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TAX JUSTICE ISSUES IN THE PHILIPPINES' EXTRACTIVES SECTOR

The Philippines ranks among the countries in the world with the highest deposits of gold, copper, nickel and other minerals. It is the fifth most mineral-rich country in the world, according to the Mines and Geosciences Bureau (MGB), with 30% of its territory (or around 9 million hectares) known as having high mineral potential (DENR). With an estimated value of \$1.4 trillion (Joint Foreign Chambers), the country's mineral reserves particularly gold, copper and nickel, count among the five largest in the world. These represent resources that, with environmentally sustainable use, can fund development and end poverty.

Yet, while representing potentially substantial resources for the country's development, the mining sector contributes a very small percentage of around one percent to GDP. In 2012, its share was even lower at only 0.07 percent of GDP.

The industry is also a major cause of domestic resource loss. On top of producing primarily for foreign markets, it enjoys a range of fiscal incentives given to investment priority areas. The revenue loss has been substantial, prompting the clamor for the rationalization of tax incentives especially for a site-specific industry such as mining where investments would have been made anyway without these resource-eroding sweeteners.

Meanwhile, large-scale mining investments of Australia, Canada, the United Kingdom, South Korea and China, partnering with local elites, continue to destroy lives, communities and the environment. Major mining disasters, the latest being the Philex Mine spill of toxic tailings, have wrought irreversible damage to water systems. At the same time, mining processes from exploration to regular operations inflict damage on a daily basis to the communities in the area and to the environment. ●

MINING'S POTENTIAL

Untapped mineral resources is estimated to be at least US\$840 billion in gold, copper, nickel, chromite, manganese, silver and iron, or more than 10 times the country's GDP in 2014. The National Statistical Coordination Board (NSCB) calculates as well that with the Philippines' gold reserves of about US\$16.873 billion, poverty in the country can be completely wiped out (Senate of the Philippines).

The Philippines' extractives industry produces primarily for the world market, thus very little is left to meet local demand or to fund development imperatives. Exports comprise a sizable share of Gross Value Added (GVA) or the sector's output less consumption. As the table below shows, the value of exports in 2013 stood at PhP145 billion and in 2014 at PhP180 billion, while GVA amounted to PhP115 billion and PhP125 billion, respectively. In terms of volume, total exports in 2013 alone for gold, copper, and nickel reached as high as 80%, 71%, and 92%, respectively, of total reported production volume. The following year, even greater volumes were exported at 92% for gold, 123% for copper and 94% for nickel.

COMPARISON OF METALLIC PRODUCT EXPORTS AND GVA OF THE MINING AND QUARRYING SECTOR (IN MILLION PHP)

	EXPORTS	GVA
2009	70,026	106,396
2010	87,017	128,727
2011	123,000	143,027
2012	98,692	121,435
2013	144,839	115,460
2014	179,247	125,390

Source: (Philippines Extractive Industry Transparency Initiative)

INCREASING PRODUCTION

Mineral production continues with its rising trend. Mines and Geosciences Bureau (MGB) data from 2003 to 2012 show gross production value (GPV) or the total value/gross output of the minerals extracted, more than doubling from PhP41.1 billion to PhP100.8 billion (current prices). MGB figures as of January 2016 reported further increases from previous years; GPV was pegged at PhP157.1 billion and PhP204.7 billion in 2013 and 2014, respectively (DENR-MGB).

Over a third of the sector is composed of small-scale mining which, according to the Chamber of Mines of the Philippines, among others, reportedly does not pay taxes (Halcon). Large scale mining, however, still accounts for the biggest shares of aggregate production value in metallic mining, as the table below shows.

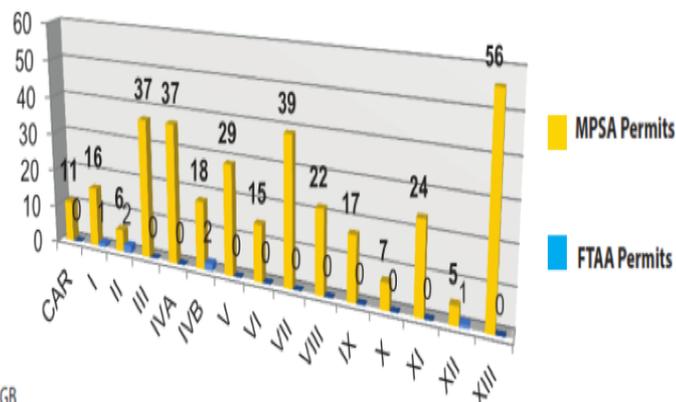
GROSS PRODUCTION VALUE IN MINING (IN PHP BILLIONS)

	2011	2012	2013	2014	Q3 2015 (Preliminary)
Large Scale Metallic	88.5	97.1	98.2	137.6	85.7
Small Scale Gold Mining (MGB)	34.6	2.1	1.1	1.0	0.08
Non-metallic Mining (MGB)	41.1	45.6	57.8	66.1	No data available as of writing
TOTAL	164.2	144.8	157.1	204.7	85.78

(DENR-MGB)

NUMBER OF OPERATING METALLIC MINES

	2011	2012	2013	2014	Q3 2015 (Preliminary)	2015
Copper (with gold)-Didipio			1	1		1
Copper (with gold and silver)	3	3	2	3		2
Copper (with gold, silver and zinc)	1	1	2	1		
Gold (with silver)	5	6	6	6		6
Chromite	2	3	3	3		3
Nickel	18	21	24	24		27
Iron	1	2	3	5		5
Total	30	36	41	43		44



Source: MGB

(Philippines Extractive Industry Transparency Initiative)

Operating metallic mines numbered only 44 as of the third quarter of 2015. But this is bound to rise considering that as of June 2015, there were already 999 approved and registered mining permits and contracts, of which 34% (339) consisted of MPSAs.

