Sustainable Development and Mining Laws: Is a "Mine Veto" Needed?

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Mining is one of the most controversial human activities, and one of the most difficult to fit within the paradigm of "sustainable development." Communities where mining occurs can become flash points where the social, economic, environmental, and governance "pillars" of sustainable development are tested, sometimes to the breaking point. The resulting conflicts, ranging from (relatively) peaceful mine permitting appeals in Nevada to the armed rebellion that overran the Bougainville mine in Papua New Guinea, highlight the critical role that community acceptance plays in a successful mining project.

The Mining, Minerals and Sustainable Development (MMSD) project was a groundbreaking, two-year study of the transition of the global mining industry to sustainable development, an independent, multistakeholder engagement process that combined workshops, research and analysis, information-sharing, and planning and recommendations for future efforts. MMSD presented its final report in August 2002 at the World Summit on Sustainable Development in Johannesburg, South Africa. *Breaking New Ground: The Report of The Mining Minerals and Sustainable Development Project* (International Institute for Environment & Development, 2002) (available at www.iied.org/mmsd/finalreport/index.html). MMSD sponsored independent regional partnerships, including an extensive study of the North American mining industry, which also published reports. MMSD also commissioned specific national studies, including a survey of mining in the Philippines.

The MMSD reports and studies are a compilation of ideas, multilayered conceptual frameworks, and recommendations too wide-ranging to summarize here, that approach the question of sustainable development and mining from all sides. This article focuses on a single issue touched on by the MMSD reports—community engagement and empowerment. Specifically, we address whether community empowerment requires that communities affected by mining be given a "mine veto" to achieve sustainable development.

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We start by defining some concepts. A "mine veto" refers to the right of a local community, provided by law, to prohibit mining activities in a particular area. Thus, it goes further than a right to participate in decision-making. We define the "community" as those whose economic and social well being and environment are directly affected by mining activities, primarily occupants of the immediate area where mining is proposed (including indigenous communities). We recognize, however, that there may be communities outside this immediate area whose aesthetic, cultural or spiritual interests in the area also may be protected by law.

MMSD Conclusions

The MMSD final report concludes that local communities too often do not participate effectively in decision-making regarding the economic, social and environmental impact of mining on their communities. *See Breaking New Ground*, ch. 9. The report recommends comprehensive changes in relations between mining companies and the communities in which they operate, including strengthening the ability of local communities to deal with these challenges, but does not propose a mine veto. *See Breaking New Ground*, ch. 16, at 399–401. The final report also describes the problems of inequitable sharing of revenues from mining between national governments and local governments and communities, noting that few mechanisms exist to give local communities a say in how benefits are shared. *See Breaking New Ground*, ch. 8.

The final report of MMSD-North America identified a number of concerns of local communities, including the impact on local communities of the decline in metal mining. *See, e.g., Towards Change: The Work and Results of MMSD-North America* (International Institute for Sustainable Development (IISD), 2002), at 22–23. The MMSD-North America report specifically disclaimed the mine veto concept, however, at least in one discussion of community engagement. *See* Task 2 Work Group, MMSD-North America, *Seven Questions to Sustainability: How to Assess the Contribution of Mining and Minerals Activities* (IISD 2002), at 29 (stating that "Informed and voluntary consent" of the affected community does not imply that consent is a condition for the project to proceed; project approval is the responsibility of the regulatory agency specified by the laws of each country).

The MMSD reports are, to some extent, a synthesis of the viewpoints expressed by different stakeholders in the process, and MMSD cautions against drawing too many generalizations from its research. The absence of a mine veto recommendation in the MMSD Final Report, therefore, is not dispositive. The focus in MMSD's recommendations is at a more general level—information-sharing, capacity-building, educating stakeholders about sustainable development and the like. MMSD encouraged the application of "subsidiarity," or decision-making at the level closest to the impact, to sustainable development dialogue as one of these broad conclusions. The MMSD report indicated: "Local issues should be solved locally, as local endowments and priorities differ from place to place. Local actors will be directly involved when their interests are threatened... [D]ecentralized decision-making to the point as close to the impact as possible should be the norm." Consistent with this concept, the following sections of this article compare the affected communities and legal remedies available in a developed country, the United States, and in a developing country, the Philippines, to better understand the role of a mine veto in empowering full community engagement in decision-making concerning mining.

