

Report of the fact-finding mission to Mindoro, the Philippines

For the Royal Ministry of Foreign Affairs, Norway

Jill Shankleman and Susan Tamondong, JSL Consulting



Table of Contents

Executive Summary	1
1. Introduction	4
2. The mission	4
3. The complaint	5
4. Framework for evaluation	7
5. Mindoro Nickel Project (MNP)	8
6. Key findings - context	9
7. Complaints concerning loyalty and mutual trust	15
8. Environmental issues	16
9. Possible contravention of Guidelines with respect to Bribery and Disclosure	18
10. Conclusions	19
Annex 1: Schedule of meetings	20

Cover photos: meeting with Indigenous groups supportive of the project; T-shirt worn by one of the people involved in the hunger strike against grant of environmental clearance for the project; Jill Shankleman and Susan Tamondong meeting with elected local leader and indigenous elder outside the immediate project area but concerned about the impact the project might have on them.

Executive Summary

1. In January 2009, the Norwegian organization Framtiden i våre hender (Future in Our Hands- FIOH) lodged a complaint relating to contravention of the OECD guidelines for Multinational enterprises. The complaint alleged violation of the General Policies guidelines, Chapter 2, of the OECD's guidelines. FIOH also asked the Norwegian contact point (NCP) to assess whether Intex has violated the guidelines relating to disclosure in Chapter 3, bribery in Chapter 6 and the environmental guidelines in Chapter 5.
2. Dr Jill Shankleman and Susan Tamondong were commissioned by NCP to make a fact-finding mission to Mindoro/The Philippines to gather information and establish facts enabling the Norwegian NCP to assess whether violations of OECD guidelines have taken place. The visit took place between January 10 and 21, 2011 following prior contact with the complainant and Intex to identify the principal contacts that each suggested the fact-finding mission should meet with.
3. Intex and the complainant (via associated organizations in the Philippines) were extremely helpful in organizing meetings, providing time to discuss the issues, and in arranging the logistics of travel to meetings. We were able to visit both provinces in Mindoro, and met with all of those suggested by the parties. We also received a large amount of documentation, some in response to our requests; some was volunteered by people we met.
4. The OECD Guidelines do not establish detailed standards that companies should adhere to. Prior to the site visit, we had proposed that the requirement in the Guidelines to "develop and apply effective self-regulatory practices and management systems that foster a relationship of confidence and mutual trust between enterprises and the societies in which they operate" (General Policies Chapter 11) could be measured by adherence to international standards for environmental management systems (ISO14001) and occupational health and safety (OSHAS 18001), and by the company releasing public reports consistent with the guidelines in the Global Reporting Initiative (GRI). When we met Intex, Resources in Manila, and realized that the mine is not yet operational, it became clear that these standards are not the most relevant because they apply primarily to operating facilities such as a mine that is in production. Of greater relevance to projects still at the planning stage are the Social and Environmental Performance Standards for new projects established by the International Finance Corporation (IFC), and adopted by most development and commercial banks providing project finance. Norway's export credit guarantee agency, Garant-Instituttet fo Eksportkredit (GIEK) applies these standards when determining what projects to provide guarantees to.¹ Intex management also informed us that they wish eventually to comply with these standards.
5. The Mindoro Nickel Project (MNP) has had a series of owners. It is currently owned by Intex Resources. Exploration has been completed on approximately one third of the total mine area (tenement) held by MNP, and the project is at an advanced stage of completing feasibility studies to develop this part of the mine area and transport excavated material to a coastal processing plant, for which four locations are under consideration. MNP is part way through securing the permits and authorizations for mining. It has acquired Full and Prior and Informed Consent (FPIC) certificates from the National Commission for Indigenous People (NCIP), although the legitimacy of these certificates forms part of the FIOH Department of Natural Resources (DENR) but this has since been temporarily revoked with a special committee set up in November 2009

¹ See GIEK, Procedures for assessing social and environmental impacts, found via http://www.giek.no/miljo_og_sosialt_ansvar/gieks_politikk_innen_samfunnsansvar/en

to investigate. MNP will also need to achieve 'Social Acceptability' – this requires formal resolutions of support from at least two of the three levels of local government. At present, both provinces have declared a 25-year moratorium on mining, as have the two municipalities where the mine site and most of MNP project facilities are expected to be located. However the legality of these moratoria is disputed.

6. The complaint regarding Chapters 2 focuses on two main issues. First, that the FPIC certifications are invalid because they were made with indigenous peoples (IPs) that do not represent those who should have been consulted, and, second, that Intex has demonstrated an inability to build loyalty and mutual trust in the society in which it operates. We found that the FPIC consents were granted consistently with NCIP guidelines, which focus on IPs living in the mine site. This has been investigated and confirmed by NCIP. However neither the MNP nor NCIP have undertaken systematic anthropological work and consultation with tribal elders to find out if other IP groups will potentially be affected by the project, for example, with respect to the 45km (approx) conveyor planned to take mined materials to the coast, or though restrictions on access to lands within the mine area. The limited engagement with only two specific groups of IPs that currently live on the mine site is inconsistent with international standards as defined by IFC Performance Standard 7.² However, we found that those IPs that MNP does engage with have been informed about the project including potential negative impacts including relocation. They told us their prime objective in giving consent to the project was to secure assistance from the project in securing title to their land under the Indigenous Peoples Right s Act (IRPA).
7. Concerning loyalty and trust – opinion about the project is highly polarized in Mindoro to the point where some elected officials refuse to have any contact with the company. Other people are strongly in favour of the project, arguing that it is their only chance for economic development, 'a risk worth taking'. Changes of ownership, company name, staffing and peaks and troughs in the level of activity since the project started in 1997 have damaged relations locally and created suspicion. Intex has not established an environmental and social management system during the prolonged (and interrupted³) exploration period, nor a grievance management system or public consultation and disclosure program. The project has relied on government agencies to lead interactions on environmental and indigenous peoples issues, and has focused its communications activities on the national government and those communities close to the mine site.
8. The suggestion that Intex is in violation of Chapters 3 and 6 concerns (a) the provision of funds by MNP to NCIP to cover costs of delineating the ancestral lands of the Sadaki group with which MNP has secured consent to mine, and (b) the use of community development projects to secure support from communities in the context of the test of social acceptability that will be applied to the project. Regarding funds paid to NCIP, we found that this is permitted under the NCIP rules, but that investigation by NCIP found that the NCIP officials concerned did not follow the required procedures. NCIP did not find that MNP had acted improperly. Concerning community projects, we heard conflicting statements about the timing of one community project cited in the complaint in relation to official support from the Barangay for the MNP. Intex does not appear to have a transparent system for deciding on its community spending, and does not disclose systematic information on criteria for the projects it supports, or what projects have been implemented and are planned. In the situation of the Philippines where there is a formal 'social acceptability' test, this exposes a company to criticism.
9. Chapter 7 – environmental. The key concerns are that Intex has presented inconsistent and incomplete information, and that the location of the mine on a watershed will result in unacceptable environmental impacts and risks downstream. We found that the EIA was not completed until 2009 – prior to this date, a project cannot be expected to

