree No. 1067, 'Water Code of the Philippines'.

42 Section 187 of the Mining Act IRR.

43 Section 187-B of the Mining Act IRR.

44 Section 142 of the Mining Act IRR.

45 Section 3(h), DENR Administrative Order No. 2003-30: 'Environmental Impact Assessment (EIA) – process that involves evaluating and predicting the likely impact of a project (including cumulative impact) on the environment during construction, commissioning, operation and abandonment. It also includes designing appropriate preventive, mitigating and enhancement measures addressing these consequences to protect the environment and the community's welfare. The process is undertaken by, among others, the project proponent and/or EIA Consultant, EMB, a Review Committee, affected communities and other stakeholders.'

Upon completion of the documentary requirements, the contractor must submit these to the EMB, which will determine the completeness of the documents. If the documents are complete, the ECC applicant or contractor will be required to pay the filing and processing fee and review fund. Thereafter, the application will be referred to a case officer who will convene the Environmental Impact Assessment Review Committee ('the EIARC') for substantive review, including site inspection. The EIARC will then prepare and submit its report and recommendation to the EIA chief, who will review it as well as the process documentation. The EIA chief will endorse the matter to the EMB director, who will approve or deny the same. If the application is approved, the EIA Division of the EMB will release the ECC. Alternatively, if the application is denied, the matter is referred to the DENR Secretary for review and final decision on ECC issuance or refusal.<sup>46</sup>

The ECC must be processed within a period of 120 working days from the time of payment of filing and processing fee.<sup>47</sup> The ECC application is deemed automatically approved if the EMB fails to render a decision on the ECC application within this period.<sup>48</sup>

Failure to commence the mining project within five years from issuance of the ECC will result in its automatic expiration.<sup>49</sup>

Mining tenement applicants or owners and, in the case of corporations applying for or holding mining tenements, the officials thereof shall be permanently disqualified from acquiring mining rights and operating mining projects if they have a record of violation of environmental standards and have failed to implement remediation measures.<sup>50</sup>

### **iii Third-party rights**

Prior to the issuance of any permit or mineral agreement, the mining applicant shall undergo the free and prior informed consent ('FPIC') process.<sup>51</sup>

The FPIC process starts with the endorsement of the project by the MGB to the NCIP Regional Office concerned, which will then conduct a field-based investigation ('FBI') to ascertain whether the area applied for falls within an ancestral domain. If this is not the case, the NCIP will issue a certificate of non-overlap, provided that the mining applicant executes an undertaking for the conduct of FPIC should it later be discovered that the area does in fact overlap with an ancestral domain.

In the event that an area does overlap with an ancestral domain, the NCIP must conduct two community assemblies.

During the first, the following matters shall be taken up:

- a* orientation on IPRA and FPIC process;
- b* validation of the FBI report and the areas affected;

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46 Ibid.

47 Ibid.

48 Section 8.2, DENR Administrative Order No. 2003-30.

49 Section 5.4.3, DENR Administrative Order No. 2003-30.

50 Section 5 of the Mining Policy IRR.

51 Section 59, Indigenous Peoples Rights Act ('IPRA').

- c* census of IPs, migrant IPs or non-IPs;
- d* identification and validation of IP elders and leaders;
- e* determination of the decision-making or consensus-building processes;
- f* consensus on the involvement of non-government organisations;
- g* validation of the members of the FPIC team representing the community;
- h* presentation of the agreed work and financial plan;
- i* option, selection and invitation of independent experts to conduct EIA or give their expert opinions;
- j* arrangements for conflict or dispute resolution mechanisms by the chosen or elected IP elders or leaders;
- k* date and place of second community assembly; and
- l* other matters that may be necessary and pertinent.

Thereafter, a second community assembly will be held to discuss the project and the concerns of the IPs.

Following the second community assembly, the ICCs and IPs concerned will discuss the advantages and disadvantages of the proposed mining project. After this, the duly authorised elders or leaders will communicate their decision to the FPIC team. If they are amenable to the project, the mining applicant and the ICCs and IPs concerned, through their community representatives, will negotiate the terms and conditions of their memorandum of agreement, the provisions of which will be explained to the community by the FPIC team in a language they speak and understand.

