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***INVESTMENT-RISK IN THE  
PHILIPPINES:***

**MULTILATERAL MINING REGIMES, NATIONAL  
STRATEGIES & LOCAL TENSIONS**

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*Investment-Risk in the Philippines:  
Multilateral Mining Regimes, National Strategies & Local Tensions*

Pascale Hatcher<sup>1</sup>

**Abstract**

The World Bank's historical influence in engineering mining laws, policies and institutions throughout the Global South is indisputable. No doubt partly in response to the harsh conclusions of the Extractive Industries Review (2003), the Bank has in recent years incorporated a strong socio-environmental narrative within its framework. In this paper, it is argued that this *Social-Development Model* carries a particular politics of mining governance, one that transforms the roles, responsibilities and legitimacy of the stakeholders involved in mining activities. This contribution builds on the case of the Philippines which, in an attempt to tap into its astounding mining potential—it is after all the fifth resource-rich country in the world—has adopted a mining regime which resolutely echoes the recommendations of the World Bank. The analysis of the Filipino mining regime's implementation on the ground demonstrates that in addition to constricting the political space of civil society stakeholders, the new mining regime appears to be riddled with contradictory objectives and therefore runs the risk of exacerbating local tensions.

**Introduction**

The considerable mineral endowment of the Philippines has, over the years, repeatedly been the mantle upon which indebted governments have stood to promise employment, education, health care, clean water and infrastructures. If the mineral endowment of the archipelago is indeed amongst the richest in the region—it is after all the fifth resource-rich country in the world—the investors were, by the mid-1990s, deterred by the lack of incentives. Resolute to tap into its astounding potential, the Filipino government embraced the World Bank's standards, by which mining activities should be resolutely handed to the private sector. Crippled in its infant stage by multiple legal challenges and a taxing socio-environmental legacy, the country's new mining regime was only deployed by late 2004, amidst great efforts by the cash-strapped Arroyo Presidency. Free from its judicial hurdles, the regime has unleashed a race for the country's fantastic reserves—now worth an estimated US\$1 trillion.

In this paper, the forth-promised mining rush is analysed in relation to the particular political path espoused by the Filipino State, a path that has been carved by the World Bank. According to the *Extractive Industries Review* (2003) no less than 100 countries have been reforming their laws, policies and institutions under the distinct leadership of the multilateral Institution.

Of particular interest to this contribution, is the addition in recent years of a strong social-development narrative attached to the multilateral guidelines, a narrative that has trickled to its country clients, notably the Philippines. Echoing the Bank's framework, the

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Arroyo Government has twined pro-mining investment incentives with a pro-poor and environmentally sustainable narrative, making the mining regime one of the most liberal legal frameworks in the region. Correlated to the socio-environmental legacy of mining activities in the country, a legacy that has provoked the uproar of one of the most numerous and organised civil society in the world, the poverty reduction narrative has been dismissed by critics as a mere discursive exercise from a State overwhelmed by the weight of its debt.

However, and as argued in this paper, the dual provisions of the mining regime should rather be viewed as a particular strategy employed by the State in order to embrace the newly recognised concept of 'political risk' within the industry. Based on the multilateral guidelines, the strategy is here defined as an attempt to both contain and manage opposition to mining activities, therefore reducing investment-risks in the sector. Building on an analysis of the international political-economy of multilateral mining regimes, the paper investigates how the reform has been transforming the functions, responsibilities and legitimacy of the stakeholders involved in the mining activities of the Philippines in recent years.

The argument of this paper is divided into three parts. In the first section, the overarching role of the World Bank in fostering mining regimes in the Global South is analysed. Such findings will further be transposed to the particular case of the Philippines which, by the turn of the 1990s, was actively prompted to adopt a new mining code. The second part of the paper is dedicated to the analysis of the provisions enshrined within the 1995 Mining Act and the cold reception it received by civil society elements. Lastly, the paper investigates how the reform has been transforming the roles of the stakeholders involved in mining activities in recent years. It will be argued that in addition to constricting the political arenas of civil society stakeholders, the new mining regime appears to be riddled with contradictory objectives and therefore runs the risk of further exacerbating tensions on the ground.

### ***1. The Philippines & the World Bank***

While plagued by legal challenges in its infant stage, the 1995 Mining Act remains the cornerstone of the Philippines' current mining regime. In this section, the clear adherence of the Act to a specific set of multilateral norms in terms of mining regimes is explained. It is argued that the Act is firmly entrenched within a greater trend over the course of the last three decades to liberalise the mining sector of countries endowed with natural resources in the Global South. After presenting a brief analysis of the historical role played by the World Bank in manufacturing mining codes in the Global South, the particular case of the Philippines will be addressed.

#### *a) The World Bank & the Promotion of New Mining Regimes: A Framework*

The World Bank's overarching influence over the liberalisation and deregulation of the mining sector of poor indebted countries throughout the 1980s and the 1990s is indisputable. The *Extractive Industries Review* (EIR), which was established in 2001 to independently evaluate the World Bank Group's (WBG) involvement in extractive industries, estimated that under the distinct leadership of the World Bank, no less than 100 countries reformed their laws, policies and institutions during the 1990s (2003: 10). The EIR further stressed that 'in line with WBG advice', these new legislations, designed to ensure the protection of capital and to promote investment, successfully brought many developing countries to experience an investment boom in their mining, oil, and gas sectors (2003: 13).

In her analysis of the Bank's influence over African mining regimes for the better part of the last three decades, Campbell (2004) catalogues three generations of mining codes which followed the Bank's guidelines. The first wave of reform, which was carried out under the umbrella of the structural adjustment programs in the 1980s, saw a dramatic retreat of the State from the sector. Accordingly, the proliferation of mine privatisations was met with the establishment of an amalgam of incentives tailored for foreign investors, notably a reduction in the level of royalties and the multiplication of incentives, sometimes the outright abolition of certain taxes. However, by the early 1990s, it became clear that the promises of the reforms of the mining sector were not materialising as hoped. Oblivious to the decline in the demand for mineral resources in the 1980s, the Bank's re-assessment of the sector, which was primarily based on the 1992 publication *Strategy for African Mining*, led to a new wave of liberalisation of the mining regimes, what Campbell coined as the 'second generation' of mining codes (2004). Consequently, the 1990s witnessed a new wave of liberalisation reforms that sought to ultimately deliver the mining sector to Foreign Direct Investments (FDI). If the second generation of mining codes did acknowledge that a certain degree of regulation was necessary, notably in terms of environmental protection, it is within the last decade that the ultimate need for the State to play a role in social and environmental regulation was acknowledged, thus the 'third generation' of mining codes<sup>2</sup> (Campbell, 2004).

If the World Bank of the turn of millennium was still strongly advocating for its country clients to offer greater fiscal enticements and guarantees for investors, the Institutions simultaneously began to acknowledge the need for environmental and social safeguards in order to mitigate the risks brought forth by mining activities. Such a shift, which led to third generation mining codes, was undoubtedly compelled by the WBG's specific role in enticing high-risk investments in the sector. It is to be noted that the particular track record<sup>3</sup> of the Bank's affiliates in the sector, the Multilateral Investment Guarantee Agency (MIGA) and the International Financial Corporation (IFC), certainly brought its share of media attention throughout the 1990s<sup>4</sup>. The overarching turn towards the need to pay greater attention to the socio-environmental impacts of mining activities was undoubtedly further motivated by the repeated reputational blows suffered by the industry on the global stage and the correlated 'heightened risk' for the pursuit of activities amongst antagonistic communities on the ground.

Today, mining is understood to be one of the most environmentally disruptive activities that can be undertaken by business (Bebbington & coll., 2009: 893) and the concept of the 'resource curse' is now widely acknowledged by all stakeholders in the industry<sup>5</sup>. The WBG is no exception: 'resource-rich countries are indeed more likely

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<sup>2</sup> See Hatcher (2004) for an analysis of the Malian mining sector as an example of a third generation mining code.

<sup>3</sup> Amongst the better-known cases is the incident in 2000 at the Yanacocha mine in Peru. A truck from the mine, which is one of the most lucrative investments in the entire IFC portfolio (Bebbington and coll., 2008: 8996), spilled 150 kilograms of mercury on a road. On another continent, in May 1998, the Kumtor gold mine in Kyrgyzstan, which is financed and insured by IFC and MIGA, released nearly two tons of sodium cyanide into the Barskoon River (EIR, 2003: 26). The controversial Freeport company, the operator of a copper and gold mine in New Guinea which was insured by MIGA, dumped 120,000 tonnes of toxic mining waste into a local river (BIC and coll., 2006: 4).

