



*Technical Report*

# Improved Investment Climate in Mining

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**Prepared for**

**Secretary Romulo L. Neri**

**National Economic Development Authority (NEDA)**

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# Preface

This report is the result of technical assistance provided by the Economic Modernization through Efficient Reforms and Governance Enhancement (EMERGE) Activity, under contract with the CARANA Corporation, Nathan Associates Inc. and The Peoples Group (TRG) to the United States Agency for International Development, Manila, Philippines (USAID/Philippines) (Contract No. AFP-I-00-00-03-00020 Delivery Order 800). The EMERGE Activity is intended to contribute towards the Government of the Republic of the Philippines (GRP) Medium Term Philippine Development Plan (MTPDP) and USAID/Philippines' Strategic Objective 2, "Investment Climate Less Constrained by Corruption and Poor Governance." The purpose of the activity is to provide technical assistance to support economic policy reforms that will cause sustainable economic growth and enhance the competitiveness of the Philippine economy by augmenting the efforts of Philippine pro-reform partners and stakeholders.

This technical report was submitted by Rodolfo Cruz, Team Leader & Mining Industry Specialist, Atty. Paul Lentejas, Mining Legal Specialist, Benny Gantioque, Institution Development & Regional Mining Specialist, and Elizabeth Eizaguirre, Presentation Specialist, in December 2005. It was requested by National Economic Development Authority (NEDA) Director-General and Socio-economic Secretary Romulo L. Neri.

The views expressed and opinions contained in this publication are those of the authors and are not necessarily those of USAID, the GRP, EMERGE or the latter's parent organizations.

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## **I. Executive Summary**

NEDA Director-General and Socio-economic Secretary Romulo L. Neri requested USAID/Philippines to provide technical assistance to help improve the investment climate and realize the economic potential of the country's mining sector. The technical assistance was to help Secretary Neri translate the Supreme Court reversal into new investments in the mining sector. The government needs to ensure that any issue or unjustified impediments to these investments are removed to attract investments in mining.

Most of the issues and concerns raised by the EMERGE Mining Team to improve the investment climate in mining were directed to various echelons of government. Private sector consultations (clustering industry associations and a spectrum of socially-active stakeholders) were undertaken to harness a wider participation of pro-active groups in reversing and addressing the negative perception that has developed through the years. Position papers were crafted to reduce structural overlaps and clearer definition of terms and functions to eliminate pyramiding extension of authority and to obtain clearances and endorsement (as observed in a proposed Administrative Order on Ore Certification).

Recommendations and action plans drawn up for each identified issue are being marked for both short- and long-term implementation to be assigned to various enlightened groups who are willing to strengthen and engage in grassroots-community-based advocacy.

There is a need to undertake "due diligence" of all conflicting and inconsistent "legislated laws, decrees, regulations, administrative orders, presidential orders, implementing rules, regional/provincial/municipal resolutions, procedures (taxation, fees, licenses, permits, endorsements, clearances, documental prerequisites, etc.)" that are disincentives for investments, causing delays in applications, work stoppage in construction/operations and logistic support to the movement of products/supplies, dispute resolution, environmental concerns, and social inconvenience.

A sustained program of intensive and massive advocacy towards achieving a positive and socially acceptable renewal of balanced development of the mining industry is needed. The advocacy and IEC<sup>1</sup> program has to involve all stakeholders and cause-oriented groups to work in unison towards harmonious goal optimization relative to the benefits derived from extracting the mineral resource of specific mining site.

The Department of Finance, DILG, BIR and DBM has to formulate and design a practical and transparent mechanism for the equitable distribution and utilization of funds derived from the share of LGUs and other stakeholders of the "wealth and excise taxes" to ensure appropriate utilization and societal benefit.

## **II. Introduction**

Developed and industrialized countries depend largely on the creative utilization and transformation of minerals into products enhancing the survival and quality of life. Rapid industrialization growing geometrically across time has churned mutations of mineral-based

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<sup>1</sup> IEC – Information Education and Communications

products through innovation and in many instances catapulted newly industrialized countries to greater heights of competitiveness by creating breakthroughs in technology.

The Philippines, wanting to achieve its rightful claim and regain its former niche as an emerging industrialized economy, must resolve to harness its strategic mineral deposits to create its own products of higher value in the global production chain.

The extraction and utilization of minerals must be made compatible with sustainable development with due regard for the strong environmental and social focus derived from the legal and administrative framework governing the minerals industry under RA No. 7942, the Philippine Mining Act of 1995, and DENR Administrative Order No. 96-40 1997.

The essence of taking a new look at reviving the mining industry is to focus on developing clustered downstream industries that convert and transform the low value high-grade mineral ore commodities into high value, mineral-based, high-technology consumer products ultimately participating in a properly managed supply chain through logistic providers that serve an overarching consolidation of local production networks to the far-reaching connectivity to global value chains.

### **Background and objective**

The Philippines is one of the most mineralized countries in the world, and the Mining sector was once one of the most important industries of its developing economy. This sector made substantial contributions to the gross domestic product until the investment climate for mining projects deteriorated due to political instability and uncertainties in the legal and policy directions and inconsistent operational interpretation. The fact that the 1987 Philippine Constitution limited foreign investors to only 40 percent ownership of total equity was a structural disincentive. Although the Mining Act of 1995 encouraged foreign investment inflow in the form of a foreign technical assistance agreement (FTAA), portions of the Mining Act were challenged in court for constitutionality. In early 2003, the Supreme Court declared significant portions of the law to be unconstitutional.

However, on November 2004 the Supreme Court granted the motion of the government in pursuit of promoting strategic economic recovery and declared the Mining Act of 1995 as constitutional.