MINING CONTRACT SCHEMES

One of various mining contract arrangements, the MPSA is defined as—

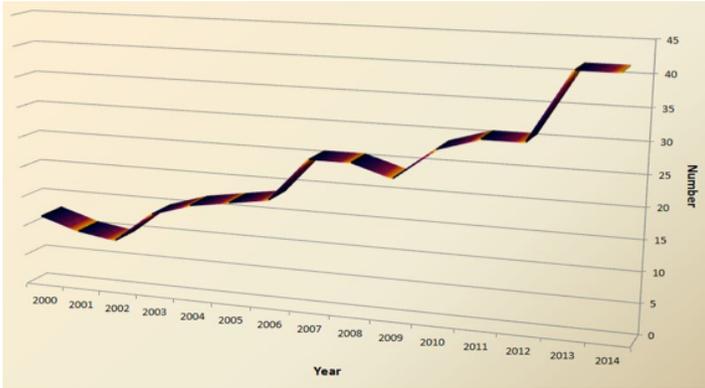
a mineral agreement wherein Government shares in the production of the Contractor, whether in kind or in value, as owner of the minerals. In return, the Contractor shall provide the necessary financing, technology, management and personnel for the mining project. (Philippine Mining Act of 1995)

Another type of contract scheme is the Financial or Technical Assistance Agreement (FTAA). Unlike other mining contracts, FTAA's are allowed 100% foreign equity. FTAA's are described as --

an agreement that may be entered into between a Contractor and the Government for the large-scale exploration, development and utilization of gold, copper, nickel, chromite, lead, zinc and other minerals except for cement raw materials, marble, granite, sand and gravel and construction aggregates. (Ibid.)

The number of operating metallic mines has steadily increased over the past decade. Hundreds of applications are currently being processed, reaching 1,864 in June 2015. More than 50% are Exploration Permits (966), which will eventually form the basis for EP holders to apply for an MPSA (currently numbering 530). The rest are comprised of FTAA's, Certificates of Accreditation, Mineral Processing Permits and Industrial Sand and Gravel Permits (DENR-MGB).

NUMBER OF OPERATING METALLIC MINES, 2000-2014



Source: (Department of Environment and Natural Resources)

REVENUE SHARING AND TAXES

The state gets returns from the mining industry in several ways but generally, through regular taxes from mining as an economic activity paid to the national tax authority, the Bureau of Internal Revenue (BIR), and through royalty taxes based on the volume or price of minerals extracted which the MGB collects.

Applicable to all mines regardless of location is the two percent excise tax collected by the BIR. It is important to differentiate taxes from royalties as they represent “the payments made by mining firms for using natural resources that, by virtue of law, are owned by the state” (Mendoza and Canare). However, only mines in mineral reservation areas¹ are currently subject to the 5% royalty tax.

Mining firms are also required to pay the BIR the 30% corporate income tax on total taxable income and the VAT, as well as customs duties to the Bureau of Customs. Other fees such as waste and tailing fees are paid to the MGB.

LGUs have a share in the mining activity within their jurisdiction through business taxes, real property taxes, registration fees and occupation fees. Only PhP50 per hectare is charged as occupation fee, with the proceeds shared between the province (30%) and city/municipality (70%) (Mendoza and Canare).

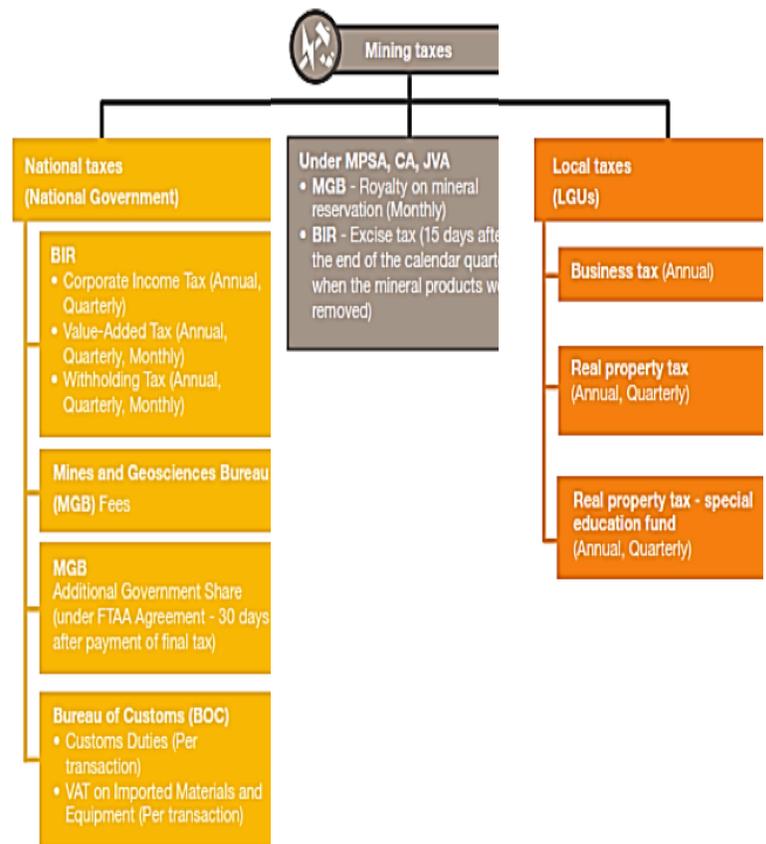
Under an MPSA, the total government share is the 2% excise tax on mineral products (Section 80). It is only through a 60%-Filipino owned mining enterprise that foreign entities can be part of an MPSA. Gomez commented on the incongruity of this policy vis-à-vis the basic assumption in entering into an MPSA, that it shall abide by “the principle according to which the Government expects a reasonable return in economic value for the utilization on non-renewable resources under its national sovereignty while the Contractor expects a reasonable return on its investment....”