Once the memorandum of agreement is finalised, the ICCs and IPs will issue a resolution of consent and the applicant will post a bond with the NCIP to answer for damages that the ICCs and IPs may suffer on account of any violation of the terms and conditions of the agreement. The NCIP will then issue a certification precondition in favour of the mining applicant.

Should the project not be acceptable to the ICCs and IPs concerned, a resolution of non-consent will be prepared, signed and released. The applicant can file for a reconsideration of this resolution within 15 days of its receipt. If the ICCs and IPs affirm the resolution of non-consent, no FPIC process for any similar proposal may be undertaken within six months from its issuance.

Unless specifically stated in the memorandum of agreement with the ICCs and IPs concerned, the FPIC process is required to be complied with for every stage of the mining project (i.e., exploration, development and operational stages).<sup>52</sup>

#### iv Additional considerations

Republic Act No. 7160, otherwise known as the Local Government Code of 1991 ('the Local Government Code'), requires prior consultation with or approval of the local *sanggunian*<sup>53</sup> concerned prior to implementation of any project or programme that may

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52 AO No. 3-2012, Revised Guidelines on FPIC and Related Processes of 2012, which took effect on May 31, 2012.

53 Legislative body of local government units in the Philippines.

cause pollution, climate change, depletion of non-renewable resources, loss of crop land, rangeland, or forest cover and extinction of animal or plant species.

In compliance with the aforesaid provisions of the Local Government Code, DENR Memorandum Order No. 2004-09 requires mining applicants to present proof of consultation or project presentation.

Prior approval or endorsement in the form of a resolution or certification by at least a majority of the local government units concerned is required in support of mining application for immediate development or utilisation activities and of applications for approval of the DMPF under the development and construction or operating periods of mineral agreements such as an MPSA or FTAA. Thus, prior to the development and operation stages of a mining project, the contractor is required to submit to the MGB favourable resolutions of the project from a majority of the local government units concerned.<sup>54</sup>

## V OPERATIONS, PROCESSING AND SALE OF MINERALS

### i Processing and operations

#### *Import of equipment and machinery*

While the Mining Act and its IRR do not prohibit the importation of equipment and machinery to be used in mining, a contractor or permit holder is required to give preference to products, services and technologies produced and offered in the Philippines of comparable quality; specifically, contractors and permit holders are required to purchase Philippine household equipment, furniture and food.<sup>55</sup>

#### *Processing of extracted minerals*

There is no law requiring mining contractors to process extracted minerals in the Philippines only. Individuals or entities that plan to engage in mineral processing apart from mineral development should, however, be in possession of an MPP.<sup>56</sup>

The new Mining Policy directs the DENR and other relevant government agencies to develop a national programme and roadmap, based on the Philippine Development Plan and a National Industrialisation Plan, for the development of value-adding activities and downstream industries for strategic metallic ores with an aim of discouraging direct shipping of ore.<sup>57</sup>

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54 So, if there are three local government units (e.g., province, municipality or *barangay (barrio)*) affected by the mining activity, the favourable resolutions of two local government units will be deemed sufficient compliance with the requirements of the Local Government Code.

55 Section 138 of the Mining Act IRR.

56 Section 5(be) of the Mining Act IRR.

57 Section 8, EO 79 of the Mining Policy.

### *Use of foreign labour and services*

A mining contractor is required to give preference to Filipinos in all types of mining employment for which they are qualified.<sup>58</sup> Employment of foreigners must be limited to technologies requiring highly specialised training and experience. Foreign executives may also be employed, provided that a Filipino understudy can be trained for such position.<sup>59</sup> Foreigners can hold the positions of mine manager, vice-president for operations or other equivalent managerial position in charge of mining, milling, quarrying or drilling operations.<sup>60</sup> The MGB Director may also allow foreigners to be employed in mining operations for a period of no more than one year.<sup>61</sup>

The foregoing notwithstanding, a mining company holding an MPSA may elect foreigners to its board of directors in proportion to the foreign equity participation therein.<sup>62</sup> This limitation is not applicable to mining companies holding EPs, MPPs and FTAAAs, as they are allowed to have 100 per cent foreign equity, unlike in mining companies holding MPSAs where only 40 per cent foreign equity is allowed since activities conducted under an MPSA are considered partly nationalised.