² IFC Social and Environmental Performance Standard 7 – Indigenous People.

³ The MPSA that permitted exploration activity was revoked between 2001 and 2004.

present complete information, and would be expected to be modifying project design, including aspects to reflect feedback. However, we also found that dissemination of the EIA such that it can be used by communities and others to evaluate the project has been very limited. The formal meetings required under Philippines law were disrupted by opponents so that not all were held as planned. Also, Intex has not been pro-active in providing information. For example, circulating the EIA, making it available on the website, translating it from English into local languages, or organising the extensive document such that it can be easily navigated by readers. In relation to the mine site location on a watershed, we found that mining on a proclaimed watershed is not permitted, however the MNP mine site area is not covered by this because it is not an officially designated watershed. A common concern of all those we spoke to in Mindoro was about flooding and protecting rice growing areas from pollution. Some accept the project's assurance that these risks will be avoided because of the design of the mining operation, others are not convinced. Intex has not released the detailed studies and mine plans that would allow these questions to be evaluated in greater detail. This is such an important issue for people in Mindoro, that it may be worthwhile establishing an independent technical group to review the mine plans in detail with respect specifically to risks of polluting downstream agriculture, or aggravating flood risks.

10. In conclusion – MNP is operating within national legislation, and this is being repeatedly tested through investigations and permit reviews. However the project has not so far applied the international standards exemplified in the IFC Social and Environmental Performance Standard/Equator Principles. These require more comprehensive impact assessment, and engagement with a wider set of potentially project affected people and other stakeholders, as well as disclosure of information, transparency and the deployment of skilled and experienced environmental and social performance managers working to clearly defined plans and procedures. Intex told us they plan to apply these standards when project financing is being negotiated. Hence, at this stage, if compliance with the IFC Performance Standards is an appropriate indicator, then Intex is not compliant with the requirement in the OECD Guidelines that “Enterprises should develop and apply effective self-regulatory practices and management systems that foster a relationship of confidence and mutual trust between enterprises and the societies in which they operate.

1. Introduction

In November 2010, the NCP commissioned Dr Jill Shankleman assisted by Susan Tamondong to conduct a two-week, fact-finding mission to Mindoro/The Philippines to provide independent information to underpin the NCP's final statement on alleged violations of the OECD guidelines by the Norwegian mining company Intex Resources ASA. The Terms of Reference (TOR) for the mission required us to study background documents provided by NCP; to have interviews and meetings with all relevant stakeholders and groups stated in the documentation; to provide an opportunity before the mission or the parties to provide a list of organizations or individuals they consider should be interviewed; to evaluate stakeholders and information with regard to legitimacy and credibility; and to provide a report not exceeding 15 pages plus a 2 page summary and annexes to NCP.

2. The mission

Jill Shankleman and Susan Tamondong were in the Philippines over January 9-21 and held meetings in Oriental and Occidental Mindoro and Manila.

Before the mission, we made contact by email and telephone with the complainant and Intex Resources; asked them for suggestions of whom we should meet, and proposed a schedule to both which allocated our time on mission equally to each so that they could set up the meetings they considered necessary. We were able to hold all the meetings proposed by both parties. We received full cooperation from both.

We had a very full programme of meetings and all those we met were courteous, supportive of the mission and generous with their time. We appreciated Intex organising interviews, introducing us to interviewees, then leaving us to discuss in private. In many cases we were provided with documentation, volunteered by the people we met or requested by us. We met NGOs and church leaders opposing the project; indigenous people from all of the pro and anti groups cited in the complaint; government officials responsible for permitting the project; the provincial governors of Occidental and Oriental Mindoro; the mayors of the two municipalities potentially most impacted by the project; local government officials and elected leaders from various Barangay⁴s; some non-IP community leaders and groups; civic groups, and former officials who had been involved in the initial certification of consent by IPs. We went to the boundaries of the mine site area but were not able to visit the site itself due to bad weather and the absence of transport across the river that separates the mine site from the closest community of Villa Cerveza.

⁴ Sub-municipal level of administration.

A ‘rule of thumb’ for field visits is that information collection is complete, given the intended level of detail of any study, when additional meetings provide no new information. During this mission we received additional information at every meeting until we left. We therefore conclude that additional facts might emerge in response to this report, although we have not identified any other stakeholders that we consider are essential to meet with.

3. The complaint

The complaint was submitted in January 2009 by Future in Our Hands (FIOH). FIOH works with other NGOs on issues related to mining in the Philippines. PIPLinks (a UK based organisation working on indigenous peoples rights with a focus on the Philippines)⁵and Alamin (Alyansa Laban sa Mindex-Alliance Against Mindex) based in` Mindoro. PIPLinks and Alamin provided contacts, introductions and transport support in meetings organised on behalf of FIOH during the mission.

The complaint argues that Intex Resources is in violation of Chapter II, Item 7 of the OECD Guidelines for Multinational Enterprises, and is in possible violation of Chapter III, V and VI. See Table 1.