Curiously, in conflict with the above, the Law states that in the case of MPSAs, “[t]he total government share in a mineral production sharing agreement shall be the excise tax on

minerals products.” The curiosity lies in that the government, as legal owner of the resources, should be content with such a paltry share. In this case, it appears that the government has abdicated its right to a fair share in production gains, and furthermore, confused this right with its power to tax the producer which has, in this case, been radically reduced. (Gomez)

In the case of other mineral agreements, including the FTAA, the government’s share is comprised of “the contractor’s foreign stockholders arising from dividend or interest payments to the said foreign stockholder in case of a foreign national and all such other taxes, duties and fees as provided for under existing laws” (Section 81). It should be noted that under an FTAA, collection will only start after the contractor “has fully recovered its pre-operating expenses, exploration, and development expenditures” (Philippine Mining Act of 1995).

Mining firms are also required to pay an Additional Government Share (AGS) or if upon computation, the Basic Government Share (BGS) or the total taxes, fees and royalties paid to the national and local governments, is less than 50% of the Net Mining Revenue (NMR). The difference makes up the AGS (Mendoza and Canare).



*Note that the excise tax and royalty on mineral reservation form part of the national wealth and are allocated to the national government and LGUs on a 60:40 basis.

¹ RA 7942, Section 5 on Mineral Reservations states that “[w]hen the national interest so requires, such as when there is a need to preserve strategic raw materials for industries critical to national development, or certain minerals for scientific, cultural or ecological value, the President may establish mineral reservations upon the recommendation of the Director [of the MGB] through the Secretary [of the DENR]. Mining operations in existing mineral reservations and such other reservations as may thereafter be established, shall be undertaken by the Department [DENR] or through a contractor:....”

CA – Co-production Agreement; JVA – Joint Venture Agreement (Philippines Extractive Industry Transparency Initiative)

INCENTIVES

The Mining Act spells out as well the tax exemptions, deductions and other types of incentives that mining enterprises can claim, by virtue of provisions in the Omnibus Investments Code (Executive Order No. 226) defining fiscal and non-fiscal incentives. Firms have to qualify for registration as part of the Investment Priority Plan (IPP) to be able to claim these incentives. Considered preferred, pioneer enterprises, duly registered companies mining companies are entitled to the following:

Omnibus Investments Code	Philippine Mining Act of 1995 (RA No. 7942)
<p>1. Income Tax Holiday (ITH)</p> <p>a. Six (6) years for projects with pioneer status and for projects located in a Less Developed Area (LDA);</p> <p>b. Four (4) years for new projects with non-pioneer status;</p> <p>c. Three (3) years for expansion/modernization projects.</p> <p>2. Duty exemption on imported capital equipment, spare parts and accessories;</p> <p>3. Exemption from wharfage dues and any export tax, duty, impost and fees;</p> <p>4. Tax exemption on breeding stocks and genetic materials;</p> <p>5. Tax credits on imported raw materials;</p> <p>6. Tax and duty-free importation of consigned equipment;</p> <p>7. Additional deduction for labor expense;</p> <p>8. Employment of foreign nationals;</p> <p>9. Simplification of customs procedures;</p> <p>10. Access to bonded manufacturing warehouse.</p>	<p>Incentives under EO No. 226 and the following:</p> <p>1. Exemption from real property tax and other taxes or assessments of pollution control devices;</p> <p>2. Income tax-carry forward of losses;</p> <p>3. Income tax-accelerated depreciation.</p>

CA – Co-production Agreement; JVA – Joint Venture Agreement (Philippines Extractive Industry Transparency Initiative)

MEAGER CONTRIBUTIONS TO GDP

Despite the huge wealth it generates, the sector registers dismal outputs as a proportion of GDP, lagging behind other industrial groups. Compared to agriculture, fishery, forestry; industry and services, it accounted for an “insignificant” (MGB) 0.9% of GDP from 2003-2012 (GMA Network). In more recent years, this improved only slightly to 1.14% of GDP in 2012 but declined to 1.10% as of the 3rd quarter of 2015.