<sup>4</sup> On the specific role of the IFC and MIGA in the industry see Hatcher (2009).

<sup>5</sup> The 'resource curse' suggests that an abundance of natural resources creates political and economic distortions, which increase the likelihood that countries will experience negative development outcomes (Rosser 2006: 7). The EIR found that while extractive industries can yield benefits for countries, data suggests that developing countries with few natural resources grew two to three times faster than resource-rich countries from 1960 to 2000 (EIR, 2003: 12). The Review further observed that the majority of the 45 countries that did not manage to sustain economic growth during that time also experienced violent conflict and civil strife in the 1990s (2003: 12).

to have problems achieving important development goals', stated the Bank in a recent evaluation of its experience in extractive industries (OEG, 2005: 120).

In terms of environmental impacts, large-scale mining projects notably bring forth risks of: the destruction of natural habitats as a result of the dumping of tailings and discharges; soil degradation and acid mine drainage; riverbed pollution; chemical soil contamination; air emissions (dust, pollutants); the use of scarce water and energy resources; workers handling chemical products; and the different risks associated with exposure to toxic substances (Belem, 2008: 121). The mining industry is all the more problematic as its environmental implications extend well beyond the duration of the mine's activity, as illustrated by the Filipino legacy of 800 abandoned mines (Goodland & Wicks, 2009: 3). In addition to such environmental risks, it is further increasingly understood that communities living in the vicinity of a mining site often bear an overwhelming share of the negative impacts of the extractive industry. Belem further found that mining projects tend to exacerbate income disparities and directly affect the local community through: population displacement; increased migration of workers into the project zone; price inflation resulting from this migration; the abandonment of agricultural activities; expropriation of fertile land to satisfy the mine's requirements; and increased public health problems (2009: 122). Such inherent social problems brought forth by the mining industry are often exacerbated in countries where conflicts have already erupted and where corruption is rampant. As discussed further in this article, this is particularly true for the Filipino case.

It is in light of the extent of the social and environmental problems linked to the extractive industry that James D. Wolfensohn—the President of the World Bank at the time—ordered a two-year moratorium on the WBG's mining investments and a review of its involvement in the industry. While the EIR, which emerged from this process, did conclude that there was still a role for the WBG in the sector, it however underlined that such a role should be strictly limited to one of contributing to sustainable development (EIR, 2003: 4). In its official response to the independent evaluation<sup>6</sup> (in 2004), the Bank declared: 'Our future investments in extractive industries will be selective, with greater focus on the needs of poor people, and a stronger emphasis on good governance and on promoting environmentally and socially sustainable development' (World Bank, 2004: iii).

While the Bank does acknowledge that extractive industries may 'aggravate or cause serious environmental, health, and social problems, including conflict and war' (2005: 1), it however remains adamant that such negative impacts are not inevitable. It repeatedly stated that it is precisely in light of these particular risks that it should remain involved in the sector. Beyond its official mission to tackle poverty, the WBG further argues that it brings safeguard policies and guidelines to the sector which 'improve projects beyond compliance' (OEG, 2005: 118).

It is a fact that by the end of the 1990s, the Bank had substituted its conventional policy recommendation framework for one that promoted far stricter environmental and social standards. The birth of what is here referred to as the 'Social-Development Model' (SDM) echoed throughout the industry and within mining regimes across the Global South, notably within the Philippines' Mining Act and its overall mining regime, as analysed in the following section.

#### *b) The Pressures for a New Mining Code: the Bank, the Philippines & the 'Crisis' of the Mining Sector*

Asian countries were quick to follow the multilateral guidelines. Since the early 1990s, all the major nonfuel mineral producers in the region, such as India, Indonesia, China, Papua New Guinea and the Philippines, passed new regulations aimed at attracting a

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<sup>6</sup> For a thorough analysis of the EIR and the World Bank response, see Campbell (2009).

greater share of foreign investment (O'Callaghan & Vivoda, 2010: 2). Consequently, in line with the Bank's framework, the turn of the century witnessed a wave of reforms where Asian countries were actively competing for the most deregulated and liberalised mining regime, a competition in which the Philippines came in as one of the regional front-runners. In this section the particular settings in which the Filipino government opted to adopt a new mining act in 1995 is analysed in conjunction with multilateral trends and influences.

With the exception of a project on mine closure, the World Bank is quick today in stating that it plays no part in the mining sector of the Philippines. Notwithstanding the fact that the IFC is currently looking to invest US\$900 million in the country (Ordinario, 2009), such grand statements are understandable in light of the highly polemic nature of mining activities in the Philippines in particular. While for the last decade the Bank has indeed taken a back seat in relations to the mining sector of the country, the historical influence of the Institution remains blatant. In addition to its direct involvement in the adoption of the 1995 Mining Act<sup>7</sup>, along the Asian Development Bank (ADB)<sup>8</sup>, the particular historical influence of the Bank in the Philippines has been well documented. With an estimated external debt of US\$66.27 billion<sup>9</sup> (CIA, 2010), the multilateral pressures for the country to liberalise its economy and attract FDI have indeed been sizeable since the 1980s<sup>10</sup>. Today, the Bank is notably involved in judicial reform and land administration management projects, an initiative to address infrastructure constraints, as well as measures to increase awareness of corporate governance (IBRD & IFC, 2005: 68-69). It has vowed to further inject between US\$700 million to US\$1 billion per year into the country, for the next three years (2010-2012) (World Bank, 2010).

As with all its country-clients, the World Bank has been enthusiastically promoting reforms to improve the Philippines' investment climate. In the last decades, the Institution has therefore been repeatedly deploring that the Philippines was lagging behind its regional neighbours in terms of FDI promotion (IBRD & IFC, 1999; 2002). The country 'is caught in a competitive pincer', observed the Bank (IBRD & IFC, 2002: 12 of Annex H).

Of particular concern in the early 1990s was that the Philippines didn't have what was deemed to be a solid mining framework to attract FDI. Not only was the country considered unattractive in terms of its overall fiscal incentives, the minimum requirement for 60 per cent Filipino ownership in mining activities enshrined in the Constitution further contributed to displease potential foreign investors. The Filipino mining regime of the mid-1990s was allocated a failing grade by the World Bank, as well as the Chamber of Mines and the ADB<sup>11</sup>. Crucially, the lack of FDI incentives was considered to be the cause of what was referred to as the 'crisis' that had plagued the country's mining industry since the mid 1980s.

It is to be noted that much of this narrative over the urgent need to make the Filipino industry more attractive to FDI was—and remains—built on the sector's former glory. If today the sector only accounts for 7 per cent of total exports, officials are quick to emphasise that during the early 1970s, and again in 1980, it accounted for 22 per cent of total exports<sup>12</sup>. More recently, the Philippines dropped from the 7<sup>th</sup> place in world

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<sup>7</sup> See Coupry (2007); Doyle, Wicks and Nally (2006); Loki (2009).

<sup>8</sup> On the subject, see Holden (2005) and Rovillos, Ramo and Corpuz (2003).

<sup>9</sup> As of 2008.

<sup>10</sup> On the subject, see Bello, Kinley and Elinson (1982).

<sup>11</sup> See for example IBRD & IFC (2002) and US Geological Survey (1995; 1996).

<sup>12</sup> The country's mineral exports (annual average) declined to 16.1 per cent between 1975-1985 (back to 21.3 per cent in 1980). Since 1986, the average value of mineral exports per year has been equal to only 7.3 per cent of the country's total foreign exchange earnings (Raymundo, Ramo & Corpuz, 2005: 188).

production of gold (in 1988) to the 17<sup>th</sup> place (in 1997), while copper production fell by 90 per cent (Nettleton, Whitmore & Glennie, 2004: 7). While the drastic decline of the industry is indeed blatant, it is interesting to note that the causal effect of this decline and the provisions enshrined within the contested mining regime at the time might not have been as straightforward as commonly presented. Rovillos, Ramo and Corpuz (2003) observe that such a decline has plural explanations:

The drop in copper production can be attributed to the closure of mining companies. The main reason was the financial crisis, and aggravated by other incidents. Atlas mine, once Asia's largest producing copper mine, due to the financial crisis (1994); Marcopper mines due to the infamous tailings spill incident (1996); Dizon mines after a massive erosion caused by a typhoon (1998); and Maricalum in view of operational and financial problems, including failures in the tailings dam, and the shift by the Manila Mining (this too stopped after 2 tailing spills and poor community relations) and Lepanto Mining to gold (2001) (Rovillos, Ramo & Corpuz, 2003: 3).

