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Mining and Mandatory Community Development Programs in the Philippines: A Legal Interrogation

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COMMUNITY DEVELOPMENT AND MINING

In the Fourth Quarter of the 2023 National Accounts of the Philippines, the mining and quarrying industry experienced a year-on-year growth of 10.3%. While the mining of iron and other non-ferrous metals attribute to around 20% of the entire mining and quarrying section, this activity accounts for almost 67% of the entire workforce of the industry. While mining contributes to 0.70% of the country's GDP, the Philippine government recognizes that the mining sector holds much promise in the future growth of the economy yet at the same time this industry imposes risks and generates negative externalities to community health and safety. Within the legal framework, these externalities are addressed by the requirement for mining firms to develop their respective social development and management program (SDMP) in their respective areas of operation. Based on the 9th Philippine Extraction Industries Transparency Initiative (EITI) Report, mandatory expenditures for SDMP amounted to around Php 959 million, while government reports that direct expenditures in SDMP amount to P1.35 billion.

To strengthen governance on extractive industries, the Philippine government committed to the institutionalization of EITI principles at national and sub-national levels. In the same EITI report it was noted that significant progress is to be made in strengthening spaces for multi-stakeholder participation along the extractive industries value chain.

EXECUTIVE SUMMARY

The policy brief addresses the role of civil society organisations (CSOs) in regulating mandatory community development programs in the Philippine mining sector, particularly through the Social Development and Management Program (SDMP). Under the Philippine Mining Act of 1995, mining contractors must allocate at least 1.125% of their operating costs to community development, aiming to improve living standards in host communities. However, challenges persist, including limited community participation and potential corporate insensitivity to local needs. Recommendations include amending the Mining Act to ensure CSO involvement in SDMP processes, revising regulations to enhance stakeholder participation, and expanding the monitoring role of Multipartite Monitoring Teams to include SDMP oversight. These steps aim to foster accountability and equity in resource management, ultimately benefiting local communities impacted by mining activities.

However, a report by Bantay Kita shows that local communities are often left out in hearings, or when there is community participation, are conducted in unbalanced ground (i.e. on the premises of the mining firm, or on the operation of CSO and communities under the State's security framework). This can be understood as symptomatic of the lack of democratic spaces that ensure the rights and obligations of stakeholders to authentically participate in sustainable social development programs that impact the community where these mining firms operate.

Therefore, the following issue arises: Are mandatory socio-development programs imposed by the State in the form of resource regulation an effective measure to address the problems of negative externalities and social costs borne by the operations of extractive industries, specifically that of mining and quarrying? What are the inherent legal limitations in mining regulation, especially that of mandatory community development programs like the SDMP?

THE LEGAL FRAMEWORK

More than forty countries have either adopted or have pending legislation requiring community development agreements (CDA) in their respective national and sub-national statutes. Among the countries having this requirement, the Philippines is one of the five countries in the Southeast Asia region that has adopted mandatory CDAs in the mining industry.

In the Philippines, minerals, mineral oils, and other natural resources are owned by the state; thus, the exploration, development, and use of these natural resources are under the state's full control and supervision. By constitutional fiat, the State may undertake these activities directly or with Filipino citizens or corporations. The main statute that regulates the mining industry is Republic Act No. 7942, otherwise known as the Philippine Mining Act of 1995 (PMA). Under the PMA, contractors are mandated to assist in the development of the mining community and the promotion of the general welfare of its inhabitants. For activities to be credited as expenditures for the development of mining communities, such activities should be intended to enhance the development of mining and neighbouring communities in a mining operation other than those required or provided for under existing laws, collective bargaining agreements, and similar agreements.

To operationalize the provisions of the PMA, specifically the provision on community development, the Philippine Department of Environment and Natural Resources (DENR) issued Administrative Order No. 2010-21 or the Revised Implementing Rules and Regulations of R.A. 7942 (RIRR). Under RIRR, contractors are obligated to prepare a SDMP or, in the case of holders of Exploration Permits, Mineral Agreements, or Foreign or Technical Assistance Agreements still in the exploration stage, a Community Development Program. The SDMP is a comprehensive five-year plan of the contractor for sustained improvement in the living standards of the host and neighboring communities by creating responsible, self-reliant, and resource-based communities capable of developing, implementing, and managing community development programs, projects, and activities consistent with the principle of people empowerment.

Under RIRR, the minimum allocation for SDMP is 1.125% of the contractor's operating costs. For purposes of computing the budget for the SDMP, the operating cost is defined as the specific cost of producing a saleable product on a commercial scale incurred in the calculation of the net income before tax, which includes all costs and expenditures related to mining/extraction, treatment/processing, exploration activities during the operation stage, power, maintenance, administration, excise tax, royalties, transport and marking, and annual progressive/environmental management. Under the regulation, the following programs, projects, and activities under the following areas are considered proper expenditures and chargeable to the SDMP:

1. Human Resource Development and Institutional Building
2. Enterprise Development and Networking
3. Assistance to Infrastructure Development and Support Services
4. Access to Education and Educational Support Programs
5. Access to Health Services, Health Facilities, and Health Professionals
6. Protection and Respect of Socio-Cultural Values
7. Use of facilities/services within the mine camp or plant site

The RIRR also provides that the SDMP must be prepared in consultation and partnership with the host and neighbouring communities.

