



The Norwegian National Contact Point  
for the OECD Guidelines for Multinational Enterprises

# FINAL STATEMENT

COMPLAINT FROM *THE FUTURE IN OUR HANDS (FIOH)* AGAINST  
*INTEX RESOURCES ASA* AND THE MINDORO NICKEL PROJECT

NORWEGIAN NATIONAL CONTACT POINT (NCP)

FOR THE OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES

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## KEY TERMS

CADC	Certificate of Ancestral Domains Claim
CADT	Certificate of Ancestral Domains Title
DENR	Department for Environment and Natural Resources
ECC	Environmental Clearance Certificate
EIA	Environmental Impact Assessment
EIS	Environmental Impact Statement
EMB	Environmental Management Bureau
EMP	Environmental Management Plan
FBI	Field-Based Investigation
FIVH	Future in Our Hands (Complainant)
FPIC	Free and Prior Informed Consent
ICC	Indigenous Cultural Community
IP	Indigenous Peoples
IPRA	Indigenous Peoples Rights Act (1997)
IRR	Implementing Rules and Regulations for IPRA (1998)
MNP	Mindoro Nickel Project
MOA	Memorandum of Agreement
MPSA	Mineral Production Sharing Agreement
NCIP	National Commission on Indigenous Peoples
NCP	Norwegian National Contact Point for the OECD Guidelines for MNEs
OECD	Organisation for Economic Cooperation and Development
RSF	Residue Storage Facility
UNDRIP	United Nations Declaration on the Rights of Indigenous Peoples
WFP	Work and Financial Plan

## EXECUTIVE SUMMARY

### COMPLAINT

The Norwegian Contact Point (NCP) for the OECD Guidelines for Multinational Enterprises (MNEs) received a complaint against Intex Resources ASA (Intex) from the Future In Our Hands (FIOH) on 26 January 2009 concerning the Mindoro Nickel Project (MNP) in the Philippines.

FIOH alleges possible breaches of the OECD Guidelines for MNEs (the Guidelines) on the grounds that:

- (1) Consultations with indigenous people are flawed and the project contravenes the wishes of the affected community and peoples;
- (2) Intex has been involved in bribery to facilitate mining exploration permits, and failed to comply with the standards for disclosure set forth by the Guidelines;
- (3) There is a risk of severe environmental damage if the project is materialised, and this has not been communicated appropriately to affected stakeholders.

### CONTEXT

- Exploration of approximately one third of the total area for the Mindoro Nickel Project (MNP) has been completed. Intex Resources completed feasibility studies in 2010 to develop this area and transport excavated material to a coastal processing plant. Intex has not responded to the NCPs request as to where the processing plant will be.
- Efforts are under way to secure the permits and authorisation for mining. The project had acquired Free, Prior and Informed Consent (FPIC) certificates from the National Commission for Indigenous People (NCIP), and an Environmental Clearance Certificate (ECC) from the Department of Environment and Natural Resources (DENR). The ECC has been temporarily revoked after local protests and hunger strikes against the project.
- A special committee was set up by the Philippine authorities in November 2009 to investigate the project. The committee has not yet submitted its assessment.
- Intex claims to have followed all instructions from the Philippine authorities, and on that basis claims not to be in breach of the Guidelines.

### BASIS FOR THE ASSESSMENT

- The OECD Guidelines require that enterprises follow national regulations. The *Commentary* to the Guidelines further states that “compliance with national law though necessary is not sufficient for compliance with the Guidelines.”
- While the Guidelines do not provide detailed standards to which companies should adhere, companies are expected to consider the views of other stakeholders before, during and at the termination of projects. “Stakeholders” are all those affected by the project. The “project” includes all project components including the mine site, the

processing site, residual deposit and transportation routes on land and at sea. In order for stakeholders to decide whether to support the project, they must have access to information about these key components.

- Chapter III of the Guidelines include specifications regarding businesses' activities, including project plans. As the company states that it will adhere to the World Bank/International Finance Corporations Standards and the Equator Principles, the NCP expects the company to follow these widely recognised guidelines. The IFC Social and Environmental Performance Standards require companies to identify and engage with stakeholders who may be impacted by, or who have an interest in, the planned or ongoing project.
- The NCP underscores that the OECD Guidelines are applicable to enterprises that are still at a planning or exploratory stage of their operations. The Guidelines, combined with instruments such as the IFC Performance Standards, address issues that should be a part of a company's due diligence process. Guidance for due diligence is provided in the updated version (2011) of the Guidelines. As the complaint was filed in 2009, it is assessed according to the 2000 version of the Guidelines. Recommendations for future conduct are based on the revised Guidelines.<sup>1</sup>
- The basis for the conclusions and recommendations of the NCP is in the footnotes. Key sources include submissions from the company and complainant, an independent Fact-Finding by JSL Consulting (2011), independent reports from Norwegian Institute for Water Research (NIVA) and- Tingay Consulting (2011), embassy reports, Philippine legislation, Presidential Decrees and UN documents and other reports.

## CONCLUSIONS

### *COMMUNITY RELATIONS AND CONSULTATIONS WITH INDIGENOUS PEOPLES*

- In the view of the NCP, the MNP has not been able to foster the necessary relationships of confidence and mutual trust on Mindoro in accordance with the OECD Guidelines, Chapter II, Section 7. Two organisations of indigenous peoples, the Kabilogan and the Sadaki, have given Free and Prior Consent (FPIC) to mining. However, opposition remains strong among some indigenous peoples (Alangan and Tadyawan) with ancestral rights to the land.
- Based on the OECD Guidelines recommendation to "consider the views of other stakeholders" and other relevant international standards, the NCP takes a broad and inclusive approach to which indigenous peoples companies should consult. Indigenous groups other than those consulted by the company may be affected by the MNP, either at the mine or by related infrastructure. These include not only the part of the tribe that inhabits the land, but also those who use the land according to their tradition and culture.

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<sup>1</sup> Adopted at the ministerial level of OECD 25 May 2011.



- The Philippine authorities have approved the FPIC consultations. However, the authorities have also urged Intex to identify primary and secondary Mangyan organisations and additional groups and their priorities and consultation requirements. An NCIP Fact-Finding Team stated on 9 October 2008 that Intex should consult other indigenous peoples if the Environmental Impact Assessment (EIA) proved that such groups would be affected by the project. NCIP Resolution 307 (project AMA-IVB-103) and NCIP Resolution 308, 2008 (project AMA-IVB-101) for Occidental Mindoro recommend that Intex consult more broadly.
- The company has since 2008 invited a broader group of stakeholders to consultations, and it is clear that some groups have not wanted to meet with the company at this point. In the view of the NCP, however, the company should have systematically investigated whether indigenous groups other than the Kabilogan and the Sadaki could be impacted by all project components (mine and infrastructure) at an earlier stage of project planning. The company should also have investigated if the groups with which they have consulted are legitimate representatives of all the affected indigenous peoples.
- Despite requests from the NCP and recommendations in the Report of JSL Consulting, Intex has not presented a clear, proactive stakeholder engagement strategy. Intex has informed the NCP about its plans to establish the Mindoro Mangyan Development Council to include representatives of the indigenous peoples on Mindoro on the Board for policy direction and development planning. The NCP underlines the importance of implementing these plans and of basing the selection of individuals for the board on existing indigenous decision-making structures.

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#### DISCLOSURE AND COMBATING BRIBERY

- According to Chapter VI of the OECD Guidelines, “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.” The NCP has not found evidence that establishes that the company has been involved in bribery or corruption.
- The Norwegian NCP notes the findings of a 2008 Fact-Finding Team from the National Commission on Indigenous Peoples (NCIP) that the funding of the local NCIP for “logistical support” does not constitute a violation of the domestic Guidelines for Free and Prior Informed Consent (FPIC). The Fact-Finding Team found, however, “a blatant disregard of, and failure to observe and comply with the procedure which, as a rule, is required in cases when non-NCIP resources are used to finance NCIP-mandated and related activities or projects, such as delineation and titling application activities. Consequently, those involved/concerned should be given the opportunity to explain before any sanction is to be meted.” The NCIP Team found that “with respect to the amount disbursed by Intex for the resurvey of CADC [Certificate of Ancestral Domain Claim] 024, the NCIP personnel who facilitated the disbursement of funds when no WFP [Work and Financial Plan] and MOA [Memorandum of Agreement] had been duly approved should be made to explain.”
- The NCP finds reason to question the procedures by which the FPIC was obtained from the local communities involved. Intex informs the NCP in a letter dated 27 February 2009 that out of “Intex’ budget allocation of pesos 2 million for logistics needed to undertake a survey leading to the completion of and the issuance of the Certificate of

*Ancestral Domain Title (CADT) application of one of the groups in the Mangyan community only pesos 901,399.60 was spent.* Intex also writes that the money was spent “in accordance with the Work and Financial Plan (WFP) that was prepared by the NCIP.” At this point, Intex had allegedly obtained promises from two groups that they would consent to the mining project. The results of the survey undertaken by the NCIP was to establish these two groups as rightful counterparts to FPIC procedures, and not include other groups with equal claims to the lands.

- The allocation and payment to the local office was linked to the delineation of land of indigenous peoples at a time when Intex was securing a license to mine. The NCP finds that the involvement of Intex in these procedures merits further investigation by appropriate authorities.
- The NCP does not find that Intex has acted inconsistently with the OECD Guidelines by supporting a community development project in Alcate to build a 10 million pesos dike. Intex has shown that this is in compliance with local authorities requirements and has disclosed details regarding the project. However, commencing community projects prior to gaining social acceptability may raise doubts as to whether the company is undertaking such projects in order to secure endorsements.
- Intex does not appear to have a transparent, publicly disclosed system for allocating community development funds, and is advised to establish clear criteria and systems for allocating community funding.

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#### ENVIRONMENTAL INFORMATION AND COMMUNICATION

- The extraction of minerals and metals requires a careful assessment and disclosure of the potential for direct and indirect environmental impacts. The Guidelines Chapter V Section 1 require enterprises to collect and evaluate “adequate and timely information regarding the environmental, health, and safety impacts of their activities.” Sharing information and engaging in consultations about environmental, health and safety consequences with the local community and indigenous peoples is a key requirement of the Guidelines, and is of particular importance for projects with large and potentially lasting impacts for the environment and people. Intex has committed itself to following World Bank/IFC standards for social and environmental impact assessments.
- The NCP finds that Intex has conducted an Environmental Impact Statement/ Environmental Impact Assessment (EIS/EIA) that identifies a number of environmental and social issues associated with the MNP. A draft EIA, according to IFC Performance Standard 1, should describe all of the components of the project, and any ‘associated facilities’ that will be developed by others directly as a result of the project. It should assess impacts and specify impact mitigation and monitoring measures. For any components not fully defined at the time the EIA is conducted, it should set out follow-up assessments and how these will be disclosed. The duration (Mindex, now Intex, received an exploration permit in 1997), size, and complexity of the project speak to the need for a detailed and clear EIA about key aspects of the project.
- The company has not provided the NCP with the EIA but the NCP has seen a draft of the document dated September 2009. The NCP finds that the EIA provides information on the design of some major components of the project in detail and contains a considerable

amount of baseline physical and biological information. It provides information on communities on Mindoro that are likely to be directly and indirectly affected by the project. Much of the data has been collected by field surveys and reflects considerable work by the scientists involved.

- The NCP finds, however, that the EIA does not provide adequate information about a number of important aspects of the project. There is an absence of details on waste emissions, modelling of atmospheric emissions, and the potential for marine pollution. There is little information about environmental and social implications of the maintenance road and bridges and whether the route will run through wetlands and biodiversity areas. The location and design of key components do not include details on drainage management at the mine, the residue storage facility, the transport of ore, and transport corridors. The EIA does not contain detailed information on design criteria and the design life of the dam wall and associated structures. Alternative site options are being considered and should be documented and compared in terms of social, environmental, operational, and cost implications.
- The NCP also takes note of claimed lack of information and baseline studies from the Philippine EIA Review Committee. In 2009, the EIA Review Committee noted a lack of baseline information on four of six components of the project, no information on indicative design and hectarage related to housing/township, poor delineation of impact areas and poor integration among modules “making inference of possible major impacts vague and extremely difficult to evaluate.”
- To fulfil its objective, the EIA needs to be comprehensive; focus on the identification, clarification and objective analysis of issues; and be well-illustrated. The EIA for the MNP could be substantially improved in all of these respects in accordance with the IFC Performance Standards, which require “comprehensive risk and impact evaluations that include the project’s area of influence.”
- The NCP appreciates that the project is still in its planning phase and that the EIA was not completed when the complaint to the NCP was raised in January 2009. Full disclosure of environmental impacts could therefore not be expected at the time. The NCP finds, however, that draft documents and plans should have been made available in line with IFC Performance Standard 1, which requires prior disclosure of relevant and adequate information, including draft documents and plans.
- The NCP finds that the EIA, when completed and before the ECC was issued, was not disseminated according to the procedures set forth by the Environmental Management Bureau (EMB). The Philippine EMB procedural manual 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.*”
- According to the JSL Consulting Report (2011), the EIA of the project was not shared with the Mayor, any of the Municipalities or other local authorities. The Governors and mayors of both provinces informed that they had not seen the EIA. It is not available online and has not been made available in Tagalog or in Mangyan dialects. The NCP furthermore finds that the consent given by indigenous peoples was provided before the

EIA was completed and before the design of the project has been finalised. Thus, the consent was not sufficiently informed.

- JSL Consulting reports that local communities in Mindoro fear that mining will exacerbate the flood problems and pollution of rice fields in the area, while others are looking to Intex to invest in flood prevention measures that the local government is not financing. The municipality rejected a Norwegian development assistance (NORAD) flood control project due to local opposition to the Norwegian-owned MNP. Other environmental issues of concern registered by JSL Consulting include potential impacts on biodiversity, water quality, agriculture, and tourism potential.
- The NCP has not found evidence that Intex has clarified to the local population whether proposed mitigations will be sufficient to prevent an increase in landslides, the possible contamination of water sources, where and how waste disposal will be carried out, the location of the processing plant, and details related to the conveyor route and other transportation issues. The NCP finds that such information should be made available to the local population at an early stage of the project in line with the OECD Guidelines and IFC Performance Standard 1, Section 21.
- The NCP finds that Intex has not been proactive in making available technical information and impact studies, including maps and illustrations, which would allow stakeholders to evaluate claims that the MNP will be safe for the environment and the health of the population. The absence of a readily available EIA and other environmental information makes it difficult for the affected community to assess the actual implications of the project. A presentation of plans for mitigation and monitoring to all concerned stakeholders would be expected in light of the known risks related to mining in vulnerable environments and the information in the EIA.
- Intex has gathered and presented information on environmental and social impacts and mitigations in the Definitive Feasibility Study and the EIA. However, the NCP upholds the allegations of FIOH, finding that the information provided on environmental impacts is incomplete. The NCP expects Intex to provide the public with “adequate and timely information” on the environment, health and safety impacts of the project. The NCP expects Intex to engage in “adequate and timely communication and consultation” with the affected communities on environmental risks. Failing to do so constitutes a breach of Chapter V of the OECD Guidelines.

## RECOMMENDATIONS

The duty and mandate of the NCP is to make recommendations on the implementation of the OECD Guidelines in accordance with the “Procedural Guidance” (Chapter C, number 3). The NCP recommends that Intex Resources as a minimum acts upon the following recommendations:

- *Conduct due diligence* in relation to the entire project impact area, including associated infrastructure. As part of the due diligence process, identify primary and secondary Mangyan groups potentially affected by MNP.
- *Engage in consultations* with all impacted indigenous peoples in an understandable language and form, respecting the outcome of the consultations. Establish a consultation system to regularly exchange information with all stakeholders.



- *Establish a transparent system* for deciding community spending and disclose systematic information on criteria for planned and implemented projects. In relation to allegations of bribery, inform involved parties about all details such as concerns “logistical support” and the “request for additional funds.”
- *Develop disclosure and reporting plans and systems* in accordance with the IFC Performance Standards and the Global Reporting Initiative (GRI). Base the recently updated *Code of Conduct* and plan for combating corruption on acknowledged international guidelines, and communicate it to the public and in potential contracts.
- *Prepare a revised Environmental and Social Impact Assessment (ESIA or EIA)* that provides a comprehensive and detailed analysis of all the environmental and social implications of all components of the project. The EIA/ESIA should be organised, clearly illustrated and with understandable data and differentiate between significant and less significant risks.
- *Finalise the EIA* in dialogue with all relevant groups directly affected by the company’s operations and *ensure* a review by an independent third party. Make the draft EIA publicly available in local languages, including a summary, and invite all stakeholders to hearings to obtain feedback.
- *Establish a grievance management system* to cover the range of possible grievances including environmental health and safety, labour rights, and community grievances by impacted groups and indigenous peoples.

## BACKGROUND AND PROCEDURE

### THE OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES (MNES)

The OECD Guidelines for MNEs comprise a set of voluntary principles and standards for responsible business conduct in areas including disclosure, employment and industrial relations, environment, combating bribery, consumer interests, science and technology, competition, and taxation. The Guidelines are not legally binding. However, OECD governments and a number of non-OECD countries have committed to encouraging multinational enterprises operating in or from their territories to observe the Guidelines wherever they operate, while taking into account the particular circumstances of each host country. Updated Guidelines were adopted 25 May 2011, and will be applied to complaints submitted after 1 September 2011.

The Guidelines are implemented in adhering countries by National Contact Points (NCPs), which are charged with raising awareness of the Guidelines amongst businesses and civil society. NCPs are also responsible for dealing with complaints that the Guidelines have been breached by multinational enterprises operating in or from their territories.

### THE NORWEGIAN NATIONAL CONTACT POINT (NCP)

The NCP is tasked with assessing possible violations of the OECD Guidelines. According to the Guidelines, obeying domestic law is the first obligation of business.<sup>2</sup> The Guidelines make reference to other international instruments relevant to business operations. Where there is weak national implementation or legislation, or a discrepancy between national and international standards, the NCP encourages the company to base its business on the more stringent standard. The NCP expects companies to take initiatives to solve conflicts with civil society and to answer questions from the NCP in a cooperative, precise and speedy manner. The NCP also expects the company to demonstrate how the Guidelines influence its business conduct.

The complaint process is broadly divided into the following key stages:

- (1) **Initial Assessment:** Analysis of the complaint, the company's response, and any additional information provided by the parties. The NCP will use this information to determine whether the complaint merits further consideration.
- (2) **Conciliation/mediation or Examination:** The NCP will offer conciliation/mediation to the parties with the aim of reaching a settlement agreeable to both parties. Should conciliation/mediation fail to achieve a resolution or should the parties decline the offer, the NCP will examine the complaint in order to assess whether it is justified.
- (3) **Final Statement:** If a mediated settlement has been reached, the NCP will publish a Final Statement with details of the agreement. If conciliation/mediation is refused or fails to result in an agreement, the NCP will examine the complaint and prepare and publish a Final Statement. The Final Statement consists of an assessment of whether or not the Guidelines have been breached and, if appropriate, recommendations to the company for future conduct.

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<sup>2</sup> OECD Guiding Principles Chapter I, Item 7 and 8 and Commentary Item 2. The OECD Guidelines' commentary 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."

The Norwegian NCPs complaint process, Initial Assessments, Final Statements and Follow-Up Statements, are published on the NCP's website: [www.responsiblebusiness.no](http://www.responsiblebusiness.no).

## NCP PROCESS IN THIS SPECIFIC INSTANCE

The complaint was received by the NCP from FIOH on 27 January 2009. The complainant argues that Intex Resources is in violation of Chapter II, Item 7 of the OECD Guidelines, and is in possible violation of Chapters III, V and VI. See Annex II / Table II. On 4 March 2009, the NCP considered that the submission from FIOH met the criteria for accepting a complaint under the Guidelines.

