**THE “*ALTERNATIVE*” MINING BILL—A Bill Designed to Kill Responsible Mining in the Philippines**

**By:**

**Ronald S. Recidoro**

*Vice President, Legal & Policy*

*Chamber of Mines of the Philippines*

The so-called *“People’s Mineral Resources Act”* is actually a rehash of three (3) near-identical bills filed during the 15th Congress to repeal the Philippine Mining Act of 1995: **House Bill No. 206**, introduced by Rep. Lorenzo Tanada III; **House Bill No. 3763**, introduced by Reps. Kaka Bag-ao, Walden Bello, Teddy Baguilat, Jr., Rufus Rodriguez, Maximo Rodriguez, Carlos Padilla, and Roilo Golez; and **House Bill 4315,** introduced by Reps. Teddy Casino, Luzviminda Ilagan, Neri Colmenares, Rafael Mariano, Raymond Palatino, Emerenciana De Jesus, and Antonio Tinio.

The bill covers the exploration, development and utilization of mineral resources onshore and quarry resources, *excluding offshore mining, petroleum and coal*. Key points of the draft bill includes:

* Cancelling all existing MPSAs, FTAAs, exploration permits, and all other forms of mining permits, licenses, and agreements *(section 165)*;
* Giving ownership *(“private collective ownership”)* of natural resources within ancestral domains to indigenous peoples (IPs), contrary to Article XII of the Constitution *(sec. 28)*;
* Restricting the extraction, development and utilization of mineral resources only to Filipino citizens *(sec. 48)*.
* The Mines and Geosciences Bureau (MGB) will no longer be a permit-issuing body but shall be a scientific research institution limited only to (non-invasive) exploration, monitoring and regulation of mining operations *(sec. 20 and 25)*.
* Establishment of a Multi-Sectoral Mining Council (MSMC)[[1]](#footnote-2) which shall be tasked to determine whether mining operations should be allowed, deliberate and approve proposals for mineral agreements, issue mining permits, monitor operations, and establish rules of procedure *(sec. 39 and 40)*.
* All areas are closed to mining operations unless opened by the Council as a result of deliberations and processing *(sec. 42)*.
* Prohibits open pit mining methods and sub-marine tailings disposal *(sec. 59)*.
* Prohibits subsequent transfers of mining rights (sec. 67).
* Limits the term of mineral agreements to a maximum of fifteen (15) years—non-renewable *(sec. 58)*.

During the public hearings called by the House Committee on Environment and Natural Resources, the Chamber of Mines had occasion to raise the following objections to the draft bill:

1. **The proposed Alternative Mining Bills run contrary to the principle of State ownership of all natural resources enshrined in Article XII of the Constitution**. — The concept of *“collective private ownership”* by indigenous cultural communities of all mineral resources found within their claimed ancestral lands will place substantial portions of the Philippines outside the scope of the Philippine Constitution and beyond the reach of the State and the Filipino people. ANCESTRAL DOMAINS OR ANCESTRAL LANDS CONSTITUTE 10 MILLION HECTARES OR A THIRD OF THE ENTIRE PHILIPPINE TERRITORY; AND THE RESOURCES THEREIN, 80% OF THE NATION'S NATURAL WEALTH. It would also defeat, dilute or lessen the authority of the State to oversee the *“exploration, development, and utilization of natural resources,”* which the Constitution expressly requires to “be under the full control and supervision of the State.”
2. **The MGB is the only government agency with the technical knowledge and expertise essential for the rational exploration, development, and use of the country’s mineral resources. —** The Alternative Mining Bills propose the creation of MSMCs that will have the power to decide whether an area is open or closed for mining, and thereafter, which mining applicant may be allowed to operate therein. This organizational framework is impractical, and, given the enormity of the stakes involved, is clearly indefensible. There is no minimum educational or professional requirement for the members. Neither is experience in the mining industry required. The number of members also appears to be impractical and unwieldy. Unlike the MGB, the MSMCs will not have the same technical capability to make informed decisions involving the areas to be opened to mineral agreements, their terms and minimum capitalization requirements, and other technical requirements, and will thus likely resolve pending applications on the basis of emotion and/or popular support.
3. **The process outlined in the proposed Alternative Mining Bills for *(i)* determining the areas open or closed to mining, and *(ii)* deliberating and approving mineral agreements are overly cumbersome and impractical. —** The proposed process is unwieldy, protracted, repetitive, and impractical. Firstly, while *Sections 2(c), 26, and 27* of the Local Government Code only provides for prior *consultation* with affected LGUs and communities, the proposed Alternative Mining Bills have taken it a step further by requiring antecedent *unanimous* consent by affected LGUs before an area or areas may be opened for mining. *Secondly*, while the proposed bills give “guidelines” for the MSMC to consider, the fact remains that the matter will still be resolved by popular vote. Subjecting the question to a vote will not necessarily guarantee that the decision will be the correct one. The standard should always be that the proposed mining activity must have a real contribution to the economic growth and general welfare of the country. *Thirdly*, the process incorporates a protracted process of *repeated* consultations and consents from perceived stakeholders that does nothing but discourage investor interest, both local and foreign.
4. **The prohibition on subsequent transfers of mining rights amounts proposed in the Alternative Mining Bills is an unreasonable curtailment of property rights without due process of law.**—There is no real reason to prohibit transfers or assignments, especially where the original contractor or permittee is no longer in a financial or technical position to complete his work obligations as outlined in the mineral agreement. Whatever dangers the proponents of the Alternative Mining Bills seek to address by the prohibiting the assignment or transfer of mining rights are already readily addressed by the Mining Act by requiring (i) that the transferee or assignee be similarly qualified, financially and technically, to undertake the work obligations outlined in the agreement, and (ii) that the transfer or assignment be with the prior consent/approval by the DENR Secretary and/or the President, as the case may be.
5. **Shortening the term of mineral agreements, the removal of fiscal and non-fiscal incentives, and the removal of auxiliary rights will only serve to stunt the growth of the mineral resources industry.**—The proposal to shorten the term of mineral agreements *(from 25 years down to only 15 non-extendible years)*, the removal of auxiliary rights, and fiscal and non-fiscal incentives will serve no purpose other than to dissuade any nascent interest by investors. It is thus imperative that we not only retain these existing rights and incentives, but seek ways to enhance them, as well.
6. **Removal/prohibition on full foreign participation and limiting the eligibility to engage in mining activities only to Filipino citizens or corporations 60% of whose equity is owned or controlled by Filipinos is contrary to law and the Constitution.**—In the landmark *La Bugal-B’laan Case,*[[2]](#footnote-3) the Supreme Court ruled that the Constitution allows for foreign participation in the large-scale exploration, development and use of mineral resources through financial or technical assistance agreements with government. The Supreme Court recognized the fact that foreign business entities and multinational corporations are the ones with the resources and know-how to provide technical and/or financial assistance of the magnitude and type required for large-scale exploration, development and utilization of these resources. The Supreme Court even went so far as to declare that the drafters of the Constitution gave their implied assent to everything that these financial or technical assistance agreements necessarily entailed; or that could reasonably be deemed necessary to make them tenable and effective, including management authority with respect to the day-to-day operations of the enterprise and measures for the protection of the interests of the foreign corporation, Provided that Philippine sovereignty over natural resources and full control over the enterprise undertaking the exploration, development and utilization activities remain firmly in the State.
7. **Modifying the government’s share in the mineral agreement and increasing the same to 10% of the gross revenue, and imposing royalty payments to indigenous cultural communities to 10% of gross revenues is inequitable and confiscatory.—**The proposal to increase the government’s share from 2% to 10% of gross revenues will shake the confidence of existing and prospective investors on the consistency and stability of Philippine mining policies.

The extremely high excise tax proposal *(set at 10% of the international market price x quantity)* is of great concern to the industry. As this tax is set on gross revenues and not profitability, it will penalize lower margin mines. In particular, it will diminish the ability of mining contractors to borrow funds or access financing simply because the chances of incurring financial distress are accelerated by the mechanics of this tax.

The proposed fiscal regime would also net the contractor an internal rate of return (IRR) that is *uncompetitive* by world standards, considering that mining companies incur huge exploration costs in determining the feasibility of mining projects. *A higher IRR for mining projects encourages mining companies to do more exploration work for the discovery of new mines and, more importantly, helps ensures responsible mining practices*.

To justify an increased tax based on gross output, government regulators have expressed the concern that mining contractors may not be reporting their true costs and contract prices and are thereby depriving government of its fair share in revenues. Whether the concern is real or not, government’s tax base approach is an overly simplistic solution that disregards equity/fair play for the sake of ease in administrative implementation. It also disregards international market practice that gives the smelters and the mining companies the option to choose from various international market prices for commodities.

If government’s objective is to raise its share in mining revenues, the proposed tax scheme may fail as it will discourage mining investors from even considering the country. Like the proverbial farmer with a goose laying golden eggs, government’s new tax plan for mining will kill the goose: there will be no new mining operations to tax.