GROSS DOMESTIC PRODUCT BY INDUSTRIAL ORIGIN

	Percent to GDP				
	2012	2013	2014 (1 st to 3 rd quarter)		
I. Agriculture, Fishery and Forestry	11.09	10.47	10.02	9.59	9.12
II. Industrial Sector	32.22	32.88	33.43	33.22	33.23
A. Mining & Quarrying	1.14	1.08	1.07	1.21	1.10
B. Manufacturing	22.14	22.80	23.26	22.84	22.80
C. Construction	5.52	5.69	5.89	5.82	6.00
D. Electricity, Gas and Water	3.42	3.31	3.20	3.35	3.33
III. Service Sector	56.70	56.66	56.55	57.19	57.65
A. Transportation, Storage and Communication	7.56	7.49	7.49	7.52	7.64
B. Trade and Repair of Motor Vehicles, Motorcycles, Personal and Household Goods	16.74	16.61	16.54	16.35	16.52
C. Financial Intermediation	6.77	7.12	7.20	7.39	7.37
D. Real Estate, Renting and Business Activities	10.77	10.94	11.21	11.44	11.60
E. Public Administration and Defense; Compulsory Social Security	4.36	4.18	4.08	4.25	4.02
F. Other Services	10.49	10.31	10.03	10.25	10.50
Gross Domestic Product	83.41	82.63	82.91	82.65	83.01

Source: Bangko Sentral ng Pilipinas

In terms of government revenues (i.e., earned from mining contract arrangements), the table below shows this barely reaching one percent on average from 2007-2010.

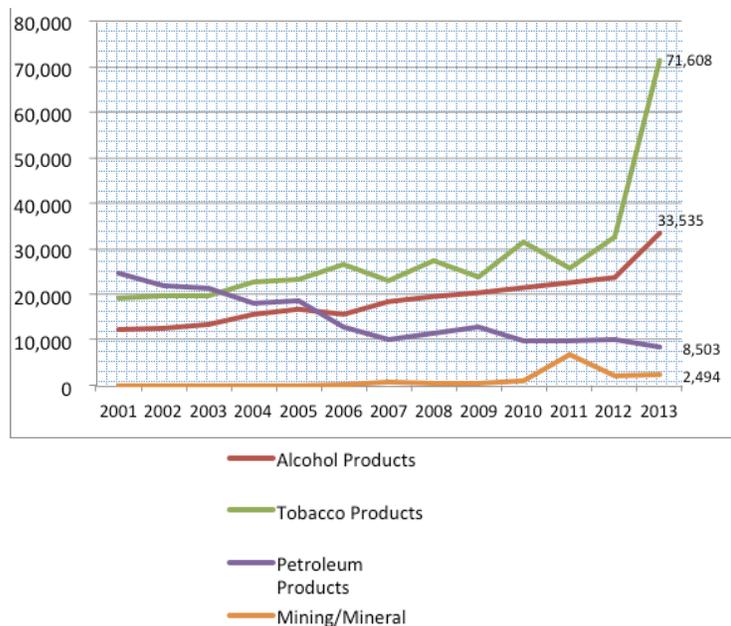
GOVERNMENT REVENUES, TOTAL AND RECEIVED FROM MINING. (IN BILLIONS PHP). 2007-2010

	2007	2008	2009	2010	Average (07 to 10)
National Government Revenue (A)	1137	1203	1123	1208	1168
Total LGU Revenue from Local Sources (B)	79	90	92	98	90
Total Revenue (A + B)	1216	1292	1215	1306	1258
Total Revenue from Mining (National & Local)	10.4	7.7	12.4	13.4	11.0
Share of Mining Revenue to Total	0.9%	0.6%	1.0%	1.0%	0.9%

Source: Data from DOF and MGB; authors' computations. Note: Figures may not add up due to rounding. Cited in (Mendoza and Canare)

As with the revenue-sharing schemes, excise taxes paid by mining firms averaged a mere 0.12% over 15 years from 1999 to 2013. The graph below shows excise taxes from mineral mining in comparison to alcohol, tobacco and petroleum products. It contributed only PhP2.5 billion or 2.15% of the total PhP116.14 billion excise taxes collected from these four products in 2013.

COMPARISON OF EXCISE TAX COLLECTIONS, 2001-2013 (IN MILLION PHP)



Source: Generated from DoF data

EXCISE TAXES ON MINING COLLECTED BY BIR, SHARE OF TOTAL REVENUE COLLECTIONS (BASED ON FIELD REPORTS) CY 1999 – 2013 (IN MILLION PESOS)

PARTICULARS	MINING/MINERAL	TOTAL REVENUE COLLECTIONS	% SHARE
1999	241	341,320	0.07
2000	243	360,802	8
2001	120	388,679	0.03
2002	152	394,549	0.04
2003	156	426,010	0.04
2004	232	468,177	0.05
2005	251	542,696	0.05
2006	490	652,734	0.07
2007	942	713,596	0.13
2008	660	778,581	0.08
2009	719	750,288	0.09
2010	1306	822,624	0.16
2011	6986	924,146	6
2012	2206	1,057,916	0.20
2013	2494	1,216,661	0.20

(Department of Finance) and author's calculations

FORGONE REVENUES

Government has been undertaking efforts to stem illicit financial flows and tax dodging. Yet, at the same time, it maintains as a matter of law and policy, a fiscal incentives system that it admits costs significant amounts of draining public revenues. Described as "tax evasion...with an official stamp", tax incentives like those offered by the Philippines, ironically also promotes the very issues around tax abusive behavior that government has internationally committed to combat.