The NCP shared the complaint with Intex in March 2009. Intex submitted its response in February and March 2009 (Annex II). A series of meetings were held and the NCP solicited fact-finding from the Norwegian Embassy in Manila in 2010. To further examine the allegations, independent experts were commissioned to conduct a fact-finding mission to Mindoro/the Philippines from January 10-21, 2011.<sup>3</sup> The choice of experts and terms of reference were mutually agreed with the parties.

After 26 months of processing the complaint, the NCP was re-organised and made independent of the government, with four new members and a new Secretariat. The new NCP took over the case on 1 March 2011. The new NCP contacted the parties for a meeting and offered dialogue/mediation in March 2011, which the parties declined. On 30 March 2011, the new NCP assessed the admissibility of the complaint, and decided to progress the assessment in accordance with the complaint procedure while building on the processing of the case by the former NCP.

Based on prior fact-finding, the NCP submitted a request for clarification to enable a more substantiated response to the complaint on 20 June 2011. As the CEO was travelling extensively, and none other than the CEO according to Intex had sufficient knowledge to answer the questions posed, Intex requested a new postponement, and was granted an extension until 1 September 2011. The Norwegian NCP received responses to the questions on 24 September 2011 (Annex III) and additional documentation as a response to the draft final statement on 21 November 2011.

The NCP has considered all the information submitted by FIOH and Intex Resources. The NCP has also considered and given weight to the information collected during the fact-finding mission in January 2011 by independent experts and reviewed information from relevant external sources.<sup>4</sup> A draft of the final statement was shared with the parties in accordance with NCP procedures.

## DETAILS OF THE PARTIES INVOLVED

**THE COMPLAINANT:** Framtiden i våre hender (The Future in Our Hands, from hereon FIOH) is a Norwegian-registered NGO and research centre working for fair distribution of the world's resources and works for environmental and ethical investments. FIOH works with other NGOs on issues related to mining in the Philippines, including PIPLinks (a UK based organisation working on indigenous peoples rights, particularly on the Philippines)<sup>5</sup> and Alamin (*Alyansa Laban sa Mindex - Alliance Against Mindex*) based in Mindoro.

<sup>3</sup> Shankleman, J. & Tamondong, S. JSL Consulting. Report of the Fact-Finding Mission to Mindoro, the Philippines. January 2011.

<sup>4</sup> Final Statements, inter alia from the Dutch NCP (Shell/Pandacan 2008) and UK NCP (Vedanta 2009). Recommendations on exclusion from the Norwegian Pension Fund's investment universe (value 10. June 2011 NOK 3037 bill.), Freeport 15 February 2006, Vedanta 15 May 2007, Rio Tinto 15 February 2008, Barrick Gold Corporation 14 August 2008.

<sup>5</sup> See <http://www.piplinks.org/>.

**THE COMPANY:** Intex Resources ASA (hereafter “Intex”) is a Norwegian registered mining- and exploration company headquartered in Oslo, Norway. Intex Resources AS is a subsidiary fully owned by Intex Resources ASA, an international mining company focusing on the exploration of metals and minerals. Intex Resources AS was established 17 October 2007. Intex Resources AS primary activity is to own stocks and act as a holding company for the Philippine companies that control the Mindoro Nickel Project (MNP). At the end of 2009 the company did not have any employees. The result for 2009 was NOK 0, - with assets of NOK 506 316,-. The company is administered by the parent company in Oslo.<sup>6</sup>

Intex Resources AS isolated the various projects that the company is involved in into separate legal entities in December 2009. They are now organised in the Philippine subsidiaries Aglubang Mining Corporation (AMC), Alagang Mining Inc (AMI), Shapa Holding Corporation (SHC), Intex Resources Phils. Inc., (IRPI), PiliPoint Processing Inc (PPPI), and Wise Tech Services Inc. (WTSI). Stocks were transferred to Intex Resources ASA. Intex has been asked by the NCP to verify this information and explain the changes of structure and role of WTSI in relation to the project, but has not responded to this request.

## THE PROJECT IN QUESTION

The Mindoro Nickel Project (MNP) has had a series of owners.<sup>7</sup> Intex Resources and Philippine affiliates, Aglubang Mining Company and AlagAg Mining Company, currently own it. Exploration has been completed on approximately one third of the total mine area held by the MNP. The MNP is located in the central region of Mindoro Island and straddles the two Provinces of Oriental and Occidental Mindoro.<sup>8</sup> The project is at an advanced stage of completing feasibility studies to develop this part of the mine area and to transport excavated material to a coastal processing plant. Intex informs that, unlike other nickel mines in the Philippines, the MNP will process nickel in the Philippines, creating a value-added export. The MNP will produce materials useful to industry in the Philippines and will generate power without using fossil fuels. Capital Expenditures are estimated at around US\$2.5bn.

The MNP is partly underway to securing the permits and authorisations for mining. It acquired Free and Prior and Informed Consent (FPIC) certificates from the National Commission on Indigenous Peoples (NCIP), and an Environmental Clearance Certificate (ECC) from the Environmental Bureau of the Department of Environment and Natural Resources (DENR). A special committee set up in November 2009 to investigate irregularities has since revoked the ECC. The MNP has not achieved ‘Social Acceptability’ which requires formal resolutions of support from at least two of the three levels of local government. Both of the provinces and two municipalities where the mine site and project facilities are expected to be located have declared a 25-year moratorium on mining. Such a time-limited mining moratorium is presumed valid until it is challenged and declared unconstitutional by a court, according to the Philippine Department of Justice.<sup>9</sup>

Since the core activity of Intex is to manage the MNP, Intex and the MNP will be referred to as “the company” in this document.

<sup>6</sup> Information about the company from *The Brønnøysund Register Centre*, Annual Report (2011).

<sup>7</sup> In 1997 it was owned by Mindex and 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 the MNP for several years. This includes the Acting CEO, Jon Petersen.

<sup>8</sup> Final Draft EIA – Project Location and Area – Mine Site, Section 3.1.1.

<sup>9</sup> Philippine Department of Justice (DOJ) Opinions No. 035 s. 2001 and extracts from DOJ Opinions No. 008, s. 20051 reaffirming the legal position outlined in Opinion No 35 s. 2001.

**Table I. Intex' status in relation to Philippine requirements for mining<sup>10</sup>**

	<b>Requirement</b>	<b>Issuing authority</b>	<b>Status</b>
<b>Exploration Permit</b>	Permit to search or prospect for mineral resources. Valid for a two-year period and can be renewed twice or for a total of six years.	Department of Energy and Natural Resources– Mines and Geosciences Bureau (DENR-MGB)	Issued in 1997 and renewed in 1999.
<b>Certificate of Precondition of Free and Prior Informed Consent (FPIC)<sup>11</sup></b>	Opening ancestral land for mining requires free, prior and informed consent of the indigenous peoples concerned. <sup>12</sup>	National Commission on Indigenous Peoples (NCIP)	Certification of Precondition issued in Jan 1999 for original concession area. Memorandum of Agreement (MOA) signed and FPIC certified in 2008 for expanded concession area.
<b>Feasibility Study</b>	A declaration of mining project feasibility accompanied by a work program for development	Filed to DENR-MGB	Issued in Aug 2008: Revised Pre-Feasibility Study. Feb 2010: Definitive Feasibility Study.
<b>Mineral Production Sharing Agreement (MPSA)<sup>13</sup></b>	Gives the company exclusive rights to the concession area for 25 years and renewable for up to an additional 25 years. The Philippine Government will receive a share of the gross value of production, which in this case corresponds to two percent of the market value of	DENR-MGB	Exploration permit issued in Jul 2000 for Oriental Mindoro <sup>14</sup> and in Mar 2009 for Occidental Mindoro. <sup>15</sup> MPSA for Oriental Mindoro withdrawn by DENR in 2001 and reinstated by the Office of the President in 2004. <sup>16</sup>

<sup>10</sup> See the Mindoro Nickel Definitive Feasibility Study (2010), p. 19 for other permits required to mine. These include permits for sand and gravel quarry, transport, land developments, and environmental protection and management of land, air and water.

<sup>11</sup> According to Philippine legislation, the government requires a Mining Production Sharing Agreement (MPSA) which requires i.a. that the project has "Free Prior and Informed Consent" (from hereon FPIC) from indigenous peoples. The government agency responsible for certification of FPIC is the National Commission for Indigenous People (NCIP). The NCIP is also responsible for implementing the Indigenous Peoples Rights Act of 1997.

<sup>12</sup> Free and Prior Informed Consent (FPIC) Guidelines of 2006.

<sup>13</sup> Additional MPSA titles for three remaining subareas are approved "for registration" in 2009 and 2010, whereas the MPSA obtained in 2000 was approved "for exploration." See <http://www.intexresources.com/annualreport2010/section.cfm?path=107,109>, and DENR Mines and Geosciences Bureau, MRMS Report No. 002A

[http://www.mgb.gov.ph/Files/Permits/Applications/September\\_2011\\_MPSA\\_2A.pdf](http://www.mgb.gov.ph/Files/Permits/Applications/September_2011_MPSA_2A.pdf).

<sup>14</sup> See DENR Mines and Geosciences Bureau MRMS Report No. 002A.

[http://www.mgb.gov.ph/Files/Permits/Applications/September\\_2011\\_MPSA\\_2A.pdf](http://www.mgb.gov.ph/Files/Permits/Applications/September_2011_MPSA_2A.pdf)

<sup>15</sup> See <http://www.intexresources.com/news.cfm?id=126> and See DENR Mines and Geosciences Bureau MRMS Report No. 002A

[http://www.mgb.gov.ph/Files/Permits/Applications/September\\_2011\\_MPSA\\_2A.pdf](http://www.mgb.gov.ph/Files/Permits/Applications/September_2011_MPSA_2A.pdf)

<sup>16</sup> See Mindoro Nickel Definitive Feasibility Study (2010), <http://www.intexresources.com/news.cfm?id=246> and

<http://www.intexresources.com/annualreport2010/section.cfm?path=107,109>.

	the extracted nickel.		
<b>Environmental Impact Statement (EIS/EIA)</b>	Aims to identify, predict, interpret and communicate information regarding changes in environmental quality associated with a proposed project.	The company (part of the ECC process)	Issued in Jan 2009
<b>Environmental Clearance Certificate (ECC)<sup>17</sup></b>	Certifies that the project will not bring about unacceptable environmental impacts and that the proponent has complied with the requirements of the environmental impact statement system. Includes a series of public hearings.	Environmental Management Bureau (EMB)	Issued in Oct 2009. Signed by Secretary of the DENR. Temporarily revoked in Nov 2009. Special Order by DENR to set up a multi-sectoral group to investigate the ECC. Intex submitted a formal appeal to the Office of the President through the legal office.
<b>Minerals Processing Permit</b>	Permit to construct the processing plant. Five-year validity, renewable for five years. Cannot exceed 25 years.		

<sup>17</sup> Conditions include compliance with the environmental management and protection requirements of the Philippine Mining Act of 1995. This includes an Environmental Protection and Enhancement Program (EPEP), a Contingent Liability and Rehabilitation Fund (CLRF), and establishing a Mine Environmental Protection and Enhancement Office (MEPEO) to implement the Social Development and Management Program (SDMP) and submitting a report to the relevant MGB Region on an annual basis.

## COMMUNITY RELATIONS AND CONSULTATIONS WITH INDIGENOUS PEOPLES

### THE COMPLAINT

FIOH allege that Intex Resources is in breach of Chapter II of the OECD Guidelines based on the following claims:

- Consultations to obtain “Free and Prior and Informed Consent” (FPIC) have been flawed. FPIC was obtained in 1999 and in 2008 from organisations that do not represent peoples from areas directly impacted by the project. The consultation processes have been limited and agreements have not been in the local languages.
- The company has demonstrated an inability to build loyalty and mutual trust in the society in which it operates. It has undermined the opposition of civil society, including local politicians, the church and the organisations of indigenous peoples.

FIOH allege that the MNP is in breach of the following provisions of Chapter II – General Policies of the OECD Guidelines:

*Enterprises should take fully into account established policies in the countries in which they operate, and consider the views of other stakeholders. In this regard, 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 (Section 7).*

### RESPONSE FROM THE COMPANY

Intex disputes the allegation that the FPIC process was flawed in 1999 and 2008, and that the company is operating contrary to local will. Intex claims that it has invested considerable resources in informing the local population about the project in the local language. The company claims that a group of indigenous peoples belonging to a mix of Bangon, Tadyawan and Alangan tribes, issued FPIC and entered into an agreement with the company. Furthermore, Intex states that the indigenous peoples, who claimed to have rights to the land, were not legally eligible to participate in consultations as they did not reside in the impact or affected area.<sup>18</sup> Intex’ claims are substantiated by documentation submitted in 2009 and 2011 (Annex III).

### NATIONAL STANDARDS AND ASSESSMENT

The Constitution of 1987<sup>19</sup> and the Indigenous Peoples Rights Act (IPRA) of 1997 commit the state to promoting the rights of indigenous peoples in the Philippines. The IPRA defines Indigenous Peoples (IPs) as group of people or homogenous societies who have: “...*continuously lived as an organised community on communally bounded and defined territory, and who have, under claims of ownership since time immemorial, occupied land, possessed customs, tradition and other distinctive cultural traits or who have, through*

<sup>18</sup> Letter from Intex Resources to the Norwegian NCP, 27 February 2009.

<sup>19</sup> See Article II, Section 22 of The Constitution of the Republic of the Philippines (1987).

*resistance to political, social and cultural inroads of colonisation, non-indigenous religions and culture, become historically differentiated from the majority of Filipinos.”<sup>20</sup>*

The Philippines is commended for being among the few countries to have implemented the "Free, Prior and Informed Consent" provisions of the UN Declaration on the Rights of Indigenous Peoples (UNDRIP). The *Free and Prior Informed Consent Guidelines* of 2006 outline the principles and procedures for securing the consent of indigenous peoples. Consent is to be obtained from all members of indigenous peoples, free from any external manipulation “after fully disclosing the intent and scope of the activity, in a language and process understandable to the community.”<sup>21</sup> The consent of all affected Mangyan communities is mandatory prior to the approval of the mining concession. When the project affects territories covering two or more ancestral domains, the consent of all indigenous people is required.<sup>22</sup>

A Fact-Finding Team from the National Commission on Indigenous Peoples (NCIP) has investigated claims filed against Intex and the FPIC process by a federation of seven tribes from Oriental Mindoro.<sup>23</sup> In their report of 9 October 2008, the NCIP Team concluded that the 2008 consensus-building activities were conducted in accordance with the FPIC Guidelines, and that the affected areas and indigenous peoples whose consent should be obtained were properly identified.<sup>24</sup> They recommended that the Ancestral Domains Office evaluate the endorsed documents and the Memorandum of Agreement (MOA),<sup>25</sup> and submit its recommendations to the NCIP for their deliberation. The report stated that if the Environmental Impact Assessment (EIA) shows that other groups/communities would be affected, Intex would be required to undergo another consultation. The NCIP also stated that the Alag-ag MOA, concerning project AMA-IVB-101 must be with the Alangan/Mangyan community and not the Sadaki association<sup>26</sup> and that the Aglubang MOA, concerning project AMA-IVB-103 must be with the Mangyan Bangon/Ruwang community and not the Kabilogan association.<sup>27</sup>

Although the Philippines have developed legislation and procedures for protecting the interests of indigenous people, its implementation is often lacking.<sup>28</sup> There are complaints that the NCIP acts more as a broker between indigenous peoples and mining companies than as a protector the interests of indigenous peoples.<sup>29</sup> Amendments to the FPIC rules have been proposed to address the proliferating complaints of IPs with regards to the processing of FPIC.<sup>30</sup>

<sup>20</sup> Administrative Order No. 1 – Series of 1998. Rules and Regulations Implementing Republic Act no. 1, Series of 1998, otherwise known as the Indigenous Peoples Rights Act (IPRA), of 1997. Chapter II, Section 3 h). See [http://www.adb.org/Documents/Reports/Indigenous\\_Peoples/PHI/biblio.pdf](http://www.adb.org/Documents/Reports/Indigenous_Peoples/PHI/biblio.pdf).

<sup>21</sup> The Indigenous Peoples Rights Act (1997). Section 3. g).

<sup>22</sup> Rules and Regulations Implementing Republic Act No. 8371, otherwise known as “The Indigenous Peoples’ Rights Act of 1997”, Section 4. c).

<sup>23</sup> The tribes seeking an investigation by the NCIP were the Iraya, Alangan, Tadyawan, Mangyan Bangon, Buhid, Tao Buhid, and Hanunuo tribes.

<sup>24</sup> Office of the President - National Commission on Indigenous Peoples, Fact-Finding Team, 10/09/08.

<sup>25</sup> Regarding the Aglubang FPIC and CP application, NCIP Resolution no. 307, Series of 2008.

<sup>26</sup> Office of the President - NCIP Resolution no. 308, Series of 2008.

<sup>27</sup> Office of the President-NCIP Resolution no. 307, Series of 2007.

<sup>28</sup> In 2007, the UN Committee on the Elimination of all Forms of Racial Discrimination (CERD) invoked its Early Warning and Urgent Action Procedure in relation to the NCIP conduct in the context of a mining operation in indigenous lands in Mindanao. In a letter to the Government of the Philippines of August 24, 2007, the Committee expresses concern that despite the adoption of the IPRA, “the Act has not been implemented to date.” See also the CERD Early Warning Urgent Action letter to the Government of the Philippines of March 7, 2008 where the Committee finds that the situation had not improved, <http://www2.ohchr.org/english/bodies/cerd/early-warning.htm>. Furthermore, the International trade Union Confederation (ITUC) 2011 Report for the WTO General Council Review of the trade policies of Philippines “*Internationally Recognised Core Labour Standards in Philippines*”, Recommendation no.14 recommends that: The 1995 Mining Code and other laws overlapping with the 1987 Indigenous People’s Rights Act (IPRA) should be revised and measures to should be taken to enforce the IPRA.

<sup>29</sup> Shankleman et al., p.10.

<sup>30</sup> Philippine House of Representatives Committee Daily Bulletin of September 12, 2011 refers to a meeting in the Committee on National Cultural Communities and their ongoing review of the process for issuing free and prior informed consent (FPIC) following House Resolution 887 by Representative Teddy Baguilat.

The UN Special Rapporteur on the Rights of Indigenous Peoples has identified a major gap between the Indigenous Peoples Rights Act (IPRA) and its implementation, expressing concern regarding: “...*serious human rights issues related to the lack of its effective implementation. For poor indigenous farming communities crucial land rights are addressed by filing legal claims to their own ancestral domains and titles. The process is cumbersome and indigenous representatives perceive that the business interests of private enterprises, which over the years have encroached upon their ancestral domains, are more protected than their own rights based on land use and continuous occupation.*”<sup>31</sup>

## FACTS RELATING TO THE COMPLAINT

Indigenous peoples comprise an estimated ten to fifteen percent<sup>32</sup> of the population in the Philippines. The Mindoro Island consists of the Oriental and Occidental Provinces with a population of one million, of which the indigenous population is estimated at 100,000. Mangyan is the name for eight indigenous groups with different languages and traditions. These are the Alangan, Tau-buid, Tadyawan, Bangon, Buhid, Hanunuo, Ratagnon and Iraya tribes.<sup>33</sup> Many of the tribes are illiterate, politically and economically marginalised, and dependent on traditional ways for subsistence. Their attachment to the land differs from non-indigenous peoples, through i.a. ancestral graves and holy sites, gathering food, fuel and medicine; obtaining clothes and household goods and equipment from the forest; and practices such as hunting and nomadic farming.<sup>34</sup> At least two of the tribes, Alangan and Tadyawan, claim to have such attachment to the proposed mine site. This is attested by the Certificates of Ancestral Domain Claims (CADCs) recognised by the government, and is illustrated in Figures 1 and 2.

