

## Thinking Locally: Community Consultation in the Philippines

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### SUMMARY

<b>Challenge</b>	Incorporating local people's participation in the decision-making process on extraction in their community, specifically those who are impacted by large-scale mining (Precept 5 of the Natural Resource Charter <sup>1</sup> ).
<b>Country and period of focus</b>	Philippines, 1991-2015
<b>Challenge in country</b>	Reducing delays or local rejection of high-profile investment projects and depoliticizing mining operations.
<b>Core decisions</b>	The local governance code transferred some responsibility to local governments on mining operations taking place within their jurisdictions.
<b>Implications of decisions</b>	An institutionalized mechanism allows for people directly affected by large-scale mining to have a say in whether mining should proceed.
<b>Policy decisions, implementation and governance</b>	Allocate more powers to local government units (LGUs):  The Local Government Code (LGC) of 1991 gives LGUs significant discretion over the issuance of permits and franchises, and the enforcement of national environmental laws, stipulating that any project or program that, "may cause pollution, climatic change, depletion of non-renewable resources, loss of cropland, rangeland, or forest cover, and extinction of animal or plant species" requires the approval of the affected LGUs (Section 26, Section 27, LGC). Section 2c also requires the government to consult non-governmental organizations, and other concerned sectors of the community before any project or program is implemented in their respective jurisdictions.
<b>Did it work?</b>	The LGC was implemented as envisaged, giving local government greater authority over mining. Several subsequent supreme court cases <sup>2</sup> as well as attempts by the Department of Environment and Natural Resources (DENR) to reduce this authority highlights the tensions between national and local governments in implementing the code.  The code has been a partial success as it allowed local governments to have a say on local mining operations, however in several cases where LGUs refused to consent a mining operation or imposed a moratorium, despite the environmental gains there were significant investment losses for the government.
<b>Lessons learned</b>	<ol style="list-style-type: none"> <li>1. Local governments need to be transparent and accountable to truly represent local people impacted by extraction.</li> <li>2. Public access to basic information such as environmental impact assessments (EIAs) and free, prior and informed consent (FPIC) reports are necessary so that local governments can use their full bargaining potential and obtain benefits from extraction.</li> <li>3. A third party independent certification that consults local people is needed, and where appropriate, FPIC procedures are carried out.</li> <li>4. A strong intergovernmental coordination system is necessary for sound decision making and oversight of mining operations.</li> </ol>

### ABOUT THE SERIES

This is one of a series of case studies that illustrates the principles of the Natural Resource Charter. The charter is a tool used by governments and societies seeking to better harness the opportunities created by extractive resources.

<sup>1</sup> Natural Resource Charter <http://www.resourcegovernance.org/approach/natural-resource-charter>

<sup>2</sup> For example see Dante B. Gatmaytan, *A handbook on Local environmental governance* (Bantay Kita, 2014), 21-22.

## THE CHALLENGE

In the early 1990s the Philippines' regulatory framework on public consultation for environmentally harmful projects was composed of several independent pieces of legislation that were confusing and not followed.<sup>3</sup> Local government and community discontent with the social and environmental impacts of large-scale mining operations led to mass protests,<sup>4</sup> which compelled the Philippines government to close or abandon many high-profile projects.<sup>5</sup> This resulted in higher costs for the operating companies, and also delayed—and even lower—government revenue flows. Political backlash by opposition groups, backed by the media, forced several political leaders to step down.<sup>6</sup> Events reached a turning point in March 1996 following the tailings spill at the Marcopper Mining Corporation mine which filled the 26-kilometer Boac River on the island of Marinduque with 3-4 million tons of metal-enriched and acid-generating tailings.<sup>7</sup> The Marcopper Mining Disaster remains one of the worst environmental disasters in Philippine history. An investigative team from the United Nations concluded that environmental management had not been, “a high priority for Marcopper.”<sup>8</sup> The general consensus in the media and government was that the negative impact of the incident could have been reduced if the public had been consulted in the extraction process.<sup>9</sup>

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## WHAT DID THE COUNTRY DO?

The Philippine Congress passed the Local Government Code (LGC, or the Republic Act No. 7160) in 1991. The LGC is one of the most influential statutes in the context of the country's decentralization framework.<sup>10</sup> Provisions of the LGC have strengthened local governments' opposition to mining operations in their areas. In particular, the code requires agencies of the national government such as the Department of Environment and Natural Resources (DENR) to consult with and obtain consent of local government units (LGUs) before starting any project with substantial environmental risk.<sup>11</sup> Following these provisions, several local governments have withheld their consent to mining projects or imposed moratoriums. The Marcopper mining disaster stimulated further confrontations between local governments and mining companies. Although the LGC had been in place five years prior to the mining disaster, since the disaster local governments have used the code provisions more frequently to oppose mining activities in their jurisdictions.<sup>12</sup>

3 Interview with Tony La Viña on December 4th, 2014.

4 William N. Holden and R. Daniel Jacobson, “Mining Amid Decentralization. Local Governments and Mining in the Philippines,” *Natural Resources Forum* 30 (2006), 191.