### **ii Sale, import and export of extracted or processed minerals**

For minerals extracted pursuant to an MPSA or FTAA, the Mining Act and its IRR allow the sale of the minerals locally and their exportation, provided that the minerals and by-products produced are sold at the highest market price and lowest commercially achievable commissions and related fees under market conditions, and to negotiate for sales terms and conditions compatible with world market conditions. The contractor may enter into long-term sales and marketing contracts or foreign exchange and commodity-hedging contracts for its minerals and mineral products. Marketing contracts and sales agreements with foreign or local buyers involving commercial disposition of minerals and by-products shall be subject for approval by the DENR Secretary upon recommendation of the MGB Director. The approved marketing contracts and sales agreements shall be registered with the MGB, and must remain confidential.<sup>63</sup>

The Philippine mining laws do not have a provision regarding the importation of minerals.

### **iii Foreign investment**

Foreign Investment is defined as ‘an equity investment made by a non-Philippine national’. If the foreign investment consists of at least 40 per cent of the outstanding capital of a domestic mining company, this should be registered with the Securities and Exchange Commission. Further, for foreign investments in the form of foreign exchange or assets

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58 Section 39(h) and 56(j) of the Mining Act IRR.

59 Section 39(o) and (p); Section 56(q) and (r) of the Mining Act IRR.

60 Section 140 of the Mining Act IRR.

61 Section 141, Mining Act IRR.

62 Section 2-A of Commonwealth Act No. 108 otherwise known as the ‘Anti-Dummy Law’.

63 Sections 33(l) and 56(n) of the Mining Act IRR; Stipulations in standard MPSA and FTAA contracts.

actually transferred to the Philippines to be repatriated, it should be registered with the Central Bank of the Philippines ('the BSP').<sup>64</sup> Only foreign investments registered with the BSP are entitled to full repatriation of capital and remittance of dividends or profits using foreign exchange sources or the local banking system.

Repatriated foreign investment is not subject to tax. In addition, one of the investment guarantees of the Mining Act to foreign investors is the right to repatriate the entire proceeds of the liquidation of the foreign investment in the currency in which the investment was originally made and at the exchange rate prevailing at the time of the repatriation.<sup>65</sup>

Earnings from foreign investment may also be remitted in the currency in which the investment was originally made and at the exchange rate prevailing at the time of remittance.<sup>66</sup> These earnings, which will be in the form of dividends, whether cash or property, will, however, be subject to tax.

Foreign investments in mining companies are entitled to the following protection:

- a* freedom from expropriation except for public use or in the interest of national welfare or defence and upon payment of just compensation;
- b* freedom from requisition of investment except in the event of war or national emergency and only for the duration thereof, provided that any just compensation paid may be remitted in the currency in which the investment was originally made and at the exchange rate prevailing at the time of remittance; and
- c* information that is agreed as confidential by the government and the contractor shall be treated as such during the term of the project.

The Philippines has entered into 30 bilateral investment treaties ('BITs') with various countries, thus obliging it to protect foreign investments including those in mining projects.<sup>67</sup> BITs normally apply to investments brought into, derived from or directly connected with investments brought into the territory of a contracting state by nationals or companies of the other contracting state, which are qualified for registration and are duly registered.<sup>68</sup>

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64 Section 1(e) of Implementing Rules and Regulations of the Foreign Investments Act.

65 Section 229(a) of the Mining Act IRR.

66 Section 229(b) of the Mining Act IRR.

67 [www.unctadxi.org/templates](http://www.unctadxi.org/templates); In the list maintained by the United Nations Conference on Trade and Development (UNCTAD) in its website, the 29 countries with which the Philippines has entered into BITs are Argentina, Australia, Austria, Bangladesh, Belgium, Cambodia, Canada, Chile, China, the Czech Republic, Denmark, Finland, France, Germany, Italy, Myanmar, the Netherlands, Pakistan, Portugal, the Republic of Korea, Romania, the Russian Federation, Spain, Sweden, Switzerland, Thailand, Turkey and the United Kingdom. Saudi Arabia also lists the Philippines as among the countries with which it has entered into a BIT.

68 See, for instance, Article II of the Agreement between the United Kingdom and the Republic of the Philippines for the Promotion and Protection of Investments entered into force on 2 January 1981.