Intex engaged in FPIC negotiations and signed an MOA with the indigenous association Kabilogan in 1999. In 2008, Intex signed an agreement with the Kabilogan and the Sadaki for an extension of the Mindoro Nickel Concession.<sup>35</sup> The core of the complaint from FIOH is that the company has consulted with indigenous peoples that are not entitled to provide approval for the project. FIOH claim that Kabilogan was created upon the initiative of the mining project and the government to separate a smaller group from the tribe to secure formal consent for mining. They claim that the Kabilogan did not have a CADC to the land in 1999. In 2008, Intex again entered into consultations with the Kabilogan as well as the more recently formed Sadaki association. These consultations are also allegedly invalid as the company failed to include other affected indigenous peoples.

In a letter to the NCP, the organisation PIPLinks and Middlesex University Department of Law have affirmed FIOH claims, stating that the Kabilogan have been selectively identified and constitute a “minority of the Mangyan in the impacted ancestral domains”.<sup>36</sup> When the fact-finders commissioned by the Norwegian NCP met representatives that had consented to the MNP, 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.”<sup>37</sup> According to Intex, the

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[http://www.congress.gov.ph/download/commdaily/CDB%20Vol%202%20No.%2025%20\(09.12.11\).pdf](http://www.congress.gov.ph/download/commdaily/CDB%20Vol%202%20No.%2025%20(09.12.11).pdf). Debate on proposed amendments to the FPIC rules has led to questioning of whether the FPIC process is problematic in areas where several recognised IPs are located. Reference made to comments by Representative Zamora-Apsay

[http://www.ecomval.gov.ph/ecomval/index2.php?option=com\\_content&do\\_pdf=1&id=8065](http://www.ecomval.gov.ph/ecomval/index2.php?option=com_content&do_pdf=1&id=8065)

<sup>31</sup> UN documents E/CN.4/2003/90/Add.3.

<sup>32</sup> See [www.iwgia.org/regions/asia/philippines/country-facts](http://www.iwgia.org/regions/asia/philippines/country-facts) and <http://www.culturalsurvival.org/philippines>

<sup>33</sup> <http://www.mangyan.org/content/mangyan-groups>.

<sup>34</sup> Good Practice Guide: Indigenous Peoples and Mining. International Council on Mining and Metals (ICMM): <http://www.icmm.com/library/indigenouspeoplesguide>.

<sup>35</sup> Letter from Intex Resources to the NCP, 27 February 2009.

<sup>36</sup> Response to the Norwegian NCP of 4<sup>th</sup> May 2009 regarding the complaint against Intex Resources lodged on 26 January 2009.

<sup>37</sup> Shankleman et al., p. 13. The meeting was held 18 June 2010 at Eden Beach, Sablayan, Occidental Mindoro.

Mangyans who were going to be directly affected by the MNP “decided to organise themselves into a group called Kabilogan”<sup>38</sup> because they lived on the project concession.

Kabilogan was formed relatively recently (1998) and is made up of members from the Rangon Ruwang, Bangon, Buwid and Tadyawan tribes.<sup>39</sup> Sadaki is composed of members of the Alangan and Tadyawan tribes, and is an offshoot of the Kabilogan. A report from Intex suggests that the Kabilogan were initially organised to represent the interests of the Mangyans in dealing with businessmen who buy their rattan products.<sup>40</sup> Intex has established that households belonging to the Kabilogan and Sadaki groups live in the mine site area.<sup>41</sup>

NCIP resolution 307, 2008, states that the First Party to the MOA with Aglubang in Sablayan, Occidental Mindoro, are the Mangyan – Bangon/Ruwang indigenous peoples and not the Kabilogan.<sup>42</sup> Correspondingly, the subsequent NCIP resolution 308 states that the First Party to the MOA with Alag-ag in Sablayan, Occidental Mindoro, is the Alangang/Mangyan community and not the Sadaki association.<sup>43</sup>

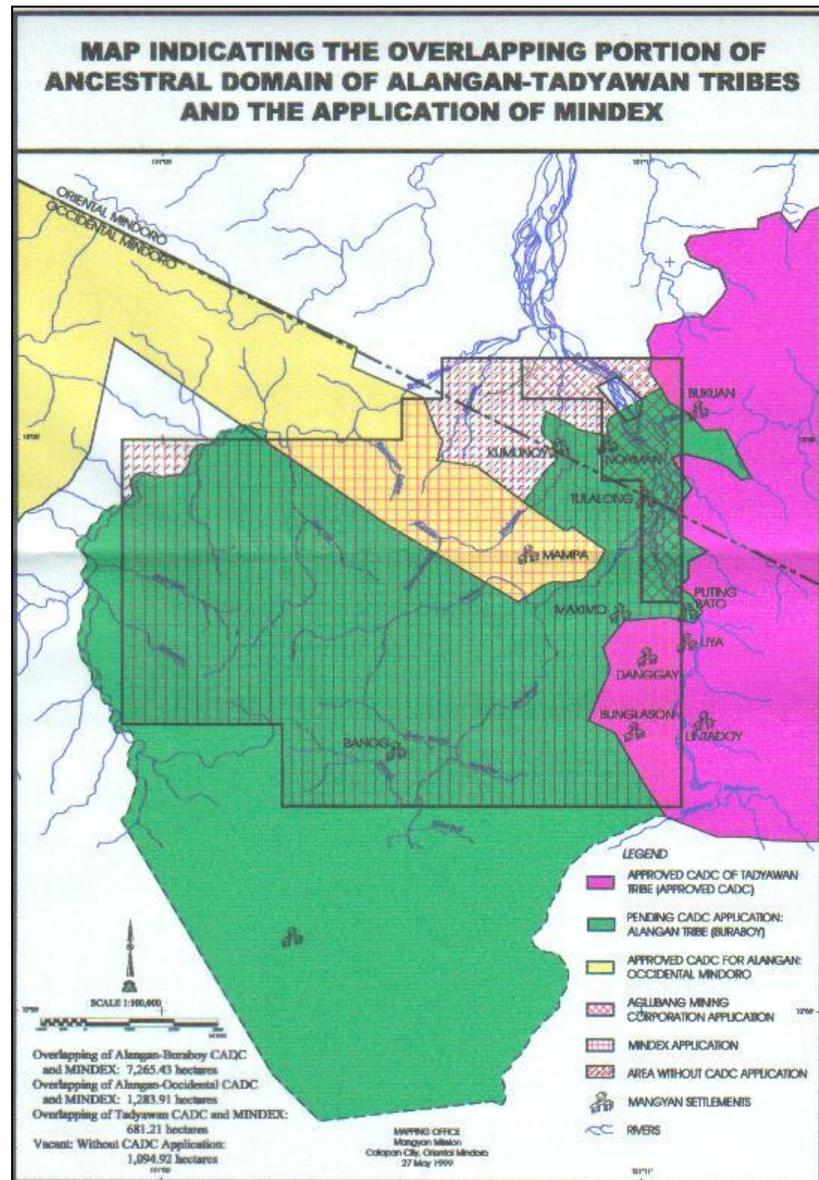


Figure 1: Map showing indigenous peoples claims to land overlapping with Mindoro Nickel Project

<sup>38</sup> Letter from Intex to the NCP, 27 February 2009.

<sup>39</sup> Final Draft EIA, Volume 1, Section 4.4.3.1.1.2.3 (Ethnic Origin, Religion and Dialects Spoken), first paragraph.

<sup>40</sup> Ibid, Volume 1, Section 4.4.3.1.1.2.7.

<sup>41</sup> At least one household of Hanunuo tribe and more than 14 other households from other or mixed tribes have been identified, according to Intex’ Final Draft EIA section 4.4.3.1.1.1.11.

<sup>42</sup> Office of the President-NCIP Resolution 307, Series of 2008, 9 October 2008.

<sup>43</sup> Ibid.

## NCP ANALYSIS

### HAS THE COMPANY ENGAGED IN CONSULTATIONS WITH THE REPRESENTATIVE AND LEGITIMATE INDIGENOUS PEOPLES?

The OECD Guidelines do not directly define with whom companies should consult, but call for Multinational Enterprises (MNEs) to “consider the views of other stakeholders.” The meaning of “other stakeholders” is defined further in the *Commentary on General Policies*: “MNEs are encouraged to respect human rights, not only in their dealings with employees, but also with respect to others affected by their activities, in a manner that is consistent with host governments’ international obligations and commitments. The Universal Declaration of Human Rights and other human rights obligations of the government concerned are of particular relevance in this regard.”<sup>44</sup>

The reference to the human rights obligations of the host government in the case of the Philippines points to the duty of MNEs to include indigenous peoples among their stakeholders. The core international standard<sup>45</sup> on the rights of indigenous peoples is the Universal Declaration on the Rights of Indigenous Peoples (UNDRIP).<sup>46</sup> Article 18 affirms the rights of indigenous people to choose their own representatives and participate in decision-making processes: “Indigenous peoples have the right to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision-making institutions.”

The right of indigenous peoples to select their own representatives is affirmed in Article 32.2 of UNDRIP, calling States to “consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions.” States are to consult with the indigenous peoples concerned in order to obtain free and informed consent “prior to the approval of any project affecting their lands or territories and other resources.”

ILO Convention no. 169, ratified by Norway in 1990, requires broad consultation with the indigenous peoples concerned “through appropriate procedures and in particular through their representative institutions.”<sup>47</sup> In March 2011, the UN Committee on the Elimination of all forms of Racial Discrimination placed a duty on Norway to ensure that the standards affirmed in ILO Convention no. 169 are applied not just in indigenous territories in Norway, but also by Norwegian companies operating overseas.<sup>48</sup>

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<sup>44</sup> OECD Guidelines for MNEs (2000), General Policies, Commentary. The 2011 version of the Guidelines (adopted 27 May 2011 at the OECD Ministerial level) includes indigenous peoples in the new Chapter IV on Human Rights and Chapter V on Employment and Industrial Relations (Commentaries).

<sup>45</sup> Of relevant binding international instruments, the Philippines has ratified the Convention for the Protection of the World Cultural and Natural Heritage (1972), the Convention on the Prevention and Punishment of the Crime of Genocide (1948), and the International Convention on the Elimination of All Forms of Racial Discrimination (1965). Norway has ratified all international instruments on indigenous people, including The Indigenous and Tribal Peoples Convention, ILO Convention no. 169 (1989).

<sup>46</sup> The UN Declaration on the Rights of Indigenous Peoples (UNDRIP) was adopted by consensus by the UN General Assembly, where both Norway and the Philippines are members. UNDRIP reflects Articles 1, (the right to self-determination) 2(1), 18, and 27 of the UN International Covenant on Civil and Political Rights, Articles 5(c), 5(d)(v), 5(e) of the UN Convention on the Elimination of All Forms of Racial Discrimination, and Article 8(j) of the Convention on Biological Diversity which covers the protection of indigenous communities.

<sup>47</sup> ILO Convention no. 169, Article 6, 1 a).

<sup>48</sup> The Philippines have not ratified ILO Convention no. 169. See UN CERD 2011 Concluding Observations to Norway Para 17. Available at: [http://www2.ohchr.org/english/bodies/cerd/docs/co/Norway\\_AUV.pdf](http://www2.ohchr.org/english/bodies/cerd/docs/co/Norway_AUV.pdf)

The NCP finds that the Kabilogan and the Sadaki associations do not fulfil the definition of indigenous peoples of the IPRA.<sup>49</sup> Neither the Kabilogan nor the Sadaki constitute “homogenous societies” with claims of ownership to the land since “time immemorial.”<sup>50</sup> Rather, they consist of some members of different tribes with distinct dialects.<sup>51</sup> The IPRA states that CADTs are issued to indigenous cultural communities and indigenous peoples / tribes and not to associations or organisations.<sup>52</sup> Certificates of Ancestral Land Titles (CALTs) are issued to individuals, families and clans.<sup>53</sup> Ancestral lands are included in Ancestral Domains and, even in cases where individuals obtain CALTs, decision-making capacity over natural resources in the Domain rests with the collective community / people / tribe.<sup>54</sup>

The NCP does not find evidence that the company has established the groups for its own purposes.<sup>55</sup> Neither is there available evidence that the Kabilogan and the Sadaki have been chosen as the representatives of the affected indigenous groups “pursuant to their own decision-making processes.”<sup>56</sup> There is no documentation that all the concerned indigenous peoples have agreed to allow the organisations to negotiate with the MNP on their behalf. This merits further investigation in light of the frequent inaccuracy with which indigenous representatives are selected. This problem has been described by the NCIP, the very institute charged with issuing land titles to indigenous peoples:

*“...the existence and proliferation of various IPOs [Indigenous Peoples Organisations] promoting different objectives within an Ancestral Domain is often the cause of divisiveness between and among community members. There arises the selection of many leaders/representatives, many of whom may not be recognised as such by other community members and the creation of positions or titles/designation that may be contrary or not within the indigenous leadership or political structure of the community. Thus, the Commission should provide guidelines on the registration of IPOs in order to determine the authorised representatives of the ICC/IPs.”<sup>57</sup>*

The NCP finds that the Kabilogan and the Sadaki represent some members of the indigenous peoples that would be affected by the MNP, but it is not clear that they constitute the legitimate representatives of all affected indigenous peoples. The NCP does not find evidence that they have been chosen by all the affected indigenous peoples to represent their interests. The uncertainty surrounding the selection of representatives for indigenous peoples should mobilise Intex to investigate further whether these groups indeed represent all affected indigenous peoples.

<sup>49</sup> Indigenous Peoples Rights Act (1997). The definition from the IPRA is used, as there is no universal definition of indigenous people in international law.

<sup>50</sup> Chapter II, Section 3. litra h) of the Indigenous Peoples Rights Act (1997).

<sup>51</sup> The dialects spoken by the members of the Kabilogan-association are Talagong, Mangyan, Bangon, Tadyawan and various other mixed dialects, according to Final Draft EIA, Volume 1, Section 4.4.3.1.1.2.3 (Ethnic Origin, religion and Dialects Spoken), fourth paragraph.

<sup>52</sup> IPRA Section 3 a) ‘Ancestral Domains - Subject to Section 56 hereof, refer to all areas generally belonging to ICCs/IPs comprising lands, inland waters, coastal areas, and natural resources therein, held under a claim of ownership, occupied or possessed by ICCs/IPs, themselves or through their ancestors, communally or individually since time immemorial, continuously to the present except when interrupted by war, force majeure or displacement by force, deceit, stealth or as a consequence of government projects or any other voluntary dealings entered into by government and private individuals, corporations, and which are necessary to ensure their economic, social and cultural welfare. It shall include ancestral land, forests, pasture, residential, agricultural, and other lands individually owned whether alienable and disposable or otherwise, hunting grounds, burial grounds, worship areas, bodies of water, mineral and other natural resources, and lands which may no longer be exclusively occupied by ICCs/IPs but from which their traditionally had access to for their subsistence and traditional activities, particularly the home ranges of ICCs/IPs who are still nomadic and/or shifting cultivators.”

<sup>53</sup> IPRA Section 3 litra b). “Ancestral Lands - Subject to Section 56 hereof, refers to land occupied, possessed and utilised by individuals, families and clans who are members of the ICCs/IPs since time immemorial, by themselves or through their predecessors-in-interest, under claims of individual or traditional group ownership.”

<sup>54</sup> IPRA Section 3 a, c, g

<sup>55</sup> Memorandum Order No. 308/2008 by the Philippine National Commission for Indigenous Peoples.

<sup>56</sup> UN Declaration on the Rights of Indigenous Peoples, Article 18.

<sup>57</sup> Office of the President – National Commission for Indigenous Peoples CIP Report 9. Oct 2009.

## HAS THE COMPANY IDENTIFIED WHICH INDIGENOUS PEOPLES SHOULD BE CONSULTED?

The OECD Guidelines call companies to respect human rights of “others affected by their activities.”<sup>58</sup> ILO Convention no. 169 calls for particular attention to be given to “the situation of nomadic peoples and shifting cultivators.”<sup>59</sup> Furthermore, IFC Performance Standard No. 7 requires companies to “*identify through impact assessment all communities of IPs that might be affected by a project and avoid adverse impacts where possible.*”<sup>60</sup>

On the basis of the OECD Guidelines and other relevant international standards, the NCP takes a broad and inclusive approach to who companies should consult. The indigenous peoples understood as “affected” include not only those that inhabit the land, but also those who use it according to their tradition and culture.<sup>61</sup> The NCP understands the term “affected” as referring to *all* affected indigenous peoples, and not only a fraction of the group or tribe, or those inhabiting the land who may be forced to relocate due to the project or related infrastructure. It would be contrary to the intention of instruments designed to protect indigenous peoples or tribes to allow a fraction of the group, without individually based property rights, to enter into agreements affecting the tribe without consulting the tribe in its entirety.<sup>62</sup> The effect of this may be that members of the tribe become unable to use the land according to tribal customs.

There are clear indications that the mining concession area of Intex overlaps with two officially recognised claims to the land. These belong to the Mangyan Sanama and Kamti organisations, representing the Alangan and Tadyawan indigenous tribes respectively.<sup>63</sup> The practice of issuing claims to the land has since changed from issuing claims in the name of organisations to issuing claims to tribes.<sup>64</sup> Figures 1 and 2 show that the Alangan and Tadyawan tribes have documented ownership claims that overlap with the mine site.<sup>65</sup> A number of households were found in the affected area in 2008 that did not belong to the Sadaki or the Kabilogan.<sup>66</sup> Several Mangyan tribes practice shifting cultivation over long cycles, meaning they may at times occupy land proposed for the MNP.<sup>67</sup> A report produced by consultants to the MNP in 2009 identified some indigenous peoples in Kabilogan that farm land within the mine site but do not live

<sup>58</sup> OECD Guidelines for MNEs, Chapter II – General Policies – Commentary.

<sup>59</sup> ILO Convention no. 169, Article 14.1.

<sup>60</sup> See IFC Performance Standard 7 <http://www.ifc.org/ifcext/sustainability.nsf/Content/PerformanceStandards>.

<sup>61</sup> International human rights covenants, for example the International Covenant on Civil and Political Rights, supra note 24, art. 1 (2), Economic Social and Cultural Rights, G.A. res. 2200 (XXI) art. 1 (2) affirm: “*In no case may a people be deprived of its own means of subsistence.*” See Indigenous Peoples Rights Act of the Philippines, Section 5: “*Indigenous Concept of Ownership sustains the view that ancestral domains and all resources found therein shall serve as the material bases of their cultural integrity. The indigenous concept of ownership generally holds that ancestral domains are the ICCs/IPs private but community property which belongs to all generations and therefore cannot be sold, disposed or destroyed. It likewise covers sustainable traditional resource rights*” See also statement by the UN Committee against Racial Discrimination: “*The Committee urges the State party to consult with all concerned parties in order to address the issues (...) in a manner that respects customary laws and practices of the (...) people and welcomes information from (the Philippines) in relation to further developments*” (CERD/C/PHL/CO/20, para 25).

<sup>62</sup> An example of codification of this principle is found in Philippines Indigenous Peoples Rights Act Section 57 on Natural Resources within Ancestral Domains: “*The ICCs/IPs shall have the priority rights in the harvesting, extraction, development or exploitation of any natural resources within the ancestral domains. A non-member of the ICCs/IPs concerned may be allowed to take part in the development and utilisation of the natural resources for a period of not exceeding twenty-five (25) years renewable for not more than twenty-five (25) years: Provided, That a formal and written agreement is entered into with the ICCs/IPs concerned or that the community, pursuant to its own decision making process, has agreed to allow such operation: Provided, finally, That all the extractions shall be used to facilitate the development and improvement of the ancestral domains*”. See, for example, the Inter-American Court of Human Rights: Case of Saramaka vs. Suriname affirms territorial rights and right to FPIC of tribal people (Maroons). Judgment of 28 November 2007. See also Fleischer, 11. February 2004 Comments to the Norwegian Parliament on law proposal “Finnmarksloven”.