Over 211 special laws provide tax incentives in the form of 4 to 8 years income tax holidays (ITHs), exemptions on duties, taxes, wharfage dues, export tax credits and additional deductions from taxable income (e.g., labor expenses). In addition, there are 14 Investment Promotion Agencies, each operating their own tax regime, with no publicly available data on the cost of incentives and or an incentives monitoring and evaluation system in place (Jacinto-Henares).

Forgone revenues from ITHs and special rates in seven investment promotion agencies, the BOI included, amounted to PhP365 billion in only four years from 2012-2015. Of this figure, BOI incentives which mining firms avail of as part of mandatory investment areas, accounted for 28% or PhP101.3 billion.

COMPARISON OF EXCISE TAX COLLECTIONS, 2001-2013 (IN MILLION PHP)

Investment Promotion Agency	Income Tax Holiday and Special Rate ^{a/}		Total tax expenditures	
	Number of Firms that Filed ITR through e-FPS ^{b/}	Tax Expenditure	Customs Duties	
Board of Investments	585	24,226,385	41,398	24,267,783
Philippine Economic Zone Authority	1,390	61,069,729	61,108,686	129,178,415
Authority of the Freeport Area of Bataan	22	103,682	199,475	302,157
Cagayan Economic Zone Authority	18	45,130	12,519	57,649
Clark Freeport Zone	91	991,792	1,132,043	2,123,835
Poro Point Freeport Zone	3	67,837	486	68,323
Subic Bay Freeport Zone	364	772,812	3,114,444	3,887,256
Total	2,473	87,277,367	72,608,051	159,885,418

Sources cited by DBM: Bureau of Internal Revenue, Bureau of Customs, Department of Finance staff calculations

a/ As declared in the annual corporate income tax return (BIR form 1702) for FY 2012 and the Electronic to Mobile Customs system. Amounts include the income tax holiday (ITH), the special rate of 5% on gross income earned (GIE) and customs duties.

b/ Total number of registered firms as of 2012 is 5,338 as submitted by the investment promotions agencies to the Department of Finance. However, the total number of firms used for Poro Point Freeport Zone and Board of Investment is as of 2008 pending submission of an updated data.

Of late, there has been a renewed push to reexamine the country's fiscal incentives, perhaps prompted on one hand by rising attention on tax revenues and illicit financial flows; and on the other, the need for domestic resource mobilization at a time of declining development aid. In 2012, President Benigno Aquino III issued Executive Order 79, specifically addressing mining incentives and urging Congress to enact a new mining law. Two bills were eventually filed in the House of Representatives and the Senate, and are currently pending.

The scale of potential revenues from incentives is highlighted in the Fiscal Risks Statements issued by the Department of Budget and Management. The Department of Finance (DoF) pegged this at a high of PhP260 billion or 57% of the greater part of the PhP455 billion total. Fiscal incentives also account for the biggest share of revenue-eroding proposals and practices. Mining enterprises registered with the BOI are among those claiming these incentives.

FORGONE REVENUES FROM DIFFERENT TAX MEASURES AND PRACTICES

Proposal/Practice	Estimated Forgone Revenues (in Billion Pesos)
Expansion of de minimis benefits to include increases in CPA and productivity bonus not exceeding PhP10,000	10
Taxing only the increment to minimum wage	60
Increasing the 13 th month pay tax exemption ceiling from PhP30,000 to PhP70,000	157 - 260
Continuous grant of fiscal incentives under the existing regime	
Other revenue-eroding measures in the 16 th Congress	68 - 86
Total forgone revenues	334 - 455

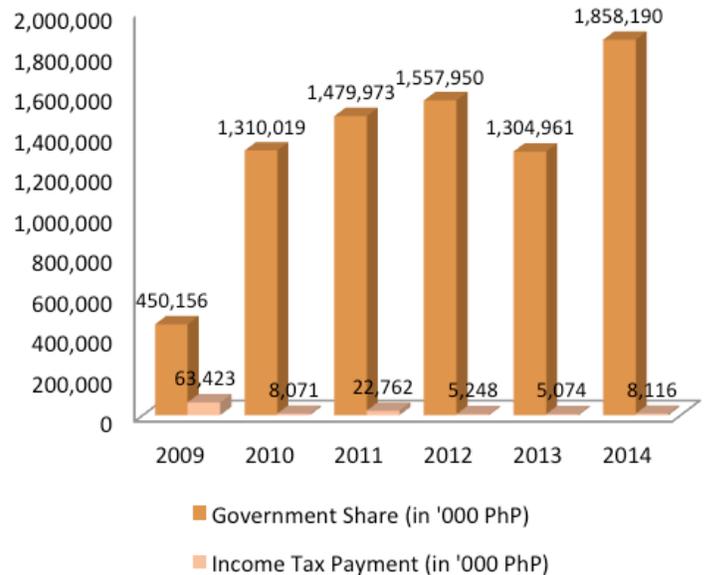
Source: As cited in (Fiscal Risks Statement 2014)

A look at Semirara Mining and Power Corporation's income tax payments after availing of incentives gives a sense of the significant reductions in public revenues. It should be noted that as an IPP firm, Semirara is already exempt from all state taxes except income tax. Yet, it was further granted by the BOI the greatly reduced effective income tax rate of 0.67% (from the regular 30% corporate income tax rate) for the years 2009-2012 (Philippines Extractive Industry Transparency Initiative).