In addition to the fluctuation of world prices and specific environmental problems within the country, the ongoing reverence to the past glory of the Filipino mining sector fails to account for the fact that the sector was strictly controlled by the Marcos regime throughout the period of the dictatorship. Notwithstanding the fact that Marcos had a direct interest in the mining industry<sup>13</sup>, wage control as well as union suppression were systematic under his administration, thus keeping costs artificially low (Nettleton, Whitmore & Glennie, 2004: 6). Bello and coll. further note that an important feature of Marcos' Mineral Resources Development Decree<sup>14</sup>, which was passed in 1974 in order to jumpstart the industry, was a complete disregard for the occupants of the lands to be exploited, notably the indigenous communities (Bello & coll., 2004: 225).

## ***II. The Quest for Investors: the Filipino Mining Regime***

Setting aside key factors such as the declining demands of the world markets, as well as vital elements of the country's historical political-economy, the Ramos Presidency opted to reform the country's mining framework in order to unequivocally attract foreign investors<sup>15</sup>. Passed into law in 1995, the *Republic Act* marked the country's clear adherence to the multilateral guidelines. Fifteen years later, it remains one of the most favourable codes to mining in the region.

In this section, the key provisions of the Mining Act are presented in conjunction to their adherence to the changing governance narrative within multilateral arenas. Combined with recent initiatives such as the *National Policy Agenda on Revitalizing Mining in the Philippines* (2004) and its correlated *Mineral Action Plan* (2004), the Act is finally apt to deliver the mining sector to international investors. As such, a first review of the Mining Act may indeed suggest that the Philippines has succeeded in balancing the sector's economic incentives with an exceptional insistence on the social and environmental dimensions of mining activities. However, the challenging first steps of the new Code will further be viewed as foreshadowing the contradictory nature of its provisions, as discussed in the final section of this paper.

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<sup>13</sup> For example, it is estimated that about half of the Marcopper mine, which was 39.99 per cent owned by Placer Development (later Placer Dome), was owned by Marcos himself through a number of cover companies (Nettleton, Whitmore & Glennie, 2004: 7).

<sup>14</sup> Presidential Decree No. 463.

<sup>15</sup> Of particular interest is that one of the main authors of the Act was soon to become the country's President (2001 to 2010). A senator at the time, Gloria Macapagal-Arroyo proposed the Mining Act in the Senate and her overall influence on the code is well documented (Andaqui, 2005; Loki, 2009).

a) *The Mining Act & its Incentives*

Beyond its tales of fiscal revenues and foreign exchange earnings, the Bank's fundamentals suggest that the quest for foreign investors is to acknowledge that 'risk' investments must be met with high return (World Bank 1992; 2004; OED, 2005). Mining in itself is considered to be a uniquely risky enterprise: it is particularly capital-intensive, the period between investment and returns is often extensive, and profits are subjected to the whims of commodity prices, notwithstanding the uncertainties of geological exploration and reserve depletion rates. In addition, the industry is considered to be subject of heightened risks in light of the 'obsolescing bargain' effect, whereby extractive industries become 'hostages' in host countries. This is characterised by the understanding that 'once the companies have paid for multi-million-dollar fixed assets, they cannot lightly withdraw from the host country' (Bray, 2003: 292).

In light of such risks, the economic rationale promoted by the Bank stipulates that countries must offer highly competitive settings to draw the scarcely available capital in their own mining sector. Combined with the overall stability of the governance regime offered by host countries, the taxation regime is considered to be 'an important determinant of returns to investors' (World Bank, 2005: 117). Resource-rich countries in the Global South have therefore been encouraged to adopt mining codes with fiscal regimes that were described as providing very generous incentives to investors (see Akabzaa, 2004).

In line with the World Bank's recommendations, the Philippines' *Republic Act 7942* offers the standard incentive package that had come to be expected by investors. The Act guarantees repatriation of all earnings, capital and loan payments to foreign entities; mineral agreements have a term of 25 years, renewable for an additional 25 years. Furthermore, it offers a host of financial incentives to guarantee returned investments and profitability to mining contractors: it reduces royalties—notably to two per cent on gold—and provides multiple and generous tax incentives including a four-year income tax holiday; tax and duty-free capital equipment imports; value-added tax exemptions; income tax deductions where operations are posting losses; and accelerated depreciation (US Geological Survey, 1996: 1). Moreover, Chapter XVI of the Act titled 'Incentives' offers investment guarantees such as repatriation of investments; remittance of earnings; freedom from expropriation by the government; as well as '[a] guarantee of confidentiality by which any confidential information supplied by the contractor pursuant to this Act and its implementing rules and regulations shall be treated as confidential'.

Crucially, in addition to the three modes of mineral agreement<sup>16</sup> stated in the Mining Act, contractors may apply for a Financial or Technical Assistance Agreement (FTAA), which is a contract involving assistance for large-scale exploration, development, and use of mineral resources. It requires an investment of at least US\$50 million. This Agreement, which can last for up to 25 years and is renewable for another period of 25 years, is to be negotiated by the Department of Environment and Natural Resources (DENR) and executed and approved by the President. Not without any controversy, the FTAA further allows for 100 per cent foreign ownership of mining properties.

Of particular generosity, and therefore one of the most divisive provisions in the Act, is the extensiveness of the areas that are up for grabs. The legislation states that 'all mineral resources in public or private lands [...] shall be open to mineral agreements or financial or technical assistance agreement applications' (Chapter III, Sec. 18). While the

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<sup>16</sup> These are the *Mineral Production Sharing Agreement* (MPSA), the *Co-Producing Agreement* and the *Joint Venture Agreement*. The MPSA is a production agreement which can last for up to 25 years. Approved by the DENR, it requires that a foreign corporation own no more than 40 per cent of the mineral project.



Act has provisions barring mining activities from zones with ‘ecological value’, activities can nonetheless proceed upon the consent of the government or other concerned parties. The government commits itself to ensuring the removal of all ‘obstacles’ to mining, including settlements and farms. In other words, as the law provides auxiliary rights ensuring that the mining rights are exercised unhampered, companies have priority access to water resources within their concession, the right to build necessary infrastructure on private lands as well as timber rights within the mining area as necessitated by the mining operations (Philippines International Review, 2009).

While resolutely tailored to promote FDI, the Filipino mining regime has also been acknowledged as ‘one of the most modern’ in the Asia-Pacific region in terms of environmental and social provisions (US Geological Survey, 2000: 21.1). As such, and this will be further argued in this contribution, the social and environmental standards enshrined within the Act and the overall mining regime of the country are a compelling example of the Social-Development Model advocated by the World Bank, a narrative which attempts to merge neoliberal practices with environmental and social safeguards. In line with this Model, a first analysis of the Philippines’ mining regime therefore does suggest that the country has succeeded in balancing the quest for investment with solid socio-environmental standards. In addition to provisions for companies to secure the Free and Prior Informed Consent (FPIC) of indigenous peoples, the 1995 Mining Act requires companies to clean up the exploited sites. Crucially, the Act further dedicates provisions for the redistribution of benefits among the local mining stakeholders, notably indigenous people. The Mining Act ‘contains social and environmental safety nets far stronger than previous mining laws, rules and regulations’, boasts the Filipino Government (Philippines Government, 2010).

In addition to the provisions secured in the Mining Act, the Indigenous Peoples Rights Act<sup>17</sup> (IPRA), enacted in October 1997, further entrenched strong social components in the overall Filipino mining regime. Although highly debated even within the Non-Governmental Organisations (NGO) community<sup>18</sup>, the IPRA was recognised as ‘a milestone in the long struggle for the recognition of indigenous peoples’ rights’ (Philippines International Review, 2009). As Tivey observes:

While there have been varying degrees of regard for the rights of indigenous inhabitants of lands utilised for mineral exploration and development in the Philippines, the law relating to native title in the Philippines was generally regarded as non-existent by investors prior to the passage of IPRA (1999: 78).

Concretely, the IPRA aimed to implement the constitutional provisions regarding the rights of indigenous cultural communities<sup>19</sup>. It spells out the right of indigenous peoples to their ancestral domains, their right to self-governance and empowerment, their social and human rights, and their right to cultural integrity (Philippines International Review, 2009). Subsequently created by the IPRA, the National Commission on Indigenous Peoples (NCIP) issued the Implementing Rules and Regulations<sup>20</sup> which notably

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<sup>17</sup> Republic Act No. 8371.