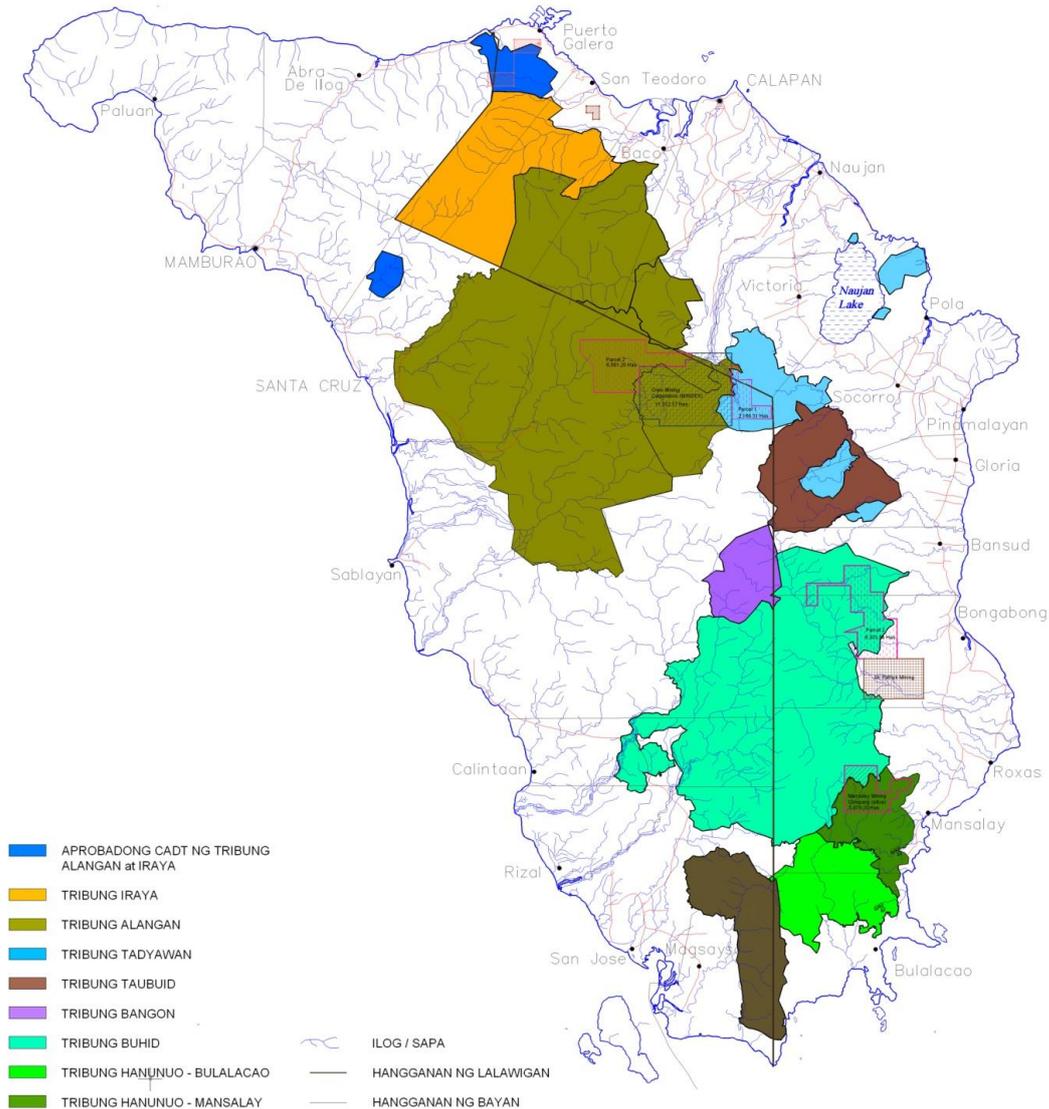
<sup>63</sup> Certificate for Ancestral Domain to Sanama and Kamti issued by NCIP according to map dated 27 May 1999.

<sup>64</sup> Memo from Intex to Norwegian NCP regarding complaint filed by FIVH, 19 May 2009.

<sup>65</sup> Certificate for Ancestral Domain issued by NCIP according to map dated 27 May 1999.

<sup>66</sup> At least one household of Hanunuo tribe and more than 14 other households from other or mixed tribes have been identified, according to Intex’ Final Draft EIA section 4.4.3.1.1.1.11.

<sup>67</sup> Walpole et al, Upland Philippines Communities, Manila Observatory, 1994.



**Figure 2: Map of Mindoro indicating location of the eight recognized indigenous tribes**

there.<sup>68</sup> There are also claims that other nomadic indigenous peoples exist in the mountains and might be affected by the mine.<sup>69</sup> Intex has not documented efforts to consult with these indigenous peoples.

For both the 1999 and 2008 FPIC consultations, the company appears to have defined the impact area as the mine site.<sup>70</sup> The potential effect of the mining project on indigenous peoples beyond the mine site has not been documented. This includes the effect of the project on indigenous peoples possibly residing by access roads, transmission lines and other associated facilities, including along the proposed 42 km conveyor corridor and other transportation routes to the processing site. It appears that neither the MNP nor the NCIP undertook any anthropological study in 1999 or later to identify indigenous peoples other than those found living on the mine site.

<sup>68</sup> Resettlement Planning Framework, Lichtel Technologies, 2009, Mindoro Nickel Project Draft EIA, Vol 3 Attachment.

<sup>69</sup> Shankleman et al. Fact finding mission meeting in Sablayan in January 2011 with indigenous peoples leaders.

<sup>70</sup> Shankleman et al. Fact finding mission to the Philippines (2011), p. 12.

In 2008, the NCIP Fact-Finding Team indicated that if the EIA showed the presence of other affected indigenous groups, the company would have to consult these groups.<sup>71</sup> This reservation indicates that the FPIC was not based on knowledge of which Mangyan communities would be impacted by issuing the concession.<sup>72</sup> Intex addresses this concern in a letter to the NCP, claiming that the right to consent is “*not prejudiced by having permitted the FPIC process to precede the completion of the EIA/EIS.*” Intex claims that the DENR “*will still require a project proponent to undertake a public hearing prior to the final issuance of the ECC (...) Any objection from the public or from the affected IPs will be considered for further study.*”<sup>73</sup>

Philippine authorities have approved of the FPIC consultations. However, already in 1999, Philippine authorities addressed the need for further consultations with indigenous peoples. The regional director of the NCIP advised the MNP to employ social scientists to guide their engagement with indigenous groups<sup>74</sup> following a number of problems with implementing the agreement with the company. Consultants on stakeholder relations<sup>75</sup> recommended in 2007 that the MNP undertake further work to identify the primary and secondary Mangyan organisations, and that “*...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.*”<sup>76</sup> The NCIP Fact-Finding Team stated on 9 October 2008 that Intex should consult other indigenous groups if the EIA proved that such groups would be affected by the project.

The NCP finds evidence that indigenous peoples who have not been consulted are likely to be affected by the MNP both within the site and by associated infrastructure. The NCP has not found evidence of systematic anthropological work and consultation with tribal elders to find out if other indigenous peoples will potentially be affected by the project within and beyond the project site.<sup>77</sup> The NCP notes that a tripartite monitoring team has recently been formed (2011) to increase transparency and accountability regarding commitments made in the MOA’s with indigenous peoples.<sup>78</sup>

In the view of the NCP, the company should have systematically investigated whether indigenous peoples other than those in the Kabilogan and the Sadaki could be impacted by project components (mine and infrastructure), and if the groups with which they consulted were the legitimate representatives of all the affected indigenous peoples. This should have been done at an early stage in the project in accordance with the OECD Guidelines and IFC Performance Standards.

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## HAVE THE CONSULTATIONS WITH KABILOGAN AND SADAKI BEEN FREE, PRIOR AND INFORMED?

A key requirement of the Philippine IPRA and the UNDRIP concerns the need to attain Free and Prior Informed Consent (FPIC) of indigenous peoples affected by business activities. The NCIP Fact-Finding Team established that the FPIC the MNP acquired from indigenous peoples in 2008 were free and prior to

<sup>71</sup> Office of the President – National Commission for Indigenous Peoples CIP Report 9. Oct 2009. See also Section 6, key finding d), of the RFFM.

<sup>72</sup> See for example Appendix 2 – Clarification of the FPIC Requirements.

<sup>73</sup> Letter from Intex to the Norwegian NCP, 19 May 2009.

<sup>74</sup> Final Draft EIA, Vol 3 Attachments, Indigenous Peoples Development Plan (IPDP) Framework.

<sup>75</sup> The 2007 IPDP Framework, included as an Annex to the Final Draft EIA.

<sup>76</sup> Final Draft EIA, Volume 1 Attachments, Stakeholder Identification, September 2007.

<sup>77</sup> Shankleman et al., p. 12.

<sup>78</sup> The MNP tripartite monitoring team is made up of representatives from the Indigenous Peoples “Mangyans” through their organisations Samahang Apo Dia Alangan ng Kisluyan Inc. (SADAKI) and Kabilogan ng Mangyan Inc. (KMI), Intex Resources Phils. Inc.(IRPI) led by Mr. Andy O. Pestaño the manger of the Community Relations and Development Office (CREDO) department, and the National Commission on the Indigenous Peoples(NCIP), Region IV-B. According to Intex, the group’s mandate is to manage the transparent and accountable delivery of MOA commitments and to ensure that these blessings be better managed by the Mangyan's so as to benefit the most number, for the longest-term possible and have lasting improvements to their lives.

<http://www.intexresources.com.ph/mindoronickel/news-joint-monitoring-team.html>

the commencement of the project.<sup>79</sup> The Kabilogan and the Sadaki were informed of potential negative impacts of the MNP such as relocation and have selected the sites to which they wish to relocate, according to the Fact-Finding Mission carried out for the Norwegian NCP. It is not clear whether they understood that the land might not support the kind of cultivation they currently undertake after mining.<sup>80</sup>

Another aspect of information concerns the language and nature of communication with affected populations. The FPIC/MOA agreements were not in local languages but in English and Tagalog and signed by fingerprints.<sup>81</sup> The indigenous peoples consulted have a high illiteracy rate, indicating that the signatories may not entirely have understood the written agreements. According to Intex, the agreements were translated into the Alangan-Mangyan dialect orally. There was a written translation of the MOA into Alangan in 1999 but not in 2008 because the “transparency of the 2008 process rendered it unnecessary.”<sup>82</sup> In 2007, a meeting was held between the Kabilogan, the Sadaki, the Norwegian Embassy and Intex where the leaders of the organisations expressed that they “understand the MOA that they signed in 1999.”<sup>83</sup>

The company is not required to disclose the draft or the final EIA in comprehensible terms to the indigenous peoples who give their consent. Indeed, FPIC was conducted prior to the completion of the EIA, which contains vital information as to potential negative effects of the project for people, health and the environment. This raises the question of whether their consent can be sufficiently informed. The UN Special Rapporteur on the Rights of Indigenous Peoples has emphasised that in order for indigenous peoples to make free and informed decisions, it is necessary that they are provided with “full and objective information about all aspects of the project that will affect them.” The Special Rapporteur states that discussions with indigenous peoples should occur “before the State has entered into any agreements with third parties.”<sup>84</sup> Whether Intex has fulfilled these recommendations and provided full and objective information is addressed further in Chapter 5.

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## DOES THE COMPANY HAVE EFFECTIVE SELF-REGULATORY PRACTICES AND MANAGEMENT SYSTEMS?

Chapter II of 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.”

The Norwegian NCP notes with concern that the MNP has relied heavily on the NCIP and the DENR to manage its relations with stakeholders, and has focused mainly on the indigenous peoples and non-indigenous communities in the immediate vicinity of the mine. The company has not informed that it has implemented a grievance management system<sup>85</sup> apart from the recently formed Joint Monitoring Team.<sup>86</sup>

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<sup>79</sup> NCIP Fact Finding Team Report dated 9 October 2008.

<sup>80</sup> Shankleman et al., p. 13-14.

<sup>81</sup> A common practice in the Philippines not necessarily related to illiteracy but used for instance to sign residential permits, according to CEO Jon Steen Petersen in E-mail to the NCP, 21 November 2011.

<sup>82</sup> Intex Resources response to Complaint filed by FIVH, 19 May 2009.

<sup>83</sup> Letter from Intex to the NCP, 27 February 2009.

<sup>84</sup> Report of the Special Rapporteur on the Rights of Indigenous Peoples, 10 August 2011. A/66/288.

<sup>85</sup> A/HRC/RES/17/4: UN Guiding Principles para 31 <http://www.business-humanrights.org/media/documents/ruggie/ruggie-guiding-principles-21-mar-2011.pdf>

<sup>86</sup> Joint Monitoring Team for Mindoro Nickel Project, Undated 2011, <http://www.intexresources.com.ph/mindoronickel/news-joint-monitoring-team.html>. According to DENR Administrative Order No. 2003-30, normally Multi-party Monitoring Teams (MMTs) shall be formed immediately after the issuance of an ECC. MMTs are organised to encourage public participation, to promote greater stakeholders' vigilance and to provide appropriate check and balance mechanisms in the monitoring of project implementation. The MMT is recommendatory to EMB. MMTs have the primary responsibility of *validation* of Proponent's environmental performance, with the following specific functions: i. Validate project compliance with the conditions stipulated in the ECC and the EMP; ii. Validate

When the Fact-Finding team hired by the NCP asked people how they communicated problems to Intex they were told they complained to the Mayor or to NGOs.<sup>87</sup>

Despite requests from the NCP, Intex has not been able to present a clear, proactive, stakeholder engagement strategy. The MNP does not have any indigenous peoples' specialists on its staff; although in 2007 consultants prepared an Indigenous Peoples Development Plan Framework for the project. The MNP has commissioned a large number of technical and environmental studies, but not made these publicly available in a way that would help people evaluate the projects claims.<sup>88</sup>

The project has not, so far, applied IFC Performance Standard 7, which requires companies to "identify through impact assessment all communities of IPs that might be affected by a project"<sup>89</sup> and "establish an ongoing relationship with the affected communities from as early as possible in the project."<sup>90</sup> To fulfil this requirement, Intex would have to conduct a more comprehensive impact assessment and engage with a wider set of potentially affected people and other stakeholders. To attain this goal, Intex is advised to have experienced environmental and social performance managers working according to clearly defined plans and procedures.<sup>91</sup>

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#### HAS THE PROJECT BUILT RELATIONSHIPS OF CONFIDENCE AND MUTUAL TRUST WITH THE COMMUNITY?

Overall, opposition to the MNP is strong. In September 2007, the Norwegian Embassy conducted a mission to evaluate the status of the MNP. The report concluded that the vast majority of the Mangyan peoples were "strongly opposed to any form of mining in their areas". The report predicted that the company might have "*substantial difficulty obtaining an ECC – because of the massive local resistance, not least the resistance in the Mangyan people's NCIP-registered organisations.*"<sup>92</sup>

Local offices of MNP have been opened and closed, and the company has had frequent changes in name and ownership since the project started in 1997. This seems to have damaged relations locally and created suspicion.<sup>93</sup> In 2009, opponents of the MNP demonstrated and participated in hunger strikes. It was not possible for the DENR to hold the full set of public consultations and hearings on project that are mandated by the Philippine environmental impact assessment process. There were disruptions at the meetings and the Provincial Governor of Oriental Mindoro issued 'cease and desist' orders that were delivered to Intex by the police. Some meetings were cancelled due to the risk of disturbance.

Opponents of the project include both elected provincial governors, the elected mayors of key municipalities potential affected by the project, several indigenous peoples groups, local civil society organisations (members of ALAMIN) and some of the local government units who have passed anti-mining resolutions. Attitudes have hardened to the extent where the governor of Oriental Mindoro told the Fact-Finders commissioned by the NCP 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

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Proponent's conduct of self-monitoring; iii. Receive complaints, gather relevant information to facilitate determination of validity of complaints or concerns about the project and timely transmit to the Proponent and EMB recommended measures to address the complaint; iv. Prepare, integrate & disseminate simplified validation reports to community stakeholders; v. Make regular and timely submission of MMT Reports based on the EMB-prescribed format. For details see DENR Administrative Order No. 2003-30 and <http://www.emb.gov.ph/eia-adb/mon-how.html>

<sup>87</sup> Shankleman et al., p.16.

<sup>88</sup> Ibid.

<sup>89</sup> See IFC Performance Standard 7 <http://www.ifc.org/ifcext/sustainability.nsf/Content/PerformanceStandards>.

<sup>90</sup> Ibid.

<sup>91</sup> Shankleman et al., p. 3.

<sup>92</sup> Report of Ambassador Ståle T. Risa to the Office of Secretary for Development, September 26, 2007.

<sup>93</sup> Shankleman et al., p. 2.

stated that “people have made their decision.”<sup>94</sup> In 2010, governors opposing the MNP were elected in both Oriental and Occidental Mindoro. Victoria and Sablayan, the two municipalities likely to be most directly impacted by the mine, elected Mayors opposing the project.<sup>95</sup>

Some opponents are not specifically opposed to the MNP but are against all mining in Mindoro. Others are opposed to any large-scale commercial activities in the mountains, and have successfully campaigned against other projects. Some only oppose the MNP on Mindoro. The Alangan tribe is vehemently against mining in the area where it claims to have ancestral graves and holy sites. It has not been documented that the planned extractions will constitute an improvement of the ancestral domains.<sup>96</sup> Intex Resources recognises that “...a lot more ground would be needed to raise the level of social acceptance for the Mindoro Nickel Project,” but finds that there is “a growing wave of support as manifested by the documented MOAs with the municipalities of San Teodoro and Pola.”<sup>97</sup>

The NCP finds that a minority appears to favour the project. There are reports that some local Barangay leaders and residents are positive to employment and economic opportunities from mining, both directly and indirectly via economic stimulus to Mindoro.<sup>98</sup> Those who have attended the Mining Awareness Seminars conducted by the MNP described these as useful and enlightening. It appears that support for the project is strongest among those in the vicinity of the mine, while opposition is more dispersed across the island.<sup>99</sup>

Protests occurring over the past decade indicate that opposition to the proposed mine remains high. Intex has informed the NCP about its plans to establish the Mindoro Mangyan Development Council and include representatives of all the indigenous peoples on Mindoro on the Board for policy direction and development planning. The NCP underlines the importance of basing the selection of individuals for the board on existing indigenous decision-making structures.

The mistrust of Intex may affect reputational risks for other actors and add to local tension, such as support for paramilitary groups. A Norwegian-funded flood control project has not progressed as foreseen due to local apprehension because of the otherwise unrelated mining exploration of Intex on Mindoro,<sup>100</sup> and Norwegian-led peace efforts between the government and Maoist groups may be undermined.<sup>101</sup>

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## CONCLUSION

The NCP finds that Intex has consulted only with the indigenous associations, Kabilogan and Sadaki. The NCP has not found evidence that the company has investigated whether these groups are the legitimate representatives of all affected indigenous peoples, while Philippine authorities have determined that Sadaki is not considered as such.<sup>102</sup> The NCP notes that it cannot be excluded that other indigenous

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<sup>94</sup> Ibid.

<sup>95</sup> At the election in May 2010 both municipalities most affected by the project elected Mayors opposing the project.

<sup>96</sup> Indigenous Peoples Rights Act, Section 57 (Natural Resources within Ancestral Domains).

<sup>97</sup> Letter from Intex to Norwegian NCP, 27 February 2009.

<sup>98</sup> Ibid.

<sup>99</sup> Shankleman et al., p. 11.

<sup>100</sup> Mid-Term Review of Pandang Gitam Oxidental Mindoro (preparation of Magasawa g Tubig Tubig a d Bucayao Rivers Flood Control Master Plan) 6 June 2008, Calapan City, Oriental Mindoro.

<sup>101</sup> On the western part of Mindoro, where Intex is considering establishing transport routes and infrastructure, insurgents such as the armed Maoist rebel group NPA operate. The New People's Army (NPA) (Filipino: Bagong Hukbong Bayan) is the armed wing of the Communist Party of the Philippines, established in 1969. According to their online information: “The NPA combat for land reform programs, reduction of land rent and interest on loans, fight against corruption, increasing the wage of farm workers, achieving reasonable price for farm produce and helping improve agricultural productivity.” NPA has attacked mining companies: <http://www.allvoices.com/news/10507329-npa-rebs-attack-3-mining-firms-in-surigao-del-norte>.