It would also appear from the following graph that government gets a huge share from the firm's total proceeds. However, under the revenue-sharing scheme for coal, Semirara is allowed to deduct

up to 90% of its gross proceeds as expenses (as compared to 70% for oil and gas). Semirara gets its revenue share of 7% from the remaining 10% of gross proceeds, and the national government is left with 3% (Ragos). Deducting the 40% that Local Government Units hosting mining activity are entitled to, less than two percent goes to the national purse.

SEMIRARA MINING AND POWER CORPORATION ANNUAL REMITTANCE OF GOVERNMENT SHARE FROM COAL PROCEEDS AND INCOME TAX PAYMENT, 2009-2014



Source: MGB cited by (Philippines Extractive Industry Transparency Initiative)

The table below further points to the actual revenues forgone from the ITH that Semirara was granted in 2008. Ragos notes that from 2009 to 2011, "the levels of income tax exemption even exceeded the statutory corporate income tax rates imposed during those years." This had the effect of accumulated forgone revenues of PhP5.7 million from 2008 to 2012, exceeding government's share and the income taxes collected from Semirara combined (A. Ragos).

INCOME TAX EXEMPTION (IN %) AND FORGONE GOVERNMENT REVENUES (IN MILLION PHP), 2008-2012

Year	Statutory Corporate Income Tax Rate (in %)	Income Tax Exemption (in % of taxable income)	Forgone Government Revenue from ITH (in million PhP)	Income Tax and Government Share minus Forgone Revenue from ITH (in million PhP)
2008	35.00	11.46	118,430	371,975
2009	30.00	30.62	584,812	-71,366
2010	30.00	31.14	1,219,925	54,943
2011	30.00	30.68	1,834,551	-376,747
2012	30.00	29.97	1,917,400	-319,990
TOTAL			5,684,118	-341,184

Source: Semirara Mining Corporation Consolidated Financial Statements, 2006-2012 cited in (A. Ragos)

Of the types of incentives, ITHs are still the most preferred mode in the Philippines and other Asian countries because of simpler administration. However, they are also known to provide many opportunities for tax dodging.

As currently designed, ITHs carry no sunset clauses and can thus be extended for indefinite periods. Companies take advantage of this extension through the “creative redesignation of existing instruments as new instruments” (also referred to as “double-dipping”) and continue to operate tax-free (Senate Economic Planning Office).

ITHs are tapped for tax avoidance not only across high-tax and low-tax countries but also domestically through transfer mispricing between affiliates of an MNC group. A company can partner one subsidiary that is not tax-exempt with one enjoying this incentive, and then artificially reduce prices of goods sold to the tax-exempt subsidiary which then sells these goods at the original (higher) cost. The difference adds to the company’s profits.

OTHER MINING AND TAX JUSTICE ISSUES -- EVADING PUBLIC SCRUTINY

In 2013, the Philippines officially signed on to the multi-stakeholder Extractive Industries Transparency Initiative (EITI), a mechanism and process that enables groups to compare and identify discrepancies between companies’ reports of revenues with tax obligations. EITI-Philippines notes that “[e]xcept for a reference in EO 79 about the country’s commitment to EITI, there is yet no overarching law that governs transparency in the extractive industries” (Philippines-EITI).

Thus far, EITI Philippines reports total un-reconciled discrepancies for the mining, oil and gas industries declining from PhP58 million in 2012 to PhP2.7 million in 2013 (Philippines Extractive Industry Transparency Initiative). However, the full picture may never be known through the EITI as it does not have mechanisms for sanctions and enforcement, and reporting is purely voluntary.

The “Tax Incentives Management and Transparency Act (TIMTA)” (Republic Act No. 10708 was ratified by the House of Representatives and the Senate only in October 2015. Among its aims is to “[promote] transparency and accountability in the grant and administration of tax incentives by the country’s Investment Promotion Agencies (IPAs) to optimize the incentives’ social benefits for the country’s overall development.” Section 4 in particular mandates businesses enjoying incentives to submit complete annual tax incentives reports of their income-based tax incentives, value-added tax and duty exemptions, deductions, credits or exclusions from the tax base. Its effectiveness remains to be seen though initially, the law’s sponsors have assured investors that incentives will remain intact. Several agencies (DoF, BIR, BoC, NEDA and DTI) have been tasked to draft the Implementing Rules and Regulations (Gascon).

Only 33 of 51 targeted material companies (i.e., those with net sales of least PhP1 billion) were reported in July 2014 to have complied with EITI’s disclosure requirements. Currently, the two reports thus far list 36 material companies as EITI-compliant (Leyco). Of non-material companies (less than PhP1 billion in net sales), 29 were targeted for EITI compliance but only 12 reported (Mariano).

Among those that declined participation is Semirara Mining and Power Corp. of DMCI Holdings. Other firms identified that did not

join the EITI process are Pacific Nickel Phils., Inc., Mt. Sinai Mining Exploration and Development Corporation, Citinickel Mines & Development Corporation and AAM-PHIL Natural Resources Exploration and Development Corporation. Among the oil and gas companies, these are Oriental Petroleum & Minerals Corp., Alcorn Gold Resources Corp., Trans Asia Oil & Energy Devt. Corp., Forum Energy Philippines Corp. (Magno).