The Supreme Court paved the way for a more business-friendly investment climate and reduced the risks and apprehensions of investors, both foreign and Filipino groups. The highlight of the decision was the affirmation that the Mining Act's Implementing Rules and Regulations (IRR) and the Financial and Technical Assistance Agreement (FTAA) of the Western Mining Corporation do not contravene the Philippine Constitution. It also noted that the Constitution expressly allows service contracts in the large-scale exploration, development and utilization of minerals, petroleum and mineral oils, and that the State may undertake these activities via "agreements with foreign-owned corporations involving either technical or financial assistance" as provided by law. Likewise, the Supreme Court emphasized the need for an appropriate balancing of interest and needs—the need to develop the stagnating mining industry in order to jumpstart the floundering economy on the one hand, and on the other, the need to enhance nationalistic aspirations to protect indigenous communities and prevent irreversible ecological damage.

The technical assistance extended by USAID/Philippines under the EMERGE project was envisioned to help the Office of the Secretary of NEDA to develop innovative approaches to improve the investment climate, realize economic potential, and strengthen the institutions in mining activities in the Philippine economy.

### **III. A Brief History of Philippine Mining Industry**

The Philippines has a long, well-established history of major production from its mines and was previously ranked among the world's top ten in the production of chromite, copper, nickel, and gold. Production has been hampered, however, for the last two decades due to numerous factors directly affecting the mining sector.

Gold mining which prospered in the 1920s and the 30s and copper which experienced a rush in the 1950s and the 60s, remain as the two most important metallic mineral products. Nickel became an important metallic mineral product in the 1970s with the opening of two nickel mines—the Nonoc mine and its Surigao Nickel Refinery and the Rio-tuba nickel mine in Palawan, which exports beneficiated nickel ore to Japan. Chromite mining is basically an oligopoly of two—one producing metallurgical chromite and the other, refractory chromites. The Philippines was also a significant producer of iron in the 60s.

Mining activity in the 1970s is considered as the busiest period, as old and dormant gold mines were re-opened, new gold projects were developed, existing copper mines were expanded and new projects were speculatively undertaken during the Martial Law regime. In 1970 and 1980, investments in the industry climbed to new heights, reaching the half billion mark due to renewed interest in Philippine mining. During this period, world market prices for copper and other metals were at their height. In 1980, about forty-five (45) operating mines were contributing over 21% to total Philippine exports.

The gold rush areas in Mindanao—i.e., the Diwalwal area in Mindanao—increased gold production and contributed to about 50% of total Philippine gold production in the mid-1990s.

#### **Metallic and Non-Metallic**

The highest contribution of the mining industry to gross national product was 2.1% in 1985, but it declined drastically by half with a performance of 1.1% in 2000.

The existing number of operating metal mines is now small compared to the 58 metal mines that operated in the 1980s when the industry accounted for over 20% of Philippine exports. The decline in metallic mineral producers was caused by a combination of economic, technical and financial factors.

However, the trend for non-metallic mines reveals an abrupt change after the enactment of the Local Government Code, which effectively transferred the function of the national government in the issuance of quarry and small-scale mining permits to the local government units (LGUs). The provincial governments were not yet prepared organizationally to monitor mining operations and collect and process production reports.

It should be noted from Table 1 that the extraordinary surges of 51% and 16.8% in mining value-added growth rates in 2002 and 2003, respectively, includes the huge increase in value-added from crude oil and natural gas production from the Malampaya Oil Rim Project.

Excluding these items results in increases of 21% and 13% for minerals alone during the years 2002 and 2003, respectively. For the third quarter of 2004, mining and quarrying posted a 6.0% growth rate in value-added.

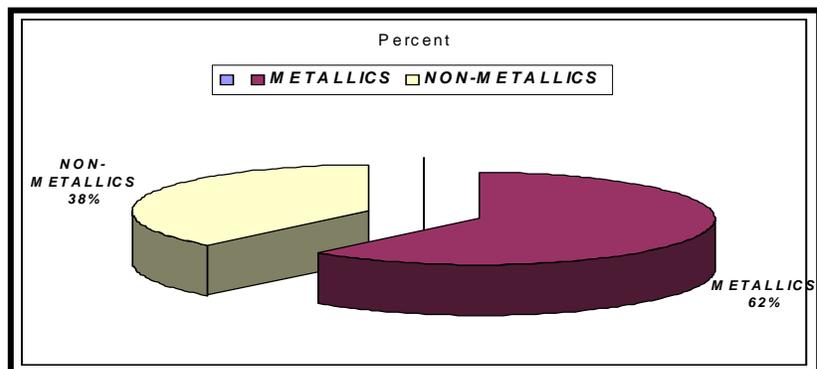
In 2002, the mining and quarrying group of the industry sector posted a growth rate of 49.2% (at constant prices). Although this surge in growth was substantially due to the Malampaya Oil Rim Project, from which natural gas and crude oil were produced, the value of metallic mineral commodities produced grew by 17.7%, owing mainly to the 25% increase in gold production.

**Table 1 – Gross National Product (GNP) and Mining Value Added (MVA) Growth Rates, 1998 – Third Quarter, 2004 (In Million Pesos)**

PERIOD	GNP	GNP Growth Rate	MINING VALUE ADDED	MVA Growth Rate
1998	934,481	0.4%	10,624	2.8%
1999	969,334	3.7%	9,736	-8.4%
2000	1,036,392	6.9%	10,833	11.3%
2001	1,061,283	2.4%	10,125	-6.5%
2002	1,107,007	4.3%	15,285	51.0%
2003	1,168,778	5.6%	17,856	16.8%
Q1-Q3, 2004	896,643	6.2%	14,436	6.2%

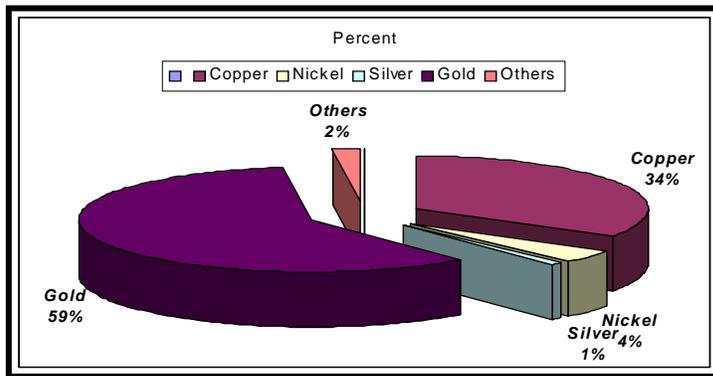
Source: MGB-DENR Statistics

During the past two and half decades, metallic minerals accounted for 62% of the country's mineral production. (See Figure 1.) At current prices the gross value-added in Mining and Quarrying was PhP43.566 billion in 2003.