5 Klaus Bosselmann, Ron Engel and Prue Taylor, *Governance for Sustainability: Issues, Challenges, Successes*, (World Conservation Union, 2008), 72.

6 Interview with Tony La Viña on December 4th, 2014.

7 *Backgrounder on Placer Dome in Marinduque, Philippines* (Mining Watch Canada, 2005), available at <http://www.miningwatch.ca/backgrounder-placer-dome-marinduque-philippines>

8 Catherine Coumans, *Placer Dome Case Study: Marcopper Mines* (Mining Watch Canada, 2002), 3.

9 Interview with Tony La Viña on December 4th, 2014.

10 Holden and Jacobson, 191.

11 Section 2 (c), Section 26, Section 27, Local Government Code of 1991. Specifically, two requisites must be met before a national project that affects the environmental and ecological balance of local communities can be implemented: prior consultation with the affected local communities, and prior approval of the project by the appropriate local government unit. If either of these mandatory requirements is absent, the project's implementation is illegal. The code does not require any minimal documentation to be shared by the national government or companies nor does it require local authorities to justify why they withhold approval.

12 Holden and Jacobson, 191.

In the majority of cases, local government opposition has not halted mining projects but it has caused significant delays. Members of the community in Didipio protested against the Didipio Copper-Gold project (sponsored by Climax-Arimco Mining Corporation, an Australian mining firm) as early as in 1994.<sup>13</sup> The mining prospectors explored and mined the area without the local community's knowledge. Yet in 2002, the barangay<sup>14</sup> of Didipio (municipality of Kasibu, Nueva Vizcaya province, Luzon Island) withheld their consent thus forcing the mining operation to halt. Similarly, in 2004 all 26 barangays of the municipality of Siocon (province of Zamboanga del Norte, Mindanao Island) refused to give their consent to the Canatuan Gold project proposed by Toronto Ventures Incorporated Pacific, a Canadian mining company. The indigenous people of Subanon<sup>15</sup> opposed the Canatuan Gold project because they were concerned with potential environmental degradation.<sup>16</sup> Other LGUs have enacted resolutions to oppose mining in their jurisdiction. In the province of Davao Oriental (Mindanao Island) both municipalities of San Isidro and Governor Generoso issued resolutions to prevent mining operations.<sup>17</sup> Both resolutions were a local response to the Marcopper disaster.<sup>18</sup> The residents of Governor Generoso specifically mentioned the incident in their resolution, pointing out that it had, "alarmed the people of Governor Generoso."<sup>19</sup>

Local governments opposed to large-scale mining operations have also imposed moratoriums, as part of the local government code provisions, to ban mining operations for specific durations.<sup>20</sup> In 1999, the provincial board of Capiz declared a fifteen-year moratorium on large-scale mining activities through Resolution No. 006-1999, and in 2003 the provinces of Samar and Eastern Samar imposed a fifty-year mining moratorium and an indefinite moratorium on the development of any new mining operations.<sup>21</sup> The province of Oriental Mindoro passed a moratorium to prevent a large-scale nickel-cobalt-mine from beginning operation, and the province of South Cotabato imposed a ban on open pit mining in 2013, mainly in response to the Tampakan open-pit copper-gold mining project in the province.

## OUTCOMES

When local governments and communities<sup>22</sup> are publicly consulted by mining companies, they can use their legal rights to enhance their bargaining power. Local governments can not only claim better compensation from the project sponsor (for example, through charging appropriate tax on mining operations, and environmental and extraction fees as listed in the Local Government Code), but also ensure there are sufficient safeguards against environmental degradation. Where there are potentially adverse environment impacts of mining, local governments and civil society groups have collaborated to withhold their consent on mining projects or issue a moratorium.<sup>23</sup> One moratorium example was in 1996 at the

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13 Rovillos R.D. et al., *Philippines: When the "Isles of Gold" turn to Isles of dissent* (2003), 15. In: Colchester, M. et al., *Extracting Promises: Indigenous Peoples, Extractive Industries, and the World Bank* (Tebtebba Foundation, 2005).

14 A *barangay* is the lowest level of subnational government in the Philippines. The territorial and political subdivisions of the Philippines are the provinces, cities, municipalities, and *barangays*. These four subdivisions are also called Local Government Units (LGUs).

15 Subanon is a tribe indigenous to the Zamboanga peninsula area.

16 Christian Aid and Philippine Indigenous Peoples Links, *Breaking Promises, Making Profits: Mining in the Philippines* (Christian Aid, London, 2004), 29.