If we are to develop a new tax regime that gives government a higher take and is competitive so that it attracts quality investments to the minerals sector, there must, first of all, be a realization that the current fiscal structure is not inequitable. A sober analysis of the current fiscal regime shows that large-scale mining companies give government a fair and equitable share in the profits from mining.

A recent study undertaken by the Chamber of Mines indicates that the total tax take of government translated to about 40% of a company’s income after deducting operating expenses but before income tax[[3]](#footnote-4)--a figure which varies and can go to as high as 100% when metals prices are severely depressed and the company reports a net loss. This is validated by the IMF Technical Assistance Report, which indicated that *“the low contribution of the mining sector to government revenue is not due to the Philippine fiscal regime for mining being generous to the contractors by international standards.”*[[4]](#footnote-5)

These facts, based on documented studies, should make policy-makers realize that a 10% tax based on gross revenues will be prohibitive and uncompetitive.

If the premise for the planned 10% excise tax is because this is what is currently being paid by mining companies, the premise is wrong. There are only a few nickel mines operating in mineral reservations and there are currently no copper or gold mines in mineral reservations. For mining operations outside a mineral reservation or ancestral domain, the government proposal would represent an increase of more than 300% the current rate *(2% excise tax plus 1% local business tax)* while for mines operating in ancestral domain areas, the proposal would represent an increase of 250%.

No other mining country in the world imposes such a high tax rate on metallic minerals. It will disadvantage any mine, even those highly profitable under average price scenarios, to pay such a high rate during periods when metal prices are low. Even the IMF has forewarned that, “*by international standards a 10 percent royalty is quite high.”[[5]](#footnote-6)*

While the mining industry believes that the current fiscal regime already gives government a fair and adequate share in the proceeds from mining, it also acknowledges government’s need for additional revenues to fund its development projects. The mining industry is always ready to work with government in achieving a revenue sharing scheme that will be fair and equitable for all stakeholders, government and investor alike. However, whatever revenue sharing scheme government may ultimately decide on, it must meet the following criteria:

1. *Internationally competitive*—it must encourage investments in the mining industry, and help enhance the country’s economic base;
2. *Achieve an equitable sharing of proceeds* between the government and investors, in particular the provinces or localities that host mining operations;
3. *Provide steady and sustained revenue streams* to government;
4. *Progressive* in nature, and
5. *Ensures an efficient and transparent system for revenue payment and collection,* therebyreducing the cost of business.

Ultimately, the test of the effectiveness of a mining tax structure is: *can the country attract investments in its mining sector?* If not, the fiscal regime may be inappropriate for the country, given its exploration, development, and production costs; the size and quality of mineral deposits; and investor perception of commercial and political risk.

To be attractive, a fiscal regime must provide a return to the investor at par with the average of other developing mining countries like Indonesia, Peru, and Papua New Guinea.

Unchanged, the current fiscal regime will yield government an estimated annual revenue of Php8.6 billion in mineral royalty alone considering several pipeline projects that are currently in various stages of mining operations. By 2020, we project government to receive Php13 billion[[6]](#footnote-7) if and when the eight *(or more)* large mining operations finally come on stream, *i.e.,* *Tampakan Copper Project, OceanaGold Project, Silangan Copper Project, Far Southeast Project, Kingking Copper Project, Runruno Gold-Copper Project, Colet Mining Project, Mindoro Nickel).* With the current policy uncertainties however, we may not see the growth of the mining industry in the medium term.

There is clearly a need for further consultations and interaction between government policy-makers and the private sector. Given the complexity of the issue, there is also a need to undertake an in-depth review of the current mining regime to help ensure that the country’s benefits from its finite mineral resources translate into sustainable wealth that will benefit future generations.

1. The MSMC shall be composed of representatives from: (i) the MGB; (ii) Department of Environment and Natural Resources (DENR); (iii) affected LGUs; (iv) NGOs; and (v) IP communities within the watershed system. [↑](#footnote-ref-2)
2. G.R. No. 127882, December 1, 2004. [↑](#footnote-ref-3)
3. Artemio Disini, Getting a Fair Share: The Industry Perspective on Mining Taxation, 2012. [↑](#footnote-ref-4)
4. Emil Sunley, Selcuk Caner, Richard Krever, and Oana Luca, *Reform of the Fiscal Regimes for Mining and Petroleum*, June 2012. [↑](#footnote-ref-5)
5. *Ibid*, p. 21. [↑](#footnote-ref-6)
6. Assuming a conservative average annual increase in gross mineral production value of 10%. [↑](#footnote-ref-7)