Source: MSG-DENR 2004 Statistics

**Figure 1: Mineral Production**

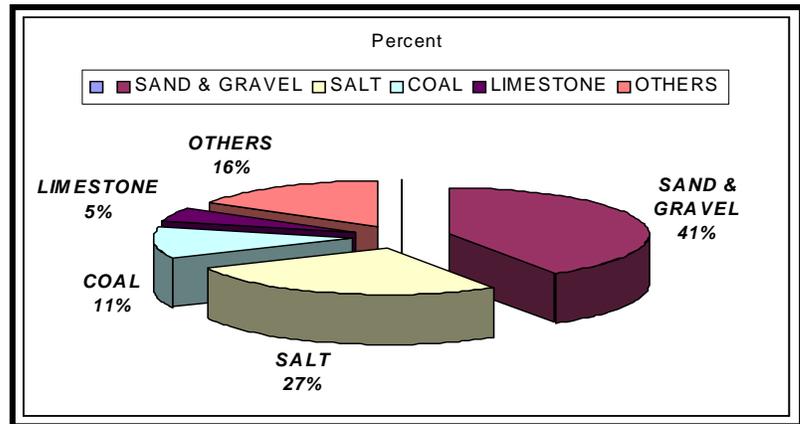


Gold contributed the highest—a 36% share (PhP18.7 billion) followed by copper which comprised 21% (PhP1.6 billion), nickel 12% (PhP0.87 billion) and silver 6.2% (PhP0.43 billion) of total cumulative production. (See Figure 2.) At current prices the gross value-added in mining was PhP21.336 billion in 2003.

Source: MSG-DENR 2004 Statistics

**Figure 2: Metallic Mineral Production**

Stone quarrying, clay and sandpits contributed PhP5.075 billion translated to construction activity, while salt was PhP2.2 billion and coal was PhP1.1 billion as shown in Figure 3. At current prices the gross value-added in quarrying was PhP10.467 billion in 2003.



Source: MSG-DENR 2004 Statistics

**Figure 3: Non –Metallic Mineral Production**

There is an apparent lack of recorded data on silica sand consumed by glass-making industries (flat glass-RAGC and bottle-making-SMC/ABI). Production data of marble quarrying operations in Rizal and Romblon are similarly unavailable for establishing performance. Data on clay has to be monitored through the kiln output of manufacturing firms engaged in ceramic tiles, sanitary ware, dinnerware, artifacts, figurines, etc.

Crude Oil production from the Malampaya Oil Rim Project rose from PhP0.148 billion in 2001 to PhP11.772 billion in 2003 at current prices, although the gross value-added of this product category was only PhP0.083 billion in 2001 and PhP5.473 billion in 2003 at constant prices.

## Mining Tenements Issued by the National Government

As of September 30, 2004, the total number of mining rights issued by the national government is 632, disaggregated as shown in Table 2:

**Table 2 – Number of Existing Mining Rights Issued by National Government**

<b>TYPE OF MINING RIGHT</b>	<b>NUMBER</b>	<b>AREA</b>
Mineral Production Sharing Agreement	208	340,945 has.
Exploration Permits	11	39,514 has.
Financial/Technical Assistance Agreement	2	51,955 has.
Industrial Sand and Gravel Permits	99	1,159 has.
Lease Contracts/Patents	312	39,800 has.
<b>TOTAL</b>	<b>632</b>	<b>473,373 has.</b>

Source: MSG-DENR 2004 Statistics

The total area covered by these mining rights is only 1.5% of the total land area of the Philippines. As of the same date, a total of six Mineral Processing Permits were approved by the Government.

Japan is the primary market for the country's mineral products. Almost all of the Philippine production of nickel and more than 60% of its copper concentrates are exported to Japan. The remaining copper concentrates are smelted by the Phil. Associated Smelting and Refining Corporation (PASAR) into copper cathodes at Isabel, Leyte Province, for export, again to Japan.

In March 1995, the Philippine Mining Act (Republic Act 7942) was designed to establish a legal framework for the mining sector and to streamline the law to ensure that the Philippines could compete effectively for foreign investment in the country's mineral industry. The Act is one of the most modern in Southeast Asia and incorporates environmental provisions on a par with other established mineral-producing countries, while also safeguarding the indigenous culture of local communities.

## IV. DECLINE OF THE MINING INDUSTRY

In the 1980s, a progressive decline in world market prices for metals began to affect the large mining corporations that earlier rushed to expand production in the early 1970s. During this period, the Government extended support to the industry by implementing a number of schemes such as the elimination of export taxes and premium duties for copper (E.O. No. 450), authorizing Grant of Assistance to Primary Gold Producers (PD No. 1070), and suspending all duties, taxes and charges for "distressed" copper producers (L.O.I. No. 1416). The fall in world market prices for metals coupled by political unrest in the Philippines, following the fall of the Martial Law regime, affected the debt structure of the industry which reached \$964 million resulting in the marginalization of mining operations. With increasing cost of production and the ill effects of energy crises and natural calamities, the industry was beset with a series of mine closures.

Over a period of two decades (1980s and 90s), copper production dropped by a staggering 90% and chromite production in 2000 was only 5% of that two decades before. The drop in copper production can be attributed to the closure of several mines— due to financial difficulties at the Atlas mine in 1994, the tailings spill accident at Marcopper mine in 1996, the pit slide at Dizon mine in 1998, operational and financial problems at Maricalum mine in 2001, and the shift of Manila Mining and Lepanto Mining to gold production.