17 Resolutions No. 75-2003 and No. 58-2005.

18 Holden and Jacobson, 192.

19 Holden and Jacobson, 192.

20 Sections 16 and 17 taken in conjunction with Sections 447(1), 447(5), 468(1), and 468(4).

21 Resolutions No. 541-2003 and No. 008-2003. The latter allowed for existing operations to take place.

22 Indigenous communities have a separate set of rights through free, prior and informed consent (FPIC).

23 Holden and Jacobson, 188-98.

Malampaya deepwater gas-to-power project, the largest industrial investment in the Philippines.<sup>24</sup> The Malampaya project proponents, Royal Dutch Shell and Occidental Petroleum (Shell-Oxy), considered different options for the offshore pipeline route: two options would have routed the pipeline entirely offshore, while the third and least expensive option would have crossed Mindoro Island. The local government and community negotiated for Shell to reject the overland option which would have involved traversing and heavily impacting rich biodiversity areas and the ancestral waters of the indigenous Tagbanua tribe.<sup>25</sup> The firm eventually selected an offshore option that was three times more expensive than traversing the island.<sup>26</sup> In another example, a moratorium imposed by the province of Oriental Mindoro stopped a project by Canadian company, Crew Development Corporation, which would have involved processing the nickel and cobalt extracted by a method called high pressure acid leaching, using concentrated sulphuric acid. The tailings from such a process would have been disposed on the seabed. Details on the potential loss of revenue for the local and national governments versus benefits gained are unavailable.

Several mining projects have not been given local consent despite potentially significant benefits at the local level.<sup>27</sup> This was because either local governments did not have enough information on the proposed project to make an informed decision or local political leaders represented elite interests (such as those of small-scale mining companies or artisanal miners in the jurisdiction).<sup>28</sup> Instead of using the code as a way to bargain for a better deal for local people, local politicians have used the provisions to keep all mining projects away from the area. This has created a divisive climate and general mistrust between national and local governments, between provincial and barangay levels of local government and also between local governments and companies. The most widely cited case on local government opposition to large scale mining is the Tampakan open-pit copper-gold mining project in South Cotabata province, which is co-owned by Filipino Sagitarrius Mining and Swiss mining giant Glencore Xstrata. The project was granted an environment compliance certificate by the DENR, despite the issue of a provincial environment code. Glencore Xstrata divested its majority share in the project in 2014 citing legal uncertainty over the provincial code as a major reason. Studies on the potential loss as a result of local and national government opposition is unavailable, but it is likely that delays and divestment has resulted in a significant loss of revenue.<sup>29</sup>

24 Sohn et al., *Development Without Conflict: The Business Case for Community Consent* (World Resources Institute, 2007), 19.

25 Sohn et al., 24.

26 Sohn et al., 24.

27 In addition to significant authority over the issuance of permits and franchises, and over the enforcement of national environmental laws, LGUs benefit from mining in two important ways. First, they receive automatic internal revenue allotments from the national government (not linked to resource extraction) and a share of "resource rents" collected from activities involving the development of mineral resources within their territorial jurisdiction. Second, LGUs have control over small-scale mining (Republic Act No. 7160, 1991, s. 484).

28 The irony is that small-scale and artisanal mining often has larger negative impacts on the environment compared to large-scale mining. See Danilo C. Israel and Jasminida P. Asiro, "Managing Mercury Pollution Emanating From Philippine Small-Scale Gold Mining Activities: An Economic Analysis," in *The Socio-Economic Impacts of Artisanal and Small-Scale Mining in Developing Countries* 517 (G.M. Hilson ed., 2003). Alternate Forum for Research in Mindanao, Inc., "A Background Study on the Small-scale Gold Mining Operations in Benguet and South Cotabato and Their Impact on the Economy, the Environment and the Community" (2012).

29 For details see Espejo, E. Low metal prices and uncertainties stall the Tampakan operation (2014). Retrieved from <http://www.rappler.com/business/specialreport/whymining/whymining-latest-stories/54123-low-metal-pricesuncertainties-stall-smi-tampakan-operation> and "Finally, Tampakan mine environmental clearance okayed" (2013). Retrieved from <http://www.rappler.com/business/special-report/whymining/whymining-latest-stories/22108-finally-tampakan-mine-environmental-clearance-okayed>. For additional examples of local resistances to mining and link to national and local politics, see Nung Wong, P., Aquino, K., Lara-De Leon, K., and Yuen Fun So, S., "As wind, thunder and lightning: local resistance to China's resource-led diplomacy in the Christian Philippines," *South East Asia Research*, 21(2) (2013), 281-302.