We note that the OECD commentary to the guidelines states that ‘obeying domestic law is the first obligation of business...the Guidelines are not intended to place an enterprise in a situation where it faces conflicting requirements. But compliance with national law though necessary is not sufficient for compliance with the Guidelines.’

Table 1: Summary of the complaint

Guideline	Complaint
<p>Chapter II</p> <p>Enterprises should take fully into account established policies in the countries in which they operate, and consider the views of other stakeholders.</p> <p>Chapter II - Item 7</p> <p>Enterprises should develop and apply effective self-regulatory practices and management systems that foster a relationship of confidence and mutual</p>	<p>Intex operations are based on an FPIC agreement from 1999 that should have been found invalid:</p> <ul style="list-style-type: none"> - FPIC was obtained from organizations that do not represent peoples from areas directly impacted - The FPIC agreement was not in the local language <p>The consultation process for two further FPIC agreements reached in 2008 was flawed:</p> <ul style="list-style-type: none"> - Only the two IP organizations that had previously provided FPIC were invited into the consultation - There were procedural errors – specifically relating to a validated list of elders/leaders present at the meeting <p>Incomplete information was provided about the drawbacks of the project and the negative impacts on</p>

⁵ See <http://www.piplinks.org/>

<p>trust between enterprises and the societies in which they operate.</p>	<p>the environment.</p> <p>The company has demonstrated an inability to build loyalty and mutual trust.</p>
<p>Chapter III (2)</p> <p>Enterprises should apply high quality standards for disclosure, accounting, and audit. Enterprises are also encouraged to apply high quality standards for non-financial information including environmental and social reporting where they exist. The standards or policies under which both financial and non-financial information are compiled and published should be reported.</p> <p>Chapter VI</p> <p>Enterprises should not, directly or indirectly, offer, promise, give, or demand a bribe or other undue advantage to obtain or retain business or other improper advantage. Nor should enterprises be solicited or expected to render a bribe or other undue advantage. In particular, enterprises should:</p> <p>Chapter VI -2. Ensure that remuneration of agents is appropriate and for legitimate services only. Where relevant, a list of agents employed in connection with transactions with public bodies and state-owned enterprises should be kept and made available to competent authorities."</p>	<p>Intex has budgeted approximately NOK 230,000 to support NCIP determine where the boundaries between different tribes should go.</p> <ul style="list-style-type: none"> - The conclusion of the process supported by Intex defined the area within the mine site as belonging to the two IP groups that have made agreements with Intex. - The provision of support to NCIP may have been in violation of the guidelines for FPIC. - Intex may be in violation by donating money to local communities during the application process.
<p>Chapter V</p> <p>Enterprises should establish and maintain a system of environmental management appropriate to the enterprise, including collection and evaluation of adequate and timely</p>	<p>There may be a violation of the guidelines in the form of inconsistent and incomplete information provided on the environmental consequences of future mining operations of Intex.</p> <ul style="list-style-type: none"> - Shifting information has been provide on how waste disposal will be carried out

<p>information regarding the environmental, health, and safety impacts of their activities, establishment of measurable objectives and, where appropriate, targets for improved environmental performance, including periodically reviewing the continuing relevance of these objectives ...</p>	<ul style="list-style-type: none"> - It is important to know where the processing plant and waste disposal area will be located in order to assess the consequences for Mindoro. - The project risks causing landslides due to deforestation - Mining nickel in open mines in a watershed area risks pollution of waters used by downstream farmers, and will amplify risks of flooding.
--	---

4. Framework for evaluation

The OECD Guidelines do not establish detailed standards that companies should adhere to. Prior to the site visit, we had proposed that the requirement in the Guidelines to “develop and apply effective self-regulatory practices and management systems that foster a relationship of confidence and mutual trust between enterprises and the societies in which they operate” (General Policies Chapter 11) could be measured by adherence to international standards for environmental management systems (ISO14001) and occupational health and safety (OSHAS 18001), and by the company releasing public reports consistent with the guidelines in the Global Reporting Initiative (GRI). When we met Intex, and realized that the mine is not yet operational, it became clear that these standards are not the most relevant because they apply primarily to operating facilities such as a mine that is in production. Of greater relevance to projects still at the planning stage are the Social and Environmental Performance Standards for new projects established by the International Finance Corporation (IFC), and adopted by most development and commercial banks providing project finance. Norway’s export credit guarantee agency, Garant-Instituttet fo Eksportkredit (GIEK) applies these standards when determining what projects to provide guarantees to.⁶ Intex management also informed us that they wish eventually to comply with these standards.

⁶ See GIEK, Procedures for assessing social and environmental impacts, found via http://www.giek.no/miljo_og_sosialt_ansvar/gieks_politikk_innen_samfunnsansvar/en

5. Mindoro Nickel Project (MNP)⁷

The origins of MRP are in exploration in the Mindoro highlands in the mid-1990s. The project has evolved since then as exploration has found recoverable volumes of nickel. Permission to explore was granted in 1998; rescinded in 2001, restored in 2004, with the project team allowed back into the area in 2005. Exploration and assessment of reserves has concentrated on one third of the mining area held by Intex Resource. From 2007, Intex has focused on evaluating the commercial and technical viability of the project and preparing detailed plans for mining and processing of ores. The project team determined that this could be a feasible project in March/April 2009 and should be developed, subject to securing finance and the required government permissions.

The project will comprise a mine that will ship unprocessed material via a conveyor to a coastal processing plant that will deploy an array of processes to produce nickel briquettes, cobalt, ammonium sulphate fertiliser (as a by-product); a power plant that will generate electricity as a by-product of chemical reactions in the processing; and a harbour at the processing site. If developed as planned it will be the largest project on Mindoro, and one of the largest nickel producers worldwide. Unlike other nickel mines in the Philippines, it will process nickel in the Philippines creating an added value export, will produce materials potentially useful to industry in the Philippines, and will generate power (including a small excess that might be available on the domestic market) without using fossil fuels. Capex is estimated at around \$2bn.