As for the nickel metal, the mining operations of Manicani mine in Samar remains suspended together with the Nonoc mine and its refinery which closed earlier in 1986. Other mines such as the Hinatuan and Rio-tuba mines in Surigao are a few years from closure, although a number of new mines opened at Taganito in 1990 and Cagdianao in 2000.

Today, the Philippine mining industry is currently below \$1 billion in annual sales similar to Malaysia and Papua New Guinea but lagging behind Indonesia with \$3.6 billion, Chile with \$13 billion and Australia with \$26 billion. The economic value-added contribution to the national economy was only Php17.9 billion in 2003, or only \$320 million. Mining has a multiplier effect of six. At a potential value added of PhP300 billion annually, mining could add incremental economic activity of PhP1.8 trillion, or 36% of GDP.

Philippine mineral exports are only \$637 million against annual potential of at least \$5 billion, which means we are utilizing only 12.74% of our mineral export potential. At the peak of Philippine mineral exports, the industry employed more than 500,000 skilled and unskilled workers; while today only 104,000 are employed and an estimated 30,000 small-scale miners subsist in squalid poverty.

Tax collections from the mining industry are only PhP2 billion against potential tax collections of PhP57 billion from this sector alone. Another PhP100 billion in potential tax revenues from incremental activities in industries linked to mining go uncollected.

Despite the huge potentials, mining development has been on the decline, dropping from 27 mines in 1997 to only 12 mines in 2004. Correspondingly, its share of total exports also declined to only 1.5% as of 2003 due to a number of factors: the decline in world market prices for metals that affected the economic viability of many mining projects; the perceived policy inconsistencies and instabilities, especially land use conflicts; the earlier Supreme Court ruling that adversely affected the industries that rely heavily on foreign investment; the strong opposition to mining by different sectors of the society; and the lack of domestic capital.

The very low prices of metals in the world market over the past decades have affected the profitability of the minerals industry. Worldwide production has exceeded demand and recycling of metals has added to the already large inventories of supply. The industry's response is to diversify and explore for higher grade ores and minerals that can attract a new market. The reasons for the decline can be capsulized as follows:

- Low International Metal Prices
- Political Instability
- Economic Downturn
- Labor Problems
- Social Acceptability
- Policy Inconsistencies
- Lack of Capitalization

## V. PHILIPPINE MINING POTENTIAL

The Philippines is situated in the so-called Pacific “rim of fire,” a geological fault that stretches from the Philippines archipelago to Indonesia. The geological formation is known to contain rich deposits of copper, gold and other minerals. However, the country has seen limited modern explorations and its vast minerals reserves remain untapped for a variety of socio-economic, legal and environmental reasons.

The potential mining wealth in the Philippines is estimated at \$840 billion (PhP47 trillion), or 1.5 times our annual GDP and 15 times our total foreign debt of \$56 billion. Globally, the Philippines ranked third in gold, fourth in copper, fifth in nickel, sixth in chromite, and has an over-all ranking of the fifth most mineralized country in the world. The country is also close to China which happens to be the world’s biggest market for minerals.

Meanwhile, from 2001 to August this year, price of gold has risen 64.5%, silver 59%, copper 140%, nickel 132%, and aluminum 37%. Prices of metals are at their historic highs. Mining has also been the best performing sector of the Philippine Stock Exchange this year. The mining index doubled in value in just one year.

On-shore, nine million hectares are high potential sites for copper, gold, nickel, chromite, and other minerals. Unfortunately, only 1.4% of the potential sites are now covered by mining permits. Off-shore, the Philippines Exclusive Economic Zone (EEZ) covers 2.2 million square kilometers with mineral resources of Placer including gold, chromite, magnetite, and silica. It also has aggregate resources, manganese nodules/encrustations with associated copper, gold, zinc, cobalt, and Polymetallic sulfide deposits containing copper, cobalt and other minerals.

As of 1996, the mineral reserves of the Philippines were comprised of 6.67 billion metric tons of metallic and 78.472 billion metric tons of non-metallic minerals. A large part of the metallic reserves is copper (70%) followed by nickel (16%). Limestone and marble account for almost 85% of the non-metallic mineral reserves.

There are currently 471,510.75 hectares of land covered by approved mining tenements namely:

- 209 Mineral Production Sharing Agreements (MPSA)
- 13 Exploration Permits (EP)
- 2 Financial or Technical Assistance Agreements (FTAA)
- 310 Mining Lease Contracts/Patents

Recently, the government has identified twenty-three (23) potential medium to large scale metallic mining projects estimated to have a gross value of mineral deposits of US\$90.8 billion, thus, the government can expect around US\$6.5 billion in foreign direct investments with an annual sales/foreign exchange of US\$3.4 billion. Annual excise taxes from these projects alone are estimated to be US\$61.4 million, with annual corporate income tax of US\$432 million. Above all, an estimated 200,000 direct and indirect jobs would be generated. For the job multiplier effect alone of ten allied jobs per mining job created, around two million jobs will be generated by these 23 identified mining projects. This is why, of the many sectors the DENR has in its mandate, only mining has been explicitly included in President Gloria Macapagal-Arroyo’s Ten Point Program of Government.

## **VI. REVITALIZING THE MINING INDUSTRY**

Recognizing the potential of the mining sector in uplifting the economic situation of the country, the President initiated a new paradigm from tolerance to active promotion of responsible mining that strictly adheres to sustainable development that includes economic growth, social equity and environmental protection.

The President issued Executive Order No. 270 on January 16, 2004 with amendments on April 20, 2004, that serves as a national policy agenda to revitalize mining in the Philippines. It has 12 guiding principles for responsible mining towards sustainable development, and calls for the formulation of the Minerals Action Plan.