While the SDMP is submitted by the contractor to the Regional Office of the Mines and Geosciences Bureau (MGB) of DENR and subsequently reviewed and evaluated by the said office, the Contractor is required to enter into a Memorandum of Agreement (MOA) with the host and neighbouring communities as represented by the barangays and municipalities concerned. Based on the approved SDMP and MOA, the contractor is obligated to submit to the Regional Office annual programs thirty days prior to the beginning of every calendar year. To manage the SDMP, the RIRR requires contractors to incorporate into its organisational structure a Community Relations Office (CRO) headed by a Community Relations Officer (COMREL) who reports directly to the highest company on-site official. The RIRR requires that the said officer be a graduate of any social science course or any person with experience and training in community development work, with preference for those with strong knowledge of the local culture.

Regarding monitoring, the determination of the level of implementation of the annual SDMP is done jointly by the CRO and the representatives of the host and neighbouring communities. The CRO must provide quarterly reports of the Annual SDMP to the Regional Office, and the latter also conducts semi-annual monitoring to audit the reports submitted. Failure to implement the SDMP shall subject the contractor to penalties, which may be a fine for the first offense and, the suspension of mining operations and fines for subsequent violations.

Theorizing Mining and Mandatory Community Development

From the nature of the industry, extractive firms are often required to obtain a social license to operate (SLO) to address both the social costs of the firm's operation and the management of social risks. Legitimacy in firm operations is acquired through the firm's legal, economic, and social licenses to operate. Social license is defined as "demands on and expectations for a business enterprise that emerge from neighbourhoods, environmental groups, community members, and other elements of the surrounding civil society." In this manner, SLO goes beyond the requisites of operation as may be legally required from them; it allows the community to be informed of the firm's operations and participate fully with the firm to preserve community interest. SLO can also be seen both from the perspective of the firm and the community: on the one hand, SLO reduces the social risk of community conflict between the firm and the community, and on the other hand, the grant of SLO implies meaningful community participation and indicative of sufficiency that the community gains from the firm.

Mining firms face the dual challenge of balancing regulatory responsibilities with the need to cultivate public goodwill. To achieve sustainable development, it is essential for these companies to actively engage with local communities. Governments often mandate that mining firms involve communities in their operations as part of their regulatory oversight. Simultaneously, the inherently disruptive nature of mining necessitates that firms maintain positive relationships with the communities in which they operate. Effective community relations require mining companies to understand and align with the shared worldviews of local residents. This alignment can be fostered through initiatives such as corporate social responsibility and targeted community development programs.

Maconahie and Hilson (2013) posit that the social construction of community development reveals how these initiatives impact their beneficiaries. On the one hand, community-driven development is better understood in its relationship to 'accumulation by exploitation' and 'accumulation by dispossession. Accumulation by exploitation refers to the unequal relations of production. In contrast, accumulation by dispossession refers to the appropriation of key livelihood resources shared by the community in favour of extractive industries granted permission by the state. The perception of these types of accumulation, as Maconahie and Hilson propose, is dependent on the social construction by the actors involved in community development. On the other hand, community development controlled by corporate entities engaged in the extraction of resources is ripe for disaster as it is not responsive to the community's needs.

While SLO may be considered as an informal requirement for firms to operate, compelling firms to engage in community development to address externalities transforms and coopts SLO as a legal and formal requirement by making it part of the statutory requirements for firms to continue operation. With this, mandated community development becomes susceptible to issues that plague government regulation, like state capture, overlapping and incomplete regulations, or hyper-regulation. All the more, the responsiveness of mandatory community development as a way to secure a firm's slo becomes more problematic when it is too focused on a top-down corporate approach towards development and sustainability or when community development is designed to be low-impact and constrained.

However, the government's mandate for firms to formulate a community development plan with the communities affected by their operations recognises that: first, the firm is only capable of crafting and implementing a community development program that is responsive to the needs of the community if they (the community) are involved in all stages of its formulation and implementation; second, the government recognises that for firms to maximise the economic value generated from the mining activity, it requires an SLO from the community, and this can be acquired both in the process and output of community development; and third, the community's participation in the firm's community development program will assist the government in exercising its regulatory function while ensuring that the community receives the benefits of community development. Thus, in this case, the internalisation of social costs relies not solely on coercive government regulation; this mandated community development in the extractive industry includes the community in the corporate governance of firms engaged in this economic activity.

The effectiveness of government-mandated community development, however, is dependent on the character and strength of the institutions where these programs are to be formulated and implemented. For example, the definition of "community" in the PMA can be easily interchanged with the administrative and political sub-unit of the State. This definition may pose complications in formulating and implementing community development programs. For one, modern communities are not monolithic social groups, and political subdivisions may not necessarily represent the inherent diversity of a defined "community." For example, there are barangays in the Philippines where indigenous peoples and the common folk are placed under one political unit. In some communities where mining operations are present, religious and cultural differences are more highlighted than in urban communities. Thus, it may have a profound impact on the direction of the community development program of the firm. In this case, community representatives, usually elected local officials, may not be able to represent the interests of cultural minorities in their jurisdiction. This is on top of prevailing issues on the existence of authentic public local consultations in crafting the community development program.