<sup>18</sup> A great deal of debate was spurred by section 56 of IPRA, which states that property rights within the ancestral domains already existing and/or vested, shall be recognised and respected, therefore allowing mining companies licensed by the Government under the 1995 Mining Act to continue their operations in these domains.

<sup>19</sup> The 1987 Constitution recognises and promotes the rights of indigenous cultural communities within the framework of national unity and development (article II, section 22); protects the rights of indigenous cultural communities to their ancestral lands to ensure their economic, social and cultural well-being (article XII, section 5); and recognises, respects and protects the rights of indigenous cultural communities to preserve and develop their cultures, traditions and institutions (article XIV, section 17).

<sup>20</sup> NCIP Administrative Order No. 98-1.

recognised ‘ancestral domains’ of indigenous communities. As owner of the land, therefore, the communities are to give FPIC<sup>21</sup> for a mining project to be instigated on their land.

*b) The Early Days: Implementation of the Mining Act & its Legal Challenges*

The 1995 Mining Act was hailed by the country’s Chamber of Mines as ‘a landmark legislation, a fruit of their years of persistent lobby in Congress and Senate’ (quoted in Rovillos, Ramo & Corpuz, 2003: 7). Tailored to attract international attention, the passage of the Act was met with a flock of foreign investors. Had all the mining rights applications since the Act’s inception been approved, approximately 40 per cent of the country’s total land area would have been covered by mining claims (Philippines International Review, 2009). By 2005, the government had approved 180 Mineral Production Sharing Agreements, 70 Exploration Permits, 126 Industrial Sand and Gravel permits, and five Special Mineral Extraction Permits (Raymundo, Ramo & Corpuz, 2005: 194)<sup>22</sup>. From 1994 to 1996, the number of foreign mining companies represented in the country increased by 400 percent (US Geological Survey, 1996 in Holden & Jacobson, 2007: 481).

Despite such early achievements, the country’s investment rates were deemed to be drastically failing expectations. The ‘key factor’ accounting for what was defined as a lack of investment, was the immediate legal challenges brought upon the Mining Act (Engineering & Mining Journal, 2008: 107). As early as 1995, the Senate had already filed a bill in order to repeal the Act<sup>23</sup>. This initial legal challenge was to be but one of the many hurdles faced by the new Mining Act for the subsequent decade.

Triggered by the Marcopper spillage (March 1996), a large number of NGOs and the Catholic Church filed a petition to the Supreme Court in 1997 challenging the validity of the granted FTAs and the 1995 Mining Act<sup>24</sup>. The environmental tragedy, which was to be known as the worst environmental incident ever sustained in the Philippines, further polarised public opinions against large-scale mining. Located on Marinduque Island, the disaster, which unleashed between 1.5 to 3 million cubic meters of toxic mining slurries and tailings into the Makulapnit and Boac rivers, was caused by the failing of a cement plug in the Tapian pit drainage tunnel. In essence, as observed by Bello and coll., ‘the spillage inundated the whole length of the Boac river which goes through almost the entire island, thereby effectively killing the small island’s ecosystem and livelihood’ (2004: 224). Crucially, the new filing was to insert a sizeable thorn in the Government’s hope to ‘rejuvenate’ the mining industry as it instigated a legal battle which was to last for the following seven years. The protagonists argued that the provisions allowing for 100 per cent foreign ownership in the Mining Act was unconstitutional. As Filipino laws on natural resources are based on the Regalian Doctrine, the country’s 1987 Constitution clearly states that: ‘All lands of the public domain, waters, minerals, coal, petroleum, [...] and other natural resources are owned by

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<sup>21</sup> The IPRA defines FPIC as the consensus of all members of the indigenous peoples to be determined in accordance with their respective customary laws and practices, free from any external manipulation, interference and coercion, and obtained after fully disclosing the intent and scope of the activity, in a language and process understandable to the community (section 2, chapter II).

<sup>22</sup> It is to be noted that although five FTAAs have now been approved, FTAs were at the epicentre of the legal challenge to the Mining Code, which were resolved only in 2004. Therefore, the only two FTAs that had by then been issued had been contracted under the previous legal framework.

<sup>23</sup> Senate Bill No. 295, Sen. Sergio R. Osmeña III.

<sup>24</sup> *La Bugal Tribal Association Inc., et al. v. Victor O. Ramos, Department of Environment and Natural Resources, et al.* (G.R. No. 127882).

the State'<sup>25</sup>(Art. XII, Sec. 2).

It its ruling in 2004, the Court held as unconstitutional parts of the Mining Act by which full ownership of mining operations were permitted—through the FTAA. The ruling stated that the provisions that could be given to foreign companies in large-scale exploration were indeed limited to *technical* and *financial* assistance by the 1987 Constitution and that the Mining Act provisions on the FTAA's were therefore unconstitutional<sup>26</sup>: 'giving ownership over natural resources that properly belong to the State and are intended for the benefit of its citizens' (quoted in *Engineering & Mining Journal*, 2004: 17). After years of waiting, this ruling was quite a blow to the government's hopes of stimulating foreign investments in the mining sector. Horace Ramos, the Director of the Mines Bureau at the time, stated that: 'The Supreme Court decision is indeed patriotic in its very essence, but we think there has been no real time to reflect on its implications for foreign investments on mineral exploration in general' (quoted in *Engineering & Mining Journal*, 2004: 17).

The Filipino Government quickly applied for a reconsideration of the ruling and by the end of the year, the Supreme Court reversed its decision. President Arroyo stated that the Court's ruling was a 'stroke of good news' (quoted in Andaquig, 2005), a sense of relief that echoed throughout the business community. The Bank applauded the decision, stating that it 'reduced regulatory uncertainty in this sector' (IBRD & IFC, 2005: 6). Following the Court's decision, a total of 23 mining and mineral processing projects were in the pipeline or had begun commercial operations (Business World Online, 2004), and over US\$3 billion of new investments had been identified (IBRD & IFC, 2005: 6). Jesse Ang of IFC Philippines observes that while the country is the Corporation's largest portfolio, it had been unable to invest in mining precisely because of the Mining Act's legal challenges (Ang, interview, 2010). 'Now we're just catching up', concludes Ang (interview, 2010).

Lobbied by the Philippines' Chamber of Mines and international companies for further laws prioritising mining (see Nettleton, Whitmore & Glennie, 2004), the Arroyo government immediately built on the momentum following the ruling to unleash an aggressive pro-mining campaign, stating that it was shifting its mining policy 'from mere tolerance to promotion for the revitalization of the minerals industry' (MGB, 2008). Of interest however, is that despite the fact that it was crippled by the heightened risk faced by the industry during the legal challenges, the sector had nonetheless seen an increase of more than 50 per cent in foreign investments between 1995 and 2001 (Nettleton, Whitmore & Glennie, 2004: 9). The mineral industry does play an important role in the Filipino economy. In 2003 alone, the industry registered PHP 41.9 billion in production, US\$519 million in export earnings and paid PHP 2.1 billion in taxes and fees (Philippines Government, 2004). Mineral exports grew to \$2.06 billion in 2006 (Philippines Government, 2010). It is estimated that the industry employs 112,000 workers—providing between PHP4 to 5 million in wages and benefits—notwithstanding the estimated

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<sup>25</sup> It further stipulates that: 'The exploration, development, and utilization of natural resources shall be under the full control and supervision of the State. The State may directly undertake such activities, or it may enter into co-production, joint venture, or production-sharing agreements with Filipino citizens, or corporations or associations at least sixty *per centum* of whose capital is owned by such citizens. [...] 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 mineral 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' (Philippine Constitution, 1987, Art. XII, Sec. 2).

<sup>26</sup> Foreigners, held the Court, were to be restricted to no more than 40 per cent ownership. The decision nullified the FTAA allocated to WMC Resource International, a subsidiary of the Australian company Western Mining Holdings Ltd.

additional 4 to 10 correlated jobs that would be created for each official mining job (Philippines Government, 2004).

Despite such sizeable achievements, the 1970s statistical performances of the sector were once more brandished to justify a renewed campaign to further attract foreign investors. Building on the momentum of a Mining Code now free of its legal hurdles, the Arroyo Government, which was struggling with an ever-increasing budget deficit, vowed to develop the country's tremendous potential. The 'Arroyo government perilously guns for "gold" or economic salvation in mining', stated Acebedo, a local editorialist at the time (2003). Mineral exports 'have [the] potential to generate more than \$1 billion in export earnings and \$400 million in tax revenues', observed the World Bank in 2002 (IBRD & IFC 2002: 16 of Annex H).