The Minerals Action Plan, on the other hand, which was formulated by the DENR in consultation with stakeholders and other government agencies, contains 57 strategies and 126 activities to address the problems of mining. It was approved by the President thru Memorandum Circular No. 67 dated September 13, 2004.

Mining incentives were also made available to attract and help investors. Under the Omnibus Investment Code of 1987, mining companies can avail of fiscal incentives (tax exemptions, tax credit on raw materials and supply, additional deductions from taxable income) and non-fiscal incentives (employment of foreign nationals, simplified customs importation procedures, importation of consigned equipment for a period of ten years). In addition to these, the Mining Act also grants incentives for pollution control devices; income tax carry forward of losses; income tax accelerated depreciation on fixed assets; and investment guarantees such as investment repatriation, earnings remittance, freedom from expropriation and requisition of investment and confidentiality of information.

For FTAA contractors (foreign-owned companies) an additional incentive, in the form of a tax holiday on national taxes, is granted from the start of the construction and development period up to the end of the cost recovery period, but not to exceed five years from the start of commercial operation. After the recovery period, the contractor starts paying these taxes, including an additional government share based on negotiated scheme.

## **VII. POSITIVE DEVELOPMENTS IN THE MINING SECTOR**

### **RP Voted World's Best Site for Mining**

Besting 119 other countries, the Philippines was adjudged the world's most attractive site for mining investors in 2005. Environment Secretary Michael T. Defensor, who flew to London to receive the award during the Mines and Money World Congress, said that the success can be attributed to wide-ranging and on-going policy reforms, support from the mining sector, and the many mining roadshows around the world where the government worked hand in hand with the private sector to revitalize the Philippine mining industry. The yearly winner is adjudged by a panel of independent judges. The main criteria for winning the award is the kind of reforms a particular country has made during the past year and whether laws and regulations are fair enough for foreign mineral investors to do their business in that particular country.

### **Creation of the Minerals Development Council**

The President recently signed Executive Order 469, which creates the Minerals Development Council (MDC), whose members will consist of key officials of the Department of Trade and

Industry (DTI), Department of Finance (DoF), Department of Environment and Natural Resources (DENR), and the National Economic and Development Authority (NEDA).

Under E.O. No. 469, the MDC, which will be under the Office of the President, shall serve as a “one-stop-shop” with primary responsibility attending the needs of the investors in the minerals industry. The MDC, the EO states, will perform the following specific tasks: coordinate national agencies and local government units in order to harmonize investment-related requirements and procedures; facilitate investments in the minerals industry; assist mining investors by providing them information, guidance, direction and solutions to their investment problems; review all aspects in mining investments including coming up with short-term and long-term measures for the sector’s sustainability.

The MDC is also tasked to advise the President on effective solutions to problems confronting the entry of mining investments into the country; promote investments in the minerals industry; and prepare and submit reports to the President on the status of investments in the mining sector.

It shall also create Regional Mineral Development Councils in key regions where there are priority mineral development projects as determined by the Mines and Geosciences Bureau (MGB) of the DENR.

DENR Secretary Michael Defensor spelled out the main function of the MDC as acting as an oversight committee to boost the administration’s ambition to secure a total of \$6 billion in mining investments in the next few years.

### **Government Identifies Mining as a Priority Program to Attract Foreign Investors**

The Philippine Government conducted a mining roadshow to China January 17-19, 2005, which generated around US\$1.6 billion in investment commitments. Together with the Philippine Chamber of Mines, an International Mining Investment Conference was held at the New World Heritage Hotel February 2-4, 2005, that saw the attendance of around 150 foreign investors and committed more than US\$300 million in mining investments.

### **Reduced Processing Time for Permit Applications**

The permitting system has been streamlined significantly. It reduced by 57% the permitting process covering Exploration Permits; 54% covering the Mineral Production Sharing Agreements; 27% the process covering the certification of the National Commission on Indigenous Peoples (NCIP); and cut to 120 days the approval of the Environmental Compliance Certificate (ECC).

### **Issued New Mining Permits/Contracts**

For the period covering January 2004 to February 2005, the DENR was able to issue twenty Mineral Production Sharing Agreements; three Mineral Processing Permits; one Special Mines Permit; two Exploration Permit Renewals; and five new Exploration Permits.

### **Opened Up New Areas for Investments**

The government has opened new areas for investments by canceling eighty-four dormant mining permits and contracts covering 100,000 hectares to give way to serious investors. It is now in the process of cleansing mining applications including FTAA’s covering 1.8 million hectares. The DENR has likewise reduced the number of pending cases in the Mines

Adjudication Board and the Panel of Arbitrators, both quasi-judicial bodies, handling the resolution of mining cases.

### **Identified Legislative Agenda in Support of Responsible Mining**

The DENR is supporting House Bill 1445 involving the direct remittance of LGU share on excise taxes, which is crucial to win the support of the local government unit. It is also supporting the proposed National Land Use Act to provide guidelines for the use and allocation of lands for mining purposes and has recommended various incentives for pollution control devices.

### **Addressed Stakeholder Concerns on Mining**

Mindful of the strong opposition against mining coming from different sectors of the society, the government conducted Stakeholders Forum on Mining in February 3, 2005, at Malacañang and invited representatives from the industry, civil society, indigenous peoples, LGUs and church groups wherein the President gave assurance that her government will not sacrifice the rights of same stakeholders in the face of the capital flowing in for mining. The DENR, thru a demand letter, has also directed Marcopper to fully undertake the recommendations made by the United States Geological Society (USGS) to rehabilitate the affected areas of Marinduque, which addresses the engineering, environmental, social, health, and geological aspects of rehabilitating the areas affected by the accident in 1996.

### **Favorable Supreme Court Decision on the Constitutionality of the Mining Act**

On December 1, 2004, the Supreme Court decided that the provision of the Philippine Mining Act of 1995 on foreign ownership in mining activities is legal. This decision paved the way to open mining investments for foreign investors.