MRP has had a series of owners and name changes since 1997. (In 1997 it was owned by Mindex, from 2000 by Crew Minerals, in 2007 the MNP was spun off from Crew Minerals into Crew Development, and the name subsequently changed to Intex Resources.) However several of the principal people involved in developing the project have been working on MNP for many years. This includes the current Acting CEO, Jon Petersen. Changes in ownership and name have contributed to stops and starts in activity, and generated some confusion and suspicion among IPs, local government, and some NGOs in Mindoro.

MNP is not yet in production. Before Intex can start production they need to secure financing and gain permission from the Mining and Geology Bureau (MGB), a national level body. Under the project's Mining Production Sharing Agreement (MPSA) issued under the Mining Act 1995, the government requires evidence that the project is technically and commercially feasible and

⁷ To simplify the presentation given changes in the name of the project sponsor, this report refers throughout to the Mindoro Nickel Project (MNP) except where a specific owner name is relevant.

that the project has approval (Free Prior and Informed Consent – FPIC) from indigenous groups (IPs), wider social acceptability, and will not cause unacceptable environmental impacts (Environmental Clearance Certificate – ECC).

Table 2: timeline of key ownership and permitting events

Date	Event
March 1997	Mindex secures a 2-year (extendable) Exploration Permit
January 1999	FPIC issued by NCIP conditional on MOA being agreed
June 1999	MOA agreed
March 2000	Mindex acquired by Crew Minerals
December 2000	Mineral Production Sharing Agreement (MPSA) issued – permits exploration but establishes pre-conditions before construction or mining can start
July 2001	MPSA cancelled
November 2005	MPSA reinstated
2008	FPIC certified and MOA signed with two indigenous community groups
March 2009	2 nd MPSA issued allowing mining production subject to conditions (FPIC, ECC, Social Acceptability, Feasibility Study)
October 2009	ECC issued
November 2009	ECC temporarily revoked and a Special order issued by DENR setting up a multi-sectoral group to investigate the ECC. No date has been set for the report of this group.

6. Key findings - context

The TOR requires us to focus on complaints relating to Intex and not to address the mining industry in general. However we found that there are some important contextual factors that are important to evaluating the complaint. These are discussed below.

The government agency responsible for certification of ‘Free, Prior and Informed Consent’ by IPs, is the National Commission for Indigenous People (NCIP). Environmental clearance is the responsibility of the Department of Natural Resources (DENR) Environmental Management

Bureau (EMB). Under the Local Government Code 1991 and the Mining Act, social acceptability is determined by securing formal resolutions of support from at least two of the three levels of local government in the impacted area i.e. Province, Municipality and Barangay, and is accompanied by an agreed 'social development programme'. According to the MPSA for MNP this should be to the value of at least 1% of annual costs of mining and milling.

Government agencies use executive orders, administrative orders, rules, guidelines etc to define how laws are to be implemented. Depending on the government policy towards mining, implementation has favoured more or less stringent interpretation of laws. Both laws and implementing rules etc related to mining, environmental protection and the rights of indigenous people have been challenged by supporters and opponents through the courts and through campaigning. At each step where MNP has received an approval etc from government, this has been challenged by opponents of the project.

Both provinces in Mindoro have promulgated 25-year moratoria on mining (Oriental Mindoro in 2002 and Occidental Mindoro in 2009). The legality of these bans on mining is disputed. The constitutional position is that provinces cannot enforce rules that are contrary to national law. i.e. the Mining Act 1995; however the moratoria have not been challenged in court.

NGO opponents of the MNP are members of a network of organizations lobbying to have the Mining Act replaced by a new Mineral Management Bill that will restrict mining to circumstances where "the ecological and social benefits and costs of mining far outweigh the ecological and social benefits and costs from other land uses", and to Filipino citizens and corporations.⁸ They are also seeking to have the 2006 guidelines on implementation of the 1997 Indigenous Peoples Rights Act (IPRA) revised on the grounds that current approach of NCIP does not fully reflect the requirements of IPRA 1997, such that arrangements NCIP acts more as a broker between indigenous people and mining companies than as a protector of IP interests.⁹

Opinion in both provinces of Mindoro about mining in general and MNP in particular, is polarised. In Mindoro we did not meet, nor were we able to identify, any stakeholders that did

⁸ House of Representatives Bill 3763, Philippines Mineral resources Act. Introduced to the First regular session of the Fifteenth Congress. See <http://www.scribd.com/doc/44452417/HB-3763-Minerals-Management-Bill>

⁹ In 2009, the UN Committee on the Elimination of Racial Discrimination included in its observations on human rights reports submitted by the government of the Philippines a recommendation that the State "verify that the current structures and guidelines/procedures established to conduct FPIC are in accordance with the spirit and letter of IPRA". Concluding observations of the Committee on the Elimination of Racial Discrimination, Philippines, CERD/C/PHL/CO/20, 23 September 2009, para 24.

not present themselves as ‘pro’ or ‘anti’ mining. No meetings included both supporters and opponents. Opponents of the project include both elected provincial governors, the elected mayors of the key municipalities potentially affected by the project, several indigenous peoples’ groups (and the Mangyan Mission and some IP leaders we met informally), and some of the small local government units (Barangay) who have passed anti-mining resolutions. Supporters of MNP, and mining in general, include two IP organisations from the mine site area who have signed Memoranda of Agreement (MOA) with MNP, some Barangay in the vicinity of the mine site, some local civil society groups and clergy. It appears that support for the project is strongest amongst those in the vicinity of the mine site, while opposition is more dispersed across the island. Opponents are concerned not only about MNP but also that if MNP goes ahead, this will open the door to the 92 other applications for mining projects in Mindoro. Supporters see the project as an important economic opportunity.

Philippines law provides significant material benefits to IPs that consent to mining (and other commercial activities) on their lands. Under IPRA , if IP communities give consent to a development in their land this should be accompanied by a negotiation on the benefits that will accrue to the IPs. In the 2006 Guidelines on IPRA this is formalised, stating that FPIC is given upon signing a MOA. Under the Mining Law (Section 17), IPs that give consent are entitled to a share of the royalties that the company pays to the government. Under the MPSA for MRP this is specified as a minimum of 1% of the gross value of minerals sold.