Mining in the United States

The indifferent attitude of many Americans toward mining may reflect the limited number of directly affected communities and states with an economic stake. The United States has the second largest mining sector in the world, but mining contributes less than 1 percent of U.S. gross domestic product. Metal mining is conducted in relatively few locations, mainly in the western United States. Only seventeen counties in the United States realize 15 percent or more of labor income from mining, and seven of these counties are in Nevada. Direct mining employment for metal and other nonfuel minerals nationwide totals only about 40,000. A. MacDonald, *Industry in Transition: A Profile of the North American Mining Sector* (IISD 2002), at 15, 22, 79.

The western United States is in transition from a resource extraction-based economy to a "New West," with a more diversified, services-oriented economic base and a population that increasingly values recreation, aesthetic enjoyment, and preservation as dominant uses of the public lands. *See, e.g.,* W. Riebsame, ed., *Atlas of the New West: Portrait of a Changing Region* (Center for the American West, 1997); Laitos & Carr, *The New Dominant Use Reality On Public Use Lands*, 44 ROCKY MTN. MIN. L. INST. ch. 1 (1998). As a result, communities in the New West include a growing population of resident and nonresident users of public lands that view mining as both inconsistent with modern social and environmental values and of negligible economic importance. This transition may be the most important characteristic of the U.S. climate for mining, because the geographic scope of these values stretches far beyond the confines of the local community to blanket an entire region.

To a large extent, mineral rights on Native American lands are owned and administered by the tribes (or on their behalf by the Department of the Interior), with some private in-holdings to which the Mining Law of 1872—which governs mining of gold, silver, other precious metals and certain other minerals in the U.S.—generally does not apply. However, the use by Native Americans of public lands subject to the Mining Law for religious purposes extends the scope of the affected Native American interests outside the boundaries of tribal lands, and has been a source of recent controversy.

Distributive equity issues involving wealth created by mining activity have not been particularly troublesome in U.S. mining communities compared to other countries, among other reasons because no royalty income is generated by the Mining Law, and the tax base of state and local government is more diverse. For example, the federal government compensates local governments with federal lands within their borders for lost property taxes under the "PILT" (payments in lieu of taxes) regime, 31 U.S.C. §§ 6901-6906.

Current U.S. Law

The Mining Law of 1872 does not grant a mine veto to communities affected by mining. However, numerous other state and federal environmental protection and land use laws have been invoked to curb undesirable mining practices since farmers successfully halted hydraulic mining in the California gold fields in 1884. *See Towards Change*, at 32-35; *California Coastal Commission v. Granite Rock Co.*, 480 U.S. 572 (1987). While not amounting to a veto, these laws often empower local communities to challenge mining activity that violates community standards, for example by permitting citizen suits directly against violators under various environmental laws. *See, e.g.* Dunn, *Environmental Citizen Suits Against Natural Resource Companies,* on page 161 in this issue.

The right to file administrative appeals and lawsuits amounts to a sort of "slow veto," increasing pressure on a mining company to negotiate issues with the affected community. For example, the owners of the Stillwater Mine in Montana paved the way for a critical expansion program by granting environmental and community groups unfettered access to information and an active role in monitoring environmental protection for the life of the mine. Good Neighbor Agreement dated May 8, 2000 (available at www.nprcmt.org/goodneighbor/GoodNeighborAgreement.asp).