## VI CHARGES

### i Royalties, taxes, duties and other fees

The Mining Act imposes a royalty of at least 5 per cent of the market value of the gross output of the minerals or mineral products extracted or produced from the mineral reservations, exclusive of all other taxes. Thus, those holding mineral agreements outside of mineral reservations are not required to pay royalties to the Philippine government.

MPSA contractors pay the 2 per cent excise tax on mineral products based on the actual market value of its gross output at the time of removal, where they were locally extracted or produced.<sup>69</sup>

The other taxes and duties payable by mining companies are the following:

- a* contractors' income tax – 32 per cent of taxable income derived during each taxable year from all sources within and without the Philippines;
- b* customs duties and fees on imported capital equipment – rates vary as provided for under the Tariff and Customs Code;
- c* value-added tax on imported goods and services – 12 per cent of value added;
- d* withholding tax on interest payments on foreign loans – 15 per cent of interest payment;
- e* withholding tax on dividends to foreign stockholders – 15 per cent of a dividend subject to tax treaty rates, if applicable;
- f* documentary stamps taxes – rates vary depending on the type of transaction;
- g* capital gains tax – for stocks not publicly traded, 5 per cent on the first 100,000 peso gain and 10 per cent on the excess gain over 100,000 pesos, for real property, 6 per cent of the selling price or fair market value, whichever is higher;
- h* royalties to indigenous peoples, if in ancestral lands – minimum of 1 per cent of the gross output from minerals;
- i* special allowance and royalty to ICCs and IPs granted pursuant to agreements entered into by the contractor and concerned parties;
- j* local business tax – the rates for this vary depending on the local government concerned;
- k* real property tax – 2 per cent of the fair market value of the property;
- l* community tax;
- m* occupation fees – 50 pesos or 100 pesos per hectare per year, depending on whether the mining area is in a mineral reservation;
- n* registration and permit fees – depending on the licence or permit applied for; and
- o* all other national and local government taxes, royalties and fees as of the effective date of the FTAA.

Further, an FTAA contractor or grantee is required to pay a basic government share consisting of all the aforesaid taxes paid for by an MPSA holder and an additional government share. The additional government share shall be payable after the recovery period and if the basic government share is less than 50 per cent of the net mining

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69 Section 217 of the Mining Act and Section 151 of the National Internal Revenue Code.

revenue. The additional government share shall be the difference of 50 per cent of the net mining revenue and the basic government share during the calendar year.<sup>70</sup>

The EMB may also impose fines and penalty in case of violation of the terms and conditions of the ECC covering the operations of an MPSA or FTAA. It can also issue cease-and-desist orders to prevent serious or irreparable damage to the environment.<sup>71</sup>

## **VII OUTLOOK AND TRENDS**

With the recent passing of the Mining Policy, the Philippine mining industry is undergoing changes. The Mining Policy directed the adoption of legislation rationalising revenue-sharing schemes and mechanisms. Thus, mining companies should expect an increase in government share as stated above and some variation in the extent of economic incentives that may be given and availed of. In the meantime, a moratorium on the acceptance of applications and grant of mineral agreements is in place, except for FTAAAs and permits.

Further, the Mining Policy has added areas that are considered closed to mining applications given the government's increasing concern for the protection of the environment and the shift in concentration to other industries to be developed. Moreover, it required the review of existing mining operations and of existing mining contracts and agreements for possible renegotiation of the terms and conditions thereof.

Notably, the Mining Policy granted reprieves to mining companies affected by local government legislation prohibiting the conduct of mining activities, as it enjoined local government units to exercise their powers and functions in a manner consistent with regulations, decisions and policies promulgated by the national government, particularly the Mining Act and its IRR, with respect to the management, development and proper utilisation of natural resources.

Given the seemingly stringent provisions of the Mining Policy, the mining industry is anxiously anticipating how the Mining Policy will finally be implemented.

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70 DENR AO No. 2007-12, 20 June 2007. 'Net mining revenue' refers to the gross output less deductible expenses. On the other hand, 'recovery period' is defined as a maximum period of five years or at a date when the aggregate of the net cash flows from the mining operations is equal to the aggregate of its pre-operating expenses, reckoned from the date of commencement of commercial production, whichever comes first.

71 Section 16 of DENR AO No. 2003-30.

## Appendix 1

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