The nucleus of the controversy was the interpretation and application of Paragraph 4, Sec. 2, Article XII of the 1987 Philippine Constitution, which reads:

*“All lands of the public domain.....*

*The President may enter into agreements with foreign-owned corporations involving either technical or financial assistance for large scale exploration, development, and utilization of minerals, petroleum, and other minerals oils according to the general terms and conditions provided by law, based on real contributions to the economic growth and general welfare of the country. In such agreements, the State shall promote the development and use of local scientific and technical resources. ...”*

### **A summary of the Supreme Court Ruling:**

1. 100% Foreign Equity allowed in Financial and Technical Assistance Agreements (FTAAs)
2. Financial and Technical Assistance can mean business investments not just mere extension of loans;
3. The constitution permits FTAAs “*based on real contributions to the economic growth and general welfare of the country*”, such a criterion would make more sense when applied to a major business investment in a principal sector of the industry.
4. “Full control” does not mean day-to-day management by the State of the contractor. The foreign investor may perform management, operational, and other prerogatives to protect its investments and enable the business to succeed.

5. The constitution does not require an Iron-clad rule on the 60 percent share of the State.
6. No term limits for FTAAAs, 25-year Rule does not apply.

### **Signing of E.O. 270 – National Policy Agenda on Revitalizing Mining in the Philippines**

In attracting high-risk investments in the Philippine minerals industry, it was usual to review the parameters upon which decisions are to be based, both for exploration and development. The positive factors sought by investors in the minerals industry were addressed by Executive Order (E.O.) 270, issued in January 2004, covering the following:

- ◆ Geological potential
- ◆ Security of tenure
- ◆ Consistent and stable mineral policy
- ◆ Investor assumes control of management
- ◆ Mineral rights ownership
- ◆ Non-restrictive foreign exchange regulations
- ◆ Stability of exploration and mining agreements
- ◆ Ability to predetermine tax liability
- ◆ Predetermine environmental obligations
- ◆ Repatriation of profits
- ◆ Measure of profitability
- ◆ Stable Fiscal Regime

However, in the issuance of NICP Clearances, the passage of the Indigenous Peoples Rights Act (IPRA) in 1997, although seen as a concrete commitment for the protection of the indigenous people and as signatory to ILO Convention 169, was seen by the industry as a strong blow to the mining industry. The law invoked the Constitution's recognition of ancestral domains, giving indigenous peoples control over large tracts of land.

The Supreme Court maintained the constitutionality of the IPRA and upheld the Regalian Doctrine, which gives to the State ownership and full control of natural resources wherever they may be found. The ruling, however, declared that ancestral lands do not constitute part of the public domain and are considered private lands.

State ownership of natural resources has been made clearer that:

- *Native title to natural resources is not the same as native title to land and therefore is not required;*
- *Ancestral domains (which is different from ancestral lands in that it is communally owned) do not confer or recognize any right of ownership of the IPs<sup>2</sup> over natural resources;*

The law does not grant absolute ownership of natural resources by IPs, but only priority rights or the right of first preference or consideration in the award of privileges provided by existing laws; and the rights of IPs include the right to an informed and intelligent participation in the formulation and implementation of any project that will affect or impact upon ancestral domains/lands, making clearer the provision about prior and informed consent.

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<sup>2</sup> IPs – Indigenous People

## Creation of Minerals Action Plan

The overall goal of revitalizing the minerals industry in the context of sustainable development is expressed in the vision statement of the National Minerals Policy as:

*“To establish a minerals industry that is not only prosperous but also socially, economically and environmentally sustainable, with broad community and political support while positively and progressively assisting in the Government’s program on poverty alleviation and contributing to the general economic well-being of the nation.”*

The Minerals Action Plan was issued on September 2004. The Principles for Responsible Mining (EO 270/ MAP) and some of the actions taken can be summarized as follows:

- ◆ **Critical role of investments** –Proposed amendments to NCIP No. AO 3 – issuance of a Special and Regular type of FPIC, strengthening of OSS/MIAC, referring legality of LGU moratorium on mining to DOJ
- ◆ **Clear, stable and predictable policies** – Dec. 1, 2004 Supreme Court Resolution upheld Constitutionality of the Mining Act 1995. Cancelled 84 non-performing mining contracts covering 100,000 hectares following due process, enjoined the PSE to allow mining projects to be listed without the required 3-year profitable period.
- ◆ **Value-adding** – Prepared the commodity profiles of selected minerals – metallic (Cu, Au,/Ag, Fe, Ni, Cr.) and Non-metallic (Limestone, Kaolin, Feldspar, Silica, Bentonite/Zeolite).
- ◆ **Support to small-scale mining** – Assisted small-scale miners in forming cooperatives. Monitored the SSM Permits and Gravel Permits issued by LGUs, socio-economic studies on the conditions of SSM (miners and areas), coordinated with DILG and LGUs for full operationalization of Provincial/City Mining Regulatory Boards, and drafted the Magna Carta for SSM.
- ◆ **Use of efficient technologies** – R&D projects for 2005 – Guidelines for Land Form Design and reconstruction of Mine-affected areas, Philippine Blasting Vibration Standard for surface mining/quarrying, and potential viability of Mines and Quarry Wastes for the manufacture of New construction materials.
- ◆ **Protection of the environment** – issued procedural guidelines for DAO 2003-30(IRR of EIA System), inclusion of PAWB in EIA projects, delineation of EMB and MGB functions in Environmental Guarantee Fund, and Eco-labeling or incentives for “green” companies, provide for final mine rehabilitation and decommissioning fund and “embassy stewardship” as a mandatory requirement for foreign mining companies. Instituted the Mandatory Environmental Insurance Coverage (MEIC). Completed the Corporate Social Responsibility (CSR) Workshops for local stakeholders.
- ◆ **Ecological integrity of mining areas and Multiple Land use-** drafted the proposed guidelines in the conduct of valuation studies to determine priority land-use resource areas with potential for mining activities.
- ◆ **Rehabilitation of abandoned mines** - formulated the Mine Viability and Environmental Assessment (MVEA), directed Marcopper to implement the

remediation and rehabilitation measures, DEBR-MGB's 3-pronged approach to address abandoned mines, and conduct of rapid field appraisal for the formulation of final land use development plan.