State or local regulation that effectively prohibits mining, however, is preempted by the Mining Law under the Supremacy Clause of the U.S. Constitution. So state and local law does not amount to a mine veto, although it might be used to modify specific practices without

making mining completely uneconomic at a particular site. *Compare, e.g.,* Ordinance No. 89-47 (City & Borough of Juneau, Alaska 1989) (requiring socioeconomic impact assessment for large mines) *with* MONT. CODE ANN. § 82-4-390, as amended by Ballot Initiative 137 (1998) (statewide ban on cyanide mining made pending gold projects uneconomic, resulting in constitutional challenge); Gunnison County Land Use Resolution (Gunnison County Board of Commissioners, adopted Jan. 8, 2001) (www.co.gunnison.co.us/Planning/lur2001/lur2001.pdf) (county ban on cyanide mining may violate state reclamation and land use statutes).

Federal procedural laws provide extensive community input into land use and permitting decisions for mines, if not a mine veto. The National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4321–4370, is the most pervasive, requiring consideration of impacts on aesthetic, social, and environmental interests; analysis of alternatives; and government consultation with affected communities prior to approving a permit for proposed mining operations. Although NEPA has been an up-front, one-time process, "adaptive environmental management" may be employed in the future to require ongoing community engagement in the continuous monitoring and adaptation of mitigation measures over the life of a project. *See* Dragoo, *What's New With NEPA (Even After 30 Years)*, 47 ROCKY MTN. MIN. L. INST. ch. 22 (2001).

Finally, public land laws such as the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. §§ 1701–82, and other statutes creating protected areas, such as the Wilderness Act of 1964, 16 U.S.C. §§ 1131–36, have resulted in the withdrawal of millions of acres of land from mining activity. Although land withdrawal powers are vested in federal agencies and are generally too cumbersome to be used as a mine veto, the Clinton administration withdrew millions of acres as national monuments using the Antiquities Act of 1906, 16 U.S.C. § 431, effectively forcing several coal companies to surrender their leases. Local land withdrawals also have been used to apply pressure to controversial mining operations, including the New World Mine in Montana and Glamis Gold's Imperial project, because withdrawal effectively prevents a claimant from relocating and amending his mining claims and mill sites in a logic sequence for mine development.

Winds of Change

As described above, affected communities have significant powers under existing U.S. law to require mining at a particular site to be conducted in a sustainable manner. Notwithstanding the availability of these mechanisms, however, the perceived need for a mine veto has led to both legislative and administrative attempts to create one in recent years. Proposed amendments to the Mining Law have often included a provision to permit the federal government to declare specific lands "unsuitable" for mining, similar to Section 522 of the Surface Mining Control and Reclamation Act. *E.g.*, H.R. 4748, 107th Cong., 2d Sess., § 208 (introduced May 16, 2002) (requiring the Secretary to prohibit mining activities that would result in significant, permanent and irreparable damage to "special characteristics" of public lands). Although the right is vested in the federal government, such a provision could indirectly be used as a mine veto by affected communities bringing a citizen suit under Section 404 of the bill alleging failure to protect such "special characteristics."

The Clinton administration creatively fashioned effective mine veto powers from existing laws, in the absence of legislative amendments to the Mining Law. New regulations allowed the Secretary of the Interior to deny a permit for mining operations likely to cause "substantial irreparable harm to significant scientific, cultural, or environmental resource values . . . that cannot be effectively mitigated," a new interpretation of the "unnecessary and undue degradation" standard of FLPMA, 43 U.S.C. § 1732(b). *See* 65 Fed. Reg. 69,998 (Final Rule Nov. 21, 2000). The Department of the Interior adopted a "comparative value" test that weighs conservation, geologic, aesthetic and similar values against mineral value when evaluating whether building stone can be mined from public lands. *Decision Upon Review of United States v. United Mining Corp.* (Secretary of the Interior May 15, 2000). (The Secretary "left for another day" the issue of whether the comparative value test applies under the Mining Law generally.) The Glamis Imperial Mine was denied a permit on the basis of a new interpretation of Section 1732(b) and the California Desert Conservation Area provision of FLPMA, 43 U.S.C. § 1781, on the basis that the Quechan Tribe used the area for traditional religious and cultural educational purposes. Several of these regulations and opinions have been overturned by the present administration, although recently proposed legislation would halt permitting for the Glamis project and would give Native Americans the right to designate natural features as sacred and thereby prevent mining and other development. *See* H.R. 5155, 107th Cong., 2d Sess., § 208 (introduced July 18, 2002).