<sup>102</sup> Office of the President – National Commission on Indigenous Peoples, Resolution no. 308, Series of 2008.

individuals of other tribes may be attached to the affected area, and Intex does not appear to have consulted them.<sup>103</sup>

The NCP finds that Intex' failure to undertake broader and more systematic assessments of affected indigenous groups and consult with these groups is inconsistent with the requirement of the OECD Guidelines, Chapter II, to "consider the views of other stakeholders." There is no evidence that Intex has systematically investigated whether indigenous peoples other than those consulted could be impacted beyond the mine site by associated infrastructure. In the view of the NCP, the MNP has not been able to foster relationships of confidence and mutual trust on Mindoro in accordance with the OECD Guidelines Chapter II, Section 7.

The assessment of the Norwegian NCP is consistent with the recommendations of local authorities. In 1999, local authorities urged Intex to identify primary and secondary Mangyan organisations and additional groups and their priorities and consultation requirements. The NCP urges Intex to implement these recommendations and follow the requirements of IFC Performance Standard 7 regarding indigenous peoples.<sup>104</sup> Intex should undertake further work to identify the primary and secondary Mangyan groups, their roles and consultation requirements, and should include the land affected by the project beyond the immediate mine site within the MNP impact area.<sup>105</sup>

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<sup>103</sup> At least one household of Hanunuo tribe and more than 14 other households from other or mixed tribes, according to Intex' Final Draft EIA section 4.4.3.1.1.1.11.

<sup>104</sup> The IFC Performance Standards were updated in August 2011 to reflect the adoption of the UN Declaration on the Rights of Indigenous Peoples and the issuance of the UN Guidelines on Business and Human Rights. These standards come into effect in January 2012 replacing the 2006 IFC standards. They require indigenous peoples FPIC for the design, implementation and outcome of mining projects in or near their territories.

<sup>105</sup> Shankleman et al., p. 14.

## DISCLOSURE AND COMBATING BRIBERY

### THE COMPLAINT

The complaint from FIOH to the Norwegian NCP alleges that Intex Resources may have promised to give, or given an undue advantage to local government officials to obtain or retain business or other improper advantage in the Mindoro Nickel Project in the following respects:

- FIOH questions the budgetary allocation of 2 million pesos<sup>106</sup> to the National Commission for Indigenous People (NCIP) to cover costs of determining the boundaries between different tribes. The conclusion of the process supported by Intex defined the area within the mine site as belonging to the two indigenous groups, which had already made agreements with Intex.
- The provision of support to the NCIP may violate the FPIC Guidelines of the Philippine government stating that the NCIP cannot receive money, gifts or other donations from the applicant that are intended to inappropriately influence the outcome of the process.
- FIOH questions whether Intex is using community development projects to secure approval from communities during the application for mining permission. FIOH highlights the agreement between Intex and the village Alcate for the building of a 10 million pesos dike to prevent flooding.

FIVH requests an evaluation regarding a potential breach of the following provisions of the OECD Guidelines:

*“Chapter III (2): 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.*

*Chapter VI: 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: 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.”*

### RESPONSE FROM COMPANY

Intex Resources has confirmed making a budgetary allocation of 2 million pesos for logistics to undertake a survey leading to the completion and issuance of the CADT from the Kabilogan.<sup>107</sup> The company invited to a viewing of a video where a company employee in 2008 openly confirms the allocation and disbursement of funds to the NCIP.

Intex informs in a letter to the NCP 27 February 2009 that out of “Intex’ budget allocation of pesos 2 million for logistics needed to undertake a survey leading to the completion of and the issuance of the Certificate of Ancestral Domain Title (CADT) application of one of the groups in the Mangyan community only pesos 901,399.60 was spent.” Intex also informs that the money was spent “in accordance with the Work and

<sup>106</sup> Equals NOK 256 000/ USD 46 000/Euro 33 000 (pr medio Oct 2011).

<sup>107</sup> Memorandum Order No. 432 issued by the Chairman of FPIC.

Financial Plan (WFP) that was prepared by the NCIP.” According to Intex, *“the fact that it was subsequently learned that the WFP was not signed by the authorised NCIP officials does not detract from the completion of the FPIC in accordance with established guidelines. During this time, the former Regional Director on top of the process died of heart attack and the document was lost in translation.”* Intex, however, submitted a copy of the WFP to the NCP on 26 November 2011.

Intex highlights that the disbursement of funds to the NCIP was in accordance with the 1999 MOA between Intex (then Mindex), the NCIP and the Kabilogan. The agreement ensures that the Kabilogan would receive full support and assistance from the company in its efforts to obtain a CADT. Intex commits to “underwrite all the necessary and incidental expenses for the processing thereof.” The NCIP commits to *“exert best efforts to ensure timely issuance of CADT/CALT permits, and other documents recognising the rights of Kabilogan over the ancestral domain/land and the rights of the company to explore and mine the area.”*<sup>108</sup> The Kabilogan specifically requested this funding to help prevent unauthorised intrusion of Mindoro lowlanders into their ancestral domain.<sup>109</sup>

Regarding Intex Resources’ contribution of a 10 million pesos dike, the company explains: *“local barangay officials of Alcate requested assistance from Intex due to the unavailability of government funding. The request carried with it an urgency considering the fact that the rainy season in Alcate can be as long as seven months and this town is flood-prone.”* The company explains that the construction of the river dike *“was equally important since Alcate is the lone and most direct access route to the project concession area for the company’s employees.”* According to Intex, the payment was not a donation “but would be credited to social benefits the company would be required to undertake once the mine becomes operational.”<sup>110</sup>

## NATIONAL STANDARDS AND ASSESSMENT

The NCIP offices are not allowed to accept or receive money, gifts, or other valuable things from the applicant intended to *unduly influence* the outcome of the FPIC process. Neither are they to demand or receive from the applicant money, gifts, donations or other valuable things outside the approved work and financial and/or supplemental plan (WFP) for conducting the Field-Based Investigation and FPIC. At the same time, the proponent of a project requiring FPIC is to underwrite all expenses attendant to securing the free and prior informed consent of indigenous peoples.<sup>111</sup>

In 2008, the NCIP Fact-Finding Team investigated and validated the allegations that i.a. the local NCIP received money from Intex to finance the delineation of ancestral domains. The company has not disputed the findings of the Fact-Finding Team.

The NCIP Fact-Finding Team found that Intex had been informed by the NCIP that the delineation and titling conversion application was already being processed, but that the initial funding was insufficient to conduct a resurvey for a portion of the claim. Thus, a request for additional funds from Intex was made. The Team found that Intex had dispersed an amount totalling pesos 987,150,00 for the WFP prepared by the NCIP. The NCIP provincial office drafted the WFP for this payment from Intex. The WFP was not,

<sup>108</sup> Section 3.2 (1) of the 1999 MOA between the Kabilogan ng Mangyan and Mindex Resources Development, Inc.

<sup>109</sup> Intex refers to Section 3.2 (1) of the 1999 MOA between the Kabilogan, Mangyan and Mindex Resources Development, Inc. – the predecessor-in-interest of Crew Minerals/Intex Resources.

<sup>110</sup> Intex Resources letter to the Norwegian NCP 27 February 2009.

<sup>111</sup> The Work and Financial Plan (WFP) is issued by the Regional Surveys Division at the order of the NCIP Regional Director and gives the authority to issue Work Order or Authority to Survey Ancestral Domain for delineation after evaluation of if the proofs for a claim for ancestral lands/domains are sufficient. The actual delineation work cannot start before the NCIP has issued a Work Order or Survey Authority, which only happens after approval of the Work and Financial Plan under NCIP Resolution No. 23 (2003). NCIP Guidelines are found here: <http://www.iapad.org/pafid/docs/Survey%20Guidelines%20v.pdf>.

however, signed by authorised NCIP officials nor was an agreement forged to acknowledge the details of the parties' commitments and functions, as is required.<sup>112</sup>

The Fact-Finding Team found *"a blatant disregard of, and failure to observe and comply with the procedure which, as a rule, is required in cases when non-NCIP resources are used to finance NCIP-mandated and related activities or projects, such as delineation and titling application activities. Consequently, those involved/concerned should be given the opportunity to explain before any sanction is to be meted."* The NCIP Team found that *"with respect to the amount disbursed by Intex for the resurvey of CADC [Certificate of Ancestral Domain Claim] 024, the NCIP personnel who facilitated the disbursement of funds when no WFP and MOA had been duly approved should be made to explain."*<sup>113</sup> The Fact-Finding Team found that violations of routines regarding donations from non-NCIP resources are separate from, and do not affect, the FPIC process, concluding that the funding of the local NCIP for "logistical support" did not constitute a violation of the domestic FPIC Guidelines.

As regards community support, the Department for Environment and Natural Resources (DENR) requires companies holding an Exploration Permit or a Mineral Production Sharing Agreement to *"...develop and implement a Community Development Program (CPD) which implementation shall be supported by a fund equivalent to a minimum of ten percent (10.0 %) of the budget of the approved two (2)-year Exploration Work Program: Provided, That the CDP shall be developed in consultation and in partnership with the host communities within the area subject of active exploration activities."*<sup>114</sup>

## NCP ANALYSIS

### DID THE COMPANY OFFER OR OBTAIN UNDUE ADVANTAGE BY FINANCING THE DELINEATION OF LAND?

The NCP takes note of the findings of the 2008 NCIP Fact-Finding Team that the payment does not constitute a breach of the FPIC Guidelines, while questioning the absence of certain precisions in the FPIC Guidelines and the interpretation of these. The FPIC Guidelines do not specify whether FPIC expenses may include financing of delineation activities for issuing CADT to a specific indigenous group while a company is seeking the approval of this group. Furthermore, the Philippine Government and the NCIP are taking steps to address challenges relating to the implementation of the FPIC Guidelines in light of various concerns.<sup>115</sup>

<sup>112</sup> Report from the NCIP Fact-finding team (9 October 2008).

<sup>113</sup> Ibid.

<sup>114</sup> Government of the Philippines, Department of Environment and Natural Resources. Administrative Order No. 2010-13. May 5, 2010.

<sup>115</sup> Concerns are expressed i.a. in the Report on the Philippines Framework for Indigenous Rights of the UN Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous peoples. The NCIP (February 2011) has also proposed improvements to the FPIC guidelines, namely conduct of Environmental Impact Assessment (EIA) vis-a-vis the FPIC; suspension of projects without FPIC; creation of a regulatory body for MOA monitoring; higher royalty fees for the IPs; the need to document customary law and traditional decision making practices in IP areas; conduct policy dialogues to harmonise FPIC with other laws; and the perceived conflict of the Local Government Code and the IPRA Law on the issuance of permits. Following a briefing by NCIP and the Committee on National Cultural Communities of the House of Representatives on February 28, 2011 a Compostela Valley Representative Maria Carmen Zamora-Apsay supported the proposed amendments and stated *"the processing of FPIC is a bit problematic in areas where several recognised IPs are located"* and House Committee Chair Teddy Baguilat said *"there is also need to fully review the determination of benefit sharing and royalties in the utilisation of natural resources in IP areas as well as the corporate social responsibility of private project proponents"*.

[http://www.ecomval.gov.ph/ecomval/index.php?option=com\\_content&task=view&id=8065&Itemid=108](http://www.ecomval.gov.ph/ecomval/index.php?option=com_content&task=view&id=8065&Itemid=108). See also UN documents E/CN.4/2003/90/Add.3 which inter alia states: *"The legal framework in which indigenous rights must be considered under the Constitution is the Indigenous Peoples Rights Act (IPRA) of 1997, which also established the National Commission on Indigenous Peoples."*

The company has not disputed the disbursement of close to 1 million pesos and the allocation of 2 million pesos for logistical support to the NCIP. The question is rather whether the allocation and the disbursement by the company of at least 901,399.60 pesos amounts to an “undue” or “improper” advantage for the concerned parties and whether the company has disclosed details concerning the transaction.<sup>116</sup> In order to determine this, the definition of such advantages deserves attention.

The OECD *Convention on Combating Bribery of Foreign Public Officials in International Business Transactions* defines a bribe as: “...an offer, promise or giv(ing) of any undue pecuniary or other advantage, whether directly or through intermediaries, to a foreign public official, for that official or for a third party, in order that the official act or refrain from acting in relation to the performance of official duties, in order to obtain or retain business or other improper advantage in the conduct of international business.”<sup>117</sup> The action may be considered undue or improper if the intent was to influence the execution of public authority.<sup>118</sup> Clearly blameworthy circumstances are generally required.

The OECD definition of bribery includes payments to third parties “in order that the official act or refrain from acting (...)” The payment of pesos 901,399.60 was disbursed to a third party (public NCIP official) and not directly to the indigenous group benefiting from the delineation activities. This public official had the capacity to influence the delineation activities. The question remains as to whether the payment constitutes an “improper” advantage.

In considering the specific instance, it is relevant to consider the actual value of the advantage, the purpose of the offer or disbursement, the legal entitlement,<sup>119</sup> the position of the donor, the public function of the recipient, transparency around the arrangement, national legislation, whether the donor had a legal entitlement to the services that the public officer was paid to provide, and other relevant factors. Several of these considerations are relevant and render the transaction at hand questionable:

- Logistical support at a value of at least PHP 901,399.60 may be considered a significant amount by the relevant authorities, not only in the Philippines, but also in Norway.<sup>120</sup>
- The purpose of the payment was to give logistical support to delineate the land such that the company could obtain an FPIC certificate; one of several requirements to obtain a license to mine. The payment made secured that a group that already had promised to consent to mining would obtain expanded land titles and claims. This could result in suspicion from groups that were not included in the land titling and FPIC consultations.
- The timing and position of the donor could also play a role in the specific instance.<sup>121</sup> The provider of the advantage (Intex) was in ongoing negotiations with the indirect recipients of the

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*While IPRA recognises the right to land, self-determination and cultural integrity of indigenous peoples, the UNSR is concerned about serious human rights issues related to the lack of its effective implementation. For poor indigenous farming communities crucial land rights are addressed by filing legal claims to their own ancestral domains and titles. The process is cumbersome and indigenous representatives perceive that the business interests of private enterprises, which over the years have encroached upon their ancestral domains, are more protected than their own rights based on land use and continuous occupation.”*

<sup>116</sup> According to the Norwegian Penal Code Section 276a, the prohibition against corruption does not require anything in return from the person receiving any advantage. This differs from the United States Foreign Corrupt Practices Act (FCPA), which contains specific requirement related to the purposes of paying the bribes (“quid pro quo requirement”). The only requirement under the Norwegian act is that there is a connection between the improper advantage and the receiver’s position, office or assignment.

<sup>117</sup> The OECD Convention of Combating Bribery of Foreign Public Officials in International Business Transactions (15 February 1999).

<sup>118</sup> Regarding small facilitation payments, see Commentary to the OECD Convention on Combating Bribery Paragraph 9. The updated OECD Guidelines call for companies to prohibit and discourage facilitation payments (Chapter VII new para 3, adopted 26 May 2011).

<sup>119</sup> There is no legal entitlement to mining for the company, as the company still needs to gain permission from the Mining and Geology Bureau.

<sup>120</sup> Proposition to the Odelsting (Ot. prp.) nr. 78 (2002-3) Chapter 12 p. 58.

advantage (the Kabilogan). This raises questions as to whether the company may have sought to influence public servants from the NCIP to decide on a particular outcome that favoured one of the indigenous peoples. The outcome of the decision concerns competing groups of vulnerable and marginalised indigenous peoples, the majority of whom are illiterate and live beneath the poverty line.

- The company should be able to disclose all financial records in accordance with quality standards for disclosure and accounting, including details of the payment to the NCIP. Intex has neither monitored nor been able to disclose to whom and how the funds were paid. Despite requests from the NCP, the company has not documented how the funding was used or the contractual basis for the payment.

In the view of the NCP, the problematic nature of Intex' involvement in the matter dates back to the 1999 MOA with Kabilogan and the NCIP, where the company commits to financing the issuance of a CADT. Entering into an agreement with an indigenous group to finance their gaining legal rights to land where the company proposes to mine exposes the company to criticism of providing undue or improper advantages to this group.<sup>122</sup>

Intex renders itself vulnerable to criticism that it sought to influence the outcome of a public decision concerning the ancestral rights of competing indigenous peoples. The company provided undue advantage to two of these groups through a third party (NCIP) at a time when the company was applying to public offices to obtain or retain business in Mindoro. Intex submitted the Work and Financial Plan (WFP) on 26 November 2011. The NCP regrets that the documents arrived at such a late stage, and has not been in a position to examine them thoroughly. However, the figures on disbursements to the NCIP provided by the NCIP, Intex in 2009, and Intex in the most recent submission, differ. Furthermore, some allocated funds remain unaccounted for.<sup>123</sup> The NCP finds that the involvement of Intex in these procedures merits further investigation by appropriate authorities.

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## HAS THE COMPANY USED DEVELOPMENT PROJECTS TO SECURE COMMUNITY SUPPORT?

According to international good practice, companies should be transparent about how decisions are made on community projects, and should seek to partner with NGOs and local government organisations. The system in the Philippines requires projects to demonstrate social acceptability through formal resolutions from different layers of local government. Although it is common practice worldwide for mining companies to support community projects before production starts,<sup>124</sup> commencing community projects prior to gaining social acceptability may raise doubts as to whether the company is undertaking such projects in order to secure endorsements.

The NCP does not find that Intex' support to the village of Alcate constitutes a breach of the OECD Guidelines provisions regarding bribery or corruption. Intex has shown that the agreement between Intex and the village Alcate to build a 10 million pesos dike is in compliance with the requirements of local

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<sup>121</sup> See also Recommendation by the Norwegian Ethical Council (15. Nov 2007) on Siemens and its reference *i.a.* to "Die Münchener Klärwerks-Affäre" [www.hrr-strafrecht.de/hrr/1/96/1-233-96.php3](http://www.hrr-strafrecht.de/hrr/1/96/1-233-96.php3)

<sup>122</sup> "...public hearings and public consultations are haphazardly conducted and poorly presented due to time constraints and the lack of skills within the government to handle social issues. Documents are not freely accessible to the public due to fear, uncertainty and a lack of experience in handling seemingly contentious matters". UNEP [http://www.unep.ch/etu/publications/35\)%20257%20to%20260.pdf](http://www.unep.ch/etu/publications/35)%20257%20to%20260.pdf)

<sup>123</sup> PHP 558449,60.

<sup>124</sup> Shankleman et al.

authorities. The support was given based on a request from the Alcate Barangay, and was not solicited by the company.

The NCP finds it inadvisable; however, to provide financial support to community projects prior to approval or gaining required social acceptability by locally impacted communities. This is in accordance with the recommendations of the Philippine Chamber of Mining. Supporting community development projects while the company is seeking approval of various government entities exposes the company to criticism that they are doing so in order to secure endorsements. Intex furthermore 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 social support.<sup>125</sup> Establishing a transparent system for community spending and disclosing systematic information on criteria for the projects could prevent such allegations.

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## CONCLUSION

The NCP has not established evidence that the company has been involved in bribery or corruption. However, the NCP finds that the payment to the NCIP merits further investigation. The NCP finds that the allocation and payment to the local NCIP office was linked to the delineation of land of indigenous peoples at a time when Intex was securing a license to mine. The NCP finds that the company has supported select indigenous groups through a third party (NCIP) and has supported community development projects prior to gaining social acceptability.

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<sup>125</sup> See also Chapter 5.

## ENVIRONMENTAL INFORMATION AND COMMUNICATION

### THE COMPLAINT

FIOH requests the Norwegian NCP to assess whether Intex has provided inconsistent and incomplete information on the environmental consequences of MNP. FIOH indicates that: 1) Intex has provided shifting information on how waste disposal will be carried out and where the processing plant will be located; 2) The project risks causing landslides and erosion due to deforestation. 3) Mining nickel in open mines in a watershed area risks pollution of waters used by downstream farmers, and will amplify risks of flooding.