- ◆ **Equitable sharing of benefits** – DBM ordered the automatic retention of LGU shares on Excise Taxes, LEDAC endorsement of Domogan Bill on Direct remittances of LGU shares on excise taxes, Ongoing deliberations on bills (national Land Use Act, Increase Royalty from Mining, Non-Repatriation of 50% of profits, Health Assessment every 2 years.).
- ◆ **Sustained IEC & respect for IPs rights** – regular funding got balanced IEC (a percent of the annual direct mining & milling costs); coordinated with PMS, PIA and NAPC in developing the Communication Plan for Responsible Mining.
- ◆ **Continuous consultations with stakeholders.** – participated in the Stakeholders Forum on Mining (Feb. 3, 2005) and various dialogues/ conferences on mining.

### **Inclusion in Government's Ten Point Medium Term Development Plan**

Increasing investments and generating jobs are key objectives in the Philippine Medium Term Development Plan 2004-2010. In 2003, investments were 16.4 percent of gross domestic product and the government seeks to increase the ratio to 28 percent by the end of the Plan. The plan aims for ten million additional jobs to be generated to alleviate the unemployment problem of the country. Improvement in the investment climate in the mining sector will attract more foreign direct investment to revive the mining industry.

### **Pending Legislative matters**

The Mining consultant submitted a position paper on the *Proposed Administrative Order "Establishing The Philippine Mineral Resources and Ore Reserves Classification System of 2005 and Providing Implementation Guidelines Therefore,"* August 17, 2005, which is now the subject of a series of public consultations.

The position paper highlights the following;

1. Reference to ore classification system;
2. Incorporate other classification system being used worldwide;
3. Defining the term "competent person."
4. Distinction of functions between a Mining engineer and a Geologist;
5. Safeguards to minimize technical errors in reports;;
6. The need for endorsement and clearances;
7. Penalties for technical errors;
8. Professional liability insurance.

## **VIII. Issues Confronting the Small-Scale Mining Industry**

With all the attention given to the mining sector, one would assume that all is well and good with the mining industry. Some had even dubbed this period as the golden era for mining in the Philippines but amidst all the celebrations and the problems hurdled by the government, one important aspect seems to be left out and remained unaddressed – issues concerning small-scale miners. While it is true that Republic Act No. 7076 was created to protect the interest of the small-scale miners, it is sad to note that this has not fully addressed the problems nor

concerns of these investors who aspire to be a part of the mining boom but unfortunately have very limited capitalization and resources. There are problems that remain to be hindrances in the realization of the steps taken by the government to alleviate poverty and create employment in the countryside and if not properly given due attention would continue to be a barrier to the direction the mining industry is expected to achieve. Some of these problems have been identified as follows:

### **Local Government Units**

While all the agencies of government on the national level are in full support of the President's campaign to support the mining industry in the country, the same cannot be said in some areas in the local level, the reasons for which are a combination of the following realities:

1. the vested interest taken by the local officials in the local mining operations thereby making it hard for outside investors to secure the necessary permits in order to operate in their jurisdiction.
2. the lack of understanding of the local officials in the mining laws aggravated by the conflicting local ordinances and resolutions filed and approved in their localities even before the issuance of the national laws governing mining methods.
3. corruption prevalent in some areas to facilitate the approval or endorsements from the concerned council or body which is required by law in securing Small-Scale Mining Permits.
4. the huge cost required to secure a local permit becomes an opportunity for local officials to tolerate illegal miners to mine and then buy the ores from them using a lone permit issued to their representative or "dummy".

### **NCIP**

1. corruption by some IP officials in return for the approval and issuance of the Free and Prior Informed Consent which is a requirement in areas applied with existing Indigenous tribes.
2. the "mushrooming" of Indigenous tribes in mineralized areas where they claim to have stayed for a period of time already in order to qualify for the royalty intended for them.

### **Non-Government Organizations/Religious Groups**

1. the seemingly endless debates with these groups who remain opposed to mining despite the reasons given by the government as to the benefits of mining for poverty alleviation, the same people who cannot even provide an answer to the hunger being experienced by the people who are supposed to benefit from mining activities in their localities.
2. their all-out campaign to ban mining activities in provinces to avoid degradation of the environment. They seem to mock the leadership of the people who continue to strive towards achieving the full potential of the country to generate the much needed revenue at the same time mindful of protecting the environment.

3. at some point in time, they even use the Church and the people's religious beliefs to insist on their points of view and cast a stone at whomever will resist their "teachings".

### **Lack of Capitalization**

1. It is to be noted that a Small-Scale Mining Permit costs roughly at about Php200,000 to Php400,000 for a 20-hectare mining claim renewable every 2 years. Along with this are the fees for services paid to a geologist to determine the volume of the mineral reserves in the area, and lastly the cost of production to come up with the volume required by the buyer. Such an amount does not come easily for small-scale miners. The lowly surface owners end up receiving royalty payments only instead of getting a bigger portion of the income, which is the most controversial aspect of small-scale mining. Incidentally, this is one of the main reasons why some areas remain unexplored or untapped, because of the lack of cooperation of the surface owners.
2. there are not enough banks to cater to the financial needs of the operation. Often, a small scale investor will risk the family's life long savings to venture into mining which is a high risk, high gain, business venture.