Other findings included the following:

- Eight mining companies under ITH that did not report corporate income tax payments in accordance with their registration with the BOI.
- OceanaGold (FTAA) did not report any revenue stream in the form of AGS
- Semirara Mining and Power Corporation did not submit reporting templates disclosing, among others, revenue streams paid and collected, mandatory expenditures and funds.

The incentive of lower corporate income tax rates provides still another way to engage in tax avoidance, through transfer pricing, i.e. setting the price on goods and services for subsidiaries to calculate the profits that will be taxed in the country their respective countries of operation. By under-pricing the goods and services passing from affiliates in high-tax to those in low tax countries, corporations are able to shift profits to the lower tax jurisdiction.

TAX DODGING IN THE EXTRACTIVES SECTOR

Despite generous incentives extended to the extractives sector, mining companies count among firms implicated in tax evasion cases.

One of them is Marcopper Mining Corporation (Marcopper), better known for the mining disaster that killed the Boac River. But it has also left behind unmet tax obligation that continue to inflict harm on the people of Marinduque

In 1996, the tailings dam of the Marcopper Mining Corporation (Marcopper) in Marinduque collapsed, causing the most destructive socio-economic and environmental disasters in Philippine history. Some 1.6 million cubic meters of toxic wastes poured into the Makulapnit - Boac river system, buried the village of Hinapulan and displaced thousands of families. Many more lost the food, water and livelihoods resources that the river supplied.

Marcopper was 39.9%-owned by one of Canada’s largest gold producers Placer Dome, Inc. from 1964 to 1997. The mining company was acquired in 2006 by another Canadian mining company and the largest gold mining company in the world, Barrick Gold Corporation.

It is now almost two decades since the Philippine government shut down Marcopper but it continues to inflict harm on the people of Marinduque. On top of its unmet commitments for compensation, it also left behind millions of unpaid real property taxes.

Based on the 2013 Report on Marinduque province of the Commission on Audit (COA), the Real Property Tax

delinquency of Marcopper totaling PhP19,253,315.36 has not yet been collected despite the Supreme Court's favorable decision on the case in 2009. COA recommended that the Provincial Treasurer "serve the Statement of Account to MMC [Marcopper] through its subsidiary MR Holdings, Ltd., demanding full payment...."

The SC decision, however, concerns only the unpaid taxes for the site occupied by the siltation dam and decant system, and a fraction of its total tax delinquencies for properties in other parts of the province.

More than a billion pesos was reportedly owed in RPT as of the 2nd quarter of 2006 according to records of the Marinduque Provincial Treasurer (Marinduque Council for Environmental Concerns).

MARCOPPER'S TAX DELINQUENCIES

Municipality	Period	Real Property Taxes	
		PhP	US\$
Sta. Cruz	1980 - 2006, 2 nd Quarter	1,013,101,529.51	18,908,203.24
Torrijos	1983 - 1996, 2 nd Quarter	11,164,686.80	208,374.15
Mogpog	1999 - 2006, 2 nd Quarter	1,194,977.89	22,302.69
Boac	1985 - 2006, 2 nd Quarter	23,163,602.60	432,318.08
TOTAL		PhP 1,048,624,496.80	\$19,571,198.16

*(\$1=PhP53.58, Bangko Sentral ng Pilipinas)

Two years before the disaster, Marcopper was given an Assessment Notice for real property taxes (RPT) due on its properties that included the Siltation Dam and Decant System in Brgy. La Mesa, Sta. Cruz, Marinduque.

Marcopper questioned the assessment by filing an appeal for review with the Local Board of Assessment Appeals (LBAA). Seeking seek RPT exemption on its siltation dam and decant tower system at the mine site in Sta. Cruz, Marinduque, the mining firm invoked Sec. 234 (e) of the Local Government Code (Republic Act 7160) which includes in its list of possible exemptions, "Machinery and equipment used for pollution control and environmental protection". In other words, Marcopper argued that the Siltation Dam and Decant System are specialized facilities and that the property they occupy should be exempt from RPT.

The LBAA dismissed the appeal in a decision dated November 10, 1995. It rejected Marcopper's argument, saying that the specialized facilities erected by Marcopper on said property were in fact "improvements on the principal real property" and therefore, subject to tax. In a second

attempt, Marcopper sought relief from the Central Board of Assessment Appeals (CBAA), and was again rejected. In its decision dated December 21, 1998, the CBAA agreed with the LBAA decision. It said that the property in question was "neither machinery nor equipment but a permanent improvement", and is not tax exempt under the LGC. The Code also includes a definition of machinery and equipment that does not apply to the siltation dam and decant system. A third attempt by Marcopper was to file a Motion for Partial Reconsideration but this was also denied by the CBAA in a decision dated July 27, 2000.

Finally, Marcopper brought its petition before the Court of Appeals (CA) and won a favorable decision on May 30, 2005. The CA, overturning the CBAA rulings, upheld MMC's assertion and directed the Municipal Treasurer of Sta. Cruz, Marinduque to "refund the tax payments made by petitioner under protest, or in lieu thereof, to credit said payments in favor of petitioner for any taxes it will be required to pay in the future". According to the CA, the pertinent provision on machinery in the LGC is "broad enough to include a machinery, instrument, apparatus or device consisting of parts which, functioning together, allows a person to perform a task more efficiently, such as the subject property...." Further, it reasoned that said "machinery" or "pollution control device" is part and parcel of Marcopper's operations to protect the environment and clean the waste waters before they are released in the Mogpog and Boac Rivers. On the finding of the LBAA and CBAA that the facility had been damaged in a typhoon and were non-operational since 1993, the CA maintained that this "does not remove it from the purview of the...RA 7160.