FIOH alleges that Intex Resources has failed to communicate these and other environmental, health, and safety risks associated with the project, and have requested the NCP to assess whether Intex is non-compliant with the following provisions of Chapter V of the OECD Guidelines:

- I. *Establish and maintain a system of environmental management appropriate to the enterprise, including:*
  - a) *collection and evaluation of adequate and timely information regarding the environmental, health, and safety impacts of their activities;*
  - b) *establishment of measurable objectives and, where appropriate, targets for improved environmental performance, including periodically reviewing the continuing relevance of these objectives; and*
  - c) *regular monitoring and verification of progress toward environmental, health, and safety objectives or targets.*
  
- II. *Taking into account concerns about cost, business confidentiality, and the protection of intellectual property rights:*
  - a) *provide the public and employees with adequate and timely information on the potential environment, health and safety impacts of the activities of the enterprise, which could include reporting on progress in improving environmental performance; and*
  - b) *engage in adequate and timely communication and consultation with the communities directly affected by the environmental, health and safety policies of the enterprise and by their implementation.*

### RESPONSE FROM THE COMPANY

In a letter to the Norwegian NCP of 27 February 2009, the company states that: *“Negative impact is always associated with development projects such as mining. However, mitigating measures to avert the negative effect of mining operations on the environment can be developed and implemented. Details of the mitigating measures are provided in the EIS [Environmental Impact Statement] to be submitted for approval by DENR-EMB. These measures include the program on pollution prevention and control. Intex policy is to abide by the provisions of applicable Philippine and International laws on the protection and enhancement of the environment and the people where it operates.”*<sup>126</sup> Intex has committed to following the World Bank/IFC standards for social and environmental impact assessments.<sup>127</sup>

<sup>126</sup> Letter from Intex Resources to the NCP, 27 February 2009 p.14, Intex Annual Report 2008 p. 31

<sup>127</sup> In the Interim Report Q6 2008, CEO of Intex Resources Hans Christian Qvist stated the company’s commitment to conduct the 2008 social and environmental impact assessment “according to internationally accepted guidelines, including the World Bank’s International Finance Corporation’s Environmental, Health, and Safety Guidelines”. See <http://www.intexresources.com/news.cfm?id=59>. In the Definitive Feasibility Study (2010), Intex expresses a commitment to

Intex has described the risks and mitigations associated with the MNP in the Definitive Feasibility Study<sup>128</sup> and the EIA, summarised in Table II.<sup>129</sup> The company has also responded to questions from the NCP on 24 September 2011 regarding specific environmental risks. Intex states that the “*final plans for mine site and installations are still at a planning stage, and details of location as well as land acquisitions have not been conducted.*”<sup>130</sup> The company is considering “four possible sites for the plant” and uses one of these to provide specifics regarding costs and other elements.<sup>131</sup>

## NATIONAL STANDARDS AND ASSESSMENT

According to the Philippine Mining Act of 1995,<sup>132</sup> all major mining and infrastructure projects in the Philippines are required to obtain an Environmental Clearance Certificate (ECC).<sup>133</sup> To obtain this, mining companies are required to prepare a full Environmental Impact Assessment (EIA) and deliver it to the regional Environmental Management Bureau (EMB) office and host municipalities. Copies of the Executive Summary are to be given to host barangays, and copies of Project Fact Sheets are to be shared with other stakeholders. An expert committee set up by the government reviews the EIA, and it is presented publicly at hearings before the Department of Environment and Natural Resources (DENR). The DENR decides whether to issue an ECC. Copies of the EIA are to be disclosed prior to the required public hearings to ensure well-informed participation in the consultation process.<sup>134</sup>

Intex submitted its EIA to Philippine authorities in April 2009. Public hearings on the project were not conducted as planned in 2008 and 2009 due to disruptions and protests.<sup>135</sup> In October 2009, an ECC was issued by DENR before the EIA Review Committee had issued its recommendations. The Review Committee failed to submit its advice within the specified time frame. Subsequent to issuing the ECC, 25 people went on hunger strike outside the DENR offices in Manila. The EMB received the EIA Review Committee decision to recommend ECC denial on 18 November 2009.

The ECC was temporarily revoked from 14 October 2009. The DENR requested Intex “to submit documentation of specifically the public consultations held and if insufficient, to comply with the provision of the law on such consultations.”<sup>136</sup> The DENR established an Investigation Team that has not yet reported. The company submitted a formal appeal to the Office of the President through the President’s legal office.<sup>137</sup> If Intex decides to change the design of the project, such as the location of the plant site or associated Residue Storage Facility (RSF), this will require major revisions to the ECC.

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ensure that its “environmental performance is in line with all national legislation, World Bank guidelines and the Equator Principles.” See [http://www.intexresources.com/upl/5-social & environmental - february 2010.pdf](http://www.intexresources.com/upl/5-social&environmental-february2010.pdf)

<sup>128</sup> Mindoro Nickel Definitive Feasibility Study 11292-00-G0722.

<sup>129</sup> The company has not provided the NCP with the EIA/EIS but the NCP has seen a draft Environmental Impact Study dated September 2009.

<sup>130</sup> Intex response to questions from the NCP, 24 September 2011.

<sup>131</sup> Ibid.

<sup>132</sup> A new Alternative Mining Bill has been suggested in proposition House Bill No. 6342 (2009), House of Representatives, Republic of the Philippines to repeal the 1995 Mining Act.

<sup>133</sup> Environmental Management Bureau, Revised Procedural Manual for DAO 2003-30. Companies are to follow the procedures set by the Environmental Management Bureau (EMB) to obtain an ECC.

<sup>134</sup> Environmental Management Bureau, Revised Procedural Manual for DAO 2003-30, Section 11 (d).

<sup>135</sup> Intex claims meetings were held as planned <http://www.intexresources.com/news.cfm?id=160>. Report of the fact-finding mission to Mindoro, the Philippines Shankleman et al. JSL Consulting 2011 claims that meetings were not held as planned. According to a letter from the EIA Review Committee for the Proposed Mindoro Nickel Project to the Environmental Management Bureau on 18 November, the two public hearings in Oriental Mindoro in October 2008 and May 2009 were aborted because of a cease order from the Provincial Governor citing the 25-year mining moratorium of the Province. One consultation in Occidental Mindoro “proceeded and properly concluded.”

<sup>136</sup> DENR Special Order No. 2009-921 and <http://www.intexresources.com/news.cfm?id=160>.

<sup>137</sup> Intex Q1 Interim Financial Report 2011: “Regarding the status on the Mindoro project’s Environmental Compliance Certificate (ECC), the matter is considered a legal issue and a formal appeal has been submitted to the Office of the President through the President’s legal office. It is the company’s position that all the requirements under the law have been met and hence the ECC will be restored.”

## FACTS RELATING TO THE COMPLAINT

Between 2004 and 2010 investments in mining in the Philippines reached USD 3,835 billion.<sup>138</sup> Investments are expected to reach at least USD 1.4 billion annually in 2011.<sup>139</sup> Twenty-three flagship-mining projects are located in biodiversity-rich areas and overlap with Key Biodiversity Areas such as in the Sierra Madre, Palawan, Mindoro, and various parts of Mindanao.<sup>140</sup> The government's decision to pursue mining as a revenue-generating industry "clashes with biodiversity-related concerns," according to the 4<sup>th</sup> National Report to the Convention on Biological Diversity.<sup>141</sup>

The MNP site is located on a topographically rugged mountain range. The area receives abundant rainfall and frequent typhoons, is prone to landslides, and is seismically active. Pristine forests in the mountain range are home to endangered species.<sup>142</sup> The area has been a long-standing host to commercial logging and the remaining vegetation is mainly second and third growth forest.<sup>143</sup> The area retains some of the only remaining forests on the island<sup>144</sup> and is described as containing "extremely high terrestrial and inland water areas of biological importance."<sup>145</sup> The Verde Island Passage between Mindoro and the Luzon spans the entire northern coastline of Mindoro and is recognised as a global centre for marine biodiversity.<sup>146</sup> Four large rivers, sourced in the mountains, merge in a watershed by the mine site and serve as a source for irrigation in the lowlands.<sup>147</sup> The area is identified as part of the critical watershed in the Provincial Physical Framework Plan of Oriental Mindoro.<sup>148</sup> This lowland is claimed to support 60 per cent of the rice production in Oriental Mindoro.<sup>149</sup>

There are numerous environmental impacts and risks associated with the MNP, as is commonly the case in mining projects.<sup>150</sup> The operational phase involves the "removal of vegetation prior to the stripping of

<sup>138</sup> <http://www.mgb.gov.ph/Files/Statistics/MineralIndustryStatistics.pdf>

<sup>139</sup> The Mines and Geosciences Bureau (MGB) and the DENR have according to Philippine press stated that the Philippines adjusted the target to 2,8bn USD in September 2011, but in October 2011 the projected figures were re-adjusted. See:

<http://www.manilatimes.net/index.php/business/top-business-news/7250-mgb-says-mining-investments-to-double> and <http://business.inquirer.net/24679/gov%E2%80%99t-to-fall-short-of-2-8b-mining-target-for-%E2%80%9911> and <http://www.gmanews.tv/story/232281/business/mines-bureau-govt-eyes-higher-investment-target-in-mining>.

<sup>140</sup> Assessing Progress Towards the 2010 Biodiversity Target: Convention on Biological Diversity Fourth National Report. Republic of the Philippines, 2009. The 117 Important Bird Areas (IBAs) are identified for the country by the Haribon Foundation (Mallari *et al.* 2001), and the 206 conservation priority areas (CPA) identified through the Philippine Biodiversity Conservation Priority setting Program (convened by Conservation International Philippines, Protected Areas and Wildlife Bureau of the Department and Environment and Natural Resources, and the University of the Philippines Centre for Integrative and Development Studies) in 2002, served as the basis for KBA identification. <http://data.iucn.org/dbtw-wpd/edocs/PAG-015.pdf>.

<sup>141</sup> Assessing Progress Towards the 2010 Biodiversity Target: Convention on Biological Diversity Fourth National Report. Republic of the Philippines, 2009.

<sup>142</sup> Such as the Tamaraw (dwarf wild water buffalo) found in the Iglit-Baco National Park <http://whc.unesco.org/en/tentativelists/5036/>

<sup>143</sup> Environmental Impact Statement, Final Draft, September 2009.

<sup>144</sup> Forested areas in Mindoro have been reduced from 967,400 hectares in the 1950s to about 50,000 hectares today.

<sup>145</sup> Philippine Biodiversity Conservation Priorities Report (2002).

<sup>146</sup> According to Conservation International, the Verde Island Passage arguably has "the highest concentration of marine species of any region in the world's oceans, including whale sharks (*Rhincodon typus*), giant clams (*Tridacna gigas*), and the iconic Banggai cardinalfish (*Pterapogon kauderni*)". See [http://www.conservation.org/resources/maps/Pages/verde\\_island\\_passage\\_map.aspx](http://www.conservation.org/resources/maps/Pages/verde_island_passage_map.aspx).

<sup>147</sup> Aglubang Ibolo and Kisluyan Rivers. Agulgang and Ibolo are sourced in the mountains above the mine site and merge near the mine site to form the Magasawang Tubig. Mindoro Nickel Definitive Feasibility Study, p. 5.

<sup>148</sup> DENR Memorandum 11th of April 2001: "The Bureau [Mines and Geosciences Bureau] may have, wittingly or unwittingly, omitted or overlooked that the area includes within its boundaries a huge portion of the Mag-asawang Tubig Watershed Reforestation Project and Proposed Watershed Reservation. Moreover (...) this fact is also attested to by the approved Provincial Physical Framework Plan (PFPP) of Oriental Mindoro."

<sup>149</sup> FAQ no. 3 Read 25 October 2011 <http://www.intexresources.com.ph/mindoronickel/faqs.html#id3>. Of the five provinces in the Mimaropa region, Mindoro Oriental in 2008 had the biggest agricultural area of rice 82,064 hectares followed by Mindoro Occidental and Palawan but in terms of production Occidental Mindoro had the highest production 37 percent followed by 33 percent Oriental Mindoro, "Rice Rice" Department of Agriculture 2008, *Office of Regional Executive Director Regional Field Unit - 4B (Mimaropa)*

<sup>150</sup> Typical environmental risks associated with mining include water use and quality, wastes, hazardous materials, land use and biodiversity, air quality, noise and vibrations, energy use and visual impacts. Adverse impacts on groundwater or surface water

the soil and underlying weathered rock material.”<sup>151</sup> There are concerns that mining will aggravate the already frequent risk of flooding in the lowlands. Intex indicates that the risk of flooding will remain “until substantial mitigation installations can be established.”<sup>152</sup> In the event of flooding, there are concerns that discharges from the mine may enter irrigation systems and drinking water.<sup>153</sup> The construction of port facilities and loading and shipping operations may affect coral reefs and turtles nesting around the island. Tailings and deposits may pose direct or indirect risks to humans and nature. A mixed population of indigenous peoples and lowlanders occupy the area<sup>154</sup> and base their subsistence on the land selected for the project.<sup>155</sup>

A range of environmental risks is associated with the process plant and RSF. Nickel metal and cobalt salt, the by-products of ammonium sulphate (fertiliser), metallurgical grade chromite and minor amounts of zinc sulphide will be produced at the processing site.<sup>156</sup> Intex plans to construct a fuel/oil depot, a storage area for chemicals and reagents, a power station, hydrometallurgical process facilities, workshops, an administration building, a warehouse, personnel housing, a mess hall, a laboratory and heavy equipment shops.<sup>157</sup> Potential risks include reduced water or water quality, air pollution, accidental waste discharge, and traffic accidents. Health hazards include noise/dust pollution and the spread of transmittable diseases due to the large workforce.<sup>158</sup> Stored chemicals for processing and possibly also stored residue may contain heavy metals and contaminants such as sulphuric acid,<sup>159</sup> and after processing sulphur dioxide and sulphate.<sup>160</sup> The RSF must be regularly monitored “to avoid



**Figure 3: Topographical map showing river systems and location of the Mindoro Nickel Project on a watershed**

quality may pose significant threats to human consumption, as well as to aquatic and terrestrial wildlife. Other potential risks include erosion and landslides. Relocating occupants and clearing the land for settlements and agriculture creates further pressures on the land. Indirectly, mining operations can result in changes in how indigenous communities interact with and impact the natural environment. For more detail, see the *Global Reporting Initiative Indicator Protocols Set, Environment Mining and Metals Sector*.

<sup>151</sup> Mindoro Nickel Definitive Feasibility Study, p. 6.

<sup>152</sup> Mindoro Nickel Definitive Feasibility Study 11292-00-G0722, Executive Summary, p. 39.

<sup>153</sup> Mindoro Nickel Issues, Claims, Myths and FAQs where Intex rejects these concerns <http://www.intexresources.com.ph/mindoronickel/faqs.html#id19>.

<sup>154</sup> Mindoro Nickel Definitive Feasibility Study 11292-00-G0722, Executive Summary, p. 38.

<sup>155</sup> Ibid.

<sup>156</sup> In the northern foothills of Mount Dumali, approximately 6 km from coast east of Pola. Mindoro Nickel Definitive Feasibility Study 11292-00-G0722, Executive Summary p. 11.

<sup>157</sup> The hydrometallurgical process facilities are claimed to be well-tested and use similar technology as the Coral Bay Nickel Company in the Philippines. The Coral Bay Company received their ECC in 2002. [http://coralbaynickel.com/index\\_files/Page644.htm](http://coralbaynickel.com/index_files/Page644.htm) Uploaded on 20 July, 2011.

<sup>158</sup> 5000 + during construction phase [www.intex.com](http://www.intex.com)

<sup>159</sup> Mindoro Nickel Definitive Feasibility Study, Executive Summary p. 31.

<sup>160</sup> Mindoro Nickel Definitive Feasibility Study, Executive Summary p. 31, Alan Tingay Report 2011, Summary Comments on the Mindoro Nickel Project EIA.

*accidental breakdowns within the facility that may cause eventual release of wastes and may result in an environmental disaster of tremendous magnitude and consequences.”<sup>161</sup>*

Intex proposes to transport the ore to the processing site on a 42,6 km conveyor belt supported by a maintenance road and bridges. Intex has stated that road transport may be used rather than a conveyor belt. This would increase the traffic associated with the project. Intex is considering alternative sites for the process plant, and the transport corridor may be placed in a different location from what the EIA describes. Transportation may threaten some of Mindoro’s endangered species<sup>162</sup> such as the above-mentioned Tamaraw and the Mindoro crocodile, both of which are on the IUCN list of critically endangered species.<sup>163</sup> Wetlands and rivers<sup>164</sup> may also be polluted if soil falls off the belt.<sup>165</sup>

## NCP ANALYSIS

### HAS THE COMPANY COLLECTED AND EVALUATED ADEQUATE AND TIMELY INFORMATION ON ENVIRONMENTAL, HEALTH AND SAFETY IMPACTS OF THE MNP?

The OECD Guidelines require companies to collect and evaluate “adequate and timely information” on environmental, health and safety impacts of projects. IFC Performance Standard 1 requires a process of Social and Environmental Assessment where risks and impacts are analysed in the context of the project’s area of influence for the “*key stages of the project cycle, including pre- construction, construction, operations, and decommissioning or closure (...)*”<sup>166</sup>

The NCP notes Intex’ publication of the Definitive Feasibility Study<sup>167</sup> and the preparation of an EIA and EMP. The NCP finds that the EIA provides information on the design of some major components of the project in some detail (in particular mining operations and the process plant) and contains a considerable amount of baseline physical and biological information about Mindoro Island, the mine site, and the marine environment of Pola Bay and near Calapan City. There is considerable information on communities on Mindoro that are likely to be directly and indirectly affected by the project. Much of the data has been

<sup>161</sup> Mindoro Nickel Definitive Feasibility Study, p. 10.

<sup>162</sup> Protected in Key Biodiversity Area (KBA) No. 61 (Mt. Calavite), KBA No 62 (Puerta Galera), KBA No 63 (Mt. Halcon), KBA No. 64 (Lake Nau jan National Park), KBA No. 65 (Siburan), KBA No 66 (Iglit-Baco Mountains).

<sup>163</sup> IUCN Red List of Threatened Species. Version 2011.1. <[www.iucnredlist.org](http://www.iucnredlist.org)>. Downloaded on 21 July 2011.

<sup>164</sup> The Philippines have ratified the IUCN Convention on International Trade in Endangered Species (1975), The Convention on Wetlands of International Importance Especially as Waterfowl Habitat (Ramsar Convention/1971), The Convention on Biological Diversity (1992), Agenda 21/ Program for Development of Ecological Actions (1992), the UN Framework Convention on Climate Change (1994), the Kyoto Protocol, Convention Concerning the Protection of the World Cultural and Natural Heritage (1972), and the Convention on the Conservation of Migratory Species of Wild Animals (Bonn Convention/1983).

<sup>165</sup> According to one of the complainant’s sources, the conveyor is understood to be “*a slurry pipe to carry materials to a near coast location for processing. There is some experience of this in the Philippines from nearby Marinduque home of a mine controlled at the time by then Placer Dome of Canada. Ironically the lowlands to be affected this time are in part occupied by refugees from Marinduque who came to Mindoro to escape the problems caused [there] by mining mismanagement, burst tailing facilities, burst pipelines.*” Geoff Nettleton of PiPLinks quoted in e-mail from Gunnell Sandanger, June 22, 2011.

<sup>166</sup> IFC Performance Standard 1, Sections 5-7. “The Assessment will be an adequate, accurate, and objective evaluation and presentation of the issues, prepared by qualified and experienced persons.” The project’s area of influence encompasses: “i) the primary project site(s) and related facilities that the client (including its contractors) develops or controls, such as power transmission corridors, pipelines, canals, tunnels, relocation and access roads, borrow and disposal areas, construction camps; ii) associated facilities that are not funded as part of the project (...), and whose viability and existence depend exclusively on the project and whose goods or services are essential for the successful operation of the project; iii) areas potentially impacted by cumulative impacts from further planned development of the project, any existing project or condition, and other project-related developments that are realistically defined at the time the Social and Environmental Assessment is undertaken; and iv) areas potentially affected by impacts from unplanned but predictable developments caused by the project that may occur later or at a different location.”