The search for a mine veto in the U.S. does not appear to be related to empowering local communities. The focus is on protecting the New West values of recreation, aesthetic enjoyment and preservation, rather than balancing the economic, social and environmental impacts of mining in local communities. The proposed veto power is typically wielded by federal government agencies, rather than affected local communities, and can be exercised from afar by nonresident communities that share these intangible values.

Mining in the Philippines

The 1987 Philippine Constitution provides that mineral and other natural resources are owned by the state and, except for agricultural lands, shall not be

alienated. The state exercises full control and supervision over natural resources, which constitute part of the national patrimony.

Estimates of mineral reserves in the Philippines—principal among which are gold, copper, iron, chromite and manganese—have been increasing. One difficulty in developing minerals is that forest cover and other natural resources are severely threatened. The Medium Term Philippine Development Plan (1999–2004), formulated by the National Economic Development Authority, notes serious environmental problems including loss in biodiversity, land degradation due to improper logging practices and infrastructure development, illegal and overfishing, and pollution from land-based activities.

With a total area of approximately 115,830 square miles, the Philippines is the fifty-seventh largest country. With a present population of about 80 million, however, it ranks as the eighth highest in the Asian region and fourteenth highest in the world. Despite modest growth rates in recent years, poverty alleviation remains the country's primary concern. Data released by the National Statistical Coordination Board for 2002 leads to the conclusion that two out of five Filipinos live in poverty and that poverty incidence rose from 36.8 percent in 1997 to 40 percent in 2000. The average incidence of poverty in rural areas is 54.4 percent, with the Autonomous Region of Muslim Mindanao suffering the highest poverty incidence of 75.1 percent. *See* Maritess N. Reyes, *Poverty in the Philippines* (www.ignaciana.org/Ministries/FINAL).

Mining was considered a major contributor to the Philippine economy in the late 1970s and early 1980s, primarily through local investments and export earnings. In 1980, there were forty-five operating mines, which contributed more than 21 percent of total Philippine exports. *See* M.V. Cabalda, *et al.*, *Sustainable Development in The Philippine Minerals Industry: A Baseline Study* (IIED 2002) (available at www.iied.org/mmsd/wp/index.html#namerica). Low metal prices combined with political uncertainties and other factors in the 1980s led to a downturn in the sector. After several years, the Philippine Mining Act of 1995, Republic Act No. 7942, was enacted, which aimed to liberalize the sector to attract more investments.

The Mining Act contains progressive features on environmental protection, community development, and indigenous peoples. These were largely overshadowed, however, by the provisions allowing fully foreign-owned companies to participate in mineral development through Financial or Technical Assistance Agreements. Agreements of this type sought to effectuate a new provision of the 1987 Constitution which permits the entry of foreign companies in large-scale mining. This concept was considered controversial, given that the exploration, development, and utilization of natural resources are and have been reserved exclusively to Filipinos.

After initial interest by foreign mining companies in the few years following the passage of the Mining Act, mineral exploration and development in the Philippines have declined; currently there are about fifteen operating metallic mines in the country. The reduction has occurred despite the oft-repeated assertion that the Philippines is considered to have great mineral potential.

A variety of challenges confront the mining industry in the Philippines, not the least of which is the pending case questioning the constitutionality of the Mining Act. In the face of this and other challenges, the mining industry and the national government still consider mining a potential source of economic benefits, particularly to rural communities where mining operations are generally situated.

Mining and Communities

Rural communities in the Philippines traditionally are engaged in forestry, agriculture, or fishing activities. The land and water bodies used by them comprises the economic base of these communities. And perhaps more significantly, many indigenous groups in the Philippines regard land and natural resources as sacred, and believe that they are stewards of these resources for present and future generations.

A mining project inevitably will have huge and radical impacts on nearby communities and the way of life of residents of the affected communities. While these impacts can be beneficial—for example, alternative employment opportunities, increased wages, infrastructure development—they also can be economically, culturally, and environmentally adverse, particularly if the mining operation reduces or affects the resource base on which residents have traditionally relied.