In an effort to minimize the number of mining projects opposed by local governments, the DENR issued Administrative Order 99-34 in 1999, which states that only the consent of two out of the three levels of LGU in a given location is needed for mining to proceed. This was seen as a national government response to the increasing number of projects that were being stopped, delayed or abandoned because of local government resistance. The moratoriums were considered by many national policymakers as, “contrary to national policy,” and presented, “lost opportunities.”<sup>30</sup> The DENR also lobbied Congress to amend both the Mining Code and the LGC, so that the requirement for local government consent could be circumvented.

## LESSONS LEARNED

Mining projects can have large and adverse environment and social impacts at the local level while benefits accrue to the nation at the central government level.<sup>31</sup> As precept 5 of the Natural Resource Charter states, resource management requires minimizing the costs for affected communities, while enhancing the benefits.<sup>32</sup> Allowing local governments to have a say in whether mining can proceed should, in theory, improve development outcomes by letting people directly affected by extractive projects make decisions about the exploration and development of mineral deposits. The basic argument in favor of such an approach is that local decision-makers are more familiar with potential and actual environmental, social, and economic impacts to the area, and are thus able to make decisions that will bring greater protection to and greater benefit to the local population. Subnational governments may not have the ability to undertake rigorous cost benefit analysis of projects or to monitor them and enforce compliance effectively. But by deciding which projects can proceed, they can ensure that the potential benefits a project brings to the area are worth the costs borne by local people; and that the locations of extractive projects are aligned with local land-use plans.<sup>33</sup> These arguments are underpinned by the assumption that local governments are accountable to the people and have comprehensive information on the proposed project in order to make sound decisions.

These assumptions have not always borne out in the case of the Philippines. While there have been a few cases where the election of provincial leaders has been influenced by communities’ say on mining,<sup>34</sup> this accountability link between local politicians and their electoral community is not the norm. Local governments in the Philippines, specifically at the provincial level, have a strong history and culture of patronage and rent seeking.<sup>35</sup> Research suggests that there are low levels of accountability to the national government and to local communities.<sup>36</sup> The combination of discretion offered by the local government code and low

30 William N. Holden and R. Daniel Jacobson, Mining and decentralization: Local governments and mining in the Philippines.” *Natural Resources Forum* 30 (2006)

31 Natural Resource Charter Precept 5

32 Natural Resource Charter Precept 5

33 Varsha Venugopal. *Assessing Mineral Licensing in a Decentralized Context. The Case of Indonesia*. (Natural Resource Governance Institute. New York, October 2014).

34 See for example, <http://asiancorrespondent.com/91430/2013-election-smi-looms-large-in-south-cotabato-polls/>

35 Serdar Yilmaz and Varsha Venugopal, “Local Government Discretion and Accountability in Philippines,” *Journal of International Development* (May 2010). For example of powerful alliances between local politicians and small scale miners see case of Diwalwal in Monkayo in Boris Verbrugge, “Decentralization, Institutional Ambiguity, and Mineral Resource Conflict in Mindanao, Philippines,” *World Development* Vol. 67, pp. 449–460 (2015).

36 Serdar Yilmaz and Varsha Venugopal, “Local Government Discretion and Accountability in Philippines,” *Journal of International Development* (May 2010).

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accountability creates perverse incentives for local governments, making them vulnerable to capture by elites or prone to reckless decision-making.

In terms of local governments having adequate information, all environmental impact assessments (EIAs) are considered confidential in the Philippines and disclosure of EIAs remain at the discretion of the national government.<sup>37</sup> In most cases, local governments have been refused access to EIAs.<sup>38</sup> When communities in the Zamboanga Peninsula (Mindanao Island) requested documents containing information on potential mining operations in their area, the Mines and Geosciences Bureau of the DENR claimed that no documents could be disclosed without the consent of the project sponsors.<sup>39</sup> The lack of transparency can help explain why local governments do not easily give consent to mining operations within their jurisdictions. This context also implies that decisions are being made with inadequate data and may not serve the best interests of the affected communities or companies.

Allowing local governments to have a say in whether mining projects can proceed brings the decision-making process closer to the level of impact and gives local people a stronger hand to bargain with mining companies and the national government. If local governments in the Philippines are to be more accountable to their people and have necessary information such as EIAs available to them, they could use provisions in the LGC to obtain better benefits for their citizens. Since local governments are likely to give more weight to local negative impacts and benefits versus national benefits in their decision-making, a strong intergovernmental coordination system is essential to ensure that decision-making is coherent and accounts for the needs and concerns at both the national and subnational level.

*Acknowledgements: Cielo Magno (University of the Philippines, School of Economics); Antonio La Viña (Ateneo School of Government, Philippines); Boris Verbrugge, (Radboud University, Netherlands)*

April 2016

37 Holden and Jacobson, 193-194.

38 *ibid.*

39 *ibid.*