## **IX. Conclusions and Lessons Learned**

The 10 point agenda of the president, which includes mining, is laudable and commands the support of all the stakeholders in the mining industry. With the easing of obstacles to developing Philippine mining potential, the government welcomes foreign companies to invest their money and expertise to achieve responsible mining in the country. The national government's approach and effort to promote mining seems to be headed toward a fruitful and happy conclusion on a national level. In the midst of all of these activities however, there seems to be a lack of focus on the local and small scale investors' needs that could actually serve as an immediate answer to more employment and economic activities for the broad masses of the population. It is therefore recommended that this aspect of the mining sector be taken care of immediately, to help the government realize its vision of making the country regain its position in the world market as a truly mineralized country that is focused on achieving and delivering the basic needs of its people.

Four major topics critical in understanding what ails the mineral industry are: a) Policy Issues affecting the mineral industry, b) Mining Law, Department Administrative Orders, the Indigenous People's Rights Act (IPRA), the Local Government Code and other Legal Issues, c) Environmental and Social Issues and d) National Vision and Mission.

*a) The existing unfavorable investment climate is due to current disincentives for foreign and local investors. These disincentives are high taxation, conflicting laws, and lack of consistency in implementing policies, rules and regulations. Support from the government is needed to correct these problems bugging the mining industry. Research and development should be given higher priority, whether through public or private sector initiatives.*

*The need to rectify the organizational aberration of the Department of Environment and Natural Resources (DENR) and the Mines and Geosciences Bureau (MGB), is*

*imperative, because of conflicting mandates that have been adversely affecting the government's management of the minerals industry. The DENR focuses on environmental issues, because they are politically popular and the MGB tends to be more active in its environment-related regulatory functions, rather than in the pursuit of plans and programs that would promote the development of our country's mineral resources.*

*b) Amendments that will modify and harmonize pertinent provisions of the Mining Law are underway, including its implementing rules and regulations, in order for the industry to attract needed investments. There is a need to streamline the licensing and permit process. Reduction of unnecessary procedural requirements can hasten resolution of disputes in the application of mining permits and agreements.*

*c) The negative perception of the minerals industry by the general public should be corrected. Poor environmental management in the past, reported by the media and by people's organizations, have contributed to this negative perception. Today, many companies have complied with stricter enforcement of environmental management practices, taking concrete steps to develop better social partnerships with people in their communities. The government and the industry players have to renew their efforts to make ordinary Filipinos aware of this. Filipino laymen need to learn more about the technical nature of the industry, its role in contributing to countryside development and the national economy, as well as its business, social and environmental responsibilities. Industry stakeholders and the government have undertaken bold initiatives to work together on a pro-active and intensive countrywide information and education campaign. The objective of this advocacy is to promote the concept that the minerals industry is socially acceptable and can, in fact, contribute significantly to the economic development of our country.*

*d) The National Vision and Mission statements of the mineral industry's long-term goal of promoting "Economic progress with social equity through responsible development and utilization of natural mineral resources." The mission statement "To contribute significantly to national growth and development through optimum utilization of natural mineral resources while caring for the environment" explains how this goal can be achieved. It is hoped that all stakeholders in the industry can strike a balance between their respective needs and work together towards this end.*

Most of the issues and concerns raised by the EMERGE Mining Team to improve investment climate in mining were directed to various echelons of government. The private sector consultation (clustering industry associations and a spectrum of socially-active stakeholders) is being harnessed to participate pro-actively in reversing and addressing the negative perception that had developed through the years. Recommendations and action plans drawn up for each identified issue are being marked for both short- and long-term implementation to be assigned to various enlightened groups who are willing to strengthen and engaged in grassroots-community-based advocacy.

## **X. Action Plan**

1. Undertake immediately "Due Diligence" of all conflicting and inconsistent "legislated laws, decrees, regulations, administrative orders, presidential orders, implementing rules,

regional /provincial/municipal resolutions, procedures (taxation, fees, licenses, permits, endorsements, clearances, documental prerequisites, etc.)“ that are disincentives for investments, causing delays in applications, work stoppage in construction/operations and logistic support to the movement of products/supplies, dispute resolution, environmental concerns, and social inconvenience. The result of this foregoing activity will serve as a platform for undertaking reform initiatives and facilitate resolution of conflict among stakeholders and enhance wealth/benefit generation (accelerate seamless implementation of projects at reduced cost of doing business) and equitable distribution (addressing social and developmental/environmental concerns).

2. Undertake a sustained program of intensive and massive advocacy (national and grassroots level) towards achieving a positive and socially acceptable renewal of a balanced development of the mining industry. The advocacy and IEC<sup>3</sup> program has to involve all stakeholders and cause-oriented groups to work in unison towards a harmonious goal optimization relative to the benefits derived from extracting the mineral resource of specific mining site.
3. Formulate and design a practical and transparent mechanism for the equitable distribution, secure and utilization of funds derived from the share of LGUs and other stakeholders of the “wealth and excise taxes” to ensure appropriate utilization and eliminate “graft and corruption.”
4. SME Fund allocation (developmental and venture capital instruments) towards the development of a value-added minerals industry for exportable finished products rather than raw materials should be pursued harnessing the TRC, PCAFNRD, PCIERD, MIRDC TAPI and ITDI of DOST. Some value-added products are: nickel and chrome for electroplated houseware and furniture, cobalt for ceramic/glass bluing, copper wire and cables, alumina and aluminum metals into finished products, fine costume jewelry, high-value non-metallic products (carbide, polished marble, synthesized ceramic tiles and construction materials, high voltage electrical insulators, glass bottles, glassware and flat glass (silica of various colors), construction materials, etc.
5. A strategic plan is needed for the establishment of a Common Service Facility and Logistics Interface for the development of the mineral mining and downstream industries through FGD<sup>4</sup> discussions among experts and influential stakeholders. Research on existing and potentially viable downstream industries for the Mineral Mining Industry must be jumpstarted. Networks among the stakeholders and shareholder groups need to be developed and existing ones strengthened through capability building programs involving the LGUs in specific mining sites.

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<sup>3</sup> IEC – Information Education and Communications

<sup>4</sup> FGD – Focus Group Discussions