The policy of Intex Resources is to develop the project in a way that complies with the IFC Social and Environmental Performance Standards and the Equator Principles. The IFC Performance Standards include detailed specifications regarding environmental and social impact assessment, about how projects should operate when they impact on indigenous communities¹⁰, and about understanding and managing impacts on areas of high conservation and biodiversity value. However at this stage, Intex has commissioned environmental studies to meet national standards only and has decided to carry out the wider consultation, impact assessment and environmental and social management planning required under these international standards when it is clear what analysis specific potential lenders and investors will need, and when the company is ready to bear the costs of these detailed studies.

1. Complaints relating to Indigenous People (IPs)

(a) The core of the complaint is that MNP has secured FPIC from groups that are not entitled to provide approval. Specifically, that members of the groups Sanama and Kamti who hold or have

¹⁰ IFC Social and Environmental Performance Standards. See www.ifc.org

applied for recognition of their ancestral domain in areas that include the mine site, should have been the parties involved. And that the Kabilogan and Sadaki groups that have agreed MOA with MNP did so in ignorance of its impacts, including that they would be relocated.

What we found is that NCIP (the government agency responsible for implementing the Indigenous Peoples Rights Act – IPRA 1997) has defined the IPs whose consent is required as those who are living in the impact area, and applied this to MNP. Initially this definition was applied ad hoc by the NCIP officials involved in the 1999 FPIC and MOA in the absence of detailed guidelines. In a series of eight consultations with IPs, NCIP also found that the group that became known as Kabilogan had provided verbal agreement to access to the land for mining exploration in 1997. The 2006 Guidelines formalized this approach ‘When the area affected covers only a portion of the ancestral domain, only the ICCs/IPs in such portion shall be involved in the FPIC process.’¹¹ Therefore the claims that the larger groups, Sanama and Kamti should be involved in negotiating FPIC as holders of ancestral domain that includes the mine site does not appear correct in the context of the rules applied by NCIP.

For both the 1999 and 2008 FPIC/MOA negotiations, the impact area appears to have been defined as the mine site. As far as we have been able to establish, neither MNP nor NCIP undertook any anthropological study in 1999 or later to identify if IPs other than those found living on the mine site in 1999 were users of the land who might then be impacted by the project. This is potentially important because the Mangyans practice shifting cultivation over quite long cycles¹². One professional IP whose career has been working with IPs told us that patterns of shifting cultivation amongst IPs in Mindoro mean that there is an element of chance in which IPs were living on the mine site when the FCIP process was started, and that there is a logic to considering whether the wider tribal group has rights to benefit from the project too. A report produced by consultants to the project in 2009 does, however, identify some IPs in Kabilogan that farm land within the mine site but do not live there¹³. We were told in meetings in Sablayan with some IP leaders that there exist in the mountains some IPs who remain remote and do not mix with lowlanders. We were unable to verify this or ascertain whether if they exist, they are located anywhere within the MNP tenement. We cannot find any analysis that addresses the question of whether IPs other than those in Kabilogan and Sadaki could be impacted by the mine, although Intex has done a survey locating where all the members of

¹¹ The Free and Prior Informed Consent (FPIC) Guidelines of 2006, NCIP Administrative Order No. 1, Series of 2006, Section 10(b).

¹² Walpole et al, Upland Philippines Communities, Manila Observatory, 1994

¹³ Resettlement Planning Framework, Lichtel Technologies, 2009, Mindoro Nickel project EIA, Vol 3. Attachment

Kabilogan and Sadaki live. We have we seen any analysis of whether the project will impact on IPs along the proposed conveyor corridor or at the processing site.

(b) The complainants also argue that the groups who provided consent to MNP were established by the mining companies for this purpose, and that IPs have not been given guarantees that they will not be relocated. When we met representatives of the IP groups who have given consent to MNP (at a meeting with 90+ participants, with translation between English, Tagalog and Mangyan)¹⁴, they were emphatic that they had the right to agree or not to the project, and rejected the right of wider tribal groups to negotiate. They argued that they had long been established as a sub-group of the Mangyans with their own group of elders, and decided in 1998 to organise themselves formally 'because of a problem about the group Mindex'. We were told that the priority of the IP groups at the mine site is to secure formal legal recognition through IPRA as owners of the land they live on, and that they had specified the provision of financial and legal assistance in securing title as a condition in the 1999 Memorandum of Agreement (MOA) with MRP.¹⁵ To date, the Sadaki Group has acquired a CADTI¹⁶, but not yet Kabilogan.

As the people who granted FPIC, the members of Kabilogan and Sadaki will receive 2% of the gross value of output as royalty from the mine after production starts.

In relation to Kabilogan and Sadaki being 'artificial' bodies set up by the NCP, we were told by the groups that Kabilogan was indeed established specifically in relation to mining. (Sadaki was a later spin-off from Kabilogan). It is not possible to tell what support, if any, the project gave. The files for the 1999 FPIC/MOA are in principle available at the NCIP national office in Manila, but when we requested sight of the file it could not be found. However we did find evidence that Kabilogan and Sadaki are not passive supporters of MNP. While we were told by IPs that communications between Kabilogan, Sadaki and Intex are good, 'we talk monthly, we talk about problems in the MOA', there have been a number of problems since 1999 between the IPs and the MCP in relation to implementation of the MOA, and NCIP has intervened to resolve disputes. This suggests that the IPs that have given consent to Intex are independent of Intex.

(c) Concerning relocation, the IPs told us – when we asked about the impacts they expected from the mine – that they would be relocated and that they had themselves selected the sites to

¹⁴ 18 June 2010 at Eden Beach, Sablayan, Occidental Mindoro

¹⁵ MOA between Kabilogan Mangyan Inc. and Aglubang Mining Corporation lists the first two benefits to Kabilogan as 'measures for the conservation/protection of the ancestral domain of the KMI ICCs/IPs' and 'The AMC shall from certified copy dated September 2009. provide funds for the formulation of ADSDPP of Ancestral Domain Alangan Mangyan described as CADC 024'.