Recent regulations have attempted to define and classify communities impacted by mining operations. Department of Environment and Natural Resources (DENR) Administrative Order No. 2000-98 (Rules and Regulations on the Implementation of the Social Development and Management Program) identified the affected communities as the mine camp, the host or primary impact zone communities, and neighboring or secondary impact zone communities. The mine camp refers to that part of the mining area where housing/residential, recreational and other support facilities are built solely for mine employees and dependents. The regulatory classifications echo the MMSD Final Report (Chapter 9, Local Communities and Mines), which categorized communities as occupational, residential, and indigenous. These classifications are important due to requirements in the Mining Act and its implementing rules on community development funds and activities.

The Indigenous Peoples Rights Act (IPRA), Republic Act No. 8371 (Oct. 29, 1997), defines indigenous peoples

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matter of right under 28 U.S.C. § 1292(a), and further that all courts of appeals have expedited procedures for obtaining a stay on appeal. A hearing within days is available in true emergencies. Defendants who lose in the trial court and seek an appellate stay of the injunction pending full briefing and hearing have a heavy burden similar to that carried by the plaintiff to obtain the injunction in the trial court. The defendant-appellant must show that the district court was wrong on the merits and that the balance of harms and public interest require that the district court's injunction be stayed until the appeals court rules on the case.

Very few issues allow for the exercise of more discretion than the second stage of the injunction deliberation process, where the court balances the harm to the plaintiff against the harms to the defendant and third parties and then determines what is in the public interest. These standards unavoidably force courts in a number of natural resource cases to resolve important public policy debates. For example, federal lands managed by BLM have many uses: mineral, aesthetic, recreational, and others. Recent executive orders support expanded exploration and development of energy reserves on public lands to promote self-efficiency and decreased reliance on foreign energy sources. *See, e.g.*, Exec. Order No. 13,212, 66 Fed. Reg. 28,357 (May 22, 2001). Mining and oil and gas operations, no matter how well run, will unavoidably create some disturbance to the environment. The question becomes how much "damage" is too much? How "hard" a look does the government have to take with regard to alternatives under NEPA? In the *Wisely* case described above, an environmental group unsuccessfully sued to stop a seismic survey on BLM and in Utah on the ground that the rolling stock used in applying the technology would leave tracks on a soil crust made up of microorganisms covering less than one one-hundredth of one percent of the leased land. *See Southern Utah Wilderness Alliance v. Wisely*, Civ. No. 2:01CV616J (D. Utah 2001) (motion for preliminary injunction denied; case dismissed; plaintiff required to pay industry intervenor's costs).

Some in Congress and elsewhere have argued that the courts are the least equipped branch of government to make the determinations of policy and science that citizen suits can require. Congress, however, specifically invested the courts with that power when they included citizen suit authority in the environmental statutes. The balance between the sometimes-competing values of environmental protection and natural resource development will be influenced and decided in various forums, and the citizen suit will remain active among them.

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as groups that have continuously lived as an organized community on communally bounded and defined territory, occupied, possessed and utilized such territories under claims of ownership since time immemorial. In addition, they share common bonds of language, customs, traditions, and other distinctive cultural traits and may be historically differentiated from the majority through resistance to political, social, cultural inroads of colonization, nonindigenous religions, and cultures.

Indigenous cultural communities are divided into about 110 ethnolinguistic groups situated in lowland, forest, and coastal areas throughout the country. They numbered approximately twelve to thirteen million in 1993 which is roughly 18 percent of the national population. In general, they suffer not only from economic marginalization but also from social and cultural displacement as well as political disenfranchisement.

While regulations have defined types of concerned communities with respect to mining operations, it is significant that a recent study involving four companies in the Philippines (including a mining exploration group) revealed an expanding concept of communities. This concept included relocation sites of displaced residents, barangays (villages) immediately surrounding the operation, and even other communities radiating outward from the host community. Ma. Cecilia Dalupan and Cristina Villadolid-Pavia, *Multi-partite Environmental Monitoring: A Scoping Study for the Center for Corporate Citizenship*, unpublished paper for the Philippine Business for Social Progress (2002).