<sup>167</sup> <http://www.intexresources.com/news.cfm?id=246>

collected by field surveys and reflects considerable work by the scientists involved. The EIA provides an analysis of some of the potential environmental and social impacts of the project.

**Table II: Intex plans for mitigating environmental, health and social impacts<sup>168</sup>**

**Landslides and erosion:** Progressive rehabilitation is a key component of the Environmental Protection and Enhancement Program (EPEP).<sup>169</sup> Mining will be conducted sequentially in order to cause only “temporary disturbance.” Slopes and loose topsoil will be protected from soil erosion and landslides by coco nets. After cessation of operations, waste rock and topsoil will be replaced and the areas will be replanted with natural forest species to provide wildlife sanctuaries.<sup>170</sup> Intex claims that the terrain will be fully re-vegetated after 2-4 years.<sup>171</sup> Local government units are expected to carry the costs of flood-mitigating infrastructure.<sup>172</sup>

**Watershed and water quality:** Intex does not dispute that the MNP is located on a watershed, but claims the project is not likely to affect the watersheds because the mining activities will be limited to an equivalent of 1 percent of the total tenement area. Intex plans to source water from within active mine areas to avoid reducing fresh water needed for irrigation. The company claims that ground water is “virtually non-existent in the exceptionally impermeable (tight) laterite soil and will be affected only temporarily in limited areas where mining operations occur.”<sup>173</sup> Intex will seek to avoid escape of silt from the active mine areas and indicates this means there is no risk to river quality. The company states that the discharge water “will not contain any chemical components above accepted international threshold values for water” and no chemicals or explosives are to be used in the mining operation.<sup>174</sup>

**Waste disposal:** Residue from the mine will be stored in a Residue Storage Facility (RSF). The residue will be treated and the residual acid neutralised before the materials are transferred to the RSF. The facility will be lined with impervious materials and the residue will be stored behind a 200-300 meter high dam made to withstand earthquakes.<sup>175</sup> The main consumable, sulphur prills, will be handled in closed system for sulphuric acid production, and “no chemical components will be allowed over national and international environmental threshold values.”<sup>176</sup> Waste composition will be monitored before and after deposition and discharges into the ocean are to meet regulatory environmental threshold values. The company does not state whether it will propose an alternative port site if the processing plant is re-located to Occidental Mindoro.

**Biodiversity:** According to Intex, “there are no records of critical fauna populations nor marine vegetation in the proposed areas, or nearby.”<sup>177</sup> The conveyor route will “have the same impact on the ground as a high-tension power line or a ski-lift cable system.”<sup>178</sup>

**Health, safety and social impacts:** Intex plans an intensive information and education campaign to address the different causes of industrial accidents and the leading causes of morbidity and mortality. Intex plans regular health and medical surveillance and will provide information about health programs offered by the health unit and treatments available in the community.<sup>179</sup> The MNP currently expects to employ around 2,000 people, though as many as 5-6,000 during construction.<sup>180</sup> Living quarters will be placed away from the construction sites, and roads will be sprinkled to prevent generation of dust in the working areas and communities.<sup>181</sup>

<sup>168</sup> Mindoro Nickel Definitive Feasibility Study 11292-00-G0722, Section 12 Social and Environmental Management, p. 9.

<sup>169</sup> Mindoro Nickel issues, claims, myths and FAQs no.5, Read 25 October 2011.

<http://www.intexresources.com.ph/mindoronickel/faqs.html#id14>.

<sup>170</sup> Mindoro Nickel Definitive Feasibility Study 11292-00-G0722, Section 12 Social and Environmental Management, p. 5.

<sup>171</sup> Intex has not presented a detailed vegetation map. This makes it impossible to determine whether the samples presented in the EIA represents an adequate sampling design. Regarding the vertebrate fauna, the EIA acknowledges that few species of wildlife with low population density were encountered due to rain at the time of the survey. “Further surveys need to be conducted in other areas within the proposed mining sites and during more favourable weather condition or climatic condition” (p. 4-53).

<sup>172</sup> Mindoro Nickel Definitive Feasibility Study 11292-00-G0722, Section 12 Social and Environmental Management, p. 5.

<sup>173</sup> Intex response to questions from the NCP, 24 September 2011.

<sup>174</sup> Ibid.

<sup>175</sup> Ibid, 9. The design height is stated as 200 m in the EIA (p. 3-24) but as 360m in Intex Resources Q1 Financial Interim Consolidated Financial Statements [www.oslobors.no](http://www.oslobors.no). For relevant requirements, see for instance the Finnish Dam Safety Code of Practice, Section 7 and Appendix 17 Assessment Of Impact Of Waste Dam Functioning and Failure on Health and the Environment <http://www.ymparisto.fi/download.asp?contentid=17581&lan=EN>

<sup>176</sup> Intex response to questions from the NCP, 24 September 2011.

<sup>177</sup> Ibid.

<sup>178</sup> Ibid.

<sup>179</sup> Mindoro Nickel Draft Environmental Impact Statement. September 2009 Section 5.5.1.1.

<sup>180</sup> Intex response to questions from Norwegian NCP, 24 September 2011. According to previous plans (Draft EIS), the mine site will have an average of 347 employees, progressing to 700 employees during pre-construction. At the plant site a village is planned to house approximately 5000 employees during construction. According to the MNP website “the project will provide direct employment opportunities for over 1,600 people and many more by the multiplier effect” <http://www.intexresources.com.ph/mindoronickel/aboutus.html>.

<sup>181</sup> Mindoro Nickel Draft Environmental Impact Statement. September 2009. Section 5.5.1.1

However, the EIA also contains major deficiencies and does not provide the detail required by the IFC Performance Standards:

- The EIA lacks discussions of waste emissions, modelling of atmospheric emissions (particularly sulphur dioxide), risk and hazard analysis, sea water intake and issues associated with the supply of fresh water, and the potential for marine pollution during construction and operations.<sup>182</sup>
- There is no in-depth analysis of the potential impacts of the process plant such as specification of atmospheric and other waste emissions, modelling of ground level concentrations and design and management strategies to prevent pollution of Pola Bay from the plant site. The EIA contains statements that these issues will be resolved in the future by engineering design. It should, however, provide engineering and other data in sufficient detail to demonstrate that an acceptably low level of impact and risk will be achieved in conditions that include worst-case scenarios.<sup>183</sup>
- Little information is provided about the environmental and social implications of the maintenance road and bridges and it is unclear whether the route will run through wetlands, primary forests or Key Biodiversity Areas. Irrespective of the route and method of transport that is chosen for the transport corridor, there will likely be significant environmental and social implications. These must be identified, assessed, and discussed with the affected communities and landowners.<sup>184</sup>
- The location and design of key components are not sufficiently advanced for a detailed description and analysis of their potential environmental and social impacts. Examples include drainage management at the mine, the RSF, transport of ore and transport corridors.
- The final locations of key components have not been determined. Intex has recently announced that it favours alternative sites for the process plant and the RSF to those identified in the EIA. Intex now prefers road transport of ore from the mine to the process plant to using a conveyor belt. This has implications for the transport corridor. No information is available on the environmental and social context of these changes. If there are alternative site options, the EIA should document and compare the environmental, social, operational and cost implications and demonstrate that these have been considered in the decision-making process, in accordance with international standards such as the IFC Performance Standards.<sup>185</sup>
- There is no information on certain components of the environment that may be affected by the proposal. For example, there is a great deal of information on the marine environment near Calapan City and other population centres on the north coast of Mindoro. These baseline data are included in the EIA given the risk that any pollution from the mine site may flow down the Aglubang/ Mag-asawang Tubig river system and impact the marine environment. Comparisons of future sampling

<sup>182</sup> IFC Performance Standard 1 – Paragraph 6 requires companies to “consider potential transboundary effects, such as pollution of air, or use pollution of international waterways, as well as global impacts, such as the emission of greenhouse gases.” See also UNEP Environmental Impact Assessment Training Resource Manual, 2<sup>nd</sup> Edition 2002  
[http://www.unep.ch/etu/publications/EIA\\_2ed/EIA\\_E\\_top7\\_body.PDF](http://www.unep.ch/etu/publications/EIA_2ed/EIA_E_top7_body.PDF)

<sup>183</sup> See for instance European Commission Guidance on EIA Scoping June 2001; “Checklist of information needed for scoping”, i.a. stating that “Where a primary effect is identified the user [of the Scoping Checklist] should always think about whether secondary or further effects on other aspects of the environment could arise as a result (...). Users should also remember that effects can occur not only permanently and over the long term but also temporarily (...) intermittently, for example during certain periods of activity or times of year or as a result of abnormal events affecting the project (accidents, freak weather conditions, earthquakes, etc.). See also European Commission Guidance on EIA Review June 2001, Section 4 Descriptions of likely significant effects and Section 5 Mitigation:  
<http://ec.europa.eu/environment/eia/eia-guidelines/g-review-full-text.pdf>

<sup>185</sup> IFC Performance Standard 1 – Paragraph 9: “Projects with potential significant adverse impacts that are diverse, irreversible, or unprecedented will have comprehensive social and environmental impact assessments. This assessment will include an examination of technically and financially feasible alternatives to the source of such impacts, and documentation of the rationale for selecting the particular course of action proposed.”

with the baseline data may indicate the extent of any such impacts. Any pollution from the mine, however, will affect the river system itself before affecting the marine environment. There is a lack of information in the EIA on the physical and ecological features of the river system and of its use by communities. The information provided on the natural environment of the mine site is also limited and inadequate for the purpose of determining environmental impacts.

- The EIA does not contain analysis of worst-case scenarios that could result from partial or complete malfunctions, and no detailed information on design criteria and design life of the dam wall and associated structures, construction impacts, predicted quantities and potential impacts of overflows through the spillway, and ongoing maintenance in the long term following mine closure although IFC Performance Standard 1 requires a comprehensive assessment at all stages of the project, including closure.<sup>186</sup>

The EIA Review Committee has commented on the lack of information and baseline studies in the EIA. In 2009, the Committee noted a lack of baseline information on four of six components of the project, no information on indicative design and hectareage related to housing/township, poor delineation of impact areas, and poor integration among modules “making inference of possible major impacts vague and extremely difficult to evaluate.”<sup>187</sup>

The NCP appreciates Intex’ positive steps and stated commitment to follow international standards.<sup>188</sup> Although the company has collected and evaluated environmental and social data relating to the MNP, the NCP finds that the information provided is incomplete and does not reach the level of detail required by international standards such as the IFC/World Bank. The EIA does not provide sufficiently detailed and clear information about a number of important aspects of a project of this scale and complexity. This makes it difficult to assess the actual implications of the project and the significance of the potential risks. For more detailed recommendations on what a supplementary or final EIA should include, see Annex I.<sup>189</sup>

## HAS THE COMPANY PROVIDED ADEQUATE AND TIMELY INFORMATION ABOUT THE POTENTIAL ENVIRONMENTAL, HEALTH AND SAFETY RISKS OF THE MNP?

Chapter V of the OECD Guidelines requires companies to provide the public and employees with “adequate and timely information on the potential environment, health and safety impacts” of the company. According to IFC Performance Standard 1, clients that have undertaken a social and environmental impact assessment are to disclose the document. For projects with adverse social or environmental impacts, *“disclosure should occur early in the Social and Environmental Assessment process. (...) Informed participation involves organised and iterative consultation, leading to the client’s incorporating into their decision-making process the views of the affected communities on matters that affect them directly, such as proposed mitigating measures, the sharing of development benefits and opportunities, and implementation issues (...). Effective consultation:*

- i. *should be based on the prior disclosure of relevant and adequate information, including draft documents and plans;*
- ii. *should begin early in the Social and Environmental Assessment process;*
- iii. *will focus on the social and environmental risks and adverse impacts, and the proposed measures and actions to address these; and*

<sup>186</sup> See also Directive 2006/21/EC of the European Parliament and of the Council of 15 March 2006 on the management of waste from extractive industries and amending Directive 2004/35/EC - Statement by the European Parliament, the Council and the Commission: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2006:102:0015:01:EN:HTML>.

<sup>187</sup> Letter from the EIA Review Committee for the Proposed MNP to the EMB 18 November 2009.

<sup>188</sup> Intex Resources ASA <http://www.intexresources.com.ph/mindoronickel/>

<sup>189</sup> Recommendations from the Norwegian NCP to the company on Environmental assessments and management. See also the Alan Tingay Report 2011, Summary Comments on the Mindoro Nickel Project EIA.

iv. *will be carried out on an ongoing basis as risks and impacts arise.*<sup>190</sup>

The complaint from FIOH alleges that the information in the EIA and EMP is incomplete and misleading, and seeks an assessment as to whether the information provided by the company has been disclosed to the public in an adequate and timely manner.

The deficiencies identified in the EIA reduce its value in providing information to affected communities and other interested parties. This should be a key objective of the document. For this to be achieved, the EIA needs to be comprehensive; focus on the identification, clarification and objective analysis of issues; and be well illustrated. The EIA for the MNP could be substantially improved in all of these respects. The NCP finds that the deficiencies in the EIA are not in the best interests of the company and promote rather than help to resolve uncertainties, misunderstandings and concerns in communities that may be affected by the project.<sup>191</sup>

Mining projects prepare an environmental assessment when the project is sufficiently defined for the potential impacts to be evaluated. It is important to take into account that the EIA was not completed when the complaint to the NCP was raised in January 2009. It was delivered to Philippine authorities in April the same year. Hence, full disclosure of environmental impacts could not be expected at the time the complaint was raised. The NCP finds, however, that the MNP should have shared a draft of the EIA with concerned stakeholders in line with IFC Performance Standard 1.<sup>192</sup>

The NCP also finds that when the EIA was completed, it was not made generally available. It was not disseminated within Mindoro and the Governors and mayors of both provinces have informed that they had not seen the EIA. Only the anti-mining alliance Alamin stated that they had secured a copy, 'through backdoor routes.' The EIA is not available online and has not been made available in Tagalog or in Mangyan dialects. According to Intex, the EIA will be released when the study is complete and investigations in connection with temporary suspension and revocation are completed.<sup>193</sup> In a letter to the NCP, Intex emphasises that environmental baselines and the EIA are to be viewed as a work in progress, and the company's position is "for prompt disclosure of the latest available facts to stakeholders as soon as the information becomes available."<sup>194</sup>

The absence of information on certain environmental risks and plans for the project has been indicated on other occasions. In 2008, a Mindoro case study identified lack of information about the MNP plans and potential impacts on lives and livelihoods. According to the team, "plans and agreements with the national Philippine Government and its agencies are often shrouded in secrecy"<sup>195</sup> Information that is available online is of little help for most Mindorenos who do not have access to the Internet.

According to Intex, mine education and information campaigns have been conducted in all stakeholder barangays and municipalities.<sup>196</sup> Intex held a series of "Public Participation Activities" in 2007 and 2008. The participants were members of the Kabilogan and Sadaki associations, local leaders, politicians and others. In these meetings, Intex committed to assisting tribal groups to secure their CADTs; to prepare an assessment to effectively mitigate the impact on flooding; to prepare a Rehabilitation Program; to conduct an inventory of plants and animals; and to conduct regular information meetings with the residents.<sup>197</sup>

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<sup>190</sup> IFC Performance Standard 1, Paragraphs 20 – 22.

<sup>191</sup> See i.a. EU Commission Guidance on EIA Scoping, Section B5, and especially B5.3 Essentials for Effective Consultation.

<sup>192</sup> IFC Performance Standard 1 calls for the prior disclosure of relevant and adequate information, including draft documents and plans.

<sup>193</sup> Intex' response to questions from the NCP, 24 September 2011

<sup>194</sup> Letter from Intex to the NCP, 27 February 2009.

<sup>195</sup> Philippines Mining or Food? Case Study 5: Mindoro Island, Robert Goodland and Clive Wicks 2008.

<sup>196</sup> Mindoro Nickel issues, claims, myths and FAQs. <http://www.intexresources.com.ph/mindoronickel/faqs.html#id12>

<sup>197</sup> EIA 2-14 – Summary of Conducted Public Participation Activities.

On July 3, 2008, Intex held a required Consultative Community Assembly (CCA) to which the representatives of Mangyans in the affected area were invited. The presentation, held in Tagalog, covered: *"...a basic mining module, nickel and its uses, the mining process, Intex initiatives in areas to be affected by the project, the plant process, the materials management area, the pier, the rehabilitation and decommissioning, the mitigating measures, the relevant mining laws, the legal rights of IPs, the monetary benefits that would accrue to IPs."*<sup>198</sup>

According to Intex, the three public consultations conducted by DENR during 2008/2009 in Oriental and Occidental Mindoro<sup>199</sup> were conducted as planned and well-attended by sectoral groups, religious organisations, local community officials and Mangyan representatives.<sup>200</sup> According to the EIA Review Committee, the two meetings in Oriental Mindoro were halted due to a cease order from the Provincial Governor citing the 25-year mining moratorium, while the third meeting in Occidental Mindoro was "properly concluded."<sup>201</sup> The NCP has not been able to verify which indigenous groups were invited to these meetings.

The NCP has not been able to find evidence on what information has been provided during the meetings regarding specific environmental, health and safety risks, mitigations, policies and plans. The NCP has not found evidence that Intex has clarified to the local population whether proposed mitigations will be sufficient to prevent an increase of landslides, the contamination of water sources, where and how waste disposal will be carried out, the location of the processing plant, details related to the conveyor route, and other transportation issues. The NCP finds that such information should be made available to the local population at an early stage of the project in accordance with the OECD Guidelines and IFC Performance Standard 1.

The NCP furthermore finds that information provided by Intex is not always consistent. Intex has stated that "no Mangyans will be required to leave their ancestral lands" while an EIA attachment indicates that a total of 482 persons may be resettled, including indigenous peoples.<sup>202</sup> Fact-finders for the NCP found that Intex had informed the Kabilogan that they would be relocated and had selected relocation sites.<sup>203</sup> The number of relocations, who would have to relocate, the extent of land compensation, and information to those who would have to relocate is not provided. Those implicated do not appear to be informed that although the land will be reforested, it may not support the kind of cultivation they currently undertake.<sup>204</sup>

The NCP finds that the lack of a readily available EIA and other environmental and social information makes it difficult for the affected community to evaluate and determine whether to support MNP. The NCP appreciates that the project is still in its planning phase. However, this has been the case since the project began in 1997.<sup>205</sup> A presentation of plans for mitigation and monitoring to all concerned stakeholders would be expected in light of the known risks related to mining in vulnerable environments and the information Intex presents in the EIA.<sup>206</sup> The lack of available and detailed environmental information to

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<sup>198</sup> Letter from Intex to Norwegian NCP, 19 May 2009.

<sup>199</sup> Letter from the EIA Review Committee for the Proposed Mindoro Nickel Project to the Environmental Management Bureau 18 November 2009 and <http://www.intexresources.com/news.cfm?id=160>.

<sup>200</sup> Intex Resources ASA <http://www.intexresources.com.ph/mindoronickel/csr-environment-studies.html>

<sup>201</sup> Letter from the EIA Review Committee for the Proposed Mindoro Nickel Project to the Environmental Management Bureau 18 November 2009 and <http://www.intexresources.com/news.cfm?id=160>.

<sup>202</sup> Mindoro Nickel issues, claims, myths and FAQs. <http://www.intexresources.com.ph/mindoronickel/faqs.html#id14>. EIA attachment: *Land Acquisition and Resettlement Framework*.

<sup>203</sup> JSL Consulting Report 2011 p. 16

<sup>204</sup> Intex response to questions from Norwegian NCP, 24 September 2011. According to the MNP Environmental Impact Statement (EIS) Attachment 23, Land Acquisition and Resettlement Framework 3.2.1 Scale of Affected Persons a total of 482 persons may be affected, including indigenous peoples within the tenement area, outside the tenement area and within the ancestral domain and non-IPs.