¹⁶ Certificate of Ancestral Domain Title

which they wished to relocate. However we were not able to ascertain to what extent the IPs understand that after mining, although the land will be reforested, it may not support the kind of cultivation they undertake now, or if they see the opportunity to produce tree crops instead – as envisaged by Intex - as an opportunity or a threat. The 2009 EIA for MNP includes a Resettlement Plan Framework that provides a detailed analysis of who will be resettled and of the process of compensation.¹⁷ It is not clear to what extent IPs were consulted in preparation of this Plan. It is also unclear to what area the Plan applies – section 3.3.2.1 refers to a land area of 800 ha. only. As far as we are able to tell, the EIA report, let alone the Annex volumes that include the Resettlement Plan Framework, have not been disseminated, and are not available in Tagalog or in Mangyan.

(d) The complaint notes that the proper processes were not followed in the 2008 FRPC/MOA consultations. These complaints have been made also by KPLN and the Mangyan Mission to the NCIP and were investigated in 2008 by a fact-finding team set up by NCIP. The team visited Mindoro in October 2008. This investigation found that the assembly and consensus building processes were carried out correctly such that the next steps to process FPIC/MOA within NCIP should be followed. They found problems with the actions of two NCIP staff and requested follow up investigation of their actions. The NCIP noted that the EIA for MNP was not yet complete, and that if the EIA found that the project would affect other IPs, then consultation must be extended to include these groups.¹⁸

(e) NCP does not have any IP specialists on its staff although in 2007 consultants did prepare an Indigenous Peoples Development Plan Framework (IPDP) for the project. In 1999 the regional director of NCIP advised MNP to employ social scientists to guide their engagement with IPs¹⁹ following a number of problems with how the MOA was being implemented. Consultants on stakeholder relations recommended in 2007 that MNP undertake further work to identify the primary and secondary Mangyan organizations, ‘...this should include additional identification of groups, provision of more detail on the function and purpose of groups, assessment of the relative priorities of each group and their consultation requirements.’²⁰ The 2007 IPDP framework (included as an Annex to the EIA) notes concerns of IPs outside the two groups that MNP has negotiated with. The IPDP proposes that an independent NGO should work with the IPs to explore questions of how benefits could be equitably shared amongst the wider group of

¹⁷ See footnote 7.

¹⁸ We have a copy of this report, dated 10/09/08. However it is in faint typescript and on foolscap paper. We will send it to NCP with the final report, it cannot be scanned into a clear document.

¹⁹ Final draft EIA, Vol 3 Attachments, Indigenous Peoples development Plan Framework

²⁰ Final Draft EIA, Volume 1 Attachments, Stakeholder Identification, September 2007

Mangyans. The consultants suggest that a Mangyan Development Council with ‘representatives of all the IP tribes will sit down as a Board for policy direction to plan development for the Mangyans on a long-term and sustainable basis.’ We heard from Intex that they do have plans to establish a council of elders.

(f) During the fact finding mission we conducted on behalf of NCP, we heard from several sources that the question of mining has caused conflict within IPs in Mindoro, and a powerful plea from one Elder for a meeting between MNP and all the IPs in the area, at which they could find out about the MNP – ‘We are very worried, we are afraid as we do not know what it means for our land, if we know what is going to happen, then only then we would have peace.’

(g) International standards – IFC performance Standard 7²¹, Indigenous Peoples (PS7), was issued in 2006 and is widely accepted as an international standard for project finance. PS7 requires that projects:

- Identify through impact assessment all communities of IPs that might be affected by a project and avoid adverse impacts where possible
- Undertake free, prior and informed consultation on matters that directly affect IPs such as mitigation measures and development benefits
- Establish an on-going relationship with the affected communities from as early as possible in the project
- If the project will be located on traditional lands under use, the project should:
 - Document its efforts to minimize land use
 - Have IPs land use documented by experts in collaboration with IPs
 - Inform IPs of their legal rights
 - Offer compensation plus culturally appropriate development opportunities
 - Document the results of negotiation.
 - Retain qualified and experienced external experts to assist in the assessment.

7. Complaints concerning loyalty and mutual trust

It is clear from the polarised views about MNP, and the force with which hostility is expressed, that to date MRP has not established relationships of loyalty and mutual trust within Mindoro. Both ‘pros’ and ‘antis’ claim that there is a silent majority that supports their stance. The only objective information comes from elections at all level of local government. In 2010, governors who oppose MNP were elected in both provinces, as were mayors in the two municipalities likely to be most directly impacted (Victoria and Sablayan). At the most local, Barangay, level, we understand that the picture is more mixed but have not been able to get accurate statistics.

In 2009, it was not possible for DENR to hold the full set of public consultations and hearings on MNP that are mandated in the Philippines environmental impact assessment process. This was

²¹ See www.ifc.org or www.equator-principles.com

because of disruption at the meetings, issuance of 'cease and desist' orders by the police, and decisions to cancel some meetings because of the risk of disturbance.

The OECD Guidelines require companies to 'develop and apply effective self-regulatory practices and management systems that foster a relationship of confidence and mutual trust between enterprises and the societies in which they operate.' Over much of its history, MNP has focused on national government stakeholders, and on the IPs and non-IP communities in the immediate vicinity of the mine. MNP has relied heavily on NCIP and DENR to manage its relations with stakeholders. Intex lacks a clear, pro-active, stakeholder engagement strategy, nor systems to regularly exchange information with local government and other interested parties. Intex does not have a grievance management system, and when we asked people how they communicated problems to Intex we were told they complained to the Mayor or to NGOs. Local officers have been opened and shut. MNP has commissioned a large number of technical environmental studies, but has not made these publicly available in a way that would help people evaluate the project's environmental claims. On the other hand, we heard from many people that they had attended the Mining Awareness Seminars conducted by MNP and found these useful and enlightening.