Redefining Mining

The Mining Act provides that the state shall promote mineral development in a way that effectively safeguards the environment and protect the rights of affected communities. Its implementing rules provide that activities, policies and programs that promote community-based and community-oriented development shall be encouraged, consistent with the principles of people empowerment and grassroots development.

This articulation is one among a number of signifi-

cant policy attempts in the Philippines to redefine mining in the context of sustainable development and thus recognize the role and necessity of local, and indigenous communities in determining development options. Relatively recent requirements involving host, local and indigenous communities have been put in place ranging from consultations, monitoring, establishment of community development funds and activities, and consent requirements. The last effectively and in some cases expressly grants communities and other stakeholders the legal right to veto a mining project.

Areas Closed to Mining. The implementing rules of the Mining Act provide that areas closed to mining applications include areas that the Environment Secretary may exclude based on a proper assessment of their environmental impacts and implications on sustainable land uses. Examples of such areas are critical watersheds and built-up areas, i.e. portions of land within the municipality or barangay (village) actually occupied as residential, commercial or industrial as embodied in a duly approved land use plan by the appropriate local legislative council. In this case, while the community itself does not have the mine veto right, the Environment Secretary may exercise such a right on behalf of communities and other stakeholders.

In addition, the implementing rules provide that in the case of areas legally covered by small-scale mining, the prior consent of the small-scale miners is required before the area is opened for other applications such as those for large-scale mining. The party seeking mineral development is required to agree on a royalty payment for the benefit of the local community affected by the proposed mining operation. This royalty is included in a trust fund for the socioeconomic development of the concerned community.

Consent of Indigenous Peoples. The Mining Act and its implementing rules provide that no mineral agreements or permits may be granted without the prior consent of any affected indigenous peoples. As a condition to obtaining consent, the concerned parties are required to agree on a royalty payment (which may not be less than 1 percent of the gross output of the mine), which forms part of a trust fund for the socioeconomic well-being of the indigenous peoples concerned.

The IPRA strengthened this provision and extends the requirement of "free and prior informed consent" to all development activities within ancestral domains and lands. The IPRA defines "free and prior informed consent" 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." No licenses, lease or permits for the exploration or development of natural resources affecting indigenous peoples or their ancestral domains can be issued without obtaining the free and prior informed consent of the indigenous peoples concerned as evidenced by a certification issued by the National Commission on Indigenous Peoples (NCIP). Furthermore, the concerned indigenous groups have the right under the IPRA to stop or suspend any project that has not satisfied the requirement of the consultation process necessary in obtaining an NCIP certification that a mining or other development area does not overlap with any ancestral domain.

Approval of Local Legislative Councils. Asserting their authority pursuant to the Local Government Code of 1991, Republic Act No. 7160, at least two provincial governments have banned for fifteen and twenty-five years, respectively, large-scale mining for environmental reasons. Whether the Local Government Code grants them such authority remains debatable. However, guidelines have been issued requiring a formal certification showing prior approval by any two of the concerned local legislative councils (Sanggunian Panlalawigan, Bayan and Barangay for Provincial, Municipal and Village) in support of applications for mining development and utilization. Clarificatory Guidelines in the Implementation of the Revised Implementing Rules and Regulations of the Mining Act, DENR Memorandum Order No. 99-34 (1999). For exploration applications, proof of consultation with project presentation to any two of the concerned legislative bodies is required.

A variety of challenges confront the mining industry in the Philippines, not the least of which is the case questioning the constitutionality of the Mining Act.