Sponsored and promoted by the World Bank<sup>27</sup>, this second burst to stimulate the sector took the form of the *National Policy Agenda on Revitalizing Mining in the Philippines*<sup>28</sup> (NMP). The key strategies and activities to implement this new 'paradigm on mining' were later detailed in the 2004 *Mineral Action Plan*<sup>29</sup> (MAP). The latter instigated changes in regulatory requirements for mining prospectors, simplifying the mining permit process to reduce the length of time needed for investors to receive the approvals for a mineral production agreement in this country. While the average waiting period was three to five years, investors would now have to wait only six months (US Geological Survey, 2007: 21.1). These measures were followed in 2005 by an international conference organised by the Philippine Chamber of Mines, which resulted in 29 memorandums of understanding and letters of intent with local and international partners, and generated commitments of an estimated US\$5 billion in new investment (US Geological Survey, 2007: 21.1). In sum, the Arroyo Presidency has been multiplying its efforts to transform the sector into a 'key driver' of the economy (Philippines Government, 2010), seeking to further increase foreign investments to US\$10 billion by 2011 (Loki, 2009). 'The Philippine mining industry has been rejuvenated', markets today the Government (Philippines Government, 2010).

While the significance of such narrative is the subject of the following section of this contribution, it is here crucial to note that the omnipresence of the social-development narrative both within the NMP and the MAP. By 2003, the global extractive industry was already on the *qui vive*, bracing for the impact of the EIR. This further accelerated the increasing acceptance for a pro-poor, sustainable mining framework across the industry. This global shift was well received in the Philippines; a country where mining activities had long been the subject of acute political tensions. Unsurprisingly therefore, the Arroyo Government's renewed efforts to stimulate FDI mirrored the new multilateral stand on sustainable mining. 'Our vision', states the Filipino Government, is:

A mining and 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. (MGB, 2005)

It is to be further noted that the NMP was presented as the result of a participatory and inclusive nine month pan-national endeavour, a process that was incidentally financed by the World Bank. The language of NMP echoes the multilateral stance by which the social and environmental risks of mining activities can be mitigated with solid environmental and social protection standards. As stated by the Mining and Geosciences Bureau (MGB), '[the] government believed on the potential of the minerals sector to attract new

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<sup>27</sup> On the subject, see Doyle, Wicks and Nally (2006).

<sup>28</sup> Executive Order No. 270. Issued on January 16<sup>th</sup>, 2004 with amendments on April 20<sup>th</sup>.

<sup>29</sup> Memorandum Circular No. 67.

investments, generate revenues for the government and provide additional jobs and livelihood opportunities. However, these should be anchored on the basic principles of sustainable development' (MGB, 2008).

Corollary, the MAP was presented as the product of a consensus arising from a consultation process. The MAP states that it has 'incorporated most of the comments of other government agencies, and the Minerals Industry and Civil Society/NGOs' (Philippines Government, 2003). Interestingly however, the consultation process of the MAP and NMP were both energetically opposed by civil society for being far less inclusive than advertised. In their analysis of the draft NMP, Nettleton, Whitmore and Glennie conclude that the idea of 'dialogue' entrenched within the initiative rather reflects the government's belief 'that civil society needs only to be educated to overcome its emotional resistance to mining' (2004: 9), a point that stems from a framework which carries a particular *politics* of mining, as argued in the last section of this contribution.

### ***III. The Filipino State at Work: Conflicting Interests & Strategic Choices***

Resolutely focussed on attracting foreign investors, while mitigating the socio-environmental impacts of such activities, the Filipino mining regime has been celebrated by the Government as a cornerstone of the country's economic future. While the sector has seen a sizeable increase in foreign investments, the environmental, social and human rights dimensions embedded in the mining regime appear to have been, in practice, relegated away from the State's scrutiny. If cynics have been quick to dismiss the poverty reduction narrative linked to the regime, it is here argued that such dimensions attached to the mining framework are far from a mere discursive exercise from a cash-strapped State in desperate need of enticing investors.

While there does indeed exist a serious gap in the monitoring process of the socio-environmental clauses of the mining regime, as analysed further in this section, such failures should rather be viewed as the consequences of what Szablowski (2007) coined as a 'strategic choice' of the State. In practice, such processes take the form of a retreat of the State from its formal monitoring functions while simultaneously delegating its regulating, mediating and monitoring functions upon the shoulders of the private sector. In turn, and this is the argument brought forth by Campbell (2004; 2009) in her study of African countries, these shifts in functions further impact the responsibilities and legitimacy of the stakeholders involved in mining activities. As argued in this final section, the particular case of the Philippines demonstrates that the State opted to be selectively absent as a strategy to both contain and manage opposition to mining activities, therefore reducing investment risks within the sector.

#### *a) A Strategic Absence*

There exists a deep contradiction within the particular mining framework espoused by the Filipino State, and advocated by the World Bank, one that requires the State to both promote FDI and regulate socio-environmental standards. These dual objectives suggest a degree of prioritisation or, in other words, a set of strategic choices on the part of the State.

A first indication of the nature of such choices is reflected by the limited and sporadic implementation of the socio-environmental provisions of the regime. 'The Philippines may appear to have excellent laws to protect the environment, human rights and indigenous peoples, yet their application is unacceptably poor', observe Goodland, a former senior environmental adviser to the World Bank, and Wicks (2009: 2). The reality, further concludes a report based on the findings of a team led by Clare Short MP, the former UK Secretary of State for Overseas Development, 'is that that where investments

are concerned the law is too often viewed as a mere technicality to be overlooked or circumvented' (Doyle, Wicks and Nally, 2006: iii).

The case of the implementation and monitoring of the FPIC—or rather the lack of—is illustrative of the inherent contradictions within the State's mandate. As soon as the Indigenous Peoples Rights Act took form in October 1997, the provisions for FPIC were seen by both the Government's National Commission for Indigenous Peoples (NCIP) and by mining companies as 'an impediment to be bypassed as quickly as possible' comment Goodland and Wicks (2009: 2). It is to be noted that half of all the areas identified in mining applications were located in areas subjected to the provisions of the Indigenous Peoples Rights Act (Holden, 2005). Therefore, barely a year after its enactment, the constitutionality of the landmark law was being challenged by the industry<sup>30</sup>.

While the constitutionality of the IPRA was ultimately upheld (in 2000), a temporary restraining order was nonetheless issued to prevent the implementation of the Act. The subsequent funding cuts succeeded in *de facto* effectively paralysing the Agency (Bello & coll., 2004: 229), leaving it to be what the UN qualified as an 'unfulfilled promise' (UN, 2002). Since its inception, the NCIP—which is the primary government agency responsible notably for the implementation of the policy, plans and programmes promoting and protecting the rights of indigenous peoples—has faced severe resource limitations to carry out the provisions of the Act, both in terms of budget and the expertise required to deal with complex matters of consent in indigenous communities (Nettleton, Whitmore & Glennie, 2004). Stavenhagen, the UN Special Rapporteur for the human rights of indigenous peoples, voiced his concern 'with the slow pace of implementation of the provisions of IPRA', and further observed 'a loss of confidence among indigenous organizations in the ability or willingness of government agencies to proceed actively with its effective implementation' (2003: 21).

Similarly, the MGB and the DENR appear to lack the political support, resources and expertise required to effectively enforce the overall social and environmental safeguards enshrined in the mining regime. The DENR, which is the main government body responsible for mining, is expected to strive to maintain a balance between proper economic objectives and protection of the environment within the mining industry through appropriate regulation (US Geological Survey, 1995: 685). It is notably mandated to ensure that the following considerations are taken into account before a mining operation is authorised:

- Local government empowerment is encouraged;
- Respect and concern for the indigenous cultural communities;
- Equitable sharing of benefits and natural wealth;
- Demands of the present generation while providing the foundation for future generations;
- Worldwide trend towards globalisation is adhered to;
- Protection for and wise management of the environment by all stakeholders. (Philippines Government, 2010)

In practice however, the DENR appears to fall short of this mandate. While the chronic issue of the flight of experts to the private sector goes a long way to explain the shortage of qualified staff within the Government ranks, the Department appears to lack the very resources to carry out its socio-environmental mandate. At issue here is notably the dual

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<sup>30</sup> In position papers and statements, mining companies claimed that the enactment of IPRA was 'sending confusing signals to foreign mining companies wanting to invest in the Philippines, and had the effect of dampening enthusiasm for investment opportunities created under the liberalized mining law' (in Philippines International Review, 2009).

role assigned to the Department where it is expected to act both as a promoter and a regulator for the sector. Crucially therefore, it appears that the DENR—and the NCIP—is resolutely entrenched within the pro-mining camp<sup>31</sup> (Vivoda, 2008: 133). The Structural Adjustment Participatory Review International Network (SAPRIN) found that the DENR's regional offices and field personnel were 'actively and aggressively helping mining company personnel in convincing the people to accept the mining project' (quoted in Nettleton, Whitmore & Glennie, 2004: 12). In short, observes Jesse Ang of IFC-Philippines, with such dual roles the DENR may be qualified as 'a schizophrenic organisation' (interview, 2010). The issue has trickled to the MGB which 'has no effective power to sanction firms that violate regulations' observes Walden Bello, Member of Congress in the Philippines' House of Representatives (Bello & coll., 2004: 226). It is thus unsurprising that bureaucratic inefficiencies are manifest and that the enforcement of regulations is 'slow, erratic and inefficient' (Vivoda, 2008: 136). Overall, further concludes Bello, the MGB: 'as with the entire government, is wracked by conflicting goals—that of promoting industry and that of protecting the lands' (Bello & coll., 2004: 226).