Opposition to MNP is strong. Some opponents are opposed to all mining in Mindoro, not specifically MNP. Some are opposed to any large-scale commercial activity on the mountains, and have successfully campaigned against other projects. Attitudes are hard, for example, the governor of Oriental Mindoro told us that 'we will only talk to them (Intex) if the court strikes down the moratorium, without this, there is no avenue to re-build relations'. The Governor of Occidental Mindoro said to us that, 'people have made their decision. It would take a long time and a lot of change to even think about re-considering.' In this context, it is not clear how much mutual trust and confidence could be built even with better management systems. However, some local Barangay leaders and residents are equally enthusiastically looking forward to employment and economic opportunities from mining, both directly and indirectly via economic stimulus to Mindoro.

8. Environmental issues

The key concerns of the complainants are (a) that MNP has presented inconsistent and incomplete environmental information, (b) that the project is located in a watershed and risks creating pollution downstream that could affect agriculture, and (c) that the project will cause deforestation that could cause landslides. We also heard from many of those we spoke to in

Mindoro (both supporters and opponents of the project) of their concerns about flooding, a shared concern in lowland Mindoro.²²

(a) Concerning disclosure of environmental information, at the time the complaint was made (January 2009), Intex had not completed its environmental impact assessment (EIA). Therefore, full disclosure of environmental impacts could not have been expected. This timing accords with usual practice for mining projects, which prepare an environmental assessment when the project is well enough defined that its potential impacts can be evaluated. Further, it is not uncommon that project plans change as understanding of the project size and the environment develops, and in response to issues that were raised in consultation.

However, we also found that when the EIA was completed, it was not generally made available. The EIA that Intex completed in April 2009 has not been disseminated within Mindoro. For example, the Governors of both provinces told us that they have not seen the EIA, nor have the mayors, nor anyone else we asked other than the Alamin anti-mining alliance who stated that they had secured a copy, 'through backdoor routes'. This is not consistent with the EMB procedural manual which states that, "Prior to public Hearings or Public Consultations. The Proponent is required to give copies of the full EIA Report to the EMB RO and host municipalities; copies of the Executive Summary to the host Barangays; and copies of Project Fact Sheets to other stakeholders for a well-informed participation in the hearing/consultation process."²³ We were also told that, in practice, EIAs are not always made publicly available unless people request copies

The EIA for MNP is still being evaluated. Under the Philippines regulatory system, the EIA is reviewed by an expert committee set up by the government, and is also presented publicly at hearings before the Department of Natural Resources (DENR) decides whether to issue an Environmental Clearance Certificate (ECC). Public hearings on MNP were not held as planned in 2009 because of disruptions and protests, which meant that no meeting was held in either the towns of Victoria or Sablayan. In October 2009, an ECC was issued by DENR before the full review committee had issued its recommendations; however the review committee failed to submit its (negative) advice within the specified time frame. Subsequent to issue of the ECC,

²² Some of those we spoke to fear that mining will exacerbate the flood problems in the area, while others are looking to Intex to invest in flood prevention measures that the local government is not financing. Other environmental issues of concern include potential impacts on biodiversity, water quality, agriculture, tourism potential etc.

²³ Environmental Management Bureau, Revised Procedural Manual for DAO 2003-30, Section 11 (d).

twenty five people went on hunger strike outside DENR offices in Manila. This led to revocation of the ECC, and the establishment of a second committee that has not yet reported.²⁴

(b) In relation to watersheds, the Mining Act prohibits mining in watersheds that have been designated as protected. However, the MNP mine site area is not designated as a protected watershed so is not covered by this ban.

Intex is not relying on the legal argument about whether or not the area is a watershed. The company argues that the way in which they will mine the nickel resource will not impact the rivers that rise in the area because they will mine in small blocks, restoring each as they go so reducing the risks of sediment flowing into rivers and that they will install sediment traps in each block to ensure no sediment is released (and that the incentives to do this are pollution control and production because sediment contains valuable metals). The approach proposed by Intex and the reasons why they consider there are no risks to the quality of the rivers has been explained in broad terms in 'Mine Information and Education' meetings run by Intex in Mindoro. However the detailed studies underlying these assertions have not been released, and therefore have not been subject to public scrutiny in the Philippines. We have not seen these studies, nor do we have the technical expertise to evaluate them.

9. Possible contravention of Guidelines with respect to Bribery and Disclosure

The complainants raise two specific concerns, one is about the provision of finance to NCIP to delineate the ancestral domain of IPs with whom MNP has an MOA; the second is about providing community benefits to communities whilst the project is still seeking approvals that will show it has social acceptability.

With respect to the funds to NCIP – this was investigated by NCIP in 2008 as part of the investigation of the MOAs. NCIP found that NCIP made a request to Intex for these funds. However the NCIP officials involved did not follow the authorised processes of NCIP procedures where non-NCIP resources are used to finance NCIP activities. However the investigation concluded that this does not affect the validity of the FCIP process.

In relation to MNP funding community projects, it is common practice worldwide for mining companies to support community projects even before production starts. However, the system in the Philippines through which projects must demonstrate social acceptability through formal resolutions from different layers of local government exposes companies to criticism that they are spending money on community projects in order to secure endorsements is not usual

²⁴ On November 18, 2009, the ECC was suspended for 90 days by DENR; on November 27 it was temporarily revoked under DENR Special Order No.2009-921.

worldwide. Further, international good practice, as recommended for example by the mining company-lead 'International Council on Mining and Metals' is that companies should be transparent about how decisions are made on community projects, and should seek, where possible to partner with NGO and local government organizations. Intex does not appear to have a transparent, publicly disclosed system for allocating community development funds and is therefore open to allegations of using community projects to secure support.