<sup>205</sup> Intex Resources ASA <http://www.intexresources.com/news.cfm?id=21>

<sup>206</sup> Questions from NCP to Intex, 20 June 2011.

date is contrary to the OECD and IFC obligations to provide “adequate and timely information”<sup>207</sup> and to begin consultations “early in the Social and Environmental Assessment Process.”<sup>208</sup> The NCP finds that Intex policy of disclosure is not consistent with company practice.

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## CONCLUSION

The NCP emphasises that the extraction of minerals and metals requires a careful assessment and disclosure of the potential for direct and indirect environmental impacts. Sharing information about environmental, health and safety consequences with the local community and indigenous peoples is a key requirement of international standards including the OECD Guidelines, the IFC Performance Standards, and the Global Reporting Initiative.<sup>209</sup>

The NCP finds that while Intex has conducted an impact assessment that identifies and addresses some of the environmental and social issues and mitigations associated with the MNP, the analysis is lacking on several points. More detailed management and monitoring plans should be prepared. The company has also failed to share the available information in a broad and detailed manner with concerned stakeholders. Intex has not been proactive in making available technical information and impact studies, including maps and illustrations that would allow stakeholders to evaluate claims that the MNP will be safe for the environment and the health of the population.<sup>210</sup> The absence of this information has made it difficult for affected groups to assess the environmental consequences for Mindoro.

The NCP finds that more extensive impact assessment and stakeholder consultation will be needed to conform to the IFC Performance Standards. Environmental and social management plans need to be disclosed in a way that is readily accessible by those who will be impacted and other interested parties. This means making at least a thorough non - technical summary available in local languages; meeting with NGOs and civil society groups that have concerns or expertise in relation to specific issues, and making available the technical analyses on which key assertions, such as those relating to siltation and flood risks, have been arrived at.<sup>211</sup>

The NCP upholds FIOH allegations that the information provided on environmental impacts is incomplete. The NCP expects Intex to provide the public, including the NCP, with “adequate and timely information” on the environment, health and safety impacts of the project. The NCP expects Intex to engage in “adequate and timely communication and consultation” with the affected communities on environmental risks. Failing to do so constitutes a breach of Chapter V of the OECD Guidelines.

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<sup>207</sup> OECD Guidelines for MNEs, II a).

<sup>208</sup> IFC Performance Standard 1.21 – consultations.

<sup>209</sup> Global Reporting Initiative Indicator Protocols Set, Environment Mining and Metals Sector, available at [www.globalreporting.org](http://www.globalreporting.org).

<sup>210</sup> JSL Consulting, Fact-Finding Mission, p. 19.

<sup>211</sup> Ibid, p. 20.

## RECOMMENDATIONS FROM THE NORWEGIAN NCP TO THE COMPANY

In instances where the parties do not reach a mutually agreed-upon solution, the NCP is mandated to make recommendations on the implementation of the OECD Guidelines in accordance with the “Procedural Guidance.”<sup>212</sup> Intex Resources has expressed its commitment to develop the project in accordance with international standards. To restore confidence and clearly demonstrate that the company is aligned with relevant international standards, the NCP recommends that Intex Resources as a minimum acts upon the following recommendations.

### DUE DILIGENCE

- Identify, prevent, mitigate and account for how Intex will address their actual and potential adverse impacts. Intex should address potential impacts through prevention or mitigation, while actual impacts should be addressed through remediation.<sup>213</sup> The company should go beyond identifying and managing material risks to the enterprise itself, and include the risks of adverse impacts related to all matters covered by the OECD Guidelines. Conducting a proper due diligence in all relevant areas can help Intex avoid the risk of adverse impacts.
- Include human rights impacts as part of the due diligence process as defined by the updated OECD Guidelines for MNEs (2011), IFC Performance Standards (2011) and the UN Guiding Principles on Business and Human Rights (2011).<sup>214</sup> The UN Guiding Principles detail the human rights due diligence process: *“While processes for assessing human rights impacts can be incorporated within other processes such as risk assessments or environmental and social impact assessments, they should include all internationally recognised human rights as a reference point, since enterprises may potentially impact virtually any of these rights.”*
- Identify and assess corruption risks before and after entering into business decisions as part of due diligence. Background checks prior to contracting and third party assessments of new partners should be part of the due diligence processes.
- Include the potential for engagement in conflict-affected areas as part of the due diligence process. The OECD Risk Awareness Tool,<sup>215</sup> OECD Due Diligence for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas<sup>216</sup> and the Voluntary Principles for Security and Human Rights recommend risk assessments that identify security risks and the potential for violence.<sup>217</sup> The Red Flags by Fafo/International Alert detail liability risks for companies operating in high-risk zones.<sup>218</sup>

<sup>212</sup> OECD Guidelines (Chapter C, Item 3). For other similar statements from NCPs, see for example UK NCP Vedanta (2009).

<sup>213</sup> Principle 22 of Human Rights Due Diligence, UN Guiding Principles on Business and Human Rights.

<sup>214</sup> According to the UN Guiding Principles on Business and Human Rights, *“The initial step in conducting human rights due diligence is to identify and assess the nature of the actual and potential adverse human rights impacts with which a business enterprise may be involved. The purpose is to understand the specific impacts on specific people, given a specific context of operations. Typically this includes assessing the human rights context prior to a proposed business activity, where possible; identifying who may be affected; cataloguing the relevant human rights standards and issues; and projecting how the proposed activity and associated business relationships could have adverse human rights impacts on those identified. In this process, business enterprises should pay special attention to any particular human rights impacts on individuals from groups or populations that may be at heightened risk of vulnerability or marginalisation, and bear in mind the different risks that may be faced by women and men.”*

<sup>215</sup> <http://www.oecd.org/dataoecd/26/21/36885821.pdf>: Voluntary Principles for Security and Human Rights:

<sup>216</sup> [http://www.oecd.org/document/36/0,3746,en\\_2649\\_34889\\_44307940\\_1\\_1\\_1\\_1,00&en-US\\$01DBC.html&lang=en](http://www.oecd.org/document/36/0,3746,en_2649_34889_44307940_1_1_1_1,00&en-US$01DBC.html&lang=en)

<sup>217</sup> <http://dx.doi.org/10.1787/9789264111110-en>

<sup>218</sup> <http://www.voluntaryprinciples.org/>

<sup>218</sup> Red Flags: Liability Risks for Companies Operating in High-Risk Zones. Fafo/International Alert (2008)

[http://www.redflags.info/index.php?page\\_id=4&show=news&news\\_id=1&style\\_id=0](http://www.redflags.info/index.php?page_id=4&show=news&news_id=1&style_id=0)

## CONSULTATIONS WITH INDIGENOUS PEOPLES

- Conduct an independent assessment to identify the primary and secondary Mangyan organisations, obtain detail on the function and purpose of groups, and assess the relative priorities of each group and their consultation requirements.<sup>219</sup> This should include the land affected by the transport route from the mine to the processing plant.<sup>220</sup> Take into account language and potential barriers to effective engagement during the consultation process, as recommended in the UN Guiding Principles on Business and Human Rights.<sup>221</sup>
- Identify stakeholders through a formal process, providing “sufficient time to allow the affected indigenous or local community to prepare its response.”<sup>222</sup> Stakeholders should be given the opportunity to present their response, allowing for “full and fair consideration by the proponent.”<sup>223</sup> See further guidance on how to identify and consult with indigenous and other stakeholders in the “Akwe: Kon Guidelines” from the Secretariat of the Convention on Biological Diversity.<sup>224</sup>
- Develop a clear, proactive, stakeholder engagement strategy and systems to regularly exchange information with local government and other interested parties.<sup>225</sup> Intex informs that they have plans to establish a council of elders.<sup>226</sup> The NCP cautions against foreign companies establishing new structures for indigenous peoples rather than building on existing indigenous structures.<sup>227</sup>
- Apply IFC Performance Standard 7 as a minimum for engagement with indigenous peoples:
  - *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 ongoing relationship with the affected 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 minimise 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*

<sup>219</sup> Report of the Special Rapporteur on the Rights of Indigenous Peoples A/66/288, section 96.

<sup>220</sup> Recommended to Intex in 2007 by consultant agency Golder Associates, Attachment to Draft Environmental Impact Statement Volume 1. In 1999 by the regional director of NCIP advised MNP to employ social scientists to guide their engagement with IPs according to Vol 1 Final Draft Environmental Impact Statement NCIP resolution 308 of 2008 regarding Alag-ag (Intex) exploration permit in Sablayan, Oriental Mindoro furthermore concludes “Resolved that the 1st Party in the Memorandum of Agreement with the Alag-ag Mining Corporation and the NCIP are the Alangan/Mangyan Indigenous Cultural Communities and not the Sadaki”

<sup>221</sup> UN Guiding Principles on Business and Human Rights.

<sup>222</sup> Ibid.

<sup>223</sup> Ibid.

<sup>224</sup> The Akwe: Kon Guidelines for the Conduct of Cultural, Environmental and Social Impact Assessments Regarding Developments Proposed to Take Place on, or which are Likely to Impact on, Sacred Sites and on Lands and Waters Traditionally Occupied or Used by Indigenous and Local Communities (2004). <https://www.cbd.int/doc/publications/akwe-brochure-en.pdf>.

<sup>225</sup> Final Draft EIA, Volume 1 Attachments, Stakeholder Identification, September 2007

<sup>226</sup> A mining company established a Council of Elders, which was criticised by the UN Committee on the Elimination of all Forms of Racial Discrimination (CERD).

[http://www2.ohchr.org/english/bodies/cerd/docs/early\\_warning/Philippines27082010.pdf](http://www2.ohchr.org/english/bodies/cerd/docs/early_warning/Philippines27082010.pdf)

<sup>227</sup> According to Jill Shankleman et al (2011), an Intex consultancy report suggests to establish a new Mangyan Development Council with “representatives of all the IP tribes to sit down as a Board for policy direction to plan development for the Mangyans on a long-term and sustainable basis.”

- Document the results of negotiation
- Retain qualified and experienced external experts to assist in the assessment.

## DISCLOSURE AND TRANSPARENCY

- Establish a transparent system for deciding community spending and disclose systematic information on criteria for planned and implemented projects. This is advised in order to ensure a transparent process and to avoid garnering support for the project through financial or other beneficial means.<sup>228</sup> Where possible, consider partnering with NGOs and local government organisations.
- Regarding the allegations of FIOH, inform involved parties about all details relating to the allegations of bribery related to “logistical support” and the “request for additional funds.” Important information includes when the disbursements were made, how, by whom, and to whom. The absence of such information could render the company vulnerable to further accusations of corrupt practices.
- Base the *Code of Conduct* and plan for combating corruption on acknowledged international guidelines, such as the OECD *Good Practice Guidance on Internal Controls, Ethics and Compliance* (2010). Communicate the Code of Conduct to the public and in contracts with employees, agents and intermediaries. Mitigations and improvements should be documented and made public. This requires a clear management commitment to spend resources to avoid corruption and manage potential consequences.
- Develop reporting and disclosure systems in accordance with the IFC Performance Standards and other relevant standards, such as the Global Reporting Initiative Indicators for the Mining and Metals Sector.

## ENVIRONMENTAL ASSESSMENT AND MANAGEMENT

- Include all associated infrastructure projects in the EIA/ESIA. This is standard practice of the IFC and Export Credit Agencies particularly in projects where there are risks with respect to associated facilities such as roads and bridges.<sup>229</sup>
- Clearly explain environmental consequences, employment opportunities and development opportunities associated with the project and provide the local population with organised, illustrated and understandable data. Differentiate between significant and less significant risks.
- Develop the EIA in dialogue with all relevant groups directly affected by the company’s operations, and ensure a review by an independent third party. Make the draft EIA/ESIA publicly available in local languages and invite the relevant authorities, specialists, indigenous peoples, NGOs and the public at large to hearings where they can provide feedback to the company.
- Ensure that environmental management systems are in accordance with international standards such as ISO 14001 and the IFC Environmental, Health and Safety Guidelines for Mining.

<sup>228</sup> See The Good Practice Guidance for Mining and Biodiversity (2006) from the International Council on Mining and Metals.

<sup>229</sup> See the IFC Environmental, Health and Safety Guidelines for Mining and IFC Performance Standard 1.



- Ensure quality monitoring of the operation by the company and by the local and central government regarding environmental consequences throughout the project planning, and if approved, execution stages.
- Define social impact management strategies for each of the key components of the project that include social adjustments to the influx of workers, inputs to local economies that promote benefits, measures designed to limit negative impacts (traffic, noise, light spill, atmospheric emissions, risk, social disruption), and the provision of services and infrastructure.
- Revise the EIA to include more complete information on issues detailed in Annex I.

## GRIEVANCE MECHANISM

- Establish a locally based grievance management system. A grievance mechanism is a system for dealing with concerns or complaints raised by individuals or groups within communities affected by company operations. It offers companies and communities an alternative to external dispute resolution.
- According to the *IFC Good Practice Note: Addressing Grievances from Project-Affected Communities*, a grievance mechanism can improve communication and increase trust between companies and affected communities:<sup>230</sup> *“The grievance mechanism should be scaled to risks and adverse impacts of the project, address concerns promptly, use an understandable and transparent process that is culturally appropriate and readily accessible to all segments of the affected communities, and do so at no cost to communities and without retribution. The mechanism should not impede access to judicial and administrative remedies. The client will inform the affected communities about the mechanism in the course of its community engagement process (PS 1, Paragraph 23).”*<sup>231</sup>
- The grievance mechanism should cover the range of possible grievances including environmental health and safety, labour rights, and community grievances by impacted groups and indigenous peoples in accordance with the IFC Performance Standards and the UN Guiding Principles on Business and Human Rights.<sup>232</sup>

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<sup>230</sup> See the IFC Good Practice Note: Addressing Grievances from Project-Affected Communities. Guidance for Projects and Companies on Designing Grievance Mechanisms. September 2009: 7, p. 6.

<sup>231</sup> Ibid, II.

<sup>232</sup> IFC Performance Standard 1, Paragraph 23. In order to ensure its effectiveness, the grievance mechanism should be legitimate, accessible, predictable, equitable, transparent, rights-compatible, a source of continuous learning, and based on engagement and dialogue. See The Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework.

## ANNEX I: NCP recommendations for the preparation of a revised EIA/ESIA

The NCP finds that a revised or final EIA<sup>233</sup> should include:

- A general map of the major vegetation associations on the mining tenements and nearby areas. No specific map of the vegetation on the mining tenements is provided in the EIA. A vegetation map for Mindoro is provided in Figure 4-21, which indicates that the tenements support Grassland while the vegetation is shown as Mossy Forest, Closed Canopy Forest and Brush/Cultivated in Figure 4-41. The former figure is clearly incorrect and the latter provides only a general description of the vegetation in structural terms.
- Additional information on the flora of all impact areas and especially the mine site. The flora of the mine area was primarily determined by description and collection of specimens in 10 x 10 metre plots in which tree species were recorded and 5 x 5 m plots nested in the larger plots in which all species were recorded. The location of these plots is shown in Figure 4-18 of the EIA. This indicates that 31 of the larger plots were located on or close to the Lower Kisluyan deposit, 15 on the Buraboy deposit and 6 elsewhere in the tenement area.
- In terms of the vegetation types, about 9 of the plots were located in Closed Canopy Forest, 23 in Mossy Forest and 20 in Brush/Cultivated areas. In the absence of a detailed vegetation map it is impossible to determine whether this represents an adequate sampling design that provides a statistically reasonable number of replicates in each of the major vegetation associations that may be present. In terms of the proportion of vegetation sampled on the deposits, the Lower Kisluyan deposit has an area of about 1500ha and Buraboy about 800ha. The total areas sampled for flora were in the order of 0.31ha and 0.15ha respectively. These represent about 0.02% of both deposits. The 5 x 5 m plots in which all plant species were collected constitute an even smaller sample of the area of the deposits. This suggests that the survey may not provide a reasonably comprehensive list of flora and that potentially unusual species may not have been recorded. Extensive survey and collection of flora over the Lower Kisluyan and Buraboy deposits in all seasons should be implemented to supplement the data collected from the plots.
- The results of a vertebrate fauna survey of the Lower Kisluyan and Buraboy deposits that includes sampling of all vegetation associations and that includes sampling in the dry season. A total of 50 species of vertebrate fauna were recorded in surveys apparently mainly in the plots established to assess flora. These included 27 species of birds, 8 mammals, 9 reptiles and 6 amphibians. These are low numbers for tropical forests and relative to the total numbers that have been recorded on Minoro (273 bird species, 62 reptiles, 62 mammals and 15 amphibians). These figures suggest that the vertebrate fauna of the mine sites has not been assessed adequately. Therefore the potential impact of mining on vertebrate fauna and the need for any management measures cannot be assessed with any confidence. This is acknowledged in the EIA, "During actual sampling, very few species of wildlife with low population density were encountered. Apparently, this was primarily influenced by the prevailing rainy condition during the time and duration of the surveys. Further surveys need to be conducted in other areas within the proposed mining sites and during more favourable weather condition or climatic condition" (p4-53).
- Figures that show land use on and near the mining tenements and in particular the Lower Kisluyan and Buraboy deposits and detailed topography, slope data, all watercourses (linked with descriptions of physical, chemical and hydrological features), and catchment boundaries of all watercourses on the Lower Kisluyan and Buraboy deposits.

<sup>233</sup> See also Alan Tingay Report 2011, Summary Comments on the Mindoro Nickel Project EIA.

- A general surface drainage/run-off management plan for the Lower Kisluyan deposit and a detailed surface run-off management plan (together with design criteria) for the mine areas that will be exploited in the first 2-3 years of operations.
- Descriptive information and analyses of the physical, chemical, biological and social values of the Aglubang/ Mag-asawang Tubig river system.
- Detailed physical, biological and social data (including maps and plans) of all sites being considered for the process plant and residue storage facility and surrounding areas.
- Detailed information and analyses of the environmental and social implications of the proposed road transport corridor and of vehicle movements including analyses of risks and hazards, noise, dust and social disruption.
- Detailed information on the marine and coastal environment in the vicinity of the port site.

## ANNEX II: Summary of the complaint

OECD Guidelines	Complaint
<p><u>Chapter II:</u> Enterprises should take fully into account established policies in the countries in which they operate, and consider the views of other stakeholders.</p> <p><u>Chapter II - Item 7:</u> 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.</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"> <li>- FPIC was obtained from organisations that do not represent peoples from areas directly impacted</li> <li>- The FPIC agreement was not in the local language</li> </ul> <p>The consultation process for two further FPIC agreements reached in 2008 was flawed because:</p> <ul style="list-style-type: none"> <li>- Only the two IP organisations that had previously provided FPIC were invited into the consultation</li> <li>- There were procedural errors – specifically relating to a validated list of elders/leaders present at the meeting</li> </ul> <p>Incomplete information was provided about the drawbacks of the project and the negative impacts on the environment. The company has demonstrated an inability to build loyalty and mutual trust.</p>
<p><u>Chapter III (2):</u> 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><u>Chapter VI:</u> 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 ensure that remuneration of agents is appropriate and for legitimate services only (...)</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"> <li>- 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.</li> <li>- The provision of support to NCIP may have been in violation of the guidelines for FPIC.</li> <li>- Intex may be in violation by donating money to local communities during the application process.</li> </ul>
<p><u>Chapter V:</u> Enterprises should establish and maintain a system of environmental management appropriate to the enterprise, including collection and evaluation of adequate and timely 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>	<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"> <li>- Shifting information has been provide on how waste disposal will be carried out</li> <li>- It is important to know where the processing plant and waste disposal area will be located in order to assess the consequences for Mindoro.</li> <li>- The project risks causing landslides due to deforestation</li> <li>- Mining nickel in open mines in a watershed area risks pollution of waters used by downstream farmers, and will amplify risks of flooding.</li> </ul>