When correlated to the dual role of the agencies, the rampant corruption which particularly characterises the Philippines brings to light the degree by which the social and environmental provisions of the mining regime are exposed to the whims of the country's bureaucrats<sup>32</sup>. According to Ang, the country's chief issue indeed remains the towering levels of corruption, albeit the World Bank tactfully refers to it as a problem of 'governance' (interview, 2010). The Philippines does rank 139<sup>th</sup> out of 180 countries on the Corruption Perceptions Index<sup>33</sup> of Transparency International (2009). In fact, observe O'Callaghan and Vivoda the DENR itself 'has been described as one of the most graft-ridden and corrupt agencies in the Philippines' (2010: 9). As the DENR appears to be lacking the teeth required to carry out its functions linked to a sustainable development narrative, the high level of corruption within the agency itself might go a long way to further explain why its contradictory mandate of promoting mining activities has however been vigorously enacted.

If such widespread bureaucratic deficiencies have commonly been framed as mere corruption issues, they should rather be perceived as symptoms of a larger problem, one where multilateral standards are dictating a particular set of priorities to the State. The World Bank indeed came to acknowledge the importance of the State, albeit emphasising its role in the facilitation and regulation of the sector (World Bank, 2007). Key to this paper is the work of Campbell (2004; 2009) who has shown that while the regulatory and legal reforms in the mining sector in Africa have indeed contributed to a more favourable environment for FDI, they have also entailed: 'a process of redefining the role of the State that is so profound that it has no historical precedent' (2004: 7). Because of this, further argued the author: 'these measures have the potential effect in the countries concerned of driving down norms and standards in areas of critical importance to social and economic development, as well as the protection of the environment' (Campbell, 2004: 7).

The Filipino case is here compelling. While the regime is quite solid in terms of socio-environmental standards, the very capacity of the State to carry out these provisions remains hampered by decades of neoliberal reforms where the State's functions were transformed in a way that accentuates its ability to mediate, regulate and mobilise in favour of the private sector rather than its citizens. Crucially, this is further

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<sup>31</sup> Along the country's Presidency, the Majority of the Congress, the mining investors and the Chamber of Mines. On the subject, see Vivoda (2008).

<sup>32</sup> On the issue of corruption see O'Callaghan and Vivoda (2010); Bello and coll. (2004).

<sup>33</sup> The Index is a measurement tool of perceptions of public sector corruption.

telling of another–complementary–strategic choice compelled upon the State; one where it delegates to the industry its traditional monitoring and regulating tasks in addition to the social welfare of the local communities, as argued in the following section.

*b) The Social-Development Model & the Management of Local Demands*

Building on Campbell's (2004; 2009) conclusions, it is here argued that while the Filipino Government now frames all mining activities under the umbrella of poverty reduction, the socio-economic and environmental impacts of mining on local communities are in fact addressed within a particularly technical framework which constricts the political spaces of stakeholders inclined to oppose mining activities. The argument here is that the SDM represents an attempt to reduce investment risks by offering a depoliticised avenue to contain and manage opposition to mining activities. While the State chose to 'absent' itself from its formal regulatory and monitoring responsibilities, the SDM further suggests a parallel transposition of a greater set of environmental and social responsibilities to the industry.

In his analysis of the Peruvian case, Szablowski (2007) observed that while enticing legal and economic provisions were being offered to mining companies as compensation for investing in a risk country, the State was increasingly delegating its role as regulator upon the shoulders of the industry. The author concludes that the legal and practical conditions required to attract FDI have circumscribed the nation State's ability to respond to internal political pressures. As such, the State has developed coping strategies in order to reconcile competing internal and external pressures. This means that it has formally awarded rights to the investor, while informally delegating local regulatory responsibilities: 'Accordingly, it appears that states themselves are involved in transferring legal authority to mineral enterprises to manage social mediation' (Szablowski, 2007: 27). The Bank itself does observe that:

[...] the 'shrinking state' has meant new responsibilities for private mining companies. Other private sector actors have also taken prominent positions; that is, the community members and representatives, including NGOs. In the area of environmental and social responsiveness, the industry has moved from a phase of awakening and acceptance to full integration of environmental considerations in project preparation and operations. (World Bank, 2007)

It is however to be noted that the delegation strategy rests on a logic by which it is in a company's own interest to ensure local stability. In turn, the latter suggest a tendency to frames socio-environmental concerns linked to mining activities in terms of 'externalities', rather than 'risks' confronting local communities. In their analysis of the conceptualisation of the notion of 'risk' in the mining sector, Emel and Huber make a compelling argument by questioning how capital has come to redefine the very idea of risk within such techno-managerial framework (2008: 1397):

Largely ignored in the financial risk lexicon are the environmental, economic, social and public health risks to the landowner whether it be the host state or the local community. These latter risks—recognized as significant by local community members, indigenous groups, and non-governmental organizations that resist mines—are viewed by investors, banks, and mining companies as engineering and social issues that can be mitigated. The host government is pressured with discouraging significant attention to these risks because they do heighten 'political risk' and thus their recognition will make the possibility of capital investment all the more precarious. (Emel & Huber, 2008: 1398)

Crucially, this is a process where socio-environmental principles are embraced only after being re-packaged within a depoliticised framework which serves to manage the risks facing investors above all else. MIGA, the insurance arm of the WBG, observes that:



[...] well-designed environmental and social programs can help *manage potential reputational risks* for project sponsors, *reduce social conflicts* within communities, protect the environment and help *reduce political risks*. For these reasons, MIGA aims to help its clients take a responsible approach to the environmental and social aspects of their projects. (Our emphasis. MIGA, 2009: 1)

The shift to the SDM therefore allows for a contraction of local concerns within a depoliticised framework, one that suggests technical solutions to problems which used to be perceived as highly political. This echoes what Carroll coined as ‘political technologies’ embedded within the larger context of a shift within neoliberalism<sup>34</sup>(2010: 9):

Specifically, these new technologies included participatory approaches and consultation exercises designed to circumvent or dissolve implementation impediments. The core concern underpinning much of this was not to have input from newly empowered citizens in shaping the development and deployment of particular programmes and projects [...] Rather, the technologies were executed in a manner that sought to build constituencies for particular agendas and marginalize opposition, in tandem with technocratic efforts to avoid some of the problems attending past efforts—especially environmental and social problems associated with large-scale infrastructure projects. (Carroll 2010: 9)

This provides great insights within the WBG’s SDM which trickled down to mining regimes throughout the Global South, and in this case to the Philippines. Recent imperatives for the participation of local populations, as well as for new social and environmental provisions conveyed by the Bank, do not therefore translate a novel interest in the political empowerment of local entities. It rather encompasses a need to rally certain segments of civil society to manage local resistance and in so doing reduce the risks faced by the industry. Here participatory schemes and civil society engagement serve to mediate the negative impact of mining activities on the ground, while also offering a path to vent local contestation.

This choice of framework is particularly understandable in the case of the Philippines, as mining activities have historically been highly contentious politically. The political economy and the environmental legacy of the sector have indeed repeatedly polarised public opinions and rattled the country’s political stage.

It is to be noted that the Philippines’ unique geography and biodiversity have been at the core of such debates. This is to say that beyond the acute environmental risks linked to mining activities in general, the country’s particular location makes it prone to intense volcanic activity and earthquakes, typhoons, landslides and droughts. Holden (2005) concludes that the Philippines would be one of the most disaster prone countries in the world. The author bluntly observes that: ‘it is a substantially more complicated contingency to have a mine site requiring perpetual care in a situation where a torrential rain storm, from a typhoon, causes a tailings dam to overflow or where an earthquake causes a catastrophic tailings impoundment failure’ (Holden, 2005: 240). Of particular importance as well is the fact that the country is considered to be a ‘geo-hazard hotspot’, rated one of the 17 countries in the world categorised as a mega-biodiversity country (Doyle, Wicks & Nally, 2006: iii).