10. Conclusions

The conclusion we draw from this is that the MNP is complying with national requirements, and under Philippines law has yet to find out whether they will secure approval to mine, and under what environmental conditions. However Intex has not been proactive in making public the technical information and impact studies that would allow stakeholders to evaluate the company's claims that the project will be safe for the environment. Further, as recognised by Intex, more extensive impact assessment and stakeholder consultation will be needed to conform to the IFC Performance Standards which includes, for example, evaluating if the project risks having negative impacts on livelihoods and if so, developing mitigation measures, as well as identifying the direct and indirect positive impacts in terms of jobs, revenues etc.

Our evaluation is that Intex is not yet operating in a way that is consistent with international standards as defined by the IFC Performance Standards/Equator Principles. In particular, IFC standards require on-going engagement from the earliest stage with *all* IPs potentially affected by a project, and that proposals to mitigate adverse impacts be developed in consultation with affected people. International standards require an environmental and social impact assessment and environmental and social management plans to be disclosed in a way that is readily accessible by those who will be impacted and other interested parties. This means, for example, making at least a thorough non-technical summary available in local languages; it usually involves meeting with NGOs and civil society groups that have concerns or expertise in relation to specific issues, and making available the technical analysis on which key assertions, such as those relating to siltation and flood risks, have been arrived at.

ANNEX 1 PROGRAM OF ACTIVITIES, 10-21 January 2011

10 January, Monday

10:00 - 13:30 Meeting with Fr. Edu Gariguez of Mangyan Mission and NASSA (National Secretariat for Social Action- Justice and Peace), and Lodel Magbanua, PIPLinks Philippines, Quezon City

14:00 - 17:00 Meeting with NGOs: Legal Rights Center, Haribon Foundation, PIPLinks Philippines, Fr. Archie Casey and Jaybee Garganera (41-B Mapagsanguni St.,Quezon City

18:00 -19:30 Meeting with Knut Solem, the Norwegian Ambassador to the Philippines, Makati City

11 January, Tuesday

8:00 - 11:30 Meeting with Intex Resources CEO and Staff, Intex Office in Ortigas City

12:00 -13:00 Meeting with Nelia Halcon, Executive Vice-President, Chamber of Mines of the Philippines

1:30 - 16:00 Meeting with National Commission on Indigenous Peoples (NCIP) Roque Agton, Jr.,Chairman of NCIP and Legal Staff

16:30 – 17:30 Meeting with Roland de Jesus, Regional Director of Mines and Geosciences Bureau (MGB), Region 1VB MIMAROPA, Department of Environment and Natural Resources (DENR)

12 January, Wednesday

6:00 - 10:00 Travel to Mindoro by road Manila to Batangas; then Ferry to Calapan, Oriental Mindoro

11:00 -12:00 Meeting with Jeff Rafa, Coordinator from ALAMIN NGO

Travel from Calapan to Victoria

14:30 - 16:30 Meeting with Mayor Alfredo Ortega, Jr. of Victoria and LGUs, Mindoro Oriental

Travel back to Calapan (2 hours by road)

13 January, Thursday

9:00 - 11:30 Meeting with leaders of Mangyans in KPLN, and SANAMA Anti-Mining groups

12:00 - 15:00 Meeting with ALAMIN women leaders and environmental activists

15:15 – 16:30 Meeting in Calapan with Governor Alfonso Umali, Jr of Oriental Mindoro

Evening – Coordination Meeting with Jeff Rafa

14 January, Friday

6:30 - 14:00 Travel to Mindoro Occidental : Ferry To Batangas from Calapan; Ferry to Abra de Ilog from Batangas; then By road to Mamburao, Occidental Mindoro

Lunch Stop in Abra de Ilog Municipal Hall hosted by Mayor Eric Constanti

no, in absentia

14:30 – 15:30 Meeting in Mamburao with Governor Josephine Sato of Mindoro Occidental and Staff

Travel to Sablayan (3 hours by road)

15 January, Saturday

8:00 – 9:00 Meeting with the Youth at La Safia Hotel in Sablayan

9:00 – 14:00 Meeting at the Mayor’s Office in Sablayan, with Municipal Mayor Ed Gadiano and his Staff, LGU Barangay leaders, and Mangyan leaders

16 January, Sunday

7:30 – 17:00 Travel to Barangay Pag-Asa and back to Sablayan; Meeting with Mangyan leaders in the Village, at the foot of the mountain

17 January, Monday

9:00 – 10:30 Meeting with Intex Staff in Countrywoods, Sablayan

11:00 – 12:00 Meeting with NCIP Bureau Office Director and Staff in Sablayan

15:00 – 19:00 Meeting with Pro-Mining Groups, NGOs, and Mangyan leaders at the Garden of Eden, Sablayan

Travel to San Jose (2 hours)

18 January, Tuesday

6:30 – 14:00 Travel to Oriental Mindoro from Occidental side

14:30 – 15:30 Meeting with Barangay Captain and Councilman (Sangguniang Barangay) in Barangay Alcate, on the way to the Mine Site

15:30 – 16:00 Travel to Mine Site Area, Barangay Villa Serveza

Travel back to Victoria

17:00 – 19:30 Meeting with Pro Mining Groups, NGOs, and other interested stakeholders at the Intex Field Office in Barangay Mabini, Victoria

Travel to Calapan (2 hours)

19 January, Wednesday

10:00 – 14:00 Travel back to Manila (Ferry to Batangas from Calapan, Car to Manila)

13:00- 17:30 Meeting with Velma Cholipas, former Regional Director of NCIP (1998) at Sulu Hotel, Quezon City

20 January, Thursday

9:00 – 13:00 Last meeting with Intex in Intex Office Ortigas

15:00 – 17:00 Meeting with Janet Serrano Reisland, former NCIP Commissioner

21 January, Friday

8:30 – 10:30 Meeting with Prof. Rene Rollon, Director of Institute of Environmental Science and Meteorology (IESM), University of the Philippines, Quezon City

11:45 – 12:45 Meeting with Horace Ramos, former DENR Secretary and former MGB Director and Intex Lawyer Leo Cleto Gamolo

14:00 – 16:00 Meeting with Cesar Siador, Jr., Chief of Environmental Impact Assessment and Management Division, Environmental Management Bureau, DENR.