The CA denied the Motion for Reconsideration filed by the Marinduque LGU, prompting the elevation of the case before the Supreme Court with the CA and Marcopper named as respondents. The Supreme Court (3rd Division) eventually rejected the claim for real property tax exemption on the siltation dam and decant facility. It also reversed and set aside the 2005 decision of the Court of Appeals granting the tax exemption and ordering the Municipal Government to refund Marcopper.

The SC, in sum, ruled that "the CA committed grave abuse of discretion in ignoring irrefutable evidence that the subject property is not a machinery used for pollution control, but a structure adhering to the soil and intended for pollution control, but has not been actually applied for that purpose during the period under assessment" It also declared the Tax Assessment Notice valid under the Local Government Code.

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OTHER LOSSES – ENVIRONMENTAL DEGRADATION AND SOCIAL DISLOCATION

Challenging the generous fiscal incentives granted to mining investments gains even more traction in the light of the sector’s continuing history of inflicting environmental, social and cultural harm. The Philex mine spill at the Philex mines in Padcal, Benguet, Mountain Province, last August 2012 was preceded by two other spills in the 80s and the 90s. But the latest incident has overshadowed the Marcopper disaster, with 20 million tons of toxic tailings leaking into water bodies, or 10 times larger than the volume released by the Marcopper mine in 1996.

A fact-finding mission organized by civil society found many adverse impacts resulting from the Philex disaster:

- the Balog Creek, previously categorized as class A river, as well as the downstream Agno River were heavily polluted after the spill, badly affecting the environment, agricultural lands and local communities whose livelihood were based on the proper functioning of the river.
- Elevated heavy metal levels included zinc, arsenic and copper, the latter being 4.5 times higher than the allowed level
- Complaints over diseases in downstream communities increased
- People had to stop fishing, and later on, fish catch was reported to be reduced significantly, while some people reported to have seen mutant fishes
- Other NGOs described the rivers to be biologically dead

Gold panning in the river by artisanal miners used to be an important livelihood source, which is not possible anymore due to the heavy contamination. (Environmental Justice Atlas)

MGB suspended Philex operations immediately after the mine spill, but lifted this in 2014 as penalties had reportedly been paid. Operations continue and may well extend until 2020 with the discovery of new mineral resources. (Ibid)

The Philex spill is only the latest of several mining operations causing loss of life, community displacement and environmental destruction. The list includes the open pit copper and gold mining activities of Sagittarius Mines, Inc. in Tampakan, South Cotabato, and the coal production in Antique province of Semirara Mining Corp., the only large-scale coal producer in the Philippines.

CONCLUSIONS

In the face of many human and development needs that are often plugged through borrowings and government’s sale of its assets,

the fairness of the proposition to examine and put an end to the generous incentives packages extended to the mining sector bears no further justification. As Guevara firmly points out,

As the owner of mines, the state is bound to ensure that the country gets the greatest value for its resource, safeguard the environment, and protect the indigenous communities who have for so long claimed the mountains as their home. As the tax authority, government must ensure that the natural resource sector contributes to the costs of government, not just based on its ability to pay, but compensate the country for the loss of our national patrimony.

The first order of the day is to withdraw the incentives to mining activities. It is difficult to understand why government should lure mining companies to come to the Philippines when they are after the resources that we own.... (Guevara)

It is well established in law that because taxes are the lifeblood of the nation, tax incentives exempting some groups and/or individuals from an obligation that is imposed on everyone should neither be taken lightly nor granted freely and irresponsibly. For this reason, incentives cannot be automatically claimed but applied for in accordance with specific procedures.

Arguably, incentives can also be an instrument for serving public interest, as tax has been proven to also serve a steering function, such as through sin taxes that promote social merits and disincentivize social demerits. However, this has not been the case with the country’s incentives system, which has only enabled corporations to dodge their tax obligations and resulted in forgoing potentially massive amounts of returns to the state and the public purse.

Particular to the extractives sector, there is a clear case to be made against awarding wide-ranging incentives to investments that would have been made anyway because minerals are site-specific. But what is even more reprehensible and unjust is that these incentives are generously given to a sector raking in billions in profits for foreign big business interests and partner national elites, displacing communities and inflicting often irreversible environmental damage.

It is thus a welcome development that government and lawmakers have pressed anew for the rationalization of fiscal incentives and greater transparency and accountability in the extractives sector. Financial resources that can be raised from judiciously granting incentives are crucially needed by a country where basic social services remain grossly wanting, where building the fundamental infrastructure needed to meet basic needs remains contingent on incurring more debts and dependent on private sector investment.

However, rationalization also raises the question – what is being rationalized? Clearly, the direction is towards rationalizing incentives in a way that they support government’s Investment Priorities Plan – procedurally a plan without benefit of broad consultations and substantively reflecting a growth-driven paradigm that continues to be debunked, among others, by continuing dependence on borrowings and privatization, chronic crisis and poverty, and the inability to build publicly subsidized infrastructure for the adequate, predictable and sustainable delivery of basic social services. Efforts towards truly reforming the country’s fiscal incentives regimes must comprehensively move in this direction. ●

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