By fostering greater participation of CSOs in regulatory processes and decision-making, accountability,

transparency, and equity in the mining sector can be further enhanced. This shift towards more participatory governance is essential for mitigating the adverse effects of mining and ensuring that its benefits are equitably distributed among all stakeholders involved.

CONCLUSION

Mandatory community development imposed by the Philippine Government on mining firms can be understood from the view of allowing firms to internalise the externalities inherent in their industry and, at the same time, facilitate the acquisition of the SLO from the communities they operate. While the formulation and implementation of the SDMP are already integrated into the existing legal framework for mining, more can be done to make its programs, projects, and activities relevant and responsive to community needs.

This can be done by expanding CSO participation in the formulation, evaluation, and monitoring of SDMP. By opening spaces for CSO participation and maximising the already existing regulatory mechanisms within the PMA and its RIRR, increased collaboration, reduced information asymmetries, and more responsive programs, projects, and activities are to be implemented to the benefit of communities and the environment. As the Australian Government emphasises collaboration with Southeast Asian partners to promote Australia's capabilities in mining, energy, and mining equipment, technology, and services (METS) for sustainable development in the region, the integration of smart regulation becomes critical. In this way, the Australian government may assist in capacitating stakeholders in formulating and monitoring mandatory community development programs that ensure the alignment of resource extraction with both environmental sustainability and the socio-economic well-being of local communities.

RECOMMENDATIONS

Amend the Philippine Mining Act to include CSO participation in regulation. Since the time of writing, the PMA has been the primary legislation regulating the mining industry for almost three decades. While there are calls for the revision of the PMA towards “responsible mining”, this review should also focus on how existing regulatory mechanisms, especially the implementation of the SDMP, can be more equitable and sustainable. In addition to the mandatory expenditure that mining firms should bear for SDMP, the statute itself must ensure the inclusion of stakeholders in mining communities and not only limit the participation in the formulation, implementation, and monitoring of the SDMP between the local government unit, the MGB, and the contractor. This will entail the setting of rights and obligations that ensure the participation of CSO in the SDMP process. While non-governmental and people’s organisations participate in the environmental impact assessment prior to the issuance of the environmental clearance certificate, this participation must expand to other areas of regulation like those contained in Chapter X of the PMA, which includes the SDMP.

Revise the RIRR to expand the participation in the formulation, approval, and monitoring of SDMP and annual SDMP implemented in existing mining sites. The RIRR provides that the SDMP is to be prepared by the contractor in consultation and in partnership with the host and neighboring communities. To expand the participation of CSO in the entire SDMP framework, CSO representation may be included in the technical conference which makes the final evaluation of the program. In this manner, the MGB will benefit from stakeholder voices on the evaluation of the proposed SDMP in addition to their role in the formulation of the program at the preparation stage.

Expand the role of the MMT from the monitoring of the EPEP to include the monitoring of the SDMP. Under the existing provisions of the PMA, the monitoring and the audit of the SDMP are done by the CRO and the representatives of the community. On the other hand, the Mine Rehabilitation Fund (MRF) is managed by the MRF Committee (MRFC) and the duty to monitor the implementation of the Environmental Protection and Enhancement Program (EPEP) can be deputised to the Multipartite Monitoring Team (MMT). The composition of the membership of the MRFC and the MMT includes not only the contractor and the government regulator but also the community, including CSOs and indigenous groups. Adding SDMP monitoring and audit may also be done by the MMT in order to maximise the pool of expertise and resources already available to the MMT into the monitoring of social development programs in the mining sites subject to the regulatory oversight of the MGB. Further, this may synergize the EPEP and SDMP as the social development of these sites is intertwined with its environmental protection and enhancement, both within and beyond the life of the mine. However, measures should be implemented to guarantee the independence of the MMT. This involves changing the contractor's role to that of a facilitator for funds that are favorably endorsed to the MMT, rather than allowing the contractor to withdraw money directly from the fund and control the funds used for MMT activities.

Encourage Australian collaboration in capacitating regulatory agencies, firms, and communities to engage in increasing stakeholder participation in the regulation of SDMP. The Australian Government may share its expertise in community development in extractive industries by capacitating regulatory agencies, CSO, communities, and mining firms through its COMREL, in co-design and co-production strategies that identify programs, projects, and activities that address persisting community concerns and develop long-term community development initiatives through more open spaces for collaboration and cooperative regulatory oversight. Further, the Australian Government can help the Philippine Government, through MGB, in increasing and streamlining the availability of data from mining firms on their respective SDMP, making it more publicly accessible and understandable to allow communities and CSO to make informed decisions on identifying collaborative ways forward in terms of community development in their respective sites.