Such unique risks linked to the country’s geography have been exacerbated by successive failures from the industry. In addition to the 1996 Marcopper incident, the 2005 Rapu-Rapu incident, which incidentally occurred less than a year after the removal of the Mining Act’s judicial hurdles, hit the Arroyo government with a new wave of pressures from local communities and anti-mining groups. Operated at the time by

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<sup>34</sup> There is a rich literature on the subject. See Carroll (2010); Gamble (2006); Jayasuriya (2001); Robison (2006).

*Lafayette Philippines* and *Lafayette Mining of Australia*, the Rapu-Rapu mines saw two incidents within a few weeks. The failure of a pump caused the overflow of cyanide-laden tailings into nearby creeks, an incident that was followed three weeks later by heavy rains which caused the tailings pond to overflow into the same creeks. While the Philippines' Chamber of Mine and the Government downplayed the actual impact of the spill<sup>35</sup>, the tailings spill resonated with the recent Marinduque incident<sup>36</sup>.

Beyond these two environmental incidents, the Filipino mining sector appears to have been plagued by chronic environmental problems. Ironically, the coastal dumping practices of Marcopper would have pumped 200 million tons of toxic waste rock over a period of 16 years (Farrell, and coll., 2004: 8). A Christian Aid and Philippine Indigenous Peoples Links' Report found that every day an estimated 160,000 tonnes of mine tailings would find their way into rivers, lakes and irrigation systems in the Philippines (Nettleton, Whitmore & Glennie, 2004: 17). The authors further report incidents of mine tailings spillage in Sipalay and Hinobaan, in Negros Occidental, in Itogon, Benguet, and mudflows in Sibutad, Zamboanga del Norte (2004: 3).

There can be no doubt that the strong anti-mining sentiment within the general Filipino population has indeed been fuelled by the multiple and severe mining incidents that occurred in the country over the last decades<sup>37</sup>. It is to be noted that in addition to being exceptionally numerous<sup>38</sup>, the Philippines' NGO community is one of the most dynamic in the world (Vivoda, 2008: 134). Of particular importance is the existence of strong anti-mining coalitions bridging the concerns of a number of actors such as indigenous communities, the Catholic Church<sup>39</sup>, environmental groups, as well as a wide range of other regional and national civil society organisations. Together, these actors, who represent a 'formidable political force' against mining (Llorito, 2006), have been relentless in their attempts to challenge the 1995 Mining Act since its inception.

The successes of these anti-mining coalitions—notably within the country's court system—have repeatedly been identified as a severe risk for the industry and underlined the urgent need for the industry to curb the 'political risks' correlated to mining. Karsten Fuelster, a Senior Investment Officer at the Oil Gas Mining & Chemicals Department of the WBG, does admit that the Philippines offer a 'challenging environment' for investors (interview, 2009). The Bank observes: 'Successful development will depend very much on improving environmental and social practices which caused substantial problems in the past' (IBRD & IFC, 2005: 6). Holden, an expert on the issue of mining activities in the country, asks: 'Have Filipino civil society organizations foreclosed a potential source of economic growth so desperately needed for the amelioration of poverty?' (2005: 237). According to Maria Lisa Alano, Executive Director of the NGO *Alternate Forum for Research in Mindanao*, NGOs in the Philippines did manage to a certain extent to stop the operations of mining companies in the country. 'However', observes the activist, 'if you

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<sup>35</sup> 'It was really a minor incident, a drop in the ocean', commented Benjamin Philip Romualdez, president of the Philippines' Chamber of Mines (quoted in Llorito, 2006).

<sup>36</sup> The subsequent public pressures forced the Arroyo government to order, in March 2006, a review of the Mining Act. The announcement was to lead to the creation of an 'independent commission' to investigate the health and environmental impacts of the tailings spills (Llorito, 2006).

<sup>37</sup> This has been well documented. See notably Acebedo (2003), Centre international des droits de la personne et du développement démocratique (2007), Doyle, Wicks and Nally (2006), Goodland and Wicks (2009), Nettleton, Whitmore and Glennie (2004), Tujan and Guzman (1998).

<sup>38</sup> Holden (2005) reports that 60,000 non-profit institutions were registered in the country by the turn of the century, making what Hilhorst perceives as the country with 'probably the largest NGO density in the world' (quoted in Holden, 2005: 227).

<sup>39</sup> Amongst the anti-mining camp, the Catholic Church is a particularly powerful voice within the country. See Holden, 2005; Vivoda, 2008.

look at the struggle, it's still there; as long as the mining act is still in place, they have the instrument to promote these activities' (Alano, interview, 2010).

The increasing need for the industry to acknowledge the 'political risks' linked to mining activities did give greater impulse and credential to the Socio-Development narrative. However, not only does the model advocate for the technocratic management of political demands, but for the relocation of such management to be nestled within the local sphere rather than at the national level. Crucially, the techno-management of political demands might actually come to exacerbate existing tensions, and in turn, directly undermine the sector's hopes for stability.

### *c) Conflict, Politics & Insurgency*

While the industry and the State have embraced the social-development framework descending from the multilateral arena, the imminent question remaining to be addressed is whether the latter will indeed foster the long-term local stability sought by the mining industry. In this last section of this contribution, it is argued that the process might rather be prone to exacerbate existing tensions in the long-term. In fact, the techno-managerial settings used to frame local voices, coupled with the re-localisation process of the burden of implementation and monitoring onto the local arena, may be an explosive cocktail for a country such as the Philippines, where mining activities have already ignited entire regions.

The decentralisation process of the State's power in recent years has failed to be accompanied by greater financial and human resources to the local governmental sphere, thus leaving a great gap in the local monitoring capacities (O'Callaghan & Vivoda, 2010: 12), a gap now partly filled by the industry. While the process is convenient for a government that seeks to please pro-mining interests without rattling its own political constituency, it however creates a clear power imbalance where the local communities are left negotiating with multinational industries. The 'strategic absence' of the State at the local level and the implied delegation of the enforcement of the socio-environmental standards to the companies have indeed left local communities in an awkward *rapport de force*.

Without the central State as an overseer, a range of questionable tactics by some companies has been extensively reported<sup>40</sup>, notably with the support of easily corruptible local authorities. In the case of the principle of FPIC, the deception, cooptation and even coercion of indigenous peoples has been repeatedly noted<sup>41</sup>. According to Alano of a Mindanao based NGO: 'not only is FPIC the only place where the local communities are to have a say [in a mining project], they sometimes don't even have time to read the technical reports' (interview, 2010). Building on the case of the Midsalip community where tactics such as using presence sheets for a mere information meeting were used by the geotechnical company to 'prove' the consent of the community for the project, Coupry (2007) concludes that the FPIC must be seen as a 'democratic farce'<sup>42</sup>. Whitmore (2006) further lists a number of abuses of FPIC, including:

[...] ignoring or misrepresenting 'joint meetings' (Rio Tinto in Pagadian), the creation of bogus community organisations (TVI in Canatuan), falsifying documents of community assent (Crew/Mindex in Mindoro), asking communities to sign agreements in languages they do not understand (WMC in Tampkan), the bribery of community leaders (Climax in Didipio), and finally, intimidation of community leaders (TVI in Canatuan again).

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<sup>40</sup> On the subject, see notably Coupry (2007); Goodland and Wicks (2009); Nettleton, Whitmore and Glennie (2004); Raymundo, Ramo and Corpuz (2005); Whitmore (2006).

<sup>41</sup> See Goodland and Wicks (2009); Raymundo, Ramo and Corpuz (2005); Whitmore, (2006).

<sup>42</sup> Author's translation.

(Whitmore, 2006)

The transfer of the monitoring and enforcement of the socio-environmental provisions to the local spheres further leaves affected communities with the overwhelming burden of having the knowledge of the law as well as collecting the data required for challenging mining projects. Accessing such mining information has however proven to be quite difficult in the Philippines, notably since the DENR, MGB and the Environmental Management Bureau have been found to be 'averse to disclosing information to the public' (Aguilar, 2008, quoted in O'Callaghan & Vivoda, 2010: 11-12).