Failure to show compliance with this requirement already has been invoked as one reason to set aside a mining project, as seen in the reported cancellation of the Mineral Production Sharing Agreement of Crew Minerals Philippines (CMP) covering 9,720 hectares in the mountains in Oriental and Occidental Mindoro. Although CMP asserted its operations would minimize environmental effects and would result in increased employment and revenues, critics insisted that the area is within a watershed and includes land being claimed as ancestral domain by the Mangyans, an indigenous

community. In April 2001, it was further reported that Philippine Environment Secretary Alvarez ruled that that AMC failed to get an environmental impact assessment and "prior approval" of the concerned local government units in violation of the Local Government Code of 1991 and department regulations. *See* Joel Jabal, *Mindoreños hail government scrapping of mining project*, Inquirer News Service, Apr. 20, 2001 (available at www.inq7.net).

Public Participation and Social Acceptability. Under the Philippine Environmental Impact Statement (EIS) system, mining development and utilization projects are considered environmentally critical and thus must undergo a full environmental impact assessment to secure an Environmental Compliance Certificate (ECC). The EIS system has been refined in recent years to incorporate public participation and social acceptability.

The Procedural Manual for the EIS System (Environmental Management Bureau, DENR, 1999, and cited in Cablada) does not grant any stakeholder a veto right. It does, however, broadly define the intent of public participation as giving citizens the opportunity to influence major decisions that affect them and to enable citizens to take responsibility for environmental protection and management through active involvement in decision-making. It further defines social acceptability as the result of a process that is mutually agreed upon by the DENR, the stakeholders, and the proponent to ensure that the concerns of communities and other stakeholders are fully considered and resolved in the grant or denial of an ECC.

The Key—Social Preparation

There is now increasing appreciation for direct involvement with affected communities, even as early as the application stage. Philippine laws and rules mandate that the decision-making process in whether a mining activity will be allowed is not limited solely to the government and the mining proponent.

The Silangan Mindanao Exploration Co. (SMEC), for example, is a majority Filipino-owned mining company, created as a joint venture of Philex Gold Philippines, Inc. and Anglo American Exploration. Its drilling operations began in March 2000 in the southern province of Surigao del Norte. Even while in the exploration phase, it established a Community Technical Working Group involving local communities and formulated a Social Development and Management Program including community projects in such areas as water systems and educational facilities.

As indicated by SMEC and other companies, there is a growing recognition of the importance of partnership with communities for the development of the area in which they are commonly situated. Open communication lines, greater transparency, and access to information contribute to a company's acceptability in an area, and consequently to its continued operations and sustainability.

One Size Does Not Fit All

A comparison of the Philippine and U.S. legal regimes and the communities affected by mining illustrates why different solutions may be needed to resolve local problems locally in the pursuit of sustainable development. In the context of a developing country like the Philippines, it is not difficult to understand why communities have been given a veto right with respect to mining operations. Large-scale resource-based activities like mining are often situated in rural areas and potentially have great environmental and social impacts. There is a history of environmental damage that continues to the present. A mine veto is a tool to level the playing field in a legal system that recognizes affected communities as partners in mining development. This is especially true in a relatively young democracy like the Philippines where genuine people empowerment is still more the goal than the reality.

Citizens of the American New West, by comparison, enjoy relative wealth, mobility and access to an administrative and court system that can be used to protect their interests. The aesthetic, recreational, and preservation values protected under U.S. environmental and land use laws are shared and defended by people who live and work far from the economic region benefited by mining. Dependence on resource extraction is waning, resulting in what U.S. mining industry participants in MMSD observed as the "withering" of the economic "leg" of sustainable development. *Industry in Transition*, at 4. Where communities have access to legal and other resources and are already empowered to a large extent, a legal mine veto does not seem especially critical. The continued agitation for a veto, however, illustrates the need for more collaborative decision-making.

In a developing country, requiring not only consultation but the consent of concerned communities serves to empower communities with decision-making authority and thereby restore their trust in the process. As is often the case, however, the content of policy may differ greatly from its implementation. While much has been said of the need to empower communities, empowering governments to formulate and implement sound policies is just as important. Mechanisms like consent requirements or the mine-veto right of communities and other stakeholders may permit government to share ownership or responsibility for selecting and monitoring development projects.

With or without a veto right, empowered communities require new investments by mining companies in social preparation and community relations in both the developed and developing world. Only in this way is trust built and a sustainable partnership possible.