Additionally, it is compelling to note that the Environmental Impact Assessment (EIA), which is notably required in the Philippines to ensure mining operation compliance, overwhelmingly rely on the industry's *voluntary* compliance. Amongst the outcomes of the 2005 campaign for the revitalisation of the mineral industry, the MGB boasts of: 'A culture of change leading to a self-regulating minerals industry driven by the highest degree of professionalism, responsibility and accountability and dedication to continual improvement and commitment to Best Practice and sustainable development' (2005). This faith in the industry's self-regulation is deeply entrenched within the SDM. It is useful to note that the WBG's own standards overwhelmingly rely on industry-generated information<sup>43</sup>. However, beyond the reliance on an industry whose line of accountability is evidently directed to its shareholders, the EIA process in the Philippines has been found to be lacking in terms of enforcement. In the proposal for an *Alternative Mining Bill* (2009), the current EIA is referred to as 'outdated' and insufficient to 'adequately address the complexity of mine operations'<sup>44</sup>. A fact-finding team led by Clare Short MP, the former UK Secretary of State for Overseas Development, which visited the Philippines in 2006, found that in practice, the 'participation rights, including the right to information, participation in decision making and access to justice' required by the EIA was lacking (Doyle, Wicks & Nally, 2006: 12). It further took note of local communities and NGOs complaints regarding 'the difficulty communities had in obtaining copies of EIAs, and of the lack of independent analysis or explanation of their contents and implications' (Doyle, Wicks & Nally, 2006: 12). In short, the particular environmental and social legacy of the mining sector in the Philippines rather point towards a distinct lack of enforcement of standards: 'We have never seen a mining industry with a poorer environmental record', states the author of a report commissioned by the Filipino Government (Clark, 2004, quoted in Nettleton, Whitmore & Glennie, 2004: 17).

The multiplication of initiatives apparently geared towards offering solid socio-environmental safeguards must be analysed within the depoliticised framework in which they are embedded. The SDM indeed conveniently bolsters 'technical' initiatives disarticulated from the politics of mining. It is compelling to note that the Bank suggests that the 'adverse consequences' of mining activities on local communities could be better addressed notably if the local people had 'the requisite skills to take advantage of the opportunities' (World Bank, 2005: 6). Hence, in recent years the WBG has multiplied its technical initiatives to enhance local capacity, as well as to persuade the industry to strengthen their standards and community programmes.

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<sup>43</sup> The IFC's own Social and Environmental Assessment (SEA) is to be written by the client and as such, the client has a substantial influence on the range of issues that will later be assessed by the Institution. It is to be further noted that the SEA does not specifically require human rights issues to be addressed, nor guarantees the opportunity for local communities to review a project's Action Plan before it is finalised (Halifax Initiative Coalition, 2006).

<sup>44</sup> Filed in Congress in May 2009, House Bill No. 6342 proposes to scrap the Mining Act of 1995 and to introduce a new mining policy which is 'anchored on land and natural resources management and human rights-based approach'. See Alyansa Tigil Mina (2009).

In this spirit, the Arroyo government has advertised the potentials of the mining sector in terms of its expected benefits on economic growth and ultimately, poverty reduction. Schools, health centres, clean water, power supply, roads and employment for local—and often remote—communities, the promises of the extractive industry are described as infinite. However, a number of studies on employment rates and the mining sector rather suggest that the industry's potential for job creation has repeatedly been overstated<sup>45</sup>. It is to be noted that the commercial viability of lower grade ore mining—and this is particularly relevant to the case of the Philippines—requires high levels of mechanisation, and thus lower labour costs (Nettleton, Whitmore & Glennie, 2004: 17). Such a use of advance technologies has also equated to the assignments of higher paid jobs to expatriates or to workers not from the local communities. Furthermore, notwithstanding the highly unstable nature of employment in the sector as a result of the fluctuation of commodity prices and the relatively short lifespan of most mines, mining may damage other industries including farming, fishing and tourism, which tend to offer more sustainable jobs (Nettleton, Whitmore & Glennie, 2004: 17-19). In addition, new mines often bar local communities from accessing artisanal mining sites, thus depriving them of their livelihood. It is to be noted that small-scale mining takes place in over 30 provinces in the Philippines and involves as many as 200,000 people<sup>46</sup> (Philippines International Review, 2009). The sectors of agriculture, fisheries and tourism have been argued to create more jobs per unit of money invested and to greater contribute to poverty reduction (Goodland and Wicks, 2009). '[T]he poorest', concludes the EIR, 'do not benefit from extractive industries' (2003: 18).

The contradictions inherent to the promises of the mining sector are further exacerbated by the demographic concerns inherent to the Philippines. With a population expected to reach 150 million by 2036 (Doyle, Wicks & Nally, 2006: iii), food security is critical. While the Bank acknowledges such challenges and made rural development 'a top national priority' (IBRD & IFC, 1999: 2), there exists a certain difficulty, as suggested by Goodland and Wicks (2009), to reconcile the government's priority focus on mining with the need to feed a rapidly expanding population. Once self-sufficient in rice, the Philippines is now the world's biggest importer<sup>47</sup>, explain the authors.

Lastly, there further exists a particularly acute problem inherent to fostering mining investments in conflict-affected countries. The EIR observed that 'extractive industries have been linked to human rights abuses and civil conflict' (2003: 6), something that is particularly apparent in the Philippines. If the SDM attempts to channel voices of contestation, the depoliticised avenues offered might prove to be inadequate to address the rampant insecurity already plaguing several of the country's mining regions. In the Philippines, the expansion of large-scale mining has ventured on territories already the subject of armed resistance to the government, notably in the Mindanao region. This process has further led to an increased militarisation to bolster the security of mining projects. Crucially, the country has witnessed a rise in the presence of private military companies which have led to rampant human rights abuses. With more than 700 activists killed in less than five years—including civil rights and environmental advocates—the Philippines is currently facing what Doyle, Wicks and Nally refer to as 'a crisis of extra-judicial killings' (2006: iii). The assassination, in March 2009, of a prominent campaigner against the gold and copper mining in Tampakan town South Cotabato, highlights that

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<sup>45</sup> On the subject, notably see BIC et al. (2006); Campbell (2004; 2009); Holden (2005).

<sup>46</sup> Small-scale miners account for a significant volume of the total gold production in the Philippines. In 1994, they produced almost half, or 46 per cent of the 27,059 kilograms of gold produced in the country (Philippines International Review, 2009).

<sup>47</sup> The authors further observe that world market prices have doubled or tripled in recent years, placing imported rice out of reach of the county's poor (Goodland & Wicks, 2009: 1).

anti-mining activists are far but immune to such trends. This recent killing would mark the twentieth anti-mining activist killed under the Arroyo administration (Cayon, 2009). This once again echoes the lack of enforcement of the human rights provisions enshrined within the mining regime.

### ***Conclusions***

If the performances of the Filipino mining sector have historically fallen short of the government's aspirations, the recent surge of investments in the sector might be announcing key changes. Finally free of its judicial hurdles, the country's Mining Act has indeed been conducive of the country's 'mining boom', much to the satisfaction of the cash-strapped Arroyo presidency.

In this contribution, it was argued that the Social-Development Model rooted at the core of the emerging Filipino mining regime brings forth concerns relating to the legitimacy of the transformations of the roles and responsibilities assigned to local stakeholders, as well as the possible subsequent contraction of local political spaces. Ultimately, the overarching influence of the World Bank in fostering such framework raises the issue of the increasing *multilateralisation* of norms and the correlated dislocation in the lines of accountability between states and their citizens.

In turn, this further highlights the disappearance of local platforms where alternatives for the current mining regime might emerge and lead to a national debate. It is indeed compelling to note that the politically sensitive questions linked to corporate profit and the very role of the State in mining activities are conveniently set aside. The sizable fiscal and legal incentives tailored for the industry should indeed be paralleled to the evidence that State revenues from mining in the Philippines account for less than one per cent of total government annual income (Goodland & Wicks, 2009: 1). As such, key issues pertaining to the rule of law, property rights and taxation, which are increasingly dictated by multilateral instances should be relocated within national political arenas, well within reach of public debates.

Of interest however, is the emergence of a localised backlash against the regime where localities and provinces are turning to local laws to ban mining activities from their territory<sup>48</sup>. While this trend has been strongly condemned by the Arroyo government, the issue will now have to be tackled by the newly elected administration. Barely five months after the elections (May 2010), the Aquino presidency is already being petitioned by civil society to revoke the 1995 Mining Act.

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<sup>48</sup> The province of South Cotabato proposed a legislation to ban open-pit mining in June, joining the ranks of the provinces of Marinduque, Mindoro and Palawan, which have had